THE INTERPLAY BETWEEN CIVIL AND CRIMINAL LAW

SLATER ELZA, *Amarillo*
Underwood Law Firm

State Bar of Texas
36TH ANNUAL
LITIGATION UPDATE INSTITUTE
January 30-31, 2020
Austin

CHAPTER 14

SLATER ELZA

Slater Elza's practice focuses on representing businesses and governmental entities in litigation matters. As a litigator, Slater has tried over 125 matters through verdict in state courts, federal courts and arbitrations. Over the past few years he has handled significant litigation in Texas, Louisiana, Oklahoma, New York, New Jersey, Florida, Indiana, Wisconsin, Virginia and Pennsylvania for clients. Slater regularly handles state and federal criminal cases, as well as works on litigation matters with both civil and criminal components.

Slater's non-governmental clients include an international producer and marketer of food, agricultural products and services, various nationally recognized insurance companies, multiple healthcare providers and many other regional employers and businesses. Understanding his clients is very important to Slater as he considers himself more than legal counsel – he solves problems. Slater believes in a team approach that places the best Underwood attorneys for any matter on the case.

He serves as President-Elect for the Texas Association of Defense Counsel, a statewide organization of personal injury defense, civil trial and commercial litigation attorneys, and is a former treasurer and director for the Amarillo Area Bar Association. Elected in 2018, Slater also serves on the Litigation Council for the Litigation Section of the State Bar of Texas and is an elected board member for the Texas City Attorneys Association and former regional chairman for the Texas Supreme Court's Committee on the Unauthorized Practice of Law. Slater regularly speaks around the State on litigation and local government issues. Slater serves on Underwood's Board of Directors, as well as Chairman of the Litigation Practice Group for the Firm.

TABLE OF CONTENTS

THE INTERPLAY BETWEEN CIVIL AND CRIMINAL LAW[1]

If your time to you is worth savin',
Then you better start swimmin',
Or you'll sink like a stone
For the times they are a changin'.

Bob Dylan

INTRODUCTION

There are few legal matters today that do not have the potential for interplay between civil and criminal law. Both Plaintiffs and Defendants have become more aggressive in their use of potential criminal charges to gain leverage. So has the government. Even when this danger is not evident, a cautious practitioner is always looking ahead to avoid the existing issue morphing into a criminal issue. Surprising your client with the news that their stressful civil matter just became a criminal matter potentially affecting their freedom is not acceptable.

There are any number of legal predicaments affected by potential criminal charges:

1. Personal injury claims;
2. False act claims;
3. Employment issues;
4. RICO;
5. Bankruptcy
6. Family law and CPS investigations;
7. Administrative licensure or clearance matters; and
8. Qui tam matters.

History tells us the more emotional the parties and issues, the more likely someone looks to increase the pain faced by his opponent. Further, as local prosecutors look for headlines and U.S. Attorneys offices continue to increase their prosecution numbers, they increasingly look for cases already developed through unlimited civil discovery. We have seen a huge increase in the interplay between litigation counsel and prosecutors.

Because of this, the civil practitioner must develop the wisdom to analyze each decision affecting a client, coupled with the humbleness to reach out for criminal assistance in the best interests of their client. One thing is for sure – the criminal aspects of any matter outweigh the civil process every time.

I. HISTORY OF THE 5TH AMENDMENT AND ITS APPLICATION TO THE STATES AND CIVIL MATTERS

The Fifth Amendment of the United States Constitution contains several of the most important protections for persons accused of crimes (or possibly facing such accusations) under the American criminal justice system. It also affects civil litigants and potential witnesses. In sum, it offers the following safeguards:

- Protection from being prosecuted for crimes unless first legally indicted by a Grand Jury;
- Protection from "double jeopardy" — being prosecuted more than once for the same criminal act;
- Protection from "self-incrimination" — being forced to testify or provide evidence against one's self; and
- Protection against being deprived of life, liberty, or property without "due process of law" or just compensation.

