Criminal Law by Nelson P. Brav, Column Editor

Protecting Against Self-Incrimination

Nelson Brav has practiced criminal law since 1970, beginning with Defender's Inc. of San Diego. In 1973 he entered private practice adding cases in injury and business litigation. He has been a Director and Vice President of the San Diego County Bar Association, President of the Criminal Defense Lawyer's Club and a member of the Law and Justice Agency Advisory Board for the County of San Diego. He practices with Steven Schwartz in San Diego at Brav & Schwartz, APC. Mr. Brav has been the Criminal Law Column Editor for ***Trial Bar News*** since 1998. He may be reached by e-mail at: **nbrav@cts.com**.

On occasion, criminal defense attorneys are asked to help protect a party or a witness in a civil action from incriminating responses to civil discovery. Production of documents, interrogatories, and requests for admissions all require verification under penalty of perjury. Answers at depositions are, of course, under oath. Documents that are produced can be incriminating by content, signatures, or even by possessing them.

Yet, we often experience reluctance to assert the Fifth Amendment privilege. Both from an emotional and substantive response, the reaction is understandable. For the client it can be embarrassing and appear reputationally harmful. For the lawyer, it can mean requesting a stay of discovery and a continuation of the trial. It can also impact the client's ability to testify at trial and damage his or her claim. See, *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 307-308. An adversary can gain leverage and even cause for excluding evidence at trial. However, the failure to assert the privilege when necessary can have worse consequences. It can provide a prosecutor with admissions, incriminating writings and even a confession which results in a criminal conviction with potential incarceration.

Some basics may be helpful. First of all, the privilege applies to individuals. It does not protect corporate records and records from various other entities. *Braswell v. United States* (1988) 487 U.S. 99, 102; and *Bellis v. United States* (1974) 417 U.S. 85, 88.

However, writings by corporate officials may constitute personal records. To determine whether a document belongs in the corporate or personal category, a functional test has been applied. For example, a pocket calendar maintained by a business executive for personal use which does not involve secretarial access was deemed a personal record. However, a desk calendar, kept both by the secretary and the corporate official, and which was open to view on the desk, would more probably be in the corporate record category and thus not protected. *United States v. MacKey* (9th Cir. 1981) 647 F.2d. 898, 901. Even though the contents of business records are not generally privileged, the act of producing them can be and may not be compelled without a grant of use immunity. *United States v. John Doe* (1984) 465 U.S. 605, 612.

Normally, depositions pose the biggest problem. The questions that can cause the harm can come as a surprise. The responding party can't refuse to answer all questions by claiming a blanket privilege, but must be selective and assert the protection on a question by question basis. *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, 174. Further, there must be some showing of the actual possibility of a criminal prosecution. *Blackburn v. Superior Court (Orange County)* (1993) 21 Cal.App.4th 414, 426. There is no requirement that you explain in detail the reasons since the reasons themselves could also be incriminating. Adequately preparing your client for deposition as well as thorough investigation of the case during its preparation for discovery and trial should alert you to the possibility of a Fifth Amendment situation, although there can always be surprises.

It is usually helpful if you can write out on a card a short one liner invoking the privilege and have the client ready to read the response when you tell him or her to. A simple assertion such as "I assert my Fifth Amendment privilege against self incrimination" will suffice, but it must be repeated as often as necessary. The person asking the deposition questions may bring a motion to compel responses. A defense can then be prepared justifying the protection.

If you know in advance of the deposition that the privilege must be asserted, it is helpful to contact the opposing attorney to suggest that the deposition be postponed to give the client an opportunity to consult with a criminal defense attorney if you think that is appropriate. If there is a refusal, a protective order may be sought *ex parte*.

The privilege exists not only in the Fifth Amendment to the United States Constitution, but in Article 1, Section 15 of the California Constitution. Also, California Evidence Code §940 states that a person can "refuse to disclose any matter that may tend to incriminate him." The privilege applies with equal force to civil matters. *Murphy v Waterfront Commission of New York Harbor* (1964) 378 U.S. 52, 79. There should be no shame in asserting the protection. It "registers an important advance in the development of our liberty." *Ulmann v. United States* (1956) 354 U.S. 422, 426, (Quoted from Griswold, *The Fifth Amendment Today* (1955), 7).

In protecting your client against a motion to compel, a declaration from the criminal defense lawyer that an investigation is underway, or that a criminal case is already filed, coupled with a certified copy of the complaint or indictment, makes the case for judicial protection. However, the existence of such an investigation or pending case is **not a requisite**. It is sufficient that if the information sought and provided would furnish "a link in the chain of evidence needed to prosecute" the individual for a crime. *Hoffman v. United States* (1951) 341 U.S. 479, 486-487.

The important thing is to be ready to protect your client if the need arises and knowing how to do it. The failure to assert the privilege when necessary can have serious consequences for your client.