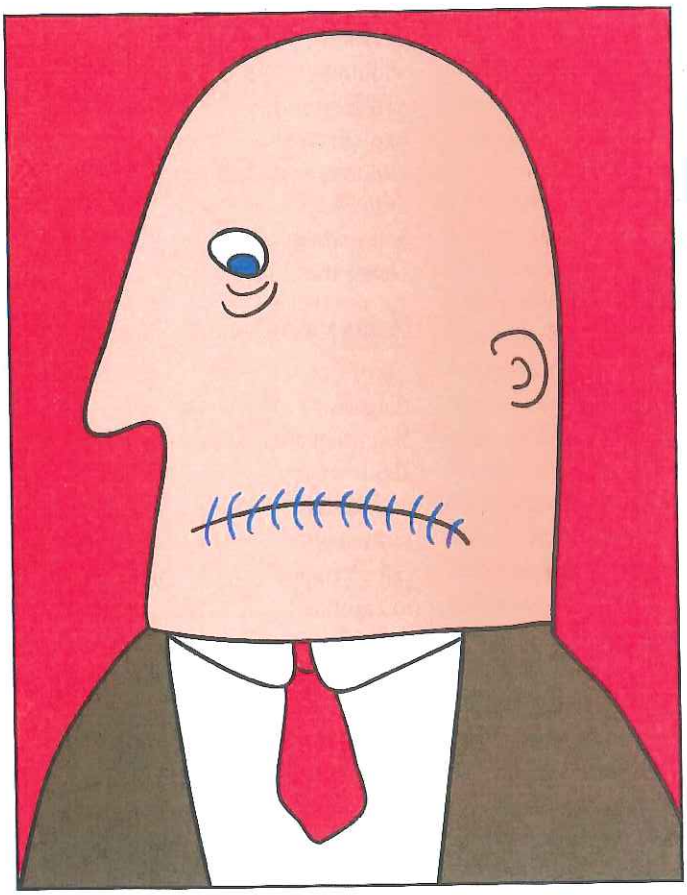
Should Your Client Remain Silent?

BY **BRIAN J. BLITZ & PATRICK EMERSON**



No one dared disturb the sound of silence.

—Simon & Garfunkel, *The Sounds of Silence, on* SOUNDS OF SILENCE (Columbia Records 1966).

A litigator's mission is often to disturb the silence. Yet, the Fifth Amendment of the United States Constitution guarantees that our clients have a right to remain silent, or technically, a privilege against self-incrimination. Therefore, it is critical that litigators, including family law practitioners, understand what role the privilege against self-incrimination plays in litigation strategy.

Supreme Court doctrine

The Fifth Amendment privilege against self-incrimination provides that: "No person shall…be compelled in any criminal case to be a witness against himself." Under the Fourteenth Amendment, this privilege is extended to the States. The privilege applies to natural persons, but not to corporations or other collective entities. *Braswell v. U.S.*, 487 U.S. 99 (1988). The privilege may not be available to a natural person who wishes to avoid producing the documents of a corporation, even if production could prove personally incriminating. *See, e.g., Fisher v. U.S.*, 425 U.S. 391, 410 (1976). However, "act-of-production" immunity may later limit the use of evidence as to who produced subpoenaed records, in the event that the producer is personally prosecuted. *Id.* at 408.

The privilege means that a *criminal* defendant has the right to remain silent in pretrial and trial proceedings. However, the amendment also applies to civil proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). Typically, a party to a civil suit has no "blanket Fifth Amendment right to refuse to answer questions." *U.S. v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969). Instead, a party is expected to assert the privilege on a question-by-question basis.

Successfully asserting the privilege entails avoiding a number of procedural pitfalls. The privilege is waived if not effectively asserted. *Rogers v. United States*, 340 U.S. 367, 371 (1951). The privilege will not undo a prior admission of guilt and may not be sustained by the court, given other incriminating facts. *See, e.g., id.* at 373–74. A court may not sustain the privilege where the statute of limitations has run on the underlying offense or where the declarant has been granted immunity from prosecution.

