James G. Perry
ABIR COHEN TREYZON SALO, LLP

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The Fifth Amendment in civil cases

THE RIGHT AGAINST SELF-INCRIMINATION IS SIMPLY INAPPLICABLE IN MANY CONTEXTS

In the first installment, *The Fifth Amendment in Civil Cases: The Right Against Self-Incrimination Cuts Both Ways*, (Advocate Oct. 2023), I introduced and explained why the Fifth Amendment right against self-incrimination (the "Privilege") is typically not a bar to civil litigation and its use may result in severe sanctions imposed against the objecting party. This article addresses the two most important issues when your defendant(s) objects on Privilege grounds – does the Privilege truly apply and to what extent? In reality, there are very limited circumstances when the Privilege serves as a bar to the evidence sought during civil discovery. This goes hand in hand with the running theme – the Privilege is overutilized and under-analyzed.

Who has the right to invoke the Privilege?

Corporations *do not* have a right to invoke the Privilege. (*Avant! Corp. v. Superior Court* (2000) 79 Cal.App.4th 876, 883 [providing that "corporations have no privilege against self-incrimination"].) As the United States Supreme Court made clear, under the "collective entity rule" the Privilege also cannot be asserted on behalf of a corporation by its representative(s). (*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"]; *City of San Jose v. MediMarts, Inc.* (2016) 1 Cal.App 5th 842, 851 ["The underlying principle of this doctrine, as repeatedly explained by the United States Supreme Court, is that a corporate officer may not rely on the Fifth Amendment when required to produce the records of the corporation"].) This is true despite the fact that production of responsive material may *also* tend to incriminate the representative (e.g., custodian or secretary) "personally." (*MediMarts, Inc., supra*, 1 Cal.App.5th at p. 851 (quoting *Braswell, supra*, 487 U.S. at p. 99-100); see also *Dreier v. United States* (1911) 221 U.S. 394, 400 [holding that corporate secretary properly found in contempt for refusing demand for corporate documents, notwithstanding his claim that those papers would tend to incriminate him].)

The Privilege can be invoked, however, by a "sole proprietor or practitioner" acting on behalf of a corporation where the production of the requested information implicates the personal Privilege of the producing party. (*MediMarts, Inc.*, 1 Cal.App.5th at p. 851.) Similarly, the Privilege can be invoked where the "personal documents contain [] more intimate information about the individual's private life." (*Andersen v. Maryland* (1976) 427 U.S. 463, 485-86 (quoting *Bellis v. United States*, 417 U.S. 85, 87-88).) What the later principle essentially means is that the objecting party *may* be permitted to invoke the Privilege where responsive material strays from the corporate context into the "private life" context.

In this vein, it is important to ask who/what actor will be subject to criminal prosecution by disclosure of the information for which a Privilege objection was made. This is because the

Privilege, as noted above, is a *personal* one, meaning, a party is not permitted to invoke the Privilege on behalf of another person. (See *Fisher v. United States* (1976) 425 U.S. 391, 397 ["The Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege …."]; *Couch v. United States* (1973) 409 U.S. 322, 328 ["It is important to reiterate that the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him"].) In other words, one party to your lawsuit cannot invoke the Privilege on behalf of another party.

In short, before you get into a discussion about whether the responsive information is compelled, incriminating, and/or testimonial, make sure the objecting party is permitted under the law to invoke the Privilege. In many of my cases, I dispose of certain Privilege objections by pointing out that the Privilege is completely irrelevant to the material sought (e.g., I'm only asking for corporate records).

When does the Privilege apply?

As explained in the first installment, the 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 the defendant is compelled (through the legal process) to produce, that leads to or supports criminal prosecution against defendant and that discloses the mental processes of defendant. Far too often, parties *and* judges become fixated on the "incriminating" element, to the disservice of the "compelled" and "testimonial" elements. Worse, the same parties

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2024

and judges will utterly miss the well-settled exceptions and/or waivers to an objecting party's Privilege argument.

What amounts to compulsion for purposes of the Privilege?

Where the confusion often lies with the "compulsion" element is that there must be compulsion of material that is both "testimonial" *and* "incriminating." In *Fisher v. United States* (1976) 425 U.S. 391, the United States Supreme Court recognized that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating." (*Id*. at pp. 408, 410-411 [noting that compulsion is absent where party "merely … assert[s] that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else"].) Meaning, the mere fact that a party is required to produce incriminating evidence *is not* sufficient to implicate the Privilege because there must also be compulsion from the mind of that party.

