You Have the Right to Remain Silent - Sometimes

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No person…
shall be compelled…
in any criminal case…
to be a witness against himself.
U.S. Const. amend. V

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A Review of the Fifth Amendment Privilege in Civil Cases
By David I. Spector and Ashleigh Bholé

Introduction
Justice Brandeis once stated, "[s]ilence is often evidence of the most persuasive character." U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149 (1923). It is because of the truth of this statement that there is such a significant body of law on the use of the Fifth Amendment privilege in civil cases and why Federal Courts have so extensively addressed the complexities of balancing the search for the truth against the constitutional right against self-incrimination.

Because the privilege against self-incrimination is constitutionally based, Courts stress that the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side. However, Courts also give due consideration to the nature of the proceeding, how and when the privilege was invoked, and the potential for harm or prejudice to opposing parties.

How do you handle the invocation of the Fifth Amendment privilege in a civil case? How can you leverage the use of the opposing party's silence to strengthen your case? What procedural avenues are available to obtain the discovery and information you need to fully litigate your case when faced with a prior invocation of the right to remain silent? What happens when a party attempts to use the Fifth Amendment privilege after already disclosing information during discovery? Can you compel a witness to take the stand at trial if you know they will take the Fifth Amendment? What happens when a case involves both individual and corporate defendants?

This article will provide you with an overview of the use of the Fifth Amendment privilege in civil cases, will survey the most cited, and the most recent, case law on the relevant issues and will conclude with a list of "take home" points to keep in mind when you are faced with an opposing party's assertion of his or her Fifth Amendment right. This article will also provide an in-depth discussion of specific issues such as waiver of the Fifth Amendment privilege, invocation of the privilege at various stages of litigation, the adverse inference given to a Fifth Amendment assertion, retraction of the assertion on the eve of trial and a court's accommodations provided to an invoking party.

The Fifth Amendment Privilege – The Basics
The Fifth Amendment privilege against self-incrimination prohibits compelling any person in a criminal case "to be a witness against himself." U.S. Constitution. Amend. V. It does not, however, provide an all-encompassing right of refusal to respond to an inquiry or discovery request. In order to assert the privilege against self-incrimination, the threat of future prosecution must be "reasonable, real, and appreciable." U.S. v. Gecas, 120 F. 3d 1419, 1424 (11th Cir. 1997) (emphasis added). Courts have expressed that a "fanciful possibility" of criminal prosecution will not support the invocation of a witness's Fifth Amendment right. In re Scientific-Atlanta.: The Matter of John Pietri, Case No. 6:08-mc-56-GAP-DAB, 2008 WL 2901582, at *2 (M.D. Fla. July 24, 2008).

The Fifth-Amendment privilege not only extends to answers that would in themselves support a conviction but also embraces those questions which would furnish a link in the chain of evidence needed to prosecute the

claimant. S.E.C. v. Banc de Binary, et al., Case No. 2:13-cv-993, 2014 WL 1030862 (D. Nev. March 14, 2011) (citing Malloy v. Hogan, 378 U.S. 1 (1964)).

For example, in Hillman v. City of Chicago, the Court determined that in a wrongful termination lawsuit, the former employer's answers to deposition questions relating to his employment with the city could be incriminating even if the danger of prosecution was small. See 918 F. Supp. 2d 775 (N.D. Ill. 2013). In particular, certain deposition questions sought to link the deponent to various conspiracies, including: an alleged conspiracy to illegally terminate the plaintiff because of a disability and in retaliation for a worker's compensation claim; an alleged conspiracy to commit fraud to cover up the true reasons for the plaintiff's termination; a conspiracy by the city employees to alter documents related to employment claims; a conspiracy to cover up ghost payrolling; and other similar conspiracies. The Court found that these inquiries could lead to potentially incriminating responses.

On the other hand, in Draken Group, Inc. v. Avondale Resources, Inc., a breach of contract lawsuit based on an oil and gas field acquisition gone bad, the District Court found certain documents in the possession of a non-party witness to be non-incriminating. See Case No. 06-CV-595-SAJ, 2007 WL 1857811 (N.D. Ok. June 26, 2007). In Draken, a non-party witness who was incarcerated for charges unrelated to the case at bar was deposed by the plaintiff for his involvement in the acquisition. He invoked his Fifth Amendment privilege in response to production requests for letters and emails demonstrating his fraudulent stock trading and securities activity. The Court found that although the documents contained opinions relating to the potential securities violations on the part of the non-party witness, and the potential investigation by the Oklahoma Securities Commission, the documents did not come from anyone with authority to criminally prosecute him. Id. at * 2. As a result, he was not confronted with a substantial and real risk of incrimination. The case law varies significantly on what is or is not incriminating and a judge's assessment will be made based on the specific circumstances of the case.

The History and Subsequent Case Law Reveal That The Fifth Amendment Privilege Against Self-Incrimination Is A Personal Privilege.

Couch v. United States, 409 U.S. 322, 328 (1978) (the privilege "adheres basically to the person, not to information that may incriminate him"). The personal nature of this constitutional right has a number of implications.

First, if the witness believes that a truthful answer is incriminating, he is required to invoke the right himself. State ex rel. Butterworth on Behalf of Dade County School Bd. v. Southland Corp., 684 F. Supp. 292, 294 (S.D. Fla. 1988) (concluding witness must personally invoke the privilege against self-incrimination absent some compelling circumstance). Counsel is not entitled to instruct him not to answer a question on the grounds that the response would be incriminating. United States v. Schmidt, 816 F. 2d 1477, 1481 n. 3 (10th Cir. 1987) (only holders of the Fifth Amendment privilege, "not their counsel, are the proper parties to interpose a claim of privilege"); Textron Financial Corp. v. Eddy's Trailer Sales, Inc., No. CV 08-2289, 2010 WL 1270182 (E.D.N.Y. March 21, 2010) (recognizing that attorney's invocation of the Fifth Amendment privilege on behalf of client during deposition was invalid and that invalidity of invocation could on its own support a motion to compel).

