

PRIVILEGES: A BENCH PERSPECTIVE—THE SWORD OR SHIELD?

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AS A TRIAL ATTORNEY, YOU ARE FACED WITH many strategy decisions related to privileges, such as when to assert a privilege, fight an asserted privilege or waive a privilege. The protections provided by privileges can be used as a tool in your litigation arsenal. Oftentimes the courts are called upon to determine whether your use of a privilege takes the form of a shield or a sword. In making that decision the trial court is faced with many types of litigation maneuvers, some of which are:

- 1) Whether a privilege has been asserted properly and preserved so as to protect material from written discovery;
- 2) Whether there has been an inadvertent disclosure of privileged material such that the disclosing party is entitled to protection from itself;
- 3) Whether an assertion of the Fifth Amendment privilege against self-incrimination is proper in your civil case and what the ramifications of such assertion are, if any; and
- 4) Whether the shield of privilege actually has been forged into a sword and therefore is being used offensively.

There are many other issues related to privileges that appear before the trial bench, but this paper will limit its discussion to these four areas.

Much of the case law written in the area of privilege assertion arises out of mandamus actions or interlocutory appeals associated with temporary injunction applications. A mandamus action is a drastic remedy typically sought in response to an abuse of judicial power by a trial judge. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex 1992) (orig. proceeding). The literal definition of mandamus, “we command,” should shed light on just how extreme this measure of relief is. *Id.*; BLACK’S LAW DICTIONARY 866 (5th ed. 1979). An interlocutory appeal from a grant or denial of a temporary injunction generally occurs if there is a question of whether the trial judge has abused her discretion. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(4); *Ebony Lake Healthcare Center v. Tex. Dept. of Hum. Servs.*, 62

S.W.3d 867 (Tex. 2001). Usually no trial judge desires to be on the receiving end of an appellate ruling which holds that the trial judge has abused their discretion or judicial power. Nevertheless, I will fall on my sword and admit to being the trial judge who received such a reversal by the Texas Supreme Court in the *Ebony Lake* case, wherein the issue of a peer review privilege was a primary issue in the case. TEX. OCC. CODE ANN. § 160.007 (West 2001); *Ebony Lake Healthcare Center*, 62 S.W.3d at 872-73. Therefore, I feel that I am just the trial judge to discuss some of the strategies and pitfalls that arise in the area of privilege assertions and disputes.

“In order to properly protect privileged information from written discovery, a party should not object at all. Instead a party should ‘assert a privilege ...’”

Maneuver No. 1: Written Discovery - The Proper Method for Asserting a Privilege

Although it has been over five years since the Texas Rules of Civil Procedure were substantially revised, many lawyers ignore the significant changes made in the area of privilege assertion and continue to use the old word processor method of cutting and pasting in large blocks of unnecessary and prophylactic objections to written discovery, potentially at their client’s peril. See TEX. R. CIV. P. 192.2(e) (allowing for waiver of objections if a party attempts to obscure the proper objection with unfounded ones); *In re: Arden*, No. 08-03-00269, 2004 Tex. App. LEXIS 2596, at *11 (Tex. App.—El Paso Mar. 24, 2004) (not designated for publication) (party timely stated his attorney client privilege position and abandoned a previously asserted work product privilege). TEX. R. CIV. P. 193.3 was adopted in part to eliminate the prophylactic use of objections to written discovery requests based on claims of privilege. Despite the adoption of Tex. R. Civ. P. 193.3, many lawyers continue to make objections to written discovery requests that hypothetically call for the disclosure or production of privileged information (even though at the time of the response the lawyer is unaware of the actual existence of any document or information that is in fact privileged).

