The Fifth Amendment for Civil Litigators

June 15, 2021

10:00 a.m. - 11:00 a.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

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LAWYERS' PRINCIPLES OF PROFESSIONALISM

As a lawyer, I have dedicated myself to making our system of justice work fairly and efficiently for all. I am an officer of this Court and recognize the obligation I have to advance the rule of law and preserve and foster the integrity of the legal system. To this end, I commit myself not only to observe the Connecticut Rules of Professional Conduct, but also conduct myself in accordance with the following Principles of Professionalism when dealing with my clients, opposing parties, fellow counsel, self-represented parties, the Courts, and the general public.

Civility:

Civility and courtesy are the hallmarks of professionalism. As such,

- I will be courteous, polite, respectful, and civil, both in oral and in written communications;
- I will refrain from using litigation or any other legal procedure to harass an opposing party;
- I will not impute improper motives to my adversary unless clearly justified by the facts and essential to resolution of the issue;
- I will treat the representation of a client as the client's transaction or dispute and not as a dispute with my adversary;
- I will respond to all communications timely and respectfully and allow my adversary a reasonable time to respond;
- I will avoid making groundless objections in the discovery process and work cooperatively to resolve those that are asserted with merit;
- I will agree to reasonable requests for extensions of time and for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;
- I will try to consult with my adversary before scheduling depositions, meetings, or hearings, and I will cooperate with her when schedule changes are requested;
- When scheduled meetings, hearings, or depositions have to be canceled, I will notify my adversary and, if appropriate, the Court (or other tribunal) as early as possible and enlist their involvement in rescheduling; and
- I will not serve motions and pleadings at such time or in such manner as will unfairly limit the other party's opportunity to respond.

Honesty:

Honesty and truthfulness are critical to the integrity of the legal profession – they are core values that must be observed at all times and they go hand in hand with my fiduciary duty. As such,

- I will not knowingly make untrue statements of fact or of law to my client, adversary or the Court;
- I will honor my word;
- I will not maintain or assist in maintaining any cause of action or advancing any position that is false or unlawful;

- I will withdraw voluntarily claims, defenses, or arguments when it becomes apparent that they do not have merit or are superfluous;
- I will not file frivolous motions or advance frivolous positions;
- When engaged in a transaction, I will make sure all involved are aware of changes I make to documents and not conceal changes.

Competency:

Having the necessary ability, knowledge, and skill to effectively advise and advocate for a client's interests is critical to the lawyer's function in their community. As such,

- I will keep myself current in the areas in which I practice, and, will associate with, or refer my client to, counsel knowledgeable in another field of practice when necessary;
- I will maintain proficiency in those technological advances that are necessary for me to competently represent my clients.
- I will seek mentoring and guidance throughout my career in order to ensure that I act with diligence and competency.

Responsibility:

I recognize that my client's interests and the administration of justice in general are best served when I work responsibly, effectively, and cooperatively with those with whom I interact. As such,

- Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the Court (or other tribunal) and my adversary of any likely problem;
- I will make every effort to agree with my adversary, as early as possible, on a voluntary exchange of information and on a plan for discovery;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- I will be punctual in attending Court hearings, conferences, meetings, and depositions;
- I will refrain from excessive and abusive discovery, and I will comply with all reasonable discovery requests;
- In civil matters, I will stipulate to facts as to which there is no genuine dispute;
- I will refrain from causing unreasonable delays;
- Where consistent with my client's interests, I will communicate with my adversary in an effort to avoid needless controversial litigation and to resolve litigation that has actually commenced;
- While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation.

Mentoring:

I owe a duty to the legal profession to counsel less experienced lawyers on the practice of the law and these Principles, and to seek mentoring myself. As such:

- I will exemplify through my behavior and teach through my words the importance of collegiality and ethical and civil behavior;
- I will emphasize the importance of providing clients with a high standard of representation through competency and the exercise of sound judgment;
- I will stress the role of our profession as a public service, to building and fostering the rule of law;
- I will welcome requests for guidance and advice.

Honor:

I recognize the honor of the legal profession and will always act in a manner consistent with the respect, courtesy, and weight that it deserves. As such,

- I will be guided by what is best for my client and the interests of justice, not what advances my own financial interests;
- I will be a vigorous and zealous advocate on behalf of my client, but I recognize that, as an officer of the Court, excessive zeal may be detrimental to the interests of a properly functioning system of justice;
- I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;
- I will, as a member of a self-regulating profession, report violations of the Rules of Professional Conduct as required by those rules;
- I will protect the image of the legal profession in my daily activities and in the ways I communicate with the public;
- I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance; and
- I will support and advocate for fair and equal treatment under the law for all persons, regardless of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, gender identity, gender expression or marital status, sexual orientation, or creed and will always conduct myself in such a way as to promote equality and justice for all.

Nothing in these Principles shall supersede, supplement, or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which a lawyer's conduct might be judged, or become a basis for the imposition of any civil, criminal, or professional liability.

The Fifth Amendment for Civil Litigators (2021CLC-TT02)

Timed Agenda

0-10: Background on the Fifth Amendment and Article First, Section 8.

10-30: When and how a party/witness may invoke the privilege.

30-50: Effects and strategic considerations of invoking the privilege.

