CRIMINAL CONSIDERATIONS IN CIVIL CASES: WHAT CIVIL LAWYERS SHOULD KNOW ABOUT THE FIFTH AMENDMENT

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Joe Kendall obtained his B.B.A. from Southern Methodist University and a JD from Baylor University School of Law in 1980.

Upon graduating law school, Joe Kendall served as an Assistant District Attorney in Dallas County, followed by 5 ½ years as a State District Court Judge in the 195th Judicial District Court of Dallas County. In 1992, President George H. W. Bush appointed him to the United States District Court for the Northern District of Texas.

In 1999, while a federal judge, Judge Kendall was appointed by President Bill Clinton to serve as a Commissioner on the U.S. Sentencing Commission, the seven member body that writes Federal Sentencing Guidelines. As a Commissioner, Judge Kendall worked on many important sentencing issues, including significant work on fraud sentencing guidelines, corporate governance, and compliance issues under the Sarbanes-Oxley Act. He also instructed at numerous programs presented by the Federal Judicial Center in Washington, D.C., teaching new federal judges the sentencing guidelines at Federal Judicial Center orientation programs. Judge Kendall also served as editor of In Camera, the national newsletter of the Federal Judge Association, where he was also a member of the Board of Directors.

Joe Kendall served as a United States District Judge from 1992 until 2002 when he resigned his life appointment and became partners with his long time friend Walter Umphrey, opening the Dallas office of Provost Umphrey, LLP.

In 2008, Joe Kendall bought the Dallas office of Provost Umphrey, LLP and founded the Kendall Law Group, LLP in Dallas, which specializes in securities fraud, patent litigation, health care law, employment law, and high profile white collar criminal defense. Joe Kendall does work as a mediator, arbitrator and Texas local counsel in high stakes litigation.

Joe Kendall has personally tried over 100 jury trials to verdict. During his judicial career, he presided over approximately 500 jury trials and disposed of over 11,000 cases. Joe Kendall was board certified in criminal law in 1985, but did not maintain that certification after becoming a federal judge. He is a Life Member of the National Association of Criminal Defense Lawyers.

Since leaving the bench in 2002, as counsel, co-counsel, or local counsel, Joe Kendall has participated in the recovery of over one billion dollars on behalf of individuals, pension funds and businesses.
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Ms. Rudman specializes in health care law, representing doctors, nurses and providers in health care fraud defense, prompt pay and other disputes against insurance companies, coding and billing disputes, credentialing, peer review, medical board investigations, antitrust and non-compete, and anti-kickback compliance issues.

Jody Rudman is a twice-published author. She has taught CLE and served as a media commentator. She has been appointed by the State Attorney General to serve at the helm of the State’s most high profile healthcare and charitable trusts litigation. In her twenty year legal career, she has tried dozens of jury trials and handled appeals before the Fifth Circuit and the United States Supreme Court.
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CRIMINAL CONSIDERATIONS IN CIVIL CASES: WHAT CIVIL LAWYERS SHOULD KNOW ABOUT THE FIFTH AMENDMENT

Any civil client, in the course of any civil proceeding, can suddenly find himself the target of a criminal case, or giving testimony about actions that have criminal consequences. It is critical for civil lawyers to know and understand the Fifth Amendment privilege and to recognize when separate criminal counsel is needed. This article addresses what every civil practitioner ought to know to counsel his client about the Fifth Amendment, the implications of invoking the Fifth Amendment in a pending civil matter, and to address the involvement of criminal counsel in the course of a civil dispute.

I. INTRODUCTION


Of course, criminal proceedings are not limited to corporations or sophisticated business people. Any involvement of federal funds, federal contracts, the Internet, or the U.S. mail can trigger a federal criminal investigation. Moreover, any civil client can have arrests, active probations, or pending indictments that are fodder for cross examination in a civil dispute. The proliferation of Internet databases and social media make opposing counsel’s discovery of unsavory facts about a civil client far easier. And any civil client, in the course of any civil proceeding, can inadvertently fall headlong into testimony about actions that have criminal consequences.

It is therefore increasingly important for civil lawyers to know and understand the Fifth Amendment privilege and to recognize when criminal counsel ought to be consulted. This article is designed to touch upon scenarios in which civil attorneys might need to consider counseling clients about the Fifth Amendment, the implications of “taking the Fifth,” and the involvement of criminal counsel in a civil dispute.

