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PRACTICE RESOURCE

Parallel Proceedings and the Perils of the Adverse Inference

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Introduction

A healthcare corporation facing a government investigation into its practices must prepare to battle a multi-headed hydra, because healthcare investigations frequently involve multiple legal proceedings litigated simultaneously, commonly referred to as “parallel proceedings.” Parallel proceedings can involve two or more government agencies simultaneously pursuing civil, criminal, and possibly administrative penalties against the same corporation, based upon the same alleged misconduct. Alternatively, parallel proceedings may involve a government investigation accompanied by the presence of civil litigants outside of the government.
Quite often, parallel proceedings in the healthcare context involve all the above, all at once: a criminal investigation and a civil investigation pursued by different offices of the federal government, typically the Department of Justice (DOJ) and the Office of Inspector General of the Department of Health and Human Services, while private litigants and attorneys general from various states pursue their own lawsuits. For instance, Eli Lilly’s record-breaking $1.42 billion settlement with the government in early 2009, regarding the company’s alleged improper marketing of the antipsychotic drug Zyprexa, was the culmination of simultaneous investigations by both the civil and criminal branches of the Department of Justice, the Medicaid Fraud Control Units of numerous states, and four private qui tam actions. Although parallel proceedings can occur in a variety of cases, healthcare entities are particularly susceptible given the combination of current government enforcement priorities and the potentially substantial civil damages and penalties. Civil damages under the False Claims Act may equal $11,000 per each false claim submitted, plus triple the amount of damages allegedly suffered by the government.

One of the many perils confronting a corporation defending against parallel proceedings is the potential impact of an adverse inference drawn against the company in civil proceedings. Such an inference can result from the invocation by an employee—or even a former employee—of a Fifth Amendment right against criminal self-incrimination. The adverse inference doctrine has very real implications for a company confronted with the increasingly common parallel proceedings scenario. When summoned to testify at a civil deposition or trial, a company’s employees must choose either to answer each question openly, risking the possibility that the government later may deem the testimony evidence of the individual’s guilt in a parallel criminal action, or plead the Fifth Amendment, risking that an adverse evidentiary inference will lead to the individual’s civil liability. For example, assume that a hospital administrator is a defendant in a civil proceeding, and is asked under oath about his participation in the hospital’s alleged practice of providing illegal kickbacks to an outside physician group. The administrator must weigh the risks that his answers later could be used specifically against him in a possible criminal proceeding alleging violations of the Anti-Kickback Statute, versus the risk that invoking the Fifth Amendment will produce unfavorable inferences against him in the matter at hand, thereby enhancing his immediate risk of exposure to civil penalties.
The adverse inference does not work against only the invoking individual. Under doctrines of vicarious corporate liability, and as explained below, the individual’s choice likely will bind his employer. A positive answer may implicate the company in the criminal matter, whereas invocation of the Fifth Amendment, raised to protect the employee’s individual interests, can be used as an adverse inference against the party that most likely constitutes the primary target of any civil proceeding: the corporation.

The tensions that can arise between the interests of the individual employee and the corporation in this context are most palpable when the organization is large, such as a hospital, medical device company, or a pharmaceutical company. In these cases, the interests of even the CEO or the head of the board of directors can be adverse—and easily recognized as adverse—to the interests of the entity as a whole. In small or closely-held organizations, however, the interests of the owner and the entity can converge, at least as a practical matter. Although the legal concepts discussed in this article are the same regardless of the size of the entity, their pragmatic application can vary. It will be more difficult for an organization to avoid the application of an adverse inference if the organization is small and the individual invoking the Fifth Amendment is closely tied to the organization, due to the overlap of interests and the enhanced ability of the individual to exercise control over the organization.

**The Right Against Self-Incrimination and the Adverse Inference Doctrine**

The Fifth Amendment to the Constitution provides that no individual “shall be compelled in any criminal case to be a witness against himself.” This provision of the Bill of Rights has become an essential and well-known element of our justice system, as courts have interpreted it to mean that all people have the right to refuse to testify in any lawsuit, criminal or civil, if they believe that their testimony may incriminate them in an existing or future criminal action. A witness properly may invoke the right against self-incrimination when she reasonably believes that her testimony would show criminal liability, or, more broadly, would provide a link in the chain of evidence necessary to prosecute her for a crime. In practice, courts are exceedingly reluctant to second-guess an individual’s decision to invoke the Fifth Amendment. When an individual invokes rights under the Fifth Amendment—colloquially known as “pleading the Fifth”—that invocation cannot be used as evidence against that individual in a criminal trial.

