

The Privilege Against Self-Incrimination in Civil Proceedings

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Introduction

Recent years have shown an increase in civil proceedings and attending parallel criminal prosecutions. This arrangement can occur in a variety of contexts, for example: (1) the Securities and Exchange Commission investigates improprieties on the part of a corporation and initiates an investigation and civil enforcement action that ultimately result in the federal government charging officers and directors with various crimes based largely upon the same illicit conduct the SEC has alleged; (2) the Department of Labor initiates an investigation that results in a finding of both civil and criminal ERISA violations; or (3) employment litigation arises where an employee sues the employer for the conduct that could potentially form the basis of a criminal matter. Manifold other examples come to mind, such as allegations of civil fraud, civil RICO complaints, and state bar investigations involving an attorney's conduct that might also be criminal in nature.

Parallel civil and criminal proceedings become even more complicated when a lawyer is jointly defending a corporation and an individual employee, officer, or director of the corporation. In that instance, the lawyer may face the dilemma of advising the corporation to comply with all discovery requests while also advising the individual employee, officer, or director to invoke the Fifth Amendment right against self-incrimination to avoid potential criminal liability.



The following discussion addresses this legal quandary.

1. *The Ubiquitous Doctrine of the Right against Self-Incrimination*

Lawyers and non-lawyers alike typically think of the right against self-incrimination as a principle that arises only in criminal proceedings. The reality, however, is that the decision about whether to invoke the privilege in a civil proceeding may be equally important. Periodically, both in-house counsel and attorneys representing individuals or corporations come to a critical fork in the road in a civil proceeding where serious consideration is required as to whether an individual client should invoke the privilege against self-incrimination. This issue arises in civil matters where criminal liability might also manifest, such as claims of fraudulent conduct, negli-

gence, or administrative enforcement actions. In some cases, state or federal prosecutors may be closely monitoring the developments in a civil matter in contemplating the possibility of seeking criminal charges, which, if known to the prospective criminal defendant, makes the decision about whether to invoke the right against self-incrimination even more critical. In other circumstances, unbeknownst to the client or his counsel, there may already be a criminal case underway involving the same client in the parallel civil matter.

In a situation where the client faces the possibility of providing information in a civil proceeding that could later be used against them in a separate criminal case, the government is in a unique position of taking full advantage of the fruits of the civil discovery process to obtain potentially incriminating information to be used against the client in a criminal

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matter. Therefore, when responding to civil discovery requests, both documentary and testimonial in nature, counsel should undertake a careful analysis of areas of possible criminal exposure. If the potential for criminal exposure is significant, it may be in the client's best interest to invoke the right against self-incrimination in response to civil discovery requests. This decision, of course, must weigh the impact the invocation will have in the civil matter, such as the possibility that an adverse inference will be drawn against the client. However, that consequence may be avoided in certain circumstances by seeking a stay of the civil discovery or even of the entire civil proceeding until conclusion of the parallel criminal matter.

As the Supreme Court observed, "[i]n civil proceedings, there are costs when a party asserts the privilege against self-incrimination; '[i]t will, for example, always disadvantage opposing parties... since it keeps them from obtaining information they could otherwise get.'" *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), quoting *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 82 (2d Cir.1995). "Consequently, 'the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.'" *Baxter*, 425 U.S. at 318. Accord *United States v. Solano-Godines*, 120 F.3d 957, 962 (9th Cir. 1997) ("In civil proceedings. . .the Fifth Amendment does not forbid fact finders from drawing adverse inferences against a party who refuses to testify.").

This poses a certain predicament for counsel in that the negative inferences the civil jury may permissibly infer arising from the refusal to testify might jeopardize an otherwise winnable case, yet on the other hand, by invoking the Fifth, the litigant might avoid serious criminal consequences.

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2. *An Individual's Privilege Against Self-Incrimination May Be Asserted In Civil And Criminal Proceedings Alike.*

Under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, section 12 of the Oregon Constitution, a person may not be compelled to give self-incriminating testimony in any stage of a criminal proceeding. This privilege, however, is not limited to circumstances where there is a pending criminal action. A person may not be compelled to give testimony in any proceeding, civil or criminal, formal or informal, before administrative, legislative or judicial bodies, when that person's answers may tend to incriminate him in future criminal proceedings. See *Lefkowitz v. Cunningham*, 431 US 801, 804-805 (1977) (Fifth Amendment privilege available in criminal as well as civil proceedings where the testimony might later subject the witness to criminal prosecution); *State v. Langan*, 301 Or 1, 5 (1986) (Article I, section 12 privilege against self-incrimination applies in any judicial or non-judicial setting where compelled testimony is sought that might be used against the witness in a criminal prosecution). As the United States Supreme Court affirmed in *United States v. Balsys*:

[The privilege against self-incrimination] "can be asserted

in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory," 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. *Kastigar v. United States*, 406 U.S. 441, 444-445, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972); see also *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S.Ct. 16, 17, 69 L.Ed. 158 (1924) (the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

524 U.S. 666, 672 (1998) (emphasis added).

The scope of the privilege is in no way limited to questions that narrowly concern the ultimate issue out of which criminal liability might flow. The Supreme Court has held that the privilege is to be construed liberally "in favor of the right it was intended to secure." *Hoffman v. United States*, 341 US 479, 486 (1951). *Hoffman* makes clear that the scope of the privilege "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id.* Therefore, a party can only be compelled to testify despite a claim of privilege under the Fifth Amendment if a judge is convinced that it is "perfectly clear, from a careful consideration of all the circumstances in [the] case, that the witness is mistaken, and that the answer cannot possibly have" a tendency to incriminate. *Id.* at 488.

Notably, a corporation does not share the same Fifth Amendment protection

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against compelled self-incrimination that an individual officer or director of the corporation has. In *Braswell v. United States*, 487 U.S. 99 (1988), the United States Supreme Court stated:

The rule was first articulated by the Court in the case of *Hale v. Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906). Hale, a corporate officer had been served with a subpoena ordering him to produce corporate records and to testify concerning certain corporate transactions. Although Hale was protected by personal immunity, he sought to resist the demand for the records by interposing a Fifth Amendment privilege on behalf of the corporation. The Court rejected that argument: “[W]e are of the opinion that there is a clear distinction...between an individual and a corporation, and...the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.” *Id.*, at 74, 26 S.Ct., at 379. The Court explained that the corporation “is a creature of the State,” *ibid.*, with powers limited by the State. As such, the State may, in the exercise of its right to oversee the corporation, demand the production of corporate records. *Id.*, at 75, 26 S.Ct., at 379.

487 U.S. at 105. Therefore, it is crucial for counsel advocating for the rights of a corporation to understand that although a corporation has no right against self-incrimination, an individual corporate employee still enjoys that right to the fullest. Any misunderstanding of this principle could result in serious consequences where counsel fails to recognize the individual’s right against

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self-incrimination might be jeopardized by the demands of civil discovery. (See discussion at section (3) below)...

3. *The Privilege against Self-Incrimination Extends to the Production of Documents that Could Provide a Link In the Chain Needed to Prosecute Where the Act of Production Implies an Assertion of Fact.*

The privilege against self-incrimination is not limited to testimony or verbal responses to questioning, but also applies to requests for production of documents. In *United States v. Hubbell*, 530 U.S. 27 (2000), the Court reaffirmed the “act of production” doctrine. Under this principle, an individual can invoke the Fifth Amendment privilege when compelled to turn over documents that are incriminating or that may lead to inculpatory evidence, if the act of producing the documents themselves implies assertions of fact. It is not merely the fact that the compelled documents may contain incriminating evidence that justifies invocation of the privilege. Rather, it is the testimonial nature of production of potentially inculpatory documents that triggers the privilege because by complying with the order to produce, the individual is effectively admitting that the documents exist, were in his possession or control, and were authentic. *Id.* at 37.

See also *United States v. Doe*, 465 US 605, 612-613 (1984) (distinguishing between the contents of the records, which are not privileged, and the act of producing the records which was a privileged act.)

United States v. Hubbell arose out of the Independent Counsel’s investigation of the Whitewater Development Corporation. In *Hubbell* the Independent Counsel had served the defendant with a subpoena duces tecum seeking an expansive range of information relating to the defendant’s financial situation. The subpoena ordered him to gather and provide “any and all” documents related to his and his family’s sources of income. This request included his bank records, records of expenses, all tax return information, and all documents related to his work with specific individuals. *Hubbell*, 530 U.S. at 46-50. The Court concluded that the response to the subpoena required both “mental and physical steps necessary to provide...an accurate inventory of the many sources of potentially incriminating evidence sought.” *Id.* at 42. The breadth of the demand for production by the subpoena required a response that was the “functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition.” *Id.* at 41-42. The Court found it was

undeniable that providing a catalog of existing documents fitting within any of the eleven broadly worded subpoena categories could provide a prosecutor with a “lead to incriminating evidence,” or “a link in the chain of evidence needed to prosecute.”

