Compelled Statements of Government Employees

By Michael F. Dailey

As a means of investigating and addressing workplace misconduct, government employees may be compelled to answer questions "specifically, directly and narrowly related to the performance of (their) official duties,"[1] and may be terminated for failure to comply. In return, the employee is immunized from the "use of his answers or the fruits thereof in a criminal prosecution of himself."[2] As employment misconduct often overlaps criminal misconduct, it is important to understand how the resulting immunity from compelled statements may impact a criminal prosecution.

Development of the Law

The United States Constitution allows government employers ample authority for the establishment of "reasonable qualifications and standards of conduct" for employees.[3] Included within this ambit is the right of a government employer to "insist that its employees furnish . . . information pertinent to their employment," and to "require its employees to assist in the prevention and detection of unlawful activities by [other government employees]."[4] The Fifth Amendment to the United States Constitution provides, "No person shall be . . . compelled in any criminal case to be a witness against himself."[5] An obvious dilemma arises when an employer seeks to compel a self-incriminating statement from its employee.

Prior to 1967, a government employee could be ordered to waive immunity from criminal prosecution, and then be compelled to answer questions pertaining to his official duties. If he refused, by law, he forfeited his employment.[6] If he complied, his responses could be used to incriminate him. This changed in 1967. In a case involving New Jersey police officers, the Supreme Court of the United States held that the Constitution "prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from [government] office."[7]

Over a series of cases that followed, a compromise emerged which balanced the concerns of the government employer regarding control of the workplace, against the rights of the employee as provided by the Fifth Amendment. "Given adequate immunity [from criminal prosecution], the state may plainly insist that its employees either answer questions under oath about the performance of their job, or suffer the loss of employment."[8] Adequate immunity consists of "immunity from federal and state use of the compelled testimony, or its fruits, in connection with a criminal prosecution against the person testifying."[9]

Scope of Immunity

A government employee who is compelled to give statements pertaining to his employment receives *use* and *derivative use immunity. Use immunity* means the actual statements made by the person compelled cannot be used in a criminal prosecution against him. *Derivative use immunity* means any evidence that is derived from, or the "fruit of," compelled statements cannot be used in a criminal prosecution against the person compelled. The scope of this immunity is intended to be broad, a "sweeping proscription of any use, direct or indirect."[10]

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Compelled statements, under the doctrines of use and derivative use immunity, are treated differently than statements taken in violation of *Miranda v. Arizona*. Statements taken under custodial interrogation, but in the absence of *Miranda* warnings, cannot be used as direct evidence against the declarant in a criminal action, but *can* be used to impeach him if he takes the stand.[11] Similarly, compelled statements cannot be used as direct evidence against the declarant in a criminal action. However, compelled statements also *cannot* be used to impeach the declarant, even if he takes the stand and testifies inconsistently with his compelled statement.[12]

The difference stems from the fact that statements violating *Miranda* are not coerced or involuntary. They are voluntary statements merely taken in the absence of notice of the right to remain silent. Compelled statements, by contrast, are statements taken under duress. In the eyes of the law, they are treated no differently then a confession extracted via torture. "The Fifth and Fourteenth Amendments provide that no person shall be *compelled* in any criminal case to be a witness against himself. A defendant's compelled statements, as

opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled."[13]

When Does Immunity Attach?

Immunity attaches immediately, whenever the government employer, in any way, communicates to its employee that refusal to answer questions will result in disciplinary action, regardless of whether the employee invokes his right to remain silent.

As a general rule, a person who is questioned must assert his Fifth Amendment privilege against self-incrimination, and refuse to answer. If such person answers questions without asserting the privilege, "his choice is considered to be voluntary,"[14] and any answers given may be used to incriminate him. There is no obligation to advise a person of the right to refuse to answer questions—"an individual may lose the benefit of the privilege without making a knowing and intelligent waiver."[15]

There are certain well-defined exceptions to this general rule. However, in each there exists some "identifiable factor" which has the effect of denying "the individual a free choice to admit, to deny, or to refuse to answer."[16] The most well known exception is police custody, under which "inherently compelling pressures work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely."[17] A second exception, which is the essence of this discussion, exists where "the assertion of the [Fifth Amendment] privilege is penalized so as to foreclose a free choice to remain silent."[18] This is what happens when the employer directs its employee to answer questions or suffer the consequences. "If the state, either expressly or by implication, asserts that invocation of the privilege would lead to [negative ramifications, it creates] the classic penalty situation, the failure to assert the privilege [is] excused, and the [answers of the person questioned are] deemed compelled and inadmissible in a criminal prosecution."[19]

