SUPREME COURT OF PENNSYLVANIA
COMMITTEE ON RULES OF EVIDENCE

REPORT

Proposed Amendment of the Comment to Pa.R.E. 104

The Committee on Rules of Evidence is considering proposing the amendment of the Comment to Pennsylvania Rule of Evidence 104 to suggest procedural guidance for determining claims involving the right against testimonial self-incrimination. The Pennsylvania Rules of Evidence and the various bodies of procedural rules are silent on the topic. The Pennsylvania case law provides little guidance with the practice of addressing these claims:

> [T]here is no formula for determining when and how the Fifth Amendment privilege can be asserted (nor do we think one should be created). *Commonwealth v. Kirwan,* 847 A.2d 61, 65 (Pa. Super. 2004). We are confident that trial courts can draw on their wealth of experience and fashion procedures appropriate to the practicalities of the case and that will allow the judge to make a sufficiently informed decision. We are likewise confident that lower courts will create a record sufficient to demonstrate the propriety of permitting or denying the privilege at the same time as preserving any Fifth Amendment right.

Commonwealth v. Treat, 848 A.2d 147, 148 (Pa. Super. 2004) (internal quotations omitted).

The timing of these claims can be particularly problematic in proceedings where pre-trial discovery is limited, including criminal, juvenile, and custody proceedings. In the absence of thorough pre-trial discovery, proponents and opponents of testimony can be surprised at trial with assertions of privilege. As indicated to the Committee, these claims are "trial stoppers," and the need for the trial judge to resolve expeditiously the claims is hindered by the lack of procedural guidance.

To address this need, the Committee has prepared a Comment to Pa.R.E. 104 suggesting a procedure for resolving these claims. The Committee elected to place this procedure in a Comment intending for it to be suggestive rather than placement in the rule text as a requirement.

As background, the basis for a right against self-incrimination can be found in constitution and statute. *See* U.S. Const. amend. V; Pa. Const. art 1, § 9; 42 Pa.C. § 5941. In terms of evidence, this right has been described as a "privilege." *See, e.g.*, 42

Pa.C.S. § 5947(b)(2) ("privilege against self-incrimination"); *Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995) (same). The assertion of privilege raises a preliminary question under Pa.R.E. 104(a). As Pennsylvania precedent has not firmly established a process to analyze these claims, the Committee focused largely on federal practice.

A witness may refuse to testify unless it is "*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer *cannot possibly* have such tendency" to incriminate. *Hoffman v. U.S*, 341 U.S. 479, 488 (1951) (emphasis in original); *see also Commonwealth v. Allen*, 462 A.2d 624, 627 (Pa. 1983). "The privilege afforded not only extends to answers that would in themselves support a conviction ... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute." *Ullmann v. U.S*., 350 U.S. 422, 429 (1956); s*ee also Commonwealth v. Carrera*, 227 A.2d 627, 629 (Pa. 1967), *superseded by statute on other grounds, Commonwealth v. Swinehart,* 664 A.2d 957 (Pa. 1995). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti v. U.S.*, 390 U.S. 39, 53 (1968).

When a question requires an incriminating response, such as "did you bribe John Doe?," the judicial determination can be made without further inquiry. However, when a facially innocent inquiry, such as "do you know John Doe?," may result in an incriminatory "link in the chain of evidence," then the judge may require more information than presently before the court. *See generally* 1 McCormick on Evidence § 132 (7th ed.); 98 C.J.S. Witnesses § 613. A judge's inquiry will be directed at potentially sensitive information, which assuming the privilege applies, the parties are not entitled to hear.

A witness asserting a privilege against self-incrimination should be appointed counsel if not already represented. The Committee believed it was important that an unrepresented claimant be appointed counsel to explain the privilege being asserted and whether the claim has merit. *See* 42 Pa.C.S. § 4549(c) (Investigating Grand Jury Act providing counsel for witnesses to guard against self-incrimination); *Commonwealth v. Schultz*, 133 A.3d 294, 309 (Pa. Super. 2016) ("In affording the right to counsel inside the grand jury room, our legislature sought to offer greater protections to individuals' constitutional right against self-incrimination when appearing in the grand jury setting.").

