

5.01. Self-Incrimination

(US Const 4th Amend; NY Const, art 1, § 6; CPLR 4501)

(1) In a criminal proceeding:

(a) No person shall be compelled in any criminal case to be a witness against himself or herself.

(b) When the defendant does not testify on his or her own behalf, neither the court nor the prosecutor may comment adversely thereon.

(2) In a civil proceeding:

(a) A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit.

(b) A competent witness may otherwise decline to give an answer which will tend to accuse himself or herself of a crime or to expose him or her to a penalty or forfeiture in response to a specific question.

(3) When during the giving of testimony, a witness invokes the privilege, the court must determine the degree of prejudice, if any, to the party whose right to examine the witness is impaired by the witness's invocation of the privilege and, upon that determination, take appropriate action to dissipate any prejudice.

Note

Subdivision (1) (a) restates both the Federal Constitution's Fifth Amendment and New York Constitution's (art I, § 6) prohibition on compelled self-incrimination. (*See generally* William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 50.10 [on the scope of the privilege in a criminal proceeding].)

Albeit the “general rule [is] that the witness is the judge of his right to invoke the privilege” (*People v Arroyo*, 46 NY2d 928, 930 [1979]), a witness may validly claim the privilege only where it is shown that the hazards of incrimination are “substantial and real, and not merely trifling or imaginary” (*Marchetti v United States*, 390 US 39, 53 [1968] [internal quotation marks and citation omitted]; see *Ohio v Reiner*, 532 US 17, 21 [2001]; *Zicarelli v New Jersey Comm’n of Investigation*, 406 US 472, 478 [1972]; *Carver Fed. Sav. Bank v Shaker Gardens, Inc.*, 167 AD3d 1337, 1340 [3d Dept 2018]).

Subdivision (1) (b) is derived from *Griffin v California* (380 US 609, 615 [1965] [“We . . . hold that the Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”]).

CPL 300.10 (2) states: “Upon request of a defendant who did not testify in his own behalf, but not otherwise, the court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn.” The failure to give that instruction, “on [the] defendant’s request,” is reversible error. (*People v Britt*, 43 NY2d 111, 115 [1977]; compare *People v Vereen*, 45 NY2d 856, 857 [1978] [instructing the jury as provided by the statute, over the defendant’s objection, may be harmless error].)

Subdivision (2) is derived from CPLR 4501. (See generally Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, CPLR 4501.)

Subdivision (2) (a) states verbatim the first sentence of CPLR 4501. (See *McDermott v Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 28 [1964] [“Unlike his counterpart in a criminal prosecution, the defendant in a civil suit has no inherent right to remain silent or, once on the stand, to answer only those inquiries which will have no adverse effect on his case. Rather, he must, if called as a witness, respond to virtually all questions aimed at eliciting information he may possess relevant to the issues, even though his testimony on such matters might further the plaintiff’s case”].)

Subdivision (2) (b) is derived from the second sentence of CPLR 4501 which reads:

“This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness.”

(See *Matter of Agnello v Corbisiero*, 177 AD2d 445, 446 [1st Dept 1991] [“While it is undeniably true that the privilege applies in both civil and criminal proceedings, petitioner here did not properly invoke the privilege. When he was called as a

witness on respondent's case, he refused to answer any and all questions put to him, and not just questions the answers to which he reasonably believed could incriminate him" (citation omitted).]

Subdivision (3) is derived from the holding in *People v Siegel* (87 NY2d 536, 544 [1995]) that "the trial court has wide discretion in fashioning the appropriate corrective response, depending on the degree of prejudice that was incurred by the party whose right of cross-examination of the witness was impaired by the claim of the privilege." The *Siegel* Court highlighted three "corrective responses":

(a) directing that the entire testimony of the witness be stricken when the questions the witness refused to answer were closely related to a principal element of the case, or

(b) directing that a portion of the testimony be stricken when the questions the witness refused to answer were connected to a discrete phase of the case, or

(c) permitting the jury to consider the refusal to answer questions in determining the believability and weight of the testimony when the questions the witness refused to answer involve collateral matters or cumulative testimony concerning credibility.

(*Id.* at 544; *see also* CJI2d[NY] Witness Refuses to Answer—Refusal Effect on Witness Credibility, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Refusal_Credibility.pdf; CJI2d[NY] Witness Refuses to Answer—Refusal Requires Testimony Stricken, available at http://www.nycourts.gov/judges/cji/1-General/CJI2d.Witness_Testimony_Stricken.pdf).

In a civil proceeding, "[w]hile the Fifth Amendment accords an individual the privilege not to answer questions . . . if the answers might incriminate the person in future criminal proceedings (*see Baxter v Palmigiano*, 425 US 308, 316 [1976]), a witness who asserts this Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial." (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d 389, 407 [2019].)

Thus, the consequences that may attend the invocation of the privilege in a civil case include:

(a) permitting the jury to consider the failure to answer questions by a witness who is a party " 'in assessing the strength of evidence offered by the opposite party on the issue which the witness was in a position to controvert' (*Marine Midland Bank v Russo Produce*

Co., 50 NY2d 31, 42 [1980]).” (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d at 407, *supra.*)

(b) “ ‘an unfavorable inference may be drawn against a party from the exercise of the privilege against self-incrimination’ (Prince, Richardson on Evidence § 5-710).” (*Id.*; *see El-Dehdan v El-Dehdan*, 26 NY3d 19, 37-38 [2015] [“a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination. Here, defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his (defense) to avoid civil contempt liability”]; *see also* PJI 1:76 [“General Instruction—Evidence—Claim of Privilege”].)

In its decision in *Carothers*, the Appellate Division held that an adverse inference may not be drawn against a party in a civil action where the privilege is invoked by a nonparty witness (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 150 AD3d 192, 203-204 [1st Dept 2017]; *compare Searle v Cayuga Med. Ctr. at Ithaca*, 28 AD3d 834, 837–838 [3d Dept 2006] [“While no adverse inference typically arises from the invocation of the privilege by a nonparty witness, that rule is not inflexible. The inference may be appropriate where the witness is a former party who settled, the testimony in question is directly relevant to an issue before the jury and the party being burdened by the adverse inference may be held vicariously liable due to the witness's actions” (citations omitted)]). The Court of Appeals, in its *Carothers* opinion, noted that they had “not previously decided whether a *nonparty's* invocation of the Fifth Amendment may trigger an adverse inference instruction against a party in a civil case, and we have no occasion to do so here because any error by the trial court was harmless.” (*Andrew Carothers, M.D., P.C. v Progressive Ins. Co.*, 33 NY3d at 407, *supra.*)

(c) dismissal of the complaint. (*Levine v Bornstein*, 13 Misc 2d 161, 165 [Sup Ct, Kings County 1958], *affd no op* 7 AD2d 995 [2d Dept 1959], *affd no op* 6 NY2d 892 [1959] [plaintiff’s refusal to answer questions in an examination before trial required dismissal of the complaint].)