



DEPARTMENT OF LAW
OFFICE OF THE
Attorney General
STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. BABBITT
ATTORNEY GENERAL

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The Honorable Frank J. Felix
State Senator
State Capitol, Senate Wing
Phoenix, Arizona 85008

Re: 77-215 (R77-332)

Dear Senator Felix:

This is in response to your letter of October 12, 1977 in which you requested our opinion on the following questions:

1. Is the immunity extended under A.R.S. § 41-1152 use or transactional immunity?
2. Would the administration of oaths to witnesses invoke the immunity provisions of A.R.S. § 41-1152?
3. What is the threshold of "required" testimony? Would unsolicited, yet incriminating remarks be immunized?

With respect to your first question, transactional immunity ". . . accords full immunity from prosecution for the offense to which the compelled testimony relates . . ." Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 1661 32 L.Ed. 2d 212 (1972). The first sentence of A.R.S. § 41-1152 provides as follows:

No person sworn and examined before either house or any committee thereof shall be held to answer criminally or be subject to any penalty or forfeiture for any fact or act about which he is required to testify. [Emphasis added.]

This language clearly meets the requirements of the Kastigar definition, supra, and thus the immunity extended under A.R.S. § 41-1152 is transactional immunity.

With respect to your second question, our conclusion is that the administration of oaths to witnesses does not invoke the immunity provisions of A.R.S. § 41-1152. While there is no Arizona case law on this point, the case of McLain v. Superior Court, 99 C.A. 2d 109, 221 P.2d 300 (1950), construed a California statute nearly identical to A.R.S. § 41-1152 as follows:

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"When [the witness] testimony touched upon the alleged bribery of Evans, immunity attached." McClain, supra at 305.

This leads us to conclude that immunity does not automatically attach to all testimony simply because the witness has been sworn. Rather, we believe that immunity attaches to that testimony that can reasonably be characterized as responsive to questions posed by the committee.

As was the case above, there is no Arizona case law which would definitively answer your third question. However, Ex Parte Connolly, 16 Cal.App. 2d 709, 61 P.2d 490 (1936), is directly on point in interpreting California's statutory counterpart to A.R.S. § 41-1152. In that case the court stated:

"For the purpose of this proceeding we do not hold that it is necessary for the witness in all cases to claim the immunity granted under the section. But we do hold that, before he can successfully assert the claim of immunity in a proceeding of this kind, it is incumbent upon him to show that his testimony before the committee was not voluntary, but was given under some form of compulsion. It has often been said that the object of these immunity clauses is to assist the state in procuring credible evidence to aid in the enforcement of the law, and that it is not their object to prevent a witness from voluntarily incriminating himself or to enable a clever criminal, by voluntarily and surreptitiously including criminal with noncriminal facts, to secure wholesale immunity." Ex Parte Connolly, supra, at 494.

Thus, we believe that the immunity provided by A.R.S. § 41-1152 protects only that testimony which is compelled, and that volunteered or unsolicited remarks by a witness are not immunized under this statute. Nonetheless, courts are inclined to construe immunity grants broadly and it may be difficult factually to

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draw a line between genuinely responsive answers and answers calculated to provide an "immunity bath". Therefore, it would be advisable for the committee to take steps to control the line of questioning and to assess in advance the implications of immunity for any prospective witness.

Yours very truly,

BRUCE E. BABBITT
Attorney General



PHILIP J. MacDONNELL
Assistant Attorney General
Director
Special Prosecutions Section