9.4 SELF-INCRIMINATION

A person has a constitutional right not to disclose material that may be incriminating.[1] The privilege against self-incrimination also applies to administrative proceedings.[2] For the privilege to be applicable in an administrative or civil proceeding, the testimony sought must enhance the threat of criminal prosecution to such an extent that reasonable grounds exist to apprehend its danger.[3]

When discovery is resisted on the ground of self-incrimination, the position of a party or a witness who voluntarily testifies or participates may be distinguished from a person testifying under compulsion. The rule that one who testifies in his own behalf thereby foregoes the right to invoke the privilege against self-incrimination regarding matters made relevant by direct examination is controlling when a party refuses to comply with pretrial discovery requirements on the grounds of self-incrimination.[4]

In *Christenson v. Christenson*,[5] the Minnesota Supreme Court held that a plaintiff who, on the ground of privilege against self-incrimination, refused to answer questions in depositions and refused to answer the defendants' requests for admissions, was required to either waive her privilege against self-incrimination or have her civil action dismissed. With respect to a plaintiff who asserts the privilege against self-incrimination, the Minnesota Supreme Court stated:

> The interdiction of this constitutional safeguard in civil cases must be balanced against the purposes and policies supporting the discovery rules. Minn. R. Civ. P. 26.02 provides that parties may only obtain discovery regarding matters not constitutionally privileged, but Rules 26.02 is not intended to allow the exploitation of the Fifth Amendment to unfairly prejudice an adversary in a civil case. This court will not permit a plaintiff to use the judicial forum to make allegations only to later insulate himself by invoking the Fifth Amendment as a shield from cross-examination. . . . As we have previously stated: ". . . a person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened."[6]

The Minnesota Supreme Court recognizes that different considerations may apply to defendants:

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1 U.S. CONST. amend. V; MINN. CONST. art. 1, §7.

2 Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976); Unifd. Sanitation Men Ass'n v. Sanitation Comm'r, 392 U.S. 280, 284-85 (1968); Spevak v. Klein, 385 U.S. 511, 516-17 (1967); *see* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-56 (1964); State v. Gensmer, 235 Minn. 72, 77, 51 N.W.2d 680, 684 (1952).

3 Hoffman v. United States, 341 U.S. 479, 486-87 (1951); Parker v. Hennepin Cnty. Dist. Court, 285 N.W.2d 81, 83 (Minn. 1979).

4 *Parker*, 285 N.W.2d at 83; Christenson v. Christenson, 281 Minn. 507, 519, 162 N.W.2d 194, 201 (1968); *In re* J.W.'s Welfare, 374 N.W.2d 307, 310 (Minn. Ct. App. 1985), *rev'd on other grounds,* 391 N.W.2d 791 (Minn. 1986).

5 281 Minn. at 524, 162 N.W.2d at 204.

6 *Parker*, 285 N.W.2d at 83 (citations omitted).

> Invocation of the Fifth Amendment by a civil defendant, however, requires a more subtle response because of the involuntary nature of a defendant's participation in a lawsuit, and the appearance of compulsion. Nevertheless, courts have been able to safeguard the constitutional foundation of the privilege "without permitting the civil defendant to gain an unfair advantage especially since, in private civil litigation, the plaintiff's only source of evidence is frequently the defendant himself, and since the type of case where the privilege is most frequently asserted . . . involve[s] intentional and often malicious conduct." Thus, in some situations where a civil defendant has refused to answer on Fifth Amendment grounds, courts have struck his pleadings, counterclaims or affirmative defenses, entered judgment against him, or compelled him to repeat his refusal to answer to read his deposition in front of the jury. Such sanctions do not punish a defendant for his assertion of the privilege, but for his failure to answer as he typically would have under normal circumstances.[7]

In *Parker v. Hennepin County District Court,*[8] the defendants asserted a Fifth Amendment privilege as a justification for refusal to answer certain discovery requests. The Minnesota Supreme Court permitted the imposition of sanctions on the defendants by treating the questions as admitted when the defendants refused to answer based on a valid assertion of the Fifth Amendment privilege.

