

1  
2  
3  
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON  
5 FOR THE COUNTY OF MULTNOMAH

6 In the Matter of the Marriage of:

7 KAINE ANDREW HORMAN,

8 Petitioner,

9 and

10 TERRI LYNN MOULTON HORMAN,

11 Respondent.  
12

Case No. 100666084

RESPONDENT'S MOTION FOR  
PROTECTIVE ORDER

13 **UTCR 5.010(3) CERTIFICATE OF COMPLIANCE**

14 Before the filing of this motion, counsel for Respondent Terri Horman (Wife)  
15 conferred with counsel for Petitioner Kaine Horman (Husband) to limit the scope of all  
16 discovery by opposing counsel of Wife. Counsel for the parties have been unable to  
17 resolve this issue after a good faith effort to do so.

18 **UTCR 5.050 STATEMENT**

- 19 A. Oral argument is requested.  
20 B. Time requested for oral argument is 60 minutes.  
21 C. Court reporting services are requested.

22 **MOTION**

23 Pursuant to ORCP 36 C(1), Wife moves the court for a protective order requiring  
24 that discovery not be had against her to preserve her constitutional rights under the Fifth  
25 Amendment of the United States Constitution and Article 1, section 12, of the Oregon

26 ///

1 Constitution. This motion is supported by ORCP 36 C and the following Points and  
2 Authorities.

### 3 POINTS AND AUTHORITIES

#### 4 A. Introduction

5 Wife seeks a protective order under ORCP 36 C(1) ordering that she not be  
6 required to answer any questions at deposition or produce any documents in the above-  
7 captioned proceeding. In pleadings filed by Husband, and in media appearances by  
8 him, Husband accuses Wife of being involved in the disappearance of Kyron Horman.  
9 Husband also contends that Wife engaged in a murder-for-hire plot in which Husband  
10 was the target. There is an ongoing police investigation into these matters. Wife  
11 contends that the criminal investigation and the divorce proceeding are so closely  
12 entangled that requiring Wife to answer deposition questions or produce documents will  
13 violate her rights under Article I, section 12, of the Oregon Constitution and the Fifth  
14 Amendment of the United States Constitution.

#### 15 B. Applicable Law

16 ORCP 36 C(1) provides that "[u]pon motion by a party \* \* \* from whom discovery  
17 is sought, and for good cause shown, the court \* \* \* may make any order which justice  
18 requires to protect a party or person from annoyance, embarrassment, oppression, or  
19 undue burden \* \* \* including one or more of the following: (1) that the discovery not be  
20 had; (2) that the discovery may be had only on specified terms and conditions[.]" The  
21 rule is designed "to protect that party or person in *any* way that justice requires." *Carton*  
22 *v. Shisler*, 146 Or App 513, 516 (1997) (emphasis in original).

23 Because civil discovery is so broad, tools such as depositions pose a significant  
24 risk of abuse, which may seriously hamper the privacy interests of litigants. *Seattle*  
25 *Times Co. v. Rhinehart*, 467 US 20, 34-5 (1984). There, in discussing the analogous  
26 *////*

1 federal rule, FRCP 26,<sup>1</sup> the Supreme Court observed that the "unique character of the  
2 discovery process requires that the trial court have substantial latitude to fashion  
3 protective orders." *Id.* at 36.

4 Further, as noted in prior briefings to this court, when there are simultaneous civil  
5 and criminal proceedings that involve the same underlying transactions or conduct,  
6 forcing the accused to participate in pre-trial discovery in the civil case seriously  
7 threatens the right to be free from self-incrimination in the criminal proceeding. *Ex Parte*  
8 *Dinkel*, 956 So 2d 1130 (Ala 2006).

