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Curbing improper use of the Fifth Amendment

HOW TO KEEP YOUR CIVIL CASE MOVING FORWARD IN THE FACE OF SPECULATIVE STAYS AND BLANKET REFUSALS

The right to remain silent does not equate to immunity from civil litigation, no matter how virtuously argued by the defense. Our clients are entitled to an expeditious and fair resolution of their civil claims, which means the entire civil action does not grind to a halt pending the defendant's parallel criminal proceeding. And while civil defendants may choose to remain silent, they do so at their own risk, which may result in evidentiary sanctions and difficulty defending the civil action.

Keep this in mind: the burden is on the party asserting the privilege, and the applicability and scope of that privilege is determined by the discretion of the court. There are no bright-line rules here, meaning you should not kowtow to overly broad objections that frustrate your litigation strategy, as you will have the opportunity to advocate your position to the court.

In order to avoid costly stays and overly broad protective orders, you need to know the law and recognize, as well as communicate to your client, that law and motion will almost certainly be required, with its associated costs.

However, it's worth the fight and if you can ultimately succeed in keeping your case progressing forward, pressure will be placed on the defense and their insurers to come to a reasonable settlement so that the insured may focus on the pending criminal charges.

Below is an effective litigation plan to keep your case on track when the defense attempts to frustrate your efforts with blanket refusals, objections to appear at deposition, and moves for a lengthy stay pending the outcome of the criminal proceeding. This article is written from the perspective of a civil defendant asserting his Fifth Amendment privilege, but the analysis is equally valid to address a witness' assertion of the same.

Proper use of the Fifth Amendment

Before discussing improper uses of the Fifth Amendment, it's important to recognize the legitimate, broad applicability of this privilege. California recognizes the privilege against self-incrimination in any proceeding, including criminal, civil, or administrative. (Evid. Code, § 940). A witness or party may refuse to provide information when the following four elements are shown:

1. The information would tend to incriminate the holder of the privilege,

2. The individual claiming the privilege has standing to do so,

3. The information was obtained or is being requested by compulsion, and

4. The information is testimonial or communicative in nature. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 366.) The privilege may be legitimately asserted regardless of the severity of the potential criminal liability, and includes prosecution for felonies, misdemeanors, and criminal fines. (*In re Leavitt* (1959) 174 Cal.App.2d 535, 539). Moreover, the Fifth Amendment protects not only against direct admissions, but from testimony that would form a "link in the chain" of evidence that could implicate the defendant. (*Hoffman v. United States* (1951) 341 U.S. 479, 486).

In sum, it is a broadly applicable privilege that the defendant will assert to block not only his direct testimony, but responses to basic written discovery, including independent witness identification and documentary evidence, such as photographs and video. Defense will argue such responses would form a link in the chain to connect him to criminal liability. Given that the defendant likely has the most relevant information concerning the incident, such a blanket denial can completely thwart discovery in your case. A case which is your burden to prove.

Given its breadth, it is unlikely you will be able to completely deny a defendant's ability to assert his right to remain silent. However, as discussed below, your goal instead should be to narrow the scope of this privilege so that you can continue with relevant discovery and proceed to a resolution of your case.

Practical strategy

The practical strategy is not to argue that this broad privilege does not apply, but to instead argue that its scope should be circumscribed by the court to allow you to proceed with your case. Your goal should be to limit any protective order or stay as only applicable to the defendant's own testimony concerning his actions near in time to the incident.

Disclosure of witness names, images of the scene, and employer records as well as deposing of these witnesses should proceed in order to strike a fair balance between the competing interests of the parties. (*People v. Coleman* (1975) 13 Cal.3d 867, 885; See also *People v. Leavitt* (1932) 127 Cal.App. 394 [a defendant cannot block the testimony of a third party because such testimony may incriminate him]; *People v. Trujeque* (2015) 61 Cal.4th 227, 268 ["Although the witness may have a valid claim to the privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions. The witness may be totally excused only if the court finds that he could 'legitimately refuse to answer essentially all relevant questions.'"].)

