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2013

§ 5:10 Potential Constitutional Limitations on Claims of Privilege — The Constitutional Right to Produce Evidence

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Recommended Citation
Federal Evidence § 5:10 (4th ed., 2013)

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Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE (4th edition, Thomson Reuters 2013)

§ 5:10 Potential constitutional limitations on claims of privilege—The constitutional right to produce evidence

Sometimes evidentiary privileges collide with a constitutional right to present evidence. Significant authority holds that this constitutional right, which most clearly appears in the case of the accused in criminal cases but may also exist in civil litigation,[1] occasionally overrides rules of exclusion, including privilege rules.[2]

State constitutions sometimes guarantee a right to present evidence,[3] but this right does not appear expressly in the United States Constitution. Nonetheless three lines of federal authority converge to set up such a right. These lines appear in the constitutional guarantees of compulsory process, confrontation, and due process. In the Washington case, the Court struck down a Texas statute making an accomplice incompetent to testify on behalf of a criminal defendant because it violated the defendant's right of compulsory process.[4] In the Davis case, the Court held that a state statute protecting the confidentiality of juvenile proceedings must yield to the defendant's right of confrontation, thereby allowing the defendant to impeach a prosecution witness for bias by showing that he was on probation from a juvenile court adjudication.[5] In the Chambers case, the Court found a violation of due process where state evidence law barred the

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[Section 5:10]

[1]See E. Imwinkelried, The Case for Recognizing a New Constitutional Entitlement: The Right to Present Favorable Evidence in Civil Cases, 1990 Utah L. Rev. 1, 7–18 (arguing for constitutional right of civil litigants to introduce evidence, that would normally be excluded under evidentiary rules, including privileges).

[2]E. Imwinkelried, Exculpatory Evidence § 2-2 (1990).

[3]See Mass. Const. pt. 1, art. XII; New Hampshire Const. pt. 1, art. 15. In states lacking an express guarantee, such a right is sometimes found in other constitutional provisions. See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 94 (1974).

[4]Supreme Court: Washington v. Texas, 388 U.S. 14 (1967). See also Rock

v. Arkansas, 483 U.S. 44, 52 (1987) (state statute barring testimony by witness with memory refreshed by hypnosis could not be applied to keep defendant from testifying) (based on compulsory process clause); Holmes v. South Carolina, 547 U.S. 319 (2006) (defendant had constitutional right to offer evidence that third party may have been perpetrator of crime for which defendant was charged).

[5]Supreme Court: Davis v. Alaska, 415 U.S. 308, 319 (1974). See also Olden v. Kentucky, 488 U.S. 227, 232 (1988) (error to block defendant from cross-examining complainant to show she brought false charge of rape to keep

defendant from introducing evidence that a third party had confessed to the murder for which he was being prosecuted and further prohibited impeaching the third party with his earlier confession.[6]

In its 1974 decision in the Nixon case, the Court explicitly recognized the convergence of these lines of authority to produce a right to present evidence:

> The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.[7]

Despite the obvious implications of this broad statement, the Court has also stated clearly that the constitutional right to present evidence does not necessarily supersede privileges[8] or other evidentiary rules.[9] Here is a comment from the Court's 1973 decision in the Rock case:

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boyfriend from learning of her relationship with defendant); Smith v. State of Illinois, 390 U.S. 129, 131 (1968) (refusing to let defense show name/address of prosecution witness violated confrontation rights).

[6]Supreme Court: Chambers v. Mississippi, 410 U.S. 284 (1973). See also Pennsylvania v. Ritchie, 480 U.S. 39, 41 (1987) (accused has limited due process right to discover exculpatory evidence in privileged file of government agency that would affect outcome; files to be submitted for in camera review); Green v. Georgia, 442 U.S. 95, 97 (1979) (excluding from sentencing hearing evidence that would reduce culpability violates due process).

[7]Supreme Court: U.S. v. Nixon, 418 U.S. 683, 711–713 (1974) (upholding subpoena by special prosecutor for confidential presidential communications; claim of executive privilege would not prevail over "demands of due process of law in the fair administration of criminal justice").