Under both exceptions, because the individual's "free choice to admit, to deny, or to refuse to answer" has been compromised, the immunity attaches immediately and automatically. "When a public employee is compelled to answer questions or face removal upon refusing to do so, the responses are cloaked with immunity automatically, and neither the compelled statements nor their fruits may thereafter be used against the employee in a subsequent criminal prosecution. The resulting immunity that attaches when a witness is ordered to answer such questions . . . flows directly from the [federal] constitution, attaches by operation of law, and is not subject to the discretion of the employer."[20]

Thus, immunity is not something which the employer bestows upon its employee. It is the product of the employer's actions. If the government employer uses its power to coerce its employee to answer questions, the employee has been compelled, his answers and their fruits are automatically immunized, and cannot be used against the employee in a criminal action. The employer has no choice here, immunity is the employee's side of the compromise crafted by the courts.

Verification of Immunity

Of utmost importance to employees of the government is the means by which they may ensure that their immunity is recognized and honored. As stated above, compelled statements, and evidence derived therefrom, cannot be used in a criminal proceeding against the declarant. To enforce this immunity, the declarant need only show that he gave a compelled statement. The burden then shifts to the government to "prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." This process is referred to as a "Kastigar Hearing."[21]

Although the burden shifts to the government to show independent sources, it is not necessary for the court to hold an actual hearing. The court can determine whether a "Kastigar Violation" occurred simply by reviewing the trial record.[22] The government may also meet its burden with "affidavits that are non-conclusory in form and do not simply ask the court to rely on the government's good faith."[23]

Limitations of Immunity

Although advertised as a "sweeping proscription of any use, direct or indirect," there are limitations to the protection afforded the person who gives a compelled statement.

I. Perjury

"The Fifth Amendment does not endow the person who testifies with a license to commit perjury."[24] A person who is compelled to give statements, and does so falsely while under oath, may be prosecuted for perjury, and both his false immunized testimony, plus any truthful testimony necessary to prove that he knowingly made the alleged false statements, may be used against him.[25] This narrow exception to the immunity that attaches to compelled statements requires that the

statements be made under an oath attesting to their truthfulness.

II. Use and Derivative Use Immunity vs. Transactional Immunity

A person who is compelled to give statements does not receive *transactional immunity*. Transactional immunity, familiar to grand jury proceedings, accords the declarant full immunity from prosecution for the offense to which his testimony relates. The Supreme Court, however, expressly held that compelled testimony is not a bar to criminal prosecution. "Immunity from use and derivative use is coextensive with the scope of the (Fifth Amendment) privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity . . . affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted."[26] Thus, a person who has given a compelled statement is placed in the position he would have been in had he never spoken at all. He can still be prosecuted for the underlying criminal misconduct, but his compelled statements, and anything derived from them, cannot be used against him.

III. Self-Reporting Statutes

Information derived from a person pursuant to a "self-reporting statute" may be used against that person in a criminal prosecution without infringing upon that person's Fifth Amendment privilege. This issue was decided by the United States Supreme Court in the case of *California v. Byers*,[27] and adopted by the New York State Court of Appeals in the case of *People v. Samuel*.[28] Both cases involved statutes requiring motorists involved in motor vehicle accidents to remain at the scene, identify themselves, and report the accident to police. The courts held that these "self-reporting statutes" do not violate motorists' Fifth Amendment privilege when they are designed "only to regulate lawful activities and channel such activities into lawful behavior, despite incidental risk of inculpation."[29] "If the purpose of the statute is to incriminate, it is no good. If its purpose is important in the regulation of lawful activity, to protect the public from significant harm . . . and only the incidental effect is occasionally to inculpate, then the statute is good within constitutional limitations."[30]

The holdings in *Byers* and *Samuels* were applied to a procedure of the New York City Police Department which requires a police officer, whether on or off duty, to notify his employer whenever his or her firearm is discharged.[31] The holdings were also applied to "Use of Force Reports" utilized by the New York Department of Correction, which are required to be prepared by any correction officer "involved either as a participant or a witness in a use of force incident against an inmate."[32] Thus, any time a government employee is required to prepare a report as part of his regular duties, and provided the purpose of the report is not to inculpate the employee who prepares it, the statements in the report are considered voluntary, and are admissible as evidence against the employee in a criminal court of law.

