Swing Your Sword: Defending the Health Care Provider in a Civil Action When that Client Faces Criminal Charges

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Introduction

When the topic arises, we can all think immediately of high-profile criminal cases that captured the nation's attention. O J Simpson, Casey Anthony, Derek Chauvin (the George Floyd murder), Rodney King, George Zimmerman (the Trayvon Martin killing), and most recently at the time of this writing, Alex Murdaugh in South Carolina.

The civil liability of the criminal defendant, or target, does not as often grab headlines, with the notable exception of the second trial of OJ Simpson, following which the families of Nicole Brown Simpson and Ronald Goldman were awarded $33.5 million in damages. *See, e.g., Goldman v. Simpson*, 160 Cal.App.4th 255,(Cal. App 2 Dist. 2008). This presentation explores evidentiary and procedural issues inherent in defending such civil cases as well as coverage issues that arise under professional liability policies.

A. Staffing the Defense/Retention of Counsel

When a health care provider experiences an adverse event so unusual or extreme that a criminal investigation arises, the target is well served to retain an attorney well versed in criminal law practice. In our world of defending negligence and even gross negligence claims, we do not interact with prosecutors and detectives and so getting a capable and experienced defense attorney must be the first order of business.

The insurance carrier may be presented with a request by retained counsel to engage a criminal law attorney as necessary to protect the insured policyholder against liabilities not ordinarily encountered in professional liability claims for money damages. Consider whether the criminal law attorney might be considered a consulting expert to navigate the complex issues outside those ordinarily seen in defending professional liability malpractice claims. Damages are awarded as sums of money to patient plaintiffs but just as counsel may be engaged to defend providers before various regulatory boards seeking to impose penalties such as suspension and revocation of licensure, in the rare instances we discuss herein, a criminal law attorney might be just the type of expert needed to avoid damages to life and liberty outside a correctional facility in these extreme cases.

B. Procedural Defenses

1. Motion to Stay

If the defendant is under indictment or otherwise facing an active criminal proceeding, civil trial judges will most often grant a motion to stay the civil case until the criminal proceeding is completed. A federal court in the District of Columbia attempted to articulate the standard required of a movant seeking a stay in the case of Horn v. District of Columbia, 210 F.R.D. 13,

15 (D.D.C. 2002), holding the movant must "(1) make a clear showing, by direct or indirect proof, that the issues in the civil action are 'related' as well as 'substantially similar' to the issues in the criminal investigation; (2) ... make a clear showing of hardship or inequality if required to go forward with the civil case while the criminal investigation is pending; and (3) ... must establish that the duration of the requested stay is not immoderate or unreasonable." The decision whether to stay the case lies within the sound discretion of the trial court. *Id.*

2. Motion to Seal

In a currently pending civil matter, a health care professional insured under a homeowners policy was sued by his son for the alleged wrongful death of the son's mother and the insured provider's ex wife. The death had been extensively reported in both print and television news outlets. The sensational nature of the unsolved murder in the victim's home in a quiet and safe neighborhood led to great interest, especially as the victim was related to a number of local elected officials.

The filing of the lawsuit did not generate immediate news attention and at the prompting of the client's criminal law attorney, a motion was filed and an order was obtained sealing the lawsuit from public scrutiny. On the anniversary date of the unsolved murder, the news outlets brought up the story of the unsolved homicide. A clerk's error resulted in a public filing which was pounced upon by the local paper with the consequence being the health care provider lost his employment at a local hospital. The False Claims Act requires such complaints to be filed under seal by the plaintiff and the grounds for privacy may be argued on behalf of a defendant but success with such motions will vary by court. In U.S. ex rel. Le Blanc v. ITT Industrice, Inc., 492 F.Supp. 2d 303, (S.D.N.Y. 2007), a discussion may be found about the consequences of a plaintiff's failure to file the statutory requirements of the act, including dismissal of the complaint with prejudice.

