

## Calling a Witness Whom You Know Will Claim the Fifth

by  
**Kenneth L. Jorgensen, First Assistant Director**  
**Minnesota Office of Lawyers Professional Responsibility**

Reprinted from *Minnesota Lawyer* (September 10, 2001)

A witness's invocation of the privilege against self-incrimination is not an uncommon occurrence in criminal proceedings. Some Fifth Amendment privilege claims come as a surprise; others may be anticipated but are uncertain until the witness actually takes the stand because the witness has equivocated about asserting the privilege. In these situations, knowledge that the witness will claim a privilege cannot be imputed to the lawyer.

A more difficult situation arises when the lawyer "knows" the witness will refuse to testify on Fifth Amendment grounds (e.g., the witness's counsel has advised the lawyer that the witness will assert the privilege and refuse to answer any substantive questions). Lawyers universally understand that the defendant's right against self-incrimination cannot be used as an offensive forensic tactic in seeking a conviction. However, is it ethically proper to examine a "witness" in the jury's presence when the lawyer knows the witness will assert a valid Fifth Amendment privilege against self-incrimination?

Consider the following. Jenny is prosecuting a defendant charged as an accessory after-the-fact in a murder for hire case. The defendant has retained counsel and has been exploring the possibility of a deal in which he would testify against the victim's husband who is charged with hiring his wife's killer. When the deal falls through, Jenny tells the husband's counsel that she intends to call the husband as a witness in the upcoming accessory after-the-fact trial. Counsel informs Jenny that the husband will not answer her questions on Fifth Amendment grounds.

Despite her knowledge that the husband will claim privilege and refuse to testify, Jenny still desires to call the husband as a witness in the accessory after-the-fact trial, if only to ask him a single question: "Do you know the defendant who is charged with being an accessory after-the -fact in your wife's murder?" Jenny's intention is to elicit the anticipated response, "I have been advised to not answer that question on the grounds that it may violate my right against self-incrimination." Can Jenny ethically employ this technique?

The Rules of Professional Conduct do not directly address this issue. While the rules prohibiting conduct prejudicial to the administration of justice and denouncing use of evidence gathering methods that violate third-party rights may be cause for concern, they provide little, if any, insight into the propriety of this technique. See e.g., Rules 8.4 (d) and 4.4.

Specific instruction on this issue is available in the ABA Standards Relating to the Administration of Criminal Justice. Standard 3-5.7 (c) of the Prosecution Function advises that prosecutors should not "call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify." Standard 4-7.6 (c) of the corollary Defense Function imposes an identical obligation upon criminal defense counsel. At least one ethics writer<sup>[Ftn 1](#)</sup> claims that violation of these criminal justice standards also constitutes a violation of Rule 4.4 which prohibits using methods of obtaining evidence that violate the rights of a third person.

So why do the Rules of Professional Conduct possibly, and the Criminal Justice Standards expressly, prohibit Jenny from calling the husband solely to elicit his privilege claim in the jury's presence?

Much of the prohibition against calling a witness who the lawyer knows will assert a valid privilege is premised upon the Confrontation Clause of the Sixth Amendment. A significant interest secured by the clause is the right of cross-examination. In Jenny's case, calling the victim's husband to show the jury that he would claim the Fifth in response to questions concerning his relationship with the defendant was an attempt to create or manufacture evidence, via the inferences drawn by the jury from the husband's assertion of the privilege. In doing so, Jenny effectively denied the accessory defendant his right to confront or rebut this inferential evidence, since she was aware that the husband would claim a valid privilege and not answer her questions or those asked by the defendant's counsel on cross-examination.

The mischief associated with calling a witness who will claim a valid privilege is the "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." *Foster v. State*, 687 S.W.2d 829 (Ark. 1985).

Calling a witness who will claim privilege is not a per se ethical violation, nor does it always constitute reversible error. Where the information about whether the witness will assert the privilege is conflicting or where doubt exists about the validity of witness's privilege claim, courts have found no error. See e.g., *Namet v. United States*, 83 S.Ct. 1151 (1963) (where the witness had already pled guilty to a crime associated with the defendant, the prosecutor had reason to doubt the validity of the witness's privilege claim). Unfortunately, unilaterally determining the validity of a witness's privilege claim before trial is undoubtedly a precarious task, which can later be subject to second-guessing and hindsight. Where doubt exists, lawyers should raise the privilege issue with the court outside of the jury's presence before calling the witness to the stand. See e.g., *Lawrence v. State*, 360 S.W.2d 716 (Ga. 1987) (it is for the court to decide if the danger of incrimination is real and appreciable).

---

<sup>1</sup> John Wesley Hall, "Professional Responsibility of the Criminal Lawyer," sec. 19:10 (2nd ed. 1996).