IS THAT LEGAL?
OR SHOULD I PLEAD THE 5TH?

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THE FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ***nor shall be compelled in any Criminal Case to be a witness against himself,*** nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation? U.S. CONST. Amend. V.

THE CONSTITUTION OF NORTH CAROLINA

Article 23, Rights of Accused.

In all criminal prosecutions, every person charged with a crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, *and not be compelled to give self incriminating evidence,* or to pay costs, jail fees or necessary witness fees of the defense unless found guilty. N.C. CONST. art. 23.

"The Privilege against self-incrimination is a right that was hard earned by our forefathers. The reasons for its inclusion in the Constitution-and the necessities for its preservation-are to be found in the lessons of history." Quinn v. U.S., 349 U.S. 155, at 161 (1955)(Chief Justice Earl Warren, writing for the Court).

I.

A BRIEF HISTORY OF THE FIFTH AMENDMENT.

Let's imagine that we go away to an island in the Pacific and establish a new nation. We would first organize our tents, pots and pans and find a way to obtain food and water. Then, we would create rules by which to govern ourselves. As we gained experience in our new country we would realize that our citizens should not be required to confess guilt, admit misconduct, or accept punishment. We would conclude that we should not torture our citizens to make them reveal their truths. We would decide that we needed a mechanism where they could decline to give evidence against themselves. But, is this a principle which would introduce itself quickly to our minds? Would it take a long period of experience with our laws before this concept dawned upon us?

It is possible that our nation would exist for centuries before this novel idea emerged. Perhaps it would be introduced in some legal proceeding. We would snap our fingers and say to ourselves: "Ah, the accused shouldn't be required to speak at all."

Among our citizens, would this strange idea be well received? It is more often our experience that human beings do not immediately cling to lofty principles. A rebellion or two may be required to give the idea traction.

Just for a moment let us suppose that here in North Carolina in the next general election we place upon the ballot a referendum on whether people who are accused of crimes may be free to remain totally silent; that they need not confess their crimes; that in the face of questioning by the police or the court they may say absolutely nothing and stand mute. Would the referendum pass?

Perhaps it would pass; however, the idea that innocent people don't need this protection and that guilty people don't deserve this protection, is a powerful one.

The history of the Fifth Amendment is struggle and courage. The idea that accused people may decline to answer questions about their conduct is not easy to grasp.

The history of this struggle is well documented by Leonard W. Levy in his book, *Origins of the Fifth Amendment, The Right Against Self-Incrimination,* Oxford University Press*, 1968.* Mr. Levy describes the tortured history of the fight to establish freedom from self incrimination in more than five-hundred pages of frightening and terrifying detail. From Star Chamber and trial by combat to the struggle in the American colonies, this right that we enjoy was a long time coming.

Human experience tells us that the legal protection against self incrimination is directly related to the issue of torture. When there is freedom to remain silent, torture slinks away to some other dark corner to brood.

The shift from widespread use of torture to a more civilized process dates to the 16th and 17th centuries in England. Prior to that time people were required to swear to their innocence. A refusal to take this oath of innocence gave rise to a presumption of guilt. Coercion and torture were commonly employed to compel cooperation.

The best known case from that time is that of a Puritan named John Lilburne. He refused to take the oath of innocence in 1637. His call for what he described as freeborn rights was a rallying point for reform. His concept of freeborn rights may have influenced the concept of unalienable rights in the Declaration of Independence.

In 1647, English citizens presented thirteen demands to Parliament. One of these demands was the right against self incrimination. The Puritans brought to America the idea of a right against self incrimination.

It is now a *right* that we enjoy. It is sometimes called a privilege. But, it is much more than that. It is a right that we enjoy as American citizens and it is in every breath of our air and every drop of our water. Early in the history of the United States Supreme Court, there is language which honors the right.

"It is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to incriminate him or subject him to fines, penalties or forfeitures." Counselman v. Hitchcock, 142 U.S. 547 (1892).

The courts have held that this right may not be clinched tightly in the hands of the court and dished out only in rare instances.

"The Constitution ought to be liberally construed to preserve personal rights and to protect the citizens against self incriminating evidence." Smith v. Smith, 116 N.C 336, 21 S.E. 196 (1895).

"...(T)he judge must be perfectly clear, from a careful consideration of all the circumstances of the case, that the witness is mistaken, and that the answer cannot possibly have such a tendency to incrimination." Malloy v. Hogan, 378 U.S. 1 (1964).

