Pleading 'the Fifth' in Family Law

by Amanda S. Trigg and Paul J. Myron

"I plead the Fifth." It's a phrase we've all heard. Most people use the phrase lightheartedly, perhaps to dodge a question that actually lacks any incriminating purpose. It refers, for ease of reference, to the Fifth Amendment of the United States Constitution, as originally included in the Bill of Rights, in 1789:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The most commonly invoked clause, in jest or in serious defense of a constitutional right, is "No person…shall be compelled in any criminal case to be a witness against himself." When a witness declines to answer a question under oath, in a deposition or trial, the right apparently creates a barrier to obtaining crucial testimony. Furthermore, when a witness or deponent constantly invokes the privilege in situations that do not call for such a privilege, it can be downright irritating.

On its face, the Fifth Amendment would not obviously apply to family law matters, but all practitioners know that sometimes criminal actions, or fear of allegation of criminal activities, arise. The sensitive issues embodied in family cases, such as child custody, support, and equitable distribution, differ tremendously from other civil cases. Matrimonial matters, moreover, usually involve parties who desire the same ultimate outcome—divorce. As such, a family part judge often should handle a party's Fifth Amendment rights differently than a civil or criminal judge if a party or witness declines to answer a question during a deposition on that basis.

Grounds for Asserting the Fifth Amendment

Invoking the Fifth Amendment requires a colorable possibility that the deponent might incriminate him or herself by providing the testimony sought. The Supreme Court has defined this 'possibility' to mean it "need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[1] Alternatively, as long as the possibility, not necessarily probability, of criminal prosecution exists, it is appropriate to assert the privilege.[2]

In New Jersey, when adultery previously constituted a crime, the courts consistently upheld the use of the privilege when a deponent sought to avoid self-incrimination for adultery.[3] However, since the adoption of the New Jersey Code of Criminal Justice on Sept. 1, 1979,[4] adultery is no longer criminalized, and courts have held the privilege no longer applies to such conduct.[5] Elimination of that crime from New Jersey's statutes decreased the opportunities to invoke the privilege in a divorce matter, but there remain other relevant reasons to do so. For example, a spouse may be asked about possible physical abuse, misuse of marital property or failure to report income, which could lead to criminal exposure.

Fundamentals of Evidence

As practitioners know, the Fifth Amendment does not just apply on the witness stand. An individual maintains the right whenever offering testimony, including when answering interrogatories, requests for admission, or during a deposition. All of these tools create testimony under oath. That testimony can then be used for any purpose against the opponent,[6] or to contradict the opponent's subsequent testimony at a hearing or trial.[7] It appears most dramatically in a deposition, where Rules of Evidence permit any part of a deposition to be offered into evidence, and objections to be raised.[8]

Generally, the Rules of Court require a deponent to answer every question, unless he or she objects and refuses to answer to assert a privilege, protect confidentiality or comply with a court order.[9] A deponent can also make a motion or application to the court that the deposition is being conducted or defended in bad faith.[10] Depending upon the basis of the motion or application, the court may order the attorney to cease the deposition or limit its scope.[11]

The Adverse Inference

Courtroom dramas and cinematic depictions of legal proceedings give viewers and, therefore, litigants the false impression that the Fifth Amendment offers absolute protection from any negative consequences for exercising a constitutional right. While a litigant might not face incarceration for invoking the Fifth Amendment, even if done frivolously, exercising the privilege incorrectly or excessively may damage a litigant's case.