A. Due Process

The cornerstone of the American justice system, the Due Process Clause of the Fifth Amendment of the U.S. Constitution guarantees that no person will be deprived of liberty or property without due process of law. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). This clause imposes two separate limits on government:

- Substantive Due Process: This asks whether the government has an adequate reason for taking away a person's life, liberty, or property. In other words, substantive due process looks to whether there is a sufficient justification for the government's action. Whether there is such a justification depends very much on the level of scrutiny used. Nonetheless, any time the government deprives a person of life, liberty, or property, the government must provide a sufficient justification. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986).
- Procedural Due Process: This refers to the procedures that the government must follow before it deprives a person of life, liberty, or property. The Court must determine what kind of notice and what form of hearing the government must provide when it takes a particular action. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-70 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The due process clause is "a historical product" that traces all the way back to chapter 39 of Magna Carta, in

[1] Special thanks to other Underwood lawyers who pitched in on this paper while I got ready for trial. Specifically, thank you to Jennie Knapp, Jason Fenton, Titiana Frausto, John Smithee, Jr. and Traci Phipps.

which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." W. McKechnie, Magna Carta: A Commentary on the Great Charter of King John 375-95 (Glasgow, 2d rev. ed. 1914); *see also Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). The phrase "due process of law" first appeared in a statutory rendition of this chapter in 1354 - "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law." 28 Edw. III, c. 3. *See* F. Thompson, Magna Cart—Its Role in the Making of the English Constitution, 1300-1629, 86-97 (1948).

Originally, the due process clause had no application at all against the states. *See Barron v. City of Baltimore*, 32 U.S. 243 (1833). However, the Fourteenth Amendment, ratified in 1868, uses the same language found in the Fifth Amendment and protects the same rights from infringement by the states.

B. Grand Jury

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II. Morse, A Survey of the Grand Jury System, 10 ORE. L. REV. 101 (1931). The basic purpose of the grand jury is to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion). This provision, however, only applies in federal courts and is not applicable to the states, either as an element of due process or as a direct command of the Fourteenth Amendment. *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972); *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *Hurtado v. California*, 110 U.S. 516 (1884).

C. Double Jeopardy

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense…. The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187–88 (1957). This concept goes far back in history and some form of it was included in several state bills of rights following the Revolution. For example, the first bill of rights that expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Art. I, Sec. XCI, 4 F. Thorpe, The Federal and State Constitution, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. *Id.* at 3100.

For most of its history, the double jeopardy clause was only binding against the Federal Government. *See Palko*, 302 U.S. at 322. However, in *Benton v. Maryland*, the Court concluded "that the double jeopardy prohibition…represents a fundamental ideal in our constitutional heritage…. Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' … the same constitutional standards apply against both the State and Federal Governments." 395 U.S. 784, 794–95 (1969). Thus, the double-jeopardy limitation now applies to state governments as well.

Finally, the double jeopardy clause applies only to criminal cases. *Ex parte Watkins*, 73 S.W.3d 264, 267–68 (Tex. Crim. App. 2002). For civil proceedings, the doctrine of *res judicata* serves the same basic purposes and principles as double jeopardy does in the criminal context. *Id.* at 267 n. 7 (citing 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 4401 *et seq.* (1981)). However, neither doctrine protects a civil litigant from future criminal charges.

D. Self-Incrimination

The self-incrimination clause comes from the maxim "*nemo tenetur seipsum accusare*," that "no man is bound to accuse himself." The concept arose out of the competition of two different systems of law enforcement that competed in England for acceptance – the accusatorial and the inquisitorial. CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS & INTERPRETATION, GOVERNMENT PRINTING OFFICE, Centennial Edition, at 1484 (2014). In the accusatorial system, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others. *Id.*

In the inquisitorial system, which developed in the ecclesiastical courts, the alleged wrongdoer was compelled to affirm his culpability through the use of the oath *ex officio*. *Id.* Under the oath, an official had the power to force a person before him to take an oath to tell the truth to the full extent of his knowledge. *Id.* Additionally, before administration of the oath, the person was not told about the nature of the charges brought against him or whether he had been accused of a crime. Maguire, Attack of the Common Lawyers on

the Oath Ex Officio as Administered in the Ecclesiastical Courts in England, *in* ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN 199 (C. Wittke ed. 1936).

Opposition to the ecclesiastical oath over a period of time led to the general acceptance of the principle that a person could not be required to accuse himself under oath in any proceedings before an official tribunal seeking information related to a criminal prosecution.