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The same does not hold true, however, when a witness invokes the Fifth Amendment in a civil proceeding. It is well-settled that an individual’s decision to plead the Fifth in response to a question at a civil deposition or trial is not only admissible evidence in that civil action, but may give rise to an adverse inference that the answer to the question would have been unfavorable to the individual. Further, when an employee decides to exercise the right, the invocation in a civil lawsuit can create an adverse inference against the individual’s employer. Of course, an employee concerned that her testimony might result in personal criminal liability may, either appropriately or simply out of an abundance of caution, liberally plead the Fifth in response to all manner of questions, thereby creating a host of adverse inferences against the employer. Accordingly, a civil litigant pursuing a corporation could employ the adverse inference doctrine to great effect by posing very specific questions to an employee with the expectation that each question will produce an invocation of the Fifth. The questions may be crafted in such a way that the implied adverse responses could be quite damaging, particularly with no explanatory context. An employee’s invocation of the Fifth Amendment therefore creates very real risks for the corporate defendant in parallel proceedings.

This scenario presents an unpleasant dilemma. Under many circumstances, an employee’s decision to plead the Fifth Amendment ultimately will represent a better alternative for the corporation than the employee’s direct testimony about possible wrongdoing conducted at the behest or with the knowledge of the company. Generally, the more advanced the criminal investigation, and the more substantial the criminal exposure, the more likely it will be that the interests of the invoking employee and the corporation overlap entirely, and the need to invoke the Fifth will clearly serve the interests of all affected parties. Nonetheless, and as explained below, there are other circumstances in which invocations of the Fifth by employees may eclipse the risks that positive answers pose for the corporation. Ultimately, the most a corporation can hope to do is to try to halt or delay the parallel civil proceedings, and, barring that, attempt to maximize the chances that employees make informed and intelligent choices when deciding whether to exercise their rights against self-incrimination. As discussed below, providing competent, experienced, and independent counsel for employees will minimize chances that an employee either will assert Fifth Amendment privilege in the absence of real exposure, or fail to assert the privilege when truly necessary.

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Federal Court Decisions Extending an Adverse Inference to the Corporate Defendant

The Second Circuit’s 1983 decision in *Brink’s v. New York* often is cited as the source of the doctrine that an employee’s invocation of his right against self-incrimination can give rise to an adverse inference against his employer in a civil lawsuit. The plaintiff in *Brink’s* (Brink’s) had contracted with New York City (City) to collect parking meter revenues. The city terminated the contract when it discovered that some of Brink’s employees were stealing change from the meters. Brink’s sued for breach of the contract. The city counterclaimed for breach of contract and negligence, based on the alleged thefts. At trial, the district court allowed the City’s attorney to question Brink’s non-party employees and ex-employees about the thefts, and ruled that the employees’ assertions of their Fifth Amendment right against self-incrimination was competent and admissible evidence against Brink’s on the City’s counterclaims. A jury awarded the City damages on its claims against Brink’s.

The Second Circuit agreed that there was no “constitutional mandate” that would prevent admission of an employee’s Fifth Amendment refusal to testify in a civil case, although the court refused to adopt a “bright line rule” that such evidence is always admissible. Rather, the court concluded that the probative value of the invocation must be weighed against its potential prejudice, pursuant to Federal Rule of Evidence 403. The Second Circuit found that the employees’ refusal to testify about the thefts was probative on the City’s counterclaim, and not so prejudicial as to bar its admission. Importantly for employers facing parallel proceedings, the court further held that the fact that an employer no longer employs the person invoking the privilege does not necessarily bar admission of the invocation against the employer.

