
**A CRIMINAL DEFENSE ATTORNEY’S CHALLENGE:
THE FIFTH AMENDMENT PRIVILEGE IN
PENNSYLVANIA GRAND JURY PROCEEDINGS**

*Catherine M. Recker**

Temple University Beasley School of Law and its professors launched me on a professional journey that continues to challenge and fulfill me. I owe my interest in the practice of criminal defense to Professor Edward Ohlbaum, under whom I studied evidence and trial advocacy while a student at the law school.¹ Professor Ohlbaum introduced me to the trial lawyer’s craft and the personal satisfaction that comes with defending those accused of committing crimes. I was also fortunate to experience the prosecutorial side of the criminal justice system while a student intern for the Strike Force—the Department of Justice’s division that investigated and prosecuted Organized Crime and Racketeering. Even though these two experiences were distinct, and I found the defense role more inspiring and rewarding as a career choice, each informs my practice to this day.

My interest in criminal defense, sparked by Professor Ohlbaum, has engaged me for nearly thirty years. As the Honorable Mitchell S. Goldberg of the U.S. District Court for the Eastern District of Pennsylvania said of Professor Ohlbaum, “[t]here is no attorney in the Philadelphia legal community who has taught more young lawyers about how justice plays out in a courtroom.”² Professor Ohlbaum taught me that justice is predicated on respect for a defendant’s constitutional rights. Through my practice, I have learned that there are few rights more critical to the fair administration of justice than the Fifth Amendment right not to be compelled to be a witness against oneself.³ Clients, however, often resist their lawyers’ recommendations to invoke the Fifth Amendment because they think that doing so makes them look guilty or would

* Ms. Recker is a partner at Welsh & Recker, P.C., whose practice focuses on representing individuals and corporations in criminal investigations, trials and appeals, and in other government enforcement and regulatory matters. Ms. Recker is an alumna of Temple University Beasley School of Law and of *Temple Law Review*.

1. Professor Ohlbaum might have been best known as the coach of Temple’s trial team, which competes in the National Trial Competition, cosponsored by the Texas Young Lawyers Association and the American College of Trial Lawyers. I regret to this day not trying out for the trial team because the trial team students display incredible courtroom skills, making them worthy adversaries of any seasoned trial lawyer, before they’ve even passed the bar exam. I know this because after I became a Fellow in the College, Professor Ohlbaum recruited me along with other Fellows to judge the Regional Competition, which Temple hosts.

2. Jeff Gammage, *Edward Ohlbaum, Temple Law Professor*, PHILA. INQUIRER (Mar. 14, 2014, 8:10 PM), http://www.philly.com/philly/education/20140315_Edward_Ohlbaum__Temple_law_professor.html [perma: <http://perma.cc/V2LJ-CQMV>].

3. See U.S. CONST. amend V.

make them look like they have something to hide.

Criminal defense attorneys meet their clients when “they are facing the overwhelming prospect of losing everything that is dear to them: liberty, fortune, and family.”⁴ This is especially apparent when they face a sustained period of incarceration.⁵ It was Professor Ohlbaum who taught me that it falls upon the criminal defense lawyer to “illuminate for the judge and the jury some of the most inspiring aspects of our clients and the human condition.”⁶

One fundamental way that defense attorneys can illuminate our clients’ humanity—or at least begin the process of doing so—is to develop a sufficiently strong attorney-client relationship. This relationship is the basis for “the oldest of the privileges for confidential communications known to the common law”—the attorney-client privilege.⁷ The Pennsylvania legislature codified this privilege,⁸ state and federal common law elaborate on the privilege,⁹ and the Rules of Professional Ethics explicitly discuss it.¹⁰ A robust attorney-client privilege protects the individual defendant and promotes the broader public interest in the administration of justice.¹¹ A strong attorney-client relationship allows the client to reveal to us possibly damning information and at the same time to trust our instincts and advice. When the criminal justice system confronts clients in ways they cannot understand, trust in the attorney-client relationship is often all the clients have to sustain them. Trust in the relationship enables a client to accept that it may be necessary to invoke the Fifth Amendment privilege against self-incrimination and refuse to answer questions, notwithstanding the fear that refusing to answer questions may be counter to a client’s intuition or perceived best interests.

