WHAT CIVIL PRACTITIONERS NEED TO KNOW ABOUT THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND WHAT CRIMINAL DEFENSE LAWYERS AND PROSECUTORS NEED TO LEARN ABOUT THE RAMIFICATIONS OF ASSERTING THE PRIVILEGE IN CIVIL LITIGATION

By Andrew R. Schulman,

This was prepared at least six years ago for an Inns of Court CLE

PREFACE

I.

Anybody who owns a television understands that the Constitution of the United States allows criminals to refuse to answer when asked about their crimes. It is perfectly acceptable for a burglar—a burglar!—to require the police to spend countless hours speaking to witnesses, running DNA tests, looking at footwear impressions, all the while knowing that the proof of the crime lay hidden, silently, between his two ears. If he chooses not to speak, the police have no choice but to accept this and go on about their day. Yet the burglar's victim must testify and can, in theory, go to jail himself if he refuses.

Judges, who routinely order the production of juvenile rape victims' therapy records, see e.g., State v. Cressey, 137 N.H. 402, 413 (1993), would never think of first asking their alleged rapists whether they committed the crime. The rape victims' privacy is conditional; the rapist's absolute. Every criminal jury in the nation is told it cannot draw any inference from the defendant's silence but that it must carefully scrutinize the credibility of the police and civilian witnesses who were all forced to testify under the pains and penalties of perjury.

The U.S. Supreme Court has been downright poetic in its *praise* of this state of affairs. See e.g., Ullmann v. United States, 76 S.Ct. 497, 500 (1956), quoting Griswold, The Fifth

Amendment Today (1955), at p. 7 ("This command of the Fifth Amendment...registers an important advance in the development of our liberty-one of the great landmarks in man's struggle to make himself civilized."); Johnson v. New Jersey, 86 S.Ct. 1772, 1779 (1966) (referring to the privilege against self-incrimination as "the mainstay of our adversary system of criminal justice."); Kastigar v. United States, 92 S.Ct. 1653, 1656 (1972) ("The privilege reflects a complex of our fundamental values and aspirations"); United States v. Balsys, 118 S.Ct. 2218, 2242 (1998) ("The privilege recognizes the unseemliness, the insult to human dignity, created when a person must convict himself out of his own mouth").

What gives? As a society, and possibly even as a species, we place great value on what has been alternatively called contrition, remorse, acceptance of responsibility and, more colloquially, standing up to the plate. For example, under the Federal Sentencing Guidelines, a criminal defendant who "clearly demonstrates acceptance of responsibility" qualifies for a reduced sentence. See, United States Sentencing Guidelines (2009), §3E1.1. In state court, a defendant who lacks remorse may lawfully receive a greater sentence than one who is contrite. See, State v. Lamy, 158 N.H. 511 (2009). We teach our children to admit their errors. When we bungle something, we admit it ourselves. Why then all the hagiography about the burglar's—the burglar's!—right to silence?

More to the point, *Dragnet* and its prodigy (see e.g., *Kojack, Starski and Hutch, Law and Order*) reaffirm the well established principle that the police can and should interrogate suspects and arrestees. Cf Miranda v. Arizona, 86 S.Ct. 1602 (1964) ("[T]he admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence[.]"); State v. Monroe, 142 N.H. 857 (1998). Police detectives are paid and encouraged to interrogate arrestees—i.e. prisoners who are taken into custody and held in the

bowels of the police station to await formal arraignment—provided they first incant the famous warnings and the soon-to-be defendant agrees to speak.

The rule underlying these seeming contradictions is this: The government can, and should, question prospective criminal defendants about their alleged crimes, but it cannot ***compel*** them to speak, by oath or otherwise. For both historical and contemporary reasons, requiring an alleged wrongdoer to speak under oath about his crimes has been viewed as *per se* coercion, the functional equivalent of torture.

II.

This was the understanding of those who literally stepped off the Mayflower in Plymouth. See, Bradford, William, *History of Plimoth Plantation* (available at http://www.gutenberg.org/files/24950/24950-h/24950-h.htm at p. 4) (stating that while a civil magistrate cannot, without sin, fail to diligently seek, by all due means, a "naked confession," he cannot "extract punishment" or administer an oath for this purpose.). In this respect, at least, the Pilgrims correctly articulated English law: Seventeenth and Eighteenth Century common law courts on both sides of the Atlantic relied at least as much on confessions as our courts today, but they never conducted an inquisition of criminal defendants under oath.

Under the Stuarts however, such inquisitions became a matter of course in the Court of the Star Chamber and the Court of the High Commission. During the tumultuous reign of Charles I (1625-1649), both courts were used to suppress political and religious opposition (provoking, among other things, the Puritans' decision to re-settle in New England). Dissenters were hauled before the Star Chamber without indictment, put under oath, tortured into confessing, tried in secret without any right to confront their accusers, and punished severely. These innovations proved spectacularly unpopular and, in due course, the English Civil War put

an end to the Stuarts, the Star Chamber, and compelled self-incrimination under oath. The result was the entrenchment of the doctrine *Nemo tenetur seipsum accusare* ("no man is bound to accuse himself") in the law of all English speaking jurisdictions. See e.g., Brown v. Walker, 16 S.Ct. 644, 646-647 (1896). Cf: 10 U.S.C. §948r (Military Commissions Act of 2009, excluding evidence obtained by torture and providing that no defendant in a military commission may be compelled to testify against himself).

