How 6th Circ. Flint Ruling Adds To 5th Amendment Case Law

By **Ronald Blum and Rebecca Kimmel** (December 2, 2022)

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Whether to invoke the Fifth Amendment privilege against self-incrimination in a civil case is one of the most difficult questions lawyers — and their clients — confront.

Clients want to tell their story, and rightly so. Refusal to do so risks an adverse inference, usually dooming a civil case. But civil liability may be the lesser of evils. Looming criminal charges may present a bigger risk, though one that is hard to assess.

In weighing and advising on this difficult issue, practitioners often consider the general rule that invoking the Fifth Amendment is proceeding-specific: A witness may testify in one litigation, yet invoke the Fifth on the same topic in a different case.[1]

But what about in the same case? May a witness testify at deposition and later invoke the Fifth at trial in the same litigation?

Last month, the U.S. Court of Appeals for the Sixth Circuit answered yes in a lengthy opinion in which each judge wrote separately.[2]

The Civil and Criminal Litigation Arising From the Flint Water Crisis

After the city of Flint, Michigan, began sourcing its water from the Flint River in 2014, contaminating the city's water supply, tens of thousands of residents brought suit in the U.S. District Court for the Eastern District of Michigan. Dozens of cases were consolidated before U.S. District Judge Judith Levy.

Among numerous defendants were former Michigan government officials, including former Gov. Rick Snyder, and former Flint officials Gerald Ambrose, Howard Croft and Darnell Earley.

Other defendants included the engineering firms that the city of Flint had hired to assess its water problems and use of the river as a water source — Veolia North America LLC and its affiliates, and Lockwood Andrews & Newnam PC and its affiliates.

Michigan prosecutors brought criminal charges against Ambrose, Croft and Earley. But then the prosecutor was dismissed, a new solicitor general took over the investigation and the charges were dismissed without prejudice.[3]

Jeopardy did not attach, and prosecutors announced the investigation was ongoing. At that time, no charges were brought against Snyder.

Meanwhile, the civil cases moved forward. Faced with discovery, Ambrose, Croft and Earley sought a stay, hoping to postpone discovery until the statute of limitations on potential criminal charges expired.[4]

The court denied their motions, noting that none of them were currently under indictment

and that the plaintiffs, court and public had an interest in proceeding expeditiously.

The plaintiffs also sought depositions of Snyder and his former adviser, Richard Baird, a nonparty to the litigation. They did not join in the motions; they had not been charged — yet.

Despite the prior criminal charges and comments by prosecutors of ongoing investigations,[5] the five former government officials testified at their depositions. None invoked his Fifth Amendment privilege against self-incrimination.

The former governor, for example, answered questions on such topics as his knowledge of Flint's use of the Flint River as a water source, the discovery of lead in Flint's water, and the remedial actions.[6]

As the consolidated civil cases progressed, so too did the criminal cases. During 2020 and early 2021, all five of the former officials were indicted.[7]

During the same period, the former government officials settled the consolidated civil cases.[8] Meanwhile, the cases continued against the engineering defendants, VNA and LAN. Judge Levy scheduled a bellwether trial, Walters v. Flint.

The Motions in the District Court to Quash the Trial Subpoenas

In February, the five former officials, all now nonparties, received subpoenas from the plaintiffs and VNA to testify at the bellwether trial. They moved to quash. Snyder, for example, argued that his indictment dramatically increased his risk, and his deposition testimony did not waive his right to invoke the privilege.[9]

The trial court denied the motions to quash, relying on and quoting the U.S. Supreme Court's 1999 decision in Mitchell v. U.S.:[10] "'[A] witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.'"[11]

The court scheduled a hearing to address the implications of denying the motions to quash, including to create a process by which the plaintiffs and VNA could submit questions beyond the scope of the waiver.[12]

Counsel explained that Snyder and the other former officials would refuse to testify and instead subject themselves to contempt to preserve their ability to appeal as of right.[13]

The court, recognizing that this contempt-and-appeal approach was "just not a good option," invited a motion for an interlocutory appeal.[14] Judge Levy granted that motion on April 1, and later that month, the Sixth Circuit expedited the appeal.[15] The circuit court heard oral argument on July 28.

While the appeal was pending, the bellwether trial went forward. The jury viewed the former officials' videotaped depositions in lieu of their live testimony.[16]

The jury could not reach a verdict, however, and the court declared a mistrial on Aug. 11.[17] In September, Judge Levy scheduled retrial for February 2023.[18]

The Sixth Circuit Decision and the Separate Opinions of Each Judge

On Nov. 8, the Sixth Circuit issued its decision. Each judge wrote separately on both mootness and the merits.

U.S. Circuit Judge Richard Allen Griffin's lead opinion holds the appeal is not moot and that appellants should be allowed to invoke the privilege at trial, even after their deposition testimony.

