MEMORANDUM ON:

WHAT DO YOU DO WHEN THE DEPONENT TAKES THE FIFTH?

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You are deposing the president of an investment firm. Your client is suing the firm on a constructive trust and accounting cause of action. Your first two background questions, concerning the deponent's name and age, he politely answers. You next ask him who he works for. The president refuses to answer on the grounds that the answer may tend to incriminate him. Undaunted, you ask him where his firm is located. Again, he stands on the Fifth Amendment. You get the same response to your question concerning how long he has been associated with this investment firm. How do you deal with this recalcitrant deponent?

This article reviews the general rules and principles surrounding the Fifth Amendment privilege against self-incrimination, along with providing guidelines for proceeding with discovery when the Fifth Amendment is asserted at a deposition.

Amendment V

The Fifth Amendment of the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." The Illinois Constitution contains substantially the same language.

It is well established that the privilege against self-incrimination may be asserted by any witness in any civil proceeding or pre-trial examination where there is a reasonable apprehension of criminal prosecution. *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

The mere assertion of the Fifth Amendment privilege does not automatically insulate a party from the usual duty to comply with discovery. The Supreme Court in *Hoffman v. United States*, 341 U.S. 479 (1951), dictated that a witness can properly invoke the Fifth Amendment protection when he or she has reasonable cause to apprehend danger of self-incrimination from a direct answer. However, the Court in *Hoffman* recognized the long-standing principle that the Fifth Amendment privilege not only extends to answers that would themselves support a conviction, but also embraces answers that furnish a link in the chain of guilt that alone may not indicate any crime. Therefore, a party who reasonably apprehends a risk of self-incrimination may claim the privilege even though no criminal charges are pending against him or where the risk of prosecution is remote. *10-Dix Building Corp. v. McDaniel*, 134 Ill.App.3d 664, 480 N.E.2d 1212 (1st Dist. 1985).

The court must determine if the deponent's fear of self-incrimination is well-founded. *Mason v. United States*, 244 U.S. 362 (1917). In determining reasonable fear of self-incrimination, a court must not look at the likelihood of prosecution, but the possibility of prosecution. *Hoffman v. United States*, 341 U.S. 479 (1951); *In Re Folding Carton Antitrust Litigation*, 609 F.2d 867 (7th Cir. 1979); *People v. Burkert*, 7 Ill. 2d 506, 131 N.E.2d 495 (1955). Courts do not recognize fanciful and imaginary fears of self-incrimination as constituting a possibility of prosecution. *Mason, supra; People v. Schultz*, 380 Ill. 539, 44 N.E.2d 601 (1942).

Who Can Use The Shield Of The Fifth Amendment?

The framers of the constitutional guarantee against compulsory self-incrimination were interested primarily in protecting individual civil liberties. The framers did not intend to have the privilege available to protect the economic and other interests of organizations. *United States v. White*, 322 U.S. 694 (1944). Yet, numerous cases have concluded that the privilege against self-incrimination extends not only to oral testimony, but also to personal documents and business records of the sole proprietor or practitioner. *United States v. Doe*, 465 U.S. 605 (1984); *Boyd v. United States*, 116 U.S. 616 (1886); *In re Zisook*, 88 Ill.2d 321, 430 N.E.2d 1037 (1982).

Since the privilege against self-incrimination is purely personal, courts have removed the protective shield of the Fifth Amendment from individuals who act as representatives of collective business entities. Collective business entities have no privilege against self-incrimination with respect to the content of

a business document. *Bellis v. United States*, 417 U.S. 85 (1974). Similarly, representatives of collective business entities have no Fifth Amendment protection with respect to producing business records, even if these records might incriminate the representative personally. *Id.* This maxim has been applied to corporations, partnerships, unincorporated associations and unions. Additionally, a personal record can lose the protection of the Fifth Amendment if it contains commingled notations of a collective business entity. *United States v. Wattman*, 394 F.Supp. 1393 (W.D. Pa. 1975).

When The Deponent Loses Fifth Amendment Protection

When the possibility of criminal prosecution is nonexistent, the deponent's right to assert the privilege disappears. The elimination of the possibility of criminal prosecution occurs in a variety of ways: the statute of limitations expires, the prosecution grants the deponent immunity, the deponent waives his Fifth Amendment privilege.

The privilege can no longer be asserted after the prosecution for a crime is barred by lapse of time. The interrogating party has the burden of proving no prosecution has been commenced within the period of time during which prosecution was permissible. *O'Neil v. O'Neil*, 299 F. 914 (1924). The decision to prosecute is entirely within the prosecutor's discretion. Consequently, a judge's prediction as to the likelihood of whether a prosecutor will file an indictment is not dispositive in ascertaining the permissible scope of a claimed Fifth Amendment privilege. Furthermore, the Fifth Amendment protection afforded the deponent will not be eviscerated merely on counsel's assurances that he does not happen to know of any current investigation. *In Re Corrugated Container Antitrust Litigation*, 661 F.2d 1145 (7th Cir. 1981).