The Privilege Is Not Limitless. It Does Not Prevent Adversaries In Civil Litigation From Finding The Same Evidence Elsewhere.

Second, the Fifth Amendment prohibits compelling a witness to testify against himself, but it does not bar the eliciting of incriminating statements from another or prohibit gathering incriminating statements that the person may have made to others or that are contained in documents in the possession of others. Johnson v. United States, 228 U.S. 457 (1913). Therefore, a witness has no right to claim a privilege regarding evidence not in his possession. Couch, 409 at 328. Similarly, a witness may not invoke the privilege to prevent others from testifying about incriminating statements made by the witness. Of course, there are always other evidentiary rules such as those governing hearsay which may prevent the statement from being admitted into evidence.

Finally, as discussed in more detail below, the privilege does not extend to the information and documents of an artificial entity, such as a corporation or a trust, held by an individual in a representative capacity. See Watson v. C.I.R., 690 F. 2d 429 (5th Cir. 1982). A "collective entity," such as a corporation or a trust, does not have a Fifth Amendment Right.

The Fifth Amendment Privilege May Be Invoked At Any Point During the Litigation.

The Fifth Amendment privilege may be invoked by an individual to a civil action at any point during the litigation when that individual reasonably apprehends a risk of self-incrimination. Thus, a defendant may invoke the privilege as early as in the answer to a complaint and as late as on the stand at trial. A Fifth Amendment assertion in an answer, however, does not count as an admission. National Acceptance Co. of America v. Bathalter, 705 F. 2d 924 (7th Cir. 1983) (assertion of Fifth Amendment in answer to complaint does not constitute an admission of the allegations and does not relieve the plaintiff of the need to adduce proof). But invoking the privilege in an answer may have some serious implications for the invoking party at later stages in the litigation, such as at summary judgment. In Cartier International AG v. Daniel Markus, Inc., the District Court of New Jersey's ruling on summary judgment evidences the effect of a defendant's choice to remain silent early on in a civil action. See Case No. 10-1459, 2013 WL 5567150, at * 1 (D.N.J. Oct. 8, 2013). The case involved world renown jewelry designer Cartier in a trademark infringement and counterfeiting lawsuit against multiple defendants. One of the defendants asserted his Fifth Amendment privilege in response to every factual allegation in the Complaint, in response to every written discovery response and in response to every substantive question during his deposition. He also refused to produce any documents in the action. Id. at *4. Cartier moved for summary judgment. In response, the defendant suggested that there was no dispute of genuine issue of material fact because he had taken the 5th as to all matters of fact, therefore the plaintiff had failed to meet its burden to illustrate a genuine dispute. The District Court disagreed. Granting summary judgment in favor of Cartier, the Court noted:

"By [the defendant's] pleading the Fifth Amendment at every turn, and his failure to produce affirmative evidence to indicate any factual disputes regarding material issues of fact, the Court is persuaded that the record supports the moving documents and summary judgment must be granted to Plaintiffs as to all counts. Again, [the defendant] has simply plead the Fifth Amendment throughout the course of this litigation, and has not so much as denied that he sold the counterfeit jewelry in question…"

Id. at * 7 (emphasis added). The Court explained that a defendant cannot avoid liability simply by pleading the Fifth, since the standard to overcome a plaintiff's motion for summary judgment is to establish a genuine dispute of material fact. Where a defendant has not supplemented the record with affirmative proof as to the existence of alternative theories to dispute the relevance of the plaintiff's pertinent evidence, summary judgment will be granted in favor of the plaintiff. Id. at * 9.

Similarly, in U.S. Commodity Futures Trading Commission v. Arrington, et al., the District Court of Nebraska applied an adverse inference against the defendant with respect to deposition questions in which he asserted his Fifth Amendment, and in reliance in part on this inference, granted summary judgment in favor of the plaintiff. See Case No. 8:11CV181, 2014 WL 685331 (D. Neb. Jan. 28, 2014).

Parties and non-parties alike may also assert their 5th Amendment rights during discovery, in response to interrogatories or at deposition. It is perhaps during discovery that Fifth Amendment assertions become most challenging and most courts addressing the Fifth Amendment privilege in civil cases have reviewed its invocation in the context of discovery. The implications of a Fifth Amendment assertion during discovery (i.e. in response to interrogatories, document requests and/or deposition questions) will be discussed throughout this article.

Finally, a party or non-party witness may invoke their Fifth Amendment privilege at trial. Considerations of a Fifth Amendment assertion at trial which will be discussed in more detail in a separate subsection.

The Burden Of Establishing Entitlement To Invoke The Fifth Amendment Privilege Rests With The Party Asserting The Privilege.

See Estate of Fisher, 905 F. 2d 645, 649 (2d Cir. 1990) ("[w]hen the danger is not readily apparent from the implications of the question asked or the circumstances surrounding the inquiry, the burden of establishing its existence rests on the person claiming the privilege") (citation omitted). The claimant of the privilege must demonstrate a reasonable possibility that his own testimony will incriminate him, but need not establish it by a preponderance of the evidence. Krape v. PDK Labs, Inc., No. CV 02-3440, 2004 WL 831137, at *3 (E.D.N.Y. Apr. 19, 2004). The court's analysis of whether a party has met this burden necessitates an examination of the deposition testimony or particular discovery responses on a question-by-question basis.

