

The Legal Intelligencer

Using the Privilege: Fifth Amendment Fundamentals for Corporations

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Most in-house lawyers, if they're fortunate, haven't bumped up against the Fifth Amendment and its related issues since the bar exam. After all, the so-called "nickel" typically arises solely in the criminal context, and corporations don't have the right to plead the Fifth Amendment at an organizational level. However, with governmental investigations of varying types on the rise, and in-house counsel advising the corporation and preparing witnesses for participation in these investigations, the Fifth Amendment and its protections are an important tool in protecting the company and its employees from self-incrimination.

Fifth Amendment Fundamentals

The Fifth Amendment to the U.S. Constitution provides, in relevant part, that "no person ... shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination has been defined as the constitutional right of a person to refuse to answer questions or otherwise give testimony against himself or herself. To plead the Fifth, or to "take the nickel," is to refuse to answer a question from a governmental body because the response could provide self-incriminating evidence of an illegal act.

Importantly, the Supreme Court has repeatedly recognized that "a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances," as the court held in *Grunewald v. United States*, 353 U.S. 391 (1957). The Fifth Amendment is intended to protect "the truthful responses of an innocent witness" where the responses of such a witness might provide the government with "incriminating evidence from the speaker's own mouth," as the court held in *Ohio v. Reiner*, 532 U.S. 17 (2001). The privilege is thus available to both the innocent and the guilty. Importantly, the privilege protects statements that might incriminate the witness regardless of the likelihood of prosecution; rather, the witness must simply have a reasonable fear that his or her responses might self-incriminate.

The Fifth Amendment privilege applies when a witness might be compelled to give information that could be used directly or indirectly as evidence to support a criminal conviction. The applicability of the Fifth Amendment in response to a question seeking direct evidence of a crime is easily identifiable. Everyone who has seen *Law & Order* knows that when a prosecutor asks a witness whether he or she killed the

victim, the witness has a right to remain silent if the answer could be used to establish that he or she has, indeed, done so.

Use of the Fifth Amendment in situations calling for indirect evidence of criminal culpability can be trickier. Questions like, "Where were you on the night of the incident?" and even, "Do you know the accused?" can, under certain circumstances, provide evidence that might incriminate the witness. When answers would provide a link in the chain of evidence needed to prosecute the witness, the Fifth Amendment is available as a protection.

Of course, a witness cannot simply claim a blanket Fifth Amendment privilege to all questions that might be asked of him or her. A witness must instead assert the privilege to each question asked. Likewise, because the privilege is personal, it cannot be asserted on behalf of another. In short, an attorney cannot assert the privilege on behalf of a client. A corporation cannot assert the privilege, nor can an employer assert the privilege on behalf of its employees.

The Fifth Amendment privilege is also limited to the protection against self-incrimination by being compelled to provide information that is testimonial or communicative in nature. Determining whether information is testimonial can also be tricky. The Fifth Amendment does not provide a shield for a witness to avoid producing incriminating material, such as a specific DNA, blood or other evidence that might lead directly or indirectly to incrimination. Documents themselves are not protected by the privilege.

However, the Fifth Amendment does protect a witness from being compelled to self-select or produce documents if, in doing so, the witness' mental processes would be revealed and incrimination might result. The act of producing the documents establishes the existence of the document, possession of the document by a witness and the belief that the document is responsive to a request for production. Each is testimonial in nature and thus the Fifth Amendment can apply to shield the witness from having to produce the documents. Importantly, however, the privilege will not apply to documents that are required by law to be kept or to documents or records maintained by a corporation or other entity.

Often, whether a document belongs to a corporation or an individual is a threshold question in asserting the privilege. If a document is a corporate record, the act of production is merely custodial in nature and no privilege applies. If, however, the document is personal to an employee of the corporation, the privilege would shield production if the document were self-incriminating. Typically, courts look at the totality of the circumstances to determine whether a document is corporate or personal, including factors such as who prepared the document, where the document was located, the contents of the document and whether the creation of the document was necessary to the business. In today's world, however, where the line between employee and employer property blurs more every day, and more employees are bringing their own technology to the workplace, these questions can become difficult to answer.

