CHAPTER 33

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Witness's Privilege Against Self-Incrimination

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§ 33.1 OVERVIEW [1]

Both the Fifth Amendment to the U.S. Constitution[2] and article 12 of the Massachusetts Constitution Declaration of Rights[3] protect persons from compulsory self-incrimination. However, the language of article 12 gives broader protection than the Fifth Amendment[4] and therefore deserves special attention. The privilege originally arose to protect against compulsion of self-incriminating testimony by legal process. Without it, a witness subpoenaed to testify in formal proceedings under oath faced a "cruel trilemma" of penalties for answering truthfully (self-incrimination), lying (perjury), or keeping silent (contempt). The privilege protects a number of fundamental values, including the accusatory system and individual dignity, autonomy, and privacy.[5]

The privilege permits a person who is subpoenaed before a grand jury, court, legislative, or administrative body or any other subpoena-assisted tribunal to refuse to answer potentially incriminating questions.[6] As expansively interpreted by the Warren Court, the privilege also protects against police compulsion to answer questions in informal settings.[7] The privilege may be overcome only by either (1) a constitutionally adequate grant of immunity *(infra* § 33.7)[8] or (2) a valid waiver *(infra* § 33.6).[9] If the person is compelled to answer despite a valid claim of the privilege, or if his will to assert the privilege is overborne,[10] neither his responses nor evidentiary "fruits" thereof may be used as evidence against him in a criminal proceeding.[11]

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[1] For a fuller treatment of the privilege against self-incrimination, *see* AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 232 (5th ed. 1988), on which the following paragraphs significantly draw.

[2] "No person . . . shall be compelled in any criminal case to be a witness against himself."

[3] "No subject shall . . . be compelled to accuse, or furnish evidence against himself."

[4] *See* Emery's Case, 107 Mass. 172, 180–82, 185–86 (1871), discussed *infra* at § 33.7A.

[5] *See* Attorney General v. Colleton, 387 Mass. 790, 793–94 (1982).

[6] *See* Commonwealth v. Austin A., 450 Mass. 665, 667 (2008); Emery's Case, 107 Mass. 172, 184 (1871); AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 232, at 45(5th ed. 1988).

[7] *See* Miranda v. Arizona, 384 U.S. 436 (1966), discussed *supra* at § 19.4D.

[8] *See* Commonwealth v. Austin A., 450 Mass. 665, 667-69 (2008).

[9] Blaisdell v. Commonwealth, 372 Mass. 753, 761 (1977).

[10] Garner v. United States, 424 U.S. 648, 654 n.9, 656–65 (1976); *see supra* § 19.4C.

[11] Evidentiary fruits of compelled self-incrimination may not even be used to impeach the witness's credibility in a later proceeding, although they may be used as the basis for a perjury charge. New Jersey v. Portash, 440 U.S. 450 (1979); Blaisdell v. Commonwealth, 372 Mass. 753, 763 (1977). But statements obtained in violation of the "prophylactic" rules of Miranda v. Arizona, 384 U.S. 436 (1966), are not considered "compelled" and may be used to impeach. *See* Harris v. New York, 401 U.S. 222 (1971); Commonwealth v. Harris, 364 Mass. 236, 238–41 (1973); Commonwealth v. Ly, 454 Mass. 223, 228 (2009) (same, citing *Commonwealth v. Harris*), discussed *supra* § 19.5A(1).

§ 33.2 REFERENCES

Useful source materials on the privilege against self-incrimination include 32 NOLAN, MASSACHUSETTS PRACTICE §56 (3d ed. 2007 & Supp. 2011); 30SMITH, MASSACHUSETTS PRACTICE §§ 6.12–6.13, 16.43-16.45, 16.55-16.68 (3d ed. 2007 & Supp. 2011); LIACOS, BROWN & AVERY, HANDBOOK OF MASSACHUSETTS EVIDENCE § 13.13 (7th ed. 1999 & Supp. 2006); 8 WIGMORE, EVIDENCE §§ 2250–2284 (McNaughton rev. 3d ed. 1961 & Supp. 2011); AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 232 (5th ed. 1988); Dohan, Carroll & Kilkelly, "Representing the Witness Claiming His/Her Fifth Amendment Privilege," CPCS Annual Training Conference, (Nov. 14, 1997); BNA, CRIMINAL PRACTICE MANUAL 31:111–12, 51:701–08, 51:801–22.

§ 33.3 AVAILABILITY AND SCOPE OF PRIVILEGE

Although the Fifth Amendment privilege has been said to offer protection "as broad as the mischief against which it seeks to guard,"[12] in recent years the U.S. Supreme Court has significantly narrowed its scope. Although counsel should always consider whether broader protection might be established under article 12 of the Massachusetts Constitution Declaration of Rights, one should keep in mind the following contours of the federal constitutional privilege:

1. The privilege bars only *compelled* testimony; the state may elicit and use the fruit of "voluntary" self incrimination.[13] Thus, recent Supreme Court cases have

[12] Counselman v. Hitchcock, 142 U.S. 547, 562 (1892).

[13] Compulsion may be indirect, such as holding a defendant's silence against her at sentencing (Mitchell v. United States, 526 U.S. 314, 328–30 (1999)), prosecutorial comment on a criminal defendant's failure to testify (Griffin v. California, 380 U.S. 609 (1965)), a judicial instruction calling attention to the defendant's failure to consent to a Breathalyzer test (Commonwealth v. Zevitas, 418 Mass. 677 (1994)), the pressure to confess inherent in custodial police interrogation (Miranda v. Arizona, 384 U.S. 436 (1966)), or the threatened loss of a government job (Carney v. Springfield, 403 Mass. 604 (1988)), threatened job discipline or dismissal, (Garrity v. New Jersey, 385 U.S. 493 (1967)), or threatened loss of professional license (Walden v. Board of Registration, 395 Mass. 263, 266 (1985) (dictum); Spevack v. Klein, 385 U.S. 511 (1967) (attorney may not be disbarred for asserting privilege)). *But see* United States v. Stein, 233 F.3d 6, 14-17 (1st Cir. 2000), *cert. denied*, 532 U.S. 943 (despite risk of attorney's disbarment if she claimed privilege before Board of Bar Overseers, her incriminating testimony before Board was not "compelled;" unlike in the *Garrity* line of cases, defendant was not explicitly threatened with loss of employment if she claimed privilege, nor was that sanction mandated by law); McKune v. Lile, 536 U.S. 24 (2002) (requirement that incarcerated sex offender disclose past sexual misconduct or else suffer a transfer to more secure facility, and lose personal privileges, does not compel self-incrimination under Fifth Amendment); Lyman v. Commissioner of Correction, 46 Mass. App. Ct. 202 (1999) (requirement that incarcerated sex offender admit his guilt as a condition of transfer to lower security facility does not violate privilege under either federal or state constitutions), *citing* Quegan v. Massachusetts Parole Bd., 423 Mass. 834, 838 (1996) (indirect pressure on prisoner seeking parole to admit his guilt, although he maintains his innocence, is not "compulsion" under Fifth Amendment or art. 12; prisoner may elect not to seek parole and not admit guilt); Mello v. Hingham Mutual Fire Ins. Co., 421 Mass. 333 (1995) (insured's failure to submit to examination under oath constituted material breach of fire insurance policy, barring recovery;

substantially excluded the *contents* of most voluntarily prepared documents from Fifth Amendment protection, focusing instead on the testimonial assertions implicit in their compelled production.[14] But *Boyd v. United States*, protecting private papers from compelled production, might still apply "in rare situations where compelled disclosure would break the heart of our sense of privacy."[15]

2. The compulsion must be attributable to the *state.*[16]

3. The privilege protects only *testimonial* communications[17] and does not bar compelled self-incrimination by the provision of physical, nontestimonial evidence, such as blood or handwriting exemplars.[18] Consistent with the privilege, a court may

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pressure to choose between self-incrimination and loss of claim was not "compulsion" under art. 12); Commonwealth v. Harvey, 397 Mass. 351, 356 (1986) (despite departmental rules requiring police officers to answer questions put by their superiors, and the possibility — had defendant remained silent — of disciplinary sanctions, including dismissal, absent any overt threat of discharge or any other "direct pressure" to answer, his responses were voluntary). Regarding immunity for public employees compelled to answer job-related questions, *see also infra* section 33.7B(2).

[14] Fisher v. United States, 425 U.S. 391, 402–14 (1976). An argument remains under both the Fifth Amendment and art. 12 of the Mass. Const. Declaration of Rights that the privilege bars compelled production of incriminating private letters and diaries, which would reveal intimate thoughts of the witness. Boyd v. United States, 116 U.S. 616, 633, 634–35 (1886) (discussed in *Fisher, supra*, 425 U.S. at 414ff.) (Brennan, J. concurring). But a majority of the Supreme Court would probably deny Fifth Amendment protection to the contents of any document, no matter how private. *See* AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 232 (5th ed. 1988) (discussing *Fisher, supra*, 425 U.S. at 405–14); United States v. Doe (Doe I), 465 U.S. 605, 612 & n. 10 (1984) (noting that the "Fifth Amendment [self-incrimination privilege] provides absolutely no protection for the contents of private papers of any kind…. [*Fisher*] sounded the death-knell for *Boyd*.") (O'Connor, J., concurring); Andresen v. Maryland, 427 U.S. 463 (1976); United States v. Miller, 425 U.S. 435, 440–45 (1976).

[15] In re Grand Jury Proceedings (Tanger), 173 F.R.D. 336, 337 (D. Mass. 1997) (upholding claim of privilege to resist subpoena to produce potentially incriminating affidavit prepared in lawyer's office) (quoting In re Grand Jury Subpoena, 973 F.2d 45, 51 (1st Cir. 1992)). *See also preceding footnote*.

[16] *But see supra* § 19.4B.

[17] According to the Supreme Court, a "testimonial communication" is one that "itself, explicitly or implicitly, relate[s] a factual assertion or disclose[s] information." Doe v. United States (*Doe II*), 487 U.S. 201, 210 (1988) (order to sign directive authorizing unspecified banks to disclose witness's account records does not compel "testimony"). *Compare* Stevens, J., dissenting, *Doe* II, 487 U.S. at 221, n.2 ("testimony" includes "creation of new facts" and admission of a desire or state of mind). *See also* Commonwealth v. Burgess, 426 Mass. 206, 217–21 (1997) (compelled execution of form directing IRS disclosure to Commonwealth of federal tax forms, "if any," filed by taxpayer for specified years, is not sufficiently "testimonial" to violate privilege under Fifth Amendment or art. 12); Sheridan, Petitioner, 412 Mass. 599, 605 (1992) (person's mere appearance before psychiatric examiner is not "communicative" or "testimonial," even if his behavior provides observer with basis on which to evaluate his mental health). This use of the term "testimonial" is distinct from its more narrow use in defining the limits of the Sixth Amendment's Confrontation Clause. *See* Crawford v. Washington, 541 U.S. 36, 50-53 (2004).

