

Special Feature

Wait a minute...

I thought the Fifth Amendment only applied in criminal court!

A primer on the Fifth Amendment in civil litigation

by Richard Armstrong

In this day of attorney specialization, lawyers have become used to learning the rules and law applicable only to their specialty. The transactional lawyer knows little about litigation. The family law practitioner knows nothing about landlord-tenant. There are even sub-specialties within similar practice areas; for example, the average personal injury lawyer may be in way over his/her head handling a medical malpractice or products liability case. However, there are instances where legal rights and duties that are typically thought of only in relation to one field intrude into others. One such right is the Fifth Amendment right to remain silent.

- The defendant in your divorce case just took the Fifth and refused to answer questions about his adulterous conduct.
- You're suing a defendant for punitive damages arising from a drunk driving accident.
- Your opponent in a contract dispute has just filed a motion to stay the proceedings pending his client's federal prosecution for tax evasion.
- Or perhaps your client previously had a drug problem, or is an illegal immigrant.

Whatever your specialty, you may have to learn how a person's fundamental right

not to incriminate himself intersects with your right to conduct discovery, your right to depose the defendant, or even your right to set a trial date. No matter which side of the Fifth that you find yourself, it is helpful to understand the issues and how the courts and the legislature have balanced this important right with the need to efficiently administer the civil justice system.

Pre-filing considerations

• Timing of suit:

Especially in instances where the grounds of suit arise from the same conduct that has or could give rise to a criminal prosecution, (*i.e.*, drunk driving, reckless driving, fraudulent conduct), counsel contemplating filing suit should consider when to file. If the statute of limitations is not an issue, it may be much simpler to wait for the criminal case to take its course. In that situation, counsel not only has the benefit of letting the Commonwealth conduct much of the discovery, but will actually be permitted access to the investigative material that many local police jurisdictions will not provide during the pendency of the criminal case. Additionally, if the criminal case results in a plea of guilty, many of the Fifth Amendment issues will (arguably) be waived. This is especially true when the case goes

only to General District Court. If the criminal defendant is not aware that she faces the possibility of a civil suit, a quick plea in General District Court may be the route she chooses and once the appeal date has passed, civil proceedings can begin.

On the other hand, if you don't mind waiting for access to the police documents – or trying to get them from other sources, like the Commonwealth Attorney or from court filings – it can be a benefit to push the civil case while the criminal case is proceeding. First and foremost, if you have a punitive count, and you wait for the criminal process to finish, your defendant may end up serving a long sentence and the rationale for a jury to award punitive damages may have vanished. If you can set your civil trial before the criminal trial, you can argue to the jury that the defendant has not been punished (and imply that he likely will not be punished sufficiently). Second, if the civil case parallels the criminal case, usual civil tactics, such as admitting liability but challenging damages may be foreclosed as the defendant will not want to admit guilt to the offense and expose himself to criminal penalty. Further, civil counsel for the defendant will have the constant hassle of pleasing two masters, the insurance company and the defendant's criminal attorney.

- **Venue:**

If the defendant is actually being prosecuted in Circuit Court, should you file a civil case in the same court which may be heard by the same judge? Would the judge recuse herself? In a recent civil case, this was not an issue. Both sides repeatedly referenced the criminal proceedings, the dates set for hearings and trial, but no one ever raised the issue of the judge hearing both “sides” of the case.

However, when considering where and when to file, consider that in certain instances, standards for admissibility in criminal cases can be more stringent than the standards in civil court. (Compare for example, the standards for admissibility for breath and blood test results, Virginia Code §19.2-187.01, with the standards in civil cases, Virginia Code §8.01-413.02). What if the court excludes evidence in the criminal matter that you intend to use in the civil case? Will that sway the court to likewise refuse to admit your evidence?