Today, the self-incrimination clause gives a criminal defendant the right not to testify. This means that neither the prosecutor nor the judge can force the defendant to take the witness stand against their will. Additionally, when a defendant pleads the Fifth, jurors are not permitted to take the refusal to testify into consideration when deciding whether a defendant is guilty. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001). However, a defendant who does choose to testify cannot choose to answer some questions but not others. When the defendant takes the witness stand, this particular Fifth Amendment right is considered waived for the duration of the trial. *United States v. Brannon*, 546 F.2d 1242, 1246 (5th Cir. 1977).

The self-incrimination clause can also be employed in the civil context when a witness's answers might incriminate him in a pending or subsequent criminal proceeding. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1086 (5th Cir. 1979). But a civil defendant does not enjoy the same protections against jury bias with respect to liability. A jury is free to make negative inferences when a defendant chooses not to testify in a civil trial for fear of self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Additionally, it must be noted that while there may be instances where complying with a discovery request would violate the right against self-incrimination of an individual business owner, a corporation generally does not possess any Fifth Amendment rights against self-incrimination. *United States v. Kordel*, 397 U.S. 1, 8-9 (1970).

II. THE INTERPLAY BETWEEN CIVIL PROCEEDINGS AND CRIMINAL LAW

Both the United States and Texas Constitutions provide for a right against compelled self-incrimination. U.S. CONST. Amends. V, XIV; TEX. CONST. art. I, § 10. The privilege against self-incrimination applies in civil as well as criminal cases and "protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that could be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972); *see also Ex Parte DeLeon*, 972 S.W.2d 23, 25 (Tex. 1998). The Fifth Amendment applies even to those who are innocent or who deny wrongdoing: "one of the Fifth Amendment's basic functions . . . is to protect *innocent men* . . . who might otherwise be ensnared by ambiguous circumstances." *Reiner*, 532 U.S. at 21 (emphasis original) (internal citations and quotations omitted). "[T]ruthful responses of an innocent witness, as well as a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth." *Id.* (citing *Grunewald v. United States*, 353 U.S. 391, 421–22 (1957)).

In addition to the protection against compelled self-incrimination, a defendant in a parallel civil proceeding has "a due process right to judicial determination of his civil action." *Wehling*, 608 F.2d at 1087–88. "[The U.S. Supreme] Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence." *Id* (citing *Spevak v. Klein*, 385 U.S. 511, 515 (1967)). "Penalty" means more than a prison sentence; it also includes anything that would make the assertion of the Fifth Amendment privilege "costly." *Id*. at 1088 (quoting *Spevak*, 385 U.S. at 515). Courts should not "require a party to surrender one constitutional right in order to assert another." *Id.* Forcing a litigant to invoke the Fifth Amendment in the course of civil litigation can amount to a forfeiture of the due process right to a judicial determination of the civil proceeding. *Id.*

To avoid forcing a choice between one constitutional right and another, the United States Fifth Circuit Court of Appeals in *Wehling* permitted courts to delay civil proceedings as necessary to avoid impinging on a litigant's Fifth Amendment rights. *Id.*; *see also Afro-Lecon v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987). In *Denton II*, the Texas Supreme Court adopted *Wehling* and held that a state district court must consider delaying civil litigation rather than prejudicing litigants who invoke their constitutional right against self-incrimination. *Texas Dept. of Pub. Safety Officers Ass'n v. Denton*, 897 S.W.2d 757, 763 (Tex. 1995); *Afro-Lecon*, 820 F.2d at 1203 (broad scope of civil discovery, opposed to the narrow scope of criminal discovery, supports a stay of the civil case lest either side abuse discovery to gain an advantage). Notably, both *Wehling* and *Denton II* involved a *plaintiff* seeking protection. In other words, courts permitted plaintiffs to file a suit and then offensively obtain abatement to avoid waiver of those plaintiffs' constitutional rights. The argument for protection is even stronger when a civil *defendant*, who did not voluntarily initiate the litigation, seeks relief from the court. *See Wehling*, 608 F.2d at 1089 n.10. However, such protections are not guaranteed.