Soon after the decision in *Brink’s*, in *RAD Services v. Aetna Casualty & Surety Company*, the Third Circuit reviewed whether the trial court properly admitted evidence that non-party witnesses had asserted the Fifth Amendment in response to questions about allegedly illegal activities performed while employed by RAD Services (RAD). The Third Circuit affirmed the trial court’s decision to instruct the jury that two witnesses who had pleaded the Fifth would have testified adversely to RAD, explaining, “nothing forbids imputing to a corporation the silence of its personnel.” Like the Second Circuit in *Brink’s*, the Third Circuit ruled that it did not matter whether the witnesses who invoked the privilege were current or former employees of RAD (the record on

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3 *Brink’s v. New York*, 717 F.2d 700 (2d Cir. 1983).
appeal was not clear on this fact). The court explained that if the witnesses were current employees, the adverse inference was trustworthy because the employees’ self-interest in remaining employed would prevent them from falsely impugning their employer. Likewise, the court reasoned that if the two witnesses were not still employed but retained some degree of loyalty to RAD—such as by having their attorneys’ fees paid for by RAD—this loyalty would provide indicia of trustworthiness to support the adverse inference. Justifying its result under any circumstances, the court also stated that if ex-employees truly held a grudge against their employer, they would be inclined to offer damaging testimony directly, “instead of hoping for an adverse inference from a Fifth Amendment invocation.” Regardless of whether most former employees would be willing to admit criminal activity to spite a former employer, or whether former employees tend to invoke the Fifth out of a reflexive self-preservation instinct even where invocation might not be justified, the practical result of the decision in RAD is that a corporation can expect to be affected by any invocations of the Fifth.

Shortly after the Third Circuit’s decision in RAD, the Eighth Circuit issued a similar ruling in Cerro Gordo Charity v. Fireman’s Fund American Life Insurance Company. Relying on Brink’s and RAD, the Eighth Circuit agreed that a trial court appropriately allowed the jury to draw an adverse inference against a corporation trying to collect on insurance policies of a murdered woman, because the principal of the company had pleaded the Fifth in response to questions about the murder (of which he had been accused). The court agreed that the probative value of this testimony outweighed any danger of unfair prejudice. Thus, the Eighth Circuit embraced the pattern in reported cases of upholding the application of the adverse inference, and applied a relatively simple Rule 403 balancing test to do so.

The Second Circuit revisited the admissibility of a non-party witness’s Fifth Amendment invocation in a civil proceeding in the case of LiButti v. United States. In LiButti, however, the Second Circuit moved beyond the simple invocation of Rule 403 announced in Brink’s and articulated a list of non-exclusive factors that trial courts should consider when determining whether to impute an adverse inference to a party based on a non-party’s assertion of the Fifth. These factors included:

1. the nature of the relationship between the non-party and parties, particularly the non-party witness’s degree of loyalty to the party;
2. the degree of control of the party over the non-party witness;

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6 LiButti v. United States, 107 F.3d 110 (2d Cir. 1997).
3. the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and

4. whether the non-party witness played a large or small part in the litigation.

The Second Circuit explained that the closer the bond between the non-party witness and the party, the less likely the non-party would be to assert the privilege merely to damage the party. Conversely, under such circumstances, it would be more likely that the adverse inference would be trustworthy. Similarly, the Second Circuit noted that courts should be more willing to allow an adverse inference against the party when the party has a significant amount of control over the non-party witness. Regarding the compatibility factor, the Libutti Court noted that when the party and non-party witness share the same interest in the lawsuit (e.g., it would be financially favorable to both if the lawsuit were dismissed), courts should be more likely to allow the non-party’s invocation into evidence.

The factors articulated in Libutti describe a more realistic and targeted analysis for assessing relevance and prejudice under Rule 403. They provide a corporation with a specific opportunity to explain why a hostile former employee’s invocation of the Fifth Amendment should not create an adverse interest admissible against the company. Thus, a corporation and its counsel should be prepared to advocate for acceptance and application of the Libutti factors when arguing against a litigant’s attempt to draw an adverse inference against the company. Although the Second Circuit’s multi-factor analysis has yet to be formally adopted by another Circuit, no Circuit has rejected the test, and several district courts outside of the Second Circuit, including the Eastern District of Michigan and the District of Colorado, have used the test.

