

 The logo for the Legal & Liability Risk Management Institute is circular. It features a blue outer ring with the text "Legal & Liability" at the top and "Risk Management Institute" at the bottom, separated by two gold stars. The center of the logo is a blue circle containing a gold scale of justice.	<p style="text-align: center;"><b>Garrity &amp; the Administrative Interview</b></p> <p style="text-align: center;">Article 1 of 6 on Garrity by Jack Ryan</p>	 The logo for the Public Agency Training Council is circular. It features a blue outer ring with the text "Public Agency Training Council" at the top and "Academy Quality Module Training" at the bottom, separated by two gold stars. The center of the logo is a blue circle containing a red scale of justice.
--	--	---

The Fifth Amendment provides that no person shall be compelled to give testimony against him or herself. This right against self-incrimination is not absolute. The government has the power to compel a person's testimony even when that testimony is incriminating. The government must however provide the person so testifying with protection that is similar to the Fifth Amendment privilege. The mechanism that the government may compel incriminating testimony is immunity.

Courts have recognized two types of immunity. *Transactional Immunity* is a type of immunity under which a person cannot be prosecuted for the transaction or offense for that they have been granted immunity. For example, if Officer Dibbles committed a theft while working as a police officer and was granted transactional immunity in exchange for his compelled testimony, he could not be criminally charged with the theft offense. Officer Dibble could not be charged criminally even if there was evidence, totally independent of his compelled testimony that would support a criminal conviction.

*Testimonial or Use/Derivative Use Immunity* is a form of immunity that protects the person giving incriminating statements from the use of his or her statements or any evidence gained directly or indirectly from the person's statement from being used against them in a criminal prosecution. Under a grant of testimonial immunity a criminal prosecution may still be brought, however the prosecution must be based upon evidence that is independent of the compelled immunized statement.

The federal courts and most state courts recognize *testimonial or use/derivative use* immunity.<sup>1</sup> In *U.S. v. Apfelbaum* a former district attorney for Philadelphia was granted immunity in accordance with the federal immunity statute after he exercised his Fifth Amendment privilege before a federal grand jury. The grand jury was investigating a staged robbery at a car dealership where it was believed that Apfelbaum might have aided the owners of the dealership. Following the grant of immunity Apfelbaum testified. During his testimony, Apfelbaum denied trying to locate Mr. Brown, one of the dealership owners, while on a trip to Florida. Apfelbaum also denied lending money to Brown. The government charged and convicted Apfelbaum of giving false statements. At his trial, portions of his immunized testimony, including items that were not false, were introduced as evidence to prove that Apfelbaum knowingly gave false testimony following the grant of immunity.

The Third Circuit Court of Appeal agreed with Apfelbaum's argument that only the false statements should have been admitted at his trial and not the other portions of his testimony that were used by the government to establish his knowledge that the false statements were, in fact, false. The United States Supreme Court overturned the decision of the Third Circuit. A number of the Court's observations are instructive. The Court pointed out that immunity does not have to be a mirror image of the Fifth Amendment privilege. For example, a person who exercises their Fifth Amendment privilege and is not subsequently forced to testify does not risk being caught making a false statement because they have made no statement at all. Further, immunized testimony may be used in a civil trial against the person who made the statement. In some circumstances, the immunized testimony may also be used to impeach the person who gave the testimony. As the Court pointed out in *Apfelbaum*, a person who has been immunized cannot be viewed as holding the same position as a person who has remained silent and not forced to give testimony. "This Court has never held, however, that the Fifth Amendment requires immunity statutes to preclude all uses of immunized testimony. Such a requirement would be inconsistent with the principle that the privilege does not extend to consequences of a non-criminal nature, such as threats of liability in civil suits, disgrace in the community, or the loss of employment." Cite omitted.

---

<sup>1</sup> See, *U.S. v. Apfelbaum*, 445 U.S. 115 (1980).