50-60: Questions

Faculty Biography

Cody N. Guarnieri is a trial attorney in the Hartford office of Brown, Paindiris & Scott, LLP. His litigation practice focuses primarily on criminal defense and complex personal injury and general civil litigation throughout Connecticut and southern Massachusetts. Cody also counsels clients in dealing with administrative agencies for professional licensing issues, including with the Department of Public Health, Connecticut Medical Examining Board, Connecticut Board of Examiners for Nursing, Department of Developmental Services, Department of Consumer Protection, Department of Children and Families, and others. Cody regularly works with investigatory and disciplinary staff at the many boards, commissions and agencies of the State of Connecticut.

Cody is a Presidential Fellow Emeritus of the Connecticut Bar Association and is currently the vice-chair of the Criminal Justice Section of the Bar Association. Cody is also on the Board of Directors and serves as the co-chair of the Criminal Justice Section for the Hartford County Bar Association ("HCBA"). He was elected as a James W. Cooper Fellow of the Connecticut Bar Foundation ("CBF") and Chairs the Roundtable Program. Cody is also a member and holds leadership positions in various other professional organizations.

Mr. Guarnieri received dual bachelor's degrees in history and political science from Eastern Connecticut State University. His juris doctor was received with honors from the University of Connecticut School of Law. He is admitted to practice in Connecticut, Massachusetts, New York and before the U.S. District Court for the District of Connecticut and the U.S. Court of Appeals for the 2nd Circuit.

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The Fifth Amendment for Civil Litigators

June 15, 2021 10:00 a.m.

Cody N. Guarnieri, Esq.
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Connecticut Bar Association

What is the Fifth Amendment (and Conn. Const. Art. First, Section 8)?

- No person shall be … compelled in any criminal case to be a witness against himself…"
  - Fifth Amendment privilege is made binding upon the states by operation or the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964).

- "No person shall be compelled to give evidence against himself…" Conn. Const. Art. First, Section 8.

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What is the Fifth Amendment (and Conn. Const. Art. First, Section 8)?

- "From early on, the common law of this state recognized that the privilege is applicable to testimony in a civil case. *Swift's Digest*, Vol. 1, p. 744 (1822).
- The privilege against self-incrimination can only be invoked by natural persons, not corporations.
  - "Party", as used in C.G.S. § 52-199, does not evidence a legislative intent to extend the common law and constitutional privilege against self-incrimination beyond natural persons.
- It is a personal right (i.e. cannot be invoked on behalf of another).

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When can the Fifth Amendment be invoked?

- In any proceeding, civil or criminal, litigation or administrative.

- C.G.S. § 52-199 codified the common law, "…. A party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him, or to disclose his title to any property if the title is not material to the hearing or trial.

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When can the Fifth Amendment be invoked?

- At any stage of the proceeding
  - civil pretrial discovery proceedings.
  - "There is no doubt that the privilege against compelled self-incrimination may be invoked in a pretrial proceeding such as a deposition." *Penfield v. Venuiti*, 589 F. Supp. 250, 255 (D. Conn. 1984).
  - "In sum, the defendant may exercise his privilege against self-incrimination in pretrial discovery proceedings as it pertains to the affirmative defenses included in his answer without the sanction of dismissal of these defenses." *Olin Corp. v. Castells*, No. 15 24 56, 1991 WL 85141, *10 (Conn. Super., Jan., 9, 1991)

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When can the Fifth Amendment be invoked?

- The Production of Documents: Broader protections under the Connecticut Constitution than Federal?
  - *Burritt Interfinancial Bancorporation v. Brooke Pointe Associates*, 42 Conn. Sup. 445, 459, 625 A.2d 851 (1992) ("Article first, § 8, uses the phrase 'give evidence' rather than 'be a witness' because it was intended to protect something more than testimonial communications." *Id.* at 454).
- Whether producing documents containing potentially incriminating information is testimonial and protected requires the court to evaluate:
  - (1) whether the state can independently confirm the existence and authenticity of those documents and
  - (2) whether the act of production itself communicates information about the existence, custody and authenticity of the documents. *United States v. Hubbell*, 530 U.S. 27 (2000).
- "A party is privileged from producing the evidence, but not from its production." *Johnson v. United States*, 228 U.S. 457 (1913).

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When can the Fifth Amendment be invoked?

- Where the witness can articulate a credible basis supporting that the answers might incriminate the witness in future criminal proceedings
    - "[A]rticulat(ing] a credible basis for invoking the Fifth Amendment ... involves a balancing act because the privilege would not provide much protection if the requisite showing were too demanding." *OSRecovery, Inc. v. One Groupe International, Inc*., 262 F.Supp.2d 302, 307 (S.D.N.Y., 2003) (In camera review to avoid having to disclose on the record the very information that is sought to be withheld.)

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When can the Fifth Amendment be invoked?

- Both direct and "link in the chain" evidence – and "investigatory leads" evidence.
- Unless it is **perfectly clear** there is no tendency to incriminate
  - "A court may not deny a witness' invocation of the fifth amendment privilege against self-incrimination unless it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have [a] tendency to incriminate."
- Double Jeopardy, statute of limitations, Prosecutorial immunity (C.G.S. § 54-47a)

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How Does a Witness Invoke his/her Fifth Amendment Rights?

- As Early as Possible
  - "The fifth amendment privilege is not self-executing and must be asserted in a timely fashion." *State v. Cecarelli,* 32 Conn. App. 811, 866 (1993).