A. When a Civil Matter Has Criminal Implications

The potential of a parallel criminal matter in an ongoing civil dispute can sometimes be obvious. For example:

- The civil client is notified he is a target in a criminal case.
- The civil client receives a grand jury subpoena.
- Agents show up with a search warrant.
- The client is arrested.¹

Less obvious but perhaps more frequent occurrences might be something like this:

- A client is asked in her deposition about last year’s unresolved DWI arrest.
- A medical malpractice plaintiff wrote a check to the doctor, which bounced.

¹ In many state cases, prosecution begins with the police responding to a crime scene, and frequently making an arrest. An indictment follows. In a federal case, the government is often working behind the scenes undetected for some time -- developing an investigation, interviewing witnesses, getting documents and business records. You will not always know about a federal criminal investigation until it is a fait accompli, and the government has a case it can indict, prosecute, and win.
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- The client company in a commercial contract dispute inadvertently reveals it has been shaving discounts to its customers and sending checks in connection with the scheme.
- The doctor litigating an end to his overbearing non-compete clause has a disgruntled nurse who, it is revealed, blew the whistle on alleged Medicare fraud.
- Your client cheated on her tax return.

Whatever the scenario, the moment a civil client reveals, or is asked, information that has criminal implications, it is critical for the civil lawyer to stop and analyze the desirability and implications of silence.

B. Understanding The Fifth Amendment

1. Differences in Civil and Criminal Strategies

Often, the first instinct of people who are accused, or lawyers counseling them, is to speak and proclaim innocence. Consider the answer to a civil pleading, which is routinely filed and almost always denies all allegations. Similarly, responding to a request from a regulatory agency is often mandatory for regulated businesses. Lawyers who are accustomed to counseling such clients might consider an FBI knock-and-talk to require the same mandatory, detailed response. Further still, a civil lawyer knows he can only instruct his client not to answer deposition questions in limited circumstances, at the risk of reprimand from the Court. Therefore, when the deposition goes awry into matters of a pending DWI, or hot checks, or allegations of billing fraud, the astute but unprepared civil lawyer may think he has no choice but to let his client go down that road.

The criminal arena is in fact quite different. Criminal investigators are not necessarily entitled access to witnesses, let alone putative defendants. Both the timing of a target witness interview, as well as the protections afforded to the target for agreeing to give information, are a matter of finesse and can make the difference between a prison sentence and immunity. Unless a grand jury has issued a subpoena, or agents have a search warrant, or the police make an arrest, cooperation is not mandatory and is sometimes ill-advised. The civil analog is that deposition questions or discovery requests which bear upon criminal matters do not necessarily have to be substantively answered, because the Fifth Amendment privilege trumps the right to civil discovery.

2. The Fifth Amendment Provides Broad Protections

The Fifth Amendment to the United States Constitution states, “No person . . . shall be compelled in any criminal case to be a witness against himself . . .” U.S. CONST., amend V. The protections of the Fifth Amendment apply to the states under the Fourteenth Amendment. Maness v. Meyers, 419 U.S. 449, 461, n. 8 (1975). The civil litigant need not wait until he is actually indicted to invoke the privilege, nor is the privilege limited to criminal cases. The Fifth Amendment privilege exists regardless of the nature of the proceeding, and regardless of what stage it is in. See McCarthy v. Arndstein, 266 U.S. 34 (1924) (holding that the privilege against self-incrimination under the Fifth Amendment “applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it”) (emphasis added). Texas courts view the privilege similarly broadly. See Butterfield v. Texas, 992 S.W.2d 448 (Tex. Crim. App. 1999) (stating, “The Fifth Amendment privilege can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory”) (citing Kastigar v. United States, 406 U.S. 441 (1972)). The protection extends to all such proceedings because the nature of the protection goes to the questions asked, not the proceeding itself. Id. (citing In re Gault, 387 U.S. 1 (1967)).

2 Similarly, the Texas Constitution states that an “accused shall not be compelled to give evidence against himself.” TEX. CONST. Art. I, Sec. 10.
As stated, the privilege exists whether or not an indictment is actually pending. E.g., *Gebhart v. Gallardo*, 891 S.W.2d 327, 330 (Tex. App. – San Antonio 1995). It is the threat of criminal culpability that triggers the right to invoke it. As long as the testimony sought is reasonably believed to subject the witness to possible criminal prosecution, the privilege extends to it. *Kastigar*, 406 U.S. at 445.

Finally, the privilege is not limited to verbal testimony. It may also apply to the production of documents in discovery, if such production might “lead to incriminating evidence” or provide “a link in the chain of evidence needed to prosecute.” *United States v. Hubbell*, 530 U.S. 27, 42 (2000).