Blanket Assertions Of The Privilege Are Not Permitted. The person asserting the privilege must raise his Fifth

Amendment privilege in response to each individual question (whether in an interrogatory, at a deposition, or at trial) upon his reasonable belief that a compulsory response will pose a substantial and real hazard of subjecting him to criminal liability. See United States v. Basciano, 430 F. Supp. 2d 87, 93–94 (E.D.N.Y. 2006) ("[a]s to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a real danger of further crimination"). If an assertion of the privilege against self-incrimination is not made in response to each specific inquiry, it may be waived. Therefore, if you are faced with an opposing party's blanket assertion of the Fifth Amendment privilege, it is objectionable and may be the basis for a motion to compel. See. e.g. Hillman, 918 F. Supp. at 780 (granting motion to compel and directing deponents to re-submit to deposition to assert the privilege against self-incrimination only when warranted). Deponents being compelled to res-submit to deposition, for example, will be required to suggest a theory which supports their claim of privilege each time they invoke their Fifth Amendment right with respect to the individual question and identify the law or statute under which they may face criminal prosecution. Id.

It is important to note that at least one court has found that the obligation to assess the viability of a Fifth Amendment assertion on a question-by-question basis does not extend to the court's subsequent determination of whether an adverse inference is proper. In SEC v. Jasper, the defendant CFO of a publicly traded semiconductor company appealed a $1.8MM jury verdict in the SEC's favor. See 678 F. 3d 1116, 1126 (9th Cir. 2012). In two particular circumstances at trial, the district court allowed the SEC to introduce evidence of the defendant's repeated invocation of the Fifth Amendment privilege and instructed the jury that it could, but was not required to, draw an adverse inference from the invocations. Id. at 1152. The SEC introduced a videotape of the defendant's deposition, where he repeatedly invoked the Fifth Amendment, and the court also allowed the SEC to introduce written discovery responses in which he invoked his Fifth Amendment rights an additional 150 times. Id. Before playing the videotaped deposition, the district court instructed the jury as follows:

"Although you are permitted to draw a negative inference from the fact that the defendant asserts his Fifth Amendment privilege and silence in response to questions, you're not required to do so.

Now, because of the nature of this case, I might interrupt the playing of the videotape after I'm satisfied that you have had an opportunity to review the defendant and his invocation of the privilege.

In other words, we won't just allow [the SEC] to play it, and the point to play it just to have you hear it repeated multiple times. But it is permissible for them to play enough of it so that you can understand the nature [of] the questions to which the privilege was invoked."

Id. at 1127. The Ninth Circuit Court of Appeals concluded that the district court properly dealt with the evidence of the invocation of the Fifth Amendment privilege at a high level of generality and instructed the jury to do the same. See id ("the district court properly considered the propriety of the Fifth Amendment invocations precisely as they were presented to the court by both sides: as a whole, with inferences to be permitted as a whole based on the 'nature of the questions to which the privilege was invoked.'")

The Court stated that the instruction did not run afoul of the requirement to initially make a specific inquiry into the validity of the assertion in response to each question. As instructed, the jury could have concluded that the sum total of the defendant's Fifth Amendment invocations supported the adverse inference against him. Id. at 1126. "In these circumstances, and in view of the defendant's uniting his invocations into identified groupings of questions, it was not an abuse of discretion to treat the video and responses to interrogatories as general 'instances' of the defendant's invocation of his Fifth Amendment rights, and then admit them into evidence and instruct the jury as such." Id.

Not surprisingly, this 9th Circuit decision is at odds with the 2nd Circuit's opinion in Libutti v. United States, 107 F. 3d 110, 124 (2d Cir. 1997) ("As for the weight to be accorded to adverse inferences, the district court should be mindful of Justice Brandeis' classic admonition: 'Silence is often evidence of the most persuasive character.'" The exact probative value and risk of prejudice will have to be addressed on an inference-by-inference basis.)

The Adverse Inference in Civil Cases

Although in a criminal procedure, the court must instruct the jury that it cannot draw an inference of guilt from a defendant's failure to testify in civil cases, the prevailing rule is that the Fifth Amendment does not forbid an adverse inference to be drawn when a civil party refuses to testify in response to probative evidence

offered against them. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

The adverse inference, given and instructed to juries, is that the witness' testimony, had it been given and not shielded by the privilege, would not have been favorable to the witness. See United States v. A Single Family Residence, 803 F.2d 625, 629 n. 4 (11th Cir. 1986). By way of example, the District Court for the Southern District of Florida provided the following instruction to the jury in Coquina Investments v. Rothstein:

"I instruct you that this is his constitutional right to do so. I further instruct you that you may infer, from his refusal to answer certain questions, that the answer would be harmful to him.

The Fifth Amendment to the Constitution affords every person the right to decline to answer any question if that person believes that the answer may tend to incriminate them.

A negative or adverse inference means that you may infer from Mr. Spinosa's assertion of his Fifth Amendment privilege, as a former bank employee, that the answers would be adverse to TD Bank. Therefore, under the law, you may, but you need not infer, that Mr. Spinosa's refusal to answer certain questions would be adverse to TD Bank's interests.

Mr. Spinosa's assertion of his Fifth Amendment privilege alone is not proper—is not a proper basis for finding TD Bank liable in this case. However, in conjunction with other evidence to be presented, Mr. Spinosa's assertion of his Fifth Amendment privileged may be considered by you in determining TD Bank's liability in this case."

No. 10-60786-Civ, 2012 WL 4479057, at *9 (S.D. Fla. Sept. 28, 2012).

Clearly, this sample jury instruction exhibits how the use of the privilege in a civil case may carry some disadvantages for the party who seeks its protection, while simultaneously providing a plaintiff with a tactical advantage.

However, even when a defendant chooses to stand on his or her Fifth Amendment right in a civil case, this does not mean that he or she has lost. Since a civil trial court is permitted – but not required – to draw an adverse inference, the defendant has the opportunity to demonstrate why the court should exercise its discretion in not drawing the inference.

