Consequences of Invoking the Privilege Against Self-Incrimination in Civil Proceedings

A non-criminal sanction may be imposed to advance the search for truth and justice in civil matters without impairing the historic essence of the privilege.

By **Douglas S. Brierley** | April 15, 2020 | 226 N.J.L.J. 994

Invocation of the right against self-incrimination in civil proceedings may have certain adverse consequences when the invoking party or witness in good faith refuses to provide information implicating him or her in potential crimes. Although the invoker may not be directed, say, to answer the interrogatory or to pay a fine or be imprisoned for a refusal to do so, a non-criminal sanction may be imposed to advance the search for truth and justice in civil matters without impairing the historic essence of the privilege.

This historic essence preserves a person's right not to be compelled to be a witness against himself. U.S. Const. Amend. V; *State v. Stas*, 212 N.J. 37, 50-51 (2012) (noting that the privilege against self-incrimination is firmly embedded in this state's common law). A person need not be guilty or believe himself guilty of criminal conduct to invoke the privilege; invoking the privilege is justified even when the invoker insists he never committed a crime. *Ullman v. United States,* 350 U.S. 422, 426-28 (1956).

Courts recognize that, in civil discovery, the privilege against self-incrimination is not confined to narrow admissions of wrongdoing sufficient in themselves to convict the witness of a crime; it also protects statements or responses that could be injurious in the context of developed facts or settings. It reaches testimony or information that directly (N.J.R.E. 502(a)), inferentially (N.J.R.E. 502(b)), or indirectly (N.J.R.E. 502(c)) incriminates or furnishes a "clue" or "link" needed to pursue a potential crime. *Hoffman v. United States*, 341 U.S. 479, 485-87 (1951); *State v. McGraw*, 129 N.J. 68, 77 (1992) (referring to a "'reasonable ground to apprehend the peril' of incrimination"). The privilege extends to information creating the potential for criminal exposure. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 804-05 (1977); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (applying the privilege to civil and criminal proceedings wherever a response may tend to subject the invoker to criminal responsibility).

And although a prior conviction typically removes the threat of criminal prosecution for that underlying offense, if testimony about crimes for which the witness has been convicted might incriminate him in other alleged crimes as part of a "pattern" of supposedly related crimes or wrongs, the privilege against self-incrimination remains properly invoked as it relates to the crime that may be an integral part or "link" in a chain of evidence sufficient to connect the invoker to crimes still to be prosecuted. *Malloy v. Hogan*, 378 U.S. 1, 12-14 (1964) (Brennan, J.). See also *United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980) (noting the invoker may refuse to answer a question about a matter already revealed if a later response may tend to incriminate him further).

The scope of the privilege thus extends beyond responses to questions on which the ultimate issue of criminal liability might be predicated: testimonial exposure of a link in the chain of evidence to prosecute the witness for a criminal violation is all that is necessary. *Hoffman*, 341 U.S. at 486 (considering the claim of privilege in the context of the entire matter, including other matters in

evidence or disclosed in argument, the implications of the questions, and the setting in which the questions are asked); *In re Pillo*, 11 N.J. 8, 18-19 (1952).

That "link" or "clue" may thus relate explicitly or implicitly to any factual assertion or disclosure of information needed for criminal prosecution. *Doe v. United States*, 487 U.S. 201, 210 (1988). For example, when a witness is asked whether he knows certain named persons or a select group of individuals with a common interest or context related to a potentially incriminating situation, invocation of the privilege against self-incrimination is appropriate. See, e.g., *In re Ippolito,* 75 N.J. 435, 441-42 (1978) (questioning the witness whether he knew of persons who were known or suspected mobsters).

The invoker should understand that invocation of the privilege in a civil matter may have consequences *if* the party deprived of the information is unduly prejudiced. *See, e.g., Mahne v. Mahne*, 66 N.J. 53, 60 (1974) (enumerating, among available options, instruction to jury to draw an adverse inference against the invoking party and discouraging as unduly harsh the striking of defendant's answer); *Woodward-Clyde Consultants v. Chemical & Pollution Sciences,* 105 N.J. 464, 475 (1987) (barring the party invoking the privilege from offering affirmative proofs at trial about topics on which the client remained silent).