In Ullmann v. United States, 350 U.S. 422 (1956), the defendant was convicted of contempt for failing to answer questions propounded by a federal grand jury. The Court of Appeals for the Second Circuit affirmed the conviction. Mr. Justice Frankfurter spoke for the United States Supreme Court:

"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. Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit. Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege. Such a view does scant honor to the patriots who sponsored the Bill of rights as a condition to acceptance of the Constitution by the ratifying States."

II.

THE 17 QUESTIONS LAWYERS MOST FREQUENTLY ASK ABOUT THE FIFTH AMENDMENT

But, we tarry with history too long. Let us be practical. What are the questions lawyers most frequently ask about the Fifth Amendment?

1. Under what circumstances may a person plead the Fifth?

A person may plead the Fifth in either a civil or a criminal proceeding, in any forum, state or federal. The Fifth Amendment may be asserted in administrative hearings, legislative hearings and before boards and commissions. Of course, the Fifth Amendment is not available to a witness to protect or shield him from embarrassment or public contempt. The test is whether the answers tend to incriminate a person or subject him to forfeiture or punitive damages.

2. What questions are incriminating?

The leading case on what is an incriminating question is Hoffman v. United States, 341 U.S. 479 (1951). The Court said that the Fifth Amendment must be construed liberally in favor of the right it was intended to secure.

"*The privilege afforded not only extends to answers that would in themselves support a conviction . . .but, likewise embraces those which furnish a link in the chain of evidence needed to prosecute . . ..*"

The Court said that to uphold the privilege, it need only be evident that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosures could result.

The privilege protects against "injurious disclosures" which may furnish a link in the chain of evidence needed to convict.

3. What are the mechanics of taking the Fifth? How is it done?

The important thing is to use words which communicate the message. The message is simple. "I am declining to answer these questions based on my rights under the Fifth Amendment. The answers may **tend** to incriminate me."

In Matter of Mark Merrit Jones, 116 N.C. App. 695, 449 S.E.2d 221 (1994), the court stated the following about the mechanics of claiming the Fifth:

"*When the claim (of privilege) is made, if it is immediately clear that an answer might **tend** to **incriminate** (the witness), the claim should be sustained. Otherwise, the judge may, in the absence of the jury, inquire into the matter to the minimum extent necessary to determine that a truthful answer might **tend** to **incriminate**, and should deny the claim only if there is no such possibility.*"

The court's words "minimum extent necessary" provide a window into how the trial court should evaluate a Fifth Amendment claim.

4. Must the proceeding be criminal? Or, may it be a civil matter?

The Fifth Amendment may be asserted in a civil proceeding. But, it may be asserted only in instances in which the answer might tend to subject the person to criminal responsibility.

In Johnston County National Bank And Trust Company v. Larry Grainger, 42 N.C. App. 337, 256 S.E.2d 500 (1979), the North Court of Appeals expressed the idea as follows:

"That this is a civil rather than a criminal proceeding is without significance in the determination of the question before us, for the constitutional privilege against self incrimination applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."

In Allred v. Graves, 261 N.C. 31, 134 S.E.2d 186 (1964), the North Carolina Supreme Court held that in a civil action where there is a demand for punitive damages, a defendant may plead the Fifth Amendment.

"Considering the provisions of G.S. s 1-410, G.S. s 1-311, and G.S. Ch. 23, Art. 4, we think that part of the instant case seeking punitive damages for an alleged unlawful and malicious assault on plaintiff and malicious injury to her house is penal in its nature, and not in essence for a civil liability, and under such circumstances the award of punitive damages would be in a broad sense a penalty. "

5. Is there a requirement that specific words be used when asserting the Fifth Amendment privilege?

No. There is no magic formula. One may utter the words, "in fee simple" or "A to B and the heirs of B."

One may say, "Relying on my rights under Art. 23 of the North Carolina Constitution and under the Fifth Amendment to the United States Constitution, I respectfully refuse to answer on the ground that the answer may tend to incriminate me." For example, in Quinn v. U.S., 349 U.S. 155 (1955), the Court approved this simple statement: "I refuse to answer on the ground of the Fifth Amendment."

6. Must the Fifth Amendment privilege be asserted after every question? Or, should it be asserted just one time, after which it need not be reasserted over and over?

The Fifth Amendment must be asserted after each question. It will not suffice to just put the court on notice that the witness claims the Fifth Amendment privilege. This is one of the most slippery aspects of Fifth Amendment law.

