Taking the Fifth

BY RONALD J. NESSIM

When Lois Lerner—an Internal Revenue Service official at the center of its recent political scandal—was called last May to testify before a House committee investigating allegations that the agency targeted conservative groups seeking tax-exempt status, she invoked her Fifth Amendment privilege against self-incrimination. As a consequence, she was suspended from her job as head of her division in Cleveland and received considerable adverse publicity (she has since retired). Certainly, Lerner's lawyer carefully considered the pros and cons of asserting the privilege before she invoked it.

Indeed, Lerner's case provides food for thought. When does it make sense to assert the Fifth? When does it make sense to testify? As case law and practical experience illustrate, such decisions involve a careful balancing of several factors, which vary from case to case.

BLACK LETTER LAW

The U.S. Constitution's Fifth Amendment provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself." (U.S. Const. amend. V.) The privilege against self-incrimination can be invoked by an individual "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory" and it protects against "disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." (*Kastigar v. United States*, 406 U.S. 441, 444–445 (1972).) It can be invoked whether the answer would in itself support a criminal conviction, or would merely furnish a link in the chain of evidence needed to prosecute for a crime. (*Hoffman v. United States*, 341 U.S. 479, 486 (1951).)

The privilege protects "witnesses against incrimination under state as well as federal law." (*United States v. Johnson*, 488 F.2d 1206, 1209 (1st Cir. 1973), citing *Kastigar*, 406 U.S. at 456–457.) It can be asserted in any proceeding "in which the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding." (*United States v. Balsys*, 524 U.S. 666, 672 (1998).) However, the privilege does not apply where the risk of prosecution is solely from a foreign jurisdiction. (*Balsys* at 708–709.)

The right against self-incrimination is validly invoked only when substantial hazards of self-incrimination are real and appreciable. (*United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir.), *cert. denied*, 447 U.S. 925 (1980).) Certainly, Lerner had a real and appreciable risk of incrimination given that just prior to her testimony, the Department of Justice announced a criminal investigation into the alleged targeting.

The assertion of privilege is not inconsistent with a claim of innocence, and the privilege is intended to protect the innocent as well as the guilty. (*Ohio v. Reiner*, 532 U.S. 17, 21 (2001).) Indeed, Lerner asserted her innocence prior to her invocation of the privilege before the House committee.

PARALLEL PROCEEDINGS

There are several reasons for counsel to advise a client to assert the Fifth Amendment privilege rather than testify in a parallel noncriminal proceeding. First, the criminal proceeding usually takes precedence over the noncriminal proceeding given the higher stakes, which often include a felony conviction and prison. (See *Ex parte Antonucci*, 917 So. 2d 825 (Ala. 2005) (holding criminal investigation entitled defendant to stay of parallel civil suit).) If truthful answers might

incriminate the client, the client is usually better off asserting the privilege and not making those admissions in the parallel noncriminal proceeding.

There is a time and place for everything, and in most cases an early noncriminal proceeding is not the best time and place to be making admissions or statements that can be used against the client in a subsequent criminal proceeding. (Fed. Rule Evid. 801(d)(1).) Similarly, if the client has valuable information, it usually makes sense to save it for a time when the client can get something in return for it, such as immunity from criminal prosecution.

Second, there is the very real risk that a client who testifies in a parallel noncriminal proceeding will—knowingly or inadvertently—give false, incomplete, or otherwise incorrect testimony. This is especially true when the testimony takes place before the key material facts are known, whether from documents or witnesses' recollections. Even innocent mistakes a client makes in testimony can later be viewed as purposefully false exculpatory statements by criminal authorities; this can aggravate the client's position. Knowingly false statements also can constitute crimes in their own right, including obstruction of justice and perjury. (See 18 U.S.C. §1621 (perjury); and 18 U.S.C. § 1512 (obstruction).)

Third, testifying early in a noncriminal parallel proceeding can lock the client into a position on the facts too soon, which has consequences not only in that proceeding but in the criminal proceeding as well. Small details and nuances can make a big difference. Counsel may not even be able to adequately prepare the witness in what will later become key factual areas in a criminal case, the relevance of which are not yet clear. Again, this is particularly true when the documentation and other witness testimony is not well established at the time of the client's testimony in the noncriminal proceeding. Once a client is locked into a particular factual position by sworn testimony, it is much more difficult to change course later on, even when the client's memory is refreshed by documents or other witnesses' testimonies.