3. **How to Assert the Privilege**

   If a civil litigant is embroiled in discovery and faces questions which could cause him to incriminate himself, discovery does not cease altogether. A witness cannot avoid a deposition merely because he intends to invoke his Fifth Amendment privilege. The deponent must appear for the deposition and be prepared to answer questions where appropriate, and assert the privilege where not. The same holds true for discovery requests. Of particular importance to the practitioner, the Supreme Court has held that a lawyer may not be held in contempt for advising his client to refuse to produce material, so long as the lawyer believed in good faith the material may tend to incriminate the client. *Maness*, 419 U.S. at 465.  

   When invoking the Fifth Amendment, the assertion of the privilege must be raised in response to each specific inquiry, or it is deemed waived. *See Rogers v. United States*, 340 U.S. 367, 371 (1951) (stating the privilege “is deemed waived unless invoked”) (citation omitted). Each assertion of it rests on its own merits. Blanket assertions of the privilege are not permitted. *See United States v. Arias*, 404 Fed. Appx. 554, 556 (2d Cir. 2011), *cert. denied, __ U.S. __*, 131 S. Ct. 2889 (stating, “blanket assertion of a Fifth Amendment privilege is insufficient,” and a district court must undertake “a particularized inquiry to determine whether the invocation of the privilege was reasonable as to each posed question”) (citations omitted); *Moore v. Commissioner of IRS*, 722 F.2d 193, 195 (5th Cir. 1984).

   Thus, a deposition or witness examination at trial can proceed, despite opposing counsel having been warned of the witness’ intention to invoke the Fifth Amendment. The expectation is that matters which do not incriminate will be asked, and will be answered. Those that allegedly do incriminate will be asked, and the witness must invoke her privilege in response to each and every one. Whether the lawyer is taking or defending such a deposition or trial witness, it may be necessary to build the appropriate record in order to challenge or defend the invocation of the privilege.

   The witness need not be sparing in invoking his Fifth Amendment right. While he must have a good faith basis for doing so, since the privilege is broader than the “smoking gun” questions it should be invoked with an eye toward maximum protection, and minimal risk of waiver. As noted *supra*, the privilege applies not only to responses that in themselves would sustain a conviction, but also to information that would furnish a link in the chain of evidence necessary to prosecute the person. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

   If challenged, the assertion of the privilege should be sustained unless the claim is clearly mistaken – *i.e.*, unless it is clear from careful consideration of all circumstances that the witness is mistaken and the answer cannot

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3 The privilege is a personal one. Accordingly, while it extends to individual officers, directors and employees of a company, the entity itself does not enjoy it. *Braswell v. United States*, 487 U.S. 99 (1988) (stating Fifth Amendment privilege cannot be invoked on behalf of corporation); *Wilson v. United States*, 221 U.S. 361 (1911) (individual privilege cannot be used to refuse to produce corporate records when subpoena is directed to corporation). *But see Curcio v. United States*, 354 U.S. 118, 123-24 (1957) (privilege does extend to testimony about corporate records, even if there is no privilege regarding production of them).
possibly have incriminating effect. See Boler v. Texas, 177 S.W.3d 366 (Tex. App. – Houston [1st Dist.] 2005, pet. refused) (stating trial court “cannot compel a witness to answer unless it is perfectly clear, from careful consideration of all the circumstances in the case that the witness is mistaken in asserting the privilege, and that the answer cannot possibly tend to incriminate the witness”) (citation omitted); Hoffman, U.S. 341 at 486 (stating the protection “must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer”).

No magic sentence is needed to invoke one’s Fifth Amendment privilege. A simple statement will do. For instance, “[On the advice of counsel], I invoke my rights under the Fifth Amendment to the United States Constitution and refuse to answer the question at this time.”

4. The Privilege Does Have Limits.

The Fifth Amendment privilege (as long as it is not being abused) supersedes the right to civil discovery, so the witness invoking the privilege cannot be sanctioned for doing so. Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977) (holding that the “government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel discovery which has not been immunized”). The invocation of the right also cannot serve as the basis for a default judgment, striking pleadings, or holding the witness or lawyer in contempt. Maness, 419 U.S. at 467 (refusing to penalize lawyer who counseled witness in good faith to refuse to produce court-ordered materials on grounds they would incriminate the witness); United States v. White, 589 F.2d 1283, 1287 (5th Cir. 1979) (“As an initial matter, we accept the proposition that a grant of summary judgment merely because of the invocation of the Fifth Amendment would unduly penalize the employment of the privilege.”) (Citation omitted).