On the one hand, it seems that asserting the Fifth after each question is a burden on the court and irritating to the judge. But, at a hearing, a blanket refusal based on the Fifth Amendment to answer any question could furnish grounds for criminal contempt. See Enrichi v. U.S., 212 F.2d 702 (10th Cir. 1954).

7. May a person's rights under the Fifth Amendment be waived? If so, how would one waive his rights under the Fifth Amendment and could this happen unintentionally?

Generally, the courts hold that one cannot accidentally waive his or her Fifth Amendment rights. There must be a knowing and intentional waiver. See e.g., Gunn v. Hess, 90 N.C. App. 131, 367 S.E.2d 399 (1988). Plaintiff filed a complaint alleging alienation of affections and criminal conversation. Defendant answered denying plaintiff's claims. Then, plaintiff scheduled depositions at which the defendant pled the Fifth. Plaintiff claimed defendant had waived his rights under the Fifth Amendment.

The court held that the right against self-incrimination may be waived and that there is no iron clad rule for how it may be waived. It may be waived in writing or verbally. Then, the court said:

" *(We) hold that the mere filing of a verified answer does not operate to effectuate a waiver of the right to assert the privilege against self incrimination.* "

In Johnson v. Zerbst, 304 U.S. 458 (1938), the United States Supreme Court defined voluntary waiver as being "an intentional relinquishment or abandonment of a known right or privilege." Later, in Emspak v. United States, 349 U.S. 190 (1955), the Court stated that courts must exercise "every reasonable presumption against waiver of fundamental constitutional rights."

8. How closely will the court evaluate your claim of the Fifth? Does the court assume one is not entitled to assert the Fifth?

The United States Supreme Court has stated that a claim of protection under the Fifth Amendment must be liberally evaluated, holding:

"Our forefathers, when they wrote this provision into the Fifth Amendment of the Constitution, had in mind a lot of history which has been largely forgotten today. They made a judgment, and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of forced disclosures by the accused. The privilege against self incrimination serves as a protection to the innocent as well as to the guilty, ***and we have been admonished that it should be given a liberal application.*** *"* Hoffman v. United States, 341 U.S. 479 (1951)(emphasis added).

This does not mean that your assertion of the Fifth Amendment will be joyfully received by the trial judge, who may view it with some disdain. Nevertheless, the law is clear that the court must liberally evaluate the claim.

9. What if the client is granted immunity? Does this grant of immunity trump the Fifth Amendment?

One of the prosecutor's weapons against the Fifth Amendment privilege is a grant of immunity to the witness. Once immunized, the witness is no longer subject to the danger of incrimination when answering questions and, therefore, the witness can no longer assert the privilege.

When a witness is granted immunity, no testimony or other information compelled under the order of immunity or any information derived from such testimony may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Therefore, in Ullman v. U.S., 350 U.S. 422 (1956), the Supreme Court concluded that a grant of use immunity eliminated the Fifth Amendment protection and held that the witness would be required to testify to what would otherwise have been incriminating information.

Ullman had been called to testify before a grand jury regarding his Association with the American Communist Party in connection with an espionage case. But even after being granted immunity he refused to testify.

Mr. Justice William O. Douglas's powerful dissent, joined by Justice Hugo Black sheds light on the struggle on the Court concerning elimination of the Fifth Amendment rights when immunity is granted. In his dissent, Justice Douglas argued that under (the immunity law):

"The privilege of silence is exchanged for a partial, undefined vague immunity. It means that Congress has granted for less than it has taken away."

10. Must the claim of the Fifth relate to criminal conduct or may it be claimed for fear of forfeitures or penalties?

The Fifth Amendment may be asserted not only when there is danger of criminal prosecution but also when there is danger of forfeiture or penalties. See Boyd v. U.S., 116 U.S. 616 (1886).

(See also #4 above regarding punitive damages.)

11. If the Fifth is waived, may it be restored?

The general rule is that waiver of the Fifth Amendment in one proceeding does not amount to a waiver in another proceeding. In the case of In re Neff, 206 F.2d 149 (3rd Cir. 1953), an individual's testimony before a grand jury did not waive that individual's privilege at trial. The court said:

"It is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding. The privilege attaches to the witness in each particular case in which he may be called to testify, and whether or not he may claim it is to be determined without reference to what he said when testifying as a witness in some other trial, or on a former trial of the same case, and without reference to his declarations at some other time or place.

12. What if the statute of limitations has run on the criminal conduct? Does this eliminate the Fifth as a possibility for your client?