Nevertheless, "[t]he act of producing evidence in response to a [legal request] … has communicative aspects of its own, wholly aside from the contents of the papers produced." (*Id*. at p. 410.) The reason for this is because production tells the requesting party that the producing party not only has the requested evidence in his or her possession, but also that the producing party "belie[ves]" that the produced material is responsive to the requests. (*Ibid*.) Put simply, compulsion is present, and the Privilege implicated, where production of responsive material admits to (the unconfirmed) "existence" or "possession" or amounts to "authentic[ation] of the things produced." (*Baltimore City Dep't of Social Servs. v. Bouknight* (1990) 493 U.S. 549, 554-55 [reaffirming that the act of production may be incriminating if it testifies to the "existence, possession, or authenticity of the things produced"].)

One very common context where the "compelled" production of material does not implicate the Privilege is in the "foregone conclusion" context. The "forgone conclusion rule" applies "where the existence and location of the [documents sought] are a foregone conclusion and the [defendant] adds little to nothing to the sum total of [plaintiff's] information by conceding that he in fact has the [documents]" and, therefore, compelling production "does not touch upon constitutional rights." (*United States v. Sideman & Bancroft* (9th Cir. 2013) 704 F.3d 1197, 1202.)

Put another way, where the requesting party satisfies the threshold showing that, for example, the documents in question are unequivocally in the producing party's possession and that authentication of said documents can be obtained through another person, courts often find that any infringement of the Privilege is negligible and insufficient to block production. (See e.g., *Thomas v. Tyler* (D. Kan. 1993) 841 F.Supp. 1119, 1131 [finding that responsive material had "been delivered into the hands of (defendant's) employer … and the prosecution (could) thus rely on (the employer) to show (the documents') existence, possession, and authenticity"]; see e.g., *Columbia Pictures Indus., Inc. v. Galindo* (C.D. Cal. June 14, 2022) No. 2:20-cv-03129MEMF- (GJSx), 2022 WL 3009463, at *11 [finding "foregone conclusion"]; see also *United States v. Clark* (10th Cir. 1988) 847 F.2d 1467, 1472.)

In addition to being one of the more complicated, in my opinion, aspects of the Privilege, the determination of whether sufficient compulsion exists is also highly fact specific. You'd be well advised to find a case directly on point, as many practitioners (including the author of this article) and judges struggle with the exact parameters of when compulsion of "incriminating testimony" will be found.

Is the evidence actually incriminating?

Evidence will be found to be incriminating where responsive material and/or testimony "would [itself] support a conviction" or "which would furnish a link in the chain of evidence needed to prosecute" the defendant. (*Hoffman v. United States* (1951) 341 U.S. 479, 486; *Doe*, *supra*, 487 U.S. at p. 208, n. 6 [holding that communications that may "lead to incriminating evidence" is covered by the Privilege even if the information itself is not inculpatory].) Because the existence of a criminal case necessarily means that law enforcement became involved in the underlying incident, there will undoubtedly be an investigation that uncovered critical evidence that advances both the criminal and civil cases against your defendant.

Once a defendant is charged in a criminal case, the prosecution is required to turn over every single piece of evidence in its possession (with few exceptions) to the defendant. (See e.g., Pen. Code, § 1054.1.) To the issue of Privilege, all the material produced by the prosecution to your defendant(s) *is not* protected by the Privilege because it is impossible for said material to further criminal prosecution – the prosecutor already has it! (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"]; *Henry v. Sneiders* (9th Cir. 1974) 490 F.2d 315, 317.)

One example illustrates this point perfectly. If the prosecutor produces to your defendant(s) a video of defendant striking and killing the victim/decedent with his car, there is no plausible explanation that can ever be given that defendant's production of the video to your client(s) is incriminating – there is simply no possibility that production in the civil case can further prosecution in the criminal case.

In the same vein, there are other categories of material that will often not be incriminating, such as: (1) records relating to insurance coverage; (2) evidence related to a *different* defendant that has no relationship to the defendant

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2024

asserting the Privilege; (3) evidence in support of an affirmative defense – if the very purpose of the evidence is to exculpate, rather than inculpate, a claim of "incriminating" is nonsense; and (4) evidence pertaining to an unrelated event or subject matter (e.g., in a wrongful death/vehicular manslaughter case, evidence related to negligent entrustment of the vehicle in the past, even if to your defendant, might have little to do with the underlying incident). The common thread, of course, is that none of the items of evidence likely further prosecution against your defendant(s). In turn, any claim of Privilege in regard to the aforementioned material is likely improper.

It is also critical to note that where criminal prosecution is impossible under the law and nothing the objecting party produces can be incriminating, the Privilege cannot be invoked. This will arise in contexts where the statute of limitations (SOL) for the underlying alleged/potential criminal act has expired. With few exceptions, misdemeanors have a one-year SOL. (Pen. Code, § 802.) The SOL for felonies, on the other hand, varies depending on the crime(s) implicated. (*Id*., § 799, et seq.) Obviously, if your defendant(s) cannot be prosecuted for a crime because the SOL has run, the Privilege almost certainly does not exist. (See *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 431 [rejecting invocation of Privilege where "Blackburn's claims (were) … based on mere possibilities and speculation"]; see also *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 303-304.)