The right is not without limits. The privilege cannot be invoked to stop incriminating information coming from other sources. The Supreme Court has held that because the right is personal, “a party is privileged from producing the evidence but not from its production.” Couch v. United States, 409 U.S. 322 (1973) (holding taxpayer could not assert Fifth Amendment right to protect disclosure of materials in the possession of her accountant). See also California Bankers Assoc. v. Shultz, 416 U.S. 21, 55 (1974) (a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights).

The Supreme Court discussed this at length in Fisher v. United States, 425 U.S. 391 (1976), where the Court held that enforcing a summons requiring taxpayers’ attorneys to produce taxpayers’ records did not violate the taxpayers’ Fifth Amendment privileges. Enforcement against a lawyer did not “compel” the taxpayer to do anything, nor to be a witness against himself. This was true despite the fact that the Fifth Amendment would have barred a subpoena directing the taxpayer himself to produce the documents. The fact that the attorneys were agents of the taxpayers was of no consequence, because it is the extortion of information from the accused that is forbidden, and the lawyer was not the accused.

5. Invocation of the Fifth Amendment Can Be a Powerful Weapon for the Other Side.

A jury in a criminal case is instructed that a defendant has an absolute right to refuse to testify, and no inference can be gleaned from his refusal to do so. See Griffin v. California, 380 U.S. 609 (1965); Hinojosa v. Butler, 547 F.3d 285, 291 (5th Cir. 2008). Any good criminal lawyer with the opportunity to voir dire the panel, knowing her client will not be taking the stand, will prime the jury well in advance and root out anyone who cannot judge the case fairly if the defendant does not testify.
In a civil case, refusal to testify comes at an exploitable price. When a witness invokes the Fifth Amendment in a civil or regulatory action, the trier of fact is permitted to draw an adverse inference of liability. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). Thus, natural human inferences that are forbidden in criminal cases can and should be fully utilized to the other side’s advantage in a civil case. The Fifth Circuit has stated that “although a jury in a criminal case is not permitted to draw adverse inferences based on a defendant’s invocation of his Fifth Amendment rights, it is well-settled that the 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.” Hinojosa, 547 F.3d at 291 (quoting Baxter). See also SEC v. Colello, 139 F.3d 674, 677-78 (9th Cir. 1998) (granting summary judgment based in part on adverse inference).

Indeed, when the witness’ invocation of the Fifth Amendment has sufficient probative value, excluding evidence of it may be an abuse of discretion. See discussion in Hinojosa at 293-95. See also Harris v. Chicago, 266 F.3d 750, 755 (7th Cir. 2001) (trial court committed reversible error by excluding evidence of defendant’s Fifth Amendment invocation).

The adverse inference is not unlimited. An adverse inference cannot stand alone, relieving the burden on the plaintiff to offer probative evidence to prove his case. See United States v. Rylander, 460 U.S. 752, 761 (1983) (“The claim of privilege is not a substitute for relevant evidence.”). Avirgan v. Hall, 932 F.2d 1572, 1580 (11th Cir. 1991), cert. denied, 506 U.S. 952 (1992). In Lefkowitz, 431 U.S. at 808, the Supreme Court refused to allow an adverse inference where other probative evidence in support of the claim had not been adduced.

Thus, the plaintiff must offer some evidence to support his claims before he may rely on the adverse inference to bolster them. Some courts have even held that an adverse inference may not be drawn “unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information.” Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 912 (9th Cir. 2008) (citing Serafino v. Hasbro, Inc., 82 F.3d 515, 518-19 (1st Cir. 1996)). In addition, since a civil trial court is not required to draw the adverse inference, the party whose witness is invoking the privilege may be able to persuade the court not to do so because doing so would be more prejudicial than any probative value to be gained. Fed. R. Evid. 403.

There are other potential consequences to asserting the Fifth Amendment privilege. For example, invoking the Fifth Amendment can result in termination from employment, or impact pending job applications. It may affect insurance coverage. It may be deemed a breach of an insurance policy’s cooperation clause. See Medical Protective Co. v. Bubenik, 594 F.3d 1047, 1050-52 (8th Cir. 2010) (policyholder forfeited his right to insurance coverage when he invoked the Fifth Amendment during medical malpractice action because insurance policy required him to “at all times fully cooperate” with insurer and “attend and assist” in trial). Also, the protection does not extend to intra-company investigations of wrongdoing.

6. The Privilege Can Be Waived.

The witness’ decision not to invoke her Fifth Amendment privilege waives the privilege, and any potentially incriminating testimony can be used against her. Waiver can occur even where unintended, if not timely asserted. See Maness, 419 U.S. at 466 (noting the Fifth Amendment privilege is “not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion”). Some courts take a narrow and careful view of waiver. See, e.g., Boler, 177 S.W.3d at 371 (stating the Fifth Amendment privilege is waived if 1) the witness’ statements create a “significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth”, and 2) the witness had reason to know his statements would be interpreted as a waiver) (citations omitted).