- With Specificity (no Blanket Assertion)
  - Witnesses invoking the fifth amendment do not have a blanket right to refuse to testify but are obligated to answer those questions that they can answer and to make a specific claim of the privilege as to the rest. *See, e.g. Taricani v. Nationwide Mutual Ins. Co.,* 77 Conn. App. 139, 146-47 (2003).
  - "The privilege is not a general one; it is, at least in all ordinary situations, to be claimed as to each question asked." *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964).

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How Does a Witness Invoke his/her Fifth Amendment Rights?

- Intentional Waiver of the Privilege
  - An intentional relinquishment or abandonment of the right.
  - Voluntary conduct of the witness/litigant, not compulsory.
  - Not mere filing of an Answer or Affirmative Defenses.
  - Topical, not general. (And except where risk of prosecution broadened).
  - Limited to the proceeding in which wavier occurs.

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How Does a Witness Invoke his/her Fifth Amendment Rights?

- Unintentional Waiver
  - By answering some questions, a witnesses may be held to have waived the privilege against self-incrimination as to further questions. *See, United States v. Williams*, 504 U.S. 36 (1992).
  - The Second Circuit adopted a two-part test to determine whether or not a witness has implicitly waived the Fifth Amendment privilege:
    - (1) whether the prior statements must have created "a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth." and
    - (2) the witness must have had "reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination."
    - *Klein v. Harris*, 667 F.2d. 274, 287 (2nd Cir. 1981).

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How Does a Witness Invoke his/her Fifth Amendment Rights?

- Waiver by Withdrawal of Invocation
  - "In order to strike a fair balance between the parties, the Court must address two important issues:
    - (1) whether the privilege was invoked 'primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties,' and
    - (2) whether an opposing party would 'suffer [ ] undue prejudice' from a withdrawal of the privilege. These determinations are fact specific and must be made on a case by case basis."
    - *Huaman v. Sirois*, et al, Docket No. 3:13CV484, 2015 WL 1806660, *2 (D. Conn, April 21, 2015) (internal citation omitted).
  - What does the jury get to learn about previous invocation of the Fifth Amendment privilege?

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Effect of Invoking the Fifth Amendment Right

- Criminal: Cannot be used to penalize a defendant.
- Civil:
  - Does not excuse compliance with law or procedure.
  - Cannot subject the witness to “substantial economic harm”
  - Adverse Inferences

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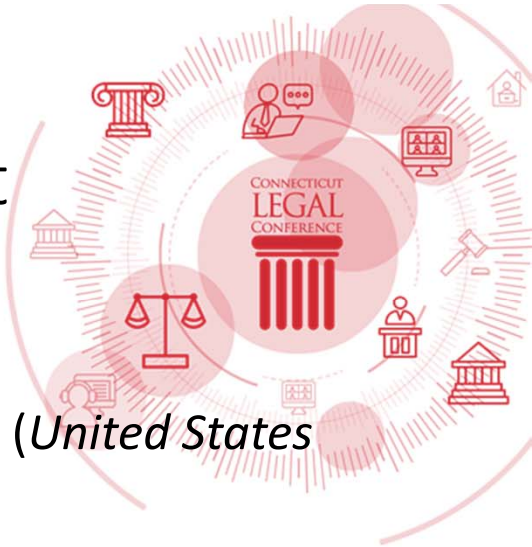
Effect of Invoking the Fifth Amendment Right



- Adverse Inference
  - "Silence is often evidence of the most persuasive character." (*United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923).
  - *Permissible*, not required.
  - "An adverse inference, however, does not supply proof of any particular fact; rather, it may be used only to weigh facts already in evidence." *In re Samantha C.*, 268 Conn. 614, 638 (2004)
  - Must otherwise satisfy evidentiary principles for admission.

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Effect of Invoking the Fifth Amendment Right

- Adverse Inference
  - *Stilkey v. Zembko*, 200 Conn. App. 165 (2020): Appellate Court reviews the adverse inferences drawn by the trial court in relation to the allegations of the complaint and the specific questions put to the defendant (for which she asserted her Fifth Amendment rights) at trial.
  - Specifically Authorized (and unauthorized) inferences
  - Cannot meet a burden *per se* with an adverse inference.

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Effect of Invoking the Fifth Amendment Right

- Adverse Inference
  - Nonparty Witnesses: Case by case
    - the trial courts to consider factors including (1) the nature of the relevant relationships, from the point of view of the non-party witness's loyalty to either litigant, (2) the degree of control of either party over the non-party witness (and vicarious admission) (3) the compatibility between the non-party witness and either party in the outcome of the case and the role of the non-party witness in the litigation
  - Procedure
    - *Wilson v. Transervice Lease Corp.*, No. FST-CV18-6034685-S, 2019 WL 3891874 (Conn. Super., July 16, 2019) (Genuario, J.)

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Effect of Invoking the Fifth Amendment Right

- Other remedies:
  - Preclusion from testifying to matters subject to assertion
  - Stay of motion until applicant will not assert fifth amendment
  - Failure to meet contractual obligation

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Strategic Considerations

- Speculative nature of risk of prosecution
- Value of the information
- Scope of possible adverse inference
- Impact of counsel's knowledge on assertions/arguments to court

- Tailoring invocation/waiver appropriately to protect the client (from both prosecution and unintended waiver) and minimize the negative impact on civil matter

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Strategic Considerations

- Opponent asserting the 5th:
  - Making a record to support the inference sought.
  - Keeping track/making record of prejudice resulting.
  - Not permitting opponent to otherwise fail to meet legal and procedural obligations

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Strategic Considerations

- Stay of Proceedings
  - No constitutional prohibition against parallel proceedings (i.e. no due violation)
  - "In determining whether to impose a stay ... the court must balance the interests of the litigants, nonparties, the public and the court itself...."
    - *Tyler v. Shenkman-Tyler*, 115 Conn. App. 521, 529 (2009).