Impact of the Adverse Inference Doctrine on Corporate Defendants Facing Parallel Proceedings

These decisions, and similar rulings, have an immediate impact on the corporate employer, which suddenly may find itself burdened with significant adverse inferences drawn from its employees’ Fifth Amendment invocations. Sometimes, the adverse inference drawn in the

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9 E.g., Curtis v. M & S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999) (reversing a district court’s refusal to allow toxic tort plaintiffs to introduce evidence that the corporate defendant’s president and corporate representative plead the Fifth Amendment rather than testify at his deposition).
minds of the jurors, with their unfettered imaginations, will be much worse than what the actual answer to the question would have been. Returning to the example of the hospital administrator involved in the anti-kickback litigation in the Introduction to this article, assume that he is asked about the content of discussions with other hospital supervisors regarding financial benefits provided to the outside physicians’ group. Further assume that his accurate answers would be that any discussions were limited, general, and focused on ensuring that any benefits constituted fair, market-driven compensation for a personal services contract (i.e., the answers would be exculpatory). If the cautious administrator routinely invokes the Fifth for any and all questions regarding the outside physicians’ group, a jury will be free to assume—and will be invited by opposing counsel to assume—that the discussions were frequent, detailed, and focused on ensuring that the physicians were compensated to induce referrals to the hospital (i.e., the answers would be inculpatory). Otherwise, the jury may reason, the administrator simply would have testified.

Likewise, the damage inflicted by an adverse inference often is exacerbated by the inability of corporate counsel to use cross-examination to diffuse or rebut the apparent impact of an invocation of the Fifth Amendment, because the very nature of the invocation ensures that there is no specific answer to address. Attempts to explore the basis or the details of the invocation would lead only to further invocations. Similarly, without a specific answer from the invoking witness, counsel cannot effectively attack a concrete target during closing arguments, or in response to motions for summary judgment. Jurors and even courts may be quick to transform adverse inferences into costly judgments or penalties that could threaten a company defending related civil and criminal proceedings.

Ultimately, the testifying individual controls the decision whether to waive or invoke the Fifth. Under some circumstances, a decision to invoke the Fifth can present a worse litigation risk for the individual’s employer than an actual answer. For example, when the likely criminal exposure of both the individual and the corporation is extremely dubious—either on the merits, or as a function of available government resources—employees nonetheless may overreact to the theoretical prospect of criminal prosecution and invoke the Fifth even in instances in which an answer would be completely benign. The standard for a proper invocation of the Fifth is extremely broad, and courts are reluctant to scrutinize an individual’s decision to invoke. Given the ease with which an individual can invoke, and given the understandable concerns an individual may have when a criminal investigation of her employer
is hovering in the background, it is entirely possible that employees—particularly former employees—will refuse to respond to a variety of questions, even though the answers would not even tangentially further any criminal case against them. Unfortunately, the corporation must contend with the litigation consequences of such invocations, as well as the public appearance created by repeated invocations of the Fifth by employees. Inappropriate invocations may infuse an otherwise moribund criminal investigation with life by fostering a perception that such invocations would not occur in the absence of real misconduct.

Sometimes a corporation will be cooperating with the government, perhaps in the absence of any formal agreement, or perhaps in conjunction with a non-prosecution agreement, a deferred prosecution agreement, or even a guilty plea agreement (which may pertain only to limited admissions of criminality). In these situations, the government often is actively investigating and focusing on employees, although private litigants will continue to focus on the corporation’s responsibility. Here, invocations of the Fifth by employees can be particularly frequent—and damaging. Perhaps the worst scenario from the corporation’s perspective occurs when an employee has committed definite criminal acts, but has done so clandestinely and without the corporation’s knowledge. However, such circumstances also present the maximum probability that the employer can convince the government to join in a request to stay the ongoing civil proceedings, as explained below, because the employer and government have shared interests.