Courts may make negative assumptions about the witness who invokes the Fifth Amendment, possibly to the benefit of the other party.[12] The ability to draw adverse inferences against one who invokes the privilege is a "logical, traditional, and [a] valuable tool in the process of fair adjudication."[13] The court has great discretion to draw and to apply its negative inferences. In extreme situations, a defendant's invocation of the privilege in a criminal proceeding may provide "independent and additional support" of guilt."[14]

A litigant's mere invocation does not by itself allow the court to draw adverse inferences. There must be other evidence in the record that would support the trial judge's negative assumptions.[15] In criminal cases, for example, an inmate's silence alone should not support an adverse decision.[16] Likewise, refusal to submit to interrogation, without any other evidence, cannot constitute a final admission of guilt.[17] Also of interest, at least one New Jersey court has suggested that a trial judge should not draw an adverse inference against a defendant who invokes the privilege in a domestic violence case.[18]

Tools to Combat a Deponent's Uncooperativeness

Even when properly utilized, practitioners and judges possess various ways of overcoming the initial obstacle to obtaining evidence. As with so many other things in life and in law, timing is everything, including when, during the discovery process, the party invokes the privilege. During a deposition, during regular court hours, if anticipating the invocation of the privilege and prepared to argue the legal issue with the court, consider calling the judge for an immediate ruling on whether the deponent must answer.[19]

When a deponent withholds discovery for any reason, consider seeking it by alternative means, such as by a subpoena to another witness or third-party institution,[20] seeking additional time from the court to do so, or, if necessary, pursuant to a case management order. If the invoking party or alternative source files a motion to quash,[21] that brings the pivotal issue before the court and creates an opportunity for discussion of the adverse inferences or other sanctions.

Depending upon the value of the evidence sought, and whether other sources of the same information exist, practitioners might bring an application to compel the testimony, on the grounds that the litigant attempts to unlawfully withhold information, seeking imposition of non-criminal sanctions if the court agrees the litigant is attempting to withhold discoverable information.[22]

Courts possess wide discretion to impose the sanctions permitted by the New Jersey Rules of Court for any failure to provide discovery. When a court finds that a litigant conceals crucial information, its powers enable it to protect the non-invoking litigant from being disadvantaged.[23] When a party seeking relief, such as alimony or child support, constantly pleads the Fifth Amendment, courts may dismiss that party's own pleading[24] on the basis that a party cannot simultaneously invoke the privilege and seek affirmative relief.[25] The constitutional right against self-incrimination may not operate as both a "shield" and a "sword."[26]

Courts resist using this sanction generally, and especially in family law matters.[27] Dismissing a divorce complaint or counterclaim, for example, prevents the other party from exercising his or her right to obtain a divorce and related relief that may pertain to children.[28] Throwing out a divorce matter from court could harm both parties and their children by leaving their issues unresolved and unstable. Depending upon the severity of the abuse of the privilege a court may instead strike claims for relief not related to the children, such as alimony or counsel fees.[29] Additionally, the invoking litigant risks other judicial sanctions.[30] Pre-trial hearings and motions *in limine* work to expose false claims of the Fifth Amendment privilege, shifting the burden of proof to the privilege-asserting party, who is in the best posi-

tion to provide relevant proof, and excluding testimony given at trial if the same testimony had been withheld during discovery under an assertion of the privilege to prevent "surprise, prejudice and perjury."[31]

Conclusion

A deponent's invocation of the Fifth Amendment can be difficult to navigate for a family law attorney. Practitioners must be mindful that the invocation allows judges to draw adverse inferences based on the deponent's unwillingness to answer. If an attorney has other independent evidence of the conduct or information sought from the deposition question, the deponent's refusal to answer should not be a major issue. Unlike prosecutors, matrimonial attorneys are not interested in proving their opponent's criminal guilt beyond a reasonable doubt. The adverse inferences the court can draw in these situations can, therefore, often be as sufficient as actually soliciting the intended information from the deponent.

Of course, there will be times when the information sought will be so crucial that even the possible adverse inferences will not suffice. As is the case with so many aspects of practice, the key in these situations is to be prepared. Attorneys should expect that the individuals they depose will not voluntarily dispel potentially damaging information. When preparing for a deposition the practitioner should look over each question and ask: "Would I want to answer this?" If the answer is no expect that the deponent does not want to answer it either and prepare for the possibility that he or she will go to great lengths to avoid the question.