Issues that arise once suit is filed

- **Must a litigant answer discovery or attend a deposition that may prove incriminating?**

There is no blanket Fifth Amendment right to refuse to answer questions in civil proceedings. *North American Mortgage Investors v. Pomponio*, 219 Va. 914, 918, 252 S.E.2d 345, 348 (1979). To exercise rights under the Fifth Amendment to the U.S. Constitution, a party must specifically claim the privilege as to a particular question and the matter is then submitted to the court for its determination of the validity of the claim. *Id.*

After identifying the specific questions objected to, the objecting party must satisfy the two-part test from *Hoffman v. United States*, 341 U.S. 479 (1979) that has been adopted in Virginia. To satisfy the *Hoffman* test, a party must demonstrate to the court as to a specific question:

- How a prosecutor might use the answer to link the party to some crime, and,
- That this linkage not seem incredible in the circumstances of the particular case.

Pomponio, 219 Va. at 919, 252 S.E.2d at 348-349.

Thus, to claim the privilege in response to interrogatories or other discovery requests, a party should enter a specific objection to a particular question and show how it would tend to incriminate him. The court then assumes the role of determining if the linkage between the information sought and the party’s claim that it will incriminate him is “not incredible” under the circumstances:

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified... and to require him to answer if it clearly appears to the court that he is mistaken.

Cunningham v. Commonwealth, 2 Va. App. 358, 344 S.E.2d 389 (1986).

See also, *Brubach v. Hystad*, 68 Va. Cir. 181 (Greene Co., 2005), where Judge Bouton stated:

Most important, in evaluating whether the privilege can be invoked, the court must ascertain if the questions in dispute could expose the witness to a legitimate danger of prosecution. It is crucial to emphasize that the privilege does not extend to remote concerns or speculative possibilities.

Id.

Thus, under this analysis, a party would not have a right to refuse to schedule or attend his deposition, but could assert the Fifth in response to particular questions posed during the deposition. As the particular assertions must then be taken up with the trial court, parties would be advised to continue the deposition so that any questions that are ruled appropriate can then be put to the party.

Under what circumstances does a litigant waive rights under the Fifth Amendment?

- **Testimony and pleas of guilty by a criminal defendant.**

In the context of a criminal trial, a defendant waives his right against self-incrimination by testifying or by pleading guilty. See, *Drumgoole v. Commonwealth*, 26 Va. App. 783 (1998), *Edmundson v. Commonwealth*, 13 Va. App. 476 (1992). Indeed, Va. Code §19.2-268 specifically provides for waiver when an accused takes the stand:

In any case of felony or misdemeanor, the accused may be sworn and examined in his own behalf, and if so sworn and examined, he shall be deemed to have waived his privilege of not giving evidence against himself, and shall be subject to cross-examination as any other witness [.] Va. Code §19.2-268.

Thus, by testifying in his own defense in a criminal trial, a civil litigant waives his right against self-incrimination. See also, *Brown v. U.S.*, 356 U.S. 148 (1958)(A witness who voluntarily offers testimony on his own behalf waives his privilege to self-incrimination.)

Many if not all plea colloquies also specify that a plea of guilty waives Fifth Amendment Rights. Virginia law also provides for entry into evidence of the criminal guilty plea when a defendant has pleaded guilty “for a criminal offense... which arose out of the same occurrence upon which the civil action is based, evidence of said plea...shall be admissible.” Va. Code §8.01-418.

- **Failure to assert the privilege**

While the Fifth Amendment protects a party from being compelled to give evidence against himself, the privilege must be asserted in order to apply. *Garner v. U.S.*, 424 U.S. 648 (1976).¹ “In general, the Fifth Amendment privilege is not self-executing

such that the witness must affirmatively claim the privilege or lose the benefits of its protection.” *Rivera-Padilla v. Com.*, 55 Va. App. 304, 685 S.E.2d 851 (2009).

It is worth noting that even documents or depositions covered by a protective order can be subject to discovery in later proceedings when the privilege against self-incrimination is not asserted. In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir.1988) (“At first blush, resolution of this case might appear to depend on balancing the deponents’ right against self-incrimination as secured by the protective order and the grand jury’s interest in effective investigation of crime. But this is not so, because the deponents’ fifth amendment right against self-incrimination did not require, nor may it depend on, the shield of civil protective orders. Deponents were entitled to rely only on their own silence or a grant of immunity to protect their rights, otherwise they risked waiving those rights.”) Thus, counsel representing a party who may want to assert the protections of the Fifth Amendment should be very wary of entering into protective orders or other agreements which may protect the materials in one context but constitute a waiver of the Fifth Amendment in another context.