[18] Opinion of the Justices, 412 Mass. 1201, 1208 (1992) (real evidence not protected by art. 12, Mass. Const. Declaration of Rights); Commonwealth v. Beausoleil, 397 Mass. 206, 222–23 (1986) (ordering defendant to undergo blood test in paternity case does not violate privilege); Commonwealth v. Nadworny, 396 Mass. 342, 362–66 (1985) (handwriting exemplar

also require a person to sign a form directing the release of confidential financial records to the government.[19] However, under article 12 of the Declaration of Rights, an individual's refusal to provide physical evidence is inadmissible as a compelled self-accusation.[20] Also, the privilege still protects the witness from having to produce

nontestimonial); Commonwealth v. Appleby, 358 Mass. 407, 413 (1970) (benzidine tests of body and fingernail clippings and analysis of clothing for blood all nontestimonial); Commonwealth v. Vanhouton, 424 Mass. 327 (1997) (field sobriety alphabet recitation test does not evoke testimonial evidence under art. 12, and is therefore nontestimonial like defendant's slurred speech in Pennsylvania v. Muniz, 496 U.S. 582, 599–600, 602–03 & n.17, and does not "impermissibly reveal the defendant's thought processes," like requiring the defendant in *Muniz* to state whether he knew the date of his sixth birthday, or to count aloud); Commonwealth v. Brennan, 386 Mass. 772, 776–77, 779–83 (1982) (neither breathalyzer nor field sobriety tests involve testimonial or communicative evidence under the Fifth Amendment; nor does art. 12 of the Mass. Const. Declaration of Rights apply to such noncommunicative evidence)(discussing Schmerber v. California, 384 U.S. 757, 764 (1966))); Commonwealth v. Poggi, 53 Mass.App.Ct. 685 (2002) (defendant's proposed display of tattoos on his forearms was non-testimonial, so would not have entitled prosecutor to cross-examine); Commonwealth v. Burke, 339 Mass. 521, 534–35 (1959) (assuming physical stance in courtroom nontestimonial)). *Compare* United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984) (spelling errors in dictated handwriting exemplar would be testimonial); *Nadworny*, *supra* (unclear under Massachusetts law whether exemplar can be dictated, thereby obtaining defendant's spelling ability; "trivial" evidence obtained in this case by having the defendant acknowledge that he was writing with his "right" hand); Commonwealth v. Wayne W., 414 Mass. 218, 228–29 & n.11 (1993) (citing Blaisdell v. Commonwealth, 372 Mass. 753, 758–60 (1977) (statements of defendant during court ordered psychiatric examination are "testimonial")). *See also supra* §§ 5.7B, 5.7C.

[19] Doe v. United States (*Doe II*), 487 U.S. 201, 210 (1988); Commonwealth v. Burgess, 426 Mass. 206, 217–21 (1997). In such cases the witness is "compelled to assert certain statements incidental to the performance of the act of producing physical evidence," but, "if such assertions are merely incidental to and implicit in the compelled act of production, and will not be relied on by the Commonwealth in convicting the defendant . . . , then those assertions are insufficiently testimonial for art. 12 purposes." *Burgess, supra*, 426 Mass. at 221 n.6.

[20] Commonwealth v. Conkey, 430 Mass. 139, 141–43 (1999) (admission of fact that defendant agreed to return to police station and provide fingerprints, but failed to do so, violated article 12; conduct evidence used to show consciousness of guilt is testimonial and, when triggered by police request that forces defendant "to choose between two potentially incriminating alternatives," compelled); Commonwealth v. Hinckley, 422 Mass. 261 (1996) (error to admit, and permit jury inference of guilt from, police testimony that defendant refused to turn over sneakers to police seeking to determine whether they matched shoe prints at scene); Commonwealth v. Grenier, 45 Mass. App. Ct. 58 (1998) (defendant's verbal analysis of choice to take field sobriety test, or to refuse, and consequences of either choice, was not admissible "negotiation" with officer but inadmissible equivalent of refusal), *citing* Commonwealth v. McGrail, 419 Mass. 774 (1995) (erroneous to admit evidence of defendant's refusal to take field sobriety tests because use violated defendant's privilege against self-incrimination under art. 12); Commonwealth v. Lydon, 413 Mass. 309, 313–15 (1992) (defendant's refusal to allow hands to be tested for presence of chemicals is inadmissible as compelled self-incrimination under art. 12 of Mass. Const. Declaration of Rights; state cannot put defendant to "Catch-22" choice between producing incriminating real evidence or adverse testimonial evidence); Opinion of Justices, 412 Mass. 1201, 1209–11 (1992) (refusal to submit to requested breathalyzer test is both "testimonial" and "compelled" under art. 12, Mass. Const. Declaration of Rights, which gives broader protection than U.S. Constitution's Fifth Amendment as construed in South Dakota v. Neville, 459 U.S. 553 (1983) (refusal is not an act coerced by the officer, and so is not compelled self-incrimination)). *See also* Commonwealth v. Zevitas, 418 Mass. 677 (1994) (jury instruction required by G.L. c. 90, § 24(1)(e), implying that defendant had refused to consent to test for blood alcohol level, violated defendant's art. 12 rights);

objects, exemplars, or documents if such production implicitly constitutes substantially self-incriminating testimony. Thus the privilege may be claimed if the witness's act of production would substantially incriminate him (a) by implicitly admitting the item's existence and location in his possession and/or (b) by implicitly authenticating the item as being the one requested in the subpoena.[21]

4. The Fifth Amendment privilege protects against compulsion to be a witness against oneself in any "criminal case." This protects against forced exposure to *criminal and quasi-criminal liability,*[22] including enhanced punishment at sentencing[23]

Commonwealth v. D'Agostino, 421 Mass. 281 (1995) (applying *Zevitas* retroactively); Commonwealth v. Koney, 421 Mass. 295 (1995) (accord).

[21] United States v. Hubbell, 530 U.S. 27 (2000) (reviewing doctrine); Fisher v. United States, 425 U.S. 391, 408–13 (1976); Commonwealth v. John Doe, 405 Mass. 676, 679 (1989) (custodian's production of personally incriminating corporate records would be "testimonial"; contempt judgment vacated); Commonwealth v. Hughes, 380 Mass. 583, 592–93 (1980) (invalidating court order requiring defendant to produce a certain firearm, where production would make an implicit incriminating statement about firearm's existence, location and control, and also function as an authentication). "[A]ssertions implied from production of things . . . are within the Fifth Amendment, and thus justify the refusal to produce, when they are nontrivial and incriminating." *Hughes, supra*, 380 Mass. at 590. The court also expressed doubt "whether a defendant may be compelled to deliver the corpus delicti, which may then be introduced by the government at trial, if only it is understood that the facts as to the source of the thing are withheld from the jury." *Hughes, supra*, 380 Mass. at 595. *Compare* United States v. Doe, 465 U.S. 605, 617 n.17 (1984), suggesting possibility of valid compulsion under production immunity, a sort of "use immunity" presumably inadequate under Massachusetts law. *See infra* § 33.7A. *Contrast* Commonwealth v. Carey, 26 Mass. App. Ct. 339, *further appellate review denied*, 403 Mass. 1102 (1988) (videotape recordings of defendant's performance of field sobriety tests are admissible, recorded conduct not "testimonial").

[22] *See* In re Gault, 387 U.S. 1 (1967) (privilege against self-incrimination applies to "non-criminal" juvenile delinquency proceedings). *But see* Care and Protection of Quinn, 54 Mass.App.Ct. 117, 121 (2002) (because care and protection proceedings are civil, witness's claim of self-incrimination privilege is subject to comment by opposing counsel and negative inference by fact finder); Minnesota v. Murphy, 465 U.S. 420, 435 n. 7 (1984) (probation revocation hearings are civil and not criminal); Baxter v. Palmigiano, 425 U.S. 308 (1976) (prison disciplinary proceedings are not "criminal proceedings" for purposes of fifth amendment, therefore adverse inference may be drawn from defendant's refusal to testify at such proceedings); Lyman v. Commissioner of Correction, 46 Mass. App. Ct. 202 (1999) (requirement that incarcerated sex offender admit his guilt as a condition of transfer to lower security facility does not violate privilege under either federal or state constitutions), *citing* Quegan v. Massachusetts Parole Bd., 423 Mass. 834, 838 (1996) (neither Fifth Amendment nor art. 12 violated by parole board's consideration of prisoner's refusal to admit guilt of crimes for which he had been incarcerated; although art. 12 gives broader protection than Fifth Amendment, prisoner not "compelled" to admit his guilt).

[23] Mitchell v. United States, 526 U.S. 314, 325 ff. (1999) (privilege applies at sentencing stage of criminal cases) (*citing* Estelle v. Smith, 451 U.S. 454, 462–63 (1981) (capital presentence psychiatric examination)); Commonwealth v. Wayne W., 414 Mass. 218, 228–30 (1993) (juvenile transfer hearing). *Cf.* Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 524–27 & n.12 (1986) (interview of juvenile by psychiatrist prior to hearing on whether to extend the term of the juvenile's commitment to DYS); Commonwealth v. Lamb, 365 Mass. 265, 269–70 (1974) (sexually dangerous person commitment proceedings are civil, but warnings might be required by due process). *See also* Sheridan, Petitioner, 412 Mass. 599, 605 (1992) (SDP proceedings not criminal proceedings).

and certain forfeitures.[24] The privilege does not protect against forced testimonial exposure to civil liability, including some state-imposed civil penalties.[25]

The compelled communication must have at least a *tendency to incriminate* the witness.[26] Whether this is so is decided by the court[27] "in the setting of each case."[28] In Massachusetts, the privilege against self-incrimination "is to be construed liberally in

[24] Boyd v. United States, 116 U.S. 616, 633–34 (1886) (forfeiture of goods by reason of criminal offenses "though they may be civil in form are in their nature criminal"). *See also* United States v. Gordon, 634 F. Supp. 409, 412 (U.S. Ct. of Int'l Trade 1986) (applying privilege; privilege may apply in action that, although civil in form and not so punitive as to give rise to all criminal procedural safeguards, is "quasi criminal" in nature) (citing United States v. Ward, 448 U.S. 242, 251–55 (1980), and United States v. United States Coin & Currency, 410 U.S. 715 (1971) (privilege applies in civil forfeiture action)); G.L. c. 233, § 20C (immunity applies when testimony may tend to "incriminate [witness] or subject him to a penalty *or forfeiture*") (emphasis supplied). *But see supra* § 21.2A (civil forfeiture of property used in commission of drug offenses not "punishment" for purposes of double jeopardy bar).

[25] 8 WIGMORE, EVIDENCE § 2256 (McNaughton, Chadbourn & Tillers, rev. 4th ed. 1985 & 2011 Supp. by Arthur Best); United States v. Apfelbaum, 445 U.S. 115, 125 (1980) (privilege does not extend to consequences of noncriminal nature, such as civil liability, disgrace in community, or loss of employment) (dictum); United States v. Ward, 448 U.S. 242, 251–55 (1980) ($500 civil penalty under Federal Water Pollution control Act is "civil" and not "quasi-criminal"); Frizado v. Frizado, 420 Mass. 592 (1995) (domestic abuse prevention processes under G.L. c. 209A are civil, not punitive; therefore, allowing adverse inference from defendant's failure to testify does not violate art. 12 of state constitution, even if criminal proceedings against defendant are pending or might be brought).