Matrimonial matters involve sensitive and personal issues. The nature of deposition questions can become quite invasive to the deponent's personal life. Questions may address extramarital affairs, intimate details of the relationship, or potential embarrassing behavior. Matrimonial lawyers must anticipate a struggle with their deponent when asking these questions. Fortunately, a prepared and even-keeled matrimonial attorney will know how to handle this situation.

Practitioners can petition the court for a wide variety of sanctions to compel the deponent to answer. If time is of the essence, one can even attempt to telephone the court for a timely ruling on the matter. When considering a request for sanctions, family law attorneys should be mindful of causing additional delays and hurdles to obtaining a timely divorce for their client. Thoroughly consider what the sought-after information is worth as far as the client's and the court's additional time and expense is concerned before submitting additional pleadings. ■

Amanda S. Trigg is a partner in the law firm of Lesnevich, Marzano-Lesnevich Trigg, O'Cathain & O'Cathain, LLC. Paul J. Myron is an associate in the matrimonial department of Lesnevich, Marzano-Lesnevich, Trigg, O'Cathain & O'Cathain, LLC.

Endnotes

1. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).
2. *Payne v. Payne*, 33 Md. App. 707, 366 A.2d 405 (1976).
3. *Mahne v. Mahne*, 66 N.J. 53, 328 A.2d 225 (1974); *Levin v. Levin*, 129 N.J. Super. 142, 322 A.2d 486 (App. Div. 1974).
4. *See Lynn v. Lynn*, 165 N.J. Super. 328, 335, 398 A.2d 141 (App. Div. 1979).
5. *Simeone v. Simeone*, 172 N.J. Super. 120, 122, 410 A.2d. 1197 (Ch. Div. 1979).
6. R. 4:16-1(b).
7. R. 4:16-1(a).
8. R. 4:16-2.
9. R. 4:14-3(c).
10. R. 4:14-4.
11. *Id*.
12. *Mahne*, 66 N.J. at 62, 328 A.2d at 229.
13. *Duratron Corp. v. Republic Stuyvesant Corp.*, 95 N.J. Super. 527, 533, 231 A.2d 854, 857 (App. Div. 1967).
14. *U.S. v. Stelmokas*, 100 F.3d 302 (3rd Cir. 1997).
15. *State Dep't of Law & Pub. Safety, Div. of Gaming Enf't v. Merlino*, 216 N.J. Super. 579, 587-88 (App. Div. 1987), *aff'd*, 109 N.J. 134 (1988).
16. *Baxter v. Palmigiano Enomoto v. Clutchette*, 425 U.S. 308, 317-18 (1976).

17. *Id.; Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967).
18. *H.E.S. v. J.C.S.*, 175 N.J. 309, 331 (2003).
19. R. 4:14-4.
20. R. 4:14-7.
21. R. 4:14-7(c).
22. *Hackes v. Hackes*, 446 A.2d 396 (D.C. 1982), *citing Levin v. Levin*, 129 N.J. Super. 142, 322 A.2d. 486 (1974); *Costanza v. Costanza*, 66 N.J. 63, 328 A.2d 230 (1974).
23. *Dodson v. Dodson*, 855 S.W.2d 383 (Mo. Ct. App. 1993).
24. *Fidelity Union Bank v. Hyman*, 418 A.2d 764, 766, 214 N.J. Super. 177, 182 (App. Div. 1986); *Mahne*, 66 N.J. at 62, 328 A.2d 225 (1974).
25. *Steinbrecker v. Wapnick*, 24 N.Y.2d. 354, 300 N.Y.S.2d. 555 (1969); *Levine v. Bornstein*, 6 N.Y.2d 892 (1959).
26. *Sparks v. Sparks*, 768 S.W.2d 563 (1989).
27. *Mahne*, 66 N.J. at 62, 328 A.2d 225.
28. *Crocker C. v. Anne R.*, 2018 NY Slip Op 50182(U).
29. *Id.*
30. *Sparks*, 768 S.W.2d at 61.
31. *In re: Grand Jury*, 286 F. 3d 153 (3rd. Cir. 2002); *Duffy v. Currier*, 291 F. Supp. 810 (D. Minn. 1968).