An Adverse Inference Offsets The Harm Caused By A Defendant Not Answering The Questions Asked But Will Not Support A Finding Of Liability Without Independent Evidence.

Courts more often than not will give an adverse inference instruction when properly requested and will premise the adverse inference on the obvious fact that an opposing party is prevented from obtaining otherwise relevant information when a witness invokes his right to remain silent. In particular, courts have found that an adverse inference offsets the harm caused to a plaintiff by the defendant not answering questions asked. See e.g. S.E.C. v. Benson, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987) ("By hiding behind the protection of the Fifth Amendment as to his contentions, he gives up the right to prove them. By his initial obstruction of discovery and his subsequent assertion of the privilege, defendant has forfeited the right to offer evidence disputing the plaintiff's evidence or supporting his own denials.")

Any Adverse Inference Drawn From A Witness' Invocation Of His Fifth Amendment Right To Remain Silent Requires A Finding That He Had Personal Knowledge Of The Subject About Which He Refused To Testify.

Because the Federal Rules of Evidence require that a witness only testify as to matters for which he possesses "personal knowledge," any adverse inference drawn from a witness' invocation of his Fifth Amendment right to remain silent requires a finding that he had personal knowledge of the subject about which he refused to testify. U.S. ex rel. DRC, Inc. v. Custer Battles, LLC, 415 F. Supp. 2d 628 (E.D. Va. 2006). Also, an adverse inference can be drawn only when independent evidence exists of the fact to which the party refuses to testify. Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F. 3d 1258 (9th Cir. 2000) (an adverse inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint; in such instances, when there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation).

An Adverse Inference Will Not Relieve The Plaintiff Of The Burden To Prove Its Case.

In Lefkowitz v. Cunningham, the Supreme Court declined to allow an adverse inference, as probative

evidence had not been adduced. See 431 U.S. 801, 808 (1977) (finding an adverse inference on its own cannot substitute for admissible evidence to support an ultimate issue of fact). Accordingly, before a plaintiff can count on utilizing an adverse inference, there must be some evidence, even if circumstantial, to support its claims. Only then may a defendant's invocation of the Fifth Amendment privilege be used to support the plaintiff's case.

While a defendant's refusal to answer questions may not be used as the sole basis of a prima facie case, the adverse inference drawn from such refusal may nonetheless be used in conjunction with other evidence to establish a prima facie case. See Baxter, 425 U.S. at 317-18; Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F. 3d 1298, 1304 (11th Cir. 2009); SEC v. Monterosso, 746 F. Supp. 2d 1253, 1263 (S.D. Fla. 2010). Accordingly, an adverse inference will be drawn when appropriate in light of other record evidence.

A Non-Party's Invocation Of The Fifth Amendment Privilege May Be Imputed To A Party Where There Is A Relationship Of Loyalty.

Generally speaking, courts will give a reasonable adverse inference instruction if the non-party witness is closely related to the party, controlled by the party, or otherwise in cahoots with the party. In order to impute a third-party's Fifth Amendment invocation to a party, the party seeking to use the invocation must establish some relationship of loyalty between the other two parties. See e.g. Brink's, Inc. v. City of New York, 717 F. 2d 700, 710 (2d Cir. 1983) (employer/employee); Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co., 819 F. 2d 1471, 1481-82 (8th Cir. 1987) (charitable organization/former director of organization). LiButti v. United States, 107 F. 3d 110, 123-24 (2d Cir. 1997) (father/daughter); Paul Mitchell Syst. v. Quality King Dist., 106 F. Supp. 2d 462 (S.D.N.Y. 2000) (business partner); State Farm Mutual Auto Ins. Co. v. Abrams, 2000 WL 574466, at *6 (N.D. Ill. May 11, 2000) (co-conspirators in insurance fraud scheme); In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 681 F. Supp. 2d 141 (D. Conn. 2009) (co-conspirators). In Libutti, the Second Circuit set forth four non-exclusive factors a trial court should consider when determining the admissibility of a non-party's invocation of the Fifth Amendment:

(1) the nature of the relevant relationships (i.e. whether the relationship is such that the witness would be inclined to invoke the privilege on behalf of the party);

(2) the degree of control of the party over the non-party witness (e.g, whether the party's control over the witness regarding the facts and subject matter of the litigation warrant treating the witness's invocation as a vicarious admission);

(3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and

(4) the role of the non-party witness in the litigation.
The first factor-the nature of the relationship-is the most significant for determining admissibility. See 107 F. 3d at 123.

When the party and the non-party witness are claimed co-conspirators, generally courts have required there to be sufficient, independent proof of a conspiracy between them before permitting the jury to draw an adverse inference against the party. See, e.g.,; Jury Instructions, In re Scrap Metal Antitrust Litig., No. 1:02 CV 0844, 2006 WL 2850453 (N.D. Ohio 2006) (instructing jury that it could draw a "negative inference" against defendant from non-party witnesses' invocation of the Fifth Amendment privilege if, and only if, "there is independent ... evidence to support the conclusion that such defendant participated in a conspiracy with the particular witness or with the particular corporation with which that witness was affiliated"); Abrams, 2000 WL 574466, at *7 (agreeing that an adverse inference may be drawn against a party from an alleged co-conspirator's invocation of the Fifth Amendment, but concluding that the court need not decide the issue on a motion for summary judgment because there was enough additional evidence of the conspiracy to create a genuine issue of material fact).

Ultimately, the "overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." Libutti, 107 F. 3d at 124.

In Deciding Whether To Draw An Adverse Inference The Court May Consider Whether The Defendant Asserted His Or Her Right to Remain Silent But Later Retracted It.