The privilege against self-incrimination can be supplanted by a grant of immunity. The two types of immunity are transactional immunity and use immunity. Under transactional immunity, the witness is fully immunized from prosecution for any offenses to which his compelled testimony may relate. Use immunity protects a witness's compelled testimony or leads derived therefrom from being used against him. *Kastigar v. United States, 406 U.S. 441 (1972); People ex rel. Cruz v. Fitzgerald*, 66 I11.2d 546, 363 N.E.2d 835 (1977).

However, use immunity given to a witness in one proceeding affords no protection against self-incriminating information disclosed by the witness in other proceedings prior to or subsequent to the immunized proceeding. *In Re Corrugated Container Antitrust Litigation, supra*, at 1154. Therefore, repeating immunized testimony in an independent proceeding may itself be viewed as incriminating; i.e., repeated or acknowledged testimony could constitute an independent source of evidence, allowing a deponent to raise his Fifth Amendment privilege. *Id.* As the interrogator, do not be surprised if the deponent, even with prior assurances of immunity, reasserts his Fifth Amendment privilege.

Perhaps the most fertile ground to remove the shield of Fifth Amendment protection from a deponent exists in the area of waiver.

Perhaps the most fertile ground to remove the shield of Fifth Amendment protection from a deponent exists in the area of waiver. The general rule is that a deponent may choose when to stop giving testimony and to assert his Fifth Amendment privilege. However, if a deponent voluntarily discloses any facts regarding a criminal transaction or connection, he is not permitted to stop, but must go on, because disclosure of a fact waives the privilege as to details. *Brown v. Walker*, 161 U.S. 591 (1896); *Rogers v. United States*, 340 U.S. 367 (1951). The rationale is that if a deponent were permitted to select the stopping point after disclosing facts, and then assert his Fifth Amendment privilege as to the details surrounding the facts, a great distortion of the facts would result. *Rogers v. United States*, 340 U.S. 367 (1951).

As early as 1924, the U. S. Supreme Court held that the Fifth Amendment privilege is not waived by the filing of nonincriminating pleadings in a civil action. *Arndstein v. McCarthy*, 254 U.S. 71 (1920). Following *Arndstein*, cases have held that the Fifth Amendment privilege is not waived by the filing of a complaint followed by an answer to a counterclaim, *Backos v. United States*, 82 F.R.D. 743 (E.D. Mich. 1979); or by responding to interrogatories, *Duffy v. Currier*, 291 F.Supp. 810 (D. Minn. 1968); or by pleading an affirmative defense, *United States v. 47 Bottles*, 26 F.R.D. 4 (D.N.J. 1960); *IO-Dix Building Corp. v. McDaniel*, 134 Ill.App.3d 664, 480 N.E.2d 1212 (1985). However, one court has determined that a deponent waived his Fifth Amendment privilege when he submitted affirmations and affidavits opposing a motion for summary judgment earlier in the proceedings. *Camelot Group Ltd. v. W. A. Krueger Co.*, 486 F.Supp. 1221, 1230 (S.D.N.Y. 1980). Whether a witness has waived the privilege will be determined by the trial court when a response by a party amounts to an admission of guilt or furnishes clear proof of crime.

How To Deal With The Fifth Amendment At A Deposition

The federal and Illinois Rules of

Civil Procedure specifically give a party a right to question a witness by oral deposition. As a general rule, the deponent must show up at the deposition and assert his privilege to each question asked of him. A deponent's refusal to appear at a deposition because he believes all possible questions will be protected by the Fifth Amendment is not acceptable. *In Re Zisook*, 88 Ill.2d 321, 430 N.E.2d 1037 (1982). Similarly, a blanket refusal to answer any and all questions at a deposition is not acceptable. *Camelot Group Ltd. v. W. A. Krueger Co.*, 486 F.Supp. 1221 (S.D.N.Y. 1980). Furthermore, the deponent cannot have the court review all of the interrogator's questions in advance of his refusal to answer. *National Life Insurance Co. v. Hartford Association and Indemnity Co.*, 615 F.2d 595 (3rd Cir. 1980); *Guy v. Abdulla*, 58 F.R.D. 1 (N.D. Ohio 1973).

As the interrogator, it is your job to clarify the breadth and scope of the deponent's position on his Fifth Amendment privilege. Since a blanket refusal to answer is unacceptable and provides no basis for the reviewing court to determine the propriety of the claimed privilege, you should not stipulate to a termination of the deposition or to a blanket refusal not to attend. Instead, you should require the deponent to assert the privilege on each question. This way, the court has a record on which to decide whether the privilege has been properly asserted to each specific question. *Gatoil Inc. v. Forest Hill State Bank*, 104 F.R.D. 580 (D. Md. 1985).

