IN THE TENNESSEE COURT OF THE JUDICIARY

IN RE: THE HONORABLE JAMES TAYLOR
GENERAL SESSIONS JUDGE
HAWKINS COUNTY, TENNESSEE

Docket No. M2011-00706-CJ-CJ-CJ

File Nos. 10-4293, 10-4322, 10-4382

DISCIPLINARY COUNSEL'S MEMORANDUM IN SUPPORT OF MOTION TO DEEM CERTAIN FACTS ADMITTED PURSUANT TO REQUEST FOR ADMISSIONS AND RESPONSES THERETO

Timothy R. Discenza, Disciplinary Counsel for the Tennessee Court of the Judiciary, pursuant to Tennessee Rules of Civil Procedure, including Rule 26, Rule 36 and Rule 37, respectfully submits this Memorandum in Support of his Motion to Deem Certain Facts Admitted Pursuant to Request for Admissions and Responses Thereto and would state as follows:

Background and Facts

The background, genesis, and facts of this specific discovery matter are as set forth in Disciplinary Counsel's Motion to Deem Certain Facts Admitted Pursuant to Request For Admissions and Responses Thereto, and are specifically adopted and incorporated into this Memorandum.

Summary of Argument

- The Tennessee Rules of Civil Procedure govern the scope and practices incident to discovery.
- Tennessee embraces a broad policy favoring discovery.
- *Rule 36, Tennessee Rules of Civil Procedure* (hereinafter *"TRCP"*) plainly identifies requirements to be followed in responding to Requests for Admissions.

Judge Taylor has failed to meet those standards and the remedies provided by the Rule are therefore just and proper.

- *Rule 26.02 (5), TRCP*, provides that in making a privileged claim, the party withholding information must follow specific steps in asserting the privilege, a fundamental and direct process that in this instance has been ignored by Judge Taylor.

- Trial is set in this action for April 25, 2012.

- To the extent matters which are properly subject to the privilege will prevent certain discovery items or issues, those items or issues will as a practical matter not be available to Disciplinary Counsel. Hence, those matters should be identified with clarity and to the extent validly asserted by Judge Taylor, any such assertions as elected should be binding on Judge Taylor at trial.

- Analysis of the ability of a witness to take the Fifth Amendment is similar in process to other privileges and in any event requires court intervention. The privilege is by no means unlimited and most certainly does not by its mere invocation terminate relevant testimony unless multiple predicates are established by that claimant. Both Tennessee and general multi-jurisdictional standards agree. By way of example and not limitation, the burden is on the party claiming the privilege to establish its proper application.

Argument

I. *TRCP 26.02 (1)* states the general principle that parties may obtain discovery of any matter which is relevant to the subject matter of the litigation. The scope of discovery is not unlimited, however, and *TRCP 26.02(1)* gives the court the authority to limit discovery if the court determines that the enumerated grounds for limiting discovery exist. *TRCP 26.02(3)* and *TRCP 26.02(4)* limit discovery of trial preparation materials, and, of course, privileged information is not discoverable.

Thus, it is the Court and not the casual and convenient blanket assertion by a party that determines the validity of a discovery request.

Discovery is allowed in an effort to do away with trial by ambush. The purpose of discovery is to bring out the facts prior to trial so the parties will be better equipped to

decide what is actually at issue. *Ingram v. Phillips, 684 S.W.2d 954 (Tenn.App.1984).*

In *White v. Vanderbilt University, 21 S.W. 3d 215, at 223 (Tenn. App. 1999),* Justice (then Judge) Koch summarized fundamental discovery policies as follows:

> The Tennessee Rules of Civil Procedure permit the discovery of relevant, non-privileged information. See *Wright v. United Servs. Auto Ass'n, 789 S.W.2d 911, 915 (Tenn. Ct. App.1990); Duncan v. Duncan, 789 S.W.2d 557, 560 (Tenn. Ct. App.1990).* They strike a balance between two important policies. The first, and perhaps more important, policy is that discovery should enable the parties and the courts to seek the truth so that disputes will be decided by facts rather than by legal maneuvering. See *Harrison v. Greeneville Ready-Mix, Inc., 220 Tenn. 293, 302, 417 S.W.2d 48, 52 (1967); Pettus v. Hurst, 882 S.W.2d 783, 786 (Tenn. Ct. App.1993).* The second policy is that the discovery rules should not permit less diligent lawyers to benefit from the work of their more diligent opponents. See *Vythoulkas v. Vanderbilt Univ. Hosp., 693 S.W.2d 350, 357 (Tenn. Ct. App.1985).*

In that the Rules favor discovery, the logical result would be that "the party opposing discovery must demonstrate with more than conclusory statements and generalizations that the discovery limitations being sought are necessary to protect it from, among other things, oppression or undue burden or expense. "A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available." *Duncan v. Duncan, 789 S.W.2d 557, 561 (Tenn.Ct.App.1990).*

Focusing on the mechanism of Requests for Admission, the purpose of Requests for Admissions is to eliminate undisputed matters in order to reduce trial time by narrowing issues; such requests which are unanswered are deemed admitted and the matter requested is conclusively established. *TRCP Rule 36.02, Tennessee Dept. of Human Services v. Barbee, 714 S.W.2d 263 (Tenn. 1986).*

Unlike an evidentiary admission, a Request concludes a matter and avoids any

need for proof at trial; thus, no proof is necessary to establish fact admitted, nor should evidence be allowed to refute admission. *Neely v. Velsicol Chemical Corp., 906 S.W.2d 915 (Tenn. App. 1995).*

Rule 36 provides the trial court discretion to allow withdrawal or amendment of matters deemed admitted because of a party's failure to timely provide answers to a request for admission, including when no response has been provided. *Meyer Laminates (SE), Inc. v. Primavera Distributing, Inc., 293 S.W.3d 162 (Tenn. App. 2009).*

As set forth on the face of the underlying Motion for which this Memorandum is submitted, the "Responses" of Judge Taylor do not comply with the fundamental requisites of Rule 36.01, including, but not limited to:

- Although objections are repeatedly made by Judge Taylor, he fails to comply meaningfully with the Rule that with respect to objections "the reasons therefor shall be stated."
- The Responses do not, as required by the Rule, "...specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter."
- The Response of Judge Taylor fail to properly constitute the obligation that a "denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder."
- The Responses violate the Rule 36 mandate that "An answering party may not give lack of information or knowledge as a reason for failure to admit or deny

unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny."

Disciplinary Counsel is unaware that Judge Taylor is under indictment or otherwise charged anywhere with a crime or a potential crime by appropriate agencies or bodies.

In any event, his Fifth Amendment claim of privilege is not legitimately advanced.

The Fifth Amendment to the United States Constitution and Article 1, § 9 of the Tennessee Constitution create a privilege against self-incrimination. This privilege is available to witnesses and parties in civil as well as criminal actions and can be invoked, where appropriate, in discovery in civil cases. A valid assertion of this privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. The witness must, however, show a 'real danger,' and not a mere imaginary, remote or speculative possibility of prosecution." (See, e.g., *Floyd v. Prime Succession of TN 2007 WL 2297810 (Tenn. App. 2007) (copy attached).*

The *Floyd* Court accepted and adopted axiomatic Fifth Amendment jurisprudence in a comprehensive fashion needing no embellishment or expansion by Disciplinary Counsel herein, stating as follows as to the rudimentary principles in play:

> In *Hoffman v. United States*, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951), the United States Supreme Court discussed the Fifth Amendment in the context of a federal prosecution. What the High Court said would apply with equal force to a state prosecution:
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> The Fifth Amendment declares in part that "No person * * * shall be compelled in any Criminal Case to be a witness against himself". This guarantee against testimonial compulsion, like other provisions of the Bill

of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." *Feldman v. United States,* 1944, 322 U.S. 487, 489, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408. This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure. *Counselman v. Hitchcock,* 1892, 142 U.S. 547, 562, 12 S.Ct. 195, 197, 35 L.Ed. 1110; *Arndstein v. McCarthy,* 1920, 254 U.S. 71, 72-73, 41 S.Ct. 26, 65 L.Ed. 138.