Trial courts generally will not permit a party to invoke the privilege against self-incrimination with respect to deposition questions and then later testify about the same subject matter at trial. See e.g. Nationwide Life Ins. Co. v. Richards, 541 F. 3d 903, 910 (9th

Circuit 2008). The Federal Rules of Civil Procedure "contemplate ... 'full and equal discovery' ... so as to prevent surprise, prejudice and perjury" during trial. Id. Because the privilege may be initially invoked and later waived at a time when an adverse party can no longer secure the benefits of discovery, the potential for exploitation is apparent. Id.

In Evans v. City of Chicago, for example, a group of defendants invoked their Fifth Amendment rights during the two-year period that the case was in discovery. See 513 F. 3d 735, 743 (7th Cir. 2008), cert. denied, 129 S. Ct. 889 (2009). The plaintiff proceeded to prepare for trial without the benefit of the defendant's testimony. Approximately one month before trial, the defendants changed their minds and retracted their Fifth Amendment assertions. The Court ordered the defendants to give depositions during the weeks leading up to trial. Id. Immediately before the trial commenced, the Court issued a ruling to exclude evidence of the defendants' two-year-long invocation of their Fifth Amendment rights. The jury returned a verdict in favor of the defendants. The plaintiff, on appeal to the 7th Circuit, argued that the trial court abused its discretion by allowing the defendants to change their position at the eleventh hour and then declining to allow that evidence of their earlier Fifth Amendment assertions. Surprisingly, the Seventh Circuit affirmed the trial court's decision, explaining that the court reasonably could have determined that ordering additional discovery cured any prejudice to the plaintiff. Id. at 745. In a strong dissent, Judge Williams criticized the decision, pointing out that the defendants had a change of heart only after seeing the plaintiff's case unfold. Judge Williams noted that a series of hurried depositions taken on the eve of trial could not have sufficiently cured the prejudice caused by two years of the defendants' silence.

Fortunately many judges have not been as generous as the Evans court towards defendants who retract their Fifth Amendment assertions. Several courts, including the Seventh Circuit in an earlier opinion, have issued decisions consistent with the reasoning in Judge Williams' dissent. See e.g. Harris v. Chicago, 266 F. 3d 750, 755 (7th Cir. 2001) (trial court committed reversible error by excluding evidence of defendant's Fifth Amendment assertion). Indeed, most courts find that the rights of the other litigant must be taken into consideration "when one party invokes the Fifth Amendment during discovery, but on the eve of trial changes his mind and decides to waive the privilege. At that stage, the adverse party — having conducted discovery and prepared the case without the benefit of knowing the content of the privileged matter — would be placed at a disadvantage." Gutierrez-Rodriguez v. Cartanega, 882 F. 2d 553, 576 (1st Cir. 1989) (trial court correctly declined to allow defendant to testify at trial after he asserted Fifth Amendment at deposition finding that "[a] defendant may not use the fifth amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial.")

An Adverse Inference May Be Used To Pierce The Attorney-Client Privilege By Way Of The Crime-Fraud Exception.

Finally, it is important to note that there is a unique situation in which the adverse inference may be used to pierce the attorney-client privilege by way of the crime-fraud exception, and force an attorney to disclose communications with the client, over the client's objection. In Amusement Indus., Inc. v. Stern, a New York federal judge ordered the defendant real estate investor to turn over emails with his attorneys that were related to his attempts to obtain financing for an allegedly fraudulent $167 million shopping center portfolio deal. See 293 F.R.D. 420 (S.D.N.Y. Feb. 11, 2013). The defendant had invoked his privilege against self-incrimination in response to nearly every question asked of him during his deposition. Id. at 482. The Court found that by refusing to answer any questions, the defendant obstructed the discovery process, which justified drawing an inference that any answers he gave in response to the questions would have been unfavorable to him. Id. This adverse inference formed the probable cause the Court needed to nullify the attorney-client privilege under the crime-fraud exception. It is uncertain whether other courts will follow in step with this recent decision from the Southern District of New York and allow the well-protected attorney-client privilege to be breached after a client invokes his Fifth Amendment privilege.

Waiver Considerations

Generally, once a witness answers some questions regarding a particular subject matter, he may not be allowed to assert his Fifth Amendment right to refuse to answer as to the details of that particular topic. Rogers. v. U.S., 340 U.S. 367 (1951); United States v. Gary, 74 F.3d 304, 312 (1st Cir. 1996) (voluntary disclosure in a particular proceeding waives the privilege for that proceeding); Mitchell v. Zenon Constr. Co., 149 F.R.D. 513, 515 (D. Virgin Island 1992) (finding that voluntary disclosure of incriminatory facts in interrogatory and

deposition answers waived privilege).

Indeed, once a witness testifies, she may not invoke the Fifth Amendment Privilege so as to shield that testimony from scrutiny. "To allow her to do so would constitute a positive invitation to mutilate the truth." See United States v. Parcels of Land, 903 F.2d 36, 43 (1st Cir. 1990) (citing Brown v. United States, 356 U.S. 148, 155-56 (1958)). Indeed, the courts will not permit "distortion of the facts by permitting a witness to select any stopping place in the testimony" in the course of a proceeding. Rogers v. U.S., 340 U.S. 367, 371 (1951). Moreover, a party may waive his or her Fifth Amendment Privilege by voluntarily producing documents in response to discovery requests. See e.g. In re Lederman, 140 B.R. 49 (Bank. E.D.N.Y. 1992) (finding debtor waived any Fifth Amendment right by producing his financial records). Waiver only occurs, however, if the originally disclosed facts are in themselves incriminating. Id.