The more evidence you get to bolster your claim, the more prejudicial it becomes for the defendant to continue to refuse to testify, because the narrative becomes one-sided.

Before discussing an effective litigation plan, the following general tips

See Behar, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

are universally helpful when litigating this issue.

• **Contact the law enforcement litigation liaison**

Most law enforcement offices have a litigation liaison or supervisor who can assist you with scheduling officer depositions as well as provide you with updates on the criminal investigation and prosecution. If formal criminal charges have not been filed, your client will likely want to know about the status of the case, and the liaison is a good first point of contact. Typically, the District Attorney has one year from the date of the arrest in which to file charges. (Pen. Code, § 802).

You should be courteous and make sure you schedule officer depositions based upon the availability of the officer's schedule and in a location most convenient for the officer. These officers will be important witnesses and it is smart practice to accommodate them as best as possible.

You should inquire whether the department has any photographs or audio/video concerning the incident and make sure to include a document request for these materials in your deposition subpoena.

You should make a specific request for any "MVARS" recordings pertaining to the incident. MVARS stands for Mobile Video/Audio recording system. These devices utilize the dash cam in the law enforcement vehicle and microphones on the officers to record arrests. This footage can capture statements from the defendant, which may be the only direct defense testimony you will receive.

• **Contact the prosecutor**

You should make an attempt to contact the prosecutor in order to keep abreast of the criminal case. The law enforcement liaison can provide you with the specific prosecutor's office where the file was sent. You should attend any preliminary hearings and trial. You should ask for any discovery completed in the criminal case, including any trial witnesses disclosed by defense.

You should advise that you are planning on taking the investigating officer's deposition. The handling prosecutor might be concerned about how the officer will testify given the pending criminal matter. Advise that the officer may appear with counsel.

• **Private investigator**

Given that you have the burden to prove your case and the defense is refusing to disclose any information, hiring a private investigator may be worthwhile. The primary goal being to canvass the incident scene for potential witness.

Litigation plan

• **Discovery: narrow the issues**

Your goal in the discovery phase is to narrow the specific questions and topics that the defendant is refusing to answer. Case law is clear, the defense cannot simply make blanket objections to written discovery and refuse to appear at his deposition. (*Trujeque*, supra, at 267; *Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1151.)

Instead, the defendant must assert the privilege to each question asked or information sought so that the court may make a particularized inquiry to determine if the privilege is applicable. (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045). A defendant who wishes to assert the privilege must generally do so on a question-by-question basis. (*People v Lopez* (1999) 71 Cal.App.4th 1550, 1555). Therefore, you need to serve written discovery and take the defendant's deposition to determine the extent of the asserted privilege.

Regardless of the blackletter of the law, in practice, most defense attorneys will refuse to produce their client for deposition and only provide objections to your written discovery. This response can be a blessing in disguise. Given that the court will be tasked with balancing the competing interests of the parties as to the scope of the asserted privilege, such a response will make defense appear unreasonable. (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 307).

Upon receiving defendant's responses to discovery and deposition responses, you need to draft your meet-and-confer letter, keeping in mind statutory deadlines to file your motion to compel. (Civ. Proc. Code, §§ 2030.300; 2025.480). You should focus the meet-and-confer letter on categories of information whose tendency to incriminate the defendant would be speculative or that would not be considered communicative in nature.

A good example is the identity of witnesses to the incident. The content of their testimony is unknown and therefore the chance that it implicates the defendant is speculative. This argument is further bolstered if the defendant offers the names of some witnesses, presumptively favorable to the defense, but withholds others. (*Coleman*, *supra*, at 885, quoting *Gordon v. Federal Deposit Insurance Corporation* (D.C. Cir. 1970) 427 F.2d 578, 580 ["'the fact that a man is indicted cannot give him a blank check to block all civil litigation … Justice is meted out in both civil and criminal litigation'"]; *People v. Williams* (2008) 43 Cal.4th 584, 615 ["a waiver may be implied when a witness has made a partial disclosure of incriminating facts"].)

Make sure to also include request for production of documents. The Fifth Amendment generally does not protect against the production of records and writings previously voluntarily prepared by the defendant. (*United States v. Doe* (1984) 465 U.S. 605, 610-612).

