



Taking The Fifth

by John D. Whitaker

I may be dating myself here but I learned about the "Miranda" warnings watching *Dragnet*. After arresting some clueless perp, old Joe Friday would growl out the obligatory warning which included telling the defendant that he had the right to remain silent, and that if he gave up the right, anything he said could and would be used against him in a court of law. The defendant was also told that he had the right to an attorney and the right to have the attorney present before he was questioned. The sad part about the way this Constitutional right was portrayed on *Dragnet* was that when the defendant did exercise his right to remain silent and asked for a lawyer, we were given the impression that he must be guilty because he did not immediately spill his guts to the authorities. Lawyers who advised their clients to remain silent were portrayed as being a menace to law enforcement.

The Fifth Amendment requires that no person "be compelled in any criminal case to be a witness against himself." In 1966 the United States Supreme Court gave birth to the "Miranda Rule" when it decided the famous case of *Miranda v. Arizona*. In *Miranda*, the Supreme Court recognized that custodial interrogations by law enforcement were inherently coercive. The Court declared that "custodial interrogation generates inherently compelling pressures which work to undermine the individuals will to resist and to compel him to speak where he does not otherwise do so freely." Essentially, the Court ruled that incriminating statements made by a defendant during a custodial interrogation could not be used at his trial unless the government could demonstrate that the defendant was informed of his rights, that he understood them, and that he waived them by voluntarily speaking with the police. If the *Miranda* warnings were not given prior to the interrogation then anything the defendant said which tended to incriminate him could not be used at trial. If the defendant decides to maintain



his right to remain silent, he cannot be forced to talk.

Throughout history there have been famous instances where witnesses have been called before Congress or some judicial body and have refused to answer questions claiming the protection of the Fifth Amendment. Oliver North was called before Congress to testify about whether he destroyed documents during the Iran Contra scandal. North refused to answer some questions by Senator Daniel Inouye about his roll in the scandal claiming that the answers would tend to incriminate him. During these hearings North's lawyer Brendan Sullivan repeatedly objected to the form of the questions and advised North not to answer a lot of the questions. When Senator Inouye suggested North speak for himself Sullivan responded "[w]ell Sir, I am not a potted plant. I am here as the lawyer. That is my job." Having a competent lawyer present for questioning can be a huge benefit to a citizen under investigation for criminal wrongdoing.

Usually criminal suspects are scared to death and have no clue about how the law works. They are usually locked in a room at the police station and the interrogations are dominated and controlled by trained inquisitors. The police encourage the misconception that some people have when they think they might be able to talk their way out of trouble. I have seen people admit doing things they did not do just to get the questioning to stop. People don't realize that all you have to do is ask for a lawyer and the questioning must stop until the lawyer shows up. When that happens, unless a potted plant shows up, the questioning will probably stop for good.

It is unfortunate that exercising your Constitutional rights is so often considered to be evidence of guilt. A lawyer who advises his client not to speak is merely exercising competent professional judgment. Lawyers swear an oath to protect the rights of their clients, and advising a client to waive his rights without knowing the facts could subject the lawyer to a claim of malpractice.