Although the disclosure of a fact waives the Fifth Amendment privilege as to details, courts have made clear that the analysis does not end there. As a well-protected constitutional right, the court must determine whether further questioning would subject the witness to a real danger of further crimination.'" In re Paige, 411 B.R. 319, 335 (Bankr. N.D. Tex. 2008). The classic waiver scenario occurs when a witness presents favorable testimony on direct examination, but then refuses to be cross-examined. In this instance, waiver will most often be argued by the party asserting the Fifth Amendment privilege (the defendant or non-party witness) for the purpose of testifying substantively after seeing the plaintiff's case unfold. However, the issue of waiver may also come up at the discovery stage, when, for example, a defendant answers interrogatories, and then refuses to answer follow-up questions during his or her deposition. In this instance, waiver will most often be argued by the opposing party (the plaintiff) for the purpose of compelling discovery answers or testimony. An Individual May Waive The Privilege Against Self-Incrimination.

The Second Circuit has explained that "when time passes and circumstances change between a waiver and a subsequent appearance, the initial waiver may not be applied to the subsequent event." In re DG Acquisition Corp., 151 F. 3d 75, 83 (2nd Cir. 1998). Numerous other courts have similarly found that a waiver of the Fifth Amendment privilege at one stage of a proceeding is not a waiver of that right for other stages.

For example, in F.T.C. v. Kitco of Nevada, Inc. despite having presented previous interrogatory answers in the same litigation, the District Court permitted, the deponent to assert his Fifth Amendment privilege in response to deposition questions where there was a danger of self-incrimination. See 612 F. Supp. 1282, 1290-91 (D. Minn. 1985).

Similarly, in Duffy v. Currier, the Court refused to find a waiver of the Fifth Amendment privilege as to deposition testimony resulting from previous interrogatory answers in the same civil case. See 291 F. Supp. 810, 814-15 (D. Minn. 1968). The Court explained:

"Plaintiff argues that by answering the written interrogatories posed by plaintiff, has waived his privilege. This argument is without merit and the court does not believe these answers to the interrogatories constitute a general waiver of the Fifth Amendment privilege, except to the extent and scope to which the answers therein contained may be used in any subsequent trial or other proceedings. The situation is not similar to a criminal case where the defendant takes the witness stand and by so doing waives the privilege and is subject to broad questioning and cross-examination. The defendant in a civil case such as this may make partial answers and not thereby be required to answer more if it appears to the court that to answer more involves a reasonable chance or danger that the balance of the answer or further answers may be incriminating…. Assuming defendant had answered in a deposition as he did in the interrogatories, anything attempting to go beyond such clearly would be privileged in this court's opinion if it tended toward incrimination." Id.

In In re Master Key Litigation, a case out of the Ninth Circuit, a deponent testified as to certain incriminating facts, but refused to testify further concerning his involvement in an alleged price-fixing conspiracy. See 507 F. 2d 292, 293 (9th Cir. 1974). The Circuit Court of Appeals held that the witness could "pick the point beyond which he will not go, and refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to further incriminate him." Id. at 294. Noting the complexity of proving criminal conspiracies, the Court held that testimony dealing with the deponent's "knowledge and intent and with specific instances of attempted restraint on competition, could very well provide a link in the chain of evidence needed in a subsequent prosecution." Id.

So what do you do if a defendant previously answered interrogatories and is now attempting to plead the Fifth at a his or her deposition? What are your remedies to ensure that the defendant does not use the 5th Amendment right as a sword and a shield in litigation? Not all courts will be lenient on an invoking party on the issue of waiver. As demonstrated by the case law cited throughout this article, the court will not permit obvious and intentional manipulation of the judicial system. Indeed, a court will compel a party to testify at a deposition, or at trial, after having answered discovery questions if it is apparent that the party is intending to use the privilege as a sword and a shield in litigation. See e.g. United States v. 4003-4005 5th Ave., 55 F. 3d 78, 82 (2d Cir. 1995) (district court did not abuse its discretion in denying attempt to withdraw invocation of Fifth Amendment invocation on eve of trial and barring submission of evidence previously claimed to be within the privilege). "Invocation of the privilege as a defense strategy 'clearly cripples plaintiff's efforts to conduct meaningful discovery and to marshal proof in an expeditious fashion, if at all." Id. In situations where the litigant's request to waive comes only at the "eleventh house and appears to be part of a manipulative, 'cat-and-mouse approach' to the litigation, a trial court may be fully entitled" to make accommodations as necessary to prevent abuse of the discovery process and prejudice to other parties. Id. at * 85-86. Therefore, a motion to compel testimony or discovery responses may be warranted when a defendant misuses the Fifth Amendment privilege.

If The Court Finds Waiver, The Appropriate Remedy May Be Simply To Strike The Defendant's Prejudicial Answers, Not To Forcibly Compel Testimony.

See Lopez v. City of New York, No. 05-CV-3624 2007 WL 2228150 (E.D.N.Y. July 31, 2007) ("Should Mr. Kirby thereafter specifically assert his Fifth Amendment privilege despite having waived it, and refuses to testify, the court will then strike his prior testimony"); Stanley v. Star Transp., Inc., Civil Action No. 1:10cv00010, 2010 WL 3417855, at *5 (W.D. Va. Aug. 30, 2010) (striking interrogatory answers where party later asserted privilege).

Special Considerations Involving Collective Entities

It is well settled that a corporation does not possess a Fifth Amendment right against self-incrimination. See Intl. Bus. Machines Corp. v. Brown, 857 F. Supp. 1384 (C.D. Cal. 1994) (citations omitted). Thus, a threshold question may arise when a records keeper or corporate executive is noticed for a deposition, or called to testify at trial. When will the individual be compelled to provide substantive answers or testimony on behalf of the corporation and when can she invoke her Fifth Amendment privilege in response to inquiries that may lead to self-incrimination? Two recent District Court opinions provide interesting views on the interplay between the assertion of the Fifth Amendment Privilege when a corporation/collective entity is involved as a party.