Even if all procedural requirements are met, a court will not automatically sustain the privilege. The asserting party's "say-so does not itself establish the hazard of incrimination. It is for the court to say whether his silence is justified." *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951). For a court to sustain an assertion of the privilege, it must find that the protected statement is (i) compelled, (ii) testimonial, and (iii) self-incriminating.

A compelled statement includes the answer to any other-

A party to a civil suit has no "blanket Fifth Amendment right to refuse to answer questions"

wise nonobjectionable question, but typically does not include statements contained in documents, as documents are likely to have been created voluntarily. *Fisher v. United States,* 425 U.S. 391, 409–10 (1976). A testimonial statement is one that does not require the declarant to furnish identifiable physical characteristics. For example, the Supreme Court held that signing a consent form, providing handwriting samples, and providing voice samples were not testimony. *U.S. v. Mara,* 410 U.S. 19, 22 n.* (1973); *U.S. v. Dionisio,* 410 U.S. 1, 5 (1973).

A court has broad discretion to determine whether a statement is self-incriminating: "The trial judge, in appraising the claim, must be governed as much by his personal perception…as by the facts actually in evidence." *Hoffman,* 341 U.S. at 486–87. The required connection between the statement and potential prosecution has had myriad incarnations, including: a link in the chain of evidence needed to prosecute an individual; a substantial and real, and not merely trifling or imaginary, hazard of incrimination; or, a reasonable belief that the statement could be used against the declarant or could lead to other evidence that might be used against him or her. *Hoffman v. U.S.,* 341 U.S. 479, 486 (1951); *Marchetti v. U.S.,* 390 U.S. 39, 53 (1968); *Kastigar v. U.S.,* 406 U.S. 441, 444–45 (1972).

However, a court cannot require a party to admit to having committed a crime. In *Grunewald v. United States,* 353 U.S. 391, 421 (1957), the U.S. Supreme Court noted that: "one of the basic functions of the privilege is to protect *innocent* men."

Viable alternatives

In addition to being mindful of the pitfalls and requirements that surround effective assertion of the privilege, family law litigators also should bear in mind that there may be viable alternatives. Although not constitutionally required by the Fifth Amendment, it is within a court's discretion to grant a stay or continuance as an alternative to a party's asserting the privilege. This may, for example, permit a criminal investigation into criminal contempt to finish before an overlapping civil matter proceeds, thus obviating the need to withhold potentially incriminating information. Some courts apply a factor analysis in considering a stay. *See, e.g., Keating v. Office of Thrift Supervision,* 45 F.3d 322, 324–25 (9th Cir. 1995). Alternatively, a court may grant a protective order regarding discovery of incriminating information.

Application to family law

Family law practitioners who assert the privilege should be aware of how the assertion may affect their client's case. On the one hand, the privilege could save a client from having to reveal embarrassing or costly information. On the other hand, the privilege may be far from cost-free. Most drastically, if the party asserting the privilege is the claimant or has brought a counterclaim, a court may dismiss the claim *because of the assertion.*

Jurisdictions vary as to if and when dismissal is warranted, and as to whether dismissal is mandatory or discretionary, and with or without prejudice, under these circumstances. However, the general rule is that a claimant may not use the privilege as a shield of defense and as a sword of attack. In other words, a litigant may not rely on information to support a claim that he or she refuses to be questioned about by an opponent.

For example, in *Minor v. Minor,* 240 So. 2d 301 (Sup. Ct. Fla. 1970), Florida's Supreme Court established that an action for divorce may be dismissed where the plaintiff wife declined to answer interrogatories relating to her husband's counterclaim of adultery. (Other courts have declined to impose the sanction of dismissal unless other options, such as striking the plaintiff's direct examination testimony, are unavailable. *See, e.g., Robinson v. Robinson,* 328 Md. 507, 518 (1992) (regarding child support).

