PLUS **Fifth Amendment Issues in Civil Cases**
DAVID MICHAEL BIGELEISEN

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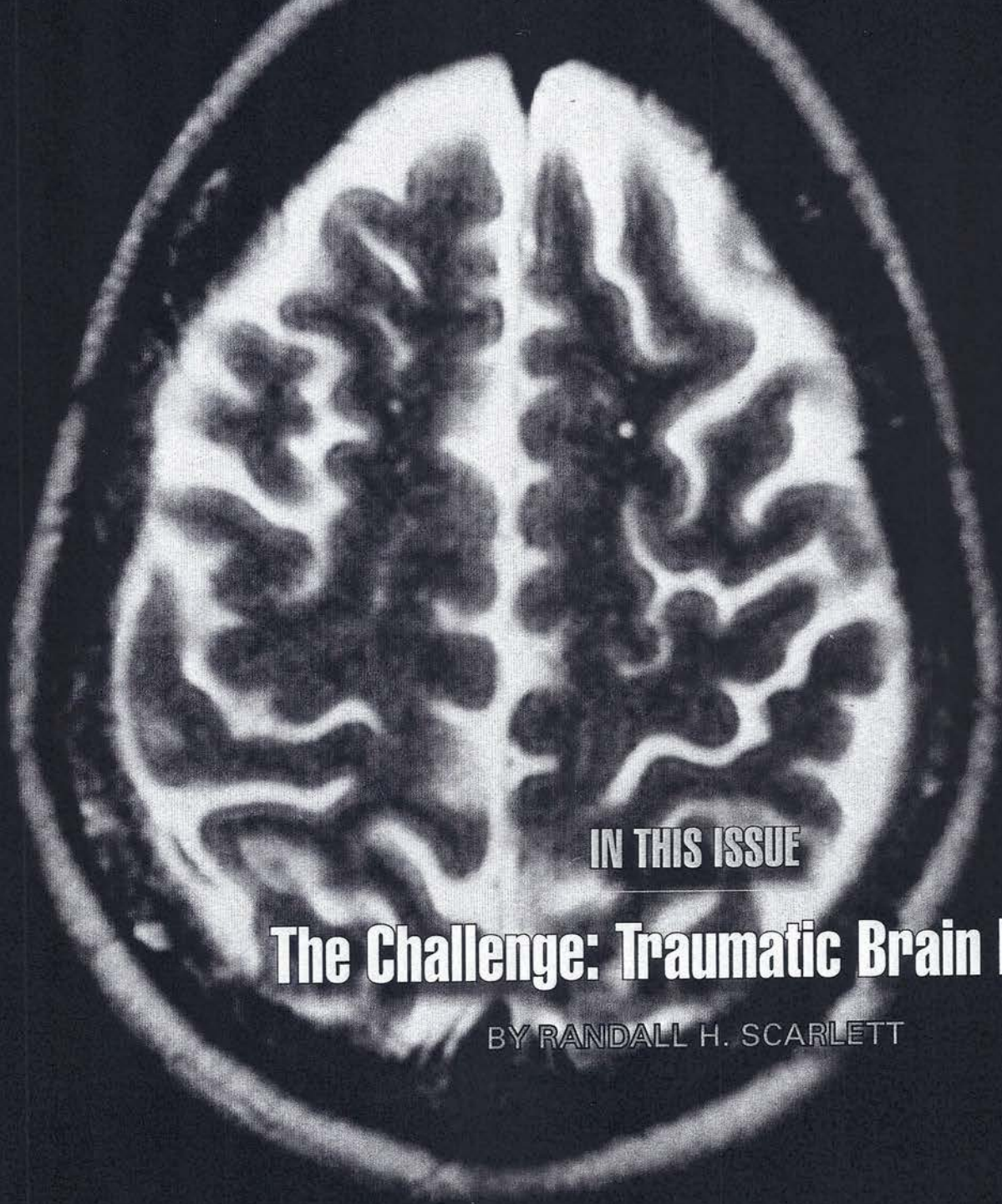

IN THIS ISSUE

The Challenge: Traumatic Brain Injury

BY RANDALL H. SCARLETT

Fifth Amendment Issues in Civil Cases

You represent a pedestrian who was knocked down by a hit and run driver. The onlookers have provided a pretty good description of the runaway car, and part of the license plate number, but none of them got a good look at the driver.

– or –

You represent a young man who was a guest at a party. The lights went out, and there was a fight. When the lights went back on, the defendant was standing right next to your client. Your client was cut very badly, perhaps by a broken bottle. The issue is the identity of the stabber. Can you question the defendant about whether he did the stabbing? Does he have to answer?

– or –

You represent the plaintiff in a civil fraud suit. You want to take the deposition of the corporate defendant. You also want to take the depositions of the officers and managers. You also want those people to produce all relevant paperwork.