Id. at 42 (quoting *Doe v. United States*, 487 US 201 (1988) and *Hoffman v. United States*, 341 US 479 (1951)).

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Like in *Hubbell*, information sought in civil discovery, along with the often interrogatory-like nature of the preliminary paragraphs ordering a party to explain the disposition of other material no longer in their possession, makes it “unquestionably necessary for [the defendant] to make extensive use of ‘the contents of his own mind’ in identifying the...documents responsive to the requests in the subpoena.” *Hubbell*, 530 U.S. at 43 (quoting *Curcio v. United States*, 354 U.S. 118, 128 (1957)). For example, in a recent civil case, based on an allegation of a fraudulent will, the plaintiff’s request for production of a certain category of “documents” defined documents to include:

all documents in your actual or constructive possession, custody or control.

If any document was, but is no longer, in your possession and control or was known to you but is no longer in existence, state whether it is:

- a) missing or lost;
- b) has been destroyed;
- c) has been transferred, voluntarily or involuntarily to other; or
- d) otherwise disposed of and in each instance, explain in detail the circumstances surrounding the authorization for such disposition and state the date or approximate date thereof.

The same request for production also asked for any documents evidencing deposits of the deceased funds in the

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defendant’s bank account, bank transfers and written authorizations to sign checks on behalf of the deceased. The acknowledgement by the defendant of the mere existence of any of these documents in the defendant’s possession would in itself have been incriminating.

Such a broad definition of requested documents and the specific requests for individual categories of documents demonstrates how the assembly and production of such materials and the potential response to this request for production required testimonial acts that are protected by the Fifth Amendment and Article I, section 12, as such acts require the party to communicate as to the existence, possession, and authenticity of the broad categories of documents ordered to be produced.

Oregon law concerning the assertion of privilege in the act of production is virtually undeveloped as compared to the law established under the Fifth Amendment. No Oregon case since *State v. Jancsek*, 302 Or 270 (1986), has attempted to analyze the issue of the privilege against self-incrimination with respect to the compelled production of documents under Article I, section 12 of the Oregon Constitution.

In *Jancsek*, the Court disposed of the state constitutional issue on the narrowest possible grounds by concluding that the document sought to be disclosed, a

letter containing admissions by the defendant to murdering his wife, was specifically identified, its contents were already known by the state, its existence was conceded by the defendant, and it was in the custody of another person, not the defendant. Thus, the act of producing the letter did not compel the defendant to do anything as the letter was not even in his possession. *Id.* at 285. The Court further found that disclosure on those facts did not implicate the act of production doctrine under the Fifth Amendment.

Jancsek is easily distinguished from the circumstances most parties may face in civil matters where the issue of asserting the privilege arises. The documents sought in civil discovery are often described in the broadest of terms and without the specificity present in *Jancsek*. Requests for production in civil litigation are typically much more analogous to the broad subpoena in *Hubbell*, seeking “any and all” information related to broad categories of potentially relevant information.

Although the testimonial nature of production was brought up in *Empire Wholesale Lumber Co. v. Meyers*, 192 Or App 221 (2004), there, the assertion of the privilege and the court’s discussion was based solely on the Fifth Amendment, and not on Article I, section 12. *Id.* at 223. As to the Fifth Amendment analysis, the court relied on *Hubbell* and concluded that the privilege could be invoked by a defendant/debtor against whom the plaintiff had obtained a judgment and was seeking to compel the defendant/debtor to answer questions and produce documents related to his income. *Id.* at 227.

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4. Risk of Waiver of Fifth Amendment Protection through Discovery Responses Versus the Risk of Adverse Consequences as Result of Invocation of the Privilege

Counsel should be wary of circumstances where the court finds a waiver of the privilege against self-incrimination as a result of answering questions posed in depositions or in response to broadly worded requests for productions like the one cited above. In *Rogers v. United States*, 340 U.S. 367, 374 (1951), the court held that once a witness makes an incriminating admission, he cannot refuse to disclose details unless such further disclosure would pose a real danger of further incrimination. Despite the general rule that "disclosure of a fact waives the privilege as to the details," the various circuits have interpreted *Rogers* with varying degrees of protection for the witness. The rule in the Ninth Circuit provides the witness with greater protection, stating that "an ordinary witness may 'pick the point beyond which he will not go,' and refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to further incriminate him." *In re Master Key Litigation*, 507 F.2d 292, 294 (9th Cir. 1974) (quoting *Shendal v. United States*, 312 F.2d 564, 566 (9th Cir. 1963)). See also *United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980) (quoting the Ninth Circuit rule from *Master Key* and *Shendal* to hold that testimony of a witness during direct examination did not waive privilege for any question on cross examination that could possibly incriminate witness further than statements already made).