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Thank You for Attending!

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A Fifth Amendment Outline for Civil Litigators

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Connecticut Legal Conference
June 15, 2021
Criminal Justice Section

I. What is the Fifth Amendment (and Conn. Const. Art. First, Section 8):

- No person shall be … compelled in any criminal case to be a witness against himself…" Fifth Amendment privilege is made binding upon the states by operation of the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 6-11, 84 S.Ct. 1489, 1492-95, 12 L.Ed.2d 653 (1964).
- "No person shall be compelled to give evidence against himself…" Conn. Const. Art. First, Section 8.
    - "From early on, the common law of this state recognized that the privilege is applicable to testimony in a civil case." *Swift's Digest*, Vol. 1, p. 744 (1822). This was based upon the English common law which provided for the privilege in a civil case, even if the answers were only 'links in a chain' which could lead to incrimination. *Cates v. Hardacre*, 3 Taunton 424, 425 (1811). It was also clearly established that the privilege was applicable to both a party and witness in civil and criminal cases. "'It is an established principle, that a person cannot, in a suit against him, be compelled to produce evidence against himself; and by strong analogy, he ought equally to be protected in his interest, when called on to testify for another.'" *Olin Corp. v. Castells*, No. 15 24 56, 1991 WL 85141, *3 (Conn. Super., Jan., 9, 1991), *citing Benjamin v. Hathaway*, 3 Conn. 528, 532 (1820); *See*, *Starr v. Tracy*, 2 Root 528 (1797); *Cook v. Swan*, 5 Conn. 140, 149 (1823).
        - "It is clear that the framers of our state constitutions, as well as the legislators since the colonialization of Connecticut, appreciated the importance of this common law privilege by embedding it in our constitutions and persistently reaffirming it in our statutes. With this history, it is clear the protection of the privilege should not be lost unless it is intentionally relinquished, nor should a person be compelled to choose between its shield and the exercise of another constitutional right." *Olin Corp. v. Castells*, No. 15 24 56, 1991 WL 85141, *3 (Conn. Super., Jan., 9, 1991).
    - The privilege against self-incrimination can only be invoked by natural persons, not corporations. *See, Lieberman v. Reliable Refuse Co.*, 212 Conn. 661, 672 (1989) ("Party", as used in C.G.S. § 52-199, does not evidence a legislative intent to extend the common law and constitutional privilege against self-incrimination beyond natural persons.)
- It is a personal right (i.e., cannot be invoked on behalf of another). *See Couch v. United States*, 409 U.S. 322, 327–29 (1973).

II. When can the Fifth Amendment be invoked?

a. In any proceeding, civil or criminal, litigation or administrative.

- "The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values that underlie the privilege." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).
- C.G.S. § 52-199. Questions which need not be answered. Self-incrimination;
    - (a) In any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him, or to disclose his title to any property if the title is not material to the hearing or trial.
    - (b) The right to refuse to answer a question, produce a document or disclose a title may be claimed by the party interrogated or by counsel in his behalf. *See*, *Lieberman v. Reliable Refuse Co.*, 212 Conn. 661, 672 (1989) (concluding that General Statutes "§ 52–199 codified, but did not [change]" common law and constitutional law privilege against self-incrimination).

b. At any stage of the proceeding

- It also is well settled that the privilege extends to civil pretrial discovery proceedings. *See e.g.*, *Estate of Fisher v. Commissioner of Internal Revenue*, 905 F.2d 645, 648-649 (2d Cir. 1990); *Olin Corporation v. Castells*, 180 Conn. 49, 53, 428 A.2d 319 (1980) (It was not error for the court to draw an adverse inference about substance abuse from the father's refusal to testify on that subject and to rely on that adverse inference in crafting its orders.)
    - "There is no doubt that the privilege against compelled self-incrimination may be invoked in a pretrial proceeding such as a deposition." *Penfield v. Venuiti*, 589 F. Supp. 250, 255 (D. Conn. 1984).
- "In sum, the defendant may exercise his privilege against self-incrimination in pretrial discovery proceedings as it pertains to the affirmative defenses included in his answer without the sanction of dismissal of these defenses." *Olin Corp. v. Castells*, No. 15 24 56, 1991 WL 85141, *10 (Conn. Super., Jan., 9, 1991).
- Production of documents:

- Entails broader protections under the Connecticut Constitution than Federal? *Burritt Interfinancial Bancorporation v. Brooke Pointe Associates*, 42 Conn. Sup. 445, 459, 625 A.2d 851 (1992) ("Article first, § 8, uses the phrase 'give evidence' rather than 'be a witness' because it was intended to protect something more than testimonial communications." *Id.* at 454).
- Whether producing documents containing potentially incriminating information is testimonial and protected requires the court to evaluate (1) whether the state can independently confirm the existence and authenticity of those documents and (2) whether the act of production itself communicates information about the existence, custody and authenticity of the documents. *United States v. Hubbell*, 530 U.S. 27 (2000).
- "A party is privileged from producing the evidence, but not from its production." *Johnson v. United States,* 228 U.S. 457 (1913).
- The right against self-incrimination is personal and does not extend to corporate entities or its records. Thus, custodians of records (holders of documents in a representative capacity) have no 5th Amendment rights, even if the corporate records may be personally incriminating. *See*, *Bellis v. United States*, 417 U.S. 85, 89 (1974), *Braswell v. United States*, 487 U.S. 99, 104 (1988).

