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The Fifth Amendment in civil cases

THE RIGHT AGAINST SELF-INCRIMINATION CUTS BOTH WAYS

You're sitting at your desk reviewing discovery responses and in between the boilerplate objections, you come across a peculiar objection. "Objection, this request violates Defendant's Fifth Amendment right against self-incrimination." Your first thought is, what is the defendant hiding? Then, how do I get this information without having to wait until the criminal case is over? To answer these questions, it is important to understand the Fifth Amendment and what it actually protects.

When does the privilege apply?

The Fifth Amendment privilege, generally speaking, applies only to "communications" that are: (1) compelled; (2) incriminating; *and* (3) testimonial. (*United States v. Doe* (1984) 465 U.S. 605, 611.) In other words, the privilege applies to evidence defendant is compelled (through the legal process) to produce, that leads to or supports criminal prosecution against defendant, and that "discloses the contents" of defendant's mind. (*People v. Low* (2010) 49 Cal.4th 372, 390 [quoting *Doe v. United States* (1988) 487 U.S. 201, 213].) The privilege *does not* apply to any and all evidence in defendant's possession or knowledge or that could expose defendant to criminal prosecution. For example, evidence that is known to or in the possession of the prosecutor, a third party or another defendant, or a public agency is rarely insulated by the privilege. While the scope of the privilege is a topic for another day, rest assured that, realistically, it is not as broad as you might think it is.

The privilege does not entitle a defendant to a stay

It is important to note that the Fifth Amendment privilege does not automatically entitle the invoking party to a stay of the civil matter simply because the client is also facing criminal charges. (*People v. Coleman* (1975) 13 Cal.3d 867, 885 ["[T]he fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter."]; *Fisher v. Gibson* (2001) 90 Cal.App.4th 275, 284.) Thus, a defendant has no constitutional right to a stay in the civil action; rather, any stay must be "from the standpoint of fairness." (*Blackburn v. Superior Ct.* (1993) 21 Cal.App.4th 414, 425.)

California courts routinely use the *Keating v. Off. of Thrift Supervision* (9th Cir. 1995) 45 F.3d 322, factors to determine whether a stay is appropriate in civil cases. The *Keating* factors look to: (1) Plaintiff's interest in proceeding expeditiously with litigation or any aspect of litigation and the potential prejudice to Plaintiff of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendant; (3) the convenience of the courts in the management of its cases and efficient use of judicial resources; (4) interests of persons not parties to the civil litigation; and (5) the interests of the public in the pending civil and criminal litigation. Regardless, trial courts are instructed, if possible, to "devise a solution that fairly accommodates the interests of all parties and the judicial system in light of the circumstances." (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 310.) Meaning, a stay is a last resort, not the first.

Defendant must demonstrate that "injurious disclosure could result"

The mere claim that the Fifth Amendment privilege applies to evidence requested is rarely sufficient to permit a defendant to

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withhold the evidence, unless the request specifically asks for evidence of a criminal violation (e.g., all evidence that defendant violated the Penal Code). (See e.g., *In re Syncor ERISA Litig.* (C.D. Cal. 2005) 229 F.R.D. 636, 649 [noting that the discovery request "clearly shows plaintiffs seek information implicating defendant Fu's Fifth Amendment rights" where request sought documents pertaining to "foreign bribery scheme"].)

What most defendants don't understand is that the invocation of the privilege must be asserted as to the specific questions asked or other evidence sought. (*Blackburn*, *supra*, 21 Cal.App.4th at 427.) A boilerplate or blanket invocation is rarely permissible. (*Hoffman v. United States* (1951) 341 U.S. 479, 486 [noting that defendant must make clear that "injurious disclosure could result" by establishing a link between the information requested and the risk of criminal prosecution].) Because *the court* (not a defendant) is required to make a "particularized inquiry" into whether the invocation of the privilege is legitimate, a defendant's failure to make a sufficiently specific Fifth Amendment objection to each request often defeats the objection. (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.)

There can be a significant benefit to forcing a defendant to make sufficiently specific privilege objections to written discovery. Given that the party invoking the Fifth Amendment privilege is required to make clear the link between the evidence sought and the risk of that evidence being used against him in his criminal prosecution, you gain valuable insight into where the smoking gun might be by forcing a proper privilege objection.

Then, of course, a defendant has no constitutional right to avoid the consequences of invoking the privilege in a civil action. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 885-86 [quoting *Keating*, *supra*, 45 F.3d at p. 326] ["'Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.'"].)

Between a rock and a hard place

It is true that a defendant may seek a protective order to prevent your client from obtaining material that implicates defendant's Fifth Amendment privilege. And your defendant may very well be granted a protective order for that material. This result is not a win for your defendant. To the contrary, it is a win for your client for several reasons.

There is nothing inherently wrong with forcing a defendant to choose between invoking his Fifth Amendment privilege in response to civil discovery requests and facing the consequences of said invocation or complying with his discovery obligations. (See *Fuller*, *supra*, 87 Cal.App.4th at p. 306 [quoting *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712] ["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.'"].) One significant consequence of invoking the Fifth Amendment privilege in a civil action is that all of the rules under the Code of Civil Procedure pertaining to the failure of a party to provide responsive evidence apply. (See *Alvarez*, *supra*, 158 Cal.App.3d at 712 ["There is a wide range of civil sanctions that may be imposed upon a civil litigant who invokes his or her Fifth Amendment right."].)