Although there is little a corporation can do to defeat the admissibility of an adverse inference once an employee pleads the Fifth in a civil proceeding, there are some prophylactic steps that employers can take toward minimizing both the underlying risk and possible consequences of this predicament. These steps include requesting a stay of the civil proceedings, requesting a protective order regarding the dissemination of civil discovery, and helping to ensure that employees are represented by skilled counsel who can provide sound advice. Each of these steps is discussed below.
Requesting to Stay the Civil Proceedings

Courts have discretion to stay a civil action pending the conclusion of the government’s parallel criminal proceedings at the request of either the government or a private party. A stay is an invaluable tool because it prevents the government from obtaining employee depositions and discovery from the civil action until the criminal action is resolved. At the very least, a stay delays civil discovery until targets and defendants have a firm grasp of the nature and scope of the criminal action. After the criminal action is complete and the extent of the company’s criminal culpability (if any) is ascertained, it becomes much easier for corporate employees and their counsel to determine correctly whether it is necessary to invoke the Fifth Amendment in response to questions in the civil proceeding. Further, an employee witness may receive immunity from prosecution in the criminal matter, which will greatly decrease the employee’s anxiety about testifying openly in any related civil action. Finally, staying civil actions allows a litigant to focus attention and resources on a single proceeding, although due regard must be paid to the eventual effect of strategies and tactics on the stayed actions.

There is no constitutional right to obtain a stay in parallel proceedings. The decision is entirely within the court’s discretion. Practically, a stay is difficult to obtain. Courts deciding whether to stay civil proceedings have considered factors including:

1. the extent to which defendants’ Fifth Amendment rights are implicated;
2. the interest of the plaintiffs in proceeding expeditiously with the civil litigation;
3. the potential prejudice to plaintiffs of a delay;
4. the burden that any particular aspect of the proceedings may impose on defendants;
5. the convenience of the court in the management of its cases;
6. the efficient use of judicial resources;
7. the interests of persons not parties to the civil litigation; and
8. the interest of the public in the pending civil and criminal litigation.12

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10 Both federal and state courts have the authority to stay legal proceedings pending immediately before them, with the caveat that courts do not have authority to stay an action pending before another court or another sovereign. Thus, as a practical point, a corporation subject to parallel federal and state actions in multiple jurisdictions may find itself in the position of having to seek stays simultaneously from multiple courts.

11 E.g., United States v. Kordel, 397 U.S. 1, 12 n.27 (1970); Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899 (9th Cir. 1989).

12 Molinaro, 889 F.2d at 902–03.
Some courts are reluctant to stay a civil proceeding unless a criminal indictment already has been returned, and will not grant a stay based upon the mere possibility that an indictment will be returned, lest litigations be postponed unnecessarily.¹³

Unlike an individual, a corporation has no right against self-incrimination under the Fifth Amendment.¹⁴ Given the practical reality that obtaining a stay typically depends upon showing that the civil proceedings imperil Fifth Amendment rights,¹⁵ a corporation will have to present any request for a stay as serving, indirectly and in part, the interests of affected individuals, stressing how their invocation of the Fifth could redound to the detriment of the corporation. This represents an uncomfortable position for the corporation, which in effect will have to argue against its own potential interests by detailing how adverse inferences would undermine its legal position. A corporation understandably may be unwilling to make such arguments, depending upon the circumstances of the case; however, if the corporation is not willing, it should assess the wisdom and utility of filing a motion to stay. Although the court will consider the interests of third persons and even the general public, the lack of a direct Fifth Amendment right will make a corporation’s stay request more attenuated and less persuasive. However, and depending upon the court, a corporate defendant may gain certain long-term advantages by making a request for a stay, which, although ultimately denied, begins to educate the court regarding the role of adverse inferences and why they should not be held against the corporation in the case at hand. Finally, if the corporation has a good relationship with an employee named in the civil proceeding and inclined to invoke the Fifth—or perhaps even a joint defense agreement with that employee for the purposes of any criminal investigation—the employee clearly should be the litigant filing the motion for a stay.

A corporate target or defendant will find it exceedingly difficult—likely impossible—to stay a parallel civil government investigation. The most a corporation can hope to do is stay parallel civil litigations instituted by private parties. Courts will not stay a parallel government civil investigation, because they find that public interest often requires

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¹³ See Id. at 903.
the government to pursue simultaneous civil and criminal courses of action. Unfortunately for healthcare corporations, private qui tam actions begun by civil litigants leave no private action to be stayed once the government ultimately decides to intervene. Similarly, qui tam actions remain under seal until the government decides whether to intervene; thus, the target of a criminal investigation may not be aware that a parallel civil qui tam action is pending against it as well. Moreover, the government generally enjoys wide latitude when it conducts simultaneous civil and criminal investigations. It is difficult for an indicted defendant to show later that the government improperly used a civil investigation to further its criminal investigation, so long as the government can show that the civil investigation had a “bona fide” basis.