In order to properly protect privileged information from written discovery, a party should not object at all. Instead a party should “assert” a privilege under TEX. R. CIV. P. 193.3. *In re: Shipmon*, 68 S. W. 3d, 815, 822 (Tex. App.—Amarillo

2001, man. den.); *In re: Monsanto Co.*, 998 S. W. 2d 917, 926 (Tex. App.—Waco 1999, n.p.h.). In order to properly “assert” a privilege in response to a written discovery request, a party should do the following:¹

1. Withhold the privileged information that is known to exist. TEX. R. CIV. P. 193.3(a).
2. Prepare and serve on the opposing party a withholding statement. *Id.* A withholding statement is a statement in a response to discovery in which a party claims that information responsive to written discovery is privileged and is actually being withheld from discovery. Such withholding statement may be included in the response to discovery or filed separately. The withholding statement must: (a) state that information or material responsive to the request has been withheld; (b) identify the request to which the information or material relates; and (c) identify the privilege(s) asserted.² *Monsanto*, 998 S. W. 2d at 924.
3. After receipt of a withholding statement, the party seeking discovery may request in writing that the withholding party identify the information or material withheld. TEX. R. CIV. P. 193.3(b).
4. Within 15 days of service of such request, the party asserting the privilege must provide the requesting party with a privilege log. The privilege log should include the following information: (a) The party must assert a specific privilege for each item or group of items being withheld; (b) the party must specify the nature of the information or material withheld, without revealing the privileged information itself, or waiving the privilege; (c) withheld information or material must be described in a way that allows the party seeking discovery to assess the applicability of the privilege; and (d) a description of documents should include the document number (“Bates number”), author or source, recipient, persons receiving copies, date, document title, document type, number of pages and any other relevant information. *Monsanto*, 998 S.W. 2d at 925.

Any party may request a hearing on a claim of privilege asserted under TEX. R. CIV. P. 193.3. The party asserting the privilege has the burden of producing evidence on each element of the privilege. *Giffin v. Smith*, 688 S.W. 2d 112, 114 (Tex. 1985). Merely, stating a privilege in the privilege log

does not prove that privilege; proof of its applicability through facts is necessary. TEX. R. CIV. P. 193.4(a). Evidence may be presented in the form of live testimony or affidavits that were served at least seven days before the hearing or at such other reasonable time as the court permits. *Id.*

When the party asserting the privilege has made a prima facie case for its claim, the requesting party has the burden to point out to the court which specific documents or groups of documents it believes require inspection. The court must decide whether an *in camera* inspection is necessary. TEX. R. CIV. P. 193.4(a); 199.6. If the court sustains the claim of privilege, the resisting party has no further duty to respond to that request. However,

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if the court determines that an *in camera* review of some or all of the requested discovery is necessary, that material must be segregated and produced to the court in a sealed wrapper within a reasonable time following the hearing. TEX. R. CIV. P. 193.4(a). If the claim of privilege is denied, the resisting party must produce the requested information or material within thirty days or at such time as the court orders. *Id.*

Maneuver No. 2: Inadvertent Disclosure

TEX. R. CIV. P. 193.3(b) (a/k/a the “snap-back provision”) is a “new” provision in the rules that protects a party who has inadvertently produced privileged information. This new rule takes some pressure off a party who is being asked to produce large amounts of documents. TEX. R. CIV. P. 193, cmt. 4. With this new rule, a party is not required to use the heightened level of diligence in reviewing every scrap of paper produced prior to the production as was felt to be necessary under the old rules. A party now may request the return of inadvertently produced documents or materials which it claims are privileged. To do so, the producing party must prepare an amended withholding statement within ten days of discovering the accidental production. The amended withholding statement should: (1) identify the information produced; (2) identify the privilege asserted for that information; and (3) request that all copies of the privileged information be returned.

The issue of whether privileged information has been inadvertently disclosed depends on whether the producing party intended to waive the particular privilege or not. Evidence of when a party first became aware of its mistake is critical to the analysis required by TEX. R. CIV. P. 193.3(d). *In re AEP Texas Central Co.*, No. 04-03-00253, 2003 Tex. App. LEXIS 6028, at *17 (Tex. App.—San Antonio July 16, 2003); *In re The*

