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WHAT YOU DON'T SAY CAN BE USED AGAINST YOU

Assessing the Fifth Amendment's Role in Qui Tam Litigation

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In 1987, current Florida governor Rick Scott used his life savings to start Columbia Hospital with the idealistic goal of cutting healthcare costs and improving patient care. A few years later, Columbia merged with the Tennessee-based hospital chain, Hospital Corporation of America ("HCA"), and quickly became one of the largest publicly traded hospitals in the country, boasting a network of over 340 hospitals and more than $20 billion in revenue. The future looked bright for Scott's little hospital start-up.

It was until 1997, when former employees of Columbia/HCA filed nine separate *qui tam* lawsuits against Columbia/HCA pursuant to the False Claims Act ("FCA" or the "Act"). The suits were based on the hospital's fraudulent Medicare and Medicaid claim practices, which, according to the *qui tam* relators, included billing Medicare and Medicaid for unnecessary lab tests, creating false diagnoses to claim higher reimbursements, and providing doctors lucrative incentives to bring in patients.[1]

As a result, many of Columbia/HCA's top-level executives faced scrutiny. Specifically, the executives of Indian Path Hospital ("IPH"), a former subsidiary of Columbia/HCA in Kingsport, Tennessee, were investigated for their scheme to inflate the hospital's Medicare reimbursements. Two of the executives, Matney and Bauer, were terminated after investigations revealed they likely altered the hospital's records to receive higher Medicare reimbursements. After his termination, Mr. Matney was deposed in the *qui tam* suit brought against HCA/Columbia for IPH's practices.[2] Mr. Matney pled the Fifth in response to all substantive questions.

The Self-Incrimination Clause of the Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."[3] The Supreme Court explained that the Fifth Amendment privilege against self-incrimination "protects a person only against being incriminated by his own compelled testimonial communications."[4] In certain circumstances, courts permit a jury to draw an adverse inference against the defendant if the witness invokes the Fifth Amendment. A witness facing criminal, or possible criminal, charges who invokes the Fifth Amendment in related civil proceedings raises interesting issues about when an adverse inference may be drawn and against whom.

With relation to the health care industry, *qui tam* actions brought pursuant to the False Claims Act have been an invaluable tool in policing Medicare and Medicaid fraud by preventing healthcare organizations and their practitioners from illegally obtaining excessive government funds at the expense of taxpayers. The investigations often attending these FCA *qui tam* suits raise interesting issues regarding the ability of those accused of submitting false Medicare or Medicaid claims to assert their Fifth Amendment right against self-incrimination and the civil repercussions of asserting that constitutional right. This article addresses some of those issues.

A. Permitting an Adverse Inference from the Invocation of the Fifth Amendment by a Non-Party Witness.

A witness's invocation of the Fifth Amendment privilege may disadvantage an opposing party in civil litigation. Thus, the Supreme Court has held that the invocation of the "Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[5] In other words, while a "trial court should strive to accommodate another party's Fifth Amendment interest, it must also ensure that the opposing party is not unduly disadvantaged."[6] In these circumstances, when a witness invokes the Fifth Amendment privilege, the fact finder may be permitted to infer from the invocation that the witness's testimony would have been unfavorable.[7]

Courts have broad discretion to permit a jury to draw an adverse inference against a party in a civil trial based on that party's invocation of the Fifth Amendment or against a party based on a non-party witness's invocation of the Fifth Amendment if there is a sufficiently close relationship between the party and the non-party witness.[8]

The seminal case on whether an adverse inference can be drawn from a party's invocation of the Fifth Amendment privilege in civil proceedings is the Supreme Court case of *Baxter v. Palmigiano.*[9] Interpreting *Baxter*, lower courts uniformly hold that an adverse inference can only be drawn when independent evidence exists concerning the fact that the party refuses to answer.[10] An adverse inference may be drawn when silence is countered by independent evidence of the fact being questioned; however, that inference cannot be drawn when, for example, silence is the only answer to the allegation contained in the complaint.[11] In such instances, when there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation; otherwise, no negative inference will be permitted.[12]

The rationale for allowing an adverse inference against a party-witness who invokes the Fifth is based upon the premise that parties to a civil proceeding are on "somewhat equal footing," and "one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding."[13] However, the witness invoking the Fifth Amendment does not have to be a

party to the civil suit in order for the Court to permit an adverse inference against a party from that invocation.