However, "[w]here a witness asserts a valid privilege against self-incrimination on cross-examination, all or part of that witness's testimony must be stricken if invocation of the privilege blocks inquiry

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into matters which are 'direct' and are not merely 'collateral.'" *Seifert*, 648 F.2d at 561-562. "The distinction between matters which are 'collateral' and those which are 'direct' is not precise or easy. It can be drawn only by reference to the particular facts of the particular case, and . . . [a] trial court has wide discretion to determine whether a witness's testimony must be stricken because cross-examination was restricted." *Id.* at 561-62 (quoting *United States v. Star*, 470 F.2d 1214, 1217-18 (9th Cir. 1972)).

If an implied waiver of the privilege through answers to discovery is at one end of the spectrum of potential pitfalls to be avoided, at the opposite end is the risk of adverse consequences in the civil suit resulting from a party's assertion of the privilege. Unlike criminal cases, where the jury is instructed not to draw adverse inferences from a defendant's silence, such inferences are permissible in a civil case when a party invokes the privilege against self-incrimination. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). In fact, in order to prevent unfairness, a court has discretion in fashioning an appropriate remedy in response to a civil party's invocation. *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (citing *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1089 (5th Cir. 1979)). And the remedy could be permitting an adverse inference, burden shifting, or even a dismissal of the action.

Another remedy, discussed below, is a stay of all or part of the proceeding.

In determining a response to invocation of the privilege, courts have developed a test by which the interest of one party's right against self-incrimination is weighed against the other party's right to a fair proceeding. The balance is examined on a case-by-case basis, but the factors for consideration uniformly discussed among the courts include: (1) the importance of the information sought; (2) whether there are alternative means to obtain the information; and, (3) whether there are remedies less drastic than outright dismissal of the action. *Serafino v. Hasbro, Inc.*, 83 F.3d 515, 518-19 (1st Cir. 1996). Courts have also consistently held "that an adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000). Because the privilege against self-incrimination is a right of constitutional magnitude, "the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Id.* (quoting *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3rd Cir. 1994)).

5. Moving to Stay the Civil Proceeding in Order to Protect the Client In Both the Civil and Criminal Matters

In order to avoid the difficult position of having to decide between waiving the privilege and incriminating one's self on the one hand, or, on the other, asserting the privilege and damaging one's position in a civil matter, counsel should consider moving for a stay of a portion or the entirety of the civil proceeding until the parallel criminal matter is resolved. While no Oregon court has addressed the issue of a stay to protect a party's right against self-incrimination when parallel civil and

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criminal proceedings are pending, federal and other state courts have developed a uniform framework for resolving this issue. Under that analysis, it is well-settled that a court's determination on a motion to stay proceedings is discretionary and, therefore, not a matter of constitutional entitlement. Such a stay may postpone the entire proceeding or may be narrowly tailored to particular discovery processes. In considering whether to grant a stay of the civil proceeding, the court weighs the following factors:

- (1) the extent to which the defendant's Fifth Amendment rights are implicated;
- (2) similarities between the civil and criminal cases;
- (3) the status of the criminal case;
- (4) the interest of the plaintiffs in proceeding expeditiously with the litigation, and the potential prejudice of delay;
- (5) the burden which any particular aspect of the proceedings may impose on defendants;
- (6) the convenience of the court in the management of its cases, and 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 or criminal litigation.

On the one hand, invoking the Fifth Amendment may protect against potential criminal liability. On the other hand, such invocation may jeopardize a civil litigant's case.

King v. Olympic Pipeline Company, 104 Wash. App. 338, 352-353 (2001) (citing *Keating v. Office of Thrift Supervision*, 45 F3d 322, 324-325 (9th Cir. 1995)).

The court in *King* reversed the trial court's denial of a motion to stay discovery of a civil suit resulting from a deadly explosion caused by the rupture of an underground pipeline. At the time the civil suit was pending, several individual defendants in the action were also the focus of a federal criminal investigation regarding the explosion. *Id.* at 345-346. As a matter of first impression, it was in *King* where the federal framework discussed in *Keating* was adopted.