U.S. Circuit Judge Amul Thapar separately "concurred in part and in the judgment," concluding that the appeal should be deemed moot, but agreeing that the appellants should be allowed to invoke the privilege.

U.S. Circuit Judge Karen Nelson Moore concurred with Judge Griffin that the appeal was not moot, but dissented on the merits.

Judge Griffin's lead opinion held that testifying at a deposition does not waive the right to invoke the Fifth Amendment privilege at a later trial in the same civil case.

In so holding, the lead opinion adheres to Mitchell's proceeding-specific test, meaning a waiver applies throughout only the proceeding in which the witness testifies.

The central question, according to Judge Griffin, was whether a deposition and trial are separate proceedings. In finding that they are distinct proceedings, Judge Griffin deemed the most "telling thread evident" in analogous case law is that courts base their decisions on "the purpose and logic supporting the Fifth Amendment."

First,

> [t]he "waiver" rule is intended to protect the fact-finding process and prevent witnesses from distorting the truth through providing self-selected testimony or testifying only to the favorable aspects of his or her testimony.[19]

Judge Griffin concluded that "[c]ross-examination prevents a witness from making only a partial disclosure of the truth by testifying only on direct examination," and consequently, "cross-examination is the crucial factor in determining what qualifies as a Fifth Amendment proceeding."[20]

Because the parties had the opportunity to cross-examine the witnesses at their depositions, any waiver should have ended at the conclusion of the deposition.

Second, protecting a witness from further incrimination — a purpose at the heart of the Fifth Amendment — buttresses the conclusion that waiver applies throughout a single proceeding, but not beyond.

The rule "account[s] for changed circumstances that may create new grounds for apprehension and for the possibility that witnesses could further incriminate themselves," as the Sixth Circuit's 1983 decision in In re: Morganroth explained.[21]

And third, Judge Griffin analyzed the purposes of the two events: A deposition helps discover the facts and merits of claims. A trial yields a final determination of questions of fact and conclusively decides issues.[22] Because deposition and trial serve different purposes, they should be deemed separate proceedings.

"Concurring in part and in the judgment," Judge Thapar explained that the case was moot because the subpoenas applied to a trial that had concluded, and appellants could receive effective appellate review were the issue to recur in a subsequent trial.

But because Judges Griffin and Moore concluded the issue was ripe and held opposing views on the merits, Judge Thapar addressed the Fifth Amendment issue. Otherwise, the panel would conclude the appeal warrants review but would leave the merits undecided.[23]

Although agreeing with Judge Griffin that appellants may invoke the privilege despite their deposition testimony, Judge Thapar believed the issue should not turn on the meaning of "proceeding."

Instead, he turned to English common law, the framers' intent in drafting the amendment, and judicial interpretation starting with the U.S. Supreme Court's 1803 decision in Marbury v. Madison.[24]

He concluded that the amendment's purpose and history show that waiver should extend only to the details of transactions the testimony discloses, and only through the end of cross-examination.[25]

Finally, Judge Moore agreed with Judge Griffin that the appeal was not moot. But she dissented in holding that the appellants' deposition testimony waived their right to assert the Fifth Amendment privilege at trial.

She explained that "choices have consequences," and the appellants should be held to their choices. The appellants knew they "spoke at their own peril when they testified at their depositions." Prosecutors had made clear that public officials involved in the water crisis faced potential criminal charges. Nevertheless, the appellants decided to testify.

Judge Moore also heralded the importance of judging credibility at trial. Cross-examination at deposition does not fulfill that function.[26]

Further, the appellants could have avoided this issue by invoking at their depositions. Allowing them to do so at trial provides an opportunity to "game" discovery. Thus, a deponent who testifies should be held to his waiver come trial.[27]

The Jurisprudential Significance of the Opinion Outweighs Its Effect on Legal Strategy or Advice in Parallel Proceedings

Any one of the three opinions, standing alone, would be significant in Fifth Amendment jurisprudence.[28] Together, they are all the more so. Anyone handling parallel criminal and civil proceedings must give the decision careful review.

For example, this is the first federal decision to address this issue, at least in any depth. The case law and majority rule in Morganroth — that invocation is proceeding-specific — is not the last word.

Further, analysis of Mitchell's single proceeding is long overdue. In criminal cases, testimonial events such as grand jury or plea proceedings are distinct proceedings from trial. Why shouldn't the same be true in civil matters? Isn't the distinction between single and multiple proceedings simply semantics?

Yet Judge Moore's conclusion that the appellants knowingly waived their privilege is beyond dispute. They undoubtedly knew the risk of criminal charges. And after they testified, they settled the civil cases.