A waiver of the privilege on a particular subject is deemed a waiver not only as to further questions on that subject, but also all underlying
details. *See Rogers*, 340 U.S. at 373 (“Disclosure of a fact waives the privilege as to

7. **Strategic Waiver is Heavily Disfavored.**

The Supreme Court has soundly rejected
efforts to waive the privilege selectively, holding
a witness “has no right to set forth to the jury all
the facts which tend in his favor without laying
himself open to a cross-examination upon those

Lower courts are inconsistent in remediating
selective waiver. While some courts have
allowed testimony, and even last minute
discovery after a witness had a change of heart
and waived her privilege, *e.g.*, *Evans v. City of
Chicago*, 513 F.3d 735 (7th Cir. 2008), cert.
denied, 555 U.S. 1104 (2009); *In re Master Key
Litigation*, 507 F.2d 292, 294 (9th Cir. 1974)
(witness is entitled to “pick the point beyond
which he will not go”), others have not been so
charitable.

In a case of selective waiver, a court might
decline to allow the new testimony, or might
allow it with evidence that the witness had
previously invoked the privilege. *See, e.g.*, *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d
553, 576 (1st Cir. 1989) (affirming denial of
defendant’s trial testimony after he had asserted
the Fifth Amendment at deposition); *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991)
(affirming trial court’s refusal to permit
defendant to submit affidavit in support of
motion for summary judgment after he asserted
the privilege to avoid being deposed); *United
States v. 4003-4005 5th Avenue*, 55 F.3d 78, 85
(2d Cir. 1995) (trial courts may adopt remedial
measures to prevent prejudice where a party
selectively invokes the Fifth Amendment to
obstruct discovery).

Any practitioner facing a witness who
waives a previously asserted Fifth Amendment
privilege, or who is counseling her client to
invoke the privilege temporarily, should be
aware of precedent in her jurisdiction and
prepared for claims of prejudice, the need for
further discovery, and a cogent explanation for
the previous invocation of the privilege. She
should also be prepared to argue appropriate
remedial measures and discuss the propriety of
the fact finder considering the adverse inference.

C. **Other Important Considerations in
Parallel Civil and Criminal Proceedings**

1. **Can a Criminal Case Stay the Civil Case?**

A defendant who is the target of an active
criminal investigation may request a stay of the
civil litigation pending resolution of the criminal
1, 12, n. 27 (1970) (“Federal courts have
defered civil proceedings pending the
completion of parallel criminal prosecutions
when the interests of justice seem to require. .
.”). This is a tactical decision to be made with
care and consultation among attorney and client.
Factors to be considered in deciding whether to
grant a stay include: (1) the extent of the overlap
of the proceedings; (2) the status of the criminal
case; (3) the balancing of interests of proceeding
expeditiously versus harm in delay; (4) the
interests of and burden on the defendant; (5) the
interests of the Court; and (6) the public interest.
*See In re CFS-Related Sec. Fraud Litigation*,
256 F. Supp. 2d 1227, 1236-37 (N.D. Okla.

As a practical matter, it may be difficult to
obtain a stay where there is no pending criminal
matter. Cases are inconsistent. *E.g.*, *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084
(5th Cir. 1979) (remanding for order staying
discovery in civil suit until statute of limitations
in criminal action expired); *Kordel*, 397 U.S. at
1 (allowing parallel civil and criminal
proceedings). *See also Kugle v. Daimler
Chrysler Corp.*, 88 S.W.3d 355, 361 (Tex. App. – San Antonio 2002, pet. denied) (stating trial
court must consider effect that discovery in civil
case may have on pending criminal proceedings,
but pending criminal case does not impair
court’s authority to proceed with civil matter).
II. CONCLUSION

Civil clients may need criminal advice in more situations and for more reasons than apparent at first blush. The role of a good civil lawyer must include recognizing the need for criminal counsel, or at a minimum the need to pay heed to the criminal implications of her client’s testimony and discovery responses if a parallel criminal matter does or could exist. Of particular importance are rights and privileges under the Fifth Amendment. No longer the exclusive domain of the criminal defense bar, the Fifth Amendment is confronted with increasing regularity in civil proceedings. A civil attorney is therefore well-advised to be well-versed in the parameters of the Fifth Amendment.

Separate criminal attorneys do not necessarily spell the end of cooperation and harmony. It is common for criminal counsel and their clients to negotiate joint defense agreements between and among persons separately represented, but with a commonality of interests.