There is perhaps no right more fundamental (or more frequently raised) than the Fifth Amendment. Indeed, the criminal defense practitioner explores its constitutional limits on a regular basis. It is the government that bears the burden of proof in a criminal case.¹² Concomitant with that burden is the government’s most important and necessary power: the authority to compel witnesses to testify under oath.¹³ Compelled testimony is “one of the

4. Catherine M. Recker, *Inductee Responder Charts Own Course*, AM. C. TRIAL LAW. J., Spring 2014, at 42, 45.

5. *Id.*

6. *Id.*

7. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

8. See 42 PA. STAT. AND CONS. STAT. ANN. §§ 5916, 5928 (West 2018).

9. See Edward J. Krauland & Troy H. Cribb, *The Attorney-Client Privilege in the United States, an Age-Old Principle Under Modern Pressures*, 2003 J. PROF. LAW. 37, 38 (explaining that even though the privilege is not specifically guaranteed by the Federal Rules of Evidence or the U.S. Constitution, “it is deeply entrenched in U.S. jurisprudence and has generated a wide body of case law”).

10. See PA. RULES OF PROF’L CONDUCT r. 1.6 (2018).

11. See *Upjohn Co.*, 449 U.S. at 389.

12. See *In re Winship*, 397 U.S. 358, 361–63 (1970).

13. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

Government's primary sources of information,"¹⁴ because it is understood that generally, "the only persons capable of giving useful testimony are those implicated in the crime."¹⁵ An important corollary to the government's power to compel a witness to testify is that when a witness invokes the Fifth Amendment and is thereafter compelled to testify, that testimony is immunized to the extent of the scope of the privilege.¹⁶

There are few decisions that influence a client's outcome more profoundly than deciding whether to testify before a grand jury or to invoke the Fifth Amendment privilege against self-incrimination when compelled by subpoena. Often, clients lunge for the opportunity to explain their conduct. But such an explanation is generally harmful to the client's interests. A strong attorney-client relationship encourages a client's trust in the lawyer's judgment regarding the potential detrimental impact of giving explanations, no matter how strong the impulse to explain may be. Answering questions can expose a client to prosecution when the government might not otherwise have sufficient evidence. Moreover, the Fifth Amendment is available not only to witnesses who may have engaged in wrongdoing, it is available to a witness professing innocence: "[O]ne of the Fifth Amendment's 'basic functions . . . is to protect *innocent* men . . . who otherwise might be ensnared by ambiguous circumstances.'"¹⁷ The privilege also extends to direct answers that may incriminate as well as "to answers that would . . . furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."¹⁸

Historically, Anglo-American jurisprudence rebelled against the continental inquisitorial system in which witnesses have no choice but to answer questions posed in a criminal proceeding, even if the answers are incriminatory.¹⁹ The English considered the inquisitorial system "so odious as to give rise to a demand for its total abolition,"²⁰ yet they only incorporated the protection in an evidentiary rule.²¹ Nevertheless, in English common law, the right not to be compelled to be a witness against oneself was eventually so valued that it was considered to derive from "the law of nature, and was embedded in that system as one of its great and distinguishing attributes."²² Our founding fathers included

14. *Id.* (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 93–94 (1964) (White, J., concurring)).

15. *Id.* at 446.

16. *See id.* at 453 (noting that immunity from direct and derivative use of compelled testimony "is coextensive with the scope of the privilege against self-incrimination"); *see also* *Adams v. Maryland*, 347 U.S. 179, 181 (1954) ("[A] witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute.").

17. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (internal quotation marks omitted) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957)).

18. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

19. *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1047–48 (1994).

20. *Bram v. United States*, 168 U.S. 532, 544 (1897).

21. *Id.* at 544–45.