WAIVER OF PRIVILEGE

Soon after Lerner's initial invocation of the Fifth Amendment, the same House committee ruled on a party line vote that she had waived the privilege by making a brief, general statement of innocence prior to invoking the privilege. Though it is possible for a witness to waive the Fifth Amendment privilege as to a particular subject matter by making statements about that topic (see *Rogers v. United States*, 340 U.S. 367, 371 (1951)), it is more difficult than waiving other privileges. Indeed, courts should "indulge every reasonable presumption against [finding a testimonial waiver]." (*Emspak v. United States*, 349 U.S. 190, 198 (1955).) For this reason, the House committee will likely have a difficult time convincing a federal court that Lerner's brief and general statement waived her right against self-incrimination.

LIMITED WAIVER

Even when a waiver is found, it will only extend to the proceeding where it occurred—in Lerner's situation, to the particular House panel where she proclaimed her innocence—and will not extend to other proceedings such as a future civil or criminal case. (*United States v. James*, 609 F. 2d 36, 45 (2d Cir. 1979).) It is also generally accepted that an individual may refuse to answer further questions about a matter already discussed, even in the same proceeding, so long as additional answers sought might tend to further incriminate her. (See *In re Master Key Litig.*, 507 F. 2d 292, 294 (9th Cir. 1974); and *Shendal v. United States*, 312 F.2d 565, 566 (9th Cir. 1963).)

WEIGHING THE COSTS

Although asserting the Fifth Amendment has real advantages, it can also have costs. In fact, in federal civil cases (and in many state jurisdictions outside California) the trier of fact (court or jury) can draw an inference against a party who asserts the privilege—namely, making the assumption that the testimony the witness would have given would have been adverse to that party. (*Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976).)

A court's decision on whether to issue an adverse inference instruction to the jury turns on whether the probative value of the assertion is substantially outweighed by the danger of unfair prejudice. When a nonparty witness is closely aligned with a party in a civil case, that witness's invocation of the privilege can also support an inference against that party. (*LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997).) An adverse inference can be very costly in a civil case, particularly when the party otherwise has a realistic chance of prevailing.

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Moreover, even in jurisdictions such as California that do not permit an adverse inference (see Cal. Evid. Code, § 913), the court will generally impose a preclusion order on a party who asserts the privilege pretrial. (*A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 566 (1978).) This means that a party will not be permitted to testify or otherwise submit evidence at trial on a subject they blocked during discovery. (See *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988).) Preclusion orders are also often imposed in those jurisdictions that allow adverse inferences.

Sometimes, however, a party can

assert the privilege against self-incrimination early in a proceeding and then reverse course before discovery is closed, thereby avoiding the consequences of an adverse inference and/or a preclusion order. (*United States v. 4003–4005 5th Ave.*, 55 F.3d 78, 84 (2d Cir. 1995).) This depends on the facts of each case, and courts have considerable discretion to rule either way. (*S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 194 (3d Cir. 1995).) Probably the most important issue for the courts is the extent to which the noninvoking party was prejudiced by the earlier invocation. (*4003–4005 5th Ave.*, at 84.) As a general rule, the earlier in a proceeding a party reverses the decision to assert the privilege and instead gives substantive testimony, the more likely that party can avoid these adverse consequences at trial. (See *In re Adelphia Commc'ns Corp.*, 317 B.R. 612, 628 (S.D.N.Y. 2004).)

Generally, the privilege does not extend to individuals working for private, nongovernment employers, which can seek to compel statements from their employees without running afoul of the Fifth Amendment. (*TRW, Inc. v. Superior Court*, 25 Cal App. 4th 1834, 1844 (1994).) However, if state action sufficiently shows that the employer is an actual or de-facto agent of the government in compelling its employees' statements, the privilege may well apply. (*Malloy v. Hogan*, 378 U.S. 1, 26 (1964).)

In most jurisdictions, employees owe their employer a duty of loyalty and cooperation. (See Cal. Lab. Code § 2856.) Because of this, an employee can suffer adverse employment consequences for refusing to answer the employer's questions—even if the answers may be incriminating. (*Nuzzo v. Northwest Airlines, Inc.*, 887 F.Supp. 28 (D. Mass. 1995) (private employee); and *Evangelou v. District of Columbia*, 901 F.Supp. 2d 159 (2012) (public employees).) Private employers, who often conduct these fact-finding interviews pursuant to their own attorney-client privilege rather than a joint privilege such as common interest, also are free to waive their privilege and turn their employees' statements over to the government without the employees' consent. (*In re Grand Jury Subpoena*, 419 F.3d 329, 333 (4th Cir. 2005); and ABA Model Rule 1.13(d).)

Finally, consider the specter of public opinion. Indeed, if the case is being covered by the media, a person invoking the Fifth Amendment will likely take a publicity hit. Lerner certainly did when her assertion of the privilege and photograph were plastered on the front page of most major newspapers. Though the privilege is intended to protect the innocent as well as the guilty, it is popularly perceived that anyone asserting the Fifth has something to hide.

An early noncriminal proceeding is not the best time and place to be making admissions.