The issue arises quite frequently when employees or former employees of a healthcare organization, or any other corporation facing allegations brought pursuant to the False Claims Act, are deposed in connection with the proceedings against their corporate employer. Courts addressing the issue have concluded that an adverse inference may be properly drawn from a non-party employee's invocation of his Fifth Amendment right against self-incrimination where there is independent, corroborating evidence supporting the imposition of the negative inference.[14]

Invocation of the Fifth Amendment may not be used, however, as a means for the corporation to avoid liability. While a corporation's 30(b)(6) representative has the right to invoke his Fifth Amendment privilege against self-incrimination in his *personal* capacity, the courts have determined the invocation does not extend to the corporation, which does not have a right against self-incrimination under the Fifth Amendment.[15] To allow such invocation would permit corporations to exert rights not available to business entities and sidestep Supreme Court precedent. Accordingly, a corporation can be "compelled to answer […] questions through an agent who will not invoke the privilege. This includes, if necessary, retaining a person not previously associated with the corporation so that that person can answer the questions."[16] Furthermore, as with other situations in which a non-party witness invokes his or her Fifth Amendment privilege, where corroborating evidence exists, an adverse inference can be drawn against the corporate party for its representative's personal invocation of his right against self-incrimination.[17]

A non-party's invocation of the privilege against self-incrimination in a civil proceeding implicates Fifth Amendment concerns *to an even lesser degree* than a party's invocation of the privilege.[18] "Case law provides sound analytical principles for determining when a fact-finder may be permitted to draw an adverse inference against a party based on a non-party witness's decision to invoke his or her Fifth Amendment privilege."[19] Most federal courts to address the issue have adopted the test established by the Second Circuit which employs "four 'non-exclusive factors' to be used when considering whether it is permissible to permit a fact-finder to consider an adverse inference [against a party] arising from a non-party's invocation of his Fifth Amendment privilege."[20]

Those four factors include:

> 1. ***The Nature of the Relevant Relationships***: While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer the

> bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.
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> 2. ***The Degree of Control of the Party Over the Non–Party Witness:*** The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed.R.Evid. 801(d)(2), and may accordingly be viewed ... as a vicarious admission.
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> 3. ***The Compatibility of the Interests of the Party and Non–Party Witness in the Outcome of the Litigation:*** The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.
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> 4. ***The Role of the Non–Party Witness in the Litigation:*** Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.[21]

Applying these factors to Mr. Matney's invocation of the Fifth Amendment during a deposition in the *qui tam* suit regarding the scenario discussed above, the District Court for the District of Columbia determined in *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.* that no adverse inference should be drawn against Columbia/HCA.[22] Specifically, the Court concluded:

> Matney's relationship to HCA, particularly at the time he pled the Fifth when he was not a Columbia employee and Columbia exercised no control over him, does not render the inference trustworthy when used against HCA. In addition, the litigation interests of Matney and the Columbia defendants are frequently divergent and sometimes directly at odds.[23]

Instead, "where [a] witness invoking the privilege is a former employee of the civil defendant, and where the questions that the witness refuses to answer concern the witness's activities undertaken on behalf of the employer and during the period of employment, [then] it is proper to allow the jury to impute the witness's guilt to the defendant."[24] However, where (in Mr. Matney's case), there does not exist a relationship sufficient to render the inference trustworthy, the court may decline to impose an inference against the defendant based on a non-party witness's invocation of the Fifth Amendment. The inquiry is fact-intensive and will

depend upon the circumstances surrounding the parties' relationship and interests at the time the right is asserted.[25]

B. Party and Non-Party Witness Deposition Testimony May Be Admissible Under the Former Testimony Exception to the Hearsay Rule.

A witness's deposition testimony is admissible in lieu of his live witness testimony pursuant to Federal Rule of Evidence 804, which permits the use of former testimony when a witness is unavailable to testify at trial. If a witness will invoke his Fifth Amendment privilege against self-incrimination and refuse to testify at trial, he is considered "unavailable" under FRE 804 and his previous deposition testimony is admissible.

1. "Unavailable" Under FRE 804.

FRE 804 addresses when a witness is considered "unavailable" for purposes of the Rule. FRE 804 states:

> Unavailability as a witness includes situations in which the declarant . . . (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statements.[26]

The Supreme Court recognized that a proper assertion of the Fifth Amendment privilege against self-incrimination makes a witness "unavailable" to testify under FRE 804.[27]

2. A Witness Does Not Have to Take the Stand to Properly Assert the Fifth Amendment Privilege.

The law is clear that the Fifth Amendment affords a witness the right to remain silent on the ground that his answers might tend to subject him to criminal liability. However, when a witness asserts his Fifth Amendment right against self-incrimination, the court must determine what sort of showing the witness must make to justify his invocation of the Fifth Amendment privilege if the only possible risk of prosecution that might result from his testimony is for perjury.