A. Requesting a Stay of the Civil Proceeding

A party who is faced with both criminal and civil proceedings may file a motion to stay the civil proceeding until the criminal proceeding has been resolved. The Fifth Circuit has stated that "…a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding." *United States v.*

Little Al, 712 F.2d 133, 136 (5th Cir. 1983). In deciding whether a stay should be granted, other jurisdictions have employed a six-factor test considering:

1. the extent of the overlap between the issues in the criminal case and those in the civil case;
2. the status of the criminal case, including whether the defendant has been indicted;
3. the private interests of the plaintiff in proceeding expeditiously, weighed against the prejudice to plaintiff caused by the delay.
4. the private interests of and the burden to the defendant;
5. the interests of the courts; and
6. the public interest.

See In re CFS-Related Sec. Fraud Litigation, 256 F. Supp 2d 1227, 1236-37 (N.D. Okla. 2003). Though Texas courts have also considered many of these issues, no specific method is currently utilized.

While there is no requirement that the party be indicted or formally charged, it may be difficult to be granted a stay if there is no criminal matter pending. Also, if there is no overlap between the two cases, there is no danger or self-incrimination. However, if the party has been indicted or charged, and the cases overlap, there is a large burden placed on the defendant if the stay is denied. The court will also weigh the effect a stay will have on its docket. Despite all the factors to be considered and weighted, the decision to grant a stay is discretionary.

Forcing a party to give a deposition and respond to written discovery in the civil case will unavoidably force them to give up either their Fifth Amendment rights or their due process right to a fair determination of their civil case. As noted in *Wehling*, a party has a right to invoke his Fifth Amendment privilege, even when no criminal charges are pending, if he reasonably apprehends a risk of self-incrimination. 608 F.2d at 1087 n.5. The proper resolution of this dilemma is paramount to the party facing this issue.

Staying discovery against an affected party is necessary to protect their constitutional rights but must not unduly prejudice the other parties. Many parties will seek a total stay, often putting judges in a precarious position. One approach taken by practitioners is to seek protection from directed discovery but allowing other discovery to proceed. Importantly, "inconvenience and delay to plaintiffs" does not provide sufficient grounds for forcing a civil defendant to choose one constitutional right over the other. *Volmar Distrib., Inc. v. New York Post Co.*, 152 F.R.D. 36, 40–42 (S.D.N.Y. 1993). "[U]nder settled authority the Fifth Amendment is the more important consideration." *Id.* Indeed, in *Wehling*, which the Texas Supreme Court cited favorably in *Denton II*, the Fifth Circuit stayed the entire case for *three years*, noting that such a stay was preferable to forcing a litigant to "choose between his silence and his lawsuit." *Wehling*, 608 F.2d at 1089. Another tactical decision involves asking for a limited stay or abatement, allowing the judge to revisit the issue periodically. Some judges may favor "administratively" closing the case so that it will not appear on their census but can be re-opened at the close of the criminal proceedings, including all appeals.

B. Waiver During Discovery

Because some discovery requests require a party to verify the truth of the response, there is the potential of waiving the privilege against self-incrimination. Responding to an interrogatory or request for production without invoking the Fifth could constitute as a waiver. Careful attention should be paid to these issues before a response is given. Because responses to requests for admissions can only be used in the pending matter, they are not subject to 5th amendment protection.

Pleadings, discovery, and testimony in a civil proceeding can be used as a party admission in a subsequent criminal proceeding. This type of evidence may not be hearsay because under both the Federal and Texas Rules of Evidence a statement does not constitute as hearsay if offered against a party and is:

1. the party's own statement in either an individual or representative capacity;
2. a statement of which the party has manifested an adoption or belief in its truth;
3. a statement by a person authorized by the party to make a statement concerning the subject;
4. a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or
5. a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Fed. R. Evid. 801(d)(2); *See also* Tex. R. Evid. 801(3)(2).

It is important to note that this does not deprive the criminal defendant from asserting his Fifth Amendment right in the criminal proceeding and refusing to testify. This distinction is largely meaningless, however, because the mere admission of the defendant's prior incriminating statements is damaging enough without also requiring the defendant to testify. Civil counsel should weigh the pros and cons of invoking or waiving the privilege during the discovery process. It may be wise to consult with a criminal attorney to ensure the party's rights are protected.

C. Defenses to the Assertion of the Privilege

There are situations in which a party is not afforded the Fifth Amendment protections. One example occurs in situations where the statute of limitations has run in regard to the potential criminal charge. (For a list of the time limitations regarding filing criminal charges Texas in state court *see* Tex. Code. Crim. Pro. Ch. 12). When no prosecution can result from an admission of guilt, the privilege against self-incrimination does not apply. Thus, if at the time the questions are propounded the statute of limitations has run, the party or the witness has no right to refuse to answer the questions.