9 Wife has found no controlling Oregon case law discussing whether a protective  
10 order preventing her from participating in pre-trial discovery is appropriate where there  
11 are parallel criminal and civil proceedings. However, the Oregon Court of Appeals  
12 extensively discussed the scope of the Fifth Amendment privilege in the context of a  
13 civil proceeding in *Empire Wholesale Lumber Co. v. Meyers*, 192 Or App 221 (2004).  
14 There, the defendant sold lumber for the plaintiff's company. The plaintiff discovered  
15 that the defendant retained the proceeds of some of the lumber sales and filed a law  
16 suit alleging, in part, breach of contract, fraud, and conversion. The plaintiff obtained a  
17 large judgment against the defendant. The defendant then filed for bankruptcy  
18 protection, seeking to avoid payment. *Id.* at 223-34.

19 After proceedings in the bankruptcy court, in which the court concluded that the  
20 judgment was not dischargeable, the plaintiff obtained an order compelling the  
21 defendant to appear for a judgment debtor examination and to produce certain  
22 documents. The plaintiff sent letters to the United States Attorney asking that the  
23 defendant be prosecuted for fraud. The United States Attorney declined. The plaintiff  
24 also contacted the Internal Revenue Service (IRS) and complained that defendant had  
25 engaged in tax evasion, but the IRS did not respond. *Id.*

26 <sup>1</sup> ORCP 36 essentially tracks FRCP 26, except that ORCP 36 does not authorize expert discovery.  
*Stevens v. Czerniak*, 336 Or 392, 402 (2004).

1           Against that background, the defendant refused to answer any questions and  
2 declined to produce any documents, contending that his answers to plaintiff's questions  
3 could lead to prosecution by the United States Attorney or the IRS. The trial court  
4 declined to order the defendant to answer questions and produce documents. The  
5 plaintiff appealed, contending that the court erred in permitting the defendant to invoke  
6 his constitutional privilege against self-incrimination to avoid answering any questions  
7 and producing any documents. *Id.* at 224-25. The Court of Appeals affirmed the  
8 defendant's right to invoke his constitutional privileges. *Id.* at 226-27. In doing so, it  
9 summarized the applicable law:

10           "[T]he privilege to be free from state-compelled self-incrimination may be  
11 asserted in 'any proceeding, civil or criminal, administrative or judicial,  
12 investigatory or adjudicatory; [to] protect[ ] against any disclosures that the  
13 witness reasonably believes could be used in a criminal prosecution or  
14 could lead to other evidence that might be so used.' *Kastigar v. United*  
15 *States*, 406 U.S. 441, 444-45, 92 S Ct 1653, 32 LEd2d 212 (1972). It  
16 protects not only statements that could be directly incriminating, but also  
17 protects testimony that 'would furnish a link in the chain of evidence  
18 needed to prosecute the \* \* \* crime.' *Hoffman v. United States*, 341 U.S.  
19 479, 486, 71 S Ct 814, 95 L Ed 1118 (1951). The standard for determining  
20 whether the privilege applies is 'whether the claimant is confronted by  
21 substantial and 'real,' and not merely trifling or imaginary, hazards of  
22 incrimination.' *Marchetti v. United States*, 390 US 39, 53, 88 S Ct 697, 19  
23 LEd2d 889 (1968). The determination of the availability of the privilege is  
24 committed to the discretion of the trial court. *Rogers v. United States*, 340  
25 US 367, 374, 71 S Ct 438, 95 L Ed 344 (1951); *US v. Boothe*, 335 F3d  
26 522, 525 (6th Cir 2003).

19           "The privilege may apply to the production of documents, as well. *Bellis v.*  
20 *United States*, 417 US 85, 87, 94 S Ct 2179, 40 L Ed 678 (1974). The  
21 privilege is strictly personal, however; the documents for which protection  
22 is sought 'must be the private property of the person claiming the privilege,  
23 or at least in his possession in a purely personal capacity.' *Id.* at 90, 94 S  
24 Ct 2179 (internal quotation marks omitted). In addition, producing  
25 documents in response to a subpoena may amount to compelled  
26 testimony where the very act of production implicitly communicates  
statements of fact such as the fact of the documents' existence, the fact  
that they are in possession of the witness, or the fact of their authenticity.  
*United States v. Hubbell*, 530 US 27, 36, 120 S Ct 2037, 147 L Ed2d 24  
(2000). Production of documents, 'in order to be testimonial, \* \* \* must  
itself, explicitly or implicitly, relate a factual assertion or disclose  
information.' *Doe v. United States*, 487 US 201, 210, 108 S Ct 2341, 101  
LEd2d 184 (1988).