[26] *See* Pixley v. Commonwealth, 453 Mass. 827, 832 (2009) ("A witness may refuse to testify unless it is 'perfectly clear, from a careful consideration of all of the circumstances in the case, that … the [witness's] answer[s] *cannot possibly* have [any] tendency' to incirminate") (emphasis in original) *quoting* Commonwealth v. Funches, 379 Mass. 283, 289 (1979), *quoting* Hoffman v. United States, 341 U.S. 479, 488 (1951). This "tendency to incriminate" should be decided on a question-by-question basis. A witness may have a valid claim with respect to the answers to some questions but not to others. *See* Commonwealth v. Martin, 423 Mass. 496, 502 (1996); Commonwealth v. Wooden, 70 Mass. App. Ct. 185, 190 n. 3, *rev. den.*, 450 Mass. 1103 (2007). More than a blanket assertion of the privilege is required "if circumstances do not clearly indicate a possibility of self-incrimination." Martin, 423 Mass. at 502. *See* Wooden, 70 Mass. App. Ct. at 190 n. 3 (same). *See infra*. § 33.5. *See also* Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 190-91 (2004) (statutory requirement that suspect stopped on *Terry* grounds "shall identify himself" does not constitute compelled self-incrimination because, absent "unusual circumstances," one's identity is not incriminating).

[27] In extraordinary circumstances when the information available does not adequately verify the claimed privilege, the court has discretion to hold an in-camera hearing at which the witness and the witness's counsel may "open the door a crack" to provide the court with additional, narrowly focused, confidential information in support of the asserted privilege. *See* Commonweatlh v. Martin, 423 Mass. 496, 504-05 (1996); Pixley v. Commonwealth, 453 Mass, 827, 832-33 (2009) (emphasizing that such a "*Martin* hearing" should be employed only in exceptional cases, where the information on the record is inadequate to resolve the privilege claim). *See infra* § 33.5.

[28] Powers v. Commonwealth, 387 Mass. 563, 565 (1982) (witness asked if he was with target on night of crime, and whether he gave police statement incriminating target; claim upheld). *See also* Murphy v. Commonwealth, 354 Mass. 81 (1968) (privilege upheld as to questions regarding witness's presence and observations at scene). *But see* Gambale v. Commonwealth, 355 Mass. 394, 397–98 (1969) (upholding contempt conviction for refusal to answer "non-accusatory" questions regarding his age, address, his employment, presence and observations at stabbing scene, etc.).

favor of the claimant."[29] Applying the federal standards announced in *Hoffman v. United States*[30] and *Malloy v. Hogan*,[31] the courts uphold a claim of privilege whenever the witness's response to questions "would in themselves support a conviction [or] . . . would furnish a link in the chain of evidence needed to prosecute the claimant."[32] *See infra* § 33.5, discussing procedure for invoking privilege.

The compelled communication must present a *"realistic threat of incrimination,"* as opposed to a "remote possibility."[33] This distinction has been drawn in upholding statutory disclosure requirements enforced by criminal penalties, usually for noncriminal and regulatory purposes.[34] However, even then the privilege might apply in circumstances posing a high risk of incrimination.[35]

5. Only *natural persons* and sole proprietorships are protected, not corporations, partnerships, unincorporated associations, or other artificial entities.[36]

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[29] Commonwealth v. Borans, 388 Mass. 453, 455 (1983). *See also* In re Brogna, 589 F.2d 24, 27 (1st Cir. 1978); Commonwealth v. Martin, 423 Mass. 496, 502 (1996) (standards are "highly protective" of the right).

[30] 341 U.S. 479 (1951).

[31] 378 U.S. 1 (1964).

[32] Commonwealth v. Borans, 388 Mass. 453, 456 (1983) (quoting Hoffman v. United States, 341 U.S. 479, 488 (1951)). *See also* Emery's Case, 107 Mass. 172, 181 (1871): "If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offense by himself, in any prosecution then pending, or that might be brought against him therefore, such disclosure would be an accusation of himself, within the meaning of [art. 12 of the Mass. Const. Declaration of Rights]."

[33] Fisher v. United States, 425 U.S. 391, 412 (1976). *See* Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 190-91 (2004) (absent unusual circumstances, statutory requirement that *Terry* suspect identify himself does not constitute compelled self-incrimnation). *See also* Pixley v. Commonwealth, 453 Mass. 827, 832 (2009); Commonwealth v. Martin, 423 Mass. 496, 502 (1996).

[34] *See* Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549 (1990) (privilege does not protect mother, who is custodian of her child pursuant to juvenile court order, from producing the child; court's authority over a child adjudicated "in need of assistance" considered part of a noncriminal regulatory scheme); California v. Byers, 402 U.S. 424 (1971) (upholding "hit and run" statute against self-incrimination attack); Commonwealth v. Joyce, 326 Mass. 751, 753–55 (1951) (disclosure requirements of G.L. c. 90, § 24, punishing "hit and run" drivers do not violate art. 12 privilege against self-incrimination, where only "remote possibility" of incrimination exists). *But see* Hiibel v. Sixth Judicial District Court, *supra*, notes 26 & 33.

[35] *See, e.g.*, Commonwealth v. Sasu, 404 Mass. 596, 601 (1989) (although G.L. c. 90, § 26, requiring motor vehicle operators to file accident reports and sanctioning failure by small "civil" fines "is in most cases nonincriminating and primarily aimed at noncriminal, regulatory governmental objectives," defendant was excused from filing report that could have incriminated him in pending vehicular homicide prosecution). *Contrast* Walden v. Board of Registration, 395 Mass. 263 (1985) (privilege not violated by fact that application for renewal of license required nurse to certify that she had complied with Mass. tax laws, in absence of showing that filing late return results in criminal prosecution).

[36] In re Grand Jury Subpoena, 973 F.2d 45 (1st Cir. 1992) (Mass. nominee trust is collective entity, whose records are not protected by the Fifth Amendment from subpoena); United States v. Doe, 465 U.S. 605 (1984); Bellis v. United States, 417 U.S. 85 (1974). *See* In the Matter of a John Doe Grand Jury Investigation, 418 Mass. 549, 552 (1994) (corporation may

Nor, under the Fifth Amendment, may an individual custodian of records of such entities claim the privilege on his own behalf, no matter how personally incriminating their contents.[37] The Supreme Judicial Court has ruled under article 12 of the Massachusetts Constitution Declaration of Rights that a custodian of corporate records may claim the privilege in response to a subpoena for those records when the act of production itself would be self-incriminating,[38] but a court may order the corporation to appoint an alternate keeper of the records to deliver the subpoenaed records.[39]

6. The privilege is *"personal"* to the individual subject to compelled self-incrimination; it cannot normally be claimed by another on that person's behalf.[40]

7. Under the *required records exception*, the privilege does not protect against production of records required by law to be kept if: (a) the aim of the state's inquiry is "essentially regulatory"; (b) the records are of a kind that the regulated party has customarily kept; and (c) the records have assumed "public aspects" that render them at least analogous to public documents.[41]

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not rely on art. 12 of the Mass. Const. Declaration of Rights in refusing to comply with a subpoena).

[37] Braswell v. United States, 487 U.S. 99 (1988). However, the Court left undecided whether the privilege protects the custodian of a close corporation from incriminating inferences that a jury would "inevitably" draw from the fact of production. *Braswell, supra*, 487 U.S. at 118, n.11.

[38] Commonwealth v. Doe, 405 Mass. 676, 678 (1989) (as sole stockholder, sole director, president and treasurer of close corporation, defendant could not be made to produce records that might be used against him in criminal proceeding). So, too, art. 12 might lead to a different result in Baltimore City Dep't of Social Servs. v. Bouknight, 493 U.S. 549 (1990), holding the privilege inapplicable, in part, by analogizing the mother's obligation to produce her child in court to an entity custodian's obligation to produce entity records for inspection. *Bouknight, supra*, 493 U.S. at 558–59.

[39] In the Matter of a John Doe Grand Jury Investigation, 418 Mass. 549 (1994). For the view that appointment of an alternate keeper will have no practical effect, *see* opinions by Justice Wilkins (concurring) and Chief Justice Liacos (dissenting), *id. at 555–57*. *See also* Fredrickson, *Criminal Law — Appointment of Alternate Keeper of Records to Comply with Grand Jury Subpoena Issued to Close Corporation,* June 1995 MASS. L. REV. 85.

[40] In the Matter of a Grand Jury Subpoena, 30 Mass. App. Ct. 462, 465 n.7 (1991) (rejecting argument that art. 12 of the Declaration of Rights permits a client to assert a self-incrimination privilege to prevent its accountant from being compelled to disclose potentially incriminating information about the client), *aff'd on other grounds*, 411 Mass. 489 (1992); Commonwealth v. Simpson, 370 Mass. 119, 121 (1976); Fisher v. United States, 425 U.S. 391, 396–401 (1976); Couch v. United States, 409 U.S. 322 (1973).

[41] In the Matter of Kenney, 399 Mass. 431, 437–42 (1987) (attorney's bank statements and files relating to property held as fiduciary fall within required records exception); Stornanti v. Commonwealth, 389 Mass. 518, 521–26 (1983) (upholding grand jury subpoena duces tecum to president of pharmacy corporation for records of drugs supplied to Medicaid recipients; required records exception applies to art. 12, Mass. Const. Declaration of Rights) (citing Grosso v. United States, 390 U.S. 62, 67–68 (1968), and Shapiro v. United States, 335 U.S. 1, 17 (1948)).

§ 33.4 DECIDING WHETHER TO INVOKE PRIVILEGE [42]

Assuming that the client has a valid claim of privilege, the decision whether to invoke it belongs ultimately to the client.[43] In counseling the client relevant considerations include the client's preference, the questions that the client will likely be asked and his likely answers, whether the government possesses evidence connecting the witness to crimes committed in this or other cases, and the client's legal status (whether he is on probation or parole, whether criminal charges or appeals are pending). It is also important for counsel to know of all the possible criminal activities in which the client has been involved that might relate to the testimony, so that counsel can advise him regarding potential incrimination and liability for perjury.

§ 33.5 HOW TO INVOKE PRIVILEGE

Outside of formal proceedings, persons must expressly assert the privilege in order to receive its protection.[44] In formal proceedings, the privilege applies differently to parties and to nonparty witnesses. The privilege protects a criminal defendant from being called as a witness by the Commonwealth and from adverse comment on his failure to testify.[45] If the defendant improperly asserts a claim of privilege (for

[42] This section was originally drawn from PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, CRIMINAL PRACTICE INSTITUTE, TRIAL MANUAL § 28.15 (1984).

[43] The accused must decide whether or not to testify in his own behalf. ABA STANDARDS: THE DEFENSE FUNCTION 4-5.2 (3d ed. 1991).