D. Corporations and the Fifth Amendment

"[I]t is well established that 'artificial entities,' such as corporations, are not protected by the Fifth Amendment." *In re Russo*, 550 S.W.3d 782, 788 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (citing *Braswell v. United States*, 487 U.S. 99, 102, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988)). Representatives testifying for an entity cannot invoke the Fifth Amendment privilege. *Id*. This is because "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation, which possesses no such privilege." *Braswell*, 487 U.S. at 100. This is true regardless of the entity's size. *Id*. at 99-100.

Federal district courts faced with this issue have sanctioned organizations whose representative refused to testify on Fifth Amendment grounds. *See In re Anthracite Coal Antitrust Litig.*, 82 F.R.D 364, 369-70 (U.S.D.C.-M.D. Pa. 1979) (imposing sanctions because the only persons with corporate knowledge appearing to testify under Rule 30(b)(6) invoked their individual Fifth Amendment privileges); *Chicago Title Ins. Co. v. Sinikovic*, 125 F. Supp. 3d 769 (N.D. III. 2015) ("Typically, '[a] witness who asserts his Fifth Amendment rights cannot be compelled to serve as a Rule 30(b)(6) deponent' and the corporation can be compelled to answer the questions through an agent who will not invoke the privilege.' But where, as here, the parties stipulated that the corporate deponent was one who invoked his Fifth Amendment privilege and M&M has not proffered another witness, a negative inference can be drawn against M&M despite the fact that it has no Fifth Amendment privilege of its own to assert.") (quoting *Bank of Am., N.A. v. First Mut. Bancorp of Ill*., 09 C 5108, 2010 WL 2364916, at *4 (N.D. Ill. June 14, 2010)); *Worthington Pump Corp. (U.S.A.) v. Hoffert Marine, Inc.*, 34 Fed. R. Serv. 2d 855 (D.N.J. 1982) ("Normally when a corporate official acting as such invokes his fifth amendment privilege, the corporation is required to designate another agent who is capable of furnishing the information without incriminating himself.").

While there is a general rule that a corporation may not invoke the privilege against compelled self-incrimination, that rule is not without its nuances. Indeed, entities comprised of only one person have sometimes been given different treatment than their larger, more structured counterparts. Case law on the topic tends to deal with records production rather than testimony, but the issues are largely the same. The courts have noted that the form of a business entity is not determinative of whether its records receive the protection of the Fifth Amendment. *U.S. v. Slutsky*, 352 F. Supp. 1105, 1107 (S.D.N.Y. 1972). The court in *Slutsky* stated that, if the real property at issue in that case were owned by a sole proprietor, there would be no question that the records would be immune from production under the Fifth Amendment, and there was no reason to remove such protection simply "because there is a shared proprietorship." *Id*.

> The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common interests only.

U.S. v. Silverstein, 314 F.2d 789, 791 (2nd Cir. 1963).

The application of this test is essentially factual. *Id*. The focus is on the extent and nature of the ownership group. *Slutsky*, 352 F. Supp. at 1107. In *Slutsky*, the court concluded that the records "were not kept in any representative capacity, but only for the personal and private business use of the general partners," and the Fifth Amendment privilege was held to apply. *Id*. at 1109. This is an approach to be remembered and analyzed by practitioners, but the reasoning seems somewhat strained to meet a desired result.

Another court reached a similar conclusion in *In re Application of Daniels*, 140 F. Supp. 322 (S.D.N.Y. 1956). In that case, the court examined a summons served upon a corporate president to appear before an agent of the I.R.S. and testify and produce records. The president was also the sole stockholder of the corporation. The corporation of which he was president was a nonresident and had never done business in the United States. He filed a motion to vacate the summons and asserted the Fifth Amendment privilege. The court noted that "[t]he process of whittling away the Fifth Amendment's broad protection by judicial construction was recently criticized by the Supreme Court in *Ullman v. U.S.* In that opinion, the Court described the privilege against self-incrimination as 'one of the great landmarks in man's struggle to make himself civilized … This constitutional protection,' it said, 'must not be

interpreted in a hostile … spirit.'" *Daniels*, 140 F. Supp. at 326-27 (internal citation omitted).