In *Keating*, the application of the federal test led to a denial of the requested stay of an administrative SEC proceeding. Keating appealed an administrative denial of his motion for a stay of a civil enforcement proceeding pending the resolution of all criminal proceedings against him. He argued that the pending criminal case had forced him to invoke the Fifth Amendment privilege during the agency hearing, which, according to Keating, deprived him of the opportunity to fully defend himself in the agency action. The Court rejected Keating's claim because the agency had severed the counts related to the pending criminal charges. *Id.* at 326. Additionally, the court considered "the interest of the

public in the pending civil and criminal litigation," reasoning "that Keating had [had] adequate time to prepare for the [Office of Thrift Supervision] hearing" and, given the numerous delays in the proceedings, "any burden on Keating was far outweighed by the public interest in a speedy resolution of the case." *Id.* at 325.

The factors outlined in these cases provide a good foundation upon which to balance the competing interests at stake concerning a party's invocation of the privilege. On the one hand, invoking the Fifth Amendment may protect against potential criminal liability. On the other hand, such invocation may jeopardize a civil litigant's case.

6. *The Corporate Attorney's Ultimate Ethical Conflict*

The above discussion highlights concerns as to a corporate counsel's inherent ethical conflict in a civil case when abiding by civil discovery rules that might produce information detrimental to a corporate employee's constitutional right to remain silent. Generally, Rule 1.13 of the Oregon Rules of Professional Conduct, captioned "Organization as a Client," governs this issue. Specifically subsection (g) provides:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent may only be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Also related to this issue, Rule 1.7(a)

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provides that, with limited exception, a lawyer “shall not represent a client if the representation involves a current conflict of interest,” which exists if, in pertinent part, 1) representing one client will be directly adverse to another client, or 2) a significant risk arises that representing one or more clients will be materially limited by the lawyer’s responsibilities to another client or former client. Notwithstanding these conflicts, Rule 1.7(b) provides that a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client, *and*
- (4) each affected client gives informed consent, confirmed in writing.

As these ethical rules demonstrate, the Oregon State Bar has recognized the precarious nature of representing the interests of individuals within a corporation while also advocating for the corporation as a whole. Rule 1.7(a), without further limitation, arguably would effectively prohibit an attorney from advocating for a corporation that is disclosing corporate records under a subpoena duces tecum—records that might criminally implicate an em-

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ployee of the corporation who is also represented by the lawyer. And although Rule 1.7(b) provides exceptions to the otherwise prohibited dual representation, the four conditions cited above arguably prevent a lawyer representing a corporation from also representing a corporate employee where there is potential criminal exposure for the simple reason that a corporation may be injured by the employee’s invocation of the right against self incrimination, or more importantly, the failure to assert the Fifth Amendment guarantee may be devastating to the employee.

7. Proposed Solutions and Practice Tips

Although the above discussion has highlighted the dilemma that counsel faces about whether to assert the right against self incrimination, there are options available that might eliminate the conflict. First, in corporate situations where criminal conduct is also implicated, it is advisable to obtain separate counsel for the officer, director, or employee, who may be implicated. Second, counsel should consider moving for a stay of the

civil case or discovery pending resolution of the criminal proceeding. Third, it may simply be best to assert the right against self-incrimination in the civil matter and suffer the potentially adverse consequences at that phase. Fourth, counsel may work to settle the pending parallel criminal matter so that disclosure in the civil case no longer poses the difficulty it otherwise would. Lastly, counsel could strive to settle the parallel civil matter before the criminal case and before the defendant is in a position of possible self incrimination.

Conclusion

The option of invoking the right against self-incrimination must be considered and evaluated in circumstances where providing testimony or even complying with civil discovery, including the production of documents, places the client in a position where he is forced to provide information that may be used as a “link in the chain” of evidence used to prosecute him in a parallel or subsequent criminal proceeding. The initial act of producing documents responsive to broad civil discovery requests typically requires significant physical and mental processes on the part of the client. The responses will often imply statements of facts and are therefore testimonial in nature. If such requests are responded to, counsel must assume that the government will have access to that information and will evaluate it for the purpose of determining whether criminal liability may be proven from it. For these reasons, the thorough evaluation of the right against self-incrimination in a civil proceeding is absolutely critical. ■