Our own founders' aversion to oaths *ex officio,* and their broader view that the privilege against self-incrimination was a necessary constituent of an adversary jury trial, led them to write the privilege into the federal Constitution as well as the constitutions of all thirteen original states. See generally, Moglen, Eben, *Taking The Fifth: Reconsidering The Origins Of The Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086 (1994); Wigmore, John H., *Nemo Tenetur Seipsum Prodere*, 5 Harv. L. Rev. 71 (1891). The first written constitution in history—which John Adams drafted for the Commonwealth of Massachusetts during his summer vacation in 1779—included a laundry list of inviolable principles of criminal procedure including the requirement that "No subject shall… be compelled to accuse, or furnish evidence against himself." Massachusetts Constitution, Part I, Article 12. Three years later, the New Hampshire Constitutional Convention of 1782 plagiarized Adams work and, with only stylistic edits, cut and paste Declaration of Rights from the Massachusetts Constitution. In 1784 the voters approved the New Hampshire Constitution, which contains an identically worded privilege against self-incrimination. See, New Hampshire Constitution, Part 1, Article 15.

But there is more than the dead hand of the past at work when we let our contemporary burglars—alleged burglars?—keep their thoughts to themselves. The privilege against self-incrimination remains vital because it speaks to our time. The privilege is almost a necessary

corollary to the first two principles of our criminal justice system, i.e. that the accused is innocent until proven guilty beyond a reasonable doubt, and that the burden to so rests solely on the government. Put another way, a criminal defendant's only obligation at trial is to show up. The defendant *may* present opening and closing arguments, cross-examine witnesses, confront his accusers, present witnesses and testify. But he need not do any of these things. The government must move the rock all the way to the top of the mountain (or at least far enough to prove guilt beyond a reasonable doubt on each element of the offense) and the defendant does not have to do or say anything. Thus, the privilege against self-incrimination is properly understood as one cog that keeps our adversary system from becoming overly inquisitorial:

> [O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 81 S.Ct. 735, 739 (U.S. 1961).

With varying degrees of success, the privilege also stands as a levee against coercive practices by the police, the courts and our legislatures. That there have been breaches in this levee is proven by the judicial decisions which patched it back up. In short, as the United States Supreme Court said in Murphy v. Waterfront Com'n of New York Harbor, 84 S.Ct. 1594, 1596-1597 (1964):

> [The privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' [citation omitted]; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' [citation omitted]; our distrust of self-

> deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.

PRACTICE

-The Constitutional privilege covers any fact that might aid in the witnesses' prosecution. "The privilege afforded [by the Fifth Amendment] not only extends to answers that would in themselves support a conviction…but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant[.]" Hoffman v. United States, 71 S.Ct. 814, 818 (1951). See also, Ohio v. Reiner, 121 S.Ct. 1252, 1254 (2001); Malloy v. Hogan, 84 S.Ct. 1489 (1964); State v. O'Connell, 131 N.H. 92, 94 (1988) (holding that the same rule applies under Part 1, Article 15 of the New Hampshire Constitution); State v. Avery, 126 N.H. 208, 212 (1985); Javari v. Scamming, 29 NH 280 (1854) ("If the fact to which [the witness] is interrogated forms but one link in the chain of testimony which is to convict him, he is protected.").

In practice, this "link in a chain" doctrine gives the privilege a wide enough reach to encompass all of the topic areas relating to a criminal offense:

> [I]t need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Hoffman, 71, S.Ct. 814. See also, Reiner, 221 S.Ct. at 1252. The ultimate question is not whether the witness will in fact be prosecuted, or whether his answer will in fact be used by the government in a prosecution, but rather whether he has "reasonable cause to apprehend danger from a direct answer." Hoffman, 71 S.Ct. at 814; Reiner, 221 S.C. at 1252.

In most cases, this is an easy question to answer. However, in close cases its determination requires both a fact specific inquiry and some knowledge of substantive criminal

law. For example, one would be hard pressed to argue that a corporate manager, caught up in a white collar investigation, could incriminate himself by testifying to the physical address of his employer. A stranger who burglarized the company in the middle of the night would no doubt have a privilege not to disclose that information. Generally speaking, however, the privilege may cover facts pertaining to a witness' motive to commit a crime, his knowledge of the roles (or even the existence) of others who were involved in the offense, and, in a white collar case, the ordinary methods of bookkeeping, record keeping or document retention used by the witnesses company.

Ultimately, of course, the existence and scope of the privilege are questions for the court rather than for the witness and his counsel to determine with finality on their own. DeMauro v. DeMauro, 142 N.H. 879, 883 (1998). This often raises delicate concerns regarding the extent to which the witness should be required to reveal information to the court. The determination is made on a question by question basis, with the court upholding the privilege unless it is "perfectly clear, from a careful consideration of all the circumstances in the case," that compelled answers "cannot possibly " have a tendency to incriminate. Key Bank of Maine v. Latshaw, 137 N.H. 665, 670-671 (1993). See also, Hoffman, 71 S.Ct. at 819; Malloy, 84 S.Ct. at 1496; Mackey v. United States, 91 S.Ct. 1160, 1166 (1971). No individual has a blanket immunity against testifying. United States v. Castro, 129 F.3d 226, 229 (1st Cir. 1997).

-The privilege against self-incrimination protects the innocent as well as the guilty. In Ohio v. Reiner, 121 S.Ct. 1252, 1254 (2001), the Supreme Court expressly held that the privilege may be asserted by innocent individuals "who otherwise might be ensnared by ambiguous circumstances." See also, Coppola v. Powell, 878 F.2d 1562, 1566 (1st Cir. 1989) ("The privilege against self-incrimination serves as a protection to the innocent as well as to the

guilty[.]"). Thus, an individual might deny actually committing a crime but still assert the privilege with respect to particular questions.

