SM-55 INQUIRY WHEN A WITNESS CLAIMS THE PRIVILEGE AGAINST SELF INCRIMINATION

I. Introduction

This Special Material outlines the procedures a trial judge should follow when a witness asserts the privilege against self-incrimination.

The privilege is recognized in identical terms by both the United States and Wisconsin Constitutions[1]: "nor shall [a person] be compelled in any criminal case to be a witness against himself."

The privilege can be raised in a variety of situations in a criminal case: at a grand jury or John Doe hearing; at a preliminary examination; at a hearing on a pretrial motion; or at trial. The same basic procedure applies regardless of the situation.

One response to a valid claim of the privilege is to order the witness to testify, thereby granting immunity. Sections 972.08 and 972.085 provide the statutory recognition for immunity in criminal cases. A number of other statutes spell out procedures for immunity in a variety of other situations.[2] All immunity statutes are interpreted in the same way – as coextensive with the constitutional privilege.[3]

Discussed here are issues relating to the requirements for a valid claim of the privilege, the granting of immunity to who one invokes the privilege, and immunity for defense witnesses.

II. Invoking the Privilege

A. Should not be claimed in the presence of the jury

Section 905.13(2) provides as follows:

> 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.

It is especially important to see that this rule is followed with respect to the privilege against self-incrimination. The burden properly falls on the attorney who calls the witness to assure that the witness is not expected to assert the privilege upon taking the stand. See §§ 3-5.7(c) and 4-7.6(c) of the ABA Standards Relating To Criminal Justice relating to the duty of counsel where a witness is expected to claim a valid privilege not to testify.

In State v. Heft, 185 Wis.2d 289, 517 N.W.2d 494 (1994), the defendant argued that her rights to due process and equal protection were denied by the trial court's application of § 905.13. The trial court had denied the defendant's request to require a witness to claim the privilege against self-incrimination in the presence of the jury. The Wisconsin Supreme Court affirmed the decision of the court of appeals[4] that the right to present a defense was not significantly infringed; Heft was allowed to present a complete defense by introducing other evidence that the witness' driving, not Heft's, was the cause of the accident. The court also held that the fact that § 905.13 applies to criminal but not to civil cases does not deny equal protection of the law to criminal defendants. There are reasonable bases for the distinction which are rationally related to legitimate state

interests: the consequences of a criminal conviction are much more severe; the need for mutuality in light of the inability to comment on the defendant's decision not to testify; and the concern for collusion.[5]

If the privilege is unexpectedly invoked before the jury, an inquiry should be conducted outside the jury's presence. (See below.) A cautionary instruction should be given if requested but only if requested. See § 905.13(3) and Wis JI-Criminal 317.[6]

B. How the privilege is invoked

No particular statement is required to invoke the privilege. A literally correct invocation would be that the witness "declines to answer on the ground that the answer might tend to incriminate the witness." But no precise formula is required:

> [i]t is agreed by all that a claim of privilege does not require any special combination of words. . . .
>
> [T]he fact that a witness expresses his intention in vague form is immaterial so long as the claim is sufficiently definite to apprise the [court] of his intention. As everyone agrees, no ritualistic formula is necessary.

Quinn v. United States, 349 U.S. 155, 162 (1955), cited in State v. Worgull, 128 Wis.2d 1, 13, 381 N.W.2d 547 (1986).

A claim of privilege as to one question does not necessarily carry over to other questions, especially where they are directed toward a different area. See State v. Hall, 65 Wis.2d 18, 28-30, 221 N.W.2d 806 (1974).

III. Court Inquiry When the Privilege is Invoked

When the privilege is invoked, the court must conduct an inquiry to determine whether the claim of privilege is valid.[7] The privilege is personal to the witness; it applies only to "testimonial" evidence; and it extends to responses that might tend to "incriminate" the witness.

A. The privilege is personal to the witness

1. The witness cannot refuse to answer on the ground that the answer might incriminate another person.[8]

2. Corporations cannot invoke the privilege.[9]

B. The privilege applies only to "testimonial" evidence

1. "Testimonial" defined

> The distinction which has emerged . . . is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not.

Schmerber v. United States, 384 U.S. 757, 764 (1966); cited in State v. Driver, 59 Wis.2d 35, 40, 207 N.W.2d 850 (1973).