[8]Supreme Court: Washington v. Texas, 388 U.S. 14, 23 n21 (1967) (not disapproving testimonial privileges such as those relating to self-incrimination, lawyer-client, or husband-wife).

Chambers v. Mississippi, 410 U.S. 284, 302(1973) (accused must comply with "rules of procedure and evidence designed to assure both fairness and reliability" in ascertaining of guilt or innocence).

U.S. v. Nixon, 418 U.S. 683, 709–710 (1974) (privileges "protect weighty and legitimate competing interests" to constitutional right to offer evidence).

[9]Supreme Court: Michigan v. Lucas, 500 U.S. 145 (1991) (upholding rape shield statute excluding evidence of consensual sexual relations between defendant and victim where defendant failed to comply with notice and offer of proof requirements).

> [T]he right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." . . . In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.[10]

Courts have not settled on a formula to resolve conflicts between privileges and the right of the accused to present evidence, but commentators favor a balancing approach.[11]

Such an approach would require courts to assess the importance and necessity of the evidence in presenting a fair defense and would include consideration of the defense need to impeach witnesses.[12] To implement this approach, a court would conduct an in camera inspection of privileged matter[13] and then perform the necessary balancing of the defense need for the evidence against policies underlying the privilege and the interests protected by the privilege in the case.[14] If defendant's right to present evidence were to prevail, the court would decide whether the appropriate remedy is to compel disclosure or impose a sanction, such as refusing to let a witness testify unless the privilege

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Sixth Circuit: But see Bennett v. Scroggy, 793 F.2d 772, 774 (6th Cir. 1986) (refusing to grant overnight continuance to let defense secure essential witness violated compulsory process clause).

[10]Supreme Court: Rock v. Arkansas, 483 U.S. 44 (1987), quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

[11]See, e.g., E. Imwinkelried, Exculpatory Evidence §§ 2–3 (1990).

[12]Relevant factors include: (a) reliability of privileged evidence; (b) probative value; (c) centrality of the issue; and (d) availability of other evidence. See generally Note, Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges, 30 Stan. L. Rev. 935, 989 (1978).

[13]White, Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence, 80 J. Crim. L. & Criminology 377, 398 n81 (1989) (defendant should be able to inspect privileged material in camera upon showing "reasonable basis for believing that the evidence may be sufficiently material"); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 822 (1976) (solution to "apparent bottleneck" in constitutional analysis would be in camera evaluation by court).

[14]Wisconsin: State v. Pulizzano, 155 Wis. 2d 633, 456 N.W.2d 325, 334 (1990) (defendant established constitutional right to present evidence of victim's prior sexual assault, but "it remains to be determined whether the State's interests in prohibiting the evidence nonetheless require that it be excluded").

claim is waived or abrogated, striking testimony already given, or dismissing the case.[15]

One factor that counts in the weighing process is the source of the privilege, whether constitutionally derived or resting on statutory or common law. A defendant's constitutional right to present evidence is unlikely to lead a court to overrule a claim of privilege that is itself constitutionally guaranteed, although the defense right might be vindicated in some other way.[16] Thus it seems settled that a defendant's right to present evidence would not lead a court to reject a rightful claim by a witness of the Fifth Amendment privilege against self-incrimination.[17] Of course the problem in this situation might be resolved if the witness is given immunity in exchange for disclosure.[18]

Another relevant factor is whether the privilege is held by the

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[15]Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 829 (1976) (government can be required to choose between "dismissing the prosecution, supplying the desired information, or granting immunity"); White, Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence, 80 J. Crim. L. & Criminology 377, 393–94 (1989) (if government witness claims privilege, blocking effective defense cross-examination, court should overrule privilege and require witness to answer or strike testimony and instruct jury to ignore it).

[16]Third Circuit: But see U.S. v. Criden, 633 F.2d 346, 356 (3d Cir. 1980) (reporter's privilege "is deeply rooted in the first amendment," but can be overcome by defendant's need for exculpatory evidence).