In each of these cases, defense counsel has told you that each person will refuse to testify, based on the Fifth Amendment. What do you do? Can you work around the problem? This article will tell you how.

ORIGINS

The Fifth Amendment of the United States Constitution provides:

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 offense 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.

Similarly, Article I Section 15 of the California Constitution provides:

The defendant in a criminal case has the right to a speedy public trial, to compel attendance of witnesses in the defendant's behalf, to have the assistance of counsel for the defendant's defense, to be personally present with counsel, and to be confronted with the witnesses against the defendant. The Legislature may provide for the deposition of a witness in the presence of the defendant and the defendant's counsel.

Persons may not twice be put in jeopardy for the same offense, *be compelled in a criminal cause to be a witness against themselves*, or be deprived of life, liberty, or property without due process of law.

These constitutional provisions are enabled by Evidence Code Section 940:

To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter.

WHO CAN CLAIM THE PRIVILEGE?

The privilege against self incrimination applies only to natural persons. A corporation, a partnership, or other similar entity is not entitled to any privilege against self incrimination. *Braswell v. United States* (1988) 487 U.S. 99, *United States v. Kardel* (1970) 397 U.S. 1, *Avant! Corp. v. Superior Court* (2000) 79 Cal. App. 4th 876. This may not be the last word, though. A corporation acts only through its officers and representatives. If the corporate agent faces criminal exposure in his or her own right, then he or she can refuse to testify.

David Michael Bigeleisen has been a lawyer since 1975. He limits his practice to criminal cases. You can reach him for consultation at 415-957-1717.

HOW DO I CONDUCT DISCOVERY?

Discovery is the backbone of most civil cases. A good deposition and complete answers to interrogatories on the major issues of your case can lead to a prompt and favorable settlement. Almost no civil case will go to trial without several packing cases of depositions, interrogatories and produced documents.

THE ANSWER IS IN THE TIMING

The answer may be in the timing. Once formal charges are filed, criminal cases move quickly, usually much more quickly than civil cases. You may get most of the discovery you need simply by following the criminal case. There will be at least one police report, often several. Most felonies have a preliminary hearing which provides a skeleton of the prosecutor's proof. Get a copy of the transcripts. Be aware, though, that in *Pacers, Inc. v. Superior Court* (1984) 162 Cal.App 3d 686, the defense sought and obtained a stay of discovery while the criminal proceeding was pending. See also *Fuller v. Superior Court* (2001) 87 Cal.App 4th 308. You might get a different result if you are coming close to the five year deadline of your civil case. There are some creative ways to work around this problem to your client's advantage.

THE FIFTH AMENDMENT CLAIM MUST BE TO A SPECIFIC QUESTION.

Let's look at our example of the two young men at the party. You are questioning the defendant at deposition. You begin by asking him basic questions about his residence and date of birth. None of these questions has anything to do with the events at the party, and the answers would not tend to prove any element of the crime. Your next question: Were you present at 47 Garden Avenue in San Francisco on March 18, 2007? The issue in your case is identity. And the answer places the defendant at the scene of the crime and at the time in question. As to this question, the defendant can and should take the Fifth Amendment. *Blackburn v. Superior Court* (1993) 21 Cal App 4th 414.

Make a record of each question to which you seek an answer. Otherwise, you have no basis to exclude his testimony at trial.

CAN THE WITNESS REFUSE TO PRODUCE DOCUMENTS?

Usually not. In most cases, records which are required to be kept by law, and those which the witness made voluntarily must be produced. *Fisher v. United States* (1976) 425 U.S. 391. For example, in *Couch v. United States* 409 U.S. 322 (1973) the taxpayer could not use the Fifth Amendment to prevent the Internal Revenue Service from obtaining records which had been turned over to her accountant.

The only exception to this is the unusual case where the act of production of the records, in itself, would incriminate the witness. If this comes up, see if you can find another witness who can authenticate the records, or find another way to prove the fact. *United States v. Hubbell* (2000) 530 U.S. 27.

WHAT CAN I FIND IN THE FILE OF THE CRIMINAL CASE?

Almost all criminal cases begin with a police report. The police report will list the names and addresses of witnesses other than the accused. This may be your beginning. Most felony cases will have a preliminary hearing. The transcript of the preliminary hearing will also contain a lot of information. If the case proceeds to trial, sit in.

CAN I CALL THE ACCUSED AS A WITNESS?

In criminal cases, the prosecutor is categorically forbidden to call the accused as a witness. He is also forbidden to comment if the accused refuses to testify. To do otherwise is serious misconduct which will result in dismissal. See *Griffin v. California* (1965) 308 U.S. 609.

The rule in civil cases is similar and overlapping. Look at CACI 216:

[Name of party/witness] has exercised [his/her] legal right not to testify concerning certain matters. Do not draw any conclusions from the exercise of this right or let it affect any of your decisions in this case. A [party/witness] may exercise this right freely and without fear of penalty.