-The privilege only applies to the risk of criminal prosecution in the United States. There are a lot of very unpleasant *non-criminal* sanctions that the government can impose for conduct that falls short of commission of a crime. These include things such as deportation (and possible removal from the only country a witness has known since childhood), loss of professional and occupational licenses (and possible deprivation of the means of the witness' livelihood), civil forfeitures and financially crippling civil penalties, loss of driving privileges, and, of course, civil liability. One cannot assert a Constitutional privilege based on potential non-criminal consequences. See, United States v. Balsys, 118 S.Ct. at 2223.

Of course, conduct that is likely to trigger severe civil consequences often involves transgression of the criminal law as well. That is particularly the case with deceptive business practices (which may *prosecuted* under RSA 358-A), claims of misrepresentation (given the ambulatory nature of the federal mail fraud, wire fraud and bank fraud statutes), and regulatory offenses under statutory schemes that provide for criminal penalties. In those cases the witness may have a reasonable fear of both criminal and non-criminal prosecution.

Additionally, the federal privilege is not available if the only risk of prosecution is in a foreign jurisdiction. Balysis, 118 S.Ct. at 2223. The New Hampshire Supreme Court has not addressed this issue under our state Constitution.

-Corporations and artificial entities do not have a Fifth Amendment privilege at all. True to its historical origins, the Fifth Amendment privilege protects only natural persons. See, Braswell v. United States, 108 S.Ct. 228, 2287 (1988) ("[I]t is well established that such artificial entities are not protected by the Fifth Amendment"); Bellis v. United States, 94 S.Ct. 2179, 2182

(1974) (holding that "the Fifth Amendment privilege is a purely personal one" and that "[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination[.]") ; Amato v. United States, 450 F.3d 46, 48 fn. 2. (1st Cir. 2006); In re Grand Jury Subpoena, 973 F.2d 45, 47 (1st Cir. 1992).

Although the New Hampshire Supreme Court has not visited the issue in recent memory, it appears that the same rule applies under Part 1, Article 15 of our State Constitution. See, State v. Cote, 95 N.H. 108, 111-112 (1948) (holding that privilege is a "purely personal" one that "does not apply to organizations or companies, incorporated or unincorporated whose character is essentially impersonal rather than purely private and personal."). The Court's more recent decisions construing the scope of our State Constitutional privilege look at the history of the privilege in the United States as a whole and towards the decisions of the U.S. Supreme Court in particular. See e.g., State v. Hearns, 151 N.H. 226, 229 (2004). Therefore it is unlikely that the Court would reach a different result today.

-Corporate employees, officers, shareholders and agents may assert their own personal testimonial privilege if asked to testify about matters that might incriminate them personally. However, they cannot assert any privilege on behalf of their corporation (or limited liability company, partnership, trust, etc.). The privilege may only be asserted by the witness himself. Thus, counsel for another individual cannot object to the witnesses' testimony on the grounds that it might incriminate him.

-The Fifth Amendment protects against compelled *testimony* and provides only limited protection against the production of documents, business records and other things. "The privilege protects a person only against being incriminated by his own compelled testimonial communications[.]" United States v. Doe, 104 S.Ct. 1237, 1242 (1984). Thus, it has

no application at all to subpoenas or warrants for the collection of blood, DNA, fingerprints, handwriting exemplars, etc. Schmerber v. California, 86 S.Ct. 1826 (1965); United States v. Wade, 87 S.Ct. 1926 (1967); United States v. Hubbell, 120 S.Ct. 2037, 2042-2043 (2000). See also, United States v. Thomann, 609 F.2d 560, 562 (1979) ("Compelling a criminal suspect to exhibit his identifying physical characteristics, such as a blood sample or fingerprints, is not the forced extraction of testimonial or communicative evidence contemplated by the fifth amendment.").

The text of Part 1, Article 15 of our state Constitution is seemingly broader than that of the Fifth Amendment. *Compare*, Article 15 ("No subject… be compelled to accuse or furnish evidence against himself.") with Amendment V ("No person…shall be compelled in any criminal case to be a witness against himself."). Nonetheless, the New Hampshire Supreme has consistently construed Article 15 to likewise apply only to compelled "testimony." See, State v. Hearns, 151 N.H. at 229 (2004); State v. Cormier, 127 N.H. 253, 255 (1985).

This means that the privilege does not provide any direct protection at all for business records, no matter how incriminating they may be. See, Andresen v. Maryland, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). However, "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." United States v. Doe, 104 S.Ct. 1237, 1242 (1984). See also, Fisher v. United States, 96 S.Ct. 1569, 1581 (1976). By producing a document, an individual necessarily admits its existence and concedes his control and possession of it. Doe, 104 S.Ct. 1237; Fisher, 96 S.Ct. 1569.

-Thus, in some situations the act of production is both testimonial and incriminating. "Under the act-of-production doctrine, persons compelled by subpoena to produce incriminating records may invoke the Fifth Amendment privilege against self-

incrimination 'only where the act of producing the evidence would contain 'testimonial' features." Amato v. United States, 450 F.3d 46, 48 (1st 2006), quoting Hubbell, 120 S.Ct. at 2050 (Thomas, J., concurring). See also, Day v. Boston Edison Co., 150 F.R.D. 16, 21 (D. Mass. 1993) (the act of producing a tape recording of a conversation that had been recorded in violation of a state criminal statute would be incriminating).

Thus, the critical question under the "act of production" doctrine is not whether the documents requested in a subpoena *duces tucem* are incriminating, but rather whether the defendant's admission of his control over those documents, and their authenticity, would be incriminating. Generally speaking, the more generic a request, the less likely it is to trigger the "act of production" doctrine. Requests for tax returns, income statements, ledgers, and other types of records are usually sufficiently generic to survive any Fifth Amendment challenge. On the other hand, a request for "the ledgers that show the customers of your cocaine sales" would clearly fall within the "act of production" privilege. The line is difficult to draw in the abstract.