2. The privilege does not apply to physical evidence

The privilege does not extend to physical evidence, even if the witness is required to be the source of that evidence or to participate in the obtaining or displaying of the evidence. For example, the following practices do not implicate the privilege:

a. fingerprinting[10]

b. participating in a lineup[11]

c. providing a voice sample or speaking certain words[12]

d. trying on a shirt[13]

e. taking blood samples[14]

C. The evidence must "tend to incriminate" the witness

In State ex rel. Rizzo v. County Court, 32 Wis.2d 642,146 N.W.2d 499 (1966), the Wisconsin Supreme Court approved the following definition of incriminating evidence:

> A matter is incriminating or tends to incriminate whenever, in the probable operation of law or the ordinary happening of events, there would be reasonable grounds to apprehend dangers to the witness from his being compelled to answer questions about which he has a particular personal knowledge. Maloney, A Code of Evidence for Wisconsin – Self-Incrimination, 1946 Wis. L. Rev. 147, 155.

The United States Supreme Court in Kastigar v. United States, 406 U.S. 441, 445 (1972), stated that the Fifth Amendment privilege ". . . 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."

The privilege may be validly claimed even after the witness has pleaded guilty. Since sentencing remains, testimony could result in "injurious disclosure." State v. Seibert, 141 Wis.2d 753, 416 N.W.2d 900 (Ct. App. 1987). After conviction, the privilege survives through postconviction attack and appeal. State v. Anastas, 107 Wis.2d 270, 320 N.W.2d 15 (Ct. App. 1982).[15]

D. Determining the validity of the claim without requiring self-incrimination

While an inquiry must be made into the validity of the claim, a valid claim could be compromised if the inquiry is too detailed or extensive. That is, witnesses should not be required to incriminate themselves in the process of establishing the validity of their claim. For this reason, courts have been urged to extend substantial deference to the claim.

There is apparently no authority in Wisconsin for conducting an in camera inquiry into the validity of the claim of privilege and then sealing the record. However, adopting such a procedure ought to lie within the inherent powers of the trial court. A model is offered by the procedure set forth in § 905.10, which sets forth an in camera procedure for determining whether a confidential informant's identity must be disclosed. (See SM-52, Disclosure of the Identity of an Informer.)

E. The court should make a finding

1. The following is suggested as a finding:

"The court finds that the (evidence) (answer) demanded of the witness (might tend to incriminate) (could not incriminate) him because, in the probable operation of the law or the ordinary happening of events there (are) (are not) reasonable grounds to apprehend dangers to the witness."[16]

F. Further action if the claim of privilege is not valid

1. Order the witness to testify

The following is suggested as a statement for the trial court to make to the witness:

"The court has concluded that the [question(s)] [request(s) for evidence] directed to you do not violate your privilege against self-incrimination. Therefore, you are ordered to (answer the question(s)) (produce the evidence demanded)."

2. If the witness continues to refuse continue with the following:

"If you do not now produce the evidence requested, you may be summarily confined until such time as you are willing to do so, or until this (trial) (grand jury term) (John Doe investigation) is completed, but in no case exceeding one year. You may not be released on bail pending an appeal concerning such confinement."

If the witness now refuses to comply with the order, the court may order the witness' summary confinement as provided by Wis. Stat. § 972.08(2).[17]

G. Further action if the claim of privilege is valid

1. excuse the witness

2. strike previous testimony[18]

3. give cautionary instructions[19]

4. order the witness to testify, resulting in a grant of immunity (see Section IV., below)

IV. Grants of Immunity

A. Requirements

A witness is granted immunity when all of the following occur:

1. there is a valid claim of the privilege against self-incrimination
2. the prosecutor moves to compel the testimony
3. the court orders the witness to testify
4. the witness complies with the order

It is within the court's discretion to grant or to deny the prosecutor's motion to compel testimony. If the court grants the motion and orders the witness to answer or to produce evidence, and if the witness complies with such order, the witness is automatically invested with immunity under Wis. Stat. § 972.08.

