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Civil litigators: Your clients have the right to remain silent

By Michelle R. Peirce

Last October, Zachary Warren — the now-indicted former Dewey & LeBoeuf client manager — was contacted by the Securities and Exchange Commission and asked to be interviewed in what he apparently believed was a civil investigation concerning the law firm's demise, according to news reports. He participated voluntarily, without an attorney, and incriminated himself in related criminal conduct. Not long after the interview, he was indicted.

Warren serves as a warning to all civil litigators who must be (but often are not) alert to the frequent, but often nuanced, situations in which their clients could be exposing themselves criminally by participating in civil or administrative proceedings. That is because there are numerous regulatory and statutory schemes — health care statutes, for instance — in which the same conduct can be deemed civil or criminal.

Worse, federal criminal statutes are written so broadly that they permit prosecutors to lodge criminal charges based on facts many attorneys might view as civil in nature. As a result, criminal exposure is not always obvious and can arise in any type of civil matter, including:

- tax or other financial fraud illuminated during a divorce or business dispute;
- health care fraud and abuse exposure in virtually any contract involving health care providers;
- false claims or representation when dealing with agencies (e.g., false certifications by contractors);
- SEC or other regulatory investigations or inquiries that are parallel to, or result in, criminal referrals;
- personal injury cases;
- insurance fraud;
- administrative proceedings (e.g., gambling commission in Massachusetts); and,
- testimony before professional licensing authorities.

Accordingly, civil litigators cannot be so focused on winning that they lose sight of a bigger concern: allowing their clients to admit to criminal conduct under oath or to waive their Fifth Amendment right to remain silent.

Although it can be a difficult decision, the best advice for some clients may be to invoke the right against self-incrimination and refuse to participate in the litigation because of the risk of criminal exposure, as discussed below.

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Right against self-incrimination

Many attorneys think that invoking the Fifth Amendment (or Article XII of the Massachusetts Declaration of Rights) is available only in a criminal investigation or proceeding. That misunderstanding can have draconian consequences for one's clients because the privilege against self-incrimination applies in civil as well as criminal proceedings. See *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924).

To invoke the privilege in a civil case, there must be a risk of criminal exposure that is substantial and real, not merely trifling or imaginary. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972).

The right, however, applies only to individuals, not to corporations. And, as with most privileges, the burden of proving a valid Fifth Amendment privilege belongs to the person seeking to invoke it. See *In re Grand Jury Subpoena*, 973 F.2d 45, 50 (1st Cir. 1992).

Damning evidence for future or pending criminal investigation

Counsel must be alert to their clients' potential criminal exposure before bringing litigation or actively participating in it.

When there is potential criminal exposure or risk, your client's answers in a deposition, interrogatories or elsewhere in the case can constitute damaging party admissions to incriminatory facts — exceptions to the hearsay rules under Federal Rules of Evidence 801 and 802 — that can place the client in peril in a criminal case.

Right to invoke Fifth Amendment privilege

Testifying in a deposition is not the only way clients can waive their Fifth Amendment privilege. Answering a complaint, in and of itself, is not likely to constitute a waiver, although there is little law on the point. See *ACLI Int'l Commodity Servs., Inc. v. Banque Populaire Suisse*, 110 F.R.D. 278, 288 (S.D.N.Y. 1986).

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That said, counsel should proceed with caution, particularly when asserting affirmative defenses. See *United Automobile Ins. Co. v. Veluchamy*, 747 F.Supp.2d 1021 (N.D. Ill. 2010) (suggesting, but declining to decide, whether answering complaint alone waives Fifth Amendment right).

Generally speaking, the more a party engages in the litigation — such as by propounding discovery — the more likely the party is to be found to have waived the Fifth Amendment right against self-incrimination. See *Veluchamy*, 747 F.Supp.2d at 1026-7.

A waiver will not be inferred lightly; the waiver must be voluntary, testimonial and incriminating. See, e.g., *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990); see also *Klein v. Harris*, 667 F.2d 274, 277-8 (2d Cir. 1981).

Recognizing the devastating impact of concluding that a person has waived his right against self-incrimination, courts often fashion alternative remedies short of finding waiver. For example, where a party asserted the Fifth Amendment at a deposition after filing an affidavit in a forfeiture action, the court struck the affidavit from the case rather than finding that there had been a waiver. *Parcels of Land*, 903 F.2d at 43-44; see also *Boim v. Quranic Literacy Inst.*, 2004 WL 2700494 (N.D. Ill., Feb. 9, 2004) (striking defendant's answer and counterclaims when defendant refused to testify at his deposition).

A District Court judge used the same reasoning to dismiss a defendant's counterclaims when the defendant's principal had invoked the Fifth Amendment. *Trustees of Boston Univ. v. ASM Commc'ns, Inc.*, 33 F.Supp.2d 66, 72 (D. Mass. 1998).