22. *Id.* at 545. Later in the *Bram* opinion the Court wrote, "our law . . . differs from the civil

the Fifth Amendment in the Bill of Rights to protect an individual from being compelled to be a witness against himself.²³ Thus, the American colonists went further than the English to protect the right against self-incrimination.

Against this backdrop of historical reverence for the Fifth Amendment in the federal courts, I was surprised to learn that the Fifth Amendment privilege against self-incrimination was not guaranteed to witnesses in state proceedings until relatively recently. In 1964, in *Malloy v. Hogan*,²⁴ the U.S. Supreme Court held that the Fourteenth Amendment guaranteed the same standards “against state invasion” of Fifth Amendment rights that protect a witness against “federal infringement.”²⁵ This came as a surprise because of the historical emphasis on the underpinnings of the privilege—that it derived from natural law as understood before the Bill of Rights was ratified. I had assumed that the protection against self-incrimination had always been available to witnesses in all state proceedings.

In the wake of *Malloy*, Pennsylvania law reaffirmed²⁶ that a witness possesses a privilege against self-incrimination and that the privilege applies in the grand jury setting.²⁷ Moreover, a witness may not be held in contempt for refusing to testify if the refusal is based on a legitimate exercise of the privilege against self-incrimination.²⁸ It is for the court to determine whether the proposed use of the privilege is real or illusory.²⁹

Despite the teachings of *Bram v. United States*,³⁰ *Hoffman v. United States*,³¹ and *Ohio v. Reiner*³²—which held respectively that the Fifth Amendment is available in the face of compulsion or improper influence to induce incrimination, when answers would provide a link in a chain of evidence needed

law; that it will not force any man to accuse himself; and in this we . . . follow the law of nature, which commands every man to endeavor his own preservation” *Id.* at 546 (quoting GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 140 (2d ed. 1760)).

23. See U.S. CONST. amend. V.

24. 378 U.S. 1 (1964).

25. *Malloy*, 378 U.S. at 3–4, 6–10 (“We hold today that the Fifth Amendment’s exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.”).

26. See *Commonwealth v. Edmunds*, 586 A.2d 887, 896 (Pa. 1991) (“The federal Bill of Rights borrowed heavily from the Declarations of Rights contained in the constitutions of Pennsylvania and other colonies.”). Pennsylvania’s original constitution provided that a witness could not “be compelled to give evidence against himself.” PA. CONST. of 1776 art. I, § 9.

27. See *Commonwealth v. Carrera*, 227 A.2d 627, 629 (Pa. 1967), *superseded by statute*, 1978 Pa. Laws 873; *Commonwealth v. Field*, 331 A.2d 744, 749 (Pa. Super. Ct. 1974) (“The fifth amendment privilege does apply to grand jury proceedings and the grand jury may not itself violate a valid privilege whether established by the Constitution, statutes or common law.”).

28. See *Commonwealth v. Reese*, 354 A.2d 573, 576 (Pa. 1976).

29. *Commonwealth v. Long*, 625 A.2d 630, 634 (Pa. 1993).

30. 168 U.S. 532 (1897).

31. 341 U.S. 479, 486–87 (1951) (“To sustain the privilege, it need only be 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.”).

32. 532 U.S. 17 (2001) (*per curiam*).

to prove criminal conduct, and when a witness claiming innocence has reasonable cause to apprehend danger from her answers—in my experience, Pennsylvania courts rule with some regularity, and without explanation, that witnesses are not eligible to invoke the privilege against self-incrimination. Perhaps this reflects the relatively recent application of the Fifth Amendment to the states as set forth in *Malloy*.³³ Whatever the reason, a witness stripped of her Fifth Amendment privilege and compelled to testify remains vulnerable to prosecution based on that testimony.