-There is no Fifth Amendment privilege to refuse to produce incriminating corporate documents. Because artificial entities have no Constitutional privilege against self-incrimination, their business records and documents may be subpoenaed, even if (a) they are both testimonial and incriminating and (b) the act of production itself would incriminate the corporation. Braswell; Bellis; Amato. In Braswell, the United States Supreme Court required the sole shareholder and president of a corporation to produce its records pursuant to a grand jury subpoena. Thus, the "act of production" doctrine has no application at all to the records and documents belonging to a collective entity.

-The privilege can be asserted in a civil case. The privilege "'can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,'" in which

the witness reasonably believes that the information sought, or discoverable as a result of his testimony, could be used in a subsequent state or federal criminal proceeding." Balysis, 1118 S.Ct. at 2222 quoting Kastigar, 92 S.Ct. at 1656 (1972); DeMauro v. DeMauro, 142 N.H. at 883 ("A party in a civil proceeding may assert the privilege to particular questions if the answer to the question could result in criminal liability."); O'Connell, 131 N.H. at 94.

The privilege may be asserted at trials, hearings, and depositions and in response to interrogatories and (as limited by the "act of production" doctrine) requests for production of documents. It may also be asserted in answers to complaints, counterclaims and cross-claims. The privilege applies with equal effect in all manner of administrative and regulatory proceedings at all levels of government.

-There may be a heavy cost to asserting the privilege in civil litigation and administrative proceedings. In criminal cases, no inference may be drawn from the defendant's decision not to testify. Griffin v. California, 85 S.Ct. 1229 (1965); State v. Ellsworth, 151 N.H. 152 (2004). Indeed, merely commenting on the accused silence is likely to cause a mistrial. In civil cases, however, there is no Constitutional prohibition on inferring a ***reasonable*** adverse inference from a party's invocation of the privilege. Baxter v. Palmigiano, 96 S.Ct. 1551 (1976); Fisher v. Hooper, 143 N.H. 585, 593, 594 (1999). See also, N.H.R.Ev. 512 (which was amended in 2002 to allow witnesses to assert the Fifth Amendment privilege in the presence of civil juries and to allow reasonable adverse inferences).

The purpose of the adverse inference is not to penalize or sanction the party for the exercise of a fundamental, personal Constitutional right, but rather to protect the rights of the opposing party (or the government in civil regulatory and enforcement proceedings). "[I]n the civil context, where, systemically, the parties are on a somewhat equal footing, one party's

assertion of his constitutional right should not obliterate another party's right to a fair proceeding." Serafino v. Hasbro, Inc., 82 F.3d 515, 518 (1st Cir. 1996).

In Baxter the Supreme Court upheld a prison disciplinary board's use of an inmate's failure to testify where "his silence was given no more evidentiary value than was warranted by the facts surrounding his case." Baxter, 96 S.Ct. at 1558. The Court distinguished this reasonable adverse inference from the types of *per se* penalties the Court found to be unconstitutional in other cases. See, Lefkowitz v. Turley, 94 S.Ct. 316 (1973) (automatic disqualification from public bidding held to be an unconstitutional penalty for the exercise of Fifth Amendment rights); Garrity v. New Jersey, 87 S.Ct. 616 (1967) (same for automatic removal from office); Spevack v. Klein, 87 S.Ct. 625 (1967) (same for disbarment). However, "not every undesirable consequence which may follow from the exercise of the privilege against self-incrimination can be characterized as a penalty.") See .e.g., Flint v. Mullen, 499 F.2d 100, 104 (1st Cir.1974).

A trial court's decision to allow an adverse inference is always discretionary:

> [I]n a civil proceeding, the drawing of a negative inference is a permissible, but not an ineluctable, concomitant of a party's invocation of the Fifth Amendment. [citation omitted]. While the law does not forbid adverse inferences against civil litigants who refuse to testify on Fifth Amendment grounds, [citation omitted] it does not mandate such inferences. When all is said and done, the trial court has discretion over whether a negative inference is an appropriate response to the invocation of the Fifth Amendment in a particular civil case

In re Carp, 340 F.3d 15, 23 (1st Cir. 2003). See also, Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000) ("The Baxter holding is not a blanket rule that allows adverse inferences to be drawn from invocations of the privilege against self-incrimination under all circumstances in the civil context").

Although there are few reported decisions on this issue (and none by the U.S. Supreme Court, the First Circuit or the New Hampshire Supreme Court), it seems likely that a judgment cannot rest solely upon the opposing party's assertion of the privilege. See e.g., LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 391 (7th Cir.1995) ("[T]he entry of judgment based only on the invocation of the privilege and 'without regard to the other evidence' exceeds constitutional bounds."); Rudy-Glanzer, 232 F.3d at 1264 ("[T]he key to the Baxter holding is that such [an] adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer. [citation omitted]. Thus, an adverse inference can be drawn when silence is countered by independent evidence of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint."); Centennial Life Ins. Co ., v. Nappi, 956 F.Supp. 222, 228 (N.D.N.Y. 1997) ("An adverse inference against the party invoking the Fifth Amendment by itself is insufficient to establish the absence of a genuine issue of material fact."). See also, In re Marrama, 445 F.3d 518 (1st Cir. 2006), in which the First Circuit expressed "reservations" but declined to decide whether an adverse inference may be taken on summary judgment (where the underlying standard requires the court to take all inferences in the non-movant's favor).