However, there may be other, related private litigations which, if not truly parallel, involve similar fact patterns, witnesses, and allegations, and for which the corporation may want to consider a stay. For example, a private litigant may sue a corporation for employment discrimination, while alleging that he is a protected whistleblower in regards to conduct underlying separate government proceedings. In another example, a civil plaintiff may sue a pharmaceutical company, claiming that he suffered adverse medical effects from the same type of off-label use of a drug that the government is investigating the company for allegedly promoting.

Finally, even the government itself sometimes has an interest in staying civil proceedings, often due to the risk that the more public nature of civil discovery generated by a private litigant could jeopardize the government’s criminal case. Thus, it occasionally behooves a corporation to explore with the government the possibility of a jointly-requested stay that may prove beneficial to both parties. These circumstances typically involve private litigation that the government regards as a threat to its criminal case because potential targets could obtain insights into the government’s case and/or explore (and, in the view of the government, undermine) the testimony of cooperating government witnesses before the government has a chance to fully prepare those witnesses—or even settle on a final prosecution theory. Of course, in such instances, a corporation may have competing incentives to allow the private litigation to proceed. If the parties’ interests

16 Molinaro, 889 F.2d at 903.
17 See United States v. Stringer, 521 F.3d 1189 (9th Cir. 2008) (reversing dismissal of indictment based in part on information obtained during SEC civil investigation, and reversing alternative decision to suppress statements made during that investigation, when SEC had conducted investigation pursuant to its civil enforcement jurisdiction, written boilerplate SEC forms alerted witnesses that information could be used in criminal proceeding, and SEC attorney warned witnesses of rights against self-incrimination).
Providing Employees with Competent Legal Counsel

whether an employee should plead the Fifth in response to questioning in a civil action is a difficult decision that requires consideration of all of the particular circumstances. Clearly, an employee with any degree of potential exposure should not attempt to make this decision

18 United States v. Tison, 780 F.2d 1569, 1572–73 (11th Cir. 1986) (upholding district court’s stay of civil proceeding for three years to prevent circumvention of criminal discovery provisions in parallel proceeding). See generally Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) (criminal prosecutions often take priority over the rights of litigants in civil cases).
19 See In re: Film Recovery Sys., Inc., 804 F.2d 386, 388 (7th Cir. 1986).
20 Compare In re: Grand Jury Subpoena Duces Tecum (Doe), 945 F.2d 1221 (2d Cir. 1991) (vacating district court’s order that refused to quash a grand jury subpoena asking for documents covered by civil protective order), with In re Grand Jury Subpoena, 62 F.3d 1222 (9th Cir. 1995) (upholding denial of motion to quash grand jury subpoena requesting documents covered by civil protective order, and adopting per se rule in favor of grand jury subpoenas); In re Grand Jury (Williams), 995 F.2d 1013 (11th Cir. 1993) (vacating district court order that quashed grand jury subpoena); In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir. 1988) (upholding district court’s refusal to quash state ordered subpoena).
without the advice of competent and experienced counsel. Accordingly, it is almost always in the employer’s best interest for its employees to be represented by capable and independent counsel, because such counsel presumably will be best able to ensure that the employee bases the decision whether to plead the Fifth on real, as opposed to imagined, risks. Conversely, it is in neither the interests of the individual nor the corporation for an employee to blithely provide answers on the record that will provide the government with building blocks for its criminal proceedings, even if the incriminating nature of the answers is not immediately apparent. Thus, for these and other reasons, it generally behooves a corporate employer to pay for competent legal counsel for its high-ranking or otherwise exposed employees.

The corporation also should consider whether it makes sense to enter into joint criminal defense agreements with employees who are witnesses in the civil proceeding. Such agreements can provide secondary benefits in civil cases, such as the ability to pool resources, share discovery, coordinate defense theories, and otherwise facilitate efforts to face the opposition as a unified force. Centralized strategy can be particularly important when legal battles must be waged on multiple fronts. Further, and as previously noted, a joint defense agreement—and the collaborative spirit that presumably serves as the predicate for such an agreement—will enhance the corporation’s ability to convince a named civil defendant with Fifth Amendment concerns to move to stay the civil litigation, thereby enhancing the chances that the litigation will be stayed.