The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *(Patricia) Blau v. United States,* 1950, 340 U.S. 159, 71 S.Ct. 223, 95 L.Ed. 170. But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. *Mason v. United States,* 1917, 244 U.S. 362, 365, 37 S.Ct. 621, 622, 61 L.Ed. 1198, and cases cited. The witness is not exonerated from answering merely because he declares declares that in so doing he would incriminate himself-his say-so does not of itself establish the hazard of incrimination. *It is for the court to say whether his silence is justified, Rogers v. United States,* 1951, 340 U.S. 367, 71 S.Ct. 438, 95 L.Ed. 344, *and to require him to answer if "it clearly appears to the court that he is mistaken." Temple v. Commonwealth,* 1880, 75 Va. 892, 899. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, *it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.* The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." See Taft, J., in *Ex parte Irvine, C.C.S.D. Ohio, 1896, 74 F. 954, 960.*

***6** *Hoffman,* 341 U.S. at 485-87 (emphasis added).

In *United States v. Townsend,* 139 F.3d 909 (Table), 1998 WL 80614 (9th. Cir.1998), the United States Court of Appeals for the Ninth Circuit addressed the proper procedure to be employed with respect to the invocation of the Fifth Amendment privilege:

In *United States v. Pierce,* 561 F.2d 735, 741 (9th Cir.1977), this court held that "[a] proper application of this standard requires that the Fifth

Amendment claim be raised *in response to specific questions propounded by the investigating body. This permits the reviewing court to determine whether a responsive answer might lead to injurious disclosures.*"

Townsend, 1998 WL 80614, at *3 (emphasis added). In *North River Ins. Co. v. Stefanou,* 831 F.2d 484 (4th Cir.1987), *cert. denied* 486 U.S. 1007, 108 S.Ct. 1733, 100 L.Ed.2d 196 (1988), the United States Court of Appeals for the Fourth Circuit made a similar observation:

> A party wishing in good faith to assert the privilege *must do so "with respect to particular [allegations]," thereby allowing the trial judge to determine the propriety of each refusal. General Dynamics Corp. v. Selb Manufacturing Co.,* 481 F.2d 1204, 1212 (8th Cir.1973), *cert. denied,* 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974) (citing *Hoffman v. United States,* 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951)). The privilege also may be asserted and preserved in the course of discovery proceedings, Fed.R.Civ.P. 26(c), but in specifics sufficient to provide the court with a record upon which to decide whether the privilege has been properly asserted *as to each question. United States v. Gordon,* 634 F.Supp. 409, 418 (Ct.Int'l Trade 1986).
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> *Stefanou,* 831 F.2d at 487. (emphasis added)

As can be seen, the proper procedure to be utilized when the Fifth Amendment is invoked is for the question to be asked first. Then, if the Fifth Amendment privilege is invoked, the trial court is "to determine the propriety of *each* refusal." [FN5] *Stefanou,* 831 F.2d at 487 (emphasis added). *Hoffman, supra.*

A witness cannot assert the privilege as a general matter to prevent discovery or to prevent discovery by a particular means, as, for example, by a motion for a protective order to prevent a deposition. Instead a witness wishing protection against self-incrimination must assert the privilege with respect to specific questions as they are asked. The court must have a record upon which to decide whether the privilege has been properly raised as to each specific question. The privilege is available only as protection from criminal liability.

In conclusion, Judge Taylor's Responses are insufficient. The enumerated Requests should be deemed admitted in the discretion of the Court. In the alternative, Judge Taylor should not be permitted to deviate from his record and stated position in his Responses and his Answer at the trial of this action.

Respectfully submitted,

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Certificate of Service

I certify that a true and exact copy of the foregoing Memorandum was mailed or delivered to Honorable James Taylor, Juvenile Court Judge, Hawkins County Tennessee, 115 Justice Center Dr., Rogersville, TN 37857 on this the 6 day of April, 2012.

Patrick J. McHale