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'I Plead the Fifth'

The self-incrimination privilege can be interposed at civil depositions

By Daniel E. Cummins
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Although it is a rare occurrence when a witness claims the privilege against self-incrimination at a deposition, attorneys should be knowledgeable on the law surrounding the privilege so that they may prepare for or quickly respond to the situation.

Understanding the implications of invoking the privilege at a deposition is made all the more formidable by the scant case law on this issue. Because Pennsylvania state court decisions on the issues are guided by federal standards, analysis of both state and federal court decisions is required.

The Privilege

The Fifth Amendment of the U.S. Constitution states that "No person...shall be compelled in any criminal case to be a witness against himself."

On the state level, Article 9, Section 1 of the Pennsylvania Constitution provides that an accused in a criminal proceeding "cannot be compelled to give evidence against himself." However, as discussed by the noted discovery guru, Judge R. Stanton Wettick Jr., with the Fifth Amendment privilege against self-incrimination being applicable to the states through the Fourteenth Amendment, the privilege is generally reviewed under federal standards. *In re Petition for Deposition*, 52 Pa.D.&C.4th 552 (C.P. Allegheny 2001).

Applicability of the Privilege to State Civil Proceedings

The federal courts and the Pennsylvania state courts have held the privilege against self-incrimination to be applicable to civil as well as criminal proceedings. See *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Evans v. Metropolitan Life Insurance Co.,* 144 A. 294 (Pa. 1928). Additionally, the Pennsylvania courts have ruled that the privilege applies to witnesses as well as parties. See *Commonwealth v. Tracey*, 8 A.2d 622 (Pa. Super. 1939).

The general rule is that testimony which would be privileged at trial must be equally excluded from disclosure during the pretrial discovery proceedings. *Homestead v. Mortgagexpress*, 47 Pa.D.&C.4th 121 (C.P. Monroe 2000). In other words, a witness is entitled to the same protection at all stages of the proceeding, including a deposition.

The right to invoke the privilege against self-incrimination at a deposition is also implicit in the Pennsylvania Rules of Civil Procedure. Rule 4007(a) provides, in part, that "[s]ubject to the limitations provided by Rule 4011, the deponent may also be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the action and will substantially aid in the preparation of the pleadings or the preparation or trial of the case."

Pennsylvania Rule of Civil Procedure 4011, entitled "Limitation of Scope of Discovery and Deposition," states that "[n]o discovery or deposition shall be permitted which...relates to matter which is privileged." 42 Pa.R.C.P. 4011(c). It is the well settled rule that the right against self-incrimination comes within the "privilege" referred to in Rule 4011 (c). *Putnik Travel & Tourist Agency v. Goldberg*, 17 D.&C.2d 590 (1958). Pursuant to these rules, the privilege against self-incrimination can serve as the basis for refusing to answer questions asked at oral deposition. Id.

Proper Assertion

The witness bears the burden of showing that a reasonable ground exists for asserting the privilege. *McDonough v. PennDOT*, 618 A.2d 1258 (Pa. Commw. 1992). If the witness' claim of the privilege is contested, it is for the court to decide the propriety of the assertion.

The Pennsylvania state courts follow the federal rule that the privilege protects an individual from being called as a witness against himself or herself in both criminal and civil proceedings, formal or informal, where the answers to questions might incriminate the individual in future criminal proceedings. *Commonwealth v. Lutz*, 618 A.2d 1254 (Pa. Commw. 1992).

However, as the McDonough court said, the "privilege against self-incrimination may only be asserted when the witness is being asked to testify to self-incriminating facts and only when a witness is asked a question demanding an incriminating answer." The privilege is inapplicable "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." *Brown v. Walker*, 161 U.S 591 (1896).

The privilege may also be asserted to support a refusal to produce documents ordered by a subpoena deces tecum in conjunction with a deposition. See *Woods v. Dunlop*, 334 A.2d 619 (1975). However, a custodian of corporate records may not refuse to produce records on the basis of the privilege against self-incrimination. As discussed by Wettick in *Hass v. Bowman*, 62 Pa.D.&C.4th 1, 15-16 (C.P. Allegheny 2003), the law is also settled that only an individual may assert a Fifth Amendment privilege. The Fifth Amendment's protection against self-incrimination does not apply to corporations. Accordingly, a while a corporate designee may assert the privilege personally to protect himself or herself, he or she may not assert the privilege on behalf of the corporation.

Manner and Timing

Questions have arisen as to the time and manner in which the privilege must be claimed. The privilege "must be personally and specifically claimed by the person entitled to it." *Ecker v. McClimons*, 6 D.&C.2d 677 (C.P.Mercer 1956). Counsel for a party or personal counsel of a witness is permitted to direct his client not to answer a question on the grounds that it may incriminate the client. Id. However, once a witness has testified as to potentially incriminating evidence, the privilege is considered waive and the witness can be compelled to divulge further details in response to questioning. *Harrison v. U.S.,* 392 U.S. 219 (1968).

Additionally, the privilege against self-incrimination may be invoked only when charges are pending or imminent. *Altieri v. Pennsylvania Coal Co.*, 25 D. & C. 2d 714 (1961). Where there is "no indictments pending and no immediate danger of prosecution in the State," the deponent was not entitled to exercise the privilege. As in *Putnik*, a deponent may invoke the self-incrimination privilege where the charges arise in a foreign jurisdiction.

No Criminal Charges

The ability of a deponent to assert a privilege against self-incrimination where there is no possibility of criminal charges, such as where the witness has already been tried, where immunity has been granted or where a statute of limitations has expired, is somewhat unsettled.