Finally, remember not to shoot the messenger. Often, it is the defendant himself, not defense counsel, who is stubbornly asserting the privilege. Be courteous and understand that the defendant is often more involved in these situations than he would be in a general negligence, insurance defense situation.

• **Law and motion: putting the burden on defense**

The two most common law and motion issues you will encounter when dealing with a defendant's Fifth Amendment privilege assertion are a motion to stay of the civil proceeding pending the outcome of the criminal matter and motions to compel regarding defendant's discovery responses. Below is a roadmap of how to navigate both proceedings.

See Behar, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

Opposing stays

The law is clear that a civil defendant who is also a defendant in a related criminal case does not have a Constitutional right to a complete stay of the civil proceeding. The Constitution "does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings." (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 885). As a result, there is no requirement that a trial judge simply rubber stamp a request for a stay. The length and extent of the stay are left to the discretion of the court. (*Avant!*, at p. 886).

To determine if a stay is warranted, its duration, and extent, the Court will look at the following factors, which need to be addressed in your opposition:

- The interests of the plaintiff in proceeding expeditiously with the litigation and the potential prejudice to the plaintiff of a delay.
- The burden that any particular aspect of the proceedings may impose on the defendants.
- The convenience of the court in the management of its cases and the efficient use of judicial resources.
- The interests of persons not parties to the civil litigation.
- The interest of the public in the pending civil and criminal litigation.

(*Avant!*, at p. 887).

You should stress to the court that while the defendant may choose to exercise his right to remain silent, the Fifth Amendment does not immunize the defendant from civil liability and the consequences of his assertion of the privilege. (*Fuller*, at p. 306 ["A party or witness in a civil proceeding 'may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it'"].)

Where the assertion of the privilege denies plaintiff relevant evidence, the following are recognized sanctions which may be used to level the playing field: excluding related defenses, striking the defendant's prior testimony, excluding the defendant from testifying at trial to matters in which he asserted the privilege, and disallowing the defendant's production of documents. (*Alvarez v Sanchez* (1984) 158 Cal.App.3d 709, 713.)

In your opposition, you should include a declaration from your client which describes the continuing negative impact of the subject incident. You want to stress to the court the daily, compounding burden to your client to evidence the real detriment of a stay. Focus on special damages, such as continued lost wages, costs of homecare, inability to perform household chores, and impact on the family dynamic.

Search the internet to determine if your incident received any media coverage. If you discover a favorable story, include a request for judicial notice in your opposition and introduce the article. These media accounts evidence the public's recognized interest in ensuring public safety and swift redress for victims.

Often, defense counsel will prematurely file these motions before any criminal charges have actually been brought. A request for stay in these circumstances is improper. (*Kassey S. v. City of Turlock* (2013) 212 Cal.App.4th 1276, 1281 [The privilege applies if the person is confronted by substantial and real, as opposed to merely trifling or imaginary, hazards of incrimination].)

If the court is inclined to grant a stay, you need to limit its scope and duration. Witnesses' memories fade and they become harder to track down with the passage of time. Stress to the court that a stay pending the resolution of any criminal proceedings could potentially last for years if the defendant is convicted and is given the opportunity to exhaust all of his appellate rights.

You may also want to concede to a stay as to the defendant's deposition only. That will still allow you to depose witnesses and conduct other relevant discovery. The court will look favorably on your offer to compromise.

Again, the goal is to keep the case moving forward, as settlement is difficult without a trial date looming. Further, in the insurance defense context, having the parallel criminal matter helps moves you towards settlement, as the defendant will likely exert pressure on the carrier to settle so that he can focus on the criminal matter. Moreover, the defendant's refusal to cooperate in his own defense will also push defense to settlement negotiations.

Motions to compel

Given the congestion of the court system, it is important to file your motions well in advance of trial to make sure your issue is properly adjudicated and you are ready for trial. Depending on your jurisdiction, you may need to attend a meeting or informal discovery conference with a discovery referee or your judge before filing your formal motion. Check your local rules.