[44] In some out-of-court circumstances the privilege might offer protection even if not asserted. *See* Commonwealth v. Sasu, 404 Mass. 596, 600–01 (1989) (although generally a defendant must make a timely assertion of the privilege, where filing of accident report as required by G.L. c. 90, § 26, would have furnished "link in chain" of incriminating evidence against him, his failure to file was a "justifiable exercise of the privilege"). *Compare* Marchetti v. United States, 390 U.S. 39, 55–57 (1968) (privilege is defense against prosecution for failure to file gambling tax returns) *with* Garner v. United States, 424 U.S. 648 (1976) (incriminating disclosures on income tax returns were not "compelled"; person must claim privilege against specific disclosures sought on return). The S.J.C. has hinted that "the extent to which and the manner in which [a person] would have to assert the protection of art. 12 [of the Mass. Const. Declaration of Rights]," in contrast to the Fifth Amendment, in order to "receive [its] benefit," might differ in the direction of "broader protection." Walden v. Board of Registration, 395 Mass. 263, 270 (1985) (dictum). However, "[i]n the absence of compulsion, we are not persuaded to rule that the privilege is self-executing." Commonwealth v. Harvey, 397 Mass. 351, 357 n.6 (1986).

[45] *See generally infra* § 35.3B; Mitchell v. United States, 526 U.S. 314, 328–30 (1999) (Fifth Amendment prohibits drawing of negative inference from defendant's silence at sentencing), *citing* Griffin v. California, 380 U.S. 609 (1965) (adverse comment violated defendant's privilege); Commonwealth v. Amirault, 404 Mass. 221, 236–38 (1989) (evidence of postarrest, post-*Miranda* silence cannot be basis for inference of guilt); Commonwealth v. Sherick, 401 Mass. 302, 304, 23 Mass. App. Ct. 338, 343–44 (1987) (improper comment on privilege against self-incrimination to state that Commonwealth's case remains uncontradicted when rebuttal could only have come from defendant); Commonwealth v. Thomas, 400 Mass. 676, 678–80 (1987) (judge should not characterize assertion as "neglect," "failure," or "refusal" to testify: "No aspect of the charge to the jury requires more care and precise expression than that used with reference to the right of a defendant in a criminal case to remain silent and not to be compelled to incriminate himself"); *See also* G.L. c. 278, § 23 (as amended, 1992)

example, refuses to provide a blood sample), the prosecutor must seek a court order, which in this instance is the equivalent of a seizure. The Commonwealth must show probable cause at an adversary hearing that the evidence if produced will probably be relevant to the question of the defendant's guilt.[46] If the defendant at trial implies that the exemplars were provided voluntarily, it is open to the Commonwealth to show that they were obtained pursuant to a court order.[47]

Defense counsel are often required to advise potential witnesses, or to represent nonparty witnesses in a criminal proceeding. Like suspects or criminal defendants, witnesses are entitled to the privilege against self-incrimination, which counsel is duty-bound to protect.[48] Nonparty witnesses must normally invoke the privilege in response to particular questions,[49] perhaps after objections by a party[50] or sua sponte warnings from the bench.[51] Having to do so in the course of trial or other hearing might be avoided if counsel for the witness informs counsel for both parties of her client's intention. This could trigger either a grant of immunity[52] or a voir dire hearing on the

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(defendant's failure to testify at preliminary hearing may not be used against him at trial). The prohibition protects the defendant against adverse comments by codefendant's counsel, as well as by prosecutors and judges. Commonwealth v. Russo, 49 Mass. App. Ct. 579 (2000).

A defendant who does not testify has the right to a jury instruction that the jury "may not draw an adverse inference from the fact that the defendant did not testify." Commonwealth v. Treadwell, 37 Mass. App. Ct. 968, 969 (1994) (quoting Carter v. Kentucky, 450 U.S. 288 (1981)); Commonwealth v. Jenkins, 416 Mass. 736 (1994). On seasonable request, he also has the right that the jury not be so instructed. Commonwealth v. Jackson, 419 Mass. 716, 732 (1995).

[46] *See* Commonwealth v. Trigones, 397 Mass. 633, 640–41 (1986); Commonwealth v. Draheim, 447 Mass. 113, 118-20 (2006) (requiring same showing for taking DNA swab from non-suspect third parties in grand-jury investigation).

[47] Commonwealth v. Smith, 403 Mass. 489, 498–99 (1988).

[48] Counsel should consult Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege,* CPCS Annual Training Conference (Nov. 14, 1997), an excellent guide on which this discussion draws. Dohan et al. stress that the decision whether to invoke the privilege belongs to the client alone, and that the lawyer must zealously advocate the claim "even if the lawyer believes the witness would never actually be prosecuted based on her testimony or if the lawyer believes the witness should testify." Dohan et al., *supra,* at 1.

[49] Commonwealth v. Martin, 423 Mass. 496, 502 (1996) ("a witness is . . . not entitled to make a blanket assertion of the privilege").

[50] *See* Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege,* CPCS Annual Training Conference, at 4 (Nov. 14, 1997) (citing Commonwealth v. Funches, 379 Mass. 283, 287 (1979) (prosecution properly objected to defense counsel question on ground response might incriminate witness)). Dohan et al. describe the normal procedure as follows: (1) a witness or attorney for one of the parties should alert the court to a potential self-incrimination claim as early as possible; (2) if assertion of a claim is challenged during trial, the issue should be resolved outside of the jury's presence; (3) once a witness's desire to invoke the privilege is brought to the court's attention the witness will be appointed counsel; (4) following a private conference with the witness client, the attorney will report to the court whether her client intends to invoke the privilege. Dohan et al., *supra,* at 5–9.

[51] On the judge's license to advise the witness *see infra* § 33.6B.

[52] *See infra* § 33.7.

claim of privilege outside the jury's presence.[53] In some instances, however, a defendant might be entitled to force the witness to invoke the privilege before the jury.[54]

In *Commonwealth v. Martin*,[55] the Supreme Judicial Court prescribed the procedure to be followed when a witness invokes the privilege against self-incrimination: (1) The judge, rather than the witness or his attorney, is empowered to decide whether a claim of privilege is justified.[56] (2) The witness bears an initial *burden of production* to establish a foundation for asserting the privilege: the witness "must show a real risk that his answers to questions will tend to indicate his involvement in illegal activity . . . and not a mere imaginary, remote or speculative possibility."[57] If the external circumstances support the witness's privilege claim, the court should honor it. But a witness may not rely on a bald assertion of his privilege if the circumstances do not clearly indicate a possibility of self-incrimination.[58] (3) The party seeking to compel the testimony in the face of the asserted privilege bears the *burden of persuasion* to prove that it is "perfectly clear . . . that the witness is mistaken,

[53] "When it is clear that a witness intends to exercise the privilege against self-incrimination, the witness should not be permitted to do so before the jury …. Where there is some advance warning … the trial judge should conduct a voir dire of the witness outside the presence of the jury, to ascertain whether the witness will assert some privilege or otherwise refuse to answer questions." Commonwealth v. Fisher, 433 Mass. 340, 350 (2001). *See, e.g.*, Luna v. Superior Court, 407 Mass. 747, 749 n.1 (1990) (on agreement of parties to avoid delaying trial, pretrial hearing on claim of privilege); Commonwealth v. Weed, 17 Mass. App. Ct. 463, 464 (1984) (after jury empanelled, and judge advised that potential prosecution witnesses wished to claim privilege, waiver hearing held).

[54] *See* Gray v. State, 368 Md. 529, 547-66 (Md. 2002) (where defendant presents defense that the witness committed the offense, and there is sufficient credible evidence of that fact, defendant entitled to avoid prejudice by calling the witness to invoke the privilege before the jury). *See also* Lentz v. Metro. Property and Cas. Ins. Co., 437 Mass. 23 (2002) (in civil case, no abuse of discretion to allow party to call, and comment in closing argument upon, witnesses who claimed privilege against self-incrimination).

[55] 423 Mass. 496, 504–05 (1996) (judge not required to accept invocation of privilege on basis of flat assertion by witness that his trial testimony would differ from testimony he gave to the grand jury).

[56] Commonwealth v. Martin, 423 Mass. 496, 504–05 (1996).

[57] Commonwealth v. Martin, 423 Mass. 496, 502 (1996). "The challenge for an attorney representing a witness is to establish the basis for the assertion while avoiding revealing the exact nature of the possibly incriminating information." Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege*, CPCS Annual Training Conference, at 8 (Nov. 14, 1997). "Counsel for the witness can generally meet [the] burden [of production] by pointing out circumstances apparent on the face of the case which pose a potential danger to the client. Often one or the other of the parties will be eager to point out likely pitfalls. It may be appropriate to obtain affidavits from the parties indicating areas of anticipated inquiry." Dohan et al, *supra.*

[58] Commonwealth v. Martin, 423 Mass. 496, 502 (1996) (judge reasonably could conclude that no sufficient foundation laid for privilege claim by witness who feared perjury prosecution because of anticipated difference between his trial testimony and his testimony at grand jury; circumstances suggested that witness was merely innocent victim, and no inaccuracy in grand jury testimony appeared). *See also* In re Brogna, 589 F.2d 24, 28 n.5 (1st Cir. 1978).

and that the answer[s] cannot possibly have [the] tendency to incriminate."[59] Barring that proof, neither the witness's claim of innocence,[60] his disingenuous motives,[61] nor the practical unlikelihood of prosecution,[62] will defeat the claim of privilege. (4) If the information available to the judge does not adequately support the witness's claim of privilege, the judge may hold an in camera hearing to allow the witness to impart sufficient information, in confidence, to allow the judge to assess the claim. An in camera hearing is not appropriate if the external circumstances support the claim of privilege.[63] (5) The permissible scope of inquiry at the in camera hearing is narrow: the witness "should not be required to disclose so much that the privilege is effectively destroyed."[64] (6) Only the witness, his counsel, and the judge may be present at an in camera hearing. A record of the hearing should be kept, under seal, which would be opened only on appellate review, if it were claimed that the witness had improperly invoked the privilege.[65]

If the trial judge rejects the witness's claim of privilege, the client may elect to refuse to testify, and immediately appeal any summary contempt judgment.[66] If the

[59] Commonwealth v. Martin, 423 Mass. 496, 502 (1996) (quoting Commonwealth v. Funches, 379 Mass. 283, 289 (1979), quoting Hoffman v. United States, 341 U.S. 479, 488 (1951)).

[60] Ohio v. Reiner, 532 U.S. 17 (2001) (Fifth Amendment protects innocent, as well as guilty, from compelled self-incrimination); United States v. Dwyer, 287 F. Supp. 2d. 82, 90 (D. Mass. 2009).

[61] Murphy v. Commonwealth, 354 Mass. 81, 84 (1968) (clear that the witness intended to remain silent whether his responses were incriminating or not).

[62] "[N]either a practical unlikelihood of prosecution nor the prosecutor's denial of an intention to prosecute negates an otherwise proper invocation of the Fifth Amendment." Turner v. Fair, 476 F. Supp. 874, 880 (D. Mass. 1979), *vacated and remanded on other grounds*, 617 F.2d 7 (1st Cir. 1980) (quoted with approval in Commonwealth v. Borans, 388 Mass. 453, 459 (1983)). *See also* In the Matter of Proceedings Before a Special Grand Jury, 27 Mass. App. Ct. 693, 700 (1989) (right to assert privilege depends not on the *likelihood* but upon the *possibility* of prosecution).