Significantly, the *Daniels* court touched on the issue of live testimony in addition to document production. "The summons seeks to compel oral testimony as well as the production of these records, and since this motion seeks an order vacating the summons in its entirety, there remains the question of whether [the president] is entitled to plead the Fifth Amendment generally now or whether he must appear personally before the Special Agent for oral examination and raise the Fifth Amendment objection to specific questions as they arise." *Id*. at 328. Ultimately, the court determined that neither party had specifically raised the issue of live testimony and, because the court found the law on that topic to be unsettled, it declined to reach the issue. *Id*. However, the court clearly viewed the Fifth Amendment as potentially available to the president. It seems likely he would ultimately have to appear and assert the privilege on a case by case basis.

In contrast, the court in *U.S. v. Silverstein* declined to apply the privilege to a subpoena to a partnership with a large number of limited partners. 314 F.2d at 791-92. According to the court in that case, "it [was] enough to say that the extensive operations involving large numbers of people and large amounts of money … are of such type that the interests of the partners in common far dominate any personal interest [the partnership] may have in the partnership books and records." *Id*. at 791. Part of the court's reasoning in *Silverstein* was the fact that the limited partnership business form had been chosen and represented "an election to submit to a greater degree of governmental intervention than would be true of a simple common-law partnership, and to more closely approximate the corporate form." *Id.*

One commentator has suggested that it would be anomalous to deprive a one-man corporation of the Fifth Amendment privilege while allowing a sole proprietor with a hundred employees to invoke it. Anthony M. Battisti, *The One-Man Corporation and the Fifth Amendment Privilege Against Self-Incrimination*, 1 J.C.R. & ECON. DEV., 181, 183-187 (March 1986). "To divest the owner of a one-man corporation of the privilege against self-incrimination would emasculate the policy behind the Fifth Amendment privilege. The privilege is traditionally invoked to protect one from being subjected to 'the cruel trilemma of self-accusation, perjury or contempt.' … The owner of a one-man corporation would be subject to the very abuses which the Fifth Amendment was fashioned to guard against if he were denied the privilege simply because he chose the corporate form." *Id*. at 187.

Texas largely follows Federal Rule of Civil Procedure 30(b)(6) pertaining to corporate representative depositions and adopted Rule 201(4), now Rule 199.2(b)(1), which provides:

> The notice must state the name of the witness, which may be either an individual or a public or private corporation, partnership, association, governmental agency, or other organization. If an organization is named as the witness, the notice must describe with reasonable particularity the matters on which examination is requested. In response, the organization named in the notice must – a reasonable time before the deposition – designate one or more individuals to testify on its behalf and set forth, for each individual designated, the matters on which the individual will testify. Each individual designated must testify as to matters that are known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized by these rules.

See TEX. R. CIV. P. 199.2(b)(1).

Once the deposition has been noticed and the subject matters to be inquired about are described, certain duties arise for the producing party: (1) designate a witness capable of answering questions on the designated subject(s); (2) designate more than one witness, if necessary, in order to provide meaningful responses to the areas of inquiry that are specified with reasonable particularity; (3) prepare the witness(es) to testify not only on matters known to the corporation but also matters reasonably available to it; and (4) designate additional witness(es) when it becomes apparent that the designated witness is unable to respond to certain relevant areas of inquiry known to or reasonably available to the corporation. *Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998) (mem.).

At least one court has held that an entity may not designate a witness as a corporate representative and then claim the sources of the designee's information are privileged. *See Allstate Tex. Lloyds v. Johnson*, 784 S.W.2d 100 (Tex. App.—Waco 1989, no writ). In *Johnson*, Allstate designated its adjuster who investigated the plaintiff's fire as the corporate representative. When questioned about Allstate's knowledge of facts and identity of witnesses with personal knowledge, both matters within the scope of the notice, counsel instructed the witness not to answer based on attorney-client and investigative privileges. In addition, Allstate failed to designate an alternative witness who could testify without allegedly intruding on those protected areas. The court held that Allstate had, in effect, failed to produce a witness able to testify on matters described with reasonable particularity in the notice. *Id*. at 103-04. Thus, producing a witness who is not capable of disclosing the information without violating privileges is the equivalent of not presenting a witness at all. *Id*.; *see also Bank of N.Y. v. Meridien*

Biao Bank Tanz., Ltd., 171 F.R.D. 135, 151 (S.D.N.Y. 1997) (mem.) (stating that a witness's inability to answer questions on designated subjects was tantamount to a non-appearance.).