In theory, corporations facing potential criminal exposure may pay for employees to retain legal counsel, and may enter into joint defense agreements with employees, without the Department of Justice holding such conduct against the corporation when DOJ assesses whether a corporation has cooperated with or impeded the criminal investigation. This assessment bears on the ultimate question of whether the corporation should be charged criminally. On August 28, 2008, in a document known as the Filip Memorandum, DOJ amended its Principles of Federal Prosecutions of Business Organizations (Principles) and, among other changes, reversed its prior policy in this regard. DOJ stated that “[i]n evaluating cooperation … prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action.” In another reversal of

22 Id. at 9-28.730.
prior policy, the Principles now state that, “[s]imilarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements.” The current Principles constitute an improvement upon their prior incarnation, which had allowed prosecutors to hold such conduct against corporations, chilling such conduct. Nonetheless, the reality of plea negotiations, charging decisions, and prosecutorial mindsets may, as a practical matter, overwhelm the stated ideals of the Principles in some cases. Corporations anxious to avoid criminal charges may spurn payment of employees’ legal fees or joint defense agreements to curry favor with the government, even though such conduct is officially sanctioned and prosecutors are forbidden from considering it. Indeed, the Principles provide an example that hints at how the “rights” accorded under the Principles, from the perspective of DOJ, should not be exercised by any corporation seeking a good result in the real world: “Of course, a corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek cooperation credit.”

Finally, corporations must never create even the appearance of putting pressure on employees or former employees to waive or invoke their rights, or otherwise change their testimony. Such efforts create resentment and can backfire, producing the opposite of the presumably desired result. They also could transform an otherwise mundane or technically complex matter into a case involving allegations of obstruction or retaliation against a whistleblower, which are always attractive to the government.

Conclusion

The adverse inference represents one of the many challenges faced by a healthcare entity embroiled in a criminal investigation or prosecution accompanied by parallel civil proceedings. Employees and even former employees, proceeding either appropriately or simply out of misplaced fear or antipathy towards the corporation, can impose the adverse inference upon a corporation by invoking Fifth Amendment rights. Further, a skillful opponent may use the adverse inference doctrine to repeated and devastating effect against a corporation. Once an employee pleads the Fifth, avoiding the adverse inference and prevent-

\[\text{23 Id.}\]
\[\text{24 Id.}\]
ing its admissibility during civil proceedings will be difficult. Containing the potential damage created by an adverse inference before a finder of fact will be similarly challenging. Nonetheless, certain tactics can avoid or dull the consequences of the doctrine, such as seeking a stay of civil proceedings related to the criminal case, obtaining a protective order for discovery provided in any civil proceedings, and helping to ensure that skilled counsel represent employees.

**PRACTICE TOOLS**

**Proper Invocation of Fifth Amendment Right Against Self-Incimination**

- The Fifth Amendment provides every individual with the right to refuse to testify in any lawsuit, civil or criminal, under certain circumstances.
- An individual may invoke the Fifth Amendment when he reasonably believes that his testimony would show criminal liability in an existing or future criminal action.
- An individual also may invoke the Fifth Amendment when he reasonably believes that his testimony would provide a link in the chain of evidence necessary to prosecute him for a crime.
- Courts rarely second-guess an individual’s invocation of the Fifth Amendment.
- A corporation has no Fifth Amendment right against self-incrimination.

**Creation of the Adverse Inference**

- An individual’s invocation of the Fifth Amendment can be used against the individual when she is a party to a civil lawsuit, and may give rise to an adverse inference that the answer to the question would have been unfavorable to the individual.
- When a corporation is a party to civil litigation, the invocation of the Fifth Amendment by the corporation’s employees or former employees may create an adverse inference against the corporation.
- More generally, a non-party’s invocation of the Fifth Amendment in civil litigation can be admissible to create an adverse inference against a party.
- An individual’s invocation of the Fifth Amendment cannot be used against that individual at her criminal trial.
Factors that May Determine Admissibility of Invocation by Non-Party/Former Employee Against Party

✓ Some courts apply the Federal Rule of Evidence 403 balancing test for assessing the admissibility of a witness’s invocation of the Fifth Amendment; this test involves a broad assessment of whether the probative value of the inference outweighs any prejudicial impact. It generally weighs toward application of the adverse inference.