I experienced such a situation in my own practice in connection with the Pennsylvania grand jury investigation and prosecution of then Pennsylvania Attorney General Kathleen Kane. Grand jury investigations are subject to strict secrecy obligations.³⁴ The grand jury investigated Ms. Kane for leaking protected materials from a different grand jury which culminated in her criminal prosecution for perjury, obstruction of justice and other crimes.³⁵ I represented a witness who testified multiple times before the investigating grand jury and who ultimately testified against Ms. Kane at her criminal trial. The public record from Ms. Kane's trial disclosed the following narrative.³⁶ My client, a colleague of Ms. Kane's, initially testified twice before the investigating grand jury. On those two occasions, he stated that at Ms. Kane's direction, he delivered an envelope containing documents to a reporter, but that Ms. Kane had not known that those documents contained protected grand jury materials.³⁷ Ms. Kane also testified before the investigating grand jury, consistent with my client, that she did not know of the protected grand jury nature of the documents.³⁸ Later, my client was subpoenaed to testify before the grand jury for a third time.³⁹ But by this time, the investigating grand jury had determined that reasonable grounds existed to believe that Ms. Kane committed various crimes, including perjury and obstruction of justice, and recommended that charges be brought against her.⁴⁰

33. See *infra* notes 36, 41, and 45 and accompanying text.

34. 42 PA. STAT. AND CONS. STAT. ANN. § 4549(b) (West 2018).

35. Commonwealth v. Kane, No. 3575 EDA 2016, 2018 WL 2376305, at *1–2 (Pa. Super. Ct. May 25, 2018).

36. While grand jury proceedings are subject to secrecy by statute, the supervising grand jury judge may permit disclosure. 42 PA. STAT. AND CONS. STAT. ANN. § 4549(b). In Ms. Kane's case, various grand jury matters were unsealed. Relevant to this Article are those matters filed in the Pennsylvania Supreme Court, which considered privilege issues among others. On August 26, 2015, the Court unsealed all related matters lodged with it except for testimony, exhibits, and in camera proceedings. See *In re Thirty-Fifth Statewide Investigating Grand Jury*, No. 18 MM 2015, slip op. at 1 (Pa. Aug. 26, 2015). Moreover, the trial of Ms. Kane is of public record.

37. Transcript of Record at 113–16, 134, Commonwealth v. Kane, No. CP-46-CR-6239-2015, 2017 WL 2366702 (Pa. Ct. Com. Pl. Mar. 2, 2017) [hereinafter Transcript]. My client was not involved in the original grand jury from which materials were leaked and was not therefore bound under oath to uphold its secrecy. See 42 PA. STAT. AND CONS. STAT. ANN. § 4549; PA. R. CRIM. P. 231.

38. Unsealed Presentment No. 60, *In re Thirty-Fifth Statewide Investigating Grand Jury*, M.D. 2644-2012 (Pa. Ct. Comm. Pleas Dec. 18, 2014) [hereinafter Presentment]; Order Accepting Unsealed Presentment No. 60, M.D. 2644-2012 (Pa. Ct. Comm. Pleas Dec. 19, 2014) [hereinafter Order Accepting Unsealed Presentment].

39. Transcript, *supra* note 37, at 5.

40. See Presentment, *supra* note 38; Order Accepting Unsealed Presentment, *supra* note 38.

This revelation sparked intense media reportage such that anyone reading the newspapers would understand that the grand jury disbelieved Ms. Kane's testimony.⁴¹ During my client's third grand jury appearance, which occurred after the grand jury recommended perjury charges related to her grand jury testimony be brought against Ms. Kane, the special prosecutor questioned him about the frequency of communication, including text messages, he had had with Ms. Kane.⁴² My client's phone records confirmed text messages and phone calls with her immediately before and after his two previous grand jury appearances.⁴³ He refused to testify, invoking the Fifth Amendment privilege against self-incrimination, which the grand jury judge denied,⁴⁴ determining it was an improper exercise of the right and held him in contempt.⁴⁵

Considering the extent of my client's communications with Ms. Kane before and after his first two grand jury appearances, it is hard to imagine a clearer link in a chain of evidence under the *Hoffman* standard demonstrating that they coordinated false testimony. Fortunately, the grand jury judge stayed the contempt order, which spared my client from incarceration while he litigated the privilege issue.⁴⁶ The Pennsylvania Supreme Court eventually denied his Petition for Review, agreeing with the grand jury judge (who ruled without explanation) that my client was not entitled to invoke the Fifth Amendment.⁴⁷

