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TRAINING BULLETIN

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"TAKING THE FIFTH" PART V

WHEN YOUR "POLICE TESTIMONY" IS COMPELLED IN A CIVIL ACTION

This will be the final Part of a five-part treatise examining the application of the Fifth Amendment's right against self-incrimination to police officers whose official-capacity conduct comes under scrutiny in some forum, which presents the possibility of self-incrimination if the officer testifies or makes a statement in such a context.[1] In Parts I through IV of "Taking the Fifth", we looked at the dynamics of the right against self-incrimination generally, and then how it applies to police officers in "course and scope" matters. From there, we went on to the nature of compelled statements and use immunity; finally, we looked at the principles in a number of settings where the officer may appear as a "subject", a "witness", a "target", or a "defendant", in a variety of circumstances: internal affairs inquiries, criminal trials, coroner's inquests and grand jury proceedings.

In this final part, we want to see what happens when an officer is a defendant, or at least an adverse witness in a third-party plaintiff's civil action against the officer, or the agency, or both.

In preparing for trial in a civil case, lawyers utilize a variety of discovery devices to learn what the defendant(s) and their friendly witnesses will say, to memorialize testimony (i.e. to, as much as possible "set" the testimony in concrete), and to focus or narrow the issues by eliminating uncontested facts from the pool of proofs that must be offered at trial to win. Secondary goals of such discovery may be to learn about the existence of other witnesses or evidence, or to develop impeachment of adverse parties or witnesses, or develop expert testimony to either promote it or impeach it. The common devices in civil cases for such discovery are five: (1) depositions; (2) subpoenas *duces tecum*; (3) notices to produce for inspection and copying (documents and evidence); (4) requests for admissions; and (5) interrogatories.

[1] *See*: "Taking The Fifth", Parts I-IV, available from the author.

Of these, notices to produce items or tangible evidence for inspection and copying, requests for admissions, and interrogatories are limited to obtaining discovery from parties to the case *only* (i.e. plaintiffs, defendants, etc.) The others, deposition and subpoenas *duces tecum* are employed to obtain discovery from non-parties or strangers to the lawsuit.

Now, suppose for example that you are sued in an excessive force claim under 42 *U.S.C.* §1983 (the federal Civil Rights Acts). As a defendant then, you could be deposed (oral testimony), required to produce documents, evidence or tangible items for inspection, copying or testing, required to admit or deny the truth of a set of written "facts" sent to you (requests for admissions); and to answer questions in writing under oath (interrogatories).

If, on the other hand, you are not currently a party to this excessive force claim (and do not want to be, either), then as a witness you could be deposed and subpoenaed for oral testimony under oath, or to produce documents or things.

But what if, either as a defendant or a "witness", **your conduct** is under investigation or scrutiny (or could reasonably be so) by a criminal investigatory official or agency (criminal investigators, district attorney, state attorney general, grand jury, coroner's inquest, U.S, Attorney, U.S. Justice Department, or another of a myriad of regulatory agencies that conduct criminal inquiries)? If you decide to respond by interviewing, testifying, speaking, writing, or producing documents, you may be incriminating yourself. You need to consult with a lawyer.

Could you, for example, assert the Fifth Amendment privilege in a civil deposition and refuse to answer questions on the grounds that the answers may incriminate you? *Absolutely*. But there may be sanctions if you do so–there may be disciplinary sanctions imposed by your Department. There may be discovery or judicial sanctions against you in the civil case–even incarceration to coerce you to testify.[2]

So, don't take this on alone; this is serious business. And, you cannot expect a city attorney, county counsel or state attorney general representative, who may be offered to you by your employer as defense or witness counsel for you, to advise you on your Fifth Amendment risks. This is where you need to get up close and personal with a lawyer who owes no divided loyalties, and can decide *what's best for you*; not what's best for the civil suit.

It will go something like this. First, the question or questions asked of you must implicate your right against self-incrimination; that is, would the answers directly incriminate you or furnish a link in the chain of evidence that *could lead* to criminal charges against you? Any realistic tendency is sufficient to *justify* invocation of the right against self-incrimination. But is it a *good* idea? That depends on a lot of facts.