[63] In re Brogna, 589 F.2d 24, 28 n.5 (1st Cir. 1978) "If . . . the court refuses to acknowledge the privilege and insists on an *in camera* verification from the lips of the witness even though reasonable grounds for claiming the privilege appear in the surrounding circumstances, the court comes perilously close to doing what the Fifth Amendment forbids."). *See also* Pixley v. Commonwealth, 453 Mass. 827, 832-33 (2009) (emphasizing that such an *in camera* hearing should be employed only in exceptional cases).

[64] Commonwealth v. Martin, 423 Mass. 496, 504–05 (1996) (citing In re Brogna, 589 F.2d 24, 28 n.5 (1st Cir. 1978)). At the hearing, "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." *Martin, supra*, (quoting In re Brogna, *supra*, 589 F.2d at 28 n.5). *See also* McIntyre's Mini Computer Sales Group v. Creative Synergy Corp. 115 F.R.D. 528 (D. Mass. 1978) (defendant required to submit "in general and circumstantial terms" reasons for invoking privilege with respect to "innocuous questions" regarding his background, present employment, and other matters).

[65] Commonwealth v. Martin, 423 Mass. 496, 504–05 (1996) (citing United States v. Goodwin, 625 F.2d 693, 702 (5th Cir. 1980)).

[66] The contempt judgment "is subject to immediate appeal as a final judgment and, if necessary, the judgment can be stayed while . . . appeal is expedited." Luna v. Superior Court, 407 Mass. 747, 749 n.1 (1990). *See also* Commonwealth v. Borans, 388 Mass. 453 (1983) (transcript of voir dire in which client limits testimony to his name and address; judgment of contempt reversed).

witness testifies at the voir dire or trial, counsel should request permission to stand next to the client at the witness stand, or else arrange some method of communicating to the witness when he should claim the privilege. No particular form of words is necessary; "I refuse to testify on the ground of the Fifth Amendment" is acceptable.[67]

If a prosecution witness gives prejudicial testimony on direct examination and first invokes the privilege on cross, the defendant's right to confrontation should at least support a motion to strike the witness's direct testimony.[68]

§ 33.6 WAIVER OF PRIVILEGE

The privilege may be waived either expressly or by implication from testimony.

§ 33.6A. EXPRESS WAIVER

An express waiver of the privilege, as of any fundamental right, is accomplished by a "voluntary, intelligent relinquishment of a known right."[69] Defendants frequently waive the privilege expressly, for example, in waiving *Miranda* rights[70] or as part of a guilty plea colloquy.[71]

According to Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege,* CPCS Annual Training Conference (Nov. 14, 1997), at 19:

> Typically, witnesses are found to be in contempt in the middle of trial, making delay a serious issue. In those circumstances there appear to be two viable appellate approaches. The simplest would be to file a Petition for Extraordinary Relief with the Single Justice of the S.J.C., pursuant to G.L. c. 211, sec. 3. Because your client faces immediate incarceration and the trial also faces a significant disruption, immediate application of the Court's supervisory powers may be appropriate. *See Luna* [407 Mass. at 749, n.1]. Because the judgment of contempt is a final decision, ordinarily one would file a standard appeal in the Appeals Court. Another method for seeking immediate relief might be to seek a stay (or further stay) from a single Justice of the Appeals Court while also requesting an expedited appeal. When time is not of the essence, a request for a stay and a standard appeal in the Appeals Court is appropriate.

[67] Quinn v. United States, 349 U.S. 155, 163 (1955). "Generally, the witness should answer no questions beyond identifying herself. . . . [E]xperience has shown that witnesses [invoking the privilege] do best when they are able to read a statement prepared for them by counsel. The witness should respectfully decline to answer the question on grounds that the answer may tend to incriminate her." Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege,* CPCS Annual Training Conference, at 7 (Nov. 14, 1997).

[68] Commonwealth v. Funches, 379 Mass. 283, 292–94 (1979). Depending on the circumstances, a motion for mistrial might also be appropriate. *See* Commonwealth v. Martin, 372 Mass. 412, 413–14 (1977) (when witness asserts Fifth Amendment privilege in front of jury, reversal appropriate (1) if it was the result of prosecutorial misconduct designed to prejudice the defendant or (2) if the claim of privilege adds "critical weight" that produces guilty verdict). *See also* United States v. Victor, 973 F.2d 975, 978–80 (1st Cir. 1992) (reviewing criteria for reversal when prosecutor, having sufficient reason to believe that a witness may invoke privilege, fails to inform court so that voir dire can be conducted out of jury's presence).

[69] Taylor v. Commonwealth, 369 Mass. 183, 189 (1975).

[70] *See supra* § 19.4D(2).

§ 33.6B. IMPLIED WAIVER

When a criminal defendant voluntarily takes the witness stand to testify at his trial, that act implicitly waives his privilege "as to any facts material to the crime for which he is being tried."[72] However, he does not waive his privilege with respect to matters that are improper for purposes of impeachment.[73]

As for nonparties, the doctrine of waiver "by testimony" holds that "if an ordinary witness, not a party to a cause, voluntarily testifies to [an incriminating fact] he waives his privilege as to subsequent questions seeking related facts."[74] Thus the witness who legitimately fears self-incrimination faces a dilemma. If he prematurely refuses to answer questions, he risks penalties for contempt. If, on the other hand, he answers "preliminary" or "peripheral" questions, he risks unintentional forfeiture of the privilege.[75] In this situation, the witness should err on the side of premature refusal to answer.

The implied waiver doctrine is limited in several respects: (1) It applies only to sworn "testimony." Therefore, unsworn out-of-court statements to the police do not result in loss of the privilege as to subsequent in-court, sworn testimony.[76] (2) The

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[71] *See infra* § 37.7. *But see* Mitchell v. United States, 526 U.S. 314, 321 ff. (1999) (in federal system, waiver of privilege as part of guilty plea colloquy does not waive the privilege at sentencing).

[72] Blaisdell v. Commonwealth, 372 Mass. 753, 764 (1977) (citing Jones v. Commonwealth, 327 Mass. 491 (1951)). *But see* Mitchell v. United States, 526 U.S. 314, 321 ff. (1999) (privilege applies at sentencing stage of criminal cases).

[73] *See* Commonwealth v. Irwin, 72 Mass. App. Ct. 643, 650-54 n. 15 (2008) (by testifying, defendant did not open door to questions about her prior refusal to speak with detectives, and cross examination concerning that refusal violated her art.-12 right to avoid compelled self-incrimination); Commonwealth v. Seymour, 39 Mass. App. Ct. 672, 675 (1996) (even though testifying defendant mentioned on direct examination the officer's request that she take a Breathalyzer, prosecutor could not ask whether she had taken the test). *Compare* Commonwealth v. Johnson, 46 Mass. App. Ct. 398 (1999) (by testifying on direct examination that he did not disguise his voice during the identification procedure, defendant opened door to prosecutor's cross-examination regarding defendant's earlier refusals to attend the lineup).

[74] Commonwealth v. Martin, 423 Mass. 496, 500 (1996) (citing Taylor v. Commonwealth, 369 Mass. 183, 189 (1975)). The doctrine rests on two grounds: *first*, that once the witness has freely incriminated himself, "continued testimony as to details would no longer tend to incriminate"; *second*, that a contrary rule would permit the witness to distort the truth by testifying selectively. *Taylor, supra*, 369 Mass. at 190. *See also* Commonwealth v. Penta, 32 Mass. App. Ct. 36, 45–46 (1992) (holding that a witness who voluntarily testified at pre-trial motion hearing waived right to exercise privilege against self incrimination at trial, because the trial was a "probable, logical, or material continuation or outgrowth" of the earlier proceedings; Brown v. United States, 356 U.S. 148, 157 (1958) (civil defendant who testifies at trial waives privilege regarding matters made relevant by her direct examination).

[75] "[T]he witness must claim his privilege in the outset, when the testimony he is about to give, will, if he answers fully all that appertains to it, expose him to a criminal charge, and if he does not, he waives it altogether." Foster v. Pierce, 11 Cush. 437, 439 (1853), *quoted in* Commonwealth v. Borans, 388 Mass. 453, 459 n.12 (1983).

[76] Taylor v. Commonwealth, 369 Mass. 183, 191 (1975). *See also* Commonwealth v. Voisine, 414 Mass. 772, 784–85 (1993) (witness's guilty pleas to related crimes did not "rise to the level of testimony" for purpose of determining whether privilege waived); Commonwealth v. Slonka, 42 Mass. App. Ct. 760, 768–69 (1997) (signed statement "under pains and penalties

privilege is not lost unless the prior testimony was given "freely and voluntarily." This judgment depends on all the circumstances, including the witness's age and understanding, and whether his decision to testify was informed by the assistance of counsel or the court.[77] Arguably, the grand jury testimony of a "target" or potential defendant is not "voluntary" unless the privilege against self-incrimination is expressly waived after full warnings.[78] (3) The witness's prior testimony must have been incriminating. Thus, he must have admitted to at least one element of a crime. Even then, the privilege would protect him against compelled further disclosures that pose a "real danger of legal detriment, that is, further disclosure [that] would supply a link in the chain of evidence."[79] (4) "[W]aiver by testimony is limited to the proceeding in which the testimony is given and does not extend to subsequent proceedings."[80] The

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of perjury" given freely and voluntarily to defense counsel by witness forfeits later claim of privilege at trial).

[77] *See* Commonwealth v. King, 436 Mass. 252, 260 (2002) (implied waiver by testimony need not be "knowing and intelligent" but only "voluntary"; whether witness was advised of privilege against self-incrimination is only one factor in determining voluntariness); Commonwealth v. Hammond, 50 Mass. App. Ct. 171, 177, *review denied* 433 Mass. 1101 (2000) (where witness, without advice of counsel, signed affidavit recanting earlier trial testimony, no error to allow him to claim privilege later at hearing on motion for new trial); Commonwealth v. Koonce, 418 Mass. 367, 377–79 (1994) ("reluctant" trial testimony of 20-year-old with 11th grade education, who was not informed of the privilege, was not "freely and voluntarily given"); Commonwealth v. Ortiz, 393 Mass. 523, 529–30 (1984) (prior testimony by 15-year-old witness who appeared unintelligent and easily confused was not freely and voluntarily given); Commonwealth v. Weed, 17 Mass. App. Ct. 463, 469 (1984) (witness misleadingly advised by prosecutor that counsel was unnecessary so long as truth was told; grand jury testimony not "freely and voluntarily given" for purposes of waiver); Taylor v. Commonwealth, 369 Mass. 183, 190–93 (1975) (a 16-year-old witness who testified without the assistance of parents or counsel, who appeared confused, and who was not advised of his privilege by the judge, did not testify "freely and voluntarily" for the purpose of waiver). *See also* Turner v. Fair, 476 F. Supp. 874, 879 (D. Mass. 1979) (witness who testified at grand jury under mistaken impression as to the scope of immunity granted him did not testify "with full awareness of the consequences and hence did not voluntarily and intelligently waive his . . . privilege"), *vacated and remanded on other grounds*, 617 F.2d 7 (1st Cir. 1980).

