Table of Contents

I. So you have a civil case with an underlying crime (The practical approach) …….2

II. Does criminal liability give rise to civil liability? If not, how is there a claim? (The legal approach) 2

III. Pleading the 5th Amendment ……...…….2, 3
- a. Federal Rule of Evidence 501 ……...…….…….. 2
- b. Texas Rule of Evidence 513 ……...…….…… 2
- c. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) ….…. 2
- d. *Hinojosa v. Butler*, 547 F.3d 285, 291 (5th Cir. 2008) …….…….. 2
- e. *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204 (5th Cir. 1983) …… 2
- f. *In re Moore*, 153 S.W.3d 527 (Tex. App.--Tyler 2004, no pet.) …… 2
- g. *Pendergest-Holt v. Certain Under Writers at Lloyd's of London*, 681 F. Supp. 2d 816; 830 (S.D. Tex. 2010) ……...…….…….. 2
- h. *Ex parte Park*, 37 Tex. Crim. 590, 40 S.W. 300 (1897) …….……. 3
- i. *Farmer v. State*, 491 S.W.2d 133 (Tex. Crim. App. 1973) …….……. 3
- j. *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814 (1951) ……...…. 3
- k. *Ex parte Butler*, 522 S.W.2d 196 (Tex. 1975) …….……...…. 3

IV. Experience from Cases (The practical and legal approach collide..……3
- a. TEX. CODE CRIM. PROC. ANN. arts. 19.34, 20.02(a) (West 2005 & Supp. 2013) …….……3
- b. *Euresti v. Valdez*, 769 S.W.2d 575, 579 (Tex. App.—Corpus Christi 1989, no writ) ……...3
- c. *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 622 (Tex. App.—Houston [14th Dist.] 1994, writ denied) …….……3
- d. *Buick v. Blum*, 130 S.W. 3d 285, 288 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ..… 3
- e. *Texas & P.R. Co. v. Hagenloh*, 247 S.W.2d 236, 239 (1952) ……..…3
- f. *Durand v. Moore*, 879 S.W.2d 196, 199, 201 (Tex. App.--Houston [1st Dist.] 1994, no writ.) … 4
- g. *Houston Transit Co. v. Felder*, 208 S.W.2d 880, 882 (Tex. 1948) ……..… 4
- h. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007) …… 4
- i. *Ten Hagen Excavating, Inc. v. Castro- Lopez*, 503 S.W.3d 463, 476 (Tex. App.—Dallas 2016) ……..…… 4
- j. *Geiger v. Varo, Inc*., 1994 Tex. App. LEXIS 3937, *2 (Tex. App. -- Dallas 1994) ……..… 4
- k. *Hooper v. Pitney Bowes, Inc*., 895 S.W.2d 773, 777-78 (Tex. App. -- Texarkana 1995, writ denied) ……...…… 4
- l. *Frito-Lay, Inc. v. Ramos*, 770 S.W.2d 887, 889 (Tex. App. -- El Paso 1989) …… 4
- m. *Frito-Lay, Inc. v. Ramos*, 784 S.W.2d 667 (Tex. 1990) ……..…… 4
- n. *Doe v. S. Cent. Spanish Dist. & Iglesia De Dios Munger Place*, 2002 Tex. App. LEXIS 7317, (Tex. App. -- Dallas, Oct. 14, 2002, no pet.) ……..……...…… 4, 5

When a Criminal Case Becomes a Civil Case

I. So you have a civil case with an underlying crime….what now? (The practical approach)

a. Assess the crime - Who committed the crime?
    i. If it is your client?
        1. Do you want to take the case?
        2. Yes, criminal counsel can help. I always keep a name on hand from a simple traffic ticket to a much larger crime.
        3. Questions to ask:
            a. Have you entered a plea?
            b. Have you given an interview?
        4. Not your client - Co-Defendant/Plaintiff?
            a. GET TO WORK!
                i. Gather administrative copies of plea papers;
                ii. Talk to all investigating officers;
                iii. Gather the fatality packet;
                iv. Find out if there is another investigation file;
                v. Is there a flip pad?
            b. Keep in mind that if it is a pending criminal case you typically are limited in what you can get.