Lincoln Elec. Co., 91 S.W. 3d 432, 437 (Tex. App.—Beaumont 2002, man. den.). Deciding to change strategy mid-stream may defeat an assertion of inadvertent disclosure of a privileged document. The court in *In Re Carbo Ceramics, Inc.*, 81 S.W.3d 369, 376-77 (Tex. App.—Houston [14th Dist.] 2002) concluded that the party asserting that the disclosure was inadvertent had actually tried to offensively use the document earlier in the litigation, therefore defeating their position of inadvertent disclosure of a letter protected by the attorney-client privilege. *Id.* Finally, the receiving party is under no duty to inform the producing party that it may have received potentially privileged documents in response to a discovery request and intends to use the material in a trial. See TEX. R. CIV. P. 193.3(d) cmt. 4; *Spatz v. Spatz*, No. 05-00-01580, 2002 Tex. App. LEXIS 2746, at *29 (Tex. App.—Dallas 2002)(unpublished opinion).

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Maneuver No. 3: The Proper Assertion of the 5th Amendment Privilege

Under the United States Constitution and the Texas Constitution, an accused has the right to not be compelled to testify or give evidence against himself. U.S. CONST. AMEND. V; TEX. CONST. art. I, § 10. A party does not lose this right simply because he is a party to a civil case. See *Maness v. Meyers*, 419 U.S. 449, 464, 95 S.Ct. 584 (1975); *Texas Dep't of Public Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 760 (Tex. 1995); *Ex parte Butler*, 522 S.W.2d 196, 198 (Tex. 1975).

Nevertheless, the assertion of a Fifth Amendment privilege in a civil case is different than in a criminal case in numerous respects. First, the civil party unlike the criminal defendant is not the exclusive arbiter of his right to exercise the privilege. *Butler*, 522 S.W.2d at 198; *In re Speer*, 965 S.W.2d 41, 46 (Tex. App.—Fort Worth 1998, no writ). When a civil litigant asserts this privilege, it is the trial court's duty to consider the witness's evidence and argument on each individual question (the privilege is asserted in response to) and determine whether the claim of privilege against self-incrimination is meritorious. See *Burton v. West*, 749 S.W.2d 505, 508 (Tex. App.—Houston [1st Dist.], 1988, no writ). Before the trial court may compel a civil witness to answer, it 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.” *Butler*, 522 S.W.2d at 198 (quoting *Hoffman v. United States*, 341 U.S. 479, 488, 71 S. Ct. 814 (1951)).

Secondly, a civil litigant cannot make a blanket assertion of a

Fifth Amendment privilege. The civil litigant must assert his privilege in response to each question asked, or the privilege is waived. *Gebhardt v. Gallardo*, 891 S.W.2d 327, 330-31 (Tex. App.—San Antonio 1995, no writ); *Speer*, 965 S.W. 2d at 46. In turn, a civil litigant may make a selective waiver of the privilege without waiving the privilege to all questions asked. *Id.* Whereas a criminal defendant who voluntarily testifies is deemed to have waived his right against self-incrimination and cannot later assert the privilege to suppress other testimony that may incriminate him. See *Ideda v. State*, 846 S.W.2d 519, 521 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). For example, a civil defendant may file a verified denial

without waiving his Fifth Amendment privilege in response to interrogatories subsequently propounded upon him. *Burton*, 749 S.W.2d at 508; *Speer*, 965 S.W.2d at 46. However, that same civil litigant may be forced to choose between asserting his privilege against self-incrimination or losing his civil

suit (as discussed further in the offensive use doctrine analysis below). See *Gebhardt*, 891 S.W. 2d at 330-31.

Finally, the fact finder in a civil case can draw a negative inference based upon the assertion of the Fifth Amendment privilege. See *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976); *Denton*, 897 S.W.2d at 760; *Gebhardt*, 891 S.W.2d at 331. Therefore, the opposing party's proposed charge should contain an instruction to the jury that it may draw a negative inference based upon the other party's assertion of its Fifth Amendment privilege, if that privilege has been asserted in response to question(s) dispositive of liability or damages.