Many early cases addressing this issue determined that "[a] blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and that the privilege cannot be claimed in advance of the questions."[28] Instead, the courts required the witness to assert the privilege with respect to particular questions, and in each instance, the court must determine whether the witness had reasonable cause to refuse to testify.[29]

Since these decisions, most courts have relaxed the formalistic position that a witness is required to take the stand in order to properly assert the Fifth Amendment privilege.[30] For

example, in *Davis v. Straub*, a witness invoked his Fifth Amendment right and refused to testify in the lower proceedings, and the trial court did not follow the normal procedure of putting a witness on the stand and instructing him to invoke the privilege as to individual questions.[31] The Sixth Circuit held that the trial court's decision to allow a defense witness to invoke the Fifth Amendment privilege before taking the witness stand was not contrary to clearly established federal law.[32] In addition, the court noted that the Supreme Court has never definitively held that a witness invoking the Fifth Amendment must take the stand and invoke that right on a question-by-question basis, although such a rule has merit.[33] Importantly, the Sixth Circuit in *Davis* clarified that previous decisions did not address the issue of whether the invocation of the privilege required that the witness take the stand, but only how to properly assert the privilege if the witness did so.[34] Specifically, a witness need not take the stand to invoke his Fifth Amendment privilege on a question-by-question basis when "the witness takes the stand and it is clear the witness intends to invoke the privilege with respect to any question asked…."[35] Under such circumstances, a particularized inquiry by the court would be futile.

Were the situation to arise in the FCA scenario described above, the executives should not be required to take the stand to invoke their Fifth Amendment privilege on a question-by-question basis. The *qui tam* suit for Columbia/HCA's alleged Medicare and Medicaid fraud was related to their tenure as executives of the hospital. Any questions about the hospital's Medicare and Medicaid practices or the executives' knowledge of any fraudulent kickbacks or misdiagnoses would prompt the invocation of each executive's Fifth Amendment privilege. In compliance with the prevailing standards, calling each executive to the stand to invoke the privilege on a question-by-question basis would be futile and a waste of the court's time. If so, the witness is not then required to take the stand to invoke the privilege in order to be considered "unavailable" under FRE 804 and may invoke the privilege before trial, thereby making any previous deposition testimony admissible. In some circumstances, former deposition testimony may be more favorable to the defendant's case than the imposition of an adverse inference. However, if the executive asserted his Fifth Amendment right during the deposition, then the *qui tam* relator is back at square one: the court must determine, through application of the factors established in *Libutti*, whether an adverse inference may be properly drawn against the defendant based on the non-party witness's invocation of his Fifth Amendment right during deposition.[36]

C. Tactics for Deposition Questions When Witness is Anticipated to Invoke the Fifth Amendment.

Through the use of carefully crafted questions, a *qui tam* relator pursuing a healthcare corporation pursuant to the FCA can utilize an employee's deposition much to its advantage by asking specific and focused questions under the expectation that the employee will invoke his Fifth Amendment right.[37] To warrant the court's imposition of an adverse inference from the

employee's invocation of the Fifth Amendment during his deposition, the deposing attorney should focus on questions that (1) lay a proper foundation for the witness's right to invoke the Fifth Amendment, (2) establish the employee's invocation of the Fifth Amendment as rendering him hostile so as to support cross-examination, and (3) allow the jury to deduce an adverse answer easily from narrow, focused questions.

3. Laying the Foundation for the Witness's Invocation of the Fifth Amendment.

An individual may only assert his Fifth Amendment right against self-incrimination if it is "evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[38] Accordingly, in order for a court to allow an adverse inference to be drawn from a witness's invocation of the Fifth Amendment, it must be apparent from the questions posed during the deposition that "injurious disclosure" could result. With relation to the Columbia/HCA executives discussed herein, preliminary questions would need to focus upon the executive's knowledge, involvement, and support of the hospital's fraudulent practices:

Q. Were you aware that Indian Path Hospital was altering its patient records in order to receive increased Medicare reimbursements?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Q. Did you encourage or participate in the hospital's fraudulent practices to inflate the hospital's revenues?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Q. Did your involvement in aiding the hospital to misdiagnose patients result in increased Medicare reimbursements?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Through this and similar lines of questioning regarding the executive's knowledge of and involvement in practices designed to defraud Medicare, the court is able to conclude that the witness would be subject to criminal prosecution. The *qui tam* relator is therefore best advised to begin by asking broad questions related to the witness's involvement in the corporate party's fraudulent practices to ensure an adverse inference has constitutional support.[39]

4. Establishing the Witness's Invocation of the Fifth Amendment as Rendering the Witness Hostile.

Equally important to the *qui tam* relator's case is ensuring that it is evident from the employee or former employee's deposition that he is hostile to the relator. Establishing the witness as adverse provides the *qui tam* relator the ability to cross-examine the witness should he decide to waive his Fifth Amendment right at trial or not be found unavailable pursuant to FRE 804. Though the questions below are entirely fictional, they provide an illustration of how the *qui tam* relator might establish Mr. Matney as hostile in the scenario described above:

Q. If I understand correctly, you are appearing here today involuntarily, but pursuant to the subpoena that was served on you; is that correct?