II. Does criminal liability give rise to civil liability? If not, how is there a claim? (The legal approach)

i. Negligence per se
ii. Respondeat Superior
iii. Negligence – hiring, supervision, training, retention
iv. Negligent misrepresentation
v. Breach of Contract
vi. DTPA Violation
vii. Fraud
viii. Wrongful death
ix. Criminally negligent homicide
x. Assault by Offensive Contact

III. Pleading the 5th Amendment

a. Use of the 5th can be used against your client – Inference but not mandatory: Federal Rule of Evidence 501 and Texas Rule of Evidence 513, which taken together allow a fact finder in civil cases to draw an adverse inference from a civil claimant's invocation of the Fifth Amendment. *See, Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) ("[T]he 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." (emphasis added)); *Hinojosa v. Butler*, 547 F.3d 285, 291 (5th Cir. 2008) ("[W]hile a person may refuse to testify during civil proceedings on the ground that his testimony may incriminate him[,] his refusal to testify may be used against him in a civil proceeding." (quoting *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 210 (5th Cir. 1983) (emphasis added))); *In re Moore*, 153 S.W.3d 527, 534 (Tex. App.--Tyler 2004, no pet.) ("Refusal to answer questions by asserting the [Fifth Amendment] privilege is relevant evidence from which the finder of fact in a civil action may draw whatever inference is reasonable under

the circumstances." (emphasis added)). *Pendergest-Holt v. Certain Under Writers at Lloyd's of London*, 681 F. Supp. 2d 816; 830 (S.D. Tex. 2010).

b. Waiver - When a witness refuses to answer upon this ground, he is not the exclusive judge of his right to exercise the privilege. The judge is entitled to determine whether the refusal to answer appears to be based upon the good faith of the witness and is justifiable under all of the circumstances. *Ex parte Park*, 37 Tex. Crim. 590, 40 S.W. 300 (1897); *Farmer v. State*, 491 S.W.2d 133 (Tex. Crim. App. 1973). The inquiry by the court is necessarily limited, because the witness need only show that an answer to the question is likely to be hazardous to him; the witness cannot be required to disclose the very information which the privilege protects. Before the judge may compel the witness to answer, he 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 *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814 (1951); *Ex parte Butler*, 522 S.W.2d 196 (Tex. 1975).

IV. Experience from Cases (The practical and legal approach collide)

a. Dram shop – Driver in prison used his incarceration to make himself look sympathetic and as if he had paid his dept to society so it was now the bar's turn to pay its price.
b. Sexual assault/assault
    i. Is it a plea that come into Evidence?
    ii. Is it the type of crime that is subject to an expunction?
c. Premises liability property crimes – use bad facts to make the jury made at the perpetrator, not the owner of the property by doing things like sending a bench warrant for the criminal to actually come to trial.
d. If the matter went to the grand jury and was no billed there will typically be no evidence - Grand jury proceedings are secret. TEX. CODE CRIM. PROC. ANN. arts. 19.34, 20.02(a) (West 2005 & Supp. 2013). Grand jury testimony can be discovered in a civil suit only if a particularized need is shown. *Euresti v. Valdez*, 769 S.W.2d 575, 579 (Tex. App.—Corpus Christi 1989, no writ). Evidence of what transpired before a grand jury is admissible only when, in the judgment of the court, it becomes material to the administration of justice that disclosure be allowed. *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 622 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
e. Course and scope will likely always come into play when it is an intentional criminal act but sometimes it will not:
    i. Texas law states that, as a general rule, a party has no duty to control the conduct of another. *See Buick v. Blum*, 130 S.W. 3d 285, 288 (Tex. App.—Houston [14th Dist.] 2004, no pet.). That said, by way of the respondeat superior doctrine an employer may be held liable for the tortuous acts of its employee when those acts are within the course and scope of employment. *See id.* To determine if an employee is within the course and scope of his employer, a Plaintiff must establish that the employee is acting (1) within the general authority granted by the employer; (2) in furtherance of the employer's business; and (3) for the accomplishment of an object for which he is employed. *See id.* When it comes to allegation of an intentional tort, such as assault, the courts generally find that it is ordinarily not within the scope of an employee's authority to commit an assault on a third person. *See Texas & P.R. Co. v. Hagenloh*, 247 S.W.2d 236, 239 (1952). In fact, the cases in which liability has been imposed upon the employer for assault by his employee are comparatively few. *See id*. ("Usually assault is the expression of personal animosity and is not for the purpose of carrying out the master's business."). When the employee turns aside, for however short a time, from the execution of the employer's work to engage in an affair wholly his own, he ceases to act for the employer, and the responsibility for that which he does in pursuing his own business or pleasure is upon him alone. *See Buck*, 130 SW.3d at 289 (*citing Texas & P.R.*