C. Pleading Defenses

It might not be immediately apparent that the decision to deny liability in a defendant's answer to a civil lawsuit might be scrutinized and criticized when the same defendant later declines to answer liability questions, invoking the privilege against self-incrimination set forth in the 5th Amendment to the United States Constitution. The title of this writing, "Swing your sword," derives from the old adage that one cannot use a privilege to shield oneself from liability and at the same time use the same action to act as a sword to make an attack. This writer has defended a case in which the plaintiff opponent later criticized the answer denying liability as an attacking pleading while invocation of the 5th amendment right against self-incrimination was clearly shielding himself from potential criminal exposure as well as civil liability.

5th Amendment Privilege

Ultimately, an individual's interest in avoiding incarceration is almost always greater than that same individual's interest in saving a liability insurer's money. The level of cooperation one might expect to receive from a client being sued for money damages when criminal charges are pending might be considerably less if engaging in usual discovery tools such as answering

requests for admissions and interrogatories and giving deposition testimony might subject the client to criminal jeopardy.

It has long been the case that pleading the 5th amendment in response to questions gives rise to an adverse inference. A party's invocation of the 5th Amendment right against self-incrimination in a civil case may in some cases give rise to an adverse inference instruction. *Farace v. Independent Fire Insurance Co*., 699 F.2d 204 (5th Cir. 1983). Even in such instances, the courts apply a Rule 404 test of whether unfair prejudice outweighs the probative value. *Hinojosa v. Butler*, 547 F.3d 285 (5th Cir. 2008); *Harrell v. DCS Equipment Leasing Corp*., 951 F.2d 1453 (5th Cir. 1992). In the two cases cited immediately above, the invocation of privilege related to impeachment questions and not the plaintiff's effort to establish a prima facie case of liability. In both instances, it was ultimately determined that if the witness desired to testify, the witness could be cross examined and refusal to answer questions could be considered by the fact finder in weighing the credibility of the testimony.

A plaintiff may opine that an adverse inference may be drawn in his favor from defendant's reliance on the Fifth Amendment. "The invocation of the Fifth Amendment in civil proceedings may be the subject of an adverse inference." *Cunningham* (In re Cunningham), B.R. , 365 B.R. 352, 2007 Bankr. LEXIS 1264, 2007 WL 1053435 (Bankr.D.Mass. 4/6/2007), *citing, In re Taylor Agency, Inc*., 281 B.R. 354, 359 (Bankr.S.D.Ala.2001)(*citing Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L. Ed. 2d 810, (1976)). However, the clear majority rule established by courts in the United States considering the issue is that the adverse inference cannot be drawn in the absence of other competent evidence to support the allegation. *Fontenot ex rel Fontenot v. Cage (In re Cage)*, __ BR __, 2007 Bankr. Lexis 2057, pp 11-12 (Bankr. W.D. La 6/8/2007); *Cunningham (In re Cunningham)*, __ B.R. __, 2007 Bankr. LEXIS 1264, 2007 WL 1053435 (Bankr.D.Mass. 4/6/2007). *See also, SEC v. Graystone Nash, Inc*., 25 F.3d 187, 192 (3d Cir.1994) "Because the privilege [against self-incrimination] is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." An adverse inference based on silence pursuant to the assertion of the Fifth Amendment privilege is insufficient by itself to create an issue of material fact precluding summary judgment. *Curtis v. M & S Petroleum, Inc*., 174 F.3d 661, 674-75 (5th Cir. 1999). The party seeking to draw the inference must have established a prima facie case separate and apart from the adverse inference. *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990). *See also SEC v. Colello*, 139 F.3d 674, 677-78 (9th Cir. 1998) (adverse inference permissible on summary judgment because there was "additional evidence" to support the plaintiff's case); *Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991) ("Invocation of the fifth amendment privilege did not give rise to any legally cognizable inferences sufficient to preclude entry of summary judgment. The negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production.")

D. Highly Publicized Litigation

In 2022, a Tennessee jury found former nurse Radonda Vaught guilty of criminally negligent homicide and gross neglect of an impaired adult. See 2022 WL 19332138 Tenn. Criminal Court, May 13, 2022. The verdict resulted in worry by nurses and medical professionals across the United States that her case could set a precedent of criminalizing medical mistakes. She was subsequently sentenced to 3 years of supervised probation. Vaught lost her nursing license despite no prior record. Nurses traveled to Nashville in support of Vaught and asked the Tennessee Governor Bill Lee to grant clemency.

