



Pleading the Fifth – Civilly Speaking

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The Fifth Amendment of the United States Constitution protects individuals against self-incrimination. Most often, this right is thought of in the context of criminal proceedings, but it also has application in civil cases. The decision to assert it in connection with a civil lawsuit is not simple. There are significant implications when asserting this right and, at some point, a party can be prevented from withdrawing the assertion of this right.



In a few recent cases, the authors have been faced with the impact of the assertion of the Fifth Amendment as a defense to the obligation to respond to discovery in civil cases. This article will explore some of the issues associated with the asserting the Fifth Amendment privilege.

Case Number One

This case involved a wrongful death caused by a motor vehicle accident where one of the drivers was operating a company-rented vehicle in the scope of his employment. To complicate matters, the driver's blood tested positive for a non-psychoactive metabolite of THC shortly after the accident. The State of Wisconsin charged the driver with vehicular homicide while the individuals and their families from the other vehicle

filed civil suits for damages, seeking compensatory and punitive damages.

Due to the number of parties in the case and the timing of the ongoing criminal case, a motion was filed to stay proceedings. The court granted the motion. Proceedings were stayed through the pendency of the criminal action. In fact, the stay had to be extended a few times due to delays in bringing the criminal matter to trial.

The stay of the civil case was needed to avoid placing the defendant driver in a worse position in the criminal case. The driver had used marijuana 24 hours before the accident and it was possible that admitting that use during the course of discovery in the civil case would permit the State to bolster its position in the criminal case and potentially bring additional charges unrelated to the accident for his use of illicit drugs. Moreover, testimony by the driver in the civil case could have been used by the State against the driver in the criminal case, which may have impacted his ability to assert his privilege against self-incrimination.

Case Number Two

In another case, the driver was in a motor vehicle accident while intoxicated. The prosecutor in this second case cooperated with the parties to the civil matter and understood that permitting the defendant to plead no contest to the violation would eliminate jeopardy issues. Discovery was temporarily stayed pending the resolution of the criminal investigation. Once the defendant's no contest plea was entered, she was able to participate in the discovery process without the danger of further criminal jeopardy.

Case Number Three

In a more complex civil matter with Fifth Amendment ramifications, the defendant faced potential criminal jeopardy for the misappropriation of government funds. The defendant could not provide deposition testimony or discovery responses for danger that he may implicate himself in the ongoing criminal investigation. As such, a motion for protective order was brought requesting that the court shield him from having to respond to written discovery or give a deposition for 120 days while the criminal investigation continued.

In the meantime, defense of the client was tendered to the insurer, who, in turn, raised a coverage issue. Through the normal process, the insurer moved to intervene and, once it was made a party to the suit, sought to bifurcate the merits from the coverage issue and stay proceedings on the merits pending the resolution of the coverage question. This additional stay provided more time for the criminal investigation to conclude.

I. Strategic Considerations Before Asserting The Fifth Amendment.

In working through these cases, we developed strategies for asserting a client's Fifth Amendment right, how to respond when opposing counsel asserts their client's Fifth Amendment right, and how to proceed once the right is asserted.

First and foremost, it is crucial to understand the implications of discovery on any ongoing criminal matters. As such, it is recommended practice for the client asserting their Fifth Amendment right to retain criminal counsel. Further, most civil counsel are unfamiliar with the nuances of criminal law. As such, consultation between civil and criminal counsel can help provide a coordinated approach and provide a more complete protection of the client's rights. Utilizing a joint defense agreement with the criminal attorney will permit the attorneys to cooperate without waiving privilege as to any information they develop and share.

Next, be sure to assert all legitimate and bona fide arguments on behalf of your client as to why a stay of the civil proceedings are necessary. It is imperative to highlight to the court the risks to the client of going forward with discovery and of the limited prejudice, if any, to the other parties in holding off on any discovery until the criminal matter is resolved. While it is unethical to unduly delay proceedings,¹ attorneys have the duty to zealously advocate for their clients. So, for example, when the client had a Fifth Amendment right that could only be protected by a stay of the civil case's discovery and the liability insurer for the client sought a stay and bifurcation to resolve the coverage issues, it made sense to agree to the bifurcation and stay. The additional delay of the merits of the civil case helped protect the client's greater interest in resolving the criminal case first. Obviously, detailed discussions with the client regarding the impact of the options available are necessary as is a detailed letter to the client confirming the conversations and the decision the client made.