c. Where the witness can articulate a credible basis supporting that the answers might incriminate the witness in future criminal proceedings

- Our Supreme Court has held that "[t]he fifth amendment privilege against self-incrimination ... privileges [the individual] not to answer official questions put to him in any ... proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Olin Corp. v. Castells*, 180 Conn. 49, 53, 428 A.2d 319 (1980).
- "[A]rticulat(ing] a credible basis for invoking the Fifth Amendment ... involves a balancing act because the privilege would not provide much protection if the requisite showing were too demanding." *OSRecovery, Inc. v. One Groupe International, Inc.*, 262 F.Supp.2d 302, 307 (S.D.N.Y., 2003) (In camera review may be required to avoid having to disclose on the record the very information that is sought to be withheld. *See id.* at 306 n.19).

i. Both direct and "link in the chain" evidence

- "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those

which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951).

- The Supreme Court has held that answers that would supply investigatory leads are also included within the ambit of the privilege. *See Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

ii. Unless it is perfectly clear there is no tendency to incriminate

- "But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, and to require him to answer 'if it clearly appears to the court that he is mistaken.' However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee." *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951), *see also, State v. Williams*, 200 Conn. 310, 319 (1986).
- "A court may not deny a witness' invocation of the fifth amendment privilege against self-incrimination unless it is *perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have [a] tendency to incriminate." (Emphasis in original; internal quotation marks omitted.) *State v. Williams*, 200 Conn. 310, 319, 511 A.2d 1000 (1986).
- No tendency to incriminate where the danger of self-incrimination relates to an offense the defendant is already convicted of, due to double jeopardy protections. *See*, *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964).
    - *But* keep in mind the rights of separate jurisdictions and the potential risk posed. *Burritt Interfinancial Bancorporation v. Brooke Pointe Associates*, 42 Conn. Sup. 445, 459, 625 A.2d 851 (1992).
- No tendency to incriminate where the statute of limitation has run, an absolute pardon is secured, or prosecutorial immunity is granted by the State.
    - *See*, C.G.S. § 54-47a. Compelling testimony of witness. Immunity from prosecution ("(b) Upon the issuance of the order such witness shall not be excused from testifying or from producing books, papers or other evidence in such case or proceeding on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness may be prosecuted or subjected to any penalty

or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence. …")

- Witness may be subject to criminal contempt if refuses to testify and there is no tendency to incriminate. *See also,* C.G.S. § 51-33a. Criminal contempt "(a) Any person who violates the dignity and authority of any court, in its presence or so near thereto as to obstruct the administration of justice, or any officer of any court who misbehaves in the conduct of his official duties shall be guilty of contempt and shall be fined not more than five hundred dollars or imprisoned not more than six months or both."
  - *Cruz v. Superior Court*, JD of Danbury, 163 Conn. App. 483 (2016) (Conviction for criminal contempt under C.G.S. Section 51-33a affirmed, where the defendant was granted transactional immunity under C.G.S. Section 54-47a, and still refused to testify at the trial of his co-defendant).

III. How Does a Witness Invoke his/her Fifth Amendment Rights?

a. As Early as Possible

- Use it or lose it, the Fifth Amendment privilege must be asserted at the earliest possible time in the proceeding. *Minnesota v. Murphy*, 465 U.S. 420 (1984); *Maness v. Meyers*, 419 U.S. 449, 466 (1979).
- "The fifth amendment privilege is not self-executing and must be asserted in a timely fashion." *State v. Cecarelli,* 32 Conn. App. 811, 818 (1993), *citing State v. Smith*, 201 Conn. 659, 664 (1986). "A person who fails to claim the protection of the privilege will not be considered to have been compelled to testify within the meaning of the fifth amendment." *Id., citing United States v. Monia*, 317 U.S. 424, 427 (1943).
- Delay in assertion could result in waiver. *See* section on Waiver below.

b. With Specificity (no Blanket Assertion)

- There are no protections under *Miranda v. Arizona* in the civil context (requires custodial interrogation).

- "The privilege is not a general one; it is, at least in all ordinary situations, to be claimed as to each question asked." *Malloy v. Hogan*, 378 U.S. 1, 6-11 (1964).
    - Witnesses invoking the fifth amendment privilege do not have a blanket right to refuse to testify but are obligated to answer those questions that they can answer and to make a specific claim of the privilege as to the rest. *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486-87 (1951); *See also, In re DG Acquisition Corp.*, 151 F.3d 75, 80-81 (2d Cir.1998).
- These same principles have been adopted and applied in Connecticut. *See, e.g. Taricani v. Nationwide Mutual Ins. Co.*, 77 Conn. App. 139, 146-47 (2003).

c. Intentional versus Unintentional Waiver

i. Intentional Waiver

- "In order to constitute the waiver, there must be 'an intentional relinquishment or abandonment' of the right." *Olin Corp. v. Castells*, No. 15 24 56, 1991 WL 85141, *4 (Conn. Super., Jan., 9, 1991), *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)."
    - Thus, the mere filing of an answer or asserting an affirmative defense alone does not constitute a waiver of the privilege, "provided the defense does not amount to an admission of guilt or furnish clear proof of crime." *Id.* at *5.
    - "It has been held that the privilege against self-incrimination can be waived in a civil matter by the voluntary testimony of the party or witness. If the party to the action voluntarily takes the stand to testify, he will waive the privilege against self-incrimination to the extent of relevant cross-examination." *Id.* at *5, *citing Brown v. United States*, 356 U.S. 148, 156 (1958).
    - "However, if the party is called to the stand by his opponent, then he forfeits the right to claim the privilege only if he makes disclosures which amount to 'an actual admission of guilt or incriminating facts.'" *Id.* at *5, *quoting McCarthy v. Arndstein*, 262 U.S. 355, 359 (1923).
- Scope: Waiver is often topical. Waiving regarding some questions on a certain topic may be deemed a wavier on further questions within that topic. *See, e.g., Rogers v. U.S.*, 340 U.S. 367, 371 (1951).