In Bank of America, N.A. v. Roberts, Bank of America brought an action for breach of a promissory note against defendants in their individual capacities as trustees and against certain trusts. See No. 4:12CV609, 2014 WL 1259779 (E.D. Mo. March 26, 2014). The plaintiff filed a motion to compel the trusts to provide substantive responses to the plaintiff's post-judgment discovery requests. The trusts raised various objections in response to the discovery requests, and asserted, their Fifth Amendment privilege against self-incrimination. Id. at *1. The Court granted the motion to compel the trusts and its trustees to respond to discovery and stated that the Fifth Amendment privilege is personal and only protects "an individual from compelled production of his personal papers and effects ...". Id. at * 4 (citing Bellis v. United States, 417 U.S. 85, 87 (1975)). Accordingly, neither the trusts, as collective entities, nor the trustees, as representatives of the trusts, could assert the Fifth Amendment privilege to protect against the disclosure of the documents in the trustee's possession. Id. at * 11. The Court explained:

"In light of the personal nature of the privilege, courts hold under the so-called 'collective entity' doctrine, that corporations and other 'collective entities' cannot claim the privilege against self-incrimination. A corollary of the 'collective entity' doctrine prohibits an individual who holds the entity's records 'in a representative capacity' from invoking the Fifth Amendment to avoid producing them 'even if these records might incriminate him personally.' An individual custodian cannot successfully assert the privilege on his own behalf because the records are not his, and the entity has no privilege to assert. [Additionally] the 'collective entity' doctrine applies whether the subpoena is directed to the organization itself or to the custodian in his representative capacity. The 'collective entity' doctrine and its corollary apply to corporations, 'regardless of how small the corporation may be,' as well as labor unions, partnerships, and trusts."

Id. at *4-6 (citations omitted) (emphasis added).

U.S. v. Real Property and Improvements Located at 2441 Mission Street, No. C 13–2062 SI, 2014 WL 492481 (N.D. Cal. Feb. 4, 2014) also presents a noteworthy analysis of the competing interests between a corporate defendant and its individual officers and employees. This was an in rem action for forfeiture of real property, in which the United States alleged that Shambala Healing Center ("SHC") operated a marijuana store on the real property located at 2441 Mission Street, San Francisco, California, in violation of 21 U.S.C. § 841(a) and 21 U.S.C. § 856. SHC and non-party Khader Al Shawa ("Shawa") (SHC's proprietor) sought a protective order prohibiting certain discovery, specifically depositions, pertaining to the principals of SHC from being used in any criminal proceedings, or in the alternative, to stay any such discovery. Shawa argued that a protective order was necessary because "he face[d] the dilemma of choosing between testifying fully and exposing himself to potentially incriminating admission or asserting his Fifth Amendment rights and prejudicing SHC's ability to defend itself" in the action. Id. at *1.

The Court denied non-party Shawa's Motion for Protective Order, or in the Alternative for a Stay. The Court found that because SHC was a corporation, it did not possess a Fifth Amendment privilege against self-incrimination - a corporation does not face the dilemma of whether to remain silent and allow the forfeiture to occur or testify against the forfeitability of its property and expose itself to incriminating admissions. Id. Similarly, SHC's principals did not face such a dilemma because they had no claim to the properties the government seeks to forfeit. Rather, the properties were in the name of the corporation, SHC. Accordingly, the Court was not required to make special efforts to accommodate Shawa's constitutional privilege against self-incrimination. Id. at * 3. The Court explained that "SHC's present circumstances are simply the result of choosing the corporate form. "If '[a] party who chooses to assert the privilege against self-incrimination in a civil case must live with the consequences,' it is all the more true that a corporation must live with the consequences of the corporate form, one of which is the inability to claim the Fifth Amendment privilege on behalf of corporate officers.'" Id (emphasis added).

Adverse Inferences Drawn Against Individual Defendants May Also Be Drawn Against Related Corporate Defendants.

Finally, adverse inferences drawn against the individual defendant may also be drawn against the corporate defendant because the individual defendants were acting in the scope of their employment when they engaged in the conduct they refused to testify about. Monterosso, 746 F. Supp. 2d at 1263 (citing Cole v. Am. Capital Partners Ltd., 2008 WL 2986444, at *5 (S.D. Fla. 2008). The Libutti factors (enumerated above) which are used to determine whether an adverse inference may be drawn against a party from the invocation of the Fifth Amendment privilege by a non-party, are the same factors used to determine whether an adverse inference will be drawn against a corporation after an employee has invoked his right to remain silent.

Judicial Accommodations For Invoking Witness

Special effort to accommodate the Fifth Amendment privilege against self-incrimination may be warranted where a defendant faces parallel civil and criminal proceedings arising from the same set of facts. Depending on the particular circumstances involved in a given case, a wide range of remedial measures may be taken when balancing the interests of the party invoking his Fifth Amendment privilege against self-incrimination and the opposing party's right to fair treatment and open discovery.

Courts May Stay A Civil Case Where There Is An Ongoing Criminal Investigation And A Significant Interest In Protecting A Party's Fifth Amendment Rights Under The Particular Facts Of The Case.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. See Keating v. Office of Thrift Supervision, 45 F. 3d 322, 324 (9th Cir. 1995) (finding that "a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.") Nevertheless, a defendant who is the target of an active criminal investigation may request a stay of the civil litigation pending resolution of the criminal proceedings.

The 9th Circuit has enunciated several factors for a trial court to consider when deciding whether to issue a stay. These factors include:

(1) the extent to which the plaintiff's Fifth Amendment rights are implicated;

(2) the interest of the defendant in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice of a delay;

(3) the burden which any particular aspect of the proceedings may impose on plaintiff;

(4) the convenience of the court in the management of its cases, and the efficient use of judicial resources;

(5) the interests of persons not parties to the civil litigation; and

(6) the interest of the public in the pending civil and criminal litigation.

Keating v. Office of Thrift Supervision, 45 F. 3d 322, 324 (9th Cir. 1995).