The Amarillo Court of Appeals recently addressed this issue in an opinion following a party seeking protection from testifying in a representative capacity. *In re Nat. Gas Consulting & Measurement, LLC*, 07-18-00309-CV, 2018 WL 7458616 (Tex. App.—Amarillo Oct. 10, 2018, no pet.), reh'g denied (Nov. 16, 2018). The individual was sued along with his single member LLC. Plaintiffs sought to require the LLC to designate a corporate representative to testify on a number of topics. The individual defendant appeared as the corporate representative, invoking his Fifth Amendment privilege over 400 times. Plaintiffs contended that a corporate entity could not invoke the privilege, while the individual and entity argued "there is no absolute rule" preventing the sole member and only knowledgeable representative of an LLC from invoking the privilege. The appellate court ultimately ruled that the trial court could compel production of records, but not oral testimony.

E. Bankruptcy Proceedings

While presenting analyses similar to those faced by the civil practitioner, the Fifth Amendment poses unique challenges in the bankruptcy context. These challenges include the mandatory disclosures via bankruptcy petitions and schedules, the risk that discharge will be denied without full disclosure, and that waiver of a debtor's Fifth Amendment rights may be inferred as opposed to arising out of only knowing and intelligent conduct. Additionally, because an entity has no privilege against self-incrimination, its officers generally cannot prevent disclosure of documents and testimony that would incriminate them personally. *Braswell*, 487 U.S. at 108 (president of corporation could not assert Fifth Amendment as basis for refusal to produce corporate records).

As the bankruptcy lawyer is aware, the disclosure requirements come early and often in a bankruptcy proceeding. The debtor must file a petition and disclosures. 11 U.S.C § 521. A reasonable time thereafter, the debtor must submit to questioning in the meeting of creditors. 11 U.S.C. § 341. The debtor may also be deposed via a 2004 examination. Fed. R. Bankr. P. 2004. Both the 341 meeting and the 2004 examination are recorded and can be reduced to writing. *Miranda* warnings are not required in the bankruptcy process, so waiver of the privilege can occur unwittingly in each of these settings. *See United States v. Jackson*, 836 F.2d 324, 327 (7th Cir. 1987) (holding that a debtor who was "convicted of giving false oaths at bankruptcy proceedings and concealing creditor's collateral" was not entitled to Miranda warnings during the bankruptcy proceedings); *In re Donald Sheldon & Co.*, 193 B.R. 152, 162 (Bankr. S.D.N.Y. 1996). Because notice of the privilege is not required in the civil setting, the bankruptcy lawyer must be on alert to unambiguously assert the privilege or it is lost. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984).

To assert the privilege properly, there must be (1) compelled disclosure, (2) that is testimonial, and (3) incriminatory. *In re Connelly*, 59 B.R. 421, 430-31 (Bankr. N.D. Ill. 1986). In that scenario, however, a blanket assertion of the privilege will not suffice. *In re ICS Cybertronics, Inc.*, 107 B.R. 821, 829 (Bankr. N.D.N.Y. 1989). The debtor must ultimately show how each question or request presents an actual risk of incrimination and prosecution. *See, e.g., In re French*, 127 B.R. 434, 440 (Bankr. D. Minn. 1991). Thus, even when the potential for incrimination is clear and widespread, though, the debtor cannot refuse to attend a creditors' meeting or refuse to provide the required schedules. *In re Russell*, 392, B.R. 315, 361 & 368 (Bankr. E.D. Tenn. 2008).