CACI 216 is based on Evidence Code Section 913:

(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

(b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

Refusal to testify is not evidence. If the only reason to call the defendant is to make him invoke the Fifth Amendment is front of the jury, then you are doing so precisely to embarrass him and have the jury draw on inference. You risk a mistrial. Let the silence speak for itself.

The rule in Federal Court is different in a narrow group of cases. The rule in *Baxter v. Palmigian* (1976) 425 U.S. 308 says that the plaintiff can comment on the defendant's failure to

rebut the plaintiff's evidence.

HOW CAN I WORK WITH THE PROSECUTION?

The prosecutor in the criminal case may be your friend. If the plaintiff is the accusing witness (we defense lawyers never use the word victim), he probably has information which will help the prosecution. In fact, the prosecutor has an affirmative duty to seek this out. He also has a duty to seek out information which favors the defense, and he has a duty to turn it over. Cooperation by the accusing witnesses helps everyone to be more completely informed and helps to bring the criminal case to conclusion.

Sometimes the most important part of seeking a just result in a criminal case is restitution to the injured party. This could apply in an injury case, a wrongful death case, or a white collar case. In white collar cases, prison sentences are often lenient, but restitution is the heart of the matter. And restitution is what your client wants.

You can ask the prosecutor to provide immunity to the accused. If complete immunity is granted, the criminal matter is over, and the accused can no longer claim protection of the Fifth Amendment.

The prosecutor will need an incentive to grant immunity. For example, does the securities broker who promoted the fraudulent scheme know about a whole lot of other similar frauds? Will prompt compensation to the injured parties result in a better resolution than a criminal sanction?

This leads us to the next question:

HOW DO I WORK WITH CRIMINAL DEFENSE COUNSEL?

Criminal defense counsel and plaintiff's civil counsel often see each other as born enemies. Perhaps, but this need not necessarily be the case.

Consider our example of the hit and run accident once again. You know that the plaintiff was hit by a black truck with a license plate that begins with 135L.... You suspect that the defendant was either the driver, or gave permission to someone to use the truck.

But the only person with the knowledge you need is the accused. You are getting nowhere.

At the same time, the insured is under a duty to report the incident to his carrier. The police are aware of this. What to do?

As criminal defense counsel, I will contact the coverage attorney for the insurer. I will say that a policyholder has a duty to report to the carrier but cannot describe the incident. The coverage attorney will ask if this is because of Fifth Amendment reasons. I will say "maybe". Coverage counsel will know exactly what this means. He will ask the carrier to appoint outside counsel. In the past, coverage counsel have asked me to recommend insurance defense counsel whom I am comfortable working with.

These cases are usually settled very quickly and quietly.

If you are asking the prosecutor to grant immunity to the accused, and the prosecutor is listening, then criminal defense counsel is your friend. He will want the terms of immunity to be as broad as possible. So do you. Ask him, and he will help you to fashion the terms of immunity.

In most cases, the watchword for the defense in the criminal case is "The less said, the better."

In smaller cases, a civil compromise will sometimes bring the criminal case to resolution. See Penal Code Sections 1377-1379. But be very careful how you choose your words. If your presentation suggests that you are using the criminal process to gain an advantage on the civil matter, you risk losing your law license and being accused extortion. See Rule 5-100 of the Rules of Professional Conduct and Penal Code Section 153.

Mitigation may be more important that issues of guilt or innocence in the criminal case. An awareness of the effect on the injured party, and prompt and complete steps to make restitution are sometimes persuasive. Of course, if the damages in your case are not liquidated, then you will want to be conservative and realistic in your demands.

WAIVER

The accused can abandon his Fifth Amendment privilege by waiver. The most common form of waiver is by testifying in the case in chief. If the witness testifies on a substantive issue in the case in chief, he will be held to have waived the Fifth Amendment privilege. See *Mitchell v. United States* (1999) 526 U.S. 314. In such a case, the witness is subject to cross-examination, and re-redirect examination under Evidence Code Section 776. If he refuses to be cross-examined, his direct testimony can be stricken.

Another form of waiver happens occasionally in the corporate setting. The Securities Exchange Commission may investigate a matter while the threat of criminal proceedings lingers in the background. The corporate defendant figures that making a clean break of its wrongdoing will result in a soft landing. But for reasons which I cannot fathom, the corporation and some of the individual defendants end up being represented by the same counsel. In such situations, the individual defendants have been found to have waived their Fifth Amendment privilege.

CONCLUSION

The right to refuse to give evidence against oneself is part of the backbone of our constitution. We are all sworn to support

...Continues on page 35

... Fifth Amendment continues from page 27

and defend it. As lawyers, we take this a matter of pride and a point of honor.

Sometimes this duty conflicts with the zeal which you bring to prosecuting your tort case. The points in this article show you how to be true to all of your duties.