    - Except where the questions broaden the risk of prosecution. *See, e.g., Rogers v. United States*, 340 U.S. 367, 374 (1951), *Illinois v. McCulloch*, 507 F.2d 292, 294 (9th Cir., 1974).
    - In both civil and criminal cases the breadth of the waiver is determined by the legitimate limits of relevant cross-examination.
- Waiving in one proceeding does not waive the right to invoke in a subsequent one. *Martin v. Flanagan*, 259 Conn. 487,497,498 (2002) (The defendant could not be held in contempt for refusing to testify in his co-defendant's trial despite waiving his fifth amendment rights and testifying in his own trial previously).
    - *See also*, *State v. Grady*, 153 Conn. 26, 34 (1965).
- Cannot be a waiver if disclosure is compulsory, as opposed to voluntary. *McCarthy v. Arndstein*, 262 U.S. 355, 359, 43 S.Ct. 562, 67 L.Ed. I 023 (1923).

ii. Unintentional Waiver

- By answering some questions, a witnesses may be held to have waived the privilege against self-incrimination as to further questions. *See*, *United States v. Williams,* 504 U.S. 36 (1992).
- The Second Circuit adopted a two-part test to determine whether or not a witness has implicitly waived the Fifth Amendment privilege: (1) whether the prior statements must have created "a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth" and (2) the witness must have had "reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination." *Klein v. Harris*, 667 F.2d. 274, 287 (2nd Cir. 1981).

iii. Waiver by Withdrawal of Invocation

- "[B]ecause all parties—those who invoke the Fifth Amendment and those who oppose them—should be afforded every reasonable opportunity to litigate a civil case fully and because exercise of Fifth Amendment rights should not be made unnecessarily costly, courts, upon an appropriate motion, should seek out those ways that further the goal of permitting as much testimony as possible to be presented in the civil litigation, despite the assertion of the privilege. Thus, if there is a timely request made to the court, the court should explore all possible measures in order to select that means which strikes a fair balance ... and ... accommodates both parties." *United States v. 4003–4005 5th Ave.*, 55 F.3d 78, 83-4 (2d Cir.1995).

- "In order to strike a fair balance between the parties, the Court must address two important issues: (1) whether the privilege was invoked 'primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties,' and (2) whether an opposing party would 'suffer [ ] undue prejudice' from a withdrawal of the privilege. These determinations are fact specific and must be made on a case by case basis." *Huaman v. Sirois, et al*, Docket No. 3:13CV484, 2015 WL 1806660, *2 (D. Conn, April 21, 2015) (internal citation omitted).
- What a jury is informed about waiver/withdrawal:
    - "In an instance where a party stands on an invocation of the Fifth Amendment privilege made during discovery, fairness dictates that the jury be informed of the invocation of the privilege and permitted to draw an adverse inference from this fact. *See Penfield v. Venuti*, 589 F.Supp. 250, 255 (D. Conn.,1984) ('Permitting an adverse inference to be drawn against a party who invokes the Fifth Amendment privilege during discovery prevents use of the privilege as a weapon in civil litigation.'). However, the court here finds that allowing the plaintiff to mention the privilege assertion where it has been withdrawn again tips the balance unfairly. Thus, grants a protective order with regard to the same." *Huaman*, 2015 WL at *6.
- *SEC v. DiBella*, Docket No. 3:04CV1342, 2007 WL 1395105 (May 8, 2007)(Denying the defendant's motion in limine to exclude evidence of the defendant's prior assertion of his fifth amendment right where the plaintiff was prejudiced by the defendant's assertion, as the postponement of discovery for years impacted the defendant's memory and permitted him to tailor his testimony on other discovery conducted in the case. The defendant, not the plaintiff, must bear the consequences of his own invocation of his fifth amendment right and the resulting lack of evidence.)

IV. Effect of Invoking the Fifth Amendment Right

a. Criminal Context

- Assertion of the 5th Amendment cannot be used to penalize the defendant in a criminal case. *See, e.g., Griffin v. California*, 380 U.S. 609 (1965). It cannot be commented on by the prosecution.

b. Civil Context

i. Does not otherwise excuse compliance with the law and procedure

- "A [party] may not use the privilege [against self-incrimination] as a sword freeing him from his civil discovery obligations and his responsibilities at trial. The privilege applies not only at trial but also at the pleading stage.... However, ... a proper invocation of the privilege [does not] mean that a defendant is excused from the requirement to file a responsive pleading; he is obliged to answer those allegations that he can and to make a specific claim of the privilege as to the rest...." *Johnson v. Raffys Café I, LLC*, 173 Conn. App. 193, 204 (2017) (internal quotation and citation omitted).
- *Johnson v. Raffys Café I, LLC*, 173 Conn. App. 193, 206 (2017) ("Here, the record reveals that the defendant never affirmatively asserted a specific claim of the privilege against self-incrimination prior to filing his motion to set aside the default. Rather, he simply failed to file any pleading responding to the allegations set forth in the plaintiff's complaint. The failure to do so was not excused by virtue of the defendant's purported—but never properly asserted—claim of privilege. Consequently, the trial court reasonably determined that the defendant's purported invocation of the privilege against self-incrimination was not good cause justifying the opening of the default.").