Maneuver No. 4: A Sword or Shield?—The Offensive Use Doctrine

The offensive use of a privilege will result in its waiver. *Ginsberg v. Fifth Ct. of Appeals*, 686 S.W. 2d 105, 108 (Tex. 1985). The Texas Supreme Court has set forth a test for the application of the “offensive-use” doctrine. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993); *Denton*, 897 S. W. 2d at 761. Before a party waives a privilege by offensive use, the court must determine that: (1) the party is seeking affirmative relief; (2) the evidence the party refuses to produce is outcome-determinative; and (3) there is no alternative source for the evidence. The party seeking the evidence in issue must meet all three elements. *Denton*, 897 S.W.2d at 761; *Transamerican Nat'l Gas v. Flores*, 870 S. W. 2d 10, 11-12 (Tex. 1994). If the party seeking the evidence proves all three elements, the court must take some remedial action.

The offensive use cases are typically subsets of sanctions cases. Even if a party has a valid reason to avoid discovery, such as an evidentiary or constitutional privilege, that party, when appropriately ordered by the trial court, must elect whether to maintain the privilege or risk suffering a sanction. *Republic Ins.*, 856 S. W. 2d at 161; *Ginsberg* 686 S. W. 2d at 107; *Hansen v. Citizen Bank of Irving*, 549 S.W.2d 446, 449 (Tex. App.—Eastland 1977, no writ). The theory behind the offensive use doctrine is that a party who is seeking affirmative relief should not be permitted to maintain the action, while at the same time maintain evidentiary privileges that protect from discovery outcome-determinative information not otherwise available to the opposing side. *Denton*, 897 S.W.2d at 761. Application of the offensive use doctrine avoids situations where it would be unfair to allow a party to both seek relief and to deny the defense essential evidence. *Id.* Upon a finding by the court of offensive use, the party seeking protection either waives the privilege or risks sanction from the trial court. If the offending party fails to waive the privilege, the trial court must then determine the appropriate sanction. *Denton*, 897 S.W.2d at 763.

In determining the appropriate sanction, the court should consider a number of factors. *Denton*, 897 S.W. 2d at 763. First, the trial court should consider the nature of both the questions asked and the privilege asserted. *Id.* If the questions ask for facially incriminating answers, such circumstances would cut against the imposition of a harsh remedy. *Campbell v. Gerrans*, 592 F.2d 1054, 1057 (9th Cir. 1979). On the other hand, the court can look at the question to determine whether more narrow questions could serve the requesting party's discovery needs and allow the party asserting the privilege the opportunity to preserve her privilege. *Denton*, 897 S.W.2d at 763. The court should also consider whether the privilege is being asserted for legitimate purposes or merely to avoid discovery or to create delay. *Id.* The court should weigh the resulting unfairness to a requesting party if forced to proceed to trial without the discovery sought against the interest of the party asserting a privilege in protecting her privilege. *Id.*; *Wehling v. Columbia Broadcasting Sys.*, 608 F. 2d 1084, 1086 (5th Cir. Tex. 1979).

The considerations regarding the appropriate sanction to make in an offensive use doctrine setting are the same as the considerations the court should make before imposing any other sanction. That is to say, a direct relationship must exist between the offensive conduct and the sanction imposed.

Transamerican, 811 S.W.2d at 917. Also, in the interest of justice, the sanction must not be excessive and should not be more severe than necessary to satisfy its legitimate purposes. *Id.* In short, the trial court should impose the least burdensome sanction necessary to prevent unfairness to the party seeking discovery. *Id.*; *Wehling*, 608 F. 2d at 1088.

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Special Credit Given To: Dana Lewis Staff Attorney for the 126th Judicial District Court ★

¹A party will not waive their privilege if it mistakenly objects to a request for privileged information instead of complying with TEX. R. CIV. P. 193.3. TEX. R. CIV. P. 193.2(f); *In Re: Univ. of Texas Health Center*, 33 S. W. 3d 822, 826 (Tex. 2000). However, once the error is brought to the attention of the objecting party, that party must assert the privilege in compliance with TEX. R. CIV. P. 193.3.

²Litigation materials are exempt from this requirement. A party is not required to assert a privilege in their withholding statement for information or materials created for purposes of litigation. TEX. R. CIV. P. 193.3(b) and cmt. 3.