IV. Use vs. Mere Access or Exposure

Use, prohibited under *Kastigar*, was distinguished from mere access or exposure by the New York State Court of Appeals in the case of *People v. Corrigan*.[33] In *Corrigan*, a police officer, who had given a compelled statement pursuant to an internal police investigation, testified before a grand jury which was investigating his misconduct. During the examination, the prosecutor had a copy of the officer's compelled statement in his possession, which he reviewed while the officer was testifying.

The court held, based on the record (*i.e.*, without conducting an evidentiary hearing), that the prosecutor had not *used* the officer's compelled statement. There was nothing indicating that the statement had been used as a source of information for questioning the officer. Rather, all of the information possessed by the prosecutor, as revealed in the questions asked by the prosecutor, could be attributed to sources independent of the compelled statement. Further, there was nothing to indicate that the prosecutor used the compelled statement as a means of controlling the witness or affecting his answers or demeanor. "Defendant was never confronted with the statement, and . . . there is no showing that he was even aware that the prosecutor had it."[34]

The court further held that there was no *derivative use* of the compelled statement. "No suggestion is made, and . . . defendant does not claim, that the People made any use of defendant's statement as a source of information leading to the discovery of other information in the investigation."[35]

The court also stated, in *dicta*, that the mere possession and viewing of an immunized statement, without more, is not use. "Defendant argues . . . that the prosecutor's mere possession and viewing of defendant's immunized statement, without more, constituted a 'use' prohibited by State and Federal Constitutions. Defendant cites no authority, nor have we found any, to support his contention."[36]

The Second Circuit similarly distinguished use from mere access or exposure in the case of *Pirozzi v. City of*

New York, where it was held that "mere access of the prosecution to a defendant's immunized statements does not violate the Fifth Amendment."[37]

V. Harmless Error

In *Corrigan,* again in *dicta*, the court stated that the use of immunized testimony will not result in the dismissal of criminal charges if there is adequate evidence from independent sources to support the charges. "Where the People have submitted evidence obtained directly or indirectly from use of an immunized statement, the charge may be sustained only if supported by admissible evidence derived from an independent source."[38]

The Second Circuit decided a similar matter in *U.S. v. Rivieccio,*[39] in which the court stated, "because the real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him, a violation of . . . the privilege against self-incrimination . . . requires only the suppression at trial of a defendant's compelled testimony."[40] In other words, if immunized evidence comes into a trial, the jury will be instructed to disregard it. If there is enough evidence, aside from that which was immunized, to support a finding of guilt, the finding of guilt should be affirmed.

VI. "Thought Process"

Criminal charges will not be dismissed upon speculation that exposure to immunized testimony may have affected a prosecutor's thought process.[41] This issue arose in the case of *U.S. v. McDaniel*,[42] in which the Eighth Circuit found that the government failed to show independent sources. According to the court, the government was unable to prove that immunized testimony was not used by the prosecutor "in some significant way short of introducing tainted evidence."[43] The court suggested that the prosecutor's thought process may have been affected because he read the defendant's immunized statement. Examples, offered by the court, of how the immunized testimony could have been impermissibly used included "focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."[44]

In New York, in the case of *U.S. v. Mariani*,[45] the lower court vacated defendant's conviction and dismissed his indictment, finding that the prosecutor had impermissibly used defendant's immunized testimony in several "non-evidentiary" respects, similar to those described in *McDaniel*. The Second Circuit reversed, however, stating, "to the extent that *McDaniel* can be read to foreclose the prosecution of an immunized witness where his immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial, we decline to follow that reasoning."[46]

Taking the decisions of *Corrigan* and *Mariani* together, it would appear that in New York State, the prosecutor can read a compelled statement of a defendant prior to trial, and still prosecute the case, provided he does not actually *use* it.