A. *Yes.*

Q. The subpoena was served in connection with the *qui tam* suit filed against your former employer, Indian Path Hospital, for alleged Medicare fraud, correct?

A. *Yes.*

Q. I am marking the Complaint in that case as Exhibit 1 if you need to reference its allegations during your time here today.

A. *Ok.*

Q. Are you aware that the claims asserted against the hospital concern certain activities and practices occurring during 1996 and 1997?

A. *Yes.*

Q. Were you employed by Indian Path Hospital for the entirety of 1996 and 1997?

A. *Yes.*

Q. You were the CFO of the hospital during that time?

A. *Yes.*

Q. Your altering of the Hospital's Medicare cost report allowed the hospital to receive increased reimbursements in 1996 and 1997?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Through this and similar lines of questioning, the *qui tam* relator is effectively able to satisfy two separate objectives beneficial to his case. First, he is able to establish the former CFO as adverse and therefore subject to cross-examination should the opportunity arise at trial. Second, if the witness does not testify at trial, the relator's deposition questions prove that the

relationship between the former executive and the hospital is sufficiently aligned to render an adverse inference trustworthy and therefore admissible pursuant to *Libutti*.[40]

5. Using Narrow, Targeted Questions to Elicit Unambiguous Adverse Inferences.

To create the strongest case for permitting an adverse inference against a non-party witness, the scope and particularity of the questions asked in deposition is important. Specifically, counsel should ask narrow, focused questions from which a jury could easily draw conclusions through application of an adverse inference. Without the aid of explanatory context, an adverse inference in these circumstances can be quite damaging to a corporate defendant.[41] These questions will be similar in subject matter to those asked to lay the foundation for the witness's invocation of the Fifth Amendment; however, to ensure the adverse inference is as beneficial to the *qui tam* relator's case as possible, the scope of the questions should be refined and narrowed, with each question covering a singular and specific fact. In the case of our *qui tam* relator's suit against HCA/Columbia, to ensure the adverse inference is as damaging as possible for HCA/Columbia, the relator's questions to Mr. Matney, or a similarly situated witness, should focus on specific incidents of Medicare fraud in which the witness is believed to have participated:

Q. Did you instruct the doctors at the hospital to keep patients longer than necessary to increase Medicare reimbursements?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Q. Did you encourage the doctors at the hospital to recruit sicker patients in order to increase the average length of patients' stays that you reported to Medicare?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Q. Were you aware that the hospital offered patients free tests and screening in exchange for their Medicare number?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Q. Did you have discussions with the other hospital executives about financial incentives to outside physicians for referring Medicare patients to the Hospital?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

Q. Did you instruct doctors to perform tests that were not medically necessary?

A. *I respectfully wish to rely on my Fifth Amendment right and decline to answer this question.*

In order to ensure the fairness of the use of the deposition testimony and to ensure the jury has a full and accurate understanding of the facts in the case, the court should instruct the jury that they are permitted to infer that had the witness answered the deposition questions, the answers would have been unfavorable to the witness. Expanding upon the questions outlined in Section C.3., *supra*, ensures that that relationship between the corporate defendant and witness is sufficiently aligned that answers adverse to the witness may also be deemed hostile to the corporate defendant.

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[1] *See, e.g., U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F.3d 899 (5th Cir. 1997).

The False Claims Act, 31 U.S.C. § 3729, *et seq*., is a federal statute that permits a private individual to bring suit on behalf of the United States for damages caused by the submission of false or fraudulent claims for payment to the federal government. Generally called "*qui tam*" actions, the Act encourages individuals with knowledge of fraudulent practices to come forward and initiate *qui tam* suits by guaranteeing the informer's litigation costs, expenses, attorneys' fees, and a percentage of any proceeds collected by the federal government from the defrauding party.

[2] *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25 (D.D.C. 2007).

[3] U.S. CONST. ART. V.

[4] *Doe v. U.S.*, 487 U.S. 201, 207 (1988).

[5] *Baxter v. Palmingiano*, 425 U.S. 308, 318 (1976).

[6] *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996).

[7] *See Baxter*, 425 U.S. at 318.