B. Testimony after the order

1. Immunity is "automatic"

Strictly speaking, there need be no motion for a grant of immunity and, accordingly, no order granting immunity. Rather, immunity is the automatic result of testimony following an order to testify after a valid claim of the privilege against self-incrimination. The operative language is found in § 972.08(1)(a):

> Whenever any person refuses to testify or produce books, papers or documents when required to do so before any grand jury, in a proceeding under § 968.26 or

> at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

2. Immunity is "use" immunity

The 1989-90 legislature changed immunity in Wisconsin from the broader "transactional" immunity to the narrower "use," or "use and fruits" immunity.[20] Section 972.08(1)(b) provides that all immunity is "subject to the restrictions under § 972.085," which reads as follows:

> Immunity from criminal or forfeiture prosecution under §§ 13.35, 17.16(7), 77.61(12), 93.17, 111.07(2)(b), 128.16, 133.15, 139.20, 139.39(5), 195.048, 196.48, 551.56(3), 553.55(3), 601.62(5), 767.47(4), 767.65(21), 776.23, 885.15, 885.24, 885.25(2), 891.39(2), 968.26, 972.08(1) and 979.07(1), provides immunity only from the use of the compelled testimony or evidence in subsequent criminal or forfeiture proceedings, as well as immunity from the use of evidence derived from that compelled testimony or evidence.

Thus, the statute provides "immunity only from the use of the compelled testimony or evidence . . . as well as immunity from the use of evidence derived from that compelled testimony or evidence." Whether evidence sought to be used in a later prosecution is protected by the immunity statute is obviously of concern only in the later prosecution. Immunity extends to subsequent criminal or forfeiture proceedings. It does not extend to protect from prosecution or punishment for perjury or false swearing

committed in the course of testifying. See Wis JI-Criminal 246 for a suggested instruction on the testimony of a witness who has received immunity.[21]

3. Bargained-for immunity: Nonprosecution agreements

As described above, immunity results from ordering a person to testify after a valid claim of privilege. The order can only follow a motion by the prosecutor. In many cases, there may be agreements with the witness, whereby concessions, including immunity, are granted in exchange for the witness' testimony. The legal effect of statutory immunity is limited to "use" immunity. Given that the broader "transactional" immunity is more attractive to the witness, what is the effect of a prosecutor's promise to, in effect, grant transactional immunity to a witness in exchange for testimony?

The Wisconsin Court of Appeals dealt with a so-called nonprosecution agreement in State v. Lukensmeyer, 140 Wis.2d 92, 409 N.W.2d 395 (Ct. App. 1987). The agreement, reduced to writing, granted Lukensmeyer "immunity" in return for truthful testimony in a murder prosecution. The court found that Lukensmeyer had breached the agreement and could be prosecuted. But the court noted that his challenge to the nonprosecution agreement was a question of first impression in Wisconsin: "Because neither party raised it, we do not reach the question of the agreement's fundamental validity. We assume, but do not decide, that a prosecutor may lawfully enter an agreement not to prosecute in return for cooperation in a criminal investigation." 140 Wis.2d 92, 102.

The question may be more important now that statutory immunity is only of the "use" variety. One could argue that the prosecutor should not be able to grant broader immunity than the statutes allow. As a practical matter, of course, prosecutors may exercise their discretion not to prosecute virtually without review. And in the process of plea negotiations charges are routinely dropped, which could be characterized as immunity on those dropped charges. Lukensmeyer appears to have it right: all agreements by the prosecutor, whether designated as "immunity" or not, need to be reviewed under the general rules relating to the fulfillment and breach of plea agreements.[22]

V. Immunity for Defense Witnesses

Immunity may be granted only upon the motion of the prosecutor. The court cannot grant immunity sua sponte; the defendant does not have the right to compel the state to request immunity for a defense witness. Hebel v. State, 60 Wis.2d 325, 210 N.W.2d 695 (1973); Sanders v. State, 69 Wis.2d 242, 230 N.W.2d 845 (1975); Peters v. State, 70 Wis.2d 22, 233 N.W.2d 420 (1975).

While the defendant has no reciprocal right to immunity grants for defense witnesses, the rule is tempered by two considerations. First, the Wisconsin Supreme Court has noted that the prosecutor's duty is "'to seek justice, not merely to convict.' When the prosecutor is considering whether or not to make a motion for immunity, he should bear in mind this predominant objective of impartial justice, and not merely whether the

evidence will be favorable to the prosecution. He should not hesitate to move for immunity solely on the basis that the testimony thus elicited might exonerate the defendant." Peters, supra, 70 Wis.2d 22, 41. Second, developments in other contexts suggest that a prosecutor's refusal to request immunity for a defense witness based solely on tactical considerations may violate due process. See McMorris v. Israel, 643 F.2d 458 (7th Cir. 1981), where, under Wisconsin's since-abandoned polygraph stipulation rule, it was held that a prosecutor must have valid, nontactical reasons for refusing to enter into a stipulation.