[17]District of Columbia: U.S. v. Thornton, 733 F.2d 121, 125 (D.C. Cir. 1984) (right to compulsory process does not give defendant right to compel witness to waive privilege against self-incrimination).

Fifth Circuit: U.S. v. Khan, 728 F.2d 676, 678 (5th Cir. 1984) (accused's right to compulsory process "must give way" to right of witness under Fifth Amendment not to testify in ways that would tend to incriminate him).

U.S. v. Chagra, 669 F.2d 241, 259–261 (5th Cir. 1982) (neither Constitution nor precedent gives defendant right to override Fifth Amendment privilege of witness).

[18]First Circuit: U.S. v. Pratt, 913 F.2d 982, 991 (1st Cir. 1990) (defendant is entitled to immunity for prospective witness whose testimony is "essential to an effective defense" or when prosecutorial misconduct distorts factfinding process).

Second Circuit: U.S. v. Bahadar, 954 F.2d 821, 826 (2d Cir. 1992) (court may require government to grant immunity or risk dismissal where: (1) it engaged in "discriminatory use of immunity" to gain tactical advantage; (2) testimony is "material, exculpatory, and not cumulative"; and (3) testimony is "unobtainable from any other source").

See generally Note, The Due Process Right to Immunization of Defense Witnesses, 22 B.C. L. Rev. 299, 300 (1981); Note, Witness for the Defense: A Right to Immunity, 34 Vand. L. Rev. 1665, 1670 (1981); Note, The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv. L. Rev. 1266 (1978); Note, "The Public Has a Claim to Every Man's Evidence": The

government or a witness.[19] A defendant's constitutional right to present evidence is more likely to prevail where that privilege is held by the governmental entity prosecuting the defendant.[20] Courts usually say that the state cannot simultaneously prosecute a defendant and deny his or her access to exculpatory evidence by asserting a privilege.[21] Thus the government cannot shield the identity of a confidential informant where doing so would significantly interfere with the ability to present a defense.[22]

Although by far the greater number of cases uphold nongovernmental privileges against constitutional attack,[23] some decisions strike the balance in favor of defendant's constitutional right to present evidence.[24] Many privileges have yielded in particular cir-

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Defendant's Constitutional Right to Witness Immunity, 30 Stan. L. Rev. 1211 (1978).

[19]Hill, Testimonial Privilege and Fair Trial, 80 Colum. L. Rev. 1173, 1193 (1980) (position of defendant "is markedly different" when governmental as opposed to nongovernmental privilege bars access to evidence; in former case, "entitlement to relief is clear in principle, and the showing needed to establish entitlement may be relatively light"; in latter case, "entitlement is itself uncertain"); White, Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence, 80 J. Crim. L. & Criminology 377, 384 (1989) (in criminal cases, privileges favoring government "should be differentiated from other privileges because of the concern for maintaining a fair adversarial balance").

[20]Supreme Court: Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (obligation to give defendant exculpatory material applies to evidence within qualified statutory privilege).

[21]Second Circuit: U.S. v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950) (government chose to prosecute, so it was not free to deny defendant "the right to meet the case made against him by introducing relevant documents, otherwise privileged").

[22]Supreme Court: Roviaro v. U.S., 353 U.S. 53 (1957). See also proposed-but-rejected Rule 510(c)(2) (qualifying privilege to refuse to disclose identity of informant who "may be able to give testimony necessary to a fair determination of the issue of guilt or innocence" in criminal case or of "material issue" on merits in civil case involving government). See the discussion of the informant's identity privilege in §§ 5:62 to 5:64, infra.

[23]Second Circuit: U.S. v. Turkish, 623 F.2d 769, 773–774 (2d Cir. 1980) (traditionally Compulsory Process Clause entitles defendant "to bring his witness to court" and adduce nonprivileged testimony, but not "additional right to displace a proper claim of privilege").

Tenth Circuit: Valdez v. Winans, 738 F.2d 1087, 1089 (10th Cir. 1984) (right to compulsory process does not displace "traditional testimonial privileges").