II. Procedural Considerations When Asserting the Fifth Amendment.

When faced with a civil case that implicates the client's Fifth Amendment rights, initially, requesting an informal stay of discovery through the resolution of any criminal matters may mitigate any concerns over Fifth Amendment issues. Opposing counsel may be attracted to such an arrangement because, although the stay creates delay in the proceedings, it may be minimal until the criminal investigation or case is resolved. If the criminal investigation is resolved by a plea deal, any danger of further jeopardy would be eliminated and the civil case can continue promptly thereafter.

If the criminal matter results in a trial, transcripts may prove to be a source of valuable information for the parties and potentially obviate the need for some depositions with their attendant cost and time commitment. Furthermore, the verdict in a criminal matter may prevent the defendant from contesting some issue, such as liability, in the civil case, simplifying the remaining issues for trial and likely fostering earlier settlement discussions.²

Efforts should be made during the course of discovery to work with opposing counsel to minimize the Fifth Amendment's invocation on the balance of the case if an agreed-upon complete stay of all discovery pending the resolution of the criminal case is not possible.³ Perhaps depositions and discovery of other parties or witnesses could be completed while the criminal case is pending. After all, "all parties--those who invoke the Fifth Amendment and those who oppose them--should be afforded every reasonable opportunity to litigate a civil case fully and ... exercise of Fifth Amendment rights should not be made unnecessarily costly."⁴ The parties could stipulate to the entry of a protective order. Courts are instructed to tailor the constitutional protection to afford only so much protection as actually needed to protect those rights while striking a fair balance to accommodate the interests of the other litigants.⁵ Once that discovery has been completed, the criminal matter may be resolved and the risk of criminal jeopardy would have passed allowing for the completion of all remaining discovery.

However, should other counsel deny requests for a stay in discovery, formally requesting a stay of proceedings may benefit a client on the theory that it is better to be proactive than reactive. The courts have the discretionary authority to defer civil proceedings where a parallel criminal matter is ongoing. The circuit courts "undoubtedly have inherent power to grant a stay if justice requires it."⁶ Where a civil and criminal action against the same defendant and arising out of the same incident are pending, the rationale for granting a stay is quite clear:

The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of the Federal Rules of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of the criminal trial, or otherwise prejudice the case.⁷

Moreover, it is within the realm of possibility that discovery in the civil matter may be subpoenaed in a criminal matter, which further complicates matters.

Civil discovery affords the prosecutor significant advantages that he or she would not possess in the absence of the civil action.⁸ "The more the issues overlap in the civil and criminal proceedings, the more likely that allowing civil discovery will jeopardize the integrity of the criminal proceeding."⁹ As such, the extent to which a defendant's Fifth Amendment rights are implicated in ongoing discovery is a factor courts can consider in deciding a stay motion.¹⁰ Courts have the authority to control their dockets.¹¹ As such, they "undoubtedly have inherent power to grant a stay if justice requires it."¹²

Even if a stay is not obtained, a party may still assert the Fifth Amendment in a civil case and prevent discovery.¹³ In fact, "Wisconsin has long recognized that a person may invoke the Fifth Amendment privilege against self-incrimination in a civil action as protection from the adverse use of such evidence in a subsequent criminal action."¹⁴ However, once the privilege is asserted, the option to withdraw the privilege and testify may be foreclosed.¹⁵ Courts will examine the timing of the privilege's withdrawal to determine if it prejudices the other parties to the civil suit.¹⁶