What about discovery directed to third parties?

- **A party has no right to claim a privilege regarding evidence not in his possession.**

“A party is privileged from producing the evidence, but not from its production.” Justice Holmes, *Johnson v. United States*, 228 U.S. 457 (1913).

The Fifth Amendment privilege is personal in nature and “adheres to the person, not to information that may incriminate him.” *Crouch v. United States*, 409 U.S. 322, 328 (1973). The Constitution prohibits compelling a person to be a witness against himself, but it does not prohibit the gathering of incriminating statements that the person may have made to others or in documents in the possession of others. *Id.*

In *Crouch*, a taxpayer under investigation by the IRS sought to prevent the government from obtaining accounting documents in the hands of her accountant. *Crouch*, at 323. The taxpayer challenged the summons as violative of her Fifth Amendment privilege against self-incrimination. *Crouch*, at 325. The court held that the element of personal compulsion, which was the essence of the Fifth Amendment protection, was missing where the documents were in the possession of a third party. *Crouch*, at 328-329. Since there was no personal compulsion the summons was directed against the accountant and not the taxpayer the Fifth Amendment protection did not apply and the challenge to the IRS summons was rebuffed. *Crouch*, at 336.

While a party has a right not to be compelled to produce evidence that may incriminate him, a party

has no right to prevent the compulsion of evidence in the possession of third parties. *Id.*; see also, *Fisher v. United States*, 425 U.S. 391 (1976). In this circumstance, the party is not being compelled to provide any information that may incriminate him. While the “divulgence of potentially incriminating evidence... is naturally unwelcome,” *Crouch*, at 329, a party has no legal right to stop that divulgence. Thus, a party has no right to ask a court to quash subpoenas *duces tecum* to third parties, FOIA requests or other materials.

What about discovery directed to a party’s own business?

- **Neither a party nor his business has a legal right to assert a privilege in documents held by the business**

The Fifth Amendment privilege against self-incrimination is a purely personal right. *Bellis v. United States*, 417 U.S. 85, 90 (1974). Partnerships, corporations and other entities have no right to assert a right against self-incrimination, “no artificial organization may utilize the personal privilege against compulsory self-incrimination.” *Id.*, *Braswell v. United States*, 487 U.S. 99 (1988). “Because [the privilege against self-incrimination] is a personal privilege, it cannot be asserted by a collective entity or the custodian of a collective entity’s records.” *In re Subpoena, No. 06-1572* (4th Cir. 10/14/2009). Note however that a sole proprietorship would be entitled to Fifth Amendment protections. *U.S. v. Doe*, 465 U.S. 605 (1984).

Thus, a legal entity has no Fifth Amendment privilege to assert. Indeed, even were a party, in her capacity as an officer of a company, to assert the privilege on her own behalf, this too would be an improper assertion. “[A]n individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally.” *Bellis*, at 88.

What about discovery of confidential or privileged materials revealed by a party in the criminal case?

- **Will a Court apply waiver principles when a party has disclosed potentially incriminating materials in his criminal case?**

The Supreme Court of Virginia has not ruled on this question and the issue remains an open one. However, while not addressing this precise issue, Virginia courts have addressed the clash between a defendant’s Fifth Amendment rights and other proceedings. In *Husske v. Commonwealth*, 252 Va. 203, 476 S.E.2d 920 (1996), as a condition of his suspended sentence, the defendant was ordered to continue participating in a mental health program and during a counseling session, defendant made statements incriminating himself in a rape. *Id.* at

207, 476 S.E.2d at 923. The Supreme Court of Virginia rejected Husske's argument that use of the statements in his subsequent rape trial violated his Fifth Amendment rights. *Id.* at 217, 476 S.E.2d at 929. The Court stated that "the defendant's obligation to participate in the mental health treatment program did not in itself convert his 'otherwise voluntary statements into compelled ones.' . . . No one required [the defendant] 'to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent.'" *Id.* at 217, 476 S.E.2d at 928 (citations omitted).