Practical Considerations in View of *Corrigan* and *Mariani*

It would be a mistake to read the decisions of *Corrigan* and *Mariani* as a license for disregarding the immunity accorded those who give compelled statements. This was made clear by the court in *Corrigan*, "We conclude with a word of caution. Although we hold that a dismissal of the information was not warranted, we by no means approve the practice followed by the prosecutor here. A defendant's guarantee of immunity . . . must be scrupulously protected."[47] It is not uncommon for a government employee to be compelled to give statements regarding matters for which criminal charges are pending against him. In those situations, it is the imperative, and fortunately the practice, that the criminal and employment matters are kept entirely separate. This is accomplished by employing a "firewall," an imaginary device which stands between those who prosecute the criminal matter and those who prosecute the employment matter. Specifically, nothing gleaned from the compulsory interview of the employee is shared with anyone even tangentially involved with the criminal matter. In the case of *People v. Feerick,* for example, where a Kastigar violation was alleged, the New York State Appellate Division for the First Department cited investigators' awareness of the need to keep the criminal and employment matters separate, and credited the steps they undertook to accomplish this separation, in support of its finding that no Kastigar violation had occurred.[48]

Other Considerations

Non-Testimonial Evidence

In an employment matter, a person may be compelled to provide non-testimonial evidence, which may then be used against him in a criminal trial. "The Fifth Amendment privilege . . . protects an accused . . . from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial* or *communicative* nature. A defendant, however, may be compelled to provide evidence such as fingerprints, a photograph, physical measurements, handwriting or voice exemplars, or be required to participate in a lineup,

stand, walk, assume a position or make a gesture, without invoking this privilege inasmuch as such evidence has been deemed not to be testimonial or communicative in nature."[49]

Conclusion

Provided the immunity which attaches to compelled statements is recognized and honored, disciplinary proceedings against government employees may be resolved, either preemptively or simultaneously, alongside parallel criminal proceedings.

Endnotes

1. *Gardner v. Broderick*, 392 U.S. 273, 278 (1968).
2. *Id*. at 276.
3. See dissent, *Garrity v. New Jersey*, 385 U.S. 493, 507 (1967).
4. *Garrity*, 385 U.S. at 507 (dissent).
5. U.S. CONST. amend. V.
6. This provision lingers anachronistically at N.Y. Const. art. 1, § 6.
7. *Garrity,* 385 U.S. at 500.
8. *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973).
9. *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).
10. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).
11. *Harris v. New York*, 401 U.S. 222, 226 (1971).
12. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).
13. *Portash*, 440 U.S. at 459 (italics in original).
14. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984).
15. *Garner v. United States*, 424 U.S. 648, 655 n.9 (1976).
16. *Murphy*, 465 U.S. at 429, quoting *Garner*, 424 U.S. at 657, which quotes *Lisenba v. California*, 314 U.S. 219, at 241 (1941).
17. *Miranda v. Arizona*, 384 US 436, 467 (1966).
18. *Murphy*, 465 U.S. at 434, quoting *Garner*, 424 U.S. at 661.
19. *Murphy*, 465 U.S. 420 at 435.
20. *Matt v. Larocca*, 71 N.Y.2d 154, 159, 524 N.Y.S.2d 180 (1987).
21. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).
22. *U.S. v. Biaggi*, 909 F.2d 662, 690 (2d Cir. 1990).
23. *U.S. v. Harloff*, 807 F. Supp. 270, 282 (W.D.N.Y.1992).
24. *U.S. v. Apfelbaum*, 445 U.S. 115, 127 (1980), quoting *Glickstein v. U.S.*, 222 U.S. 139, 142 (1911).
25. *Id.*
26. *Id*. at 453.
27. *California v. Byers*, 402 U.S. 424 (1971).
28. *People v. Samuel*, 29 N.Y.2d 252, 327 N.Y.S.2d 321 (1971).
29. *Id.* at 261.
30. *Id*. at 262.
31. *People v. Patterson*, 169 Misc. 2d 787, 646 N.Y.S.2d 762 (Sup. Ct., Kings Co. 1996).
32. *Seabrook v. Johnson*, 173 Misc. 2d 15, 660 N.Y.S.2d 311 (Sup. Ct., Bronx Co. 1997).
33. *People v. Corrigan*, 80 N.Y.2d 326, 590 N.Y.S.2d 174 (1992).
34. *Id*. at 331.
35. *Id*. at 330.
36. *Id*. at 331.
37. *Pirozzi v. City of New York,* 950 F. Supp. 90, 93 (S.D.N.Y.1996).
38. *People v. Corrigan*, 80 N.Y.2d 326, 329, 590 N.Y.S.2d 174 (1992).
39. *U.S. v.* Rivieccio, 919 F.2d 812 (2d Cir. 1990).
40. *Id*. at 816.
41. *U.S. v. Mariani*, 851 F.2d 595 (2d Cir. 1988).
42. *U.S. v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).
43. *Id*. at 311.
44. *Id*. at 311.
45. *U.S. v. Mariani*, 851 F.2d 595 (2d Cir. 1988).
46. *Id*. at 600.
47. *People v. Corrigan*, 80 N.Y.2d 326, 332, 590 N.Y.S.2d 174 (1992).
48 *People v. Feerick*, 241 A.D.2d 126, 134, 671 N.Y.S.2d 13 (1st Dep't 1998), *aff'd*, 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999).
49. *People v. Berg*, 239 A.D.2d 97, 670 N.Y.S.2d 57 (3d Dep't 1998), citing *Schmerber v. California*, 384 U.S. 757 (1966), and *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