1 "In both cases, the privilege cannot be invoked in blanket fashion; it must  
2 be invoked, and ruled upon, on a question-by-question, document-by-  
document basis. *US v. Bodwell*, 66 F3d 1000, 1001–02 (9th Cir 1995)."

3 *Id.* at 226-26.

4 Later, in *Redwine v. Starboard, LLC*, 240 Or App 673 (2011), the Court of  
5 Appeals expanded on its reasoning in *Empire Wholesale*. There, the plaintiffs obtained  
6 a judgment for over \$900,000 against Starboard arising from payments owed on  
7 delinquent promissory notes. Later, Tamara Sawyer and her husband were ordered to  
8 appear for a judgment debtor examination and to produce certain documents pertaining  
9 to Starboard's property and its finances. At the time the judgment debtor examination,  
10 Sawyer was the subject of a continuing federal criminal investigation involving, in part,  
11 Starboard. *Id.*, 240 Or App at 665-67.

12 The Sawyers invoked their privilege against self-incrimination, refused to answer  
13 plaintiffs' questions or produce any documents at the examination. The plaintiffs then  
14 brought contempt proceedings against the Saywers. The court found the Sawyers in  
15 contempt. Tamara Saywer appealed. *Id.* at 680. The Court of Appeals reversed,  
16 holding that, "so long as that proximate exposure to criminal liability remains, Sawyer's  
17 invocation of the privilege against self-incrimination as to the inquiries at issue here  
18 cannot be contravened." *Id.* at 686. In doing so, the court reiterated that the court must  
19 undertake a question-by-question evaluation to determine whether the answer to the  
20 question puts the witness in "real danger \* \* \* of crimination, as opposed to a mere  
21 imaginary possibility of increasing the danger of prosecution." *Id.* at 682 (internal  
22 citations and quotations omitted). "In making that assessment, the witness must not be  
23 "required to prove the hazard in the sense in which a claim is usually required to be  
24 established in court, lest the witness surrender the very protection which the privilege is  
25 designed to guarantee." (internal citations and quotations omitted). The court then  
26 observed that

1 "To sustain the privilege, it need only be evident from the implications of  
2 the question, in the setting in which it is asked, that a responsive answer  
3 to the question or an explanation of why it cannot be answered might be  
4 dangerous because injurious disclosure could result. *Hoffman v. United*  
5 *States*, 341 U.S. 479, 486, 71 S Ct 814, 95 L Ed 1118 (1951)."

6 *Id.* at 683.

7 The court then said:

8 "Although the witness claiming the privilege bears the burden of  
9 establishing that an answer could be injurious, the court must construe the  
10 privilege liberally 'in favor of the right it was intended to secure.' [*Hoffman*]  
11 at 486, 71 S Ct 814. Thus, it must be '*perfectly clear*, from a careful  
12 consideration of all the circumstances in the case, that the witness  
13 [claiming the privilege] is mistaken, and that the answers *cannot possibly*  
14 have such tendency to incriminate.' *Id.* at 488, 71 S Ct 814 \* \* \*.

15 "Further, the protections afforded by the privilege are not abrogated  
16 merely because the government may have access from another source to  
17 the same information sought to be compelled from the witness. That is so  
18 for at least two reasons. First, as a practical matter, such an exception  
19 would substantially subvert -- and perhaps abrogate -- the constitutional  
20 protection. Second, evidence compelled from 'the speaker's own mouth'  
21 can convey inculpatory implications that are uniquely, qualitatively  
22 different than those attending other evidence. *See, e.g., Grunewald v.*  
23 *United States*, 353 US 391, 421-22, 77 S Ct 963, 1 L Ed2d 931 (1957)  
24 (witness was justified in invoking privilege in grand jury proceedings,  
25 despite decision to testify at trial, based on legitimate concern that he  
26 'would have provided the Government with incriminating evidence from his  
own mouth')."