For example, if your defendant refuses to provide responsive material or deposition testimony relating to the underlying incident, in some cases preclusion of your defendant's testimony at trial may be warranted. (See *Fuller*, *supra*, 87 Cal.App.4th at p. 309 ["[P]reclusion of trial testimony is only one tool available to the trial court in fashioning a fair resolution."].) There is no one-size-fits-all approach to sanctions. Whether a sanction is appropriate and to what degree depends on factors such as: who is invoking the privilege (e.g., defendant or defendant's witness); ability to obtain similar or same evidence; how much evidence is affected by the invocation, etc. If you make clear to the court that the evidence sought is unique and/or solely in the possession of your defendant and of evidentiary value, sanctions are far more likely.

The best-case scenario for defendants forced to elect between invoking the Fifth Amendment privilege and suffering civil consequences or complying with their discovery obligations is that the court permits them to *delay* responding to discovery (e.g., defendant's deposition is permitted to be taken after certain critical stages in the criminal matter and/or closer to the civil trial). (See *Alvarez*, *supra*, 158 Cal.App.3d at 714.) This scenario does not eliminate the dangers defendant faces; rather, it delays them. Defendants will still be forced, albeit a bit later, to choose between asserting the privilege or complying with their discovery obligations. Under this circumstance, your defendant still faces a difficult choice – refuse to be deposed and risk the exclusion of testimony at trial or provide deposition testimony and risk providing additional evidence to the prosecutor. (See e.g., *A & M Recs., Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566 ["The accomplishment of this purpose compels the court to prevent a litigant claiming his constitutional privilege against self-incrimination in discovery and then waiving the privilege and testifying at trial. Such a strategy subjects the opposing party to unwarranted surprise. A litigant cannot be permitted to blow hot and cold in this manner"].)

You still have the ability to obtain discovery

Some of you may be thinking, "If defendant is permitted to respond to discovery at such a late stage, I risk

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having little information about the underlying circumstances before trial." Fortunately, this scenario is frequently *not* the case. While a topic for another day, there are few areas of civil discovery that are truly insulated from production by the Fifth Amendment privilege. A few examples make this clear: (1) evidence provided to defendant by the prosecution in his criminal matter is *not protected by the Fifth Amendment privilege*, see *Doe v. Elam* (C.D. Cal. Sept. 8, 2017) No. CV 14-9788 PSG (SSX), 2017 WL 11629048, at *3 ["The Fifth Amendment is not implicated when a defendant merely turns over information already in the possession of the Government."]; and (2) material that is not "incriminating" does not implicate the Fifth Amendment, such as documents and testimony supporting a defense; insurance information; and statements and documents related to another defendant, see e.g., *Siry Inv., L.P. v. Farkhondehpour*, 45 Cal.App.5th 1098, 1124 (2020), *as modified on denial of reh'g* (Mar. 23, 2020), *aff'd in part, rev'd in part and remanded*, 13 Cal.5th 333 (2022) [quoting *United States v. Hubbell* (2000) 530, U.S. 27, 36] [recognizing that the Fifth Amendment privilege is implicated only if responsive material is "incriminating"].

Then, of course, you can always send a subpoena to the law-enforcement agencies that investigated the underlying incident and obtain everything the defendant obtained during the criminal matter, and possibly more. You can also obtain discovery from every other defendant and/or party that does not have a Fifth Amendment privilege, including information that pertains to your defendant who does have a Fifth Amendment privilege. (See *Braswell v. United States* (1988) 487 U.S. 99, 110 ["Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege."].) In other words, there are ample tools available to prepare your case for trial, while at the same time making your defendant extremely uncomfortable and/or setting him up for a defenseless case.

Fighting the invocation of the privilege in your case

Each case requires a litigation plan tailored to that case and the client's needs. In our view, by rolling over and agreeing to a stay (in the absence of a cost-benefit analysis) and/or not challenging (e.g., bringing a motion to compel) the invocation of the Fifth Amendment privilege, you are helping the defendant. If the court is going to grant a stay, there is nothing you can do. However, if the court does not grant a stay in your case, the defendant is now forced to defend two fronts. There may also be other benefits to fighting a stay, such as setting up a bad-faith claim or preventing a determination that an insurance policy does not apply after a criminal conviction.

In those cases where a stay does nothing (or very little) for your case or client, force your defendant(s) to make the difficult choices that flow from asserting the privilege. The worst-case scenario is that your case proceeds without your defendant's answers to *certain* requests and/or deposition testimony, with the potential benefit of sanctions that can significantly jeopardize defendant's case. The best-case scenario, is that your defendant chooses not to invoke the Fifth Amendment privilege and your case proceeds as if there is no criminal matter. Either way, our opinion is that we have little to lose, in many cases, by holding our civil/criminal defendant's feet to the fire.

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