



# LEGAL DEFENSE TRUST TRAINING BULLETIN

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## “TAKING THE FIFTH” PART III

In Parts I and II of “Taking the Fifth”, we examined the predicates for application of *use immunity* to law enforcement officers’ statements obtained under threat of discipline (insubordination) for refusal to cooperate (termed, *administrative compulsion*). The principle that emerged is this: whenever a statement is administratively compelled by the employing public safety agency, the officer or deputy has use immunity for that statement in a criminal prosecution wherein he or she is the target, *provided* that a refusal to answer on Fifth Amendment grounds, or similar unequivocal invocation of the right to silence preceded the administrative compulsion. Hence, expressed in a simple formula to aid memory and understanding, the principle could be viewed as follows:

INVOCATION OF FIFTH AMENDMENT PRIVILEGE (Against self- incrimination)	+	ADMINISTRATIVE COMPULSION (Insubordination)	=	USE IMMUNITY
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Note that both assertion of the right to silence, *and* compulsion by threat of insubordination are necessary ingredients.

Now, we’re ready to watch the application of this principle in proceedings *outside* department walls. Recall that in Part II, we saw that in IAD investigations and OIS investigations, statements and admissions that are compelled after invocation are entitled to the all-important use immunity. We noted an important distinction exists when, for policy or strategic reasons, your department calls or invites in other agencies to handle or participate in the investigation— *watch out, no use immunity here!* (See: *People v. Velez* (1983) 144

*Cal.App.3d* 558, 564.) Regardless of how much the investigation *looks* like an “internal” only, the identity of the investigators is the key.

Let’s look now at three real scenarios developed from actual cases in which we have participated:

### Scenario No. 1

Officer O’Leary is on the witness stand, and testifying for the prosecution in *People v. Castenada*. Defendant is charged with ADW on an officer and resisting an officer. Officer O’Leary testifies that in overcoming the resistance offered by Castenada, he used his baton to strike the defendant multiple times. On cross-examination, the defense attorney goes on the attack, pointing out that at least one baton blow struck the defendant in the head, and caused a skull fracture. O’Leary says the headblow was accidental. Whereupon, the judge stops the trial, puts the jury out to noon recess, and tells O’Leary that he should get legal advice before continuing to testify, because he could be incriminating himself. The judge tells O’Leary to “be back at 1:30 with a lawyer”. What result?

### Scenario No. 2

Deputies Perez and Bologna are assigned to a regional narcotics task force, consisting of a number of narcotics investigators from local jurisdictions and state and federal agents. The United States Attorney’s office is looking into allegations that members of the task force have been “skimming” cash seizures, reserving some of the income for themselves. A grand jury is convened and subpoenas go out to all task force members. Perez and Bologna have been given direct orders by the Sheriff to testify, regardless of their right against self-

incrimination, according to a written department policy making it *neglect of duty* to refuse to testify in any official proceedings, when called upon to do so, in connection with official duties. Other task force members are not given any such orders or policies in connection with their subpoenas. *All of them testify* before the grand jury. What result?

### Scenario No. 3

80 officers of Metropolitan Division participate in serving a series of search warrants simultaneously on four "rock houses" situated together, and controlled by the local Crips gang. Surveillance, informant and undercover investigation have revealed that the houses are heavily fortified, and that the dealers and occupants are armed with automatic weapons. There is an elaborate intelligence and look-out system in place, which has permitted the gang to foil earlier small scale and opportunistic police attempts to seize dope. A detailed tactical plan is developed and each of the 80 officers is assigned to a specific role in one of the four entry and search teams. Air support arrives above the scene too early, where seconds can make the difference between a complete surprise raid, and another fruitless search and extreme threat to officer safety. Alerted by the helicopter and its own "early warning system" the gang effectively flushed the dope and the participants escaped on foot to their "safe houses". Frustrated officers arrive, perform crisis entries, and in "their supreme effort to locate hidden dope", effectively dismantle the four locations, rendering them uninhabitable. Prosecutors indict the incident commander and the team leaders for conspiracy to commit vandalism under color of a search warrant. With only the five charged, the 75 other officer-participants receive prosecution subpoenas to testify. They want to invoke their rights and refuse to testify because of the conspiracy allegations. What result?

The three scenarios above might at first blush appear to be unrelated in application of the principles we have discussed. Actually, however, they all apply the concept of use immunity.

Consider for example, in Scenario No. 1, if O'Leary continues to testify as a witness, his testimony would be usable against him, if he is later charged with assault under color of law or violation of civil rights by excessive force, simply because there is no

administrative compulsion. In Scenario No. 2, the task force members who testify without administrative compulsion are waiving their right against self-incrimination. Perez and Bologna can testify and will have use immunity. In Scenario No. 3, the 75 officers may in reality be unindicted co-conspirators, so if they seek legal advice, they will likely be told "don't testify". But if the Department has the policy which *requires* them to testify, they will have use immunity for what they say.

In each of these scenarios, the witness-officers are found between Scylla and Charybdis--put to the Hobson's choice of testifying as subpoenaed witnesses with a waiver of their rights, or invoking their rights with a resultant breakdown in the justice system-- "cops invoking the 5<sup>th</sup> ??". The difference in each scenario which produces the preferable outcome is the presence of administrative compulsion requiring all officers and deputies to testify in any official proceeding, when called upon to do so, in the performance of official duties. To refuse to do so (by invoking the right to silence or otherwise) is insubordination and neglect of duty. And, you know what? *It works!* [See: *Christal v. Board of Police Commissioners* (33 Cal. App. 2d 564)]. The justice system grinds on, the cops testify with protection, and yet, in the proper case, have immunity for what they say.

If you have any questions, give us a call.

STAY SAFE AND IMMUNIZED!

- Michael P. Stone

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