In 2018, a Mississippi jury found former jail nurse Carmon Brannon guilty of manslaughter after a six day trial following a mistrial when the first jury to hear the trial could not reach a unanimous verdict. She did not give a county jail inmate insulin for seven consecutive days during which time his medical condition declined and he pled for help but she ignored his complaints, citing her opinion he was going through withdrawal symptoms of his methamphetamine addiction. Other corrections officers testified at trial they had seen her withhold medication from other inmates.

In both instances, the employer faced civil liability in separate civil cases.

E. Insurance Coverage

Generally, liability insurance does not include coverage for intentional criminal acts. However, cases must be reviewed on their own particular facts and as the duty to defend is generally broader than the duty to indemnify, an insurer may provide a defense under a reservation of rights.

A. Terms, Conditions and Exclusions

A health care provider's medical professional liability insurance policy might be expected to include the following model language:

1. **Coverage Agreements, Coverage A – Professional Liability**: Professional Organization Coverage provides that we will pay those amounts which you become legally obligated to pay as damages as a result of a medical incident caused by you or any non-physician for whose acts you are legally responsible.

2. **Definitions:**

A "**Medical Incident**" means any act or omission in the furnishing of professional services which causes bodily injury to an individual.

"**Professional Services**" means rendering or failing to render medical care or treatment to an individual, including the dispensing of drugs or medicine. Serving on a credentials committee

or similar board or committee of a hospital or professional society is also considered to be a professional service, for the purposes of this coverage.

"**Sexual Misconduct**" means any sexual assault, intimacy, molestation, harassment, or exploitation directly or indirectly incident to professional services rendered by you or anyone for whom you are legal responsible.

3. **Exclusions**: the above-numbered medical professional liability insurance policy issued to you states that we will not cover the following:

Any claim or lawsuit arising from **sexual misconduct**.

Any liability from **unlawful prescribing or dispensing** of controlled substances, including but not limited to prescribing or dispensing such substances when your license to prescribe has been suspended, revoked, voluntarily suspended, lapsed or non-renewed.

With such language, it may seem easy and apparent that a provider being sued for having fondled a patient's genitalia has committed sexual misconduct as defined under the policy language and that coverage may not exist for a provider being sued for having sexually assaulted the patient.

Most attorneys bringing such a claim are acutely aware of the need for insurance coverage so the complaint may also contain a count alleging negligent conduct and the provider will almost always claim to have had pure intentions which were misconstrued by the patient. Common examples include physical contact in a physical examination. As such, the reservation of rights letter is used in lieu of an outright denial of coverage and defense.

B. Duty to Defend Versus Duty to Indemnify

Example language from one carrier's reservation of rights letter might appear in substance as follows:

"Because of the above and for other good and sufficient reasons, we may not have a duty to defend you with respect to the claims. Further, we may not have a duty to indemnify you with respect to such claims. Notwithstanding the foregoing, we will provide you with an attorney, independent of any personal attorney you may choose to hire, to defend your interest in the above referenced claims. We reserve our right to later disclaim coverage and to contest liability for any part of any judgment that may be rendered against you with respect to the claims. We hereby declare that such defense is being provided to you under the reservation that it may not have a duty to indemnify you for any loss resulting from the above mentioned acts or omissions.

We further specifically reserve the right to seek a declaration by a court of competent jurisdiction of our rights and duties under the policy regarding defense and indemnity. The action taken by us shall not consititute either an admission of coverage nor an acknowledgement of any obligation to pay damages in any judgment rendered against you."

It is generally true that an insurer's duty to indemnify and its duty to defend are separate and independent obligations. *See Allstate Insurance Co. v. Airport Mini Mall, LLC,* 265 F.Supp.3d 1356, 1366 (N.D. Ga. 2017), *citing Penn-Am Ins. Co. v. Disabled Am. Veterans, Inc*., 224 Ga. App 557, 481 S.E.2d 850 (1997), aff'd, 268 Ga. 564, 490 S.E. 2d 374 (Ga. 1997). An insurer's duty to defend is broader than its duty to indemnify. *Allstate v. Airport Mini Mall*, 265 F. Supp. 3d at 1366.