Stress to the court that the burden is on defense to show a response would tend to incriminate the defendant. (Evid. Code § 404). Again, the focus of your motion should be on the identification of witnesses and documents which may support your client's claims. Emphasize to the court that the defense should not be allowed to preclude the testimony of other independent witnesses by refusing to disclose their identities. (*Leavitt*, *supra*, at p.396 ["The privilege of not testifying where the answers may have a tendency to incriminate is one that is personal to the witness, and in which the defendant has no voice."]). If the defendant chooses to disclose only the names of witnesses helpful to him, this constitutes a waiver and he should be compelled to identify all known witnesses. (*Mitchell v. United States* (1999) 526 U.S. 314, 321).

Further, the defendant should be compelled to respond to general discovery questions which have no tendency to incriminate. Information concerning other potential defendants, insurance coverage, and employment course and scope should be provided. (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 429 [When the questions do not appear to call for incriminating information, the judge should require the witness to explain why and how the answers might be incriminating].)

One issue that frequently arises is the standing of a business entity to assert

See Behar, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2017 Issue

either its own alleged Fifth Amendment privilege or to assert the privilege on behalf of its employees and managing agents. The law is clear that business entities may not assert the Fifth Amendment for itself or its employees. (*United States v. White* (1944) 322 U.S. 694, 698 ["The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals… Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation."].)

As such, business entities are required to produce all books and records, even if the production could result in criminal liability to the entity. (*Braswell v. United States* (1988) 487 U.S. 99, 104-108). If the managing agents of the business entity allege that they cannot provide responses on behalf of the entity because it would subject them to personal criminal liability, ask that a *Kordel* agent be appointed who could respond as a representative of the corporation, both as to written discovery and deposition, and not in his individual capacity. (*United States v. Kordel* (1970) 397 U.S. 1, 8).

The goal is to make the defense work. Often, these issues are resolved informally. Given the labor intensive nature of these detailed motions, you should work towards an informal agreement, but make sure you have papered your file and are prepared to file your motion if discussions breakdown.

Trial tactics

In California, you cannot force a civil defendant to take the witness stand and assert the Fifth Amendment privilege in front of the jury. Prior to the passage of Evidence Code section 913 in 1965, civil litigants were permitted to comment on and draw adverse inferences concerning a defendant's invocation of the privilege. However, since its passage, the California Supreme Court has held this practice is not allowed. (*People v. Holloway* (2004) 33 Cal.4th 96, 131.)

It should be noted that the U.S. Supreme Court held that the Fifth Amendment does not afford an absolute right in civil cases to refuse to be called as a witness. (*Mitchell*, *supra*, at p. 328 ["In ordinary civil cases, the party confronted with the invocation of the privilege by the opposing side has no capacity to avoid it… The rule allowing invocation of the privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed."].)

Hence, the California Supreme Court bases its ruling on the statutory mandate of Evidence Code section 913, not a right guaranteed by the Fifth Amendment.

Nevertheless, the court must still determine whether the privilege is applicable. You should request a pre-testimonial hearing outside the presence of the jury to determine the applicability and scope of defendant's ability to assert the privilege. Further, you should file a motion in limine to exclude the defendant from testifying at trial to matters which he asserted the privilege. (*A & M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566).

You should also keep abreast of the defendant's criminal proceedings. If resolved during the pendency of your case, you are entitled to request discovery and testimony from the defendant, as the threat of incrimination is no longer present. Further, defendant's guilty or no contest plea acts as an admission by a party opponent. (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1051.)

Finally, if you prevail at trial, consider filing a motion for reasonable attorney's fees pursuant to section 1021.4 of the Code of Civil Procedure. When the defendant is convicted of a felony for the same felonious conduct that caused injury to your client, if you prevail at trial, the court, in its discretion, may award you reasonable attorney's fees.

Conclusion

There are limits to a defendant's ability to stall your action based upon the Fifth Amendment. You need to fight to narrow the scope of the privilege so that you can continue to litigate your case and move toward an expeditious resolution. A trial without the testimony of the defendant can be a benefit to you, as long as you develop a strong narrative favorable to your client, which the defense will largely be unable to rebut.

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