No matter how many times the United States Supreme Court stresses this point, parties and courts will inevitably ignore or misunderstand the significant distinction between evidence being incriminating on its face – e.g., it is bad for the defendant in his or her criminal case – and incriminating under the Fifth Amendment – and can *further* criminal prosecution. It is our job to ensure this does not happen.

The ubiquitously ignored element – "testimonial"

The best way to think of the "testimonial" element is in terms of whether compelled production requires your defendant(s) to "disclose [] the contents" of his or her mind. (*People v. Low* (2010) 49 Cal.4th 372, 390 [quoting *Doe, supra*, 487 U.S. at p. 213].) Put another way, if the communication resulting from the act of production itself – that is, independent of the *contents* of the documents produced – tends to incriminate the person producing the documents, then that person may be permitted to rely on the Privilege to avoid disclosure. (*Doe, supra*, 465 U.S. at pp. 613-14; *Fisher, supra,* 425 U.S. at pp. 410-13, 96.)

The following are examples of when responsive material typically fails to meet the "testimonial" element necessary to invoke the Privilege: (1) "The act of filing a tax return has not been considered testimonial." (*MediMarts, Inc*, 1 Cal.App.5th at p. 851 [citing *United States v. Hubbell* (2000) 500 U.S. 27, 35]; (2) "The act of handing over insurance certificate is not testimonial." (*Sherman v. Babbitt* (9th Cir. 1985) 772 F.2d 1476, 1478); (3) certain privilege log requirements during discovery: *Waymo LLC v. Uber Techs., Inc.* (N.D. Cal. 2017) 319 F.R.D. 284, 290. ("None support Levandowski's position that requiring others with whom he did business, even if under a joint defense agreement, to supply typical privilege log information would be tantamount to compelling Levandowski to self-incriminate. Under the facts of *our* case, as stated, no binding authority supports Levandowski's suggestion that his Fifth Amendment privilege necessarily supersedes typical privilege log requirements."); (4) "forgone conclusion" doctrine, discussed below; and (5) Chapter 7 "consent directives": *In re Mastro* (B.A.P. 9th Cir. 2018) 585 B.R. 587, 593 ("Accordingly, because *Doe* holds that consent directives are not testimonial, we reject Mastro's argument that an order compelling execution of a consent directive would violate his Fifth Amendment privilege against self-incrimination.").

The "testimonial" element, much like the "forgone conclusion" doctrine discussed below, is often a fact-intensive inquiry. While many of the Privilege battles are best fought under well-settled principles – e.g., what is not incriminating – there may be circumstances where the information and/or material sought is highly critical to your case and worthy of a fight on "testimonial" grounds as well. The above is meant to demonstrate that there are often multiple attacks that can be made on an objecting party's Privilege objection, thus increasing your chances of prevailing.

Waivers and exceptions

Like any privilege, the Privilege can be waived. A party must claim the Privilege to enjoy its protections. (*Rogers v. United States* (1951) 340 U.S. 367, 370-71.) The Privilege is waived for those matters about which a defendant testifies or voluntarily discloses information about, as well as the details of those matters – unless the details themselves might tend to meaningfully incriminate. (See *Mitchell v. United States* (1999) 526 U.S. 314, 321 [providing that a witness "may not testify about a subject and then invoke the privilege against self-incrimination when questioned about the details"]; see also *In re Flint Water Cases* (6th Cir. 2022) 53 F.4th 176, 193 [same].)

One specific context in which waiver occurs in civil cases is written discovery. Because parties are required to verify their responses to written discovery propounded on them, the voluntary disclosure of information that may be protected by the Privilege waives the Privilege. (See *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.* (D.D.C. 2015) 312 F.R.D. 16, 21, *aff'd in part,* 233 F.Supp. 3d 143 (D.D.C. 2017) ["Although Claimant argues in his motion that the Fifth Amendment applies to his discovery responses, Claimant did not invoke his right against self-incrimination in his responses. Instead, he answered …

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
May 2024

the government's discovery requests"].) Similarly, the failure to raise the Privilege as an objection in response to written discovery waives the Privilege. (See *Catalina Island Yacht Club v. Sup. Ct.* (2015) 242 Cal.App.4th 1116, 1125 [citing *Standish v. Sup. Ct.* (1999) 71 Cal.App.4th 1130, 1141 noting that "the failure to assert a specific objection waives that particular objection"].)