The law on this topic was reviewed in State v. Evers, 163 Wis.2d 725, 472 N.W.2d 828 (Ct. App. 1991). Peters and Sanders, supra, were reviewed and a standard was adopted to identify the showing a defendant must make to obtain judicial review of a prosecutor's immunization decision: "To demonstrate an abuse of prosecutorial discretion, a defendant must make a substantial evidentiary showing that the government intended to distort the judicial fact-finding process. See Stuart v. Gagnon, 614 F.Supp. 247 (E.D. Wis. 1985)." 163 Wis.2d 725, 737.

COMMENT

SM-55 was originally published in 1974. This revision was approved by the Committee in October 1994.

1. The privilege is found in the 5th Amendment to the United States Constitution and in Article 1, § 8. The latter differs in one respect from the former; it refers to being compelled to be "a witness against himself or herself." (Emphasis added.)

2. The immunity statutes are listed in § 972.085.

3. See, for example, State v. Hall, 65 Wis.2d 18, 27, 221 N.W.2d 806 (1974); State v. Aliota, 64 Wis.2d 354, 361, 219 N.W.2d 585 (1974).

4. 178 Wis.2d 823, 505 N.W.2d 437 (Ct. App. 1993).

5. 185 Wis.2d 289, 302, 517 N.W.2d 494 (1994).

6. Wis JI-Criminal 317 reads as follows:

> 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.

7. "The trial court has a clear responsibility to make a full record that the witness' fear of incrimination is valid, real and appreciable, and not speculative or merely an imaginary possibility of incriminatory danger." State v. Harris, 92 Wis.2d 836, 844-45, 285 N.W.2d 917 (Ct. App. 1979). Also see State v. McConnohie, 121 Wis.2d 57, 68-71, 358 N.W.2d 256 (1984).

8. Hale v. Henkel, 201 U.S. 43 (1970).

9. Braswell v. United States, 487 U.S. 99 (1988).

10. United States v. Peters, 687 F.2d 1295 (10th Cir. 1982).

11. United States v. Wade, 388 U.S. 218 (1967).

12. United States v. Dionisio, 410 U.S. 1 (1973).

13. Holt v. United States, 218 U.S. 245 (1910).

14. Schmerber v. United States, 384 U.S. 757 (1966).

15. Also see State v. McConnohie, 121 Wis.2d 57, 358 N.W.2d 256 (1984). State v. Harris, 92 Wis.2d 836, 285 N.W.2d 917 (Ct. App. 1979).

16. This suggested finding is based on the quotation from State ex rel. Rizzo v. County Court, found at page 5 of this Special Material.

17. But see State v. Gonzalaz, 172 Wis.2d 576, 493 N.W.2d 410 (Ct. App. 1992), holding that the summary contempt power of § 978.08(2) is not applicable to a pretrial motion hearing.

18. State v. Robinson, 145 Wis.2d 273, 426 N.W.2d 606 (Ct. App. 1988); Robinson v. State, 100 Wis.2d 152, 301 N.W.2d 429 (1981); State v. Koller, 87 Wis.2d 253, 274 N.W.2d 651 (1977); Ryan v. State, 95 Wis.2d 83, 289 N.W.2d 349 (Ct. App. 1980).

19. See Wis JI-Criminal 317, note 6, supra.

20. "Transactional immunity is essentially a promise not to prosecute the immunized witness for the transaction about which he testifies. In contrast, use . . . immunity . . . preserves the possibility of prosecution of the witness, provided that the government can prove that it did not use the witness's testimony in . . . proving his guilt at trial." BNA Criminal Practice Manual, Immunity, 111:2402-03.

21. Wis JI-Criminal 246 reads as follows:

> You have heard the testimony of (name of witness) who has received immunity. This means that (name of witness') testimony and evidence derived from that testimony cannot be used in a later criminal prosecution of (name of witness) .
>
> This witness, like any other witness, may be prosecuted for testifying falsely.
>
> You should consider whether receiving immunity affected the testimony and give the testimony the weight you feel it deserves.

22. "Informal" immunity and other plea concessions should be brought to jury's attention. See the Comment to Wis JI-Criminal 245 and 246.