There is no question that it is well established that a deponent's answers may be compelled by the court, regardless of the privilege, where the witness has been granted immunity from federal or state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. *Marine Midland Trust Co. v. Douvanis*, 50 D.&C.2d 403 (C.P. Lehigh 1970) citing *Gardner v. Broderick*, 392 U.S. 273 (1968); see also *Riccobene's Appeal*, 268 A.2d 104 (Pa.1970). Questions arise, however, as to whether the privilege may be properly asserted when a statute of limitations on criminal charges has run.

Although there are federal decisions in other jurisdictions holding that the privilege against self-incrimination may not be invoked where the statute of limitations has run on the charges, such has not been the settled rule in Pennsylvania. See, e.g., *Siviglia v. Siviglia*, 138 F.R.D. 452 (E.D. Pa. 1991).

In the ancient case of *McFadden v. Reynolds*, 11 A. 638 (Pa. 1887), the Supreme Court held that a deponent may indeed invoke the privilege even where the statute has run. The court reasoned that if the deponent is prevented from invoking the privilege where a statute has run, there would be no protection from the ignominy, trouble and expense of counsel in asserting a defense to the charges. Since being handed down around 120 years ago, the *McFadden* decision has been cited with favor on one occasion in a plurality opinion of the state Supreme Court and has never been overruled. See *In re Petition for Deposition*, 52 Pa.D.&C.4th at 560-561 citing *Commonwealth v. Lenart*, 242 A.2d 259 (Pa. 1968). Additionally, for a time, numerous Pennsylvania courts of common pleas continued to follow the *McFadden* decision. See *Putnik*, *Altieri*, *Shor v. Redden*, 33 D.&C.2d 179, (C.P. Bucks 1964); *Huyett v. Reading*, 34 D.&C.2d 193 (C.P. Bucks 1964).

However, Wettick, in a more recent decision in 2001, questioned the continuing validity of the *McFadden* decision in this day and age where the appellate courts repeatedly compel witnesses to testify in the similar situation where the witness has been granted immunity from any criminal charges. *In re Petition for Deposition*, 52 Pa. D. & C. 4th at 562-563. Accordingly, while it appears that trial courts may now become more inclined to compel a deponent to answer questions where the statute of limitations had expired on any potential criminal charges, there still appears to be grounds to assert the privilege in such a situation. *In re Petition for Deposition*, 52 Pa. D. & C. 4th 552 (C.P. Allegheny 2001).

Motion to Compel

When the privilege is claimed, the court will not deny all discovery. *Clark v. Lutcher*, 77 F.R.D. 415 (M.D. Pa. 1977). While a deponent may refuse to answer certain questions, or may make partial answers and stop where he or she believes further answer will incriminate him, the witness may not refuse to be deposed altogether. See *DeVita v. Sills*, 422 F.2d 1172 (3d.Cir. 1970).

Pennsylvania courts will also not allow a party or witness to avoid a scheduled deposition on the basis that the deponent will invoke the privilege at that deposition. See *Marine*, also *Huyett*.

Thus, where a party refuses to attend a deposition on the basis that he or she will be invoking the privilege against self-incrimination, the deposing party should make a motion to compel the party to attend the deposition pursuant to Pennsylvania Rule of Civil Procedure 4019(b). A motion to compel may also be filed where the deposing party believes the privilege has been improperly invoked. The deposing party may complete the deposition as to other matters or adjourn the deposition at once and head to court for a ruling. However, under Rule 4012(b) the deponent may demand the suspension of the deposition for the time necessary to get a court ruling on the issue. Thereafter, if the motion is granted and the deponent fails to obey the order, the opposing party may file a motion for sanctions. Pa.R.C.P. 4019 (a)(1)(viii).

Note that the deponent, in addition to filing an answer in opposition to the motion to compel, may also file a petition for a protective order under Pa.R.C.P. 4012(b). See *Putnik* and *Shor*. If the motion for protective order is denied, the court may, sua sponte, order the party to permit the relevant discovery. Rule 4012 (a). Both the moving and non-moving parties are permitted to recover costs, including attorney's fees, where they show that any of the motions were filed for the "purpose of delay or in bad faith." Rule 4019 (h).

Again, a deposition will not be precluded on self-incrimination grounds where the deponent is merely under a criminal investigation. In such circumstances, it appears that the court will allow the deposition to proceed at which the deponent could invoke the privilege. The Monroe County Common Pleas Court in *Homestead* did exactly that. Generally speaking, as Wettick wrote in *Hass*, in an effort to avoid any prejudice to the deposing party's case, a court will also usually reject requests from the deponent that a deposition be stayed until the conclusion of any criminal proceedings.

Adverse Inference

Finally, counsel should be aware of the implications of the invocation of the privilege by a party or witness. In Pennsylvania federal and state civil trials, an adverse inference will be allowed against parties or witnesses who invoke the privilege against self-incrimination and refuse to testify in response to probative evidence against them. Harmon v. Mifflin County School District, 713 A.2d 620 (1998); In re Oxman, 437 A.2d 1169 (Pa. 1981); *Moore v. City of Philadelphia*, 571 A.2d 518 (Pa. Commw. 1990)

Furthermore, as Wettick said in *Hass*, a party who has invoked the privilege during discovery will not be permitted to thereafter waive the privilege as a tactical matter on the eve of trial to the detriment of the opposing party and for the purpose of avoiding discovery but still testifying at trial.