In many cases, however, the reasonable adverse inferences that flow from a party's assertion of the privilege may be practically dispositive. The opposing party may be entitled to jury instructions which effectively (if not formally) resolve each separate question to which the privilege was interposed. If these questions go to the heart of the case, rather than to collateral matters, the result can be devastating. This may not be unfair when the party's truthful testimony would admit liability. But if the party has an honest explanation that would defeat civil liability (while simultaneously incriminating him), he is faced with a Hobson's choice. He can suffer the

risk of an adverse inference or, alternatively, he can provide sworn, counseled testimony that may be used against him at a later criminal proceeding. Accordingly, a civil litigant contemplating whether or not to "take the Fifth" needs to carefully consider the potential evidentiary consequences.

Plaintiffs who assert the privilege with respect to particular issues in a case may suffer additional consequences. If the plaintiff who brought the case refuses to provide discovery on Constitutional grounds, the court may exclude certain issues and, in appropriate cases even dismiss the complaint. Serafino 82 F.3d 515at 518 ("[W]hile a trial court should strive to accommodate a party's Fifth Amendment interests, [citation omitted], it also must ensure that the opposing party is not unduly disadvantaged. [citation omitted]. After balancing the conflicting interests, dismissal may be the only viable alternative.").

-Adverse consequences may flow from a related witness' assertion of the privilege. What happens when a mere witness invokes the privilege? By definition, whatever happens does not involve the Fifth Amendment (or the State Constitutional) rights of the parties—it is the witness' personal privilege. Therefore, the Constitution itself has little to say about how a witness' silence may be used in civil litigation. See e.g., F.D.I.C. v. Fidelity & Deposit Co. of Maryland, 45 F.3d 969, 977 (5th Cir. 1995) (noting that while the Constitution does not forbid an adverse inference from a *party's* invocation of the privilege against self-incrimination, "[a] non-party's silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree."); RAD Services., Inc. v. Aetna Casualty & Surety Co., 808 F.2d 271, 275 (3rd Cir. 1986) (same).

However, the rules of evidence, which exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or jury confusion, provide some

constraints. Fed.R.Ev. 403; N.H.R.Ev. 403. See, F.D.I.C. v. Fidelity & Deposit Co. of Maryland, 45 F.3d at 977-978. Generally speaking, courts will give a ***reasonable*** adverse inference instruction if the witness is closely related to the party, controlled by the party or (to use the legal term) otherwise in cahoots with the party. See e.g., FDIC (associates of an officer of the defendant); RAD Services (former employees); LiButti v. United States, 107 F.3d 110, 123 -124 (2nd Cir. 1997) (daughter who was also business associate); Brink's Inc. v. City of New York, 717 F.2d 700 (2d Cir. 1983) (employees); Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F.2d 1471 (8th Cir. 1987) (member of non-profit corporation); Paul Mitchell Syst. v. Quality King Dist., 106 F. Supp. 2d 462 (S.D.N.Y. 2000) (business partner); State Farm Mutual Auto. Ins. Co. v. Abrams, Slip. Op. No. 96 C 6365, 2000 WL 574466, at *6 (N.D. Ill. May 11, 2000) ("In order to impute a third-party's Fifth Amendment invocation to another party, the party seeking to use the invocation must establish some relationship of loyalty between the other two parties.").

In the LiButti case, the Second Circuit noted that, while the ultimate determination must be based on the specific facts of the case and the totality of the circumstances, several factors are relevant in deciding whether to allow an adverse inference from a third party's assertion of the privilege:

> Although the issue of the admissibility of a non-party's invocation of the Fifth Amendment privilege against self-incrimination in the course of civil litigation and the concomitant drawing of adverse inferences appropriately center on the circumstances of the case, the evolving case law and its underlying rationale accordingly suggest a number of non-exclusive factors which should guide the trial court in making these determinations:
>
> > 1. The Nature of the Relevant Relationships: While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer the bond, whether by reason of blood,

> friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.
>
> 2. The Degree of Control of the Party Over the Non-Party Witness: The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed.R.Evid. 801(d)(2) [statements of a party], and may accordingly be viewed, as in Brink's, as a vicarious admission.
>
> 3. The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation: The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.
>
> 4. The Role of the Non-Party Witness in the Litigation: Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.
>
> Whether these or other circumstances unique to a particular case are considered by the trial court, the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth.

Libutti 107 F.3d at 123-124.

-A witness who asserts the privilege at the discovery stage of civil litigation may be precluded from testifying at trial (as to matters for which the privilege was claimed). One of the chief purposes of civil discovery is to avoid unnecessary surprise at trial. Case management orders and discovery deadlines are set in order to allow the litigation to progress from complaint to verdict in an orderly and efficient manner. It follows, therefore, that a party cannot invoke the privilege until the morning of trial and then announce that he plans to testify after all.

In general, while courts "should strive to accommodate a party's Fifth Amendment interests," they must simultaneously "ensure[] that the opposing party is not unduly

disadvantaged." Serafino, 82 F.3d at 518. Accordingly, a court may has discretion to preclude a party from testifying at trial when the Fifth Amendment privilege was asserted during discovery. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 577 (1st Cir.1989). However, a court could instead stay the case until a parallel criminal case is resolved, extend the discovery deadline, order additional depositions or provide other forms of relief short of testimonial preclusion.

-Courts have discretion to grant or deny motions to stay a civil case pending the completion of a parallel criminal proceeding. Given the risks of adverse inferences and testimonial preclusion, parties who are involved in parallel civil and criminal cases will often seek to stay the civil proceeding pending completion of the criminal matter. Conversely, criminal defendants will occasionally want to aggressively litigate parallel civil cases and thereby obtain depositions and other discovery.