The proper vehicle for the court to review the record is a motion to compel discovery. Fed.R.Civ.P. 37; Illinois Supreme Court Rule 219. Some courts prefer that the deponent specify in writing with respect to each separate question to which he objects, the grounds for objection and, wherever possible without self-incrimination, to what degree a responsive answer might have a tendency to incriminate him. *Gatoil Inc., supra*. You may suggest to the court that requiring the deponent to respond in writing to each question is appropriate and will aid the court in its determination of whether the privilege has been properly asserted.

It also is your job as the interrogator to ascertain whether the witness has received a grant of immunity or even informal assurances that federal or state authorities will not prosecute. The following questions may be used to elicit this information:

Q: Are you or have you been under investigation by any federal or state authorities?

Q: Are you being or have you been called to testify in any federal or state grand jury proceedings?

Q: Are you receiving or have you received any formal or informal assurances of immunity from any federal or state authorities?

Follow up these questions with the standard who, when, where and why questions. These simple but fundamental questions can lay the groundwork for a motion to compel answers and possibly an award of expenses if you show the asserted privilege is not substantially justified. Fed.R.Civ.P. 37(a)(4); Illinois Supreme Court Rule 219(a).

Regarding statute-of-limitations concerns, review the applicable statute and time frame in question to determine whether the statute has run at the time of the deposition. However, for some crimes the statute of limitations may not have expired at the time of the deposition (i.e., conspiracy), thereby giving the deponent legitimate Fifth Amendment protection. The fact remains, probing this area may prove helpful. For example, you may wish to ask the following questions:

Q: Do you know the plaintiff?

Q: How do you know the plaintiff?

Q: When did you first meet the plaintiff?

Although simplistic, these general questions may provide a suitable time frame for you and the court to determine if the appropriate statute of limitations has expired. Moreover, the answers to these questions may constitute a waiver of the deponent's privilege against

self-incrimination.

Since waiver is the most fertile ground for piercing the shield of the Fifth Amendment, you must attempt to get the deponent to reveal at least some information or facts. The axiom is that once the deponent reveals a fact, he waives the privilege against self-incrimination as to the details surrounding the fact. Your lance in piercing the shield of the Fifth Amendment is the innocuous question. The innocuous question must be specific enough so that the court can determine whether the deponent's response could result in possible prosecution. The purpose of using innocuous questions is twofold. First, specific innocuous questions will bolster your motion to compel. Frequently, a judge will agree that the question is so innocuous that the Fifth Amendment privilege cannot attach to the question. Using this method of questioning, will successfully narrow the deponent's liberal use of the Fifth Amendment privilege. Second, the deponent may be lulled into a false sense of security by thinking that the innocuous questions and his responses are harmless. By obtaining factual responses, you are entitled to probe the details surrounding the responses.

Should the deponent refuse to answer even the most innocuous questions, simply ask the deponent what areas is willing to discuss. If the deponent refuses to respond, his assertion of the Fifth Amendment privilege may appear unreasonable and unjustified. Any information he does give you is a springboard to the areas that may be probed for details.

Using The Fifth Amendment As Shield And Sword

Courts overwhelmingly frown on a plaintiff in a civil action invoking the Fifth Amendment privilege against self-incrimination while maintaining a lawsuit. Although it is true that plaintiffs cannot be forced to involuntarily incriminate themselves, they should not be permitted to use the Fifth Amendment privilege as both a shield of protection and a sword of attack.

Where plaintiffs force defendants into court, it would be unjust to allow them to prosecute their cause and at the same time refuse to answer defendants' questions. *Galante v. Steel City National Bank of Chicago*, 66 Ill.App.3d 476, 384 N.E. 2d 57 (1978). Your ultimate relief in such a situation may be a motion to dismiss with prejudice. This would apply with equal force to a defendant's counterclaim.

Conclusion

Armed with an understanding of the Fifth Amendment, you can use effective questioning to forestall a recalcitrant deponent's liberal use of his Fifth Amendment privilege. By forging ahead with the deposition using specific questions, you may reveal information exposing either the deponent's immunity or the deponent's unjustified assertion of the Fifth Amendment due to the running of the statute of limitations. By using specific innocuous questions, you may lead the deponent into the fertile area of waiver. Even if the witness refuses to answer the innocuous questions, the deponent's refusal will lay the groundwork for a motion to compel answers.

INTERROGATOR'S CHECKLIST

- Who is taking the Fifth Amendment? The privilege is purely personal; corporate officers in their representative capacity cannot assert it.
- How is the privilege being asserted? Blanket refusals are not acceptable. Do not terminate the deposition — keep going.
- Determine the breadth and scope of the deponent's position on his Fifth Amendment privilege. Only answers that have a possibility of being used as a basis for prosecution are privileged.
- Determine if the possibility of prosecution is barred by the statute of limitations or a grant of immunity.
- Determine if the deponent waived the privilege by revealing incriminating facts without raising the privilege. The deponent must give details.
- Determine which areas the deponent is willing to talk about. He may waive his privilege in some areas.
- Ask specific innocuous questions to lay the groundwork for a motion to compel answers.

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