In some proceedings, particularly where the client is a party, it is possible to seek a stay of the noncriminal proceeding and avoid the Hobson's choice of testifying or asserting the privilege. Courts have considerable discretion when ruling on motions to stay, and usually they weigh a variety of factors. (See *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 55 (E.D. Pa. 1980); and *Pacers v. Superior Court*, 162 Cal. App. 3d. 686 (1984).)

SPEAKING OUT

Sometimes it may be wise to go ahead and testify in a parallel noncriminal case—not only to avoid the adverse consequences discussed above, but for strategic reasons as well. Particularly when the client is expected to come off as credible in her testimony, or can establish a defense to one or more elements of the potential criminal charges, her testimony in the noncriminal proceeding can often dissuade a prosecutor from criminally charging her—in a way that taking the Fifth would not. Such testimony can also offer mitigation when prosecutors weigh discretionary factors, such as the degree of culpability, that may influence the decision whether to charge. Of course, if the client is perceived to be making false exculpatory statements in the parallel proceeding, the decision to testify can backfire.

CAREFUL PREPARATION

The balance of the foregoing pros and cons as to whether the client should testify will be different in every case. That's why it's especially important that counsel quickly and thoroughly determine the underlying facts and their legal significance.

Of course, when a civil case is only about money, it may make business sense to do less and spend less; the matter may well resolve early, and besides, the consequence of mistakes in such a context are less costly. Yet in the event of a parallel criminal case, the risk can be overwhelming—and mistakes irreversible.

Another factor for attorneys to consider is whether the client can stand up to vigorous cross-examination. Unless that is the case, it may be a disaster to allow him or her to take the stand.

Certainly, if counsel has reasonable confidence that he knows the material facts—including what evidence does and does not corroborate his client's account—counsel is more likely to recommend that the client testify in the parallel noncriminal proceeding. Conversely, the less confident counsel is about the facts and where the parallel criminal investigation is headed, the less likely counsel is to advise the client to testify in the parallel proceeding.

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Taking the Fifth

1 The Fifth Amendment privilege against self-incrimination can only be invoked in a criminal case.

❑ True ❑ False

2 A witness who reasonably believes that the testimony might lead to evidence used against him or her in a criminal proceeding can invoke the right against self-incrimination.

❑ True ❑ False

3 The Fifth Amendment protects American citizens even when there is a risk of prosecution by a foreign jurisdiction.

❑ True ❑ False

4 The Fifth Amendment privilege can be asserted even where the risk of self-incrimination is speculative.

❑ True ❑ False

5 Only the guilty can assert the Fifth Amendment privilege.

❑ True ❑ False

6 A person who makes statements on a certain subject in a particular proceeding can waive the Fifth Amendment privilege with regard to that proceeding.

❑ True ❑ False

7 The Fifth Amendment privilege is more difficult to waive than other privileges.

❑ True ❑ False

8 If an individual testifies in a civil case on a particular subject matter, he or she cannot assert the Fifth Amendment privilege in a subsequent proceeding.

❑ True ❑ False

9 Even when a witness testifies only on a particular subject matter, Fifth Amendment waiver is not automatic and the witness may be able to assert the privilege later on in the same proceeding.

❑ True ❑ False

10 In a California state court case, the trier of fact can draw an adverse inference against a party who invokes the Fifth Amendment.

❑ True ❑ False

11 In a civil case, a federal court's decision as to whether an adverse inference instruction should be given turns on whether the probative value of the assertion is substantially outweighed by the danger of unfair prejudice.

❑ True ❑ False

12 Parties in a civil case can never be burdened with an adverse inference if the Fifth Amendment privilege is invoked by a nonparty witness.

❑ True ❑ False

13 A party who asserts the Fifth Amendment during discovery can always testify later at a trial.

❑ True ❑ False

14 The opponent of a party asserting the Fifth Amendment privilege in a proceeding, can seek an order prohibiting the asserting party from later offering evidence on the same subject matter.

❑ True ❑ False

15 A party who asserts the privilege early in a proceeding may be able to reverse course later during discovery, avoiding the consequences of an adverse inference or preclusion order.

❑ True ❑ False

16 A nongovernment employee can invoke the Fifth Amendment during an interview by his or her employer.

❑ True ❑ False

17 If a private employer is cooperating with criminal prosecutors, an employee cannot assert the Fifth Amendment privilege during the employer's interview.

❑ True ❑ False

18 An employer cannot discipline or fire an employee who asserts the Fifth Amendment privilege in a legal proceeding.

❑ True ❑ False

19 To avoid asserting the Fifth Amendment privilege in a civil case, a party can seek to stay the proceeding.

❑ True ❑ False

20 A person at risk for self-incrimination should always assert the Fifth Amendment privilege during a civil deposition.

❑ True ❑ False

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