

The Fifth Amendment Privilege Against Self-Incrimination in Civil Cases

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A witness need not give testimony that could lead to criminal prosecution.

The privilege against self-incrimination is primarily invoked in the context of criminal prosecutions. As criminal practitioners most frequently encounter Fifth Amendment issues, they tend to be more familiar with the scope and availability of the privilege. Moreover, the Fifth Amendment affords criminal suspects and defendants a blanket protection

against self-incrimination. Since there is rarely ever any question as to whether an individual is either a suspect or a target in an investigation, the Fifth Amendment in a criminal context is relatively easy to identify and invoke.

Fifth Amendment issues arise in civil cases often with little warning, however, and practitioners who may have never represented a criminal defendant are suddenly confronted with a constitutional right primarily associated with criminal law. Unlike criminal cases, in which a defendant is readily identifiable and may simply refuse to take the stand, civil litigants, witnesses, and their counsel are sometimes afforded less warning—and less time to prepare—for these issues. Accordingly, it is beneficial for all trial lawyers to have a basic knowledge of a Fifth Amendment application in the civil context.

Availability of the Fifth Amendment Privilege

Despite the U.S. Constitution's apparent limitation of Fifth Amendment rights to "any criminal case" (as well as an identical limitation in the Virginia Constitution¹), the Fifth Amendment privilege is available to an individual in any court

proceeding, whether criminal or civil.² The rule protects civil litigants and witnesses because incriminating testimony solicited in a civil proceeding could be used against the person in a future criminal case, which directly violates state and federal constitutional prohibitions on compelling a witness from giving "evidence against himself."³ The privilege, however, is available only to an individual and cannot be invoked on behalf of a company.⁴ Moreover, it is a "personal" privilege, and a witness cannot refuse to answer to protect another.⁵

In order to protect an unwitting client against self-incrimination, a practitioner must be able to identify the instance when invocation of the privilege is appropriate and analyze the applicability of the privilege. The privilege applies to testimony that may create a reasonable apprehension of prosecution by the witness. But the Fifth Amendment "does not provide a blanket right to refuse to answer questions."⁶ It is up to the judge to determine whether the privilege is properly invoked, and that means that "some investigative questioning must be allowed."⁷

A witness need not give testimony that could lead to criminal prosecution. In other words, there must be some identifiable criminal charge to which the questionable testimony would support or provide a link to evidence to support the charge.⁸ To sustain the privilege, "it need only be evident from the implication of the question, in the setting in which it is asked, the responsive answer to the question or an explanation of why it cannot be answered might be dangerous. . . ."⁹ To sustain the privilege, counsel or the witness must demonstrate to the trial court how a prosecutor, "building the most unseemingly harmless answer, might proceed step by step to link the witness to some crime" and that such linkage not seem incredible or remote in the circumstances of the particular case.¹⁰

Although the privilege is restricted to evidence that is testimonial in nature, it has been applied

in other circumstances. The Supreme Court of Virginia has held that it may be applied to discovery responses.¹¹ The Virginia Court of Appeals has extended the privilege to “private papers.”¹² Practitioners should carefully distinguish, however, testimony that could result in criminal prosecution from that which might result in civil, administrative, or other punitive penalties. No protection is afforded a client who may suffer a penalty as opposed to criminal liability. For example, attorney disciplinary proceedings are civil in nature, and the Fifth Amendment privilege is not available in a Virginia State Bar disciplinary proceeding simply because testimony could result in disciplinary action.¹³

Special analysis is required in situations in which the information sought is not verbal in nature, particularly when the evidence is the target of a subpoena. Private papers that contain incriminating information and are “testimonial or communicative” appear to be privileged.¹⁴ Business records, or other records that are required to be kept by statute, are not protected.¹⁵ Also, documents that might otherwise enjoy protection but which have been transferred to a third party are not protected.¹⁶ When analyzing incriminating documents, the most compelling factor to be considered is possession, rather than ownership of those documents.¹⁷

In order to uphold criminal statutes, courts have been careful to distinguish between communications and other evidence that could be used in a criminal prosecution. For example, nontestimonial evidence such as breath and blood samples, lineups, and mug shots are not protected. Photographs or electronic computer data are not “testimonial,” but they certainly could be incriminating. For instance, a compromising photograph suggesting adultery in the possession of a party to a divorce proceeding or the computer hard drive in a business conspiracy case where embezzlement has occurred is not likely to be protected by the Fifth Amendment. A carefully crafted subpoena could circumvent the privilege. In similar instances, practitioners should not assume that the privilege is available, or that it is definitely enforceable if an adversary invokes it.