The Supreme Court's denial of Husske's argument in a criminal case is telling as a party should theoretically have no greater rights in a civil case. *See also Doss v. Commonwealth*, 23 Va. App. 679; 479 S.E.2d 92 (1996) ("The Fifth Amendment does not insulate a defendant from all 'difficult choices' that are presented during the course of criminal proceedings, or even from all choices that burden the exercise or encourage waiver of the Fifth Amendment's right against self-incrimination.") (emphasis added).

Moreover, the "testimony equates to waiver" principle should also indicate that materials used in the criminal proceedings are waived for Fifth Amendment purposes. *See, Nutramax Laboratories, Inc. v. Twin Laboratories*, 32 F.Supp.2d 331 (D. Md., 1999) (submission of an affidavit in support of a party's position constituted a waiver of privilege against self-incrimination.); *In re Edmond*, 934 F.2d 1304 (4th Cir. 1991).

While in a different context, the cases addressing the rights of the press to access criminal proceedings also support the concept that disclosure in the criminal proceeding equates to a waiver of Fifth Amendment rights. *See In re Times-World Corp.*, 25 Va.App. 405, 488 S.E.2d 677 (1997) (Holding that the press had a first amendment right of access to criminal competency hearings and to documents admitted into evidence therein.)

What about Confidentiality Agreements?

- **What happens if a party has resolved all or part of previous or current bad acts by a confidential settlement? Can a party use the binding nature of a confidential settlement to prevent witnesses from testifying?**

The answer to this is likewise something that has not been directly addressed by the Supreme Court of Virginia. However, in several "press access" cases, the court has addressed public access to confidentiality agreements. Most recently, in *Perreault v. The Free Lance-Star*, 276 Va. 375, 666 S.E.2d 352 (2008), the Supreme Court addressed the seeming conflict between Virginia Code §8.01-581.22 (providing for confidentiality of mediation files) and Virginia Code § 8.01-55 (requiring court approval of wrongful death settlements). While the Court's ruling in favor of disclosure of the confi-

dential settlement terms was based on the statutory provision applicable only to wrongful death cases, the Court also explained that the sealing of a record rests in the sound discretion of the trial court. *Id.*, 276 Va. at ____, 666 S.E.2d at 359-360.

There is a "strong presumption" favor of public access to judicial records and "the moving party must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order." *Shenandoah Pub. House, Inc. v. Fanning*, 235 Va. 253, 259, 368 S.E.2d 253, 256 (1988).

Additionally, the waiver and partial-testimony cases discussed above (see section B) would seem to indicate that a confidentiality agreement is not an assertion of a Fifth Amendment privilege and therefore a party has waived protection for statements made therein.

Is a party entitled to a stay of criminal proceedings during the pendency of his criminal trial?

- **The Constitution does not mandate the stay of civil proceedings in the face of parallel criminal proceedings.**

The Constitution does not mandate that civil proceedings be stayed until the completion of related criminal proceedings. *In re Anderson*, 349 B.R. 448 (E.D. Va., 2006). A civil litigant has no constitutional right to a stay simply because a parallel criminal proceeding is in the works. *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72 (1st Cir., 2004).

While there are no cases from the Supreme Court of Virginia on this issue, the Circuit Court for the City of Alexandria recently denied a motion to stay proceedings but did limit the inquiries in the civil proceedings to items upon which there had been testimony in the criminal case. *Gebrekidan v. Riley*, 74 Va. Cir. 215 (Alexandria Cir. Ct. 2007). That court found the following factors as relevant in the inquiry of whether to grant the stay: the identity of the parties and issues in both actions, the time of filing, promotion of judicial efficiency and possible prejudice to a party if the stay is granted. *Id.*

Perhaps one reason why there is scant Virginia law on stays to protect Fifth Amendment rights is that the General Assembly has already seen fit to grant litigants in this situation the protection not of an automatic stay but instead of the protections found in Va. Code §8.01-223.1, (see discussion below).

- **A litigant's Fifth Amendment rights are protected by statute in Virginia, obviating the need for continuances.**

"In any civil action the exercise by a party of any constitutional protection shall not be used against him." Virginia Code §8.01-223.1.