"The decision whether or not to stay civil litigation in deference to parallel criminal proceedings is discretionary." Microfinancial, Inc. v. Premier Holidays Intern., Inc., 385 F.3d 72, 77 (1st Cir. 2004). See also, In re Melissa M., 127 N.H. 710, 712 (1986). There is no Constitutional right to a stay and, indeed, the public interest may sometimes require simultaneous civil and criminal proceedings. Melissa M., 127 at 712.

In Microfinancial, the First Circuit provided some common sense guidance as to when a stay should be granted.

> The touchstone, of course, is that a district court's discretionary power to stay civil proceedings in deference to parallel criminal proceedings should be invoked when the interests of justice counsel in favor of such a course. [citation omitted].

> That determination is highly nuanced. The decision to grant or deny such a stay involves competing interests. Balancing these interests is a situation-specific task, and an inquiring court must take a careful look at the idiosyncratic circumstances of the case before it. [citation omitted]. Notwithstanding that each instance is *sui generis*, the case law discloses five factors that typically bear on the decisional calculus: (i) the interests of the civil plaintiff in proceeding expeditiously with the civil litigation, including the avoidance of any prejudice to the plaintiff should a delay transpire; (ii) the hardship to the defendant, including the burden placed upon him should the cases go forward in tandem; (iii) the convenience of both the civil and criminal courts; (iv) the interests of third parties; and (v) the public interest.

Microfinancial, 385 F.3d at 78.

-The Privilege Against Self-Incrimination Can Be Waived Unless It Is Properly Asserted In Each Particular Proceeding. Like all other rights granted by our Constitutions to criminal defendants, the Fifth Amendment (and Article 15) privilege against self-incrimination can be waived. In the context of civil litigation, the privilege must be properly asserted by the witness in each particular proceeding. United States v. Gary, 74 F.3d 304 (1st Cir. 1996) (voluntary disclosure in a particular proceeding waives the privilege for that proceeding); State v. Roberts, 136 N.H. 731, 745 (1993) (same result under Article 15); Rogers v. United States, 71 S.Ct. 438, 440 (1951) ("If petitioner desired the protection of the privilege against self-incrimination, she was required to claim it. [citation omitted]. The privilege is deemed waived unless invoked."). *Compare*, Day v. Boston Edison Co., 150 F.R.D. 16, 21 (D.Mass. 1993) ("There is no question but that the privilege against self-incrimination can be waived, not only explicitly but also implicitly by failing to assert it. Thus if a witness who is compelled to testify, does, in fact, testify and during testimony reveals information instead of claiming the privilege, the witness can be said to have waived the privilege as to the information disclosed.) and In re Vitamins Antitrust Litigation, 120 F.Supp.2d 58 (D.D.C. 2000) (waiver may be found regardless of whether the witness actually knew of the existence of the privilege and consciously chose to

waive it) *with* Miranda v. Arizona, 86 S.Ct. 1602 (1966) (requiring that an arrestee be advised and expressly waive the privilege prior to custodial interrogation by the police, even in the absence of an oath and prior to the formal initiation of criminal proceedings).

A blanket assertion of the privilege is ineffective. The privilege must be asserted to each specific question (or in an answer, to each specific allegation in the complaint). See e.g., North River Insurance Co. v. Stefanou, 831 F.2d 484 (4th Cir. 1987) cert. denied, 108 S.Ct. 1733 (1988); Castro, 129 F.3d at 229.

Before going further on the topic of waiver, it is necessary to consider how the privilege against self-incrimination differs from other evidentiary privileges. Other privileges are designed to protect confidential relationships and information (e.g. doctor/patient, therapist/patient, lawyer/client, priest/penitent, husband/wife, trade secrets, government informants, state secrets, etc.). They come at a steep cost—the corruption of the truth finding function through the deliberate suppression of relevant, probative and, virtually by definition reliable information. For this reason, any voluntary disclosure of otherwise confidential information will waive these *confidentiality based* privileges. After all, if the information can be relayed to others without jeopardizing the underlying relationship or purpose for the privilege, then the information should also be available to our juries, judges and administrative tribunals. See, N.H.R.Ev. 510 ("A person claiming a privilege against disclosure waives the privilege if the person or the person's predecessor, while holder of the privilege, knowingly and voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This Rule does not apply if the disclosure itself is privileged."); State v. Wilkinson, 136 N.H. 170, 176-178 (1992).

The privilege against self-incrimination is different. It is not based on the any sort of confidential relationship. It is not designed to protect any socially useful information. Indeed, we spend billions of tax dollars nationwide on law enforcement in the hope that it will ferret out the very information protected by the privilege.

As explained in preface of this article, the privilege ensures that no person will be forced to incriminate himself through his own testimony. Therefore, the privilege cannot be waived simply because the underlying information has been disclosed to third parties. The crime could be committed on video tape, and the witness may have confessed to his drinking buddies, but the privilege against self-incrimination would still protect him against having to testify about the crime under oath.

Further, each new confession or admission can be additionally incriminating. Even if the witness already confessed to law enforcement, a subsequent confession made under oath with the assistance of counsel would be important evidence in the eyes of any rational criminal jury. A statement made on January 1 might be damning, but if it is repeated on June 1 in a different context, it will be doubly damning. See e.g., State v. Lavallee, 119 N.H. 207, 210 (1979) ("The fact that the witness here had, in another setting, disclosed the possibility of perjury did not constitute a waiver of her right to claim the privilege.").