Upjohn and Conflicts of Interest

All corporate counsel are familiar with the *Upjohn* warning, or corporate *Miranda*, which the company gives to employees involved in corporate investigations. The purpose of the *Upjohn* warning makes it abundantly clear that the attorney represents the company and its interests, not the individual, and that, therefore, the privileges and protections of the attorney-client relationship exist only between the attorney and the company and can only be waived or asserted by the company. In short, a proper *Upjohn* warning explains to the employee that any statements made by the employee can be disclosed at the company's discretion. Consequently, a proper *Upjohn* warning can make employees less likely to be forthcoming with incriminating information.

In-house counsel interviewing employees as part of an investigation must take care to ensure that its employees do not forfeit or waive their Fifth Amendment rights as a result of an improper *Upjohn* warning or a failure of in-house counsel to advise the witness to obtain independent counsel. The interests of the in-house counsel in obtaining full and truthful statements can conflict with the interests of the witness to not incriminate himself or herself. If the witness believes the attorney is representing his or her interests, or believes that his or her statements cannot be used without his or her permission, an irreparable conflict of

interest might be created. Likewise, if an individual testifies in a criminal case or before an administrative or regulatory body while represented by the attorney for the company and without being informed about his or her Fifth Amendment rights, the individual could later bring a claim against the attorney and the employer. In short, when dealing with a government investigation in which employees might testify in ways that self-incriminate them, proper *Upjohn* warnings and a thorough examination of potential conflicts are critical.

Parallel Incrimination

Often, when an individual employee of a corporation commits a criminal act on behalf of a corporation, both the individual and the corporation can be criminally liable. When such a scenario occurs involving a corporate officer, the officer's assertion of the Fifth Amendment privilege can protect the individual directly and the corporation indirectly. Therefore, in-house counsel should prepare the officer for Fifth Amendment issues or provide the officer with separate counsel who can assure that the officer is properly prepared. So long as the officer is protected by the attorney-client privilege of the corporation, the discussions between in-house counsel and the officer regarding the Fifth Amendment are protected from disclosure by the privilege. Although the interest of the individual against self-incrimination and the interests of the company against being incriminated by an officer will often align, in-house counsel should carefully examine the facts and interests involved to determine whether separate counsel is necessary or desirable under such circumstances.

Note also that a corporate officer can waive his or her right to assert the Fifth Amendment by willingly participating in the investigation up to a certain point. For example, if a corporate officer verifies interrogatories or discovery responses on behalf of the corporation while acting as the corporation's agent, the officer may waive his or her individual right to invoke the Fifth Amendment as to those subject areas. Corporate counsel should take great care in selecting particular personnel to act as agents of the corporation in responding to government investigations to ensure that a waiver of Fifth Amendment protections, which could benefit both the individual and the organization, does not occur.

The privilege against self-incrimination applies in criminal, civil, administrative, judicial, investigative, regulatory or adjudicatory proceedings, and it can be invoked at any stage of those proceedings. Accordingly, in-house counsel facing an investigation of any type are well advised to consider and prepare for Fifth Amendment considerations early in the process.

Consider the following example:

The Securities and Exchange Commission is investigating your company for securities fraud. They have subpoenaed your controller to provide information about corporate practices and bookkeeping. He knows his testimony could potentially incriminate both him individually and the corporation. The SEC warns that an adverse inference will be drawn in a later enforcement action if he refuses to provide the requested information. Should he take the Fifth during the investigation and risk the adverse inference? Or should he testify and potentially provide a roadmap to prosecution or lock himself (and the company) into testimony that can be used in later proceedings, including a subsequent criminal case?

The answers to these questions depend, as always, on the specifics of the situation and the facts involved. However, corporate counsel can best be prepared for dealing with these kinds of questions by familiarizing himself or herself with the protections of the Fifth Amendment, the limits of those protections, and its applicability to a wide variety of circumstances and proceedings. By giving serious consideration to the uses and consequences of the Fifth Amendment from an early point in the proceedings, corporate counsel can maximize the use of this powerful tool to the benefit of the client and the protection of its employees, and to avoid the conflicts and pitfalls often created when the interests of the corporation and the employee diverge.

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