[24]Fifth Circuit: U.S. v. Brown, 634 F.2d 819, 824 (5th Cir. 1981) (sometimes privilege or rule of evidence must give way to defendant's Sixth Amendment rights).

cumstances, including the marital confidence privilege,[25] the spousal testimonial privilege,[26] the physician-patient[27] and psychotherapist-patient privileges,[28] the privileges covering mari-

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Eleventh Circuit: U.S. v. Lindstrom, 698 F.2d 1154, 1167 (11th Cir. 1983) (privileges must "yield to the paramount right of the defense to cross-examine effectively the witness in a criminal case").

See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 172 (1974) ("private privileges are unconstitutional as applied" when "additional benefit derived from extending them to exculpatory information" is insufficient to justify burden on defendant's right to present a defense); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 824 (1976) (court must weigh importance of governmental or societal interest advanced by privilege against accused's interest in securing "exculpatory privileged evidence"); Natali, Does a Criminal Defendant Have a Constitutional Right to Compel the Production of Privileged Testimony Through Use Immunity?, 30 Vill. L. Rev. 1501 (1985).

[25]Fifth Circuit: But see U.S. v. Brown, 634 F.2d 819, 829–830 (5th Cir. 1981) (upholding spousal privilege after applying balancing test).

Alaska: Salazar v. State, 559 P.2d 66, 79 (Alaska 1976) (under marital communications privilege, error to exclude husband's confession to wife that he committed murder for which defendant was on trial; ruling denied defendant's "day in court" and "opportunity to present his story").

California: Rubio v. Superior Court, 202 Cal. App. 3d 1343, 249 Cal. Rptr. 419 (4th Dist. 1988) (defendant sought videotape protected by marital communications privilege; court ordered in camera examination to determine whether defendant's right to offer evidence should prevail over privilege).

Illinois: People v. Foskey, 529 N.E.2d 1158, 1163 (Ill. 1988), aff'd, 554 N.E.2d 192 (1990) (acknowledging state's interest in protecting marital communications, but "defendant's rights to effective cross-examination and due process of law must prevail").

Some states recognize an exception to the marital confidences privilege for a communication offered by a spouse accused of a crime, and some say that only the accused holds the privilege. In such states, the privilege does not block efforts by defendants to introduce statements that might exonerate them. See § 5:40, infra.

[26]Oregon: State v. Quintero, 823 P.2d 981 (Or. 1991), decision clarified on reconsideration, 834 P.2d 496 (Or. 1992) (trial court ordered wife of one defendant to testify despite claim of spousal testimonial privilege; confrontation rights of other defendants were superior to her statutory privilege).

[27]Minnesota: State v. Hembd, 232 N.W.2d 872, 874 (Minn. 1975) (defendant entitled to privileged medical records of alleged kidnapping victim that showed she had previously attempted to commit suicide; defendant claimed that he detained her only to keep her from killing herself).

Nebraska: State v. Trammell, 435 N.W.2d 197, 201 (Neb. 1989) (defendant entitled to medical records of victim for cross-examination and impeachment).

Rhode Island: State v. Parillo, 480 A.2d 1349, 1354 (R.I. 1984) (defendant entitled to medical records needed to impeach key eyewitness).

[28]Second Circuit: In re Doe, 964 F.2d 1325, 1329 (2d Cir. 1992) (overriding psychotherapist-patient privilege in part because of confrontation concerns).

tal counseling,[29] rape counseling,[30] and journalists,[31] as well as the protections for deliberations of grand juries[32] and trial juries.[33] When defendants seek discovery of privileged material during

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Eleventh Circuit: U.S. v. Lindstrom, 698 F.2d 1154, 1167 (11th Cir. 1983) (defendant's right to cross-examine and impeach government witness outweighed claim for privacy of records of psychotherapy).

Connecticut: State v. Pierson, 514 A.2d 724, 733 (Conn. 1986) (allowing examination of psychiatric personnel with knowledge of privileged records to determine whether victim had mental abnormality that would affect his testimony).