ii. Cannot subject witness to "substantial economic harm"

- Individuals cannot be subjected to "substantial economic harm" for asserting the 5th, such as being ineligible for participating in public contracts; *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); nor as the sole basis for disbarment of a lawyer. *Spevack v. Klein*, 385 U.S. 511 (1967).
- "The *Griffin* [*v. California*, 380 U.S. 609] rule was made clear; any sanction which would make the exercise of the constitutional privilege against self-incrimination "costly" is prohibited. Imposition of a sanction which would strip the defendant of his defenses in a civil action for exercising the privilege would indeed be costly to him. To be sure, this would violate the defendant's state and federal constitutional rights." *Olin Corp. v. Castells*, No. 15 24 56, 1991 WL 85141, *7 (Conn. Super., Jan., 9, 1991).

iii. Adverse Inference

1. Generally

- As Justice Brandeis is oft quoted: "Silence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923).
- "The privilege does not, however, forbid the drawing of adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. The prevailing rule is that the fifth amendment does not preclude the inference where the privilege is claimed by a party to a civil cause." *Stilkey v. Zembko*, 200 Conn. App. 165, 179 (2020), citing *Olin Corp. v. Castells*, 180 Conn. 49, 53–54, (1980).
- *Permissible*, not required.
- "An adverse inference, however, does not supply proof of any particular fact; rather, it may be used only to weigh facts already in evidence." *In re Samantha C.*, 268 Conn. 614, 638 (2004) *citing* Connecticut Evidence (3d Ed.2001) § 4.3.2, p. at 206; *See State v. McDonough*, 129 Conn 483, 487 (1942); *Middletown Trust Co. v. Bregman*, 118 Conn. 651, 657 (1934).
- "In sum, a synthesis of the previous discussion reveals this general rule: After a prima facie case is established, an adverse inference may be drawn against a party for his or her failure to testify, unless the party was entitled to rely upon one of the few exceptional privileges that carry with it a protection from adverse inferences." *In re Samantha C.*, 268 Conn. 614, 638 (2004).
- Must otherwise satisfy evidentiary principles for admission.
    - "In a civil matter, a witness's invocation of his or her Fifth Amendment privilege is admissible and competent evidence, as long as the probative value of the evidence [is] not substantially outweighed by the danger of unfair prejudice under Fed. R. Evid. 403." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

2. Case Specific Determination

- *See*, *Stilkey v. Zembko*, 200 Conn. App. 165 (2020), wherein the Appellate Court reviews the adverse inferences drawn by the trial court in relation to the allegations of the complaint and the specific questions put to the defendant (for which she asserted her Fifth Amendment rights) at trial.
- Specifically Authorized inferences:

- Inference permitted for refusal to submit to blood, breath or urine test in proceeding for operating motor vehicle under influence of intoxicating liquor or drugs. C.G.S. § 14–227a(e).
- Inference permitted for refusal to submit to blood, breath or urine test in proceeding for operating boat under influence of intoxicating liquor or drugs. C.G.S § 15–140r(d).
- Adverse inference allowed if witness asserts privilege against self-incrimination in child custody enforcement proceeding. C.G.S. § 46b–115cc(c).
- Adverse inference allowed if witness asserts privilege against self-incrimination in support enforcement proceeding. C.G.S. § 46b–213a(g).

3. *Insufficient to Meet a Burden of Proof Per Se*

- "In that regard, an 'inference drawn from the failure to testify ... does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced.'" *In re Samantha C.*, 268 Conn. 614, 638 (2004) *quoting State v. McDonough*, 129 Conn 483, 487 (1942).

4. *Exceptions: No Adverse Inference Permitted*

- Adverse inference not permitted for refusal to testify regarding privileged communications between a domestic violence victim and his/her counselor. C.G.S. Section 52-146k.
- Adverse inference not permitted for refusal of accused child to testify in juvenile proceedings. C.G.S. Section 46b-138a.

5. Nonparty Witnesses

- "[W]e conclude that, in determining whether a nonparty witness' invocation of the privilege should be admitted into evidence, courts should consider on a case-by-case basis whether the probative value of admitting the privilege exceeds the prejudice to the party against whom it will be used under § 4–3 of the Connecticut Code of Evidence." *Rhode v. Milla*, 287 Conn. 731, 738 (2008).
    - In making this determination, the Court points the trial courts to consider factors including (1) the nature of the relevant relationships, from the point of view of the non-party witness's loyalty to either litigant, (2) the degree of control of either party over the non-party witness (and vicarious

admission), and (3) the compatibility between the non-party witness and either party in the outcome of the case and the role of the non-party witness in the litigation. *Id.*