✓ Accordingly, corporate counsel should argue for the application of the LiButti factors, because they provide a more realistic and targeted analysis for assessing relevance and prejudice under Rule 403. The LiButti factors also provide a corporation with a specific opportunity to explain why the invocation of the Fifth Amendment by a hostile former employee should not create an adverse inference admissible against the company. These factors include:

- The nature of the relationship between the non-party and parties, particularly the degree of loyalty of the non-party witness to the plaintiff or defendant. The closer the bond, the more likely it is that the court will admit the non-party’s invocation.

- The degree of control of the party over the non-party witness. The more control the party has over the non-party witness, the more likely it is that the court will allow the non-party’s invocation to create an adverse inference against the party.

- The compatibility of the interests of the party and non-party witness in the outcome of the litigation. When the party and non-party witness share the same interest in the lawsuit (e.g., it would be financially favorable to both if the lawsuit was dismissed), courts are more likely to allow the non-party’s invocation into evidence.

- Courts also may consider whether the non-party witness played a large or small part in the litigation as a factor in determining the admissibility of his invocation.
Impact of the Adverse Inference

✓ The adverse inference doctrine can be manipulated by a civil litigation opponent through repeated and specific questions to an employee, posed with the expectation that each question will produce an invocation of the Fifth Amendment.

✓ Adverse inference may create in jurors’ minds imagined answers that are worse than actual answers would have been, especially if questions are crafted accordingly.

✓ Lack of actual answer by a witness precludes effective use of cross-examination or argument to reduce or avoid the consequences of adverse inference.

✓ Overly cautious or hostile current or former employees may invoke the Fifth Amendment without legitimate basis, thereby creating a misleading appearance of criminal conduct.

✓ Under certain circumstances, and despite adverse inference, a subject or target of a criminal investigation may take advantage of parallel civil proceedings to obtain discovery regarding issues in the government’s investigation and/or depose potential government witnesses and lock in helpful testimony.

Options for Minimizing Consequences of the Adverse Inference

1. Move to stay a civil proceeding until completion of a parallel criminal action.

   This option likely provides the best chance for a corporate defendant to avoid the perils of adverse inferences created by invocations of the Fifth Amendment by employees and former employees. Courts have considered a variety of factors when considering a request to stay a parallel civil proceeding pending an ongoing criminal case, such as:

   • The extent to which the defendants’ Fifth Amendment rights are implicated.

   • The interest of the plaintiffs in proceeding expeditiously with the civil litigation, and the potential prejudice to the plaintiffs of a delay. Whether an indictment has been returned already is important to consideration of this factor.

   • The burden that any particular aspect of the proceedings may impose on the defendants.
• The convenience of the court in the management of its cases, and the efficient use of judicial resources.
• The interests of persons not parties to the civil litigation.
• The interest of the public in the pending civil and criminal litigation.
• Courts will almost never stay a parallel civil proceeding brought by a government.
• Courts will be more inclined to grant a stay when the government itself supports the request for a stay, which the government may do if it regards private litigants as undermining the integrity of the criminal investigation.

2. Request a protective order.
• A protective order issued in civil litigation will limit or bar use of discovery provided in that litigation by other litigants in separate but related civil proceedings.
• Government frequently may obtain documents covered by civil protective orders by issuing grand jury subpoena.
• Government, however, may not disseminate to other civil litigants materials obtained through secret grand jury process, until materials become public in proper course.

3. Provide employees with competent legal counsel.
• Providing competent, experienced, and independent counsel for employees will minimize chances that an employee will erroneously assert the Fifth Amendment privilege in absence of potential exposure, or erroneously fail to assert privilege when necessary.
• The decision regarding invocation clearly rests with the employee, in consultation with his counsel.
• Corporate representatives must never pressure employees or former employees in regards to invocation of the Fifth Amendment (or any other decision regarding their legal representation), or create the appearance of such pressure.
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