Therefore, "[i]t is hornbook law that the waiver is limited to the particular proceeding in which the witness appears." United States v. Cain, 544 F.2d 1113 (1st Cir. 1976), citing United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973); DeMauro v. DeMauro, 142 N.H. at 887 ("[W]aiver of the privilege is limited to the particular proceeding in which the witness appears."); Roberts, 136 N.H. at 745. See also, Martin v. Flanagan, 789 A.2d 979, 986 fns. 6

and 7 (Conn. 2002) (collecting cases from six federal circuits and seventeen states recognizing the "particular proceeding" doctrine.).

There may be a difference of opinion between the New Hampshire and federal courts as to what constitutes a single "proceeding." The New Hampshire Supreme Court has clearly ruled that each separate stage of a case (i.e. answer to complaint, responses to interrogatory, deposition and trial) is a separate "proceeding." In State v. Roberts, the court cited what it called a 'majority rule' that "preserves a witness's right to assert the privilege in subsequent, distinct stages of a single proceeding." 136 N.H. at 745. The witness in Roberts testified at deposition but asserted the privilege against self-incrimination at trial. Upholding the assertion of the privilege, the court reasoned that, "The rule that a loss of privilege lasts no longer than the distinct stage at which the witness testified is consistent with the spirit of the privilege, because it recognizes that a witness's admissions in a second appearance may exceed those previously made." Roberts, 136 N.H. at 745 (internal quotation marks and citation omitted). See also, State v. Lavallee, 119 N.H. at 210 (testimony at probable cause hearing did not prevent witness from asserting the privilege at trial); State v. Dao, Slip Op. No. 99-0727, 2001 WL 246444, 1 (Iowa Ct. App. March 14, 2001) ("A waiver of a Fifth Amendment privilege is generally limited to the particular proceeding in which the waiver occurs--whether that proceeding is a grand jury proceeding, a deposition, or some other separate preliminary proceeding.").

The rule in the federal courts is less clear. In United States v. Gary, cited above, the First Circuit held that testimony at the defendant's first trial did not waive the privilege with respect to a second trial in the same case. But in a different procedural context the First Circuit suggested that providing an affidavit at one stage of the litigation could waive the witness' privilege at deposition. See, United States v. Parcels of Land, cited above. In Parcels of Land, the court

struck the defendant's affidavit because he refused to testify at a later stage of the proceeding. The court was not asked to compel the defendant's testimony. However, the reasoning of the case suggests that a waiver at one stage of a case might sometimes be deemed a waiver at subsequent stages. See also, In re Mudd, 95 B.R. 426 (Bankr.N.D.Tex. 1989) (testimony at creditors meetings deemed to waive privilege for entire "judicial proceeding" relating to dischargeability); Matter of Beery, 680 F.2d 705, 720, fn. 17 (10th Cir. 1982) (questioning whether the privilege would be waived for an entire bankruptcy case by testimony at one stage of the proceeding).

In any event, a witness cannot partially assert the privilege to "select any stopping place in the testimony" in a single proceeding (however the term "proceeding" may be defined). Rogers, 71 S.Ct. at 441. Once a witness has voluntarily revealed an incriminating fact, the privilege against self-incrimination cannot be invoked to avoid disclosure of the details. Gary, 74 F.3d at 312. See also, United States v. Parcels of Land, 903 at 43 ("...[O]nce a witness testifies, she may not invoke the fifth amendment privilege so as to shield that testimony from scrutiny. To allow her to do so would constitute a positive invitation to mutilate the truth." (internal quotation marks and citation omitted)).

But just as there is no such thing as a blanket assertion of the privilege, there is no such thing as a blanket waiver. The waiver is limited in scope to the topic areas addressed by the witness. See, State v. Settle, 132 N.H. 626,634-635 (1990) (privilege properly claimed when witness would *further* incriminate himself with respect to new, but similar crimes). United States v. Doe, 628 F.2d 694 (testimony waives witness' Fifth Amendment privilege during cross-examination only as to topics made relevant by direct testimony).

Given the inherently fact-specific application of these rules, counsel is in a very difficult position when contemplating the assertion of the privilege in a civil case: If counsel waits too long, and permits the client to testify to "too much," the privilege will be waived, perhaps as to questions that form the very reason counsel wished to invoke the privilege in the first place. The result could be an order compelling additional testimony and that, in turn, could be read to the jury in a subsequent criminal case. If counsel instead exercises caution and invokes the privilege early, he risks the possibility of adverse inferences with respect to some questions that might be safely answered in a way to defeat civil liability. Thus, in a factually complex case in which some, but not all areas likely to be explored at deposition raise Fifth Amendment concerns, counsel will be forced to make decisions without being able to predict with accuracy how a court may see things months down the road.

-Tricky ethical issues arise when a lawyer represents a corporation and an employee has a Fifth Amendment privilege. Lawyers representing corporations frequently prepare corporate employees and officers for deposition and, depending on the witness' role in the company, sometimes actually represent the witness. However, as noted above, the privilege against self-incrimination is a personal right of the flesh and blood witness and cannot be asserted by the corporation for its own benefit. Thus, there is at the very least a potential conflict of interest each time counsel for the corporation is faced with the possibility that a corporate employee may have a Constitutional privilege. What is in the corporation's best interest may be in the employee's worst interest and vice versa.

More important if an official investigation or proceeding is underway or imminent, it is a *felony* to encourage a non-client to withhold evidence from the government. See, RSA 641:5 (witness tampering); 18 U.S.C. §1512(b) (obstruction). Query whether (and under what

circumstances) a company's lawyer may transgress these criminal statutes by advising non-clients to assert their personal privileges, in order to keep corporate wrongdoing secret. It would certainly be unethical, and likely criminal, for corporate counsel to orchestrate the assertion of the privilege by numerous employees (as an implied condition of employment or otherwise), all for the purpose of squelching an ongoing criminal investigation of the company.