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DNA Evidence and a Book Review on the Subject

By Herald Price Fahringer and Erica T. Dubno

Introduction

Because of DNA's growing sovereignty in criminal investigations, it has become a source of considerable concern among defense lawyers, prosecutors and judges. A recent treatise covers the subject of DNA in great detail and provides criminal law practitioners with a valuable tool to assist them in utilizing and dealing with DNA evidence. The book dispels the mysteries of DNA with remarkable clarity and vigor. Thus, it makes an exceedingly difficult subject surprisingly accessible. We hope that this brief article on DNA and a review of a recent treatise on the subject will prove helpful and interesting to our readers.

"It is harrowing to learn that, to date, there are 144 officially recorded cases throughout the United States, where convictions have been overturned through the use of DNA."

Breaking the DNA Code

In the early days of World War II, American cryptographers believed they had cracked the daunting Japanese code. However, to be certain, they arranged to have an urgent message sent from Midway Island, indicating that their fresh water supply was almost exhausted. As anticipated the communication was intercepted by the Japanese. Imagine the Americans' exhilaration when, moments later, they picked up a Japanese transmission, which, after deciphering it with their new method of decoding, read: Midway "is short of water"!

Many believe that the science of DNA is encrypted in a similarly secret code, consisting of words and terms alien to most of us. Well, that code has now been broken. The code-breakers are Lawrence Kobilinksy, Thomas F. Liotti, and Jamel Oeser-Sweat. Their "codebook" is *DNA: Forensic and Legal Applications* (John Wiley & Sons, Inc., New York, N.Y., 2005) (364 pages). Every lawyer should have it.

The book reveals, with alarming clarity, the ruthless fallibility of our criminal justice system by pointing to cases where people have spent 10, 15, 20 years in prison, only to be finally cleared by DNA evidence. It is harrowing to learn that, to date, there are 144 officially recorded cases throughout the United States, where convictions have been overturned through the use of DNA. Certainly, these harsh revelations inspire a humbling deference for DNA's power to exonerate the innocent and to convict the guilty.

In fact, the science of DNA is becoming one of the most heavily mobilized weapons in the hands of law enforcement. Thus, it is imperative that lawyers facing trials, in which they will be staring down the barrel of DNA evidence, grasp the underlying science, as well as the technology utilized to exploit it. Too many lawyers experience a paralyzing paranoia when confronted with DNA, because of its intimidating, foreign nature. However, the authors have made these abstract concepts seem amiable.

Written without awe, the authors lead us through the difficult terrain of DNA without fatigue or exhaustion. Some of the territories covered are genetics, the replication of DNA, crime scene investigations, methods used to analyze DNA, and its presentation in court. Unlike so many books where the writing merely seems dutiful, here, the words have the force of authority and a grand confidence. The book is animated by actual cases that dramatize and galvanize the text. The authors avoid coddling highly technical details and, instead, write with a canny toughness that is direct and liquid clear.

As *DNA: Forensic and Legal Applications* progresses, the text becomes even more practical. Much of the book's considerable power is centered on the fifth chapter, "Litigating a DNA Case," where the authors' "hands-on" approach offers advice on how to deal persuasively with DNA issues during various phases of a trial. For example, the authors discuss ways of introducing the subject of DNA during jury selection. They also provide keen insights into how to exploit DNA evidence to strengthen an opening statement.

Regarding the perilous task of cross-examining an expert, the authors point to hidden routes for striking at some of DNA's most vulnerable soft spots, such as contesting the sufficiency of the DNA statistical database, checking the correctness of the protocols used by the laboratories that analyze the DNA, and investigating the ever-present risk of contamination that can topple the entire body of scientific proof. The primacy of DNA experts, and their bewitching testimony, must be overcome by a diligent cross-examination. Recognizing the heavy weight of this task, the book provides counsel with specific questions designed to fortify an effective