The waiver extends only to the proceeding in which the privilege is waived; clients can still assert their right against self-incrimination in future criminal proceedings. But that right will be little solace if the client has already incriminated himself or herself through damaging admissions following a waiver in a civil or administrative proceeding.

Fifth Amendment applies to some document productions

Your client also may have a constitutional right to refuse to produce certain types of documents in a civil proceeding. *United States v. Hubbell*, 530 U.S. 27, 44-45 (2000).

Diligent attorneys must consider if the client's best interests require invoking the so-called "act of production" privilege, which, broadly stated, permits individuals to refuse to produce documents when the act of producing those documents will incriminate them. See, e.g. *Unum Grp. v. Benefit P'ship, Inc.*, 2014 WL 172205 (D. Mass. Jan. 16, 2014) (upholding defendant's right to refuse to produce documents in civil case concerning insurance commissions).

Repercussions of invoking right to remain silent

It is challenging to balance the risk of criminal exposure against the repercussions of invoking a client's privilege not to testify or respond during litigation. It will obviously be harder to prove or refute liability in the civil case if a key party or witness invokes his or her Fifth Amendment rights.

Also, an adverse inference will usually be drawn against a party who has invoked the privilege. *Kaye v. Newhall*, 356 Mass. 300, 305-306 (1969). In the *Unum Group* case discussed above, although the court upheld the defendant's right to refuse to produce documents that incriminated him, the court also held that the plaintiff was entitled to an adverse inference based on the defendant's refusal to produce those documents. *Unum Grp.*, 2014 WL 172205 (D. Mass. Jan. 16, 2014).

Likewise, courts sometimes, though not always, allow an adverse inference against an association or employer when one of its officers exercised his or her Fifth Amendment rights to avoid testifying about subjects "peculiarly within their knowledge." *Labor Relations Comm'n v. Fall River Ass'n*, 382 Mass. 465, 472 (1981); *Veranda Beach Club Ltd. P'ship v. W. Sur. Co.*, 936 F.2d 1364, 1374 (1st Cir. 1991).

There can be many other negative consequences for invoking the privilege. For example, most licensed professionals are required to cooperate with their licensing authorities (e.g., FINRA, BBO), but doing so can implicate them in present or future criminal investigations.

The 1st Circuit grappled with that issue in a case in which an attorney was convicted of bankruptcy fraud based in part on incriminating testimony she gave to the Board of Bar Overseers. The attorney had moved to suppress the statements, claiming that they were "coerced" because she had risked (through an adverse inference) losing her law license if she had invoked her Fifth Amendment rights at the BBO.

The 1st Circuit held that the BBO testimony had been properly admitted at trial. *United States v. Stein*, 233 F.3d 6, 15 (1st Cir. 2000). Although invoking the right not to answer questions may have damaged the attorney's ability to maintain her license, the invocation would not have resulted in automatic forfeiture of her license and, thus, was not "coerced." *Id.*

There also can be employment implications for invoking the Fifth Amendment, especially for employees of public companies. And insureds risk losing liability coverage if the language of a liability policy allows the carrier to claim that refusing to testify violates the insured's duty to cooperate with the carrier. See *Mello v. Hingham Mut. Fire Ins. Co.*, 421 Mass 333 (1995); *Metlife Auto & Home v. Cunningham*, 59 Mass. App. Ct. 583 (2003).

Counsel must also consider the non-legal implications, such as public relations problems and personal embarrassment, for clients who assert their constitutional right. Another repercussion is that the very fact of invoking the right against self-incrimination can trigger criminal inquiry into a matter in which only the client is aware of the potential exposure.

Checklist for civil attorneys

• **Be alert for and recognize criminal exposure.** This is the most important step, though it might not jump out at you. High-risk areas that merit extra caution include anything in the health care field, interactions (past or current) with agencies and regulators, and financial irregularities you uncover in a client's matter.

• **Evaluate the level of risk and educate the client.** Counsel must avoid having such tunnel vision about the client's civil objectives that they lose sight of the bigger picture. Just as important, counsel must be willing to manage expectations and provide a reality check to a client consumed by a desire to "play hardball" when that approach could result in criminal exposure. The potential for criminal exposure might even tilt the scales toward settlement in a civil or administrative case that otherwise could be won.

• **Avoid admissions or waiving the client's Fifth Amendment privilege.** Stays of civil proceedings can be sought when there is a pending criminal investigation or proceeding, but granting the stay is discretionary. When a stay is not available or advisable, counsel should delay as much as possible (e.g., phased discovery, extensions), within the rules, the event that will trigger the client's need to invoke his constitutional right not to incriminate himself.

• **Consult criminal counsel.** It is wise to seek input from a criminal defense attorney to help evaluate the risk and consider the options. Whatever step is taken, it is essential that clients be informed of the risks and have all the information they need to decide which risk is worse: the criminal exposure or not fully prevailing in their civil cases.

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