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"Silence is often evidence of the most persuasive character," Justice Brandeis observed over seventy-five years ago.[1] How and when this most persuasive evidence may be utilized by a fact finder is an issue that has been ever evolving.

The right to remain silent in criminal prosecutions is absolute. In civil and administrative hearings there is no such protection. Actually, almost the opposite is the case. If a party fails to testify at a hearing, the fact finder is allowed to draw an adverse inference from the silence. As administrative hearings become more quasi-criminal in nature, it may be an appropriate time to rethink the rationale behind allowing adverse inferences in administrative hearings.

THE FIFTH AMENDMENT

The United States Constitution provides citizens the right to remain silent. "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[2] This constitutional protection was held to be applicable to not only the federal government, but also the states, in 1964.[3]

The protection afforded by this constitutional guarantee has been widely ridiculed and taints anyone invoking the protection. The Supreme Court noted in 1956 that "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers."[4]

Most grade school children can recite the protections associated with the right to remain silent afforded a suspect upon his arrest from watching hours of police television shows. A child can tell you that a suspect

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1. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923).

2. U.S. CONST. amend. V.

3. Malloy v. Hogan, 378 U.S. 1 (1964).

4. Ullmann v. United States, 350 U.S. 422, 426 (1956).

has the right to remain silent and anything that the arrestee says can later be used against him in a court of law.[5]

The constitutional protection cloaks the criminal defendant not only at the time of arrest, but throughout the entire criminal proceeding. The Supreme Court has held that it is a violation of a defendant's Fifth Amendment right to tell a jury that a defendant's failure to testify supports an unfavorable inference against him.[6] Trial courts are also forbidden from instructing juries that they are to view a defendant's silence as evidence of guilt.[7]

If it is well-settled law that the Fifth Amendment protections cover a suspect throughout the entire criminal proceeding, how much protection does the Fifth Amendment afford that same defendant if he is sued in a civil matter, or facing penalties in a state administrative hearing?

THE FIFTH AMENDMENT IN CIVIL AND ADMINISTRATIVE HEARINGS

The question of whether to extend the application of the Fifth Amendment to civil, along with criminal, hearings was addressed by the Supreme Court in 1924. The Court stated:

> The Government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.[8]

The constitutional protection against self-incrimination has also been recognized in administrative hearings.[9] While the Fifth Amendment protections are available to a party in both civil and administrative hearings, the cost associated with asserting this privilege can be very great.

Just what is an "adverse inference"? When one refuses to testify in a hearing, an inference of guilt "may be drawn as a matter of law from the invocation of the Fifth Amendment in a civil suit."[10] The Iowa Supreme

5. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).
6. Griffin v. California, 380 U.S. 609, 615 (1965).
7. *Id.* at 614.
8. McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).
9. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).
10. State v. Postorino, 193 N.W.2d 1, 3 (Wis. 1972) (citing Grognet v. Fox Valley Trucking Serv., 172 N.W.2d 812, 815 (Wis. 1969)).

Court defined this inference further, stating that "a trial court may infer in a civil case from a party's refusal to answer based on a claim of privilege against self-incrimination that the answer would be adverse to the party."[11] An inference of guilt can cloak a party in a civil matter who refuses to testify. Such pitfalls face a party in an administrative hearing.

In *Baxter v. Palmigiano*,[12] the Supreme Court faced the question of applying adverse inferences in prison discipline settings. Prisoners in the Rhode Island Adult Correctional Institution were instructed at the commencement of disciplinary hearings that they were not required to testify at the disciplinary hearings and could remain silent, but that the silence could be used against them.[13] The Court held that since no criminal proceedings were pending against the inmate at the time of the disciplinary hearing, and the inmate was informed that his silence could be used against him, "permitting an adverse inference to be drawn from an inmate's silence at his disciplinary proceedings is not, on its face, an invalid practice."[14]

When making the ultimate determination in a case, the fact-finder may not rely solely upon an adverse inference. The Supreme Court noted in *Baxter* that "an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board."[15] An adverse inference "may be drawn only if there is other evidence supporting an adverse finding; it must not alone constitute the evidence of guilt."[16]

The ability to draw an adverse inference from a party's silence is codified in Iowa law. The Iowa Code, in the Uniform Interstate Family Support Act, states that if "a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self incriminating, the trier of fact may draw an adverse inference from the refusal."[17] The Code, in the Uniform Child-Custody Jurisdiction and Enforcement chapter, also provides that if "a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal."[18] The Iowa Supreme Court has recognized this legal principle.[19]

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11. Eldridge v. Herman, 291 N.W.2d 319, 322 (Iowa 1980).
12. Baxter v. Palmigiano, 425 U.S. 308 (1976).
13. *Id.* at 316.
14. *Id.* at 320.
15. *Id.* at 317.
16. State v. Merlino, 524 A.2d 821, 825-26 (N.J. Super. Ct. App. Div. 1987).
17. IOWA CODE ANN. § 252K.316(7) (West 2002).
18. IOWA CODE ANN. § 598B.310(3) (West 2002).
19. Craig Foster Ford, Inc. v. Iowa Dep't of Transp., 562 N.W.2d 618, 623 (Iowa 1997).

