317 WITNESS EXERCISING PRIVILEGE AGAINST SELF-INCRIMINATION

A witness, (name of witness), exercised the constitutional right not to answer (a question) (questions) on the ground that the answer(s) might tend to incriminate the witness.

(Name of witness)'s decision not to testify must not be considered by you in any way and must not influence your verdict in any manner.

COMMENT

Wis JI-Criminal 317 was originally published in 1981 and revised in 1991 and 1994. The 2001 revision adopted a new format without substantive change.

This instruction must be given if properly requested (§ 905.13(3)). It should not be given unless it is requested.

Generally, a claim of privilege should be made outside the presence of the jury. Section 905.13(2) provides:

> Claiming Privilege Without Knowledge Of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

For a discussion of recommended procedures, see **SM-55, INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF-INCRIMINATION.**

Refusing to allow a defendant to call a witness and require that witness to claim the privilege in front of the jury does not deprive the defendant of the due process right to present a defense. State v. Heft, 178 Wis.2d 823, 505 N.W.2d 437 (1994). Heft also held that § 905.13(3) does not violate equal protection in prohibiting comment on the exercise of the privilege in criminal cases but allowing it in civil cases.

Also see ABA Standards Relating To Criminal Justice 3-5.7(c) and 4-7.6(c) relating to the duty of counsel where a witness is expected to claim a valid privilege not to testify.

When a witness refuses to answer a question or questions on the basis of the privilege against self-incrimination, the trial court has discretion to strike the entire testimony of the witness, providing the claim of privilege does not go to collateral matters only. Ryan v. State, 95 Wis.2d 83, 90, 289 N.W.2d 349 (Ct. App. 1979); State v. Monsoor, 56 N.W.2d 689, 203 N.W.2d 20 (1973) [but see State ex rel. Monsoor v. Cady, 497 F.2d 1126 (7th Cir. 1974)]; Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975).

Whether or not striking the witness' testimony is appropriate, an instruction like Wis JI-Criminal 317 may be helpful, either by itself or in addition to Wis JI-Criminal 150, Stricken Testimony. Subsection 905.13(1) provides that a claim of privilege is in general not a proper subject for comment by judge or counsel, but § 905.13(3) provides that "[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." In criminal cases, these sections apply to the privilege against self-incrimination. Wis JI-Criminal 317 does not use the precise statutory language: ". . . draw no inference therefrom." The Committee concluded that the direction that the exercise of the privilege "must not be considered by you in any way and must not influence your verdict in any manner" is a more understandable equivalent of "draw no inference."

When a witness makes a valid claim of the privilege against self-incrimination, it is within the sole discretion of the district attorney to request that the court order the witness to testify. If the court grants the motion and orders a witness to testify notwithstanding a valid claim of privilege, the witness enjoys immunity concerning matters related to the subject of his testimony. See section 972.08. The Wisconsin Supreme Court has on several occasions rejected the argument that defendants should have a reciprocal power to compel the testimony of witnesses. Peters v. State, supra; Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Elam v. State, 50 Wis.2d 383, 184 N.W.2d 176 (1971). The court has also made it clear that trial courts have no authority to sua sponte compel testimony, in the absence of a request by the prosecutor. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Shelley v. State, 89 Wis.2d 263, 278 N.W.2d 251 (Ct. App. 1979).