[78] Both the U.S. Supreme Court and the S.J.C. have held that a potential defendant who testifies before the grand jury has no right to warnings that he is a target. United States v. Washington, 431 U.S. 181, 190 n.6 (1977) (rejecting arguments based on self-incrimination and due process); Commonwealth v. D'Amour, 428 Mass. 725, 741–43 (1999) (in case where defendant was advised of, and understood, rights to silence and to state-provided counsel, no right to target warning under article 12 of the state constitution). Nor, probably, do grand jury witnesses have a federal constitutional right to receive *Miranda* warnings. *See* United States v. Mandujano, 425 U.S. 564, 578–82 (1976) (plurality opinion). *But see* ABA Model Grand Jury Act §§ 102(1), 200(2)(d), 201(2), requiring notice to witness of privilege against self-incrimination and notice of target status. If counsel enters a case after the client has already given grand jury testimony, counsel should seek a court order requiring transcription and disclosure to counsel of the client's testimony. If the client's rights were infringed, counsel should consider moving to quash the grand jury's uses of the client's testimony, or any indictment based on that testimony. *See supra* § 5.8C(3).

[79] Commonwealth v. Funches, 379 Mass. 283, 290–91 (1979) (quoting Rogers v. United States, 340 U.S. 367, 373 (1951)).

[80] 8 WIGMORE, EVIDENCE § 2276, at 458 (1961 & Supp. 2011), *quoted in* Commonwealth v. Borans, 388 Mass. 453, 457 (1983). *See* Commonwealth v. King, 436 Mass. 252 (2002) (voir dire hearing held on day of trial is that 'same proceeding" as the trial);

S.J.C. has thus held that a witness's "voluntary testimony before a grand jury does not waive the privilege against self-incrimination at trial."[81] In contrast, a witness's testimony at a pretrial motion hearing constitutes a waiver of the privilege for trial, the Court holding that for these purposes a motion hearing and the ensuing trial are part of the same proceeding.[82] (5) By testifying with respect to one unlawful act, the witness "does not thereby waive his privilege of refusing to reveal other unlawful acts,"[83] even if they involve the same criminal incident. Thus, for example, a plea of guilty to the substantive crime would not waive the privilege as to conspiracy to commit the crime or as to past perjury.[84] The test is whether the other acts are "related" to those that were the subject of the witness's voluntary testimony.[85]

Commonwealth v. Fiore, 53 Mass. App. Ct. 785, 789-90 (2002) (testimony at civil deposition did not waive privilege at subsequent criminal trial).

[81] Palaza v. Superior Court, 393 Mass. 1001 (1984) (rescript) (witness who testified to the grand jury that indicted Jones did not waive privilege of silence at Jones's subsequent trial); United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), *quoted in* Commonwealth v. Borans, 388 Mass. 453, 457–58 (1983). *See* Commonwealth v. Martin, 423 Mass. 496, 500–01 (1996) (reaffirming *Palaza* on this point despite "confusion" sown by court's language in Luna v. Superior Court, 407 Mass. 747, 750–51 (1990) (discussed note 82 *infra*.).

[82] *See* Commonwealth v. Penta, 32 Mass. App. Ct. 36, 44–47 (1992) (witness's voluntary testimony at two suppression hearings waived privilege to withhold testimony at trial of same charges, despite risk of self-incrimination). *See also* Luna v. Superior Court, 407 Mass. 747, 750–51 (1990) (witness's voluntary submission of affidavit in connection with motion to dismiss waives privilege to refuse to testify in subsequent trial of same charges; "waiver extends to subsequent proceeding if 'proceeding in which the privilege is invoked is a probable, logical, or natural continuation or outgrowth of the proceeding . . . in which prior testimony has been given by the witness,' " quoting Matter of DeSaulnier (No. 2), 360 Mass. 761, 766 (1971)).

As the S.J.C. acknowledged in Martin, *supra* note 81, its decision in *Luna* caused some confusion. The *Luna* court's inaccurate distinction of *Palaza* as a "trial involving [a] different defendant," and its reliance on dicta in *DeSaulnier* that it had earlier rejected in *Palaza*, *supra*, 393 Mass. at 1002, appeared to signify some retreat from the "same proceedings" rule. *See DeSaulnier*, *supra*, 360 Mass. at 765–66, indicating dissatisfaction with a "mechanical" application of the rule.

Although the Court's decision in *Martin* necessarily implies abandonment of the broad *Luna* doctrine, extending implied waiver to any subsequent proceeding which "is a probable, logical, or natural continuation or outgrowth of the proceeding . . . in which prior testimony [was] given by the witness," the Court has not disavowed *Luna* or *Penta*. This leaves the scope of implied waiver unclear. It has been suggested that "the only obvious distinction between testimony in the Grand Jury and testimony in later hearings is the indictment. It may be that the Court has arbitrarily distinguished between a pre-indictment investigatory proceeding and the post-indictment adjudicatory proceeding. Under this construction, the post-indictment adjudicatory proceeding appears to include any and all hearings conducted after the indictment is returned." Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege*, CPCS Annual Training Conference, at 14 (Nov. 14, 1997).

[83] Commonwealth v. Francis, 375 Mass. 211, 217 (1978) (at trial of codefendant, witness's testimony admitting breaking and entering did not waive privilege as to aspects of his conduct that might implicate him in additional crimes of larceny and conspiracy); Evans v. O'Connor, 174 Mass. 287, 291 (1899) (witness may testify regarding alleged adulterous acts in one year without waiving privilege as to acts in other years).

[84] Commonwealth v. Francis, 375 Mass. 211 (1978). *See also* Commonwealth v. Voisine, 414 Mass. 772, 784–85 (1993) (dictum implying that testimony admitting guilt of

While Massachusetts courts generally need not inform witnesses of the privilege, "in certain circumstances, where the witness is ignorant, misinformed or confused about his rights, and there is danger to him in the testimony sought to be elicited, it is a 'commendable practice' for the judge to intervene and advise the witness."[86]

§ 33.7 IMMUNITY

A witness who claims and refuses to waive the privilege against self-incrimination may nevertheless be forced to testify under a valid grant of immunity.[87]

§ 33.7A. SCOPE OF IMMUNITY

Because immunity serves as substitute for the privilege against self-incrimination, the scope of immunity granted must be coextensive with the constitutional right.[88] Because the constitutional privilege is broader in Massachusetts than under the Fifth Amendment, Massachusetts courts require transactional immunity instead of the use and derivative use immunity that suffices for federal constitutional purposes.[89] Thus, the Fifth Amendment to the U.S. Constitution requires only that no compelled testimony or fruits thereof be *used* against the witness in any subsequent prosecution,[90] whereas article 12 of the Massachusetts Constitution Declaration of

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related crimes, including accessory after fact to murder, would not bar assertion of privilege to avoid self-incrimination in crime of principal in murder in the first degree).

[85] *See supra* note 74 & text.

[86] Taylor v. Commonwealth, 369 Mass. 183, 192 (1975) (citing Commonwealth v. Slaney, 345 Mass. 135, 142 (1962)). *See also* Commonwealth v. LaFontaine, 32 Mass. App. Ct. 529, 531–34 (1992) (accord, but better practice to excuse jury and advise witness of his privilege out of jury's hearing).

[87] Refusal to testify under a valid grant of immunity is punishable by contempt. G.L. c. 233, § 20H. *See infra* § 33.7C.

[88] Blaisdell v. Commonwealth, 372 Mass. 753, 761–64 (1977) (G.L. c. 233, § 23B, immunity grant to defendants subjected to court-ordered psychiatric examination, limiting admissibility at trial of certain statements, constitutionally insufficient).

[89] Emery's Case, 107 Mass. 172, 180–82, 185–86 (1871) (art. 12 protection against compulsion to "furnish evidence" protects witness from "indirect and incidental consequences of a disclosure which he might be called upon to make"; statute compelling testimony under guarantee of use immunity invalid because privilege is broader, and requires transactional immunity). *Compare Emery, supra, and* Attorney General v. Colleton, 387 Mass. 790, 796–81 (1982) *with* Kastigar v. United States, 406 U.S. 441, 453 (1972) (upholding 18 U.S.C. § 6002, barring use against the witness in any criminal case of "compelled testimony or other information directly or indirectly derived from such testimony or other information").

[90] Kastigar v. United States, 406 U.S. 441, 453 (1972). The United States District Court for the District of Massachusetts (Young, J.) has adopted the Second Circuit rule requiring per se dismissal of an indictment returned by a grand jury that has heard defendant's immunized testimony, regardless of the government's contention that the indictment was supported by evidence wholly independent of the compelled testimony. United States v. McGee, 798 F. Supp. 53, 55–58 (1992) (citing United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), *cert. denied,* 429 U.S. 980 (1976)).

Rights[91] and supporting statutes[92] require the government, in exchange for the witness's testimony, to *forgo prosecuting* him for any crime in which he is implicated by his testimony.[93] Although testimony that is compelled under a grant of immunity may not even be used to impeach the witness's credibility should he later testify inconsistently,[94] it is admissible in a prosecution for perjury or contempt committed while the witness was immunized.[95]

State grants of immunity also protect the witness against use of the testimony and fruits in federal or other states' criminal proceedings.[96] In such proceedings, the prosecutor would have a "heavy burden" to prove that the evidence [he] proposes to use [against the defendant] is derived from a legitimate source wholly independent of the compelled testimony."[97]

Although formal immunity may be offered in Massachusetts only for certain crimes enumerated in G.L. c. 233, § 20D,[98] the immunity extends to any other crime related to the transaction about which the witness is compelled to testify.[99]

§ 33.7B. MECHANISM FOR GRANTING IMMUNITY

1. Formal Immunity

[91] Attorney General v. Colleton, 387 Mass. 790, 796 (1982); In the Matter of a John Doe Grand Jury Investigation, 405 Mass. 125, 129 (1989); Carney v. Springfield, 403 Mass. 604 (1988).

[92] G.L. c. 233, §§ 20C–20I. The witness receives both transactional and use immunity. An immunized witness "shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter, or thing concerning which he is so compelled . . . to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal or civil proceeding against him in any court of the commonwealth. . ." G.L. c. 233, § 20G.

[93] *See* Commonwealth v. Austin A., 450 Mass. 665, 668 (2008). Nonetheless, a grant of immunity extends only to the specific crimes for which the immunity was granted and to any other crimes that are related to the transaction about which the witness was compelled to testify. Regarding any other crimes, a witness may decline to testify on the basis of the privilege against self-incrimination. *See* In the Matter of a Grand Jury Investigation, 405 Mass. 125, 128–30 (1989); Commonwealth v. Turner, 371 Mass. 803, 807–11 (1977).

[94] New Jersey v. Portash, 440 U.S. 450 (1979); Blaisdell v. Commonwealth, 372 Mass. 753, 763 (1977).