Alternatively, a court may deny a party affirmative relief for asserting the privilege. For example, in *Griffith v. Griffith,* 332 S.C. 630 (1998), the court denied alimony to the respondent wife and required that she repay temporary alimony when she refused to answer questions regarding her alleged adultery (despite having previously been granted immunity from prosecution for adultery). The court in *Griffith* relied upon a negative inference against the wife, based on her silence. It stated that: "There being no good faith reason for the refusal to testify, we can think of but one logical explanation for her reticence; that is, the answers would have tended to establish the adulterous conduct which the husband sought to prove."

In this respect, civil proceedings are distinct from criminal, in which the trier of fact may *not* draw a negative inference from the assertion of the privilege. *Mitchell v. United States*, 526 U.S. 314, 327–28 (1999). Negative inferences are constitutional in civil matters where a party refuses to testify in response to probative evidence offered against him or her. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). However, not all states permit negative inferences. Also, a general exception to *Baxter* may be applied by a court where the asserting party is simultaneously a defendant in a criminal and a civil matter, and faces the *Catch 22* of choosing between waiving the privilege and automatically losing in the civil matter. *See, e.g., U.S. v. Premises Located at Route 13,* 946 F.2d 749, 756 (11th Cir. 1991) (an exception to the *Baxter* rule applies when "the invocation of the privilege would result in automatic entry of summary judgment" (internal citation and quotation omitted).

Shield-and-sword; not both

If the court permits a claim for affirmative relief to go forward, despite the claimant's assertions of the privilege, it may, nevertheless, limit the asserting party's ability to rely on evidence he or she declined to testify about—often under a shield-and-sword rationale. For example, in *In re Marriage of Hassiepen*, 646 N.E.2d 1348 (App. Ct. Ill. 1995), the reviewing court held that in modifying child support, the trial court improperly considered the payor former husband's 1992 tax returns, which he entered into evidence, when he had declined to be cross-examined on those returns.

The court stated that the former husband "has two choices: (1) he can assert the Fifth Amendment during cross-examination, but then he *cannot* rely upon his tax returns...or (2) he can submit his 1992 tax returns as evidence...but then he *cannot* assert the Fifth Amendment." The court further held that this holding did not limit his former wife's use of the returns.

Adultery and illegal drug use

As some of the foregoing cases illustrate, one type of potentially criminal conduct that often arises in family law is adultery. Another, particularly in the context of child custody disputes, is illegal drug use.

A court may sustain an assertion of the privilege on the basis of adultery. *See, e.g., Murphy v. Murphy*, 36 Va. Cir. 96 (1995). Twenty-four states still have statutes criminalizing adultery. However, whether adultery implicates a substantive criminal law varies by state. *See* Peter Nicolas, *The Lavender Letter: Applying the Law of Adultery to Same-Sex Couples and Same-Sex Conduct*, 63 FLA. L. REV. 97, 100 (2011). In those states where adultery is still a crime, a court will require a party to testify to adultery for which the statute of limitations has expired. *See, e.g., Robinson*, 328 Md. 507 at 510.

Definitions of adultery also vary and may preclude an assertion of the privilege. A recent, unpublished New York opinion illustrates the importance of the criminal definition of adultery. *See D.M. v. S.N.*, No. 3045/2008, slip op. (N.Y. Sup. Ct. Mar. 28, 2008). In this case, spouses accused each other of adultery with the same woman, "Ms. G." In New York, the Penal Code prohibits: "sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse." The court noted that, according to the definitions section of the Code, "sexual intercourse" meant: "penetration, however slight." On the basis of this definition, the court found that: "Husband is clearly not accusing the Wife of having had sexual intercourse with Ms. G." Therefore, the court held that, as the husband's allegations did not implicate criminal conduct, the wife could not use the privilege to decline to respond to a Notice to Admit. Other states require that adulterous conduct is "open and notorious," which may also preclude asserting the privilege. *See, e.g., People v. Cessna*, 356 N.E.2d 621 (App. Ct. Ill. 1976).