6. Procedure

- *See*, *Wilson v. Transervice Lease Corp.*, No. FST-CV18-6034685-S, 2019 WL 3891874 (Conn. Super., July 16, 2019) (Genuario, J.). In *Wilson* the court compares the procedural approaches used in *Ruggiero v. Christoforo* (a 2003 New Haven J.D. matter) and *Asplin v. Mueller* (a 1984 Colorado Appellate decision), as well as looks to federal approaches, including *Brink's Inc. v. City of New York*, 717 F.2s 700 (2d Cir. 1983). The court notes that these decisions ultimately hold that whether to present the witness and invocation of his/her Fifth Amendment privilege to the jury is within the discretion of the court, taking into consideration the circumstances before it, including whether "the probative nature of the evidence sought to be offered by way of inferences that a trial of fact is entitled to draw as against the prejudicial nature of the questioning." *Id.* at *4.
    - In *Wilson*, the court determines that on balance that the court will permit the witness to be questioned and invoke his fifth amendment rights before the jury, but that counsel will submit questions to the court (and defense) in advance and they will be subject to the court's approval. *Id.* at *5.

iv. Other Remedies

- "Pursuant to Practice Book § 13-14, the defendant is ordered precluded from testifying in his defense at trial concerning matters to which he has asserted his privilege against self-incrimination or submitting an affidavit concerning such matters in opposition to a motion by the plaintiff for summary judgment, except that should the plaintiff question the defendant at trial he may be cross-examined by his attorney, within the discretion of the trial court." *See*, *Rosa Bros., Inc. v. Mansi*, No. 419204, 1999 WL 429876 (Conn. Super. 1999), *appeal dismissed*, 61 Conn. App. 412 (2001).
- "The court orders that the defendant's motion to modify visitation access dated October 4, 2003 is hereby stayed until she files with the court clerk a notice of her intention not to invoke any fifth amendment privilege." *Rubenstein v. Rubenstein*, 48 Conn. Supp. 492, 851 A.2d 1262 (2004).
- "The issue before the court is whether Cappello's privilege against self-incrimination suspends or entirely excuses his contractual obligations under the insurance policy. This court answers that question in the negative based on case

law from various jurisdictions and applying traditional contract theories." *Capello v. Aetna Life & Cas. Co.*, No. CV92-0510478, 1993 WL 119691 (Conn. Super. 1993).

V. Strategic Considerations

a. Benefit – Risk Analysis

- The seriousness of the potential criminal liability and how speculative or concrete the risk of prosecution.
- Benefits of protecting that information from disclosure in the civil context, against the likelihood and scope of an adverse inference being drawn against your client.
- Knowledge of information protected by the client's fifth amendment right constraining counselor's factual arguments to the court/jury.
- Tailoring the invocation of the fifth amendment privilege to be as narrow as possible (and limit the adverse inference potentially permitted by the court), while being careful not to create an unintended waiver.
    - Be wary of tailoring a waiver too tightly as a means of strategic advantage.
- Withdrawal of waiver already invoked (if permitted), and relative impact on what the jury will know about the prior invocation.
- Where opponent asserts the 5th: make a specific and discreet record to define the scope of the assertion (do not allow a blanket 5th assertion).
    - Will assist in defining the scope of a reasonable adverse inference later on or defining the nature of the prejudice suffered.

b. Seeking a Stay of Proceedings

- No constitutional prohibition against parallel proceedings. *United States v. Kordel*, 397 U.S. 1 (1970).
- "With respect to the constitutional right not to be deprived of property without due process of law, the defendant fails to recognize that it was his decision not to testify at his dissolution trial. The court did not compel him to exercise his Fifth Amendment privilege, and the court did not compel him to forgo presenting a defense. Although he may have been faced with difficult choices under those circumstances, he was not deprived of a constitutional right." *Tyler v. Shenkman-Tyler*, 115 Conn. App. 521, 525 (2009).
    - *See also*, *State v. Easton*, 111 Conn. App. 538, *cert. denied*, 290 Conn. 916 (2009) ("So long as the defendant is neither forced to exercise nor prevented from exercising his right to testify, the right to present a defense

is not burdened by the strategic choice or resulting adverse consequences. Under such circumstances, the fact that a defendant has to make a difficult choice between two constitutional rights does not deprive him of due process." *Id.* at 541, (internal citation omitted)).

- "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *State v. Ayuso*, 105 Conn. App. 305, 310 n. 2, *cert. denied*, 286 Conn. 911 (2008).
- "In determining whether to impose a stay ... the court must balance the interests of the litigants, nonparties, the public and the court itself.... The factors a court should consider include: [1] the interests of the plaintiff in an expeditious resolution and the prejudice to the plaintiff in not proceeding; [2] the interests of and burdens on the defendants; [3] the convenience to the court in the management of its docket and in the efficient use of judicial resources; [4] the interests of other persons not parties to the civil litigation; and [5] the interests of the public in the pending civil and criminal actions." *Tyler v. Shenkman-Tyler*, 115 Conn. App. 521, 529 (2009).
- "A preliminary question must be the extent to which the issues in the criminal case would overlap with those in the civil case, because self-incrimination is more likely if there is a significant overlap." *Tyler v. Shenkman-Tyler*, 115 Conn. App. 521, 529 FN5 (2009).
- The federal district court also has the discretion to stay a civil proceeding against a defendant facing an overlapping criminal prosecution, where there is a particularized finding made by the court into the circumstances and competing interests in the case and where necessary to prevent substantial prejudice to a defendant's fifth amendment rights. *See, e.g.*, *Ironbridge Corp. v. L.I.R.*, 528 F. App'x 43, 46 FN 1, (2d Cir., 2013); *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 99-100 (2d Cir., 2012).