

Adultery and the Fifth Amendment

By James W. Korman

Thirty-three states still have fault grounds of divorce. Adultery is one of the grounds in all but two of those states. In many jurisdictions, adultery is also a crime. So the question arises, if you file a Complaint for Divorce, which is, after all, a civil action, can the party accused of adultery plead the Fifth Amendment to refuse to respond to inquiries that touch on the affair? And are there limits on asserting the Fifth? Generally, the answer to both questions is “yes.”

‘PLEADING THE FIFTH’

Adultery is defined by Black’s Law Dictionary as “Voluntary sexual intercourse of a married person with a person other than the offender’s husband or wife.” If the paramour is not married, that person usually is not an adulterer. (However, under Utah law, the unmarried paramour is also guilty of the crime of adultery.)

When a divorce complaint alleges adultery, discovery inquiries may explore the adulterous acts and the collateral damage. When that happens, when can or should, the accused “plead the Fifth”? In applicable part, the Fifth Amendment to the U.S. Constitution

provides that “No person ... shall be compelled in any criminal case to be a witness against himself.” It is well established that Fifth Amendment protection applies to civil as well as criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316 (1973).

Adultery is a crime in 22 states. Where it is a crime, it is usually a misdemeanor (Nathaniel Hawthorne notwithstanding). In Virginia and Maryland, adultery is a misdemeanor. In the District of Columbia, however, it is not a crime. As a matter of fact, in D.C., adultery may even be mandatory. (That’s a joke.) The maximum penalty in Virginia for conviction of the misdemeanor of adultery is a \$250 fine. (Code of Va. § 18.2-11(d)). In Maryland there’s a fine of \$10 (Md. Code Ann. § 10-501). Can you believe it? If you park at an expired parking meter in downtown Baltimore, it can cost you \$50. So, if the meter has expired, you might as well commit adultery in the back seat of your car, and it may actually cost you less, depending on which crime you are charged with! Misdemeanors generally have statutes of limitation. Again, using Virginia as an example, you cannot be prosecuted for the crime of adultery if it occurred more than a year ago. (Code of Va. § 19.2-8). Therefore, if during the divorce, the defendant is asked about acts of adultery that occurred 366 days ago, can he plead the Fifth? Or what if he is asked about adultery occurring in Washington, D.C., where adultery is not a crime? There are two possible answers to these questions:

The accused is compelled by court order to respond, because he/she cannot

be prosecuted for adultery occurring more than a year ago, or for adultery that took place in a jurisdiction where it is not a crime; or The “link in the chain” rationale: If an accused is compelled to testify against himself about last years’ adulterous acts, or about acts occurring in a free-love jurisdiction, that information could tend to incriminate him as to adulterous acts that are prosecutable. *See Hoffman v. U.S.*, 341 U.S. 479, 486; 71 S.Ct. 814 (1951).

There may be court decisions on both sides of these alternative views. As a matter of fact, there could be a divergence of judicial opinion in the jurisdiction in which you practice. You need to take a look at the authorities in your jurisdiction and argue those that best support your position.

WHAT ABOUT A SUBPOENA?

What about a subpoena for incriminating documents, photos and electronically stored information? The privilege is usually considered to protect against testimonial disclosure. Non-testimonial evidence may fall into a different, unprotected, category.

The Supreme Court of the United States, in *U.S. v. John Doe*, 465 U.S. 605 (1984) stated, “If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.” In that case a business owner asserted the privilege as to documents he had prepared and kept in the usual course of his business. The Supreme Court held that the preparation of the documents in question was not compelled self-incrimination, but that the act of produc-

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ing the documents was self-incrimination, since it involved what amounted to testimonial self-incrimination.

Apply the holding in *U.S. v. Doe* to the disclosure of documents in an adultery divorce case. Where documents originate from a third party, such as a bank, telephone company, on-line service provider or credit card company, they may not be privileged to start with. Such documents would not have been authored by the party to your suit and would not have originated from an otherwise privileged source, such as a lawyer or a doctor. Therefore, you cannot count on the Fifth Amendment to protect against disclosure of lurid photographs or Visa charges at a massage parlor.

The invocation of the privilege is personal. The paramour cannot refuse to answer to protect another person. See *Rogers v. U.S.*, 346 U.S. 367, 371 (1951). If it cannot be invoked by one person to protect another person, it is certainly arguable that an attorney cannot waive his/her client's privilege.

What is more, there is an important strategic consideration. Even if you can plead the Fifth, should you? To answer this question, you have to consider the "sword and shield" doctrine. You probably remember this one from law school. You cannot raise the shield of the Fifth Amendment, and at the same time wield it as a sword to sabotage any attempt by the other party, either during pre-trial discovery or at trial, to obtain information relevant to the cause of action alleged and relevant to possible defenses to the claim. So, you have to assess carefully what potential damage is done to your client's case if you do advise pleading the Fifth, and if you do not.

If you do not plead, your client's right to pursue defenses and counterclaims will be unfettered. There will be no "sword and shield" to worry about. Aside from any criminal penalties, your state may allow some serious legal consequences for adultery. The percentages for the division of marital property

might be tilted against an adulterer or he/she might lose spousal support. In Michigan, Wisconsin, Utah and Oklahoma, adultery is a felony.

If your client has confided in you that the adultery has, in fact, occurred, you have a strategic decision to make. Adultery is usually proved circumstantially. People do not often do it in public, so direct evidence is rare (although we have all had some "What were you thinking?" cases).

If the other side can very likely prove the adultery anyway, there may be no real purpose in asserting the Fifth, and making them jump through all of those hoops, only to arrive ultimately at the same conclusion through admissible proof. On the other hand, if the likelihood is remote that they can prove their case without your client's admission, and there is no "sword" you need to wield, maybe the Fifth is the way to go. You will have to explain to your client carefully the options and the ramifications of each alternative.

CONCLUSION

Court-imposed sanctions should not be a consequence of asserting the Fifth. After all, the assertion is a Constitutional privilege. That's the real bottom line. It is probably unlikely that your client will really face criminal prosecution for adultery. At the end of the day, who's going to blow the whistle? What does your client say to the kids? "Daddy was a bad boy — that's why you have to visit him in jail." Or, "Mommy can't pay us child support this month — she's being fitted for an orange jump suit." If adultery is a felony in your state, or you get stoned to death or have to wear the letter "A" for the rest of your life, plead the Fifth. When developing your strategy in the 19 jurisdictions where it is a misdemeanor, you should follow a multi-step inquiry.

- Can the other side prove it anyway? Remember, they can subpoena the paramour, who may or may not be able to assert the privilege.
- What are the consequences in

your civil divorce case? Assuming that the other side cannot prove adultery without your client's admission, and further assuming that proof of adultery could cause your client to lose spousal support or to be substantially penalized in the division of the marital estate, the Fifth becomes a very viable option. On the other hand, if your client is the big earner, or plans to remarry 10 minutes after the divorce, loss of alimony is not really an issue. You also have to assess the likely magnitude of the damage to your client if your jurisdiction permits (mandates?) a division of the marital assets that weighs against your client. What is the percentage incline of that tilt? And will your client be able to regenerate that lost wealth, or will the divorce verdict be pretty much all he or she is likely to ever have?

- If the impending straits are dire, you may want to impose in the way of the other side whatever roadblocks you can. That includes pleading the Fifth.

"Instead of getting married again, I'm going to find a woman I don't like and just give her a house and a car."

— Rod Stewart