Although the language of the court in *Parker* regarding the imposition of sanctions on defendants for failure to make discovery on grounds of self-incrimination is broad, it is properly understood in the context of proceedings between private litigants. When the government is a party and seeks to deprive one of a right, a defendant cannot constitutionally be subject to unlimited sanction for a valid assertion of the Fifth Amendment privilege.[9] In *C.I.R. v. Fort*,[10] the Minnesota Supreme Court rejected the Commissioner of Revenue's attempt to use a taxpayer's assertion of the self-incrimination privilege as a decisive factor in concluding the taxpayer constructively possessed cocaine. The court held that such adverse use of the taxpayer's self-incrimination objection would penalize the taxpayer for exercising her constitutional rights.[11]

Similarly, public employees may not be dismissed from employment for asserting the privilege against self-incrimination.[12] Public employees may, however, be required to

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7 *Id.* (citations omitted); *see In re J.W.'s Welfare*, 374 N.W.2d at 310 (applying *Parker* to the imposition of discovery sanctions); *see also* Stubblefield v. Gruenberg, 426 N.W.2d 912, 915 (Minn. Ct. App. 1988) (finding civil defendant's privilege against self-incrimination not violated by striking affirmative defense of fraud, even if due to maker's invocation of Fifth Amendment rights).

8 285 N.W.2d at 81.

9 Spevak v. Klein, 385 U.S. 511, 518-19 (1967) (finding Attorney could not be disbarred for asserting a Fifth Amendment privilege in a disciplinary hearing); *In re* Welfare of J.W., 415 N.W.2d 879, 883 (Minn. 1987) (finding waiver of claim of self-incrimination may not be condition of avoiding proceedings for termination of parental rights).

10 479 N.W.2d 43 (Minn. 1992).

11 *Id*. at 48.

12 Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977); Unifd. Sanitation Men Ass'n v. Sanitation Comm'r, 392 U.S. 280, 283-84 (1968); Spevak v. Klein, 385 U.S. 511, 517-18 (1967); Gardner v. Broderick, 392 U.S. 273, 279 (1968); *In re* Kelvie, 384 N.W.2d 901, 905 (Minn. Ct. App. 1986).

answer even potentially incriminating questions "if they have not been required to surrender their constitutional immunity."[13] Refusal to answer questions narrowly related to job performance where there has been no requested surrender of protected rights is a ground for dismissal.[14] Individuals may not be disqualified from participating in public contracts if they refuse to waive prospectively their Fifth Amendment rights regarding their performance under the contracts.[15]

A witness can only be compelled to testify or produce documents over a valid assertion of a Fifth Amendment privilege if the witness is granted immunity from subsequent use against him or her of both the information provided and any fruits of that information, the so-called use and derivative use immunity.[16] Certain statutes grant blanket immunity against subsequent prosecution for the provision of information that may tend to incriminate the person providing the information. For example, in a proceeding before the public utilities commission regarding electric and natural gas rates, the ability to prosecute, punish, or penalize a person required to produce information is removed except for a subsequent prosecution for perjury.[17]

The privilege against self-incrimination operates differently within a corporate setting. A corporation, partnership, or other business entity cannot claim the privilege against self-incrimination.[18] This is true even when the business entity is merely an alter ego of the owner.[19] A corporate agent may invoke the personal privilege with respect to depositions or interrogatories, but in that case, the corporation must appoint one who can respond without self-incrimination.[20]

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13 *Lefkowitz*, 431 U.S. at 806 (citing *Gardner*, 392 U.S. at 278-79).

14 *Id*. For a thorough discussion of the case law applicable to assertions of Fifth Amendment rights by public employees, see Gulden v. McCorkle, 680 F.2d 1070 (5th Cir. 1982) and *In re Kelvie*, 384 N.W.2d at 905.

15 Lefkowitz v. Turley, 414 U.S. 70, 77-78 (1973).

16 Minn. State Bar Ass'n v. Divorce Assistance Ass'n, 311 Minn. 279, 291, 248 N.W.2d 733, 738 (1976). There must, however, be specific authority to grant such immunity. *In re Kelvie*, 384 N.W.2d at 905.

17 MINN. STAT. § 216B.31 (2014).

18 Bellis v. United States, 417 U.S. 85, 88 (1974); Kohn v. State, 336 N.W.2d 292, 298 (Minn. 1983); State v. Alexander, 281 N.W.2d 349, 353 (Minn. 1979).

19 Hair Indus. Ltd. v. United States, 340 F.2d 510, 511 (2d Cir. 1964); *Kohn*, 336 N.W.2d at 298.

20 United States v. Kordel, 397 U.S. 1, 8 (1970); *Kohn*, 336 N.W.2d at 298-99.