Finally, the failure to *timely* raise the Privilege waives the Privilege. (See *Brown v. Superior Ct.* (1986) 180 Cal.App.3d 701, 709 ["Numerous cases have held that if an objection to interrogatories is not raised within that 30-day period, the objection is waived, absent good cause for relief from default. (Citations omitted.) We see no basis for treating the privilege against self-incrimination differently than the other privileges which may be so waived"]; *Richmark Corp. v. Timber Falling Consultants* (9th Cir.1992) 959 F.2d 1468, 1473.)

Clearly, too, the Privilege can be waived through deposition and other forms of communications. (*Mitchell*, *supra*, 526 U.S. at p. 321; *FTC v. J.K. Publications, Inc.* (C.D. Cal. 2000) 99 F.Supp. 2d 1176, 1199; see also *IBM Corp. v. Brown* (C.D. Cal. 1994) 857 F.Supp. 1384, 1390 ["Where a defendant already has given partial deposition testimony on substantive issues of the case, the Fifth Amendment privilege is 'negligible' and cannot provide the basis for a stay"].)

What the above makes clear is that the defendant(s)' actions in your civil case prior to the invocation of the Privilege matter greatly. As an example of when this recently occurred in one my cases, several defendants in a toxic-tort matter responded to written discovery (RFPs, SROGs, and FROGs) early in litigation (and signed verification pages), but over a year and a half later attempted to invoke the Privilege as to both their depositions on the underlying matters and subsequent document requests.

All defendants had been charged in a misdemeanor criminal case related to the facility and location at issue in the civil case. The problem for my defendants, however, is that the complaint in my civil case was filed one month after the criminal complaint was filed. Meaning, defendants were on notice from the very beginning that they could have invoked the Privilege if it was truly applicable but chose not to do so as to various categories of information. For this reason, the court had little trouble concluding that the invocation was gamesmanship, as defendants had waited for nearly two years after the civil and criminal matters were initiated to first invoke the Privilege.

On the topic of exceptions to the Privilege objection, one category in particular will be useful. Records that are required to be maintained under particular regulations and/or law do not implicate the Privilege. (*Craib v. Bulmash* (1989) 49 Cal.3d 475, 486 [citing *Shapiro v. United States* (1948) 335 U.S. 1, 35].) An example of records that fall within the "required records exception" are tax returns. (See *Fed. Sav. & Loan Ins. Corp. v. Rodrigues* (N.D. Cal. 1988) 717 F.Supp. 1424, 1426 ["Accordingly, because the required records exception to the Fifth Amendment applies, production of the subpoenaed tax returns is mandated absent some other overriding authority"].) Similarly, "records required to be maintained and produced under" Labor Code section 1174 are insulated from the Privilege. (*Craib*, *supra*, 49 Cal.3d at p. 490.) Because there are numerous laws and regulations that require records to be maintained and available for inspection, it is not possible to provide a comprehensive list of when the required records doctrine applies. Suffice it to say there are plenty of cases that have found the doctrine applicable in a wide variety of contexts. (See e.g., *Weinberg v. Commodity Futures Trading Comm'n* (C.D. Cal. 1988) 699 F.Supp. 808, 814, *aff'd sub nom.Weinberg v. Commodities Futures Trading Comm'n* (9th Cir. 1989) 884 F.2d 1396 ["[R]ecords required to be kept pursuant to the provisions of the Commodities Futures Trading Commission Regulations 4.23(b)(3) and 4.32(b)(3) … [do not implicate] the 5th Amendment …."].)

Although waivers of and exceptions to the Privilege may not apply in every case, the above is intended to make clear that a Privilege objection is often hardly on solid grounds. This is because many of our cases pertain to matters that are highly regulated (e.g., labor and employment) or involve parties that mistakenly believe the Privilege can be wielded whenever they see fit.

Conclusion

A Privilege objection demands evidentiary and tactical considerations that cannot be ignored. There is no question that the Privilege is far from an easy objection to navigate. Nonetheless, as argued in the first installment of "The Fifth Amendment in Civil Cases," there are significant benefits that can be obtained from recognizing when a challenge to the objecting party's invocation of the Privilege is necessary. More than the benefits previously identified, by challenging the legal basis for the Privilege invocation you set up a scenario where the objecting party may have to produce the requested material (no Privilege found) or risk a finding of intentional violation of a court order (i.e., no Privilege found, yet objecting party still refuses to produce the evidence).

By recognizing that the Privilege is an overutilized and under-analyzed objection, we embrace what several attorneys I have looked up to over the years have lived by – prosecution of any case is often as much about evidentiary support as it is about tactical approach. Forcing a proper interpretation and application of the Privilege embraces both considerations – the objecting party now knows that you intend to build your case and/or leverage any benefit provided under the law. Needless to say, our cases only get stronger when we do so.

James Perry is a former Los Angeles County prosecutor and is now a trial attorney with Abir Cohen Treyzon Salo, LLP, *focusing on cases that involve catastrophic injury, wrongful death, product liability, and environmental and toxic torts.*