Adultery is often the basis for assertion of the privilege in child custody proceedings. In *Robinson*, for example, the wife took custody of the child. The court found that the trial court was permitted, but not required, to give weight to a negative inference regarding the wife's alleged adultery. The court similarly found that the trial court had discretion as to whether to strike positive testimony from other witnesses regarding the wife's fitness to parent. The court held that the trial court properly declined to do either of these.

Robinson shows that child custody proceedings may be an exception to the version of the shield-and-sword doctrine that requires dismissal where a claimant makes selective use of privileged information. In *Robinson*, the mother made an issue of her own fitness to parent and yet refused to testify on one aspect of that issue—i.e., her alleged adultery. Thus, the mother used her silence as a sword in establishing a case for her fitness, but as a shield against the father's establishing her nonfitness.

The court distinguished the issue of child custody from any issue where *only the parties' rights* are at issue. The *Robinson* court held that: "although the rights and interests of the parents are a concern to the court, the court's overriding responsibility is to protect the best interests of the child.... [H]arsh evidentiary sanctions which would result in excluding all the appellee's testimony regarding her fitness for custody would frustrate the primary purpose of the custody proceeding."

Child custody proceedings also provide a forum for testimony regarding another type of criminal conduct that frequently arises in family law and may lead a party to assert the privilege: illegal drug use. Here, too, third-party interests of the child may prevent harsh evidentiary sanctions against the asserting party. For example, in *Montoya v. Sup. Ct.*, 173 Ariz. 129 (Ct. App. 1992), the father declined to

> The reviewing court held that "[t]he court should not treat child custody as a penalty or reward for a parent's conduct."

answer 190 of 200 requests for an admission about past drug use. The reviewing court, nevertheless, held that the trial court erred in striking the father's testimony, entering a default judgment against him, and awarding custody to the mother. In similar language to the court's treatment of adultery in *Robinson*, the reviewing court held that the trial court issued "too harsh a penalty" and that the best interests of the child required that "[t]he court should not treat child custody as a penalty or reward for a parent's conduct."

On the other hand, a negative inference regarding drug use may lead, alongside other factors, to a parent's losing custody. The shield-and-sword doctrine has been applied to dismiss a claim for custody on the basis of the claimant's drug use, notwithstanding the third-party interests of the child.

In *Qurneh v. Colie*, 122 N.C. App. 553 (1996), the natural father sought custody over the claim of a nonnatural parent. Under North Carolina law, the father's claim was subject to the presumption that awarding custody to a natural parent is in the best interests of a child. However, this presumption required that the father make a *prima facie* showing of his fitness to parent. When the nonnatural parent attempted to rebut the natural-parent presumption by questioning the father about drug use, the father asserted the privilege. The court held: "The privilege against self-incrimination is intended to be a shield and not a sword.... To allow plaintiff to take advantage of this presumption while curtailing the opposing party's ability to prove him unfit would not promote the interest and welfare of the child." *Qureh*, 122 N.C. App. at 558.

Conclusion

The privilege against self-incrimination may be relevant in many ways to family law practitioners. Fundamentals of the privilege are the subject of extensive scholarly work and judicial opinion. Therefore, we make no attempt to draw a singular conclusion or blanket rule regarding what family law litigators should do, or should not do, in advising clients to invoke or not to invoke their constitutional right.

Silence is not always golden—nor is it necessarily fool's gold. Rather, there are times to disturb the silence and times not to *dare to disturb* the silence. Such a choice must be made and understood with a firm grasp of the wealth of issues and theories at stake. Family law litigators should be aware of these, and consider their options accordingly. **FA**

Brian J. Blitz, at left, is a partner at Berger Schatz in Chicago, Illinois. Berger Schatz is one of the largest firms in the country dedicated to the practice of matrimonial law. **Patrick Emerson** is a third-year law student at Northwestern University, and has been a law clerk at Berger Schatz since the spring of 2010.