Methods of Invoking the Privilege Against Self-Incrimination

Whereas a criminal defendant enjoys a blanket protection and may simply invoke Fifth Amendment privilege and refuse to take the stand, offer any testimony, or answer any questions, the Fifth Amendment privilege enjoyed

by civil litigants and witnesses is more narrowly applied. A criminal defendant may simply refuse to take the stand; a civil litigant or witness, however, may not refuse to take the stand and may not refuse to offer testimony. To the contrary, in the civil context, the Fifth Amendment privilege extends only to specific questions. The privilege will not be automatically sustained upon a declaration by the witness or the witness’s counsel that the response could be incriminating. For obvious reasons, the witness need not explain in minute detail why the response may be incriminating. To do so may jeopardize the very protection that the privilege seeks to establish. However, the privilege must be invoked for each question. At trial or in a deposition, the witness must take the stand and invoke the privilege for each and every applicable question posed. Only the witness, and not his or her attorney, can invoke the privilege.¹⁸ In the context of a civil discovery process, such as interrogatories and requests for admissions, the privilege must be invoked in the responses.

Most Common Pitfall: Waiver of the Privilege

The privilege is most commonly waived when a client simply answers the question posed. The response will be considered a waiver not just to that specific question, but also to the matter and events relating to the question.¹⁹ Moreover, the affirmative denial of an allegation in a pleading may result in waiver of the privilege with regard to specific questions posed in discovery further along in litigation.

It is much more burdensome to invoke the Fifth Amendment privilege as opposed to waive it. To invoke, a witness has to invoke for each question. But by answering one question, waiver attaches not just to the question, but also to related inquiries.

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Limitations On and Consequences In a Civil Proceeding

Counsel should be aware that, although the Fifth Amendment privilege is a right that always accompanies a person to any legal proceeding, there are some limitations to invoking it. The concern usually involves the person who uses the

privilege not to shield himself from criminal liability but as a sword to hinder the other party's attempts to obtain information. As explained below, the General Assembly has diminished the ability to abuse the privilege.

Another limitation of availability is that the privilege cannot be invoked when the risk of criminal prosecution has dissipated, such as when the statute of limitations has expired. And the privilege does not apply to embarrassing or degrading responses, nor to testimony that may lead to civil liability. Finally, as discussed above, it does not protect against producing nontestimonial, incriminating evidence.

Sword and Shield Doctrine and Virginia Code § 8.01-223.1

The Virginia Supreme Court in *Davis v. Davis*²⁰ set out the common law doctrine of "sword and shield," explaining that the privilege against self-incrimination was intended solely as a shield. The rule thus provides that a moving party cannot use it as a sword to sabotage any attempt by the other party, either during pretrial discovery or at trial, to obtain information relevant to the cause of action alleged and to possible defenses of the claim.²¹

This doctrine's applicability in Virginia is questionable in light of Virginia Code § 8.01-223.1, which states, "In any civil action the exercise by a party of any constitutional protection shall not be used against him." The court of appeals has interpreted this latter provision as superceding, at least in some instances, the sword and shield doctrine.²² In effect, the invocation of the Fifth Amendment privilege is a weapon available to both parties that can prevent disclosure of relevant information.

On the other hand, the impact of this protection may be minimized in the context of divorce cases where adultery is alleged. In divorce proceedings, allegations of adultery must be proven by clear and convincing evidence. In a case in which the alleged adulterer's conduct is suspicious, one factor the courts consider is whether an explanation has been provided for the conduct. If no explanation has been provided, then an adverse inference may be drawn. Even when the privilege against self-incrimination has been invoked, it appears that, despite the protection afforded by § 8.01-223.1, it is still possible for an adverse inference to be drawn.²³ In *Watts v. Watts*²⁴, this is precisely what the Court of Appeals did. The husband had invoked the privilege during deposition when asked about whether he had

engaged in extramarital intercourse. In a footnote, the court stated that it was "mak[ing] no negative inference based" on this exercise of the Fifth Amendment right.²⁵ But the court, having found sufficient evidence of adultery, then made the following statement: "In [invoking the Fifth Amendment], however, husband failed to provide a reasonable explanation for his conduct, a matter about which we do take cognizance."²⁶

On this issue, counsel should also review *Romero v. Colbow*,²⁷ a divorce case in which the wife invoked the privilege in connection with questions about adultery. The Court of Appeals upheld the commissioner in chancery's finding that evidence was not sufficient to prove the wife had committed adultery despite very strong suspicious circumstances. The commissioner, relying on Code § 8.01-223.1, had said that the wife's invocation could not be used against her.²⁸ The Court of Appeals issued its ruling without commenting on this statement of the commissioner.²⁹

Virginia Code §§ 8.01-401(B) and 8.01-223.1

Under Virginia Code 8.01-401(B), when one party calls another party to testify and the latter party refuses to do so, the court may punish the refusing party for contempt of court. In addition, the court may punish the refusing party by dismissing the action (if the refusing party is the plaintiff) and strike or disregard the plea, answer, or other defense of the party.

Just as with the sword and shield doctrine, the effectiveness of this provision has been diminished by Virginia Code § 8.01-223.1. One circuit court has ruled that Code § 8.01-223.1 is a more specific statute because it addresses a refusal to testify based on a constitutionally protected right as opposed to a general refusal.³⁰ Therefore, under this reasoning, a party cannot be punished for refusing to testify based on the privilege against self-incrimination. But note that § 8.01-223.1 applies to "a party" in a civil action; this could suggest that if a party's witness invokes the privilege against self-incrimination, then the trial court is permitted to draw an adverse inference against that party.