[95] G.L. c. 233, § 20G; Commonwealth v. Steinberg, 404 Mass. 602, 607 (1989).

[96] Murphy v. Waterfront Comm'n, 378 U.S. 52, 77 (1964); Commonwealth v. Stone, 369 Mass. 965 (1976) (rescript). *See also* Baglioni v. Chief of Police, 421 Mass. 229, 234 (1995) (fact that an effective state grant of transactional immunity only translates into use and derivative use immunity for federal purposes is no obstacle to compelling a person to answer questions). But fear of foreign prosecution does not justify invoking the privilege. *See* United States v. Balsys, 524 U.S. 666 (1998).

A federal trial judge's grant of immunity to an attorney does not foreclose use of the immunized testimony in state bar disciplinary proceedings. In the Matter of Pressman, 421 Mass. 514 (1995).

[97] Kastigar v. United States, 406 U.S. 441, 460 (1972).

[98] Section 20D "demonstrates the legislature's intent that, as to crimes not specified, no immunity shall be granted." Grand Jurors for Middlesex County for the Year 1974 v. Wallace, 369 Mass. 876, 880 (1976). In 1998 the legislature expanded the list of eligible crimes to include all felonies. G.L. c. 233 sec. 20D (amended by St. 1998, c. 188, §§ 2, 3).

[99] In the Matter of a Grand Jury Investigation, 405 Mass. 125, 128–130 (1989).

A justice of the S.J.C., appeals court or superior court may, on application of the attorney general or a district attorney,[100] grant immunity to a witness in "any investigation or proceeding before a grand jury, or in a criminal proceeding in the supreme judicial court, appeals court or superior court...."[101] The court must hold a closed hearing at which the witness is entitled to counsel.[102] If the justice determines at the hearing that (1) the witness validly claimed the privilege against self-incrimination, or is likely to do so, in response to questions or orders to produce evidence (2) in grand jury or other criminal proceedings (3) concerning an offense listed in G.L. c. 233, § 20D, he "shall order the witness to answer the questions or produce the evidence requested."[103] If the justice so orders, he must also order immunity, in writing. Immunity may not be granted to a witness who was brought before the grand jury solely to obtain an order of immunity and thus obtain his testimony at a pending criminal trial.[104]

A prosecutor has the authority to withdraw the application for immunity before it is acted on by a single justice.[105] If immunity is denied, it is unresolved whether the Commonwealth may appeal the denial.[106]

2. Informal Immunity

Although neither the district attorney[107] nor the police[108] have statutory authority to grant immunity, a promise of immunity by either one might be binding on

[100] The application may be signed by an assistant attorney general or assistant district attorney. Lindegren v. Commonwealth, 427 Mass. 696 (1998). The immunity statute does not permit a judge of the superior court to order the prosecutor to seek a grant of immunity for a witness. Commonwealth v. Curtis, 388 Mass. 637, 643 (1983).

[101] G.L., c. 233, sec. 20C. Before 1998, only an S.J.C. single justice could grant immunity to a witness, and the grant had to occur, initially, at the grand jury stage. St. 1970, c. 408.

No provision exists for immunizing witnesses in the district court. Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Amendment Privilege*, CPCS Annual Training Conference, at 15 (Nov. 14, 1997).

[102] "The witness shall be entitled to representation by an attorney. . . . The court *may* appoint counsel for the witness." G.L. c. 233, § 20E(b) (emphasis supplied). The presence or absence of counsel might later prove relevant to the witness's understanding of such matters as the scope of immunity. *See* Turner v. Fair, 476 F. Supp. 874, 879 (D. Mass. 1979), *vacated and remanded on other grounds*, 617 F.2d 7 (1st Cir. 1980).

[103] G.L. c. 233, § 20E. Previously, § 20E provided that the justice "may" order immunity. The 1998 amendments substituted "shall" for "may," implying, in a case meeting the statutory conditions for immunity, the lack of judicial discretion to deny the government's application.

[104] Petition of the District Attorney for the Plymouth District, 391 Mass. 723, 727 (1984) (citing Commonwealth v. Liebman, 379 Mass. 671, 677 (1980)). *Contrast* Commonwealth v. Donahue, 369 Mass. 943, 948–49 (1976) (although an indictment had been returned already, a witness properly could be called before the grand jury that was considering further possible indictments against the defendant).

[105] In re Rouse, 373 Mass. 854 (1977).

[106] Petition of the District Attorney for the Northern District, 399 Mass. 1001 (1987) (court split three to three on issue, with seventh justice abstaining). It is also unsettled whether a witness has the right to appeal from an order granting him immunity. Commonwealth v. Steinberg, 404 Mass. 602, 608 (1989).

the government.[109] Therefore, "[a] witness is entitled, but not required, to rely on a prosecutorial promise not to prosecute."[110] Although the Supreme Judicial Court strictly reads the immunity statute's procedural requirements, in special circumstances the Supreme Judicial Court or a trial court might be persuaded to grant "judicial immunity" to a witness.[111] *See* discussion immediately *infra*.

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[107] Commonwealth v. Dalrymple, 428 Mass. 1014 (1998) (neither Attorney General nor a district attorney has inherent power under common law to grant immunity apart from G.L. c. 233, §§ 20C-20I; the immunity statute preempts "the entire subject" for witnesses in the specified proceedings), *citing* Baglioni v. Chief of Police, 421 Mass. 229, 234 (1995).

[108] Commonwealth v. St. John, 173 Mass. 566, 569 (1899). *But see* Commonwealth v. Dormady, 423 Mass. 190 (1996) (reasonable reliance on promise of transactional immunity by police chief and town counsel establishes immunity as matter of constitutional right).

[109] *See, e.g.,* Baglioni v. Chief of Police, 421 Mass. 229, 234 (1995) (precedent "suggests" that prosecutor has authority to grant immunity, but authority extends only to limits of his district); Commonwealth v. Dormady, 423 Mass. 190 (1996) (reasonable reliance on promise of transactional immunity by police chief and town counsel establishes immunity as matter of constitutional right); Commonwealth v. Shaheen, 15 Mass. App. Ct. 302, 305 (1983) (Commonwealth granted witness "virtual immunity"); Commonwealth v. Michel, 381 Mass 447, 450 (1980); Grand Jurors for Middlesex County for the Year 1974 v. Wallace, 369 Mass. 876, 880 (1976) (construing Matter of Desaulnier (No. 2), 360 Mass. 761, 764 (1971)); Commonwealth v. St. John, 173 Mass. 566, 569–70 (1899) (prosecutor's pledge of public faith must be kept) (dictum). *See also* United States v. Warren, 373 A.2d 874, 875, 877 (D.C. 1977) (citing Santobello v. New York, 404 U.S. 257 (1971)); Commonwealth v. Benton, 356 Mass. 447, 448 (1969) (assistant district attorney's plea bargain binds Commonwealth).

Another kind of "informal immunity" arises under the Fifth Amendment when a public employee is compelled to answer questions narrowly and specifically related to his job performance. *See* Carney v. Springfield, 403 Mass. 604, 607–08 n.5 (1988). On the authority of a district attorney to grant constitutionally adequate immunity to a person with respect to events as to which that person is obliged to make statements at the risk of loss of employment, *see Baglioni, supra*, 421 Mass. at 234 ("assuming" that a prosecutor has such authority, it extends only to the limits of his district; without assurance of statewide immunity, sufficient to require extension of federal immunity, employees cannot be forced to answer questions or risk dismissal). *But see Dormady, supra,* 423 Mass. at 190 (reasonable reliance on promise of transactional immunity by police chief and town counsel establishes immunity as a matter of constitutional right). *See also supra* § 33.3..

[110] Dohan, Carroll & Kilkelly, *Representing the Witness Claiming His/Her Fifth Amendment Privilege*, CPCS Annual Training Conference, at 16 (Nov. 14, 1997) (citing Commonwealth v. Borans, 388 Mass. 453, 459 (1983), and Commonwealth v. Francis, 375 Mass. 211, 216 (1978)).

[111] The S.J.C. has repeatedly declined to resolve the issue of whether a superior court judge may grant immunity to a witness at the request of the district attorney apart from the procedures set forth in G.L. c. 233, §§ 20C-20I. Commonwealth v. Doherty, 394 Mass. 341, 343 n.3 (1985); Commonwealth v. Toney, 385 Mass. 575, 587 n.9 (1982); Commonwealth v. Simpson, 370 Mass. 119, 121 (1976) (defendant lacks standing to question propriety of superior court judge's grant of immunity to prosecution witnesses without following statutory procedures); Grand Jurors for Middlesex County for the Year 1974 v. Wallace, 369 Mass. 876, 879 n.4 (1976). Also unsettled is the S.J.C.' s power, either inherent or under G.L. c. 211, § 3, to grant immunity outside the terms of the immunity statute. *See* Petition of the District Attorney for the Plymouth District, 391 Mass. 723, 728 (1984) (rejecting prosecution application for immunity and distinguishing Commonwealth v. Hennigan, No. 79-439 Civil (S.J.C. for Suffolk County, Oct. 22, 1979)) (discussed *infra).*

3. Immunity for Defense Witnesses

A defendant's rights to present a defense, to compulsory process,[112] and to a fair trial are all jeopardized when a crucial witness's testimony will be unavailable unless he is granted immunity. If the prosecution fails to seek immunity for the witness the defendant's sole remedy lies with the courts.

The defendant has no general constitutional right to have a defense witness immunized,[113] but in *Commonwealth v. Curtis* the Supreme Judicial Court conceded — without elaboration — that in "unique circumstances . . . due process may require the granting by a judge of a limited form of immunity."[114] This requires, in the first

[112] *See* Washington v. Texas, 388 U.S. 14, 19 (1967); Commonwealth v. Durning, 406 Mass. 485, 495 (1990). *But see* Commonwealth v. Drumgold, 423 Mass. 230, 247–48 (1996) (right to call witnesses is subject to witness's proper invocation of privilege against self-incrimination; defendant has no right to present direct testimony of witness who, in voir dire, refused to submit to prosecutor's cross-examination).

[113] *See* Commonwealth v. Curtis, 388 Mass. 637, 643–46 (1983), rejecting defendant's federal and state constitutional claims under compulsory process, fair trial, and due process. *See also* Commonwealth v. Grimshaw, 412 Mass. 505, 512 (1992) ("any inquiry into the question of immunity is foreclosed if the prospective witness is an actual or potential target of prosecution") (quoting Commonwealth v. Doherty, 394 Mass. 341, 343–45 (1985)). Nor does a criminal defendant have a right to have a prospective defense witness invoke his privilege against self-incrimination before the jury. Commonwealth v. Gagnon, 408 Mass. 185, 194–98 (1990).