And, if you read "Taking the Fifth", Parts I-IV, you should be recalling that department policy is perhaps, the most significant variable here. If the department policy is clear and unambiguous, and commands that you, in matters of official duty, freely and truthfully answer all questions put to you in an official proceeding, "even at the risk of self-incrimination"[3], you have little (thankfully) maneuvering room. You either go and answer all reasonable questions put to you about your performance of official duties, or you refuse to do so, inviting in the process, a charge of

[2] *See particularly*, "Taking the Fifth"–Part IV on the occasions when incarceration may be used as a coercive tactic by a judge.

[3] *See*: *LAPD Manual* §1/210.47 quoted verbatim in "Taking the Fifth"–Part IV.

insubordination and termination. It is as simple as that.

And, if you respond under these circumstances, you should have "use immunity" for what you say: it cannot be used against you in a criminal prosecution. So simple.

But, as we have known for years, few departments have such a well-defined, clear and absolute ban on "Taking the Fifth" in official proceedings. An inquiring officer, wishing to know what the consequences will be for refusing to answer on self-incrimination grounds in an official-capacity lawsuit where his testimony can be compelled by judicial contempt proceedings, will likely find the answer to be as elusive and unsure as the question of whether he will be prosecuted. This is no way to run the railroad, because it inevitably leads to inconsistent, *ad hoc* applications and dispositions of the "duty to testify". There is but one answer: **develop a policy now.**

But some, perhaps many, departments simply will not do it. For the officers of those agencies, a few simple rules must be observed.

Getting back to our illustrative example, we have the officer who is sued in an excessive force case, and is afraid to answer for fear his answers may be used against him as admissions in the collateral criminal Civil Rights Division (Department of Justice) prosecution or grand jury presentation, his department's policy says nothing on the subject, and no supervisor is willing to stick out his or he neck to provide some certainty in this very uncertain circumstance.

He then turns to his lawyer. The lawyer will first make an informed judgment about whether the answers would be incriminating. Second, he must decide whether the Fifth Amendment ought to be invoked, notwithstanding. Third, if there is going to be an invocation, how to avoid discovery sanctions (or worse) in the court proceeding, and finally, what can be done to reduce or resolve the officer's exposure to prejudice because he is going to invoke (refuse to answer).

It has been observed many times that the right against self-incrimination is an absolute, as important to our criminal justice jurisprudence as trial by jury.

Can one be required then, to pay a cost for the mere exercise of the fundamental right not to incriminate oneself? No and yes would be both technically correct answers. Here's why.

In a civil case, for example, both sides should have a level playing field. If a defendant-officer can compel all the testimony, information and production from the plaintiff, but yet the plaintiff cannot get around the defendant's Fifth Amendment invocation, an uneven field results, especially if the defendant's (perhaps, well-founded) fears of a prosecution have not materialized. The defendant-officer could remain mute all the way up to trial, and then suddenly waive his rights and testify, leaving the other side totally unprepared to deal with the testimony.

But in this event, are we justified in eliminating the right against self-incrimination from civil proceedings? Well, no, because it is a fundamental, absolute right not to incriminate oneself in *any* official proceeding.

Clearly a conflict–and the courts are tasked with balancing the equities to insure that the Fifth Amendment is properly observed and protected *without* a cost, and that observance of the right does not result in an unfair disadvantage to the plaintiff. This could mean that a defendant-officer who invokes the right against self-incrimination up to trial *could be* barred from testifying in his own defense. Stand-by for a plaintiff's verdict if this happens!

Various devices have been developed by the courts to avoid the equally harmful consequences of waiving the Fifth Amendment in order to "put out my side of the story" in a civil case, and of having the defendant's testimony barred or stricken at trial because of an albeit valid refusal to answer without retreat.

Usually, this may require putting off the civil case and discovery until the defendant-officer is out of the "Fifth Amendment woods", by reason of acquittal or disposition of criminal charges, or a final decision not to prosecute by the prosecutorial agencies (each of them with jurisdiction).

The point or bottom line is that if you are placed in this position as both a civil "defendant" and a criminal "target" in the same factual scenario, you need to consult with a lawyer who is knowledgeable about the consequences of the choice to invoke or to waive your rights against self-incrimination.

Stay safe!

-Michael P. Stone-

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