If I am accused of some wrong doing, especially a crime, or something that is not true and hurtful to my reputation, should I deny it or should I simply not say anything?

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Answer: This brings into play the evidentiary idea of admission by silence, which in criminal law parlance is known as pre-arrest silence, and falls under the evidentiary topic known as prior inconsistent statement. It also can arise in civil contexts, especially defamation cases, when a defendant raises a defense that the statement or writing was true based on the plaintiff's failure to deny. Whether or not you should deny an accusation prior to arrest or when the accused of an act that is shameful should be answered on a case by case basis and is fact specific.

On the criminal side, the question as to whether the failure to deny or take some action consistent with denial would be admissible as a prior inconsistent statement depends on whether a witness remained "silent in circumstances in which he naturally would have been expected to deny some asserted fact." Commonwealth v. Nickerson, 386 Mass. 54, 57 (1982). However, in order to put forth such evidence it is necessary for a questioning attorney to establish the proper foundation; to wit: "[1] that the witness knew of the pending charges in sufficient detail to realize that he possessed exculpatory information, [2] that the witness had reason to make the information available, [and 3] that he was familiar with the means of reporting it to the property authorities." Commonwealth v. Hart, 455 Mass. 230, 238-39, (2009). Here are some examples:

In *Commonwealth v. Nickerson* the Supreme Judicial Court found that the trial court erred when it instructed the jury that the failure of the defendant to identify the real perpetrator when doing so would have tended to incriminate the defendant himself. Commonwealth v. Nickerson, 386 Mass. 54, 60 (1982). The court held "it would not have been "natural" for the defendant to have come forward in the circumstances of this case and produce incriminating evidence against himself." Id. In *Commonwealth v. Aparicio*, the Massachusetts Appeals Court found the presentation of pre-arrest silence was error when "it would not have been "natural" for the defendant to have come forward, particularly when to do so would have shifted blame to other members of her household." Commonwealth v. Aparicio, 14 Mass. App. Ct. 993 (1982).

*Commonwealth v. Barnoski* was a criminal case where the defendant's failure to act was found to be admissible. In *Barnoski* the court found that, although not concerning whether a defendant denied wrongdoing, that it was a proper subject to cross examine a defendant about when he did not call an ambulance when his friend was supposedly bleeding in his house. Commonwealth v. Barnoski, 418 Mass. 523, 536 (1994). In that case, the court found that all the prosecutor was doing was to show that "if the defendant's story were true, he naturally would have contacted the police to get help for his wounded friend." Id. Again, although the questioning was not to specifically show a defendant would have denied an accusation pre-arrest, it nonetheless shows that the premise that it is proper to show failure to perform natural acts is probative of the truth.

With respect to civil cases, the standard is much the same. In *Warner v. Fuller* the Supreme Judicial Court enunciated the rule, to wit: "[i]t is well settled in the law of evidence that where a definite statement of an alleged fact is made in the presence and hearing of a party which affects him personally in his rights, and is of such a nature as to call for a reply, and the party addressed has knowledge of the matter to which reference is made which enables him to answer if he is inclined to make reply, and the circumstances are such as to make a reply proper and natural, the statement taken in connection with a total or even partial failure of response, is admissible in evidence as tending to show a concession of the truth of the facts stated." Warner v. Fuller, 245 Mass. 520, 528 (1923).

*Warner* was a defamation case where the plaintiff was in public office and during a political debate was publically accused of wrongdoing and conflict of interest to which he did not specifically deny although the crowd was calling for his denial of the accusations. The defendant later introduced this evidence of truth and alternatively of justification for his belief the plaintiff conducted wrongdoing. Despite the facts introduced, the trial court ruled that there was "no sufficient evidence" to establish the truth of the statement and decided the matter itself and reported it to the Supreme Judicial Court. Essentially, the trial court denied the jury the chance to decide whether the plaintiff's acts in failing to deny the accusation was grounds to establish its truth or at least justification for the defendant's communication.

In applying its rule, the Supreme Judicial Court reversed the trial court and found "the questions whether under the circumstances the defendants' inquiries if they were not true should have been denied by the plaintiff, and whether in the absence of a denial his silence should be held to be an admission of the truth of the statements, were for the consideration of the jury." Id. at 528-29.

As you can see, in either criminal or civil cases, the idea of what you do not say can come into play when the truth is sought.

In the event you are facing a question of whether to speak or not to speak, deny or not to deny, feel free to give this office a call.


Contact: George E. Bourguignon, Jr., Attorney at Law

Phone: (508) 769-1359 (Worcester) or (413) 746-8008 (Springfield)

Email: gbourguignon@bourguignonlaw.com

Website: http://www.bourguignonlaw.com