If it is certain that the statute of limitations has run as to criminal conduct, there is then no danger of criminal prosecution. See Hale v. Henkel, 201 U.S. 43 (1906), U.S. v. Mirati, 253 F.2d 135 (1958).

In such situations the Fifth Amendment privilege may not be asserted.

"If it is perfectly clear that the answer to the question could not possibly incriminate because of the running of the statute of limitations, the privilege may not be successfully asserted." Goodman v. U.S., 289 F.2d 256 (4th Cir. 1961).

13. Suppose what your client fears is not prosecution of a crime, but instead embarrassment and humiliation? What if he simply dreads scorn of his community?

The Fifth Amendment is not available to help a client avoid embarrassment.

14. What if the client has already been tried and convicted of the offense but fears that the questions being asked might lead to an investigation into other offenses?

If the answers to questions may tend to incriminate the witness in other possible criminal conduct, he may assert the Fifth Amendment.

15. What if the only possible liability is civil liability?

The Fifth Amendment is not available for concerns relating merely to civil liability.

16. May the Fifth Amendment be asserted on behalf of a corporation?

No. The Fifth Amendment is only available to natural persons. Corporations may be compelled to maintain and turn over records.

17. May the fact that you took the Fifth be used against you? May the prosecutor or your opponent attack you because you took the Fifth? May a Judge make an inference against you because you asserted the Fifth Amendment?

The answer to this question depends on whether you assert the privilege in a civil or criminal case.

In a criminal case, the answer is no.

In the early sixties, the State of California enacted legislation which explicitly granted prosecutors the ability to ask a jury to draw an inference of guilt from a criminal defendant's refusal to testify in his own defense. See Griffin v. California, 380 U.S. 609 (1965). The United States Supreme Court struck down this law, holding that the government cannot punish a criminal defendant for exercising his right to remain silent in this manner. Id.

In a civil case, the answer is yes. And in fact, your assertion of the privilege can be used against you in two ways.

First, the finder of fact in a civil case, be it jury or judge, may use a witness's invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him. See Mitchell v. United States, 526 US 314, 328 (1999); See also McKillop v. Onslow County, 139 N.C.App. 53 (2000).

Second, one cannot kill his parents and claim to be an orphan. That is, the assertion of the Fifth Amendment privilege may, in certain circumstances, be the basis for dismissal of your civil action. This is based upon the principle that a party cannot seek affirmative relief and then invoke the privilege against self-incrimination in response to relevant questions. McKillop, 139 N.C.App. 53. The relevant inquiry appears to be whether the questions you refuse to answer are so essential to the case that the action must be dismissed.

The North Carolina Court of Appeals has expressly applied this principle to dismiss family law cases. In Querneh v. Colie, the court affirmed the dismissal of a father's claim for child custody when he pled the Fifth in response to the mother's questions about his illegal drug use. 122 N.C.App. 553 (1996). The court reasoned that the questions were so relevant to the trial court's determination of the best interest of the child that the father's case could not proceed in light of his silence.

In Cantwell v. Cantwell, the Court of Appeals affirmed the dismissal of a wife's alimony claim after she pled the Fifth in response to questions about her own adulterous activities. 109 N.C.App. 395 (1993). The wife had based her claim for alimony, in part, on the premise that she was a dutiful and faithful wife. Id. The husband responded with the affirmative defense of the wife's adultery. The Cantwell court concluded that the wife could not remain silent and maintain her alimony action.

III.

THE ETHICAL IMPLICATIONS OF PLEADING THE FIFTH

Must the lawyer who asserts the Fifth reasonably believe that the assertion is based on solid grounds? Must there be a good faith basis for the assertion of the Fifth Amendment as is the case in drafting a Complaint or an answer in a civil case?

The Canons of Ethics require that a lawyer treat the court with candor and respect. Therefore, it would seem that a lawyer who asserts the Fifth on behalf of a client should have some basis upon which to found the assertion. On the other hand, a decision to assert the Fifth on behalf of a client may be made on the spur of the moment in circumstances in which there is not time to do a thorough examination into the merits of the claim. The court is under an obligation to evaluate the assertion of the Fifth. Because a lawyer may not have the luxury of long and careful thought the court may afford the attorney more leeway under those circumstances. After all, the moment may pass and a waiver ensue. An examination of the Rules of Professional Responsibility yields no guidance other than the general rules relating to candor and fairness.

CONCLUSION

Fifth Amendment protection is a cherished principle. Lawyers should not fear to use it for their clients. Courts are required to treat Fifth Amendment assertions with respect and to grant Fifth Amendment protection liberally.