The federal courts have approved the use of an *in camera* inquiry when a claim of privilege is made and the information available to the judge does not, in the judge's estimation, afford adequate verification of the witness's assertion of the privilege. *See United States v. Goodwin*, 625 F.2d 693, 702 (5th Cir. 1980)*; In re Brogna,* 589 F.2d 24, 28 & n. 5 (1st Cir. 1978); *see also Commonwealth v. Martin*, 668 N.E.2d 825 (Mass. 1996). In these circumstances, a judge has the authority to conduct an *in camera* review with a witness who has asserted his privilege.

The questioning party should provide the judge with the questions to be asked of the witness. The permissible scope of inquiry open to a judge is narrow. "A proper use for an *in camera* hearing is to allow a witness to impart sufficient facts in confidence to the judge to verify the privilege claim ... the judge is simply providing the most favorable setting possible for the witness to 'open the door a crack' where there is no other way for the witness to verify his claim." *In re Brogna, supra* at 28 n. 5.

The Committee deliberated at length whether the witness should be required to testify as to the facts that may be potentially incriminating. Members did not believe that requiring a witness to provide potentially incriminating testimony was consonant with the purpose of the privilege. Rather, the information should be presented to the judge by the witness's counsel in the form of an offer of proof, *i.e*., proffer.

The *in camera* review is limited to the witness, his or her counsel, and the judge. *See United States v. Fricke,* 684 F.2d 1126, 1131 (5th Cir. 1982). The exclusion of parties' counsel at this stage is a point for consideration:

> Subjecting a witness to an examination by a partisan party might effectively destroy the privilege. Nevertheless, we do not hold that it is always proper to exclude defense counsel from these *in camera* hearings. Even if his participation is primarily passive, counsel's presence can be important in preserving, or preventing, an error by the court. However, a reciprocity problem is present. The value of an in camera inquiry is that it allows the court to probe the witness' fifth amendment claim more deeply than it could in open court. A witness' rights are threatened if this is done in the presence of the government's attorney. Yet, if the court allows defense counsel to remain present, fairness suggests that the government's interest be represented as well.

Fricke, 684 F.2d at 1131. In the criminal context, "[a] defendant's sixth amendment rights do not override the fifth amendment rights of others." *Id.* at 1130.

In *Commonwealth v. Miller*, 518 A.2d 1187 (Pa. 1986), the Court considered the propriety of an *in camera* examination of the police officer to test the credibility of statements contained in an affidavit of probable cause. The Superior Court directed that the defendant and defendant's counsel should be excluded from the examination. The Supreme Court rejected this approach, stating:

> The concept of an *in-camera* hearing during which the defendant and his counsel are both excluded from an inquiry which may impact upon the ultimate finding of guilt or innocence is antithetical to the concept of due process as it has evolved in this Commonwealth under our Constitution. The defendant should not be forced to accept the judge as his advocate

> during that segment of the proceeding, nor is it proper to remove the judge from the role of an impartial arbiter. Our adjudicative process is an adversary one and the defendant is entitled to counsel at every critical stage. If this was a competent area of inquiry the defendant would have an absolute right to have counsel's participation in that inquiry.

Id. at 1195. While *Miller* did not involve the right to remain silent, it does signal an approach favoring the presence of the parties.

To address this concern, the Committee proposes procedural guidance whereby the witness's counsel makes a further proffer on the record before the parties at which time the judge can receive argument from the parties and make a determination whether the testimony is at risk of self-incrimination. Thereafter, further proceedings become a procedural matter outside the purview of Pa.R.E. 104.

All comments, concerns, and suggestions concerning this proposal are welcome.