Conversely, it would raise great ethical concerns for corporate counsel to affirmatively advise employees (who likely believe that corporate counsel in some sense represents them or is at least looking out for them) to waive their privileges, and possibly face criminal prosecution themselves, so that the corporation can obtain favorable treatment from the government, such as a deferred prosecution agreement. Cf: United States v. Stein, 541 F.3d 130 (2nd Cir. 2008).

Putting aside concerns about conflicts of interest and witness tampering/obstruction, there is a *per se* ethical rule that forbids a company's lawyer from instructing ***former*** employees to assert the privilege. See, N.H.R.Prof.C. 3.4(f):

> A lawyer shall not… request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The perfect solution is for each affected witness to have competent independent counsel to advise the witness on the possibility and ramifications of asserting the privilege. In an imperfect world, in which personal counsel is not available, the best the company's lawyer can sometimes do is to make his role crystal clear by telling the witness that (a) he represents the company and (b) he cannot give the witness personal legal advice.

-Fifth Amendment issues lurk beneath the surface more than most civil lawyers recognize. Many bread and butter civil cases involve conduct that *could* be criminally

prosecuted. For example, business disputes frequently involve claims brought under the New Hampshire Consumer Protection Act, RSA Chapter 358-A. Every unfair and deceptive act that can be alleged in a civil complaint is also a criminal offense. RSA 358-A:6. Civil violations of the New Hampshire Trade Secrets Act, RSA Chapter 350-B, are likely criminal violations of a related federal statute, 18 U.S.C. 1832. The federal mail fraud, wire fraud and bank fraud statutes have been construed so broadly as to cover virtually any case of misrepresentation for economic benefit. See, 18 U.S.C. §§1331, 1333, 1334. Depending on the facts, these statutes could cover various types of conduct categorized as civil breaches of fiduciary duty. Certain types of trademark and copyright infringement may be criminally prosecuted. See, 18 U.S.C. §2320 and 17 U.S.C. §506. Tort cases often involve allegations of criminal conduct ranging from driving while intoxicated, RSA 265-A:2, to reckless conduct, RSA 631:3, to the violation of various statutes enacted to ensure the public safety. Common law conversion is usually also criminal law theft.

Of course, there is a policing mechanism that comes into play when, for the ulterior purpose of denying the opposing party discovery, the privilege is asserted where the actual risk of criminal prosecution is minimal. As described above, the court would be allowed to take an adverse inference (or allow the jury to do so following the assertion of the privilege in open court). Since this could have the practical result of directing a verdict for the opposing party in many cases, a party or lawyer who is too clever about these things could find himself hoist by his own petard.

-The privilege can be defeated by a grant of immunity, criminal conviction and sentencing, or expiration of all applicable criminal statutes of limitation. If the government grants the witness immunity (or use immunity), then the privilege against self-incrimination is

defeated. Kastigar v. United States, 92 S.Ct. 1653 (1972). Since the witness' testimony could not then be used against him, there is no risk of self-incrimination. This is unlikely to occur in civil litigation involving private parties or government enforcement proceedings against the holder of the privilege.

Likewise a witness cannot claim the privilege for a crime for which he has already been convicted and sentenced, unless the matter is on appeal or there is some pending or planned post-conviction attack. See e.g., United States v. Pardo, 636 F.2d 535, 543 (D.C. Cir. 1980) ("It is clear that the privilege against self-incrimination ceases to apply once a witness has been convicted of the offense with respect to which he fears incrimination."). However, a conviction on one charge does not necessarily resolve all potential criminal liability in all jurisdictions. See, Castro, 129 F.3d at 231 (privilege available for witness who had been convicted and sentenced for drug trafficking conspiracy because he could still be charged with substantive crimes committed in the course of the conspiracy or for crimes of violence). The possibility of additional criminal liability will depend on (a) whether there was a plea agreement that resolved all possible charges arising from the same conduct; (b) the scope of the witness' double jeopardy and res judicata protection; and (c) the possibility of criminal prosecution in other jurisdictions (including in federal court if the conviction was obtained in state court and vice versa). When the risk of prosecution is *de minimis* given the existence of a government policy or practice, such as the so-called Petite policy that governs decisions regarding successive state and federal prosecutions, a court might find that there is no realistic possibility of criminal prosecution.

Finally, "if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer." In re Flat Glass Antitrust Litigation, 385 F.3d 350, 371 (3rd Cir. 2004), quoting Brown v. Walker, 16 S.Ct. 644 (1896).

When the limitations periods for all possible crimes, in all possible state and federal jurisdictions have expired, the witness can no longer incriminate himself through testimony. As a practical matter, therefore, there will rarely be any Fifth Amendment privilege when the only arguable crime the witness could be charged with is a New Hampshire misdemeanor. There is a one year statute of limitations, with no discovery rule, for New Hampshire misdemeanors. RSA 625:8. Civil cases are often brought after that statute has run and discovery is typically propounded several months after civil cases are filed. In doubtful cases, counsel will need to consult the applicable statutes of limitations including their tolling provisions.

Conclusion

New Hampshire is fortunate to have a cadre of dedicated public defenders, private criminal defense lawyers and career prosecutors. Over time, however, the criminal bar has tended to keep to itself and the civil bar has tended to avoid criminal court. This is not to deny that there are a good number of attorneys in the state who have both criminal and civil practices. But we are the exception and not the rule.

The result is that the civil bar—as a whole—is not fluent in what the criminal bar likely views as Fifth Amendment 101. At the same time, the criminal bar—again, as a whole—may lack an understanding of what will transpire in civil litigation when a client asserts a Constitutional privilege. Hopefully, this article has been of some assistance to those on both sides of the fence and, more importantly, to our clients.