For example, withdrawing the privilege right before trial might not be permitted.¹⁷ The concern is that the defendant will use the privilege as a shield during the discovery phase to avoid responding to the plaintiff's discovery "only to impale her accusers with surprise testimony at trial."¹⁸ Under such circumstances, courts will often bar the defendant from testifying at trial. However, if there is no unfair surprise to the plaintiff by the defendant's about face prior to trial, the defendant's testimony may not necessarily be barred.¹⁹ In *FTC v. Kitco of Nev., Inc.*, the defendant refused to answer questions only on certain topics during his deposition and then offered to waive the privilege after the close of the grand jury investigation. The plaintiff then waited until trial to bring a motion to bar his testimony although it had received prior notice of the defendant's intention to testify at trial. The trial court decision to allow the defendant's testimony was affirmed on appeal.²⁰ If one refuses to testify based on the Fifth Amendment privilege, the jury is entitled to presume that the answers would be adverse to that person.²¹ If a court bars a party from testifying at trial

because he or she previously thwarted discovery by asserting the privilege, there is a risk that the jury presumes the failure to testify is because the answers are unfavorable. Hence, it is incumbent upon counsel to fully analyze the impact of the decision to assert the Fifth Amendment privilege and for how long it should be asserted.

Conclusion

In the practice of civil litigation, it is crucial to be aware of Fifth Amendment issues. As zealous advocates, it is our responsibility to be aware of these issues and prevent them from adversely affecting either a criminal or civil matter involving our clients. By facing Fifth Amendment issues proactively, it is possible to protect the interests of our clients both in civil cases and parallel criminal investigations.

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References

- 1 SCR 62.03(3)
- 2 *Masko v. City of Madison*, 2003 WI App 124, ¶15, 265 Wis. 2d 442, 665 N.W.2d 391.
- 3 Indeed, Federal courts will often attempt to permit as much discovery as possible while still protecting a person's Fifth Amendment rights. *United States v. Certain Real Prop. And Premises Known as: 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 84 (2nd Cir. 1995).
- 4 *S.C. Johnson & Son, Inc. v. Morris*, 2010 WI App 6, ¶12, 322 Wis. 2d 766, 779 N.W.2d 19 (*emphasis in original*), *citing, Certain Real Prop.*, 55 F.3d at 83-84.
- 5 *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 291 (3rd Cir. 1994).
- 6 *Maxwell v. Bank of New Richmond*, 101 Wis. 286, 290, 77 N.W. 149, 151 (1898). *See also U.S. v. Kordel*, 397 U.S. 1 (1970), n. 27 ("Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution, sometimes at the request of the defense.").
- 7 *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980).
- 8 *See e.g., Deal v. Deal*, 740 N.W.2d 755, 766 (Minn. 2007).
- 9 *Id.*
- 10 *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995); *see also, Bruner Corp v. Balogh*, 819 F. Supp. 811 (E.D. WI 1993).
- 11 *Hefty v. Strickhouser*, 2008 WI 96, ¶31, 312 Wis. 2d 530, 752 N.W.2d 820.
- 12 *Maxwell v. Bank of New Richmond*, 101 Wis. 286, 290, 77 N.W. 149, 151 (1898).
- 13 *Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 172 N.W.2d 812 (1969).
- 14 *S.C. Johnson & Son, Inc., v. Morris*, 2010 WI App. 6, ¶11.
- 15 *S.C. Johnson & Son, Inc.*, 2010 WI App. 6, ¶17-19, 22.
- 16 *Id.*
- 17 *Gutierrez-Rodriguez v. Cartagena*, 882 F. 2d 553 (1st Cir. 1989); *see also*, 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018, at 149 (1970) ("If a party is free to shield himself with the privilege during discovery, while having the full benefit of his testimony at trial, the whole process of discovery could be seriously hampered."); *Kisting v. Westchester Fire Ins. Co.*, 290 F. Supp. 141, 149 (W.D. Wis. 1968) ("Plaintiffs thus seek to utilize the privilege not only as a shield, but also as a sword. This they cannot do."); *Bramble v. Kleindienst*, 357 F. Supp. 1028, 1035 (D. Colo. 1973) (Plaintiff cannot assert privilege and still continue with lawsuit).
- 18 *Gutierrez-Rodriguez*, 882 F.2d at 577.
- 19 *FTC v. Kitco of Nev., Inc.*, 612 F. Supp. 1282, 1290 (D. Minn. 1985).
- 20 *Id.*
- 21 *Wis. JI-Civil 425.*

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