Production of documents provides a unique analysis in this context. As a general rule, the Fifth Amendment does not prohibit the production of many documents (deeds, bank statements, tax returns, etc.) because the creation of those documents was not compelled. *Fisher v. United States*, 425 U.S. 391, 410 n.11 (1976). However, the act of production itself can be testimonial in the form of admissions that the documents exist, are in the possession and control of the debtor, or authentic. *In re Connelly*, 59 B.R. at 440. Under this act-of-production privilege, a debtor may assert the Fifth Amendment privilege if the act itself is actually testimonial and the documents are incriminating. *In re Sambrano Corp.*, 441 B.R. 562, 566 (Bankr. W.D. Tex. 2010). Under this exception though, the first step of the bankruptcy practitioner's analysis is to determine ownership of the documents. If the documents are owned by the bankruptcy estate or a third party, the Fifth Amendment does not provide a privilege against production. *In re Fuller*, 262 U.S. 92, 93–94 (1923). The majority position is that a debtor has title to the documents sufficient to successfully assert the Fifth Amendment if it owns *and* possesses the documents in question. *In re Ross*, 156 B.R. 272, 275–77 (Bankr. D. Idaho 1993). The Fifth Circuit falls in the majority on this issue. *United State v. White*, 477 F.2d 757, 763 (5th Cir. 1973). The minority position requires only possession of the documents in question. *United States v. Cohen*, 388 F.2d 464, 468 (9th Cir. 1967).

Assertion of the privilege in oral testimony, whether at the creditors' meeting or a 2004 examination, bears no significant difference from assertion in the civil setting. However, the debtor may be granted immunity regarding oral testimony. 11 U.S.C. § 344. If immunity

is granted, the debtor's testimony may be compelled.[2] However, if immunity is not granted, the debtor may refuse to testify and maintain a right to discharge. *See* 11 U.S.C. § 727(a)(6)(A).

Navigating the debtor's privilege against self-incrimination requires vigilance and special attention to balance the privilege against the Code's predilection toward disclosure and transparency. The bankruptcy attorney must carefully analyze these and other considerations from the moment of intake. For a more in-depth discussion of these issues, see Tarvin, *The Privilege Against Self-Incrimination in Bankruptcy and the Plight of the Debtor*, 44 SETON HALL L. REV. 47 (2014).

F. Administrative Proceedings

A witness in an administrative hearing may be able to plead the Fifth Amendment but should take several restrictions into account when considering use of the privilege.

In order for the privilege to be available, the potential penalty to be imposed by the agency must be criminal in nature. A penalty is criminal in nature when it is sufficiently punitive in purpose or effect. *See Flemming v. Nestor*, 363 U.S. 603 (1960). While not dispositive or exclusive, courts have identified several factors to consider in determining the penal intent of a penalty:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169–69 (1963).

Further, the privilege is only available for statements that are coerced and testimonial in nature. The required records doctrine is specifically applicable to administrative hearings and recognizes that regulations may be promulgated that require people to keep business records in the ordinary course of business that must be provided for review by agencies. An order compelling production of such business records would not be protected by the Fifth Amendment unless specifically targeted at a group suspected of criminal activities. *Shapiro v. United States*, 225 U.S. 1 (1948); *Marchetti v. United States*, 390 U.S. 39 (1968).

Similar to immunity in other contexts, an agency may compel testimony by granting the witness immunity from criminal prosecution. The Attorney General must approve the grant of immunity and the testimony must be mandatory to the public interest. 18 U.S.C. § 6004. However, the witness may still face criminal prosecution based on evidence obtained outside of the administrative hearing. *Kastigar*, 406 U.S. at 441.

G. Employees and Insureds

From time to time, counsel will be called upon to represent an employee who is facing actual or pending criminal proceedings. Counsel must understand and take all necessary steps to protect their client's Fifth Amendment rights against self-incrimination. Such counsel must put the client's criminal interests before any thoughts of salvaging civil litigation.

Many times, it will be easy to foresee potential criminal issues – sometimes not. Early and often communications are necessary to discover potential criminal issues. Once identified, it is imperative that the privilege not be waived. A client cannot voluntarily testify about a subject and later invoke the privilege. *Mitchell v. U.S.*, 526 US 314, 322 (1999). The privilege is waived as to those matters discussed by the party. *Id.* By opening the area of disclosure, the client has established the scope of non-examination. *Id.* Similar consequences can arise through response to written discovery. The practitioner must stand prepared to protect his client at each and every inquiry.

[2] *See Kastigar*, 406 U.S. at 453. While the Code is silent as to the type of immunity that must be offered to compel testimony, *Kastigar* states only use and derivative use immunity, as opposed to transactional immunity, is required.