Massachusetts: Com. v. Fayerweather, 546 N.E.2d 345, 347 (Mass. 1989) (trial judge can decide whether accused's confrontation rights should override privilege protecting victim's psychiatric records).

Michigan: Smith v. Ruberg, 421 N.W.2d 557 (Mich. 1988) (privilege for private counseling records of victim of sexual offense may be overridden where defendant shows reasonable probability that records contain information necessary to establish defense).

[29]New Jersey: M. v. K., 452 A.2d 704, 709 (N.J.1982) (child's due process rights to evidence in custody proceeding infringed by statutory privilege for parental communications with marriage counselor).

[30]Connecticut: In re Robert H., 509 A.2d 475 (Conn. 1986) (approving in camera disclosure of privileged material to see whether it is needed by defense).

Massachusetts: Com. v. Two Juveniles, 491 N.E.2d 234 (Mass. 1986) (if defendant could show that protected information was likely to be useful to defense, judge should review communications in camera).

Advisory Opinion to the House of Representatives, 469 A.2d 1161 (R.I. 1983) (absolute privilege for communications between rape victims and counselors violates rights of confrontation and compulsory process).

See generally Note, The Constitutionality of an Absolute Privilege for Rape Crisis Counseling: A Criminal Defendant's Sixth Amendment Rights Versus a Rape Victim's Right to Confidential Therapeutic Counseling, 30 B.C.L. Rev. 411 (1989).

[31]California: Delaney v. Superior Court, 789 P.2d 934 (Cal. 1990) (requiring disclosure of newsman's privileged interview with eyewitness and participant in murder; defense showed reasonable likelihood that information would be helpful).

New Jersey: Matter of Farber, 394 A.2d 330, 351 (N.J. 1978) (state constitutional compulsory process clause prevails over state journalist shield law).

[32]Third Circuit: Chesney v. Robinson, 403 F. Supp. 306, 310 (D. Conn. 1975), aff'd, 538 F.2d 308 (2d Cir. 1976) (state privilege for grand jury proceedings yields to defense Sixth Amendment right to cross-examine prosecution witness).

[33]First Circuit: U.S. v. Bailey, 834 F.2d 218, 222–225 (1st Cir. 1987) (constitutional error to block defendant from talking to jurors).

Fifth Circuit: Durr v. Cook, 589 F.2d 891, 893 (5th Cir. 1979) (defendant had constitutional right to present evidence of juror misconduct to impeach verdict despite state statute restricting such testimony).

pretrial proceedings, however, these privileges often prevail despite constitutional claims.[34]

Most decisions strike the balance in favor of upholding the attorney-client privilege,[35] perhaps in part because it has constitutional underpinnings, although what seems even more important is that this privilege has special importance in litigation and has achieved a kind of primacy.[36] Sometimes even this privilege must yield in the face of constitutional rights of others,[37] however, as in the situation where an attorney-client communication exculpates someone charged (apparently by mistake) with a serious crime committed by the client.[38] Elsewhere we argue that where the client is deceased, the privilege should be subject to a balancing test in a broader set of cases in which the need for information covered by the privilege is acute.[39]

Where the constitutional right to present evidence conflicts with a nonconstitutional privilege held by a private party, the appropriate remedy is uncertain. Some commentators argue that as

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[34]California: People v. Hammon, 938 P.2d 986, 992 (Cal. 1997) (in sexual assault trial, blocking defense effort to get records about complaining witness covered by psychotherapist privilege; not deciding whether production would be required at trial).

[35]Seventh Circuit: U. S. ex rel. Blackwell v. Franzen, 688 F.2d 496, 501–502 (7th Cir. 1982) (approving balancing test).

Ninth Circuit: Murdoch v. Castro, 609 F.3d 983, 995 (9th Cir. 2010) (in habeas case, Confrontation Clause jurisprudence did not override attorney-client privilege to make available to petitioner a letter by prosecution witness to attorney stating that witness had been coerced to implicate petitioner falsely).

