**1A.13 LIMITING INSTRUCTION – EXERCISE OF PRIVILEGE AGAINST SELF-INCRIMINATION**

A person has the right not to answer any questions that might possibly be used against (them) in a future criminal case. A refusal to answer does not signify either that there actually will be a future criminal case or that the person is guilty. It means only that the person does not want to say anything that might possibly be used against themlater. By not answering questions the (plaintiff or defendant) leaves the (defendant or plaintiff) without the answers that (he)(she) seeks. In evaluating the plaintiff's or the defendant's testimony, you are entitled to consider that the (plaintiff or defendant) did not answer questions because of the possibility that the answers would be used in a subsequent criminal case, even though you do not know what the answers would have been.

Use Note

Alaska R. Evid. 512(d) provides that the rule against drawing an adverse inference against a party because a privilege is involved does not apply in civil cases when the privilege against self-incrimination is invoked. This instruction covers cases in which the privilege is invoked by a party. The Comment, infra, indicates how the court should handle the non-party witness who invokes the privilege.

Comment

The Comment to Alaska R. Evid. 512(d) indicates that if a civil case is continued until a criminal case is disposed of, thus removing the possibility of future incrimination that might close the mouth of a party witness, there may be no need for this instruction. In some cases, however, especially those involving only private parties, the government may not cooperate in speeding up the filing and prosecution of a criminal case. This means that a party may have reason to invoke the privilege against self-incrimination while testifying. The law is clear that a party may do so even in a civil case, as long as there is a reasonable possibility that the answers to questions could be incriminating. See, McCarthy v. Arndstein, 266 U.S. 34 (1924). When a party does invoke the privilege in a civil case in an effort to protect against future criminal liability, an opposing civil litigant is denied evidence. This instruction explains the approach of Alaska R. Evid. 512(d), which provides that an adverse inference can be drawn against a party who refuses to answer. But the instruction suggests that the invocation of the privilege is not necessarily synonymous with an admission of guilt.

This instruction does not cover the non-party witness, since it is assumed that rarely will there be a case in which a nonparty witness testifies in part and invokes the privilege against self-incrimination in part. Usually, when a party calls a witness, the party has some idea of what the witness will say. If the party calling the witness knows that the witness will refuse to answer questions, the party should indicate this to the court out of the hearing of the jury. If an adverse party knows that a witness identified with it will invoke the privilege, it should let the court know before the witness takes the stand. If the court is not told or the parties do not know that the witness will invoke the privilege, usually the witness will do so immediately upon being asked questions about important aspects of the case. If the witness invokes the privilege before saying anything that is important, the jury can be told to disregard the witness. If, however, the witness does address important questions, there is every likelihood that the court will find a waiver of additional questions on the same subject. See, e.g., Rogers v. United States, 340 U.S. 367 (1951); Cf. Jenkins v. Anderson, 447 U.S. 231 (1980); United States v. Havens, 444 U.S. 962 (1980). Thus, the court will order the witness to answer questions and it is to be expected that the witness will do so. In the rare case in which the witness testifies on one subject and invokes the privilege on a separate subject, the court may want to give an instruction that indicates that no party is responsible for the witness' refusal to answer and, therefore, it should not be held against either side. It is not necessary to tell the jury that it can use the invocation of the privilege in assessing credibility, since by definition the privilege is claimed on a different subject than the one to which the testimony was directed.