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BEING THE PIT BOSS:
The Tripartite Relationship and Dealing with the Difficult or Unsophisticated Insured Client

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III. DEFENDING THE CLIENT FACING CRIMINAL CHARGES OR WITH A CRIMINAL CONVICTION

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Occasionally in the professional liability context carrier and counsel are called upon to provide a defense for/defend an insured who either is facing a potential or pending criminal proceeding or who has been convicted of a crime where the criminal conduct is related to the basis for the professional liability claim. Common examples include physicians or other healthcare professionals who face criminal charges related to insurance fraud, or improper dispensing of medications, professionals, medical or otherwise, facing accusations of sexual abuse or assault or professionals facing other sorts of fraud and financial crimes allegations. In all of these situations, panel counsel must understand and protect the client's 5th Amendment right against self-incrimination and must understand the effect of a criminal conviction as evidence of civil liability. For cases where the client is already incarcerated, practical problems of communication and deposition and trial testimony arise.

A. Protecting the Client's 5th Amendment Rights

Counsel defending an insured in a civil matter where the insured faces potential or pending criminal charges must make preservation of the insured's defense in the criminal case paramount. Testimony given under oath or documents produced in civil litigation are subject to use in any criminal prosecution. To this end the client's 5th Amendment rights must be protected in the civil proceeding. However, invocation of the 5th Amendment has an effect, often negative, on defense of the civil case.

1. *The 5th Amendment Applies in Civil Cases*

The Fifth Amendment to the United States Constitution provides that "no person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. Const. amend. V. The United States Supreme Court has determined that "The Fifth Amendment privilege applies not only at criminal trials, but in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate the defendant in future criminal proceedings." United States v. Lee, 315 F.3d 206, 211 (3d Cir. 2003) (quoting Minnesota v. Murphy, 465 U.S. 420, 426, (1984)).

2. *Determining Whether, and to what Extent the 5th Amendment May Be Invoked: Matters on Which Charges Have Not Yet, But Might be Filed, Matters on Which Convictions Already Have Occurred*

The 5th Amendment privilege is a broad one. The privilege protects an admission that on its own would support a criminal conviction, but the privilege also protects admissions "which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." Hoffman v. United States, 341 U.S. 479, 487 (1951). There need not be an extant criminal investigation or proceeding against the party asserting the privilege in order for it to be effective. Izen v. Catalina, 256 F.3d 324, 329 (5th Cir. 2001) (so long as claimant "reasonably apprehends a risk of self-incrimination," the protection applies). The privilege applies to both documents and testimony. Fisher v. United States, 425 U.S. 391, 424-425 (1976).

A professional need not be facing a pending criminal investigation or proceeding to invoke the privilege, although in that instance he certainly may. In the situation where there is the potential for future charges, one can assert it as well. Perhaps even more importantly, in the situation where a professional has been convicted the right still exists after the conviction so long as either, appellate proceedings have not been exhausted or, there is the possibility for additional charges based on the conduct either state vs. federal charges or different criminal charges for the same conduct. *See* United States v. Yurasovich, 580 F.2d 1212 (3rd Cir. 1978).

The first order of business then is for panel counsel to determine whether or not there is exposure to criminal prosecution. Many times this will be easy. Sometimes however it is not. A frank discussion with the client at the outset of litigation is crucial. If there is a colorable fear or threat of criminal prosecution counsel should err on the side of caution.

Once it is established that the privilege will be invoked, defense counsel must make sure it is asserted properly and that it is not waived because the privilege is waivable. A civil defendant cannot during a proceeding (either at deposition or trial) voluntarily testify about a subject and then invoke the privilege against self-incrimination when questioned about the details. In Mitchell v. United States, the United States Supreme Court stated that the privilege is waived for the matters to which the witness testifies; the witness determines the area of disclosure and, thus, establishes the scope of the cross-examination. Mitchell v. United States, 526 U.S. 314, 322 (1999). As to whether a statement in a pleading or a response to written discovery waives the privilege is an unsettled question although some Courts have established that it does not. *See e.g.* Haas v. Bowman, 62 Pa D&C 4th 1 at *13-14 (Wettick, J. Allegheny Cty 2003).

3. *The Process of Invoking the 5th Amendment at Deposition or Trial*

The Fifth Amendment Privilege against self-incrimination, while permissibly invoked in a civil proceeding, may not be permissible as to all questions asked at a deposition or at trial. The privilege against self-incrimination is a privilege to decline to respond to inquiries, not a prohibition against inquiries designed to elicit responses incriminating in nature. McCormick on Evidence, § 136, at 334 (3d Ed. 1984). Therefore, at a deposition or other proceeding the questioning party is permitted to ask questions to create a record on which to challenge the Fifth Amendment assertion. *See* e.g. Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1151 (10th Cir. 1986).

The obligation to create a record applies to Plaintiff's counsel. The obligation to be certain that the defendant invokes the 5th Amendment in response to each relevant question falls to defense counsel and his client. While a witness must answer facially innocuous questions, counsel should keep a sharp ear in order to invoke the privilege in any areas against which the right may be asserted.