Tenth Circuit: Valdez v. Winans, 738 F.2d 1087, 1090 (10th Cir. 1984) (approving balancing test).

Eleventh Circuit: Jenkins v. Wainwright, 763 F.2d 1390 (11th Cir. 1985) (approving balancing test).

[36]See § 5:13, infra.

[37]California: Vela v. Superior Court, 208 Cal. App. 3d 141, 255 Cal. Rptr. 921 (2d Dist. 1989) (statutory attorney-client privilege must give way when it deprives defendant of rights of confrontation and cross-examination).

See generally Note, The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement, 91 Harv. L. Rev. 464, 485–486 (1977) (only clients facing prosecution have absolute right to attorney-client privilege; others should face balancing analysis in assessment of privilege claim).

[38]In such a case, a court would normally immunize the compelled disclosure of the attorney from use against the client. See Cross on Evidence 399–400 (6th ed.) (English law may allow attorney disclosure to free innocent defendant). See generally Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 393 (1989).

[39]See the discussion in § 5:31, infra.

a general matter the privilege prevails,[40] while others suggest a remedy of disclosure coupled with a grant of immunity for the privilege holder.[41]

Choosing the right course turns in part on whether the defendant proposes to use privileged evidence for impeachment purposes or as substantive evidence. In the former case, the defendant's claim rests on the right of confrontation. The traditional remedy, if the right of confrontation is frustrated, is to strike the direct testimony or preclude the witness from testifying,[42] but these measures may be unnecessary if the defense has other ways to test or challenge credibility, and usually it appears that the right of confrontation can be vindicated without rejecting a proper claim of privilege.[43]

In the latter case, a defense claim to the use of privileged ma-

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[40]Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 174–77 (1974) (where defendant can show that privileged information is "indispensable to rebuttal or to an affirmative defense," court must dismiss charges); Note, Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges, 30 Stan. L. Rev. 935, 989 (1978) (whether to compel disclosure depends on how significantly disclosure would impair social and legal policies underlying privilege).

[41]White, Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence, 80 J.Crim. Law & Crim. 377 (1989) (when privilege unduly favors prosecution, choices include overruling privilege, striking testimony, or granting mistrial); Natali, Does a Criminal Defendant Have a Constitutional Right to Compel the Production of Privileged Testimony Through Use Immunity?, 30 Vill. L. Rev. 1501, 1551 (1985) (privileges arise from "various privacy concerns" and revelation "should always be required" when due process and Sixth Amendment so indicate); Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials, 9 Ind. L. Rev. 711, 824–27 (1976) (compelling constitutional argument exists "for affording the accused the ability to pierce claims of testimonial privilege" by compelling court to grant immunity).

[42]Fifth Circuit: Fountain v. U.S., 384 F.2d 624, 628 (5th Cir. 1967) (ultimate inquiry is whether defendant "has been deprived of his right to test the truth of the direct testimony," and if he has, "so much of the direct testimony as cannot be subjected to sufficient inquiry must be struck").

Nebraska: State v. Trammell, 435 N.W.2d 197, 201 (Neb. 1989) (if complaining witness refused to waive privilege for medical records, her testimony should be stricken).

An intermediate approach would allow defendant to pose the question but not require an answer. See Hill, Testimonial Privilege and Fair Trial, 80 Colum. L. Rev. 1173, 1174–75 (1980). The jury, aided by argument, may conclude that privileged information would have been favorable to the defense. See § 5:12, infra.

[43]Fifth Circuit: U.S. v. Brown, 634 F.2d 819, 825 (5th Cir. 1981) (whether Sixth Amendment rights are violated depends on "alternative means" available to impeach credibility of witness).

terial as substantive evidence rests on notions of compulsory pro- cess or due process.[44] Here the conflict is more intractable. The problem is solved if the privilege holder is willing to waive the privilege, but otherwise the stark choice is between compelling disclosure and dismissing the case.[45] Where the privilege is held or controlled by the prosecuting authority, the government can decide whether to waive the privilege and pursue the case or preserve the privilege and dismiss the charges.[46]