27 *Id.* at 684.

28 Wife contends that, under all of the circumstances, she cannot be compelled to  
29 provide documents or be subject to questions in a deposition because, if she is forced  
30 to answer any questions, her rights under Article I, section 12, and the Fifth Amendment  
31 will be jeopardized.

32 Husband understands by his statements in prior pleadings the kinds of hazards  
33 Wife will be exposed to if she is forced to invoke her rights to particular questions. For  
34 example, in his Response Regarding Respondent's Petition for Dismissal, dated  
35 November 9, 2010, Husband stated that "[o]ne can only infer that Mother will not speak  
36 because her testimony *will* lead to criminal liability for Kyron's disappearance. Until

1 Mother denies these allegations, there can be no other inferences drawn." (Emphasis in  
2 original.)<sup>2</sup>

3 In determining the merits of Wife's motion, Wife understands that the court must  
4 evaluate each discovery request. Because it is unknown what information the police  
5 could use as a link in a chain of evidence to build a circumstantial case against Wife,  
6 and in accordance with the law set forth in this Motion, Wife must very broadly assert  
7 her constitutional privileges.<sup>3</sup> To assist the court, before the hearing in this matter, Wife  
8 will provide the court with Plaintiff's Second, Third, and Fourth Requests for Production,  
9 with annotations as to which requests Wife will assert her constitutional privileges.

10 Regarding Wife's deposition, for the purposes of judicial economy, Wife contends  
11 that Husband should submit a list of questions he intends to pose at her deposition, in  
12 advance, so that the court can make its rulings. This would not preclude Husband from  
13 posing other questions at the deposition as it progresses, but would serve to limit the  
14 drain on judicial resources of the real-time, question-by-question assessment. Finally,  
15 at some point, Wife contends that repeated questioning and the invocation by Wife of  
16 her constitutional privileges would necessarily support a protective order ending the  
17 deposition to avoid what will inevitably become harassing, annoying, and burdensome  
18 examination.<sup>4</sup> Under those circumstances, justice would require an end to the  
19 examination. ORCP 36 C. See, e.g., *Carton v. Shisler*, 146 Or App 513, 516 (1997)  
20 (stating principle); *Seattle Times Co. v. Rhinehart*, 467 US 20, 35 (1984) (discussing  
21 discretion of trial court in fashioning protective orders).

22 ///

23  
24 <sup>2</sup> Under Oregon law, the court is not permitted to draw negative inferences from Wife's assertion of  
her constitutional privileges. OEC 513(1); *John Deere Co. v. Epstein*, 307 Or. 348 (1989).

25 <sup>3</sup> Compare, e.g., *Kastigar v. United States*, 406 US 411 (1972) with *State v. Soriano*, 298 Or 392 (1984);  
*Moran v. Burbine*, 475 US 412 (1986) with *State v. Haynes*, 228 Or. 59 (1979).

26 <sup>4</sup> The court should be aware that Husband contends, without any legal authority, he should not be subject  
to a deposition if Wife's deposition is not compelled. Wife will address this either in her reply brief or at  
oral argument, or both.

1 **CONCLUSION**

2 For the reasons set forth above, Wife contends that the court should enter an  
3 order limiting the scope of discovery sought against her by Husband.

4 Dated on September 23, 2013

5 THE LAW FIRM OF PETER BUNCH, LLC  
6

7  
8 

---

Peter Bunch, OSB No. 942210  
9 Attorney for Respondent  
10 Trial Attorney: Peter Bunch  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

## CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing RESPONDENT'S MOTION FOR PROTECTIVE ORDER on the attorney for Petitioner on September 23, 2013, by hand delivery, placed in a sealed envelope, addressed to the following at the address set forth below.

Brett Engel  
Gearing Rackner Engel & McGrath, LLP  
121 SW Morrison St., Ste. 750  
Portland, OR 97204

---

Peter Bunch, OSB No. 942210  
Attorney for Respondent