An economist might opine that had they invoked the Fifth Amendment at deposition, the settlement might have been more costly; their testimony deprived the plaintiffs of adverse inferences that might have been dispositive on summary judgment. Why shouldn't the witnesses be held to their strategic choices? Other courts outside the Sixth Circuit may agree with Judge Moore.

Similarly, Judge Thapar's detailed review of English common law and of the framers' intent will inform arguments based on the history of the amendment and what that history and intent means for witnesses today. Few decisions have applied an originalist approach to the self-incrimination clause.[29] Judge Thapar's opinion will likely inform arguments by jurists who are originalists, or even, to quote Justice Antonin Scalia, "faint-hearted" originalists.

But the practical effect of the decision — other than for the parties, and perhaps in academia — are less significant. Although providing legal argument for clients who find themselves in the former officials' position, the opinion will likely not change strategy or legal advice to clients confronting parallel proceedings.

A deposition is as much fodder for a prosecutor as trial testimony, even though a trial may be more public. Fear of criminal charges drives legal advice in most parallel proceedings. Being able to invoke the Fifth Amendment at trial despite earlier deposition testimony in the same case will not change that advice.[30] The risk of testifying remains the same.

Thus, although the decision is required reading for practitioners handling parallel civil and criminal proceedings, or anyone interested in Fifth Amendment jurisprudence, it is unlikely to affect legal strategy or advice in parallel proceedings.

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[1] See, e.g., In re Morganroth, 718 F.2d 161 (6th Cir. 1983).

[2] In re Flint Water Cases, No. 22-1353, 2022 WL 16824209 (6th Cir. Nov. 8, 2022).

[3] Id. at *2; 5:17-CV-10164-JEL-KGA (Dkt. 739), at 4.

[4] In re Flint Water Cases, No. 5:16-CV-10444, 2019 WL 5802706, at *5 (E.D. Mich. Nov. 17, 2019).

[5] Attorney General Statement, Flint Water Prosecution Team Expands Investigation Based on New Evidence, Dismisses Cases Brought by Former Special Counsel (June 13, 2019), https://perma.cc/RC5Z-EPUW.

[6] 5:17-CV-10164-JEL-KGA (Dkt. 712), at 2–3.

[7] Id. at 4-5; In re Flint Water Cases, No. 22-1353, 2022 WL 16824209, at *2 (6th Cir. Nov. 8, 2022).

[8] In re Flint Water Cases, 571 F.Supp.3d 746 (E.D. Mich. 2021).

[9] In re Flint Water Cases, No. 22-1353, 2022 WL 16824209, at *3 (6th Cir. Nov. 8, 2022); 5:17-CV-10164-JEL-KGA (Dkt. 712), at 2–3.

[10] Mitchell v. United States, 526 U.S. 314, 321 (1999). In Mitchell, the Supreme Court held that a guilty plea and statements at a plea colloquy do not waive the right to invoke the Fifth Amendment at a sentencing hearing, all of which are not a "single proceeding."

[11] 5:17-CV-10164-JEL-KGA (Dkt. 739). The Sixth Circuit, like most other circuits, has held that testimony in one case does not waive the privilege in a different litigation. In re Morganroth, 718 F.2d 161 (6th Cir. 1983); but see, Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969).

[12] 5:17-CV-10164-JEL-KGA (Dkt. 739), at 20.

[13] 5:17-CV-10164-JEL-KGA (Dkt. 752), at 9–11.

[14] Id. at 11.

[15] In re Richard Dale Snyder, No. 22-0104 (6th Cir. April 26, 2022) (order); 5:17-CV-10164-JEL-KGA (Dkt. 805).

[16] In re Flint Water Cases, No. 22-1353, 2022 WL 16824209, at *4 (6th Cir. Nov. 8, 2022).

[17] Following the mistrial, the Sixth Circuit requested supplemental briefing on mootness. Both sides argued the appeals are not moot because the issues are capable of repetition, yet evade review. They argued the same issue will arise when the bellwether case is retried, and in subsequent trials arising out of the Flint water crisis.

[18] In re Flint Water Cases, No. 22-1353, 2022 WL 16824209, at *4 (6th Cir. Nov. 8, 2022).

[19] Id.

[20] Id.

[21] Id. at *16.

[22] Id. at *17.

[23] Id. at *23.

[24] 5 U.S. (1 Cranch) 137 (1803).

[25] In re Flint Water Cases, No. 22-1353, 2022 WL 16824209, at *28 and 31.

[26] Id. at *36, 40, 42.

[27] Id. at *35–36.

[28] It is also significant in its holding and analyses of mootness.

[29] Justice Thomas did so in his concurrence in United States v. Hubbell, 530 U.S. 27, 49 (2000), but that case involved the act-of-production doctrine.

[30] Of course, if a client testifies at deposition and then at trial wants protection of the Fifth Amendment, counsel will rely on this decision, or at least Judge Griffin and Judge Thapar.