In light of the heavy cost associated with invoking the Fifth Amendment right to silence, is it appropriate to require a party in a state administrative hearing to face the Solomonic struggle between testifying in a hearing and possibly incriminating oneself or remaining silent and facing the adverse inference? An adverse inference should not be drawn if the penalty imposed at the conclusion of the proceeding is so severe as to effectively destroy the privilege.[20]

Professionals licensed by the State face disciplinary actions in administrative hearings.[21] Many of these hearings are quasi-criminal in nature. While not facing imprisonment, professionals can be sanctioned with fines that are labeled "administrative penalties," and can lose their ability to practice their livelihood.[22]

An example of an administrative hearing with severe consequences would be a physician who is faced with losing his medical license for having a sexual relationship with a patient. A sexual relationship between a physician and a patient is considered sexual abuse in Iowa.[23] Such action would also be a violation of the physician's duty, and could result in the revocation of the physician's license to practice medicine.[24]

After the sexual relationship is brought to light the physician may be arrested. Upon his arrest and throughout the criminal case the physician may remain silent and neither the prosecuting authority nor the judge may comment upon the silence.

When the physician comes for a disciplinary hearing before the Iowa Board of Medical Examiners, the physician must make a difficult decision. The physician may want to testify to explain the relationship and attempt to mitigate the consequences upon his license to practice medicine. However, whatever he testifies to could then be used against him criminally. The physician would likely invoke the Fifth Amendment and remain silent. This would be prudent advice especially, if the criminal matter is not concluded or is pending on appeal. However, the Board of Medical Examiners may draw an adverse inference from the silence and, if there is sufficient other evidence, revoke the physician's license to practice medicine. In this instance, the consequence of the adverse inference would be so severe as to destroy the privilege.

20. *Leonetti*, 524 A.2d at 826.
21. *See* IOWA CODE ANN. §§ 17A, 272C (West 2002).
22. *See* IOWA CODE ANN. § 272C.3 (West 2002).
23. IOWA CODE ANN. § 709.15 (West 2002).
24. IOWA CODE ANN. § 148.6(2)(b) (West 2002).

There are other examples where the invocation of the right to remain silent would have an impact, but not as severe as in the previous example. Implied consent driver's license suspension cases are situations where criminal ramifications may flow from the administrative hearing.

When a driver is stopped for driving while intoxicated, a criminal charge is filed by the local county attorney, and an administrative action is commenced by the Iowa Department of Transportation. Usually the administrative hearing will take place before the criminal case is resolved.[25] At the administrative hearing, the driver also faces the dilemma of whether to testify on his behalf to avoid losing his license or remain silent to avoid exposing himself to criminal liability.

One important distinction between the philandering physician and the drunk driver is the burden of proof. The State of Iowa has the burden to establish by a preponderance of the evidence that the physician violated his duty and should therefore lose his license to practice medicine.[26] The drunk driver has the burden of proof to establish at the administrative hearing that he was driving properly.[27]

Thus, when attempting to draw distinctions in administrative hearings as to when adverse inferences would be appropriate a fact finder may do well to first address the burden of proof. If the appellant has the burden of proof and fails to testify, this would be a situation where the drawing of an adverse inference would be appropriate.

The second aspect to look at would be the consequences facing the appellant. If the sanction is so great, such as the loss of a livelihood or the imposition of an administrative penalty that closely resembles a punitive fine, the fact finder would do better to hesitate before drawing the adverse inference. The fact finder should keep in mind that the drawing of an adverse inference is always permitted, but is not mandatory.[28]

CONCLUSION

There are many situations in administrative hearings where the drawing of adverse inferences is appropriate. A fact-finder should balance factors such as: which party has the burden of proof, the penalty to be imposed administratively and the amount of evidence in the record

25. Iowa law requires the administrative hearing to take place within forty-five days of the notice of appeal. IOWA CODE ANN. § 321J.13(2) (West 2002).
26. Eaves v. Board of Med. Exam'rs, 467 N.W.2d 234, 237 (Iowa 1991).
27. Mary v. Iowa Dept. of Transp., 382 N.W.2d 128, 132 (Iowa 1986); IOWA CODE ANN. § 17A.18(3) (West 2002).
28. Recommendation for Discharge of Kelvie, 384 N.W.2d 901, 906 (Minn. App. 1986).

without the adverse inference. In situations where the penalty to be imposed is of high consequence (such as the loss of a license to practice in a profession or the imposition of an administrative penalty that more resembles a punitive fine), the best route for the fact finder is one of caution. Since drawing an adverse inference is permissive and reviewed under an abuse of discretion standard, to err on the side of not drawing an adverse inference is the best course.

While silence is evidence of the most persuasive character, an adverse inference need not be drawn from the silence in an administrative hearing. Many reasons may exist for invoking the Fifth Amendment right to silence. To shelter wrongdoers should not be the immediate conclusion drawn by the fact finder. If the only evidence against a party is that party's silence, it is an inappropriate exercise of discretion to draw an adverse inference.

Caution may be the better part of constitutional valor when weighing the appellant's constitutional rights against the imposition of an adverse inference.