Ultimately, the Commonwealth conferred immunity on my client who testified as a witness against Ms. Kane at her criminal trial. Not surprisingly, he testified that he and Ms. Kane had created a cover story regarding the facts

41. See Petition for Review of Order of Contempt and Order Overruling the Petitioner's Invocation of the Fifth Amendment Before the Investigating Grand Jury at 1–2, *In re Thirty-Fifth Statewide Investigating Grand Jury*, No. 176 M.D. Misc. Dkt. 2012 (Pa. Jan. 22, 2015) [hereinafter Petition] (noting the existence of the final contempt order dated January 12, 2015, and entered by the Montgomery County Court of Common Pleas, though the actual order was never unsealed). Ironically, the grand jury investigation of Ms. Kane itself was the subject of numerous leaks of protected materials. For example, the Presentment was filed under seal on December 19, 2014. See Presentment, *supra* note 38. Less than three weeks later, the media reported its contents. See Craig R. McCoy & Angela Couloumbis, *Grand Jury Recommends Criminal Charges Against Kane*, PHILLY.COM (Jan. 8, 2015, 3:05 PM), http://www.philly.com/philly/news/politics/20150109_Grand_jury_recommends_criminal_charges_against_Attorney_General_Kathleen_Kane.html [perma: <http://perma.cc/L2ER-95VC>]. It was not unsealed until April 27, 2015. Order Unsealing Presentment No. 60, CP-46-MD-0000926-2015 (Pa. Ct. Comm. Pleas. Apr. 27, 2015).

42. Transcript, *supra* note 37, at 116–17.

43. See *id.*

44. *Id.* at 131; Petition, *supra* note 41, at 2 (noting the existence of the January 12, 2015 order denying my client's invocation of the Fifth Amendment privilege and holding him in civil contempt).

45. See Petition, *supra* note 41, at 4; Unsealed Memorandum in Support of the Response of the Special Prosecutor in Opposition to the Petition for Review of Contempt Order and Order Overruling the Petitioner's Invocation of the Fifth Amendment Before the Investigating Grand Jury at 6, *In re Thirty-Fifth Statewide Investigating Grand Jury*, No. 176 M.D. Misc. Dkt. 2012 (Pa. Mar. 30, 2015). While the parties articulated the supervising grand jury judge's holding in their pleadings which were unsealed, the ruling itself remains under seal. See *supra* note 41 for an explanation of the January 12, 2015 order, which remains under seal as of the publication of this Article.

46. *Id.*

47. *In re Thirty-Fifth Statewide Investigating Grand Jury*, No. 18 MM 2015 (Pa. May 18, 2015) (mem.) (per curiam). This order was subsequently unsealed on August 26, 2015.

underlying each of their accounts before the grand jury.⁴⁸ If the Commonwealth had compelled his testimony but not sought immunity for him, he would have had to resort to federal principles that protect compelled testimony as recognized in *Kastigar v. United States*.⁴⁹ These principles, which are clear in federal law, are largely unexplored in the Commonwealth's jurisprudence. As a result, the client who gives compelled testimony in a state proceeding without a grant of immunity can expose himself to grave risks including potential incarceration for refusing to testify or prosecution for the underlying conduct if he does testify.

In the example above, the Commonwealth needed my client as a witness to prove its case. Thus, the grant of immunity was an obvious solution. However, ambiguity in the status of compelled testimony presents a unique challenge for a grand jury witness who may be considered a target by the prosecution and yet is compelled to testify after being denied Fifth Amendment protections. Such a witness may face the challenge of litigating, in appellate court, the question of whether compelled testimony should be treated as immunized. Taking this step would require that the individual go into contempt of court, risking potential incarceration, until the question can be definitively answered. This degree of uncertainty in the face of extreme consequences strains even the strongest attorney-client relationship. After all, clients expect that their lawyers can answer questions about fundamental constitutional rights. When a lawyer can't provide definitive answers to these questions, the client loses faith in her lawyer, the law, or both.