4. *The Effect of the 5th Amendment in the Civil Case*

While in a criminal case a defendant's invocation of the 5th Amendment cannot be used against him, this is not so in the civil case. Pleading the 5th in a civil matter often results in an adverse inference charge being given with regard to the unanswered questions. Securities and Exchange Commission v. Graystone Nash, Inc., 25 F.3d 187, 190 (3rd Cir. 1994). The United States Supreme Court has held that an adverse inference is constitutionally permissible as a result of a party's refusal to respond to questions on Fifth Amendment grounds if the adverse inference is supported by sufficient independent evidence. Baxter v. Palmigiano, 425 U.S. 308 (1976). So long as there is independent testimony or evidence that tends to prove an element of the plaintiff's case, an adverse inference may be drawn in response to the defendant's silence. United States v. Stelmokas, 100 F.3d 302, 311 (3rd Cir. 1996).

While the adverse inference is a substantial risk, there is authority that plaintiff's counsel, through the use of leading questions, cannot use the assertion of the privilege to essentially testify for the witness, obtaining adverse inference charges on a litany of fact specific questions. RAD Services, Inc. v. Aetna Surety & Casualty Co., 808 F.2d 271, 278-79 (3d Cir. 1986) citing Brink's, Inc. v. New York, 717 F.2d 700, 715-716 (2nd Cir. 1983) . Cavalier Clothes v. Major Coat Co., No. 89-3325,1995 U.S. Dist. LEXIS 7023 at * 18-19 (E.D. Pa. 1995).

B. The Criminal Conviction as Evidence or Proof of Civil Liability

Where a professional insured suffers a conviction for conduct that is the subject of a civil lawsuit that conviction may be evidence, and in some cases indisputable proof, of the professional's civil liability.

Certainly the professional who is convicted of certain acts in a criminal case is collaterally estopped from denying those acts took place in a civil case. It is imperative that defense counsel from the outset evaluate what effect the criminal conviction has on the defense position in the civil matter.

Because of the higher standard of proof and the numerous safeguards surrounding a criminal trial, a conviction in a criminal action is conclusive in a subsequent civil litigation as to issues that were actually litigated and adjudicated in the prior criminal proceeding. See e.g., McNally v. Pulitzer Publishing Co., 532 F.2d 69, 76 (8th Cir.); Shore v. Parklane Hosiery Co., 565 F.2d 815, 818-19 (2d Cir. 1977) Aff'd 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Shaffer v. Smith, 543 Pa. 526, 673 A.2d 872, 874 (Pa. 1996).

Generally, the only significant element in terms of establishing collateral estoppel is whether the elements of the criminal offense are the same as those needed to establish civil liability. If they are, then collateral estoppel applies and the conviction is conclusive proof of civil liability. Zuder v. Aigeldinger, 2007 U.S. Dist. LEXIS 64139 (M.D. Pa. 2007). The pendency of an appeal on a conviction does not void the collateral estoppel effect of the conviction unless the judgment of conviction is reversed. Shaffer, 543 Pa. at 530, 673 A.2d at 875.

Contrast this with the effect of a guilty plea, where in certain jurisdictions, the plea may be used as affirmative, substantive evidence against that party but is introduced into evidence as an admission and does not constitute conclusive proof of the facts underlying the offense. Eaton v. Eaton, 119 *N.J.* 628, 643, 575 A.2d 858 (1990). The party who has entered the plea may rebut or otherwise explain the circumstances surrounding the admission. The reasoning here is that the guilty plea, unlike a conviction after verdict, has not been litigated and the test of issue preclusion is not met.

C. Logistical Hurdles and the Incarcerated Client

1. *Practical Tips: Communication, Depositions etc.*

When dealing with an incarcerated client, advance planning is important to handle depositions and client meetings. While client meetings are usually easily accommodated by the prison, if one needs to bring documents or other materials for review, that can require compliance with prison regulations. By the same token, often prisons have regulations concerning what can and cannot be mailed to an inmate and being cognizant of those is also important.

In terms of deposition planning, in the author's experience most facilities accommodate attorneys for deposition. Where problems arise is in regard to videotaped depositions. This author has had the experience on a number of occasions where the prison has refused to allow the prisoner to be dressed in civilian clothing and unshackled for the videotape deposition. There is authority that he has that right. See, e.g., Maus v. Baker, 747 F.3d 926, 927 (7th Cir. 2014); Lemons v. Skidmore, 985 F.2d 354, 356-57 (7th Cir.

1993); Davidson v. Riley, 44 F.3d 1118, 1122-23 (2d Cir. 1995); Holloway v. Alexander, 957 F.2d 529, 530 (8th Cir. 1992) (all holding that allowing a civil defendant to appear before the factfinder shackled or in a prison jumpsuit is prejudicial and must be guarded against). A motion for protective order may be needed to compel the prison to comply.

2. *Writ's of Habeas Corpus Ad Testificandum to Appear at Civil Trial*

If the incarcerated client wishes to attend the trial (and he may not), advance plans must be made in order to procure their appearance. While not an absolute right (Jerry v. Francisco, 632 F.2d 252 (3rd Cir. 1980) (holding no absolute right for a prisoner-litigant to appear at the trial of a civil matter) many times a prisoner will be permitted to appear. This is often done by filing a writ of habeas corpus ad testificandum. Allow sufficient lead time for the order and for the department of corrections to act. Coordinating between jurisdictions is additionally problematic.