Prior to the adoption of this section, Virginia

adhered to the sword and shield doctrine. Under that doctrine, a party could not use the Fifth Amendment as both a sword to gain advantage in a civil proceeding and as a shield to prevent the other party from being able to prove its case. *See Davis v. Davis*, 233 Va. 452, 357 S.E.2d 495 (1987) (recognizing that privilege against self-incrimination is “intended solely as a shield” and that a party may not use it “as a sword to sabotage any attempt by the other party . . . to obtain information relevant to the cause of action alleged [] and . . . to possible defenses to the claim”).

The sword and shield doctrine was statutorily enshrined in Virginia Code §8.01-401. This statute provides in relevant part:

If any party, required by another to testify on his behalf, refuses to testify, the court, officer, or person before whom the proceeding is pending, may, in addition to punishing said party as for contempt, dismiss the action, or other proceeding of the party so refusing, as to the whole or any part thereof, or may strike out and disregard the plea, answer, or other defense of such party, or any part thereof, as justice may require.

Until the passage of §8.01-223.1, this code section permitted a trial court to apply all sorts of draconian measures when a party took the Fifth. The passage of §8.01-223.1 has been held to overrule the sword and shield doctrine, *see, Travis v. Finley*, 36 Va. App. 189, 548 S.E.2d 906 (2001), although §8.01-401 still remains valid law for other circumstances not related to the Fifth Amendment.

This statute has caused particular problems in divorce cases, where litigants have successfully pleaded the Fifth rather than admit adultery, even though the adultery statute is rarely if ever prosecuted. Bills were submitted in the past session of the General Assembly to amend §8.01-223.1 to eliminate its application in family law cases. While the bills were not enacted, they will be studied and re-visited next year. Note as well that there was sentiment to completely repeal §8.01-223.1.

Trial issues

Use of evidence of prior pleas or prior convictions.

A party’s plea of guilty “for a criminal offense... which arose out of the same occurrence upon which the civil action is based, evidence of said plea... shall be admissible.” Va. Code §8.01-418. *See also, Koutsounadis v. England*, 238 Va. 128, _____, 380 S.E.2d 644, 647 (1989) (Trial court erred in granting the motion in limine which precluded the plaintiff from adducing evidence of the defendant’s guilty plea.)

What about evidence of pleas to matters that did not arise out of the same occurrence? First, records

of judicial proceedings are admissible by statute:

The records of any judicial proceeding and any other official records of any court of this Commonwealth shall be received as prima facie evidence provided that such records are authenticated and certified by the clerk of the court where preserved to be a true record. ... “Records” as used in this article, shall be deemed to include any memorandum, report, paper, data compilation, or other record in any form, or any combination thereof.

Virginia Code §8.01-389.

Thus, if relevant, a certified copy of any record, under the broad definition of record found in the statute, would be admissible against a party in the civil matter.

Note also, in terms of the relevance of previous convictions to justify punitive damages, prior DUI convictions are admissible, *see, Huffman v. Love*, 245 Va. 311, 427 S.E.2d 357 (1993), as is other evidence showing a party would be aware that his conduct would probably cause injury to another. *See, Woods v. Mendez*, 265 Va. 68, 574 S.E.2d 263 (2003). Thus, for example, a defendant’s prior experience with drinking and driving, including his attendance at court-ordered VASAP programs goes directly to prove knowledge of the effects of drinking and driving on his own conduct, as well as the danger to others posed by drunk driving. Previous instances of drinking and driving show conscious disregard and reckless indifference.

Conclusion

While at first glance, the privilege against self-incrimination might seem to complicate civil litigation, the balance stricken by the courts and the legislature makes application of the privilege less-daunting. If one keeps in mind the fundamental notion that the Fifth Amendment is a personal privilege that can be waived, the privilege’s role in specific instances of civil litigation becomes less a matter of guesswork and more a matter of common sense.

Endnotes

1. Compare *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court has required the exclusion of incriminating statements unless there has been a knowing and intelligent waiver of the privilege regardless of whether the privilege has been claimed.



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