Virginia Code § 19.2-270

Counsel who is attempting to counter an invocation of the privilege by the opponent should also become familiar with Virginia Code § 19.2-270, which provides

In a criminal prosecution, other than for perjury, or in an action on a penal statute,

evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf.

On a quick reading, the statute appears to provide immunity from future prosecution, thereby preventing the invocation of the privilege against self-incrimination. As discussed above, in order to validly invoke the privilege, there must be a danger that the statement will support some part of a criminal case against the witness. However, the statute does not provide the type of blanket immunity (such as derivative use or transactional immunity) that would prevent an invocation of the privilege. First, notice that the statute only prevents the statement being used in a subsequent prosecution. It does not prohibit using that statement to lead to other evidence; the statute only provides use immunity and not derivative use or transactional immunity. This is significant because a witness can base an invocation on the premise that the statement, even though not directly admissible, may lead to other evidence.

Also, the statute provides the immunity only if the person is testifying on his own behalf. If an attorney's client is a witness in a litigation in which the client has no interest, then the statute does not apply to that witness.

Finally, the statute does not encompass perjury prosecutions. A client cannot invoke the privilege because she wants to commit perjury at a later hearing. But if the client has already given testimony under oath in another matter and that testimony is arguably inconsistent with what the client intends to testify, then a valid basis likely remains to invoke the privilege.

Conclusion

In criminal cases, the privilege against self-incrimination frequently arises, and counsel is typically prepared to address the issue well in advance of the moment. In the civil arena, however, the privilege can come up unexpectedly. If the issue is missed — or misunderstood — then the consequences can be severe. An inadvertent waiver of the issue will mean that the client will be deprived of invoking a powerful constitutional protection. ⚖

Endnotes:

- 1 Va. Const., art. I, § 8.
- 2 *Husske v. Commonwealth*, 252 Va. 203, 214, 476 S.E.2d 920, 927 (1996).
- 3 Va. Const., art. I, § 8.
- 4 *North American Mortgage Investors v. Pomponio*, 219 Va. 914, 918, 252 S.E.2d 345, 348 (1979).
- 5 *Id.* at 920, 252 S.E.2d at 349 (citing *Rogers v. United States*, 340 U.S. 367, 371 (1951)).
- 6 *Cunningham v. Commonwealth*, 2 Va. App. 358, 361, 344 S.E.2d 389, 391 (1986).
- 7 *Id.* at 361-62, 344 S.E.2d at 391.
- 8 *Pomponio*, 219 Va. at 919, 252 S.E.2d at 348 (citations omitted).
- 9 *Id.* at 919, 252 S.E.2d at 348 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951)).
- 10 *Id.* at 919, 252 S.E.2d at 348-349 (quoting *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952)).
- 11 *Dunlany v. Smith*, 97 Va. 130, 33 S.E. 533 (1899).
- 12 *Moyer v. Commonwealth*, 30 Va. App. 744, 751, 520 S.E.2d 371, 375 (1999).
- 13 *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).
- 14 *Moyer*, 30 Va. App. at 751, 520 S.E.2d at 375.
- 15 *United States v. Doe*, 465 U.S. 605, 606 (1984); *Shapiro v. United States*, 335 U.S. 1, 16-18 (1948).
- 16 *United States v. Taylor*, 399 F.Supp. 681 (E.D. Va. 1975).
- 17 *Id.*
- 18 *Powell v. Commonwealth*, 167 Va. 558, 577, 189 S.E. 433, 441 (1937).
- 19 *Rogers v. United States*, 340 U.S. 367, 373-74 (1951); *Woody v. Commonwealth*, 214 Va. 296, 199 S.E.2d 529, 531 (1973).
- 20 233 Va. 452, 357 S.E.2d 495 (1987).
- 21 *Id.* at 456-457, 357 S.E.2d at 498.
- 22 Virginia Code § 8.01-223.1 went into effect before the *Davis* opinion was published. But *Davis* did not address this code section because the relevant facts in *Davis* arose before the statute went into effect.
- 23 In Virginia, adultery is Class 1 misdemeanor, which carries a maximum penalty of twelve months in jail and a fine of \$2,500. Virginia Code §§ 18.2-366, 18.2-11.
- 24 *Watts v. Watts*, 40 Va. App. 685, 581 S.E.2d 224 (2003).
- 25 *Id.* at 702 n.2, 581 S.E.2d at 233 n.2.
- 26 *Id.*
- 27 27 Va. 88, 497 S.E.2d 516 (1998).
- 28 *Id.* at 93, 497 S.E.2d at 518-519.
- 29 Despite the omission of any discussion of the Fifth Amendment in *Romero*, the Court of Appeals in the *Watts* case cited *Romero* in a footnote as holding specifically that the wife's invocation could not be used against her. *Watts*, 40 Va. App. At 702 n.2, 581 S.E.2d at 233 n.2.
- 30 *Murphy v. Murphy*, 19 Va. Cir. 96 (Fairfax County 1995).