[8] *See LiButti v. U.S.,* 107 F.3d 110, 123–24 (2d Cir. 1997) (setting out several nonexclusive factors a court should consider when deciding whether to allow adverse inferences from a non-party's invocation of the Fifth Amendment privilege in the course of civil litigation).

[9] *Baxter v. Palmigiano,* 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976).

[10] *See, e.g., LaSalle Bank Lake View v. Seguban,* 54 F.3d 387, 391 (7th Cir.1995); *Peiffer v. Lebanon Sch. Dist.,* 848 F.2d 44, 46 (3d Cir.1988).

[11] *See United States v. Local 560, Int'l Bhd. of Teamsters,* 780 F.2d 267, 292 n.32 (3rd Cir. 1986) (negative inference from Fifth Amendment assertion at deposition is improper unless there is "sufficient independent evidence -- besides the mere invocation of the privilege -- upon which to base the negative inference"); *Nat'l Acceptance Co. v. Bathalter,* 705 F.2d 924, 930 (7th Cir.1983).

[12] *LaSalle Bank,* 54 F.3d at 391.

[13] *Akers v. Prime Succession of Tenn., Inc.*, 2012 WL 4320591 at *8 (Tenn. Sept. 21, 2012), *citing Serafino v. Hasbro, Inc.,* 82 F.3d 515, 518 (1st Cir. 1996).

[14] *SEC v. International Loan Network, Inc.*, 770 F. Supp. 678, 695-96 (D.D.C. 1991); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1451-52 (E.D.N.Y. 1988) *aff'd*, 879 F.2d 20 (2d Cir. 1989).

[1515] *Martinez v. Majestic Farms, Inc.*, 05-60833-CIV, 2008 WL 239164 (S.D. Fla. Jan. 28, 2008).

[16] *City of Chicago, Ill. v. Wolf*, 91 C 8161, 1993 WL 177020 (N.D. Ill. May 21, 1993).

[17] S*ee LiButti v. U.S.,* 107 F.3d 110 (2d Cir. 1997).

[18] S*ee F.D.I.C. v. Fidelity & Dep. Co.,* 45 F.3d 969, 977 (5th Cir. 1995); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.,* 808 F.2d 271, 275–76 (3d Cir. 1986)).

[19] *Id.*

[20] *Levine v. March*, 266 S.W.3d 426, 442 (Tenn. Ct. App. 2007).

[21] *Libutti,*107 F.3d at 123.

[22] *Hockett.*, 498 F. Supp. 2d at 62 n. 25.

[23] *Id.*

[24] *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367 (6th Cir. 1993).

[25] *See, e.g., John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000) (explaining that "the reliability of the adverse interest is the touchstone of the analysis").

[26] FED. R. EVID. 804.

[27] *See U.S. v. Salerno*, 505 U.S. 317, 321 (1992) (recognizing the parties' agreement that two witnesses were "unavailable" to the defense as witnesses provided they properly invoked the Fifth Amendment privilege and refused to testify).

[28] *Hoffman v. U.S.*, 341 U.S. 479 (1951); *Monsivais v. U.S.*, 421 U.S. 976 (1975); *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983); *U.S. v. Pierce*, 561 F.2d 735, 740 (9th Cir. 1977); *U.S. v. Gomez-Rojas*, 507 F.2d 1213, 1219 (5th Cir. 1975); *U.S. v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971).

[29] *Monograth*, 718 F.2d. at 167; *see also U.S. v. Mahar*, 801 F.2d 1477 (6th Cir. 1986) (affirming *Morganrath*'s holding that a blanket assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement of the Fifth Amendment and the privilege cannot be claimed in advance of the questions).

[30] *See Davis v. Straub*, 430 F.3d 281 (6th Cir. 2005).

[31] *Id.*

[32] *Id.*

[33] *Id.* at 288.

[34] *Id.* at 289.

[35] *U.S. v. Highgate,* 521 F.3d 590, 594 (6th Cir. 2008); *see also Arredondo v. Ortiz*, 365 F.3d 778, 782 (9th Cir. 2004).

[36] *See* Part A, *supra*.

[37] Peter D. Hardy, Matthew T. Newcomer, *Parallel Proceedings and the Perils of the Adverse Inference*, 2 J. HEALTH & LIFE SCI. L. 241, 258 (2009).

[38] *Hoffman*, 341 U.S. at 486.

[39] Tracy A. Miner, *Representing Health Care Employees in Federal Grand Jury Proceedings*, AHLA Seminar Materials, P07030250 (2002).

[40] *LiButti*, 107 F.3d at 110.

[41] *See* Hardy, *supra* note 37.