Co. v. Hagenloh, 247 S.W.2d at 239, 241.). A tort such as assault can only be considered in the course and scope of one's employment when the nature of the employment requires the use of force (such as the duty to guard property) so that the use of force may be in furtherance of the employer's business, even if more force than necessary is applied. *See id.* at 239. A court will typically consider whether the intentional tort was so connected with and immediately arising out of the authorized employment tasks such that the task and the tort are merged into one indivisible tort that is then imputed to the employer. *See Durand v. Moore*, 879 S.W.2d 196, 199, 201 (Tex. App.--Houston [1st Dist.] 1994, no writ.) (*citing Houston Transit Co. v. Felder*, 208 S.W.2d 880, 882 (Tex. 1948)).

ii. The Court of Appeals of Texas reviewed a sexual assault matter and held that the perpetrator was not acting within the course and scope of his employment, which resulted in his employer not being held vicariously liable for the assault. In that case, a neurologist placed his penis in a patient's hand during a neurological examination. *See Buck v. Blum*, 130 S.W.3d 285, 289-90 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The Plaintiff claimed that since the procedure itself was within the scope of the doctor's authority, the use of his body part was simply an inappropriate exercise of the delegated duty. *See id.* at 289. The Court reasoned that at the very moment the doctor placed his body part in her hand, he was acting in his own prurient interest and ceased to be acting for his employer. *See id.* at 290. At that point, the physician's examination became only a pretense or a means for the doctor's inappropriate personal gratification. *See id.* As such, the Court held that since, as a matter of law, the doctor's conduct did not arise out of the course and scope of his employment, his employers could not be held liable under respondeat superior. *See id.*

iii. The standard is not if an act committed while the employee was accomplishing duties entrusted to her by the employer while is within course and scope; rather, if the act is committed for the accomplishment of the object for which the employee was hired. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 757 (Tex. 2007); *Ten Hagen Excavating, Inc. v. Castro- Lopez*, 503 S.W.3d 463, 476 (Tex. App.—Dallas 2016).

iv. A sexual assault is a separate, reprehensible act that is typically not "closely connected" with a person's authorized duties. *See, e.g., Geiger v. Varo, Inc*., 1994 Tex. App. LEXIS 3937, *2 (Tex. App. -- Dallas 1994) (summary judgment granted to employer following allegations of sexual assault by an employee since "[i]n Texas it is not within the scope of a servant's authority to commit an assault on a third person" and there was no evidence that the employee was "furthering [the employer's] interest by allegedly compelling [plaintiff] to engage in oral sex").

v. To point out further, in *Houston Transit Co. v. Felder*, 208 S.W.2d 880 (Tex. 1948), a bus company was held liable for a driver's physical assault of a driver of a car since he confronted the driver in an attempt to get his name and license number after an accident as required by his employer, and thus the entire incident was "one indivisible tort" attributable to the employer. *Id*., at 882.

vi. Now, an unauthorized or unapproved act by an employee is not an act that is necessarily done outside the scope of employment. *See Hooper v. Pitney Bowes, Inc*., 895 S.W.2d 773, 777-78 (Tex. App. -- Texarkana 1995, writ denied). However, that case states that an employer is liable for the act of an employee, even if the specific act is unauthorized or contrary to express orders "so long as the act is done while the employee is acting within his general authority for the benefit of the employer." *Id*.; *see Frito-Lay, Inc. v. Ramos*, 770 S.W.2d 887, 889 (Tex. App. -- El Paso 1989) (concluding employee acting within course and scope of employment when he committed intentional tort in attempting to retrieve employer's property at end of business relationship), *rev'd on other grounds, Frito-Lay, Inc. v. Ramos*, 784 S.W.2d 667 (Tex. 1990). Even if the evidence shows sexual

misconduct occurred on employer's premises during business hours, they can still be insufficient evidence that the conduct occurred during the course of an activity that was of benefit to appellees. *Doe v. S. Cent. Spanish Dist. & Iglesia De Dios Munger Place*, 2002 Tex. App. LEXIS 7317, (Tex. App. -- Dallas, Oct. 14, 2002, no pet.) (emphasis added) (rejecting a claim that a pastor accused of sexual exploitation while providing counseling was acting in the course of his employment by his church).

f. With any child related injury make sure to order records and speak with the investigators from Child Protective Services and Texas Department of Family Services.