[114] Commonwealth v. Curtis, 388 Mass. 637, 646 (1983). *See* Pixley v. Commonwealth, 453 Mass. 827, 834 n. 7 (2009) (recalling *Curtis* observation concerning possible due-process immunity but noting that no appellate court then-to-date had deemed such immunity appropriate). *See also* Commonwealth v. Toney, 385 Mass. 575, 587–88 (1982) (avoiding question whether court has power to grant immunity over objection of the prosecutor); United States v. Flaherty, 668 F.2d 566, 583 n.* (1st Cir. 1981), reserving question of "when, if ever, due process might require immunization of defense witnesses"; United States v. Turkish, 623 F.2d 769, 772–73 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981), also reserving question. For arguments in support of the right *see* Note, *A Clash of Fundamental Rights: Conflicts Between the Fifth and Sixth Amendments in Criminal Trials*, 5 WM. & MARY BILL RTS. J. 299 (1996); Note, *The Sixth Amendment Right to Have Use 1mmunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); Note, *Judicial Immunity for Criminal Defense Witnesses: A Safeguard for the Defendant's Sixth Amendment Right to Compulsory Process*, 16 NEW ENG. L. REV. 481, 495–504 (1981).

In Commonwealth v. Hennigan, No. 79-439 Civil (S.J.C. for Suffolk County, Oct. 22, 1979), a single justice acting under G.L. c. 211, § 3, granted immunity to a defense witness at the trial stage. The immunity was limited to prosecution for state crimes committed in Middlesex County. Although the defendant was the petitioner, both the prosecution and the trial court supported the request. Noting that due process problems arose because the prosecution had immunized certain of its witnesses but not those of the defense, the single justice affirmed his inherent power to grant immunity "at least where the prosecution, the trial judge, and the defendant wish [it] and the immunity granted is only as broad as the prosecutorial authority of the prosecutor." *Hennigan, supra*, at 2. *Hennigan* is discussed in Petition of the District Attorney for the Plymouth District, 391 Mass. 723, 728–29 n.8 (1984).

The First Circuit distinguishes between the "effective defense" and "prosecutorial misconduct" theories. The first, based on the right to compulsory process, would allow a trial court to bestow use immunity on a witness who could offer indispensable exculpatory evidence to the defense, if the government had no convincing reason to withhold immunity. *See* Government of the Virgin Islands v. Smith, 615 F.2d 964, 974 (3d Cir. 1980). On the ground that the immunity power properly belongs to the executive, the First Circuit has rejected this theory, *see* Curtis v. Duval, 124 F.3d 1, 9 (1st Cir. 1997); United States v. Mackey, 117 F.3d 24,

instance, a timely[115] motion addressed to the inherent power of the trial court requesting the court to grant immunity.[116] Ideally, defense counsel should provide details supporting the necessity for immunizing the witness, including: (1) the witness's identity, (2) a showing that the witness is available and if called would validly claim the privilege against self-incrimination,[117] and (3) a showing that the expected testimony would be material and exculpatory.[118] A showing of prosecutorial unfairness,[119] misconduct, or attempt to gain unfair advantage by withholding immunity also would be helpful,[120] as would a showing that no strong governmental interests would be sacrificed by a grant of immunity.[121]

4. Immunity for Prosecution Witnesses

28 (1st Cir. 1997). The First Circuit recognizes, on the other hand, the due process–based "prosecutorial misconduct" theory. This permits the trial court to order the prosecutor to grant immunity or face a judgment of acquittal. It applies if the prosecutor's refusal to immunize prospective defense witnesses was motivated by an intent to distort the fact-finding process by keeping exculpatory evidence from the jury, or if the government attempts to intimidate or harass witnesses. *See* United States v. Castro, 129 F.3d 226, 232 (1st Cir. 1997) (citing United States v. Angiulo, 897 F.2d 1169, 1191 (1st Cir. 1990)).

[115] *See* Commonwealth v. Upton, 390 Mass. 562, 576 n.11, 577 (1983) (motion should be made pretrial if the defense knows of the potential witness's intention to claim the privilege); United States v. Turkish, 623 F.2d 769, 777–78 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

[116] Although Commonwealth v. Curtis, 388 Mass. 637, 646 (1983), referred to a 'limited form of immunity," unless the witness were willing to waive his remaining privilege (as he did in Commonwealth v. Hennigan, No. 79-439 Civil (S.J.C. for Suffolk County, Oct. 22, 1979)) any immunity granted would probably have to be transactional. *See* Commonwealth v. Upton, 390 Mass. 562, 577 (1983).

[117] This might be done by subpoenaing the witness to attend a hearing on the motion, where, represented by independent counsel, he would state his intention. *See* Schipani v. Commonwealth, 382 Mass. 685 (1980) (rescript).

[118] Schipani v. Commonwealth, 382 Mass. 685, 685 (1980) (citing United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981)); Government of Virgin Islands v. Smith, 615 F.2d 964, 972 (3d Cir. 1980). *See also* Commonwealth v. Reynolds, 429 Mass. 388, 400 (1999) (judicial immunity claim defeated where proffered testimony not clearly exculpatory).

[119] *See* Commonwealth v. McMiller, 29 Mass. App. Ct. 392, 408–09 (1990) (prosecutorial threat to prosecute its own informant, leading her to claim the privilege, violated defendant's right to present an effective defense).

[120] *See* Government of Virgin Islands v. Smith, 615 F.2d 964, 968 (3d Cir. 1980) (due process requires that "the government could be directed to either obtain use immunity . . . or suffer a judgment of acquittal . . . when the government's decisions [denying immunity to defense witnesses] were made with the deliberate intention of distorting the judicial fact finding process"). *See also* United States v. Castro, 129 F.3d 226, 232 (1st Cir. 1997).

[121] Government of Virgin Islands v. Smith, 615 F.2d 964, 972 (3d Cir. 1980). *See also* Commonwealth v. Reynolds, 429 Mass. 388, 400 (1999) (judicial immunity claim defeated where witnesses were potential targets of prosecution); United States v. Turkish, 623 F.2d 769, 788 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) (advising summary rejection of immunity claims for witnesses who are actual or potential targets of prosecution).

A defendant has no standing to challenge a grant of immunity, even if the government does not follow the procedures set out in the statute.[122] G.L. c. 233, § 20I, providing that no defendant may be convicted solely on the testimony of, or the evidence produced by, an immunized witness, requires only "some evidence in support of the testimony . . . on at least one [essential] element of proof."[123]

§ 33.7C. CONTEMPT SANCTIONS

If a witness has been granted immunity pursuant to G.L. c. 233, §§ 20C-20E, and thereafter refuses to testify or produce evidence, the prosecutor must institute contempt proceedings against the witness.[124] A hearing or trial is conducted in the superior court where the alleged contempt occurred,[125] and if the witness is adjudged to be in contempt of court by his refusal to testify, he is punishable by imprisonment for up to a year in the House of Correction or until he complies with the order of the court, whichever comes first.[126]

1. No Right to a Jury Trial

The witness is not entitled to a jury trial on the issue of whether he is in contempt because the possible sentence of imprisonment is coercive, not punitive, and therefore it is a civil rather than criminal contempt.[127] However, the contempt proceeding need not be initiated by a civil complaint.[128]

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[122] Smith v. Commonwealth, 386 Mass. 345, 346–50 (1982) (attempted challenge under G.L. c. 211, § 3, to scope of immunity granted to prosecution witness); Commonwealth v. Simpson, 370 Mass. 119, 121 (1976) ("the privilege against self- incrimination (is) a personal privilege of these witnesses, not assertable by the defendant"). *See also* Commonwealth v. Figueroa, 451 Mass. 566, 578 (2008) (rejecting ineffectiveness claim assertedly based on counsel's failure to challenge immunity for prosecution witness, noting that "[w]e have held, without qualification, that a defendant 'has no standing to argue that the testimony of ... purportedly immunized witnesses [is] the product of improper grants of immunity.' "), *quoting Smith* and *Simpson*, *supra*.

[123] Commonwealth v. DeBrosky, 363 Mass. 718, 730 (1973). Corroboration of defendant's identity as a participant in the crime is not necessarily required. *DeBrosky*, *supra*, 363 Mass. at 730 (dictum); Commonwealth v. Jacobs, 6 Mass. App. Ct. 618, 621–22 (1978). *See also* Commonwealth v. Robinson, 48 Mass. App. Ct. 329, 335 (1999) (corroboration of evidence of the commission of the crime suffices); Commonwealth v. Stewart, 375 Mass. 380, 386 (1978) (provision does not apply to an unimmunized witness who was not indicted). However, defendant may be entitled to a cautionary instruction regarding the credibility of immunized testimony. *See* Commonwealth v. Gagliardi, 29 Mass. App. Ct. 225, 240–42 (1990).

[124] G.L. c. 233, § 20H. *See infra* ch. 46 (contempt).

[125] If the contempt was based on a refusal to testify before the grand jury, the proceeding is properly commenced in the superior court in the county in which the grand jury sat. In the Matter of a John Doe Grand Jury Investigation, 405 Mass. 125, 127–28 (1989). A single justice can decline to consider witness's objections to a grant of immunity, leaving them to be raised at the superior court contempt proceeding. Commonwealth v. Steinberg, 404 Mass. 602, 608–09 (1989).

[126] G.L. c. 233, § 20H.

[127] Commonwealth v. Raczkowski, 19 Mass. App. Ct. 991, 992 (1985); Shillitani v. United States, 384 U.S. 364, 365–70 (1966).

[128] In the Matter of a John Doe Grand Jury Investigation, 405 Mass. 125, 128 (1989).

2. Witness Cannot Refuse to Testify

Although in some instances the witness will have good grounds to resist complying with a subpoena or answering particular questions,[129] the government's decision to forego prosecution of a witness by seeking a grant of immunity regarding his testimony will usually constitute sufficient justification to overcome his interest in remaining silent. But in rare circumstances the relevancy of a particular line of questioning may be so slight that the need for testimony may be outweighed by legitimate privacy interests.[130] If it is inferable from the circumstances that the witness has sufficient knowledge to answer particular questions, the Commonwealth will not need to prove it.[131]

3. Pending Federal Charges

A witness who has been granted immunity and called before a state tribunal cannot decline to testify on the ground that federal charges are pending against him because in this situation the federal prosecutor will have the affirmative duty to prove that the evidence he would use against the defendant is derived from a legitimate source wholly independent of the compelled testimony.[132]

4. Immunity Remains in Effect

A grant of immunity to a grand jury witness, issued pursuant to G.L. c. 233, § 20E, is not limited to the term of the grand jury before which the witness had initially declined to testify, but rather extends to any successive grand juries (unless the order by the judge indicates otherwise).[133]

[129] *See supra* §§ 5.7, 5.8A.

[130] Petition of the District Attorney for the Plymouth District, 395 Mass. 1005, 1006 (1985) (noting this possibility but finding it inapt where immunized testimony related to investigation regarding the theft of cocaine from the evidence room of a police station).

[131] Commonwealth v. Raczkowski, 19 Mass. App. Ct. 991, 993 (1985) (witness refused to answer questions concerning himself or his personal experiences; in this situation, his claim of ignorance was “unconvincing”).

[132] Commonwealth v. Steinberg, 404 Mass. 602, 607–08 (1989); Commonwealth v. Stone, 369 Mass. 965 (1976); Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964).

[133] Commonwealth v. Raczkowski, 19 Mass. App. Ct. 991, 992–93 (1985); Shillitani v. United States, 384 U.S. 364, 371 n.8 (1966).