The choice among the available remedies *does not* include requiring the invoker to tell the court—even in camera—what his or her response would be were the privilege not asserted. Such a purported remedy would surrender the very protection that the privilege is designed to guarantee. *Hoffman*, 341 U.S. at 486; *Mahne*, 66 N.J. at 61 (citing to rejection in federal court of an attempt to compel defendant to answer the subject inquiry as jeopardizing the Fifth Amendment protection); Pressler & Verniero, Current N.J. Court Rules R. 4:23-1, cmt. 2.1, at 1872 (2020) (the witness asserting the privilege against self-incrimination cannot be fined or jailed for invoking the privilege, especially a defendant involuntarily appearing to protect his own interests).

Consequences may follow the assertion of the privilege against self-incrimination in a civil or non-criminal contest. Courts should balance the interests of the opposing sides and exercise discretion in determining whether to impose sanctions upon a party or witness who asserts the privilege. *See Mahne,* 66 N.J. at 59 & 61-62. Any remedy imposed on the party or witness asserting the Fifth Amendment privilege in a civil matter should be no more than necessary to prevent unfair and undue prejudice to the other side. *SEC v. Graystone Nash*, 25 F.3d 187, 191-92 (3d Cir. 1994). In other words, prejudice is a condition precedent to imposing a civil sanction against the invoker. If, for example, other proofs or sources of proof are available, then any sanction for silence should be limited or precluded accordingly. *Id.* No or reduced sanctions should be imposed when proof of supposed prejudice is lacking. For example, were a plaintiff to suffer no legally meaningful detriment because any substantive information sought from a defendant would be cumulative to proofs provided by or available from others, then no cognizable prejudice would be arise.

In such circumstances, duplication of information sought at an invoker's deposition should result in neither having the invoker's answer stricken nor the forfeiture of the right at trial to cross-examine witnesses at any trial. As determined in *Mahne*, 66 N.J. at 60, striking a defendant's answer or defenses is unduly harsh and results in an improper balance between the invoker's protected interests and others' ready access to information not already in their possession. *See also Abtrax Pharms. v.*

Elkins-Sinn, 139 N.J. 499, 514-15 (1995) (sanction of dismissal of pleadings is to be imposed sparingly under Rule 4:23-2(b)).

To resolve the competing interests, sensitivity must be the watchword for all sides. The party seeking the information blocked by assertion of the privilege against self-incrimination must retain the ability to develop his or her case in full, so that a complete and accurate version of events is presented to the factfinder for appropriate consideration. That same non-invoking party must understand, however, that the protection afforded by the privilege is far-reaching, especially if the alleged acts or conduct under scrutiny extends over a long period of time.

Inquiry posed by means of interrogatories, deposition questions, and other discovery requests that cover the invoker's status, employment history, community, identity within that community, assorted documents, and the like, may require invocation of the privilege to avoid further incrimination by pinpointing time, location, presence, opportunity, relationships, and other essential elements or "links" in a chain of evidence needed to prosecute a possible crime or pattern of crimes asserted by the non-invoking party. This sensitivity is especially apt when it is recalled that time limitations regarding many offenses have either been relaxed or removed, *see, e.g.*, N.J.S.A. 2C:1-6 & 2C:14-2 to -4 (dealing with sexual assaults and like offenses), and Megan's Law "administrative" re-tiering, which is a perpetual reality under N.J.S.A. 2C:7-1 to -11.

Regardless of a non-invoking party's contrary opinion, the focal point remains whether the invoker has a reasonable basis on which to fear future prosecution or punishment. In balancing the competing interests, neither assertion of the privilege nor the opposing side's search for information should prove "too costly." *Graystone Nash*, 25 F.3d at 191.

Douglas S. Brierley *is a partner at Brierley & Humick, in Morristown. The firm focuses on civil litigation, business disputes, professional malpractice, and alternative dispute resolution.*