Federal courts also continue to explore the limits of Fifth Amendment protections. For example, in *United States v. Allen*,⁵⁰ the Second Circuit examined whether compelled foreign testimony could be used to secure a conviction against the testifying witness in an American court.⁵¹ In *Allen*, the U.K. Financial Conduct Authority (FCA) compelled two British witnesses to give incriminating testimony in the U.K. related to manipulating the London Interbank Offered Rate (LIBOR).⁵² The FCA cloaked the witness statements with direct use immunity, but not derivative use immunity as would be automatic in the United States.⁵³ Direct use immunity would protect the witness from the government using the statements directly against the witness in a subsequent prosecution.⁵⁴ Derivative use immunity protects a witness from the government using information derived from the witness's statements against the witnesses themselves.⁵⁵ The FCA then shared the British witnesses' compelled statements

48. Transcript, *supra* note 37, at 112–15.

49. 406 U.S. 441 (1972); *see also supra* notes 16–19 and accompanying text.

50. 864 F.3d 63 (2d Cir. 2017).

51. *Id.* at 66–67.

52. *Id.* at 67.

53. *Id.* at 67 n.3 (noting that derivative use immunity requires that the government prove its case with evidence “wholly independent of the statements made in the interview” (quoting *United States v. Plummer*, 941 F.2d 799, 803 (9th Cir. 1991)).

54. *Id.*

55. *Id.*

with a cooperating witness in proceedings in the United States against the British witnesses.⁵⁶ After having examined the British witnesses' compelled statements in the FCA prosecution,⁵⁷ the cooperating witness testified before a U.S. grand jury, which ultimately returned an indictment against the British witnesses.⁵⁸ The cooperating witness also testified against the British witnesses at their criminal trial resulting in guilty verdicts for both.⁵⁹

On appeal, the British witnesses alleged that the government violated their Fifth Amendment rights when it used their own compelled testimony against them in violation of *Kastigar*.⁶⁰ The witnesses noted that the Court in *Kastigar* made clear that compelled testimony could not be used as an "investigatory lead."⁶¹ Moreover, the *Kastigar* Court held that when a defendant has previously given immunized testimony, the prosecution bears the "affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."⁶² With this foundation, the *Allen* court extended the reach of *Kastigar*'s protections and held that "compelled testimony cannot be used to secure a conviction in an American court," even when the testimony was compelled by a foreign sovereign.⁶³ The Second Circuit acknowledged that increasingly, the United States and foreign authorities are coordinating cross-border investigations and prosecutions of criminal conduct but insisted that "these developments need not affect the fairness of our trials at home."⁶⁴ True to the teachings of *Kastigar*, the *Allen* court dismissed the British witnesses' indictment because the government failed to prove that the cooperating witness's exposure to the compelled testimony did not "shape, alter, or affect the evidence used by the government."⁶⁵

As Professor Ohlbaum taught his students, respect for the defendant's constitutional rights requires more than the mechanical application of legal standards. Clients are underserved unless we strive to apply those rights in new and novel situations by constantly testing and challenging our assumptions regarding the Constitution's limits. This process can only be pursued effectively when the client trusts her attorney's advice—advice that sometimes can seem counterintuitive to the client. I believe that the vitality of the Constitution is illustrated by the fact that state and federal courts are still grappling with the contours of the Fifth Amendment, which requires defense attorneys to continue to challenge its perceived limits. I think that Professor Ohlbaum would agree.

56. *Id.* at 68.

57. *Id.* at 77 (explaining that the witness "review[ed]," "underlined, annotated, and circled certain passages" and "took five pages of handwritten notes" of the compelled testimony).

58. *Id.* at 78.

59. *Id.* at 78.

60. *Id.* at 79.

61. *Kastigar v. United States*, 406 U.S. 441, 460 (1972).

62. *Id.*

63. *United States v. Allen*, 864 F.3d 63, 82 (2d Cir. 2017).

64. *Id.* at 90.

65. *Id.* at 101.