The extent to which a party's Fifth Amendment privilege against self-incrimination is implicated may also be determined by reference to the overlap between the civil and criminal cases and the status of the criminal matter.

In General Electric Co. v. Liang, General Electric sued a former employee for, among other things, breach of an employment agreement and trade secret misappropriation. See Case No. CV-13-08670, 2014 WL 1089264 (C.D. Cal. March 19, 2014). General Electric claimed that the defendant had copied and downloaded a large number of files from his computer in violation of GE policies concerning the protection of GE intellectual property. Id. at 1.

The former employee/defendant filed a motion to stay the civil proceedings asserting that the FBI and the U.S. Attorney's Office were conducting an investigation in advance of possible criminal prosecution stemming from the same conduct alleged by GE. He also asserted that the FBI agents executed search and seizure warrants of the defendant's home and automobiles. Denying the Motion to Stay, the Court recognized that the defendant's argument had some force. Most significantly the criminal investigation that was focused on the same underlying conduct as the civil action – alleged unauthorized copying of GE computer files – increased the likelihood that documents or testimony in the civil action would be used against him in the criminal investigation. Nevertheless, the Court found that the basis for a stay was significantly diminished where the defendant had not been charged with any crime. See e.g. eBay Inc. v. Digital Point Solutions, Inc., No. C 08-4052, 2010 WL 702463, at * 3 (N.D. Cal. Feb. 25, 2010) (stay may be warranted when simultaneous civil and criminal proceedings involves same or closely related facts) (citation omitted); but see Chao v. Fleming, 498 F. Supp. 2d 1034, 1039–40 (W.D. Mich. 2007) (granting stay when no indictment had yet been issued); SEC v. Healthsouth Corp., 261 F. Supp. 2d 1298, 1327 (N.D. Ala. 2003) (same). Therefore a stay was not warranted.

Although courts have issued stays of civil proceedings absent an indictment, as a practical matter, obtaining a stay will be difficult for a defendant unless an indictment has been issued and a criminal case is underway. See Sterling Nat. Bank v. A-1 Hotels Intern., Inc., 175 F. Supp. 2d 573 (S.D.N.Y. 2001), (noting that courts of 2nd Circuit generally consider stay only after defendant has been indicted); Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F. 2d 899, 903 (9th Cir. 1989).

Courts Will Not Grant A Stay To Preserve A Party's Fifth Amendment Right At The Expense Of Other Parties.

In Pendergest-Holt v. Certain Underwriters at Lloyd's of London, the Court denied a motion to stay filed by the plaintiffs who asserted their Fifth Amendment right because the stay would unduly burden the opposing parties. See Civil Action No. H–09–3712, 2010 WL 3199355, at *3 (S.D. Tex. Aug. 11, 2010); see also In re Adelphia Comm. Sec. Litig., No. 02-1781, 2003 WL 22358819, at *5 (E.D. Pa. May 13, 2003) (citing prejudice to testifying defendants as factor in granting motion to stay).

In Menster v. Liberty Mut. Fire Ins. Co., the Court also denied a motion to stay made by a plaintiff. The particularities of this case warrant some further discussion. See No. C13–00775RSL, 2013 WL 5770359 (W.D. Wa. Oct. 23, 2013), Here, the plaintiff's home was burglarized and she filed a claim with her insurance company, Liberty Mutual. Liberty Mutual requested she voluntarily dismiss the lawsuit citing evidence of material misrepresentations. The Office of the Insurance Commissioner began an investigation into the plaintiff's claim for insurance fraud. At the time there were no known criminal charges filed. Shortly after filing the lawsuit, the plaintiff requested a stay in the proceedings because she believed she would be prevented from invoking her constitutional privilege against self-incrimination if criminal investigators or prosecutors obtained information from her civil case. Citing to the Keating factors, the Court determined that a stay was not warranted in this situation.

The Court found particularly persuasive the fact that the plaintiff was seeking a stay of civil proceedings that she herself had initiated. Generally, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment

for a serious offense is required to defend a civil or administrative action involving the same matter. Clearly that was the not the case where a plaintiff who brought a lawsuit, and intended to invoke the Fifth Amendment privilege, also sought to stay the proceedings. Id. at *1.

The Court also recognized that the plaintiff had already testified in an Examination Under Oath conducted by an attorney hired by Liberty Mutual regarding her insurance claim, so the burden on her Fifth Amendment right was diminished. Other Courts have also denied a stay where there is minimal risk to a party's Fifth Amendment right because that party already testified concerning the matter in which he or she now seeks to claim the privilege. See Fed. Save. & Loan Ins. Corp. v. Milinoaro, 889 F. 2d 899, 901 (9th Cir. 1989) (finding that the burden on a defendant's Fifth Amendment privilege was negligible when he had already testified in deposition concerning the matter in which he later sought to claim the privilege). Therefore, prior disclosure of information may result in waiver, as well as preclude a stay sought by the disclosing party.

In Balancing The Needs And Rights Of The Parties, A Court May Grant A Partial Stay, Or Fashion Its Own Alternative Accommodations, To Fit The Particular Facts Of The Case.

In Cranel, Inc. v. Pro Image Consultants Group, LLC, the Court determined that a stay was warranted but distinguished between how the stay would apply differently to the individual and corporate defendants. See Civil Action No. 2:13–cv–00766, 2013 WL 6440197 (S.D. Oh. Dec. 9, 2013). The case was not stayed as to corporate defendant, Pro Image, but was stayed as to individual defendants. The Court advised Pro Image that should it conclude that it could not respond to requests for discovery or otherwise defend itself without endangering the Fifth Amendment rights of individual defendants, then a motion for a protective order or other appropriate motion directed to specific discovery requests would be proper. The fact that Pro Image's possession of certain documents might incriminate the other individual defendants was not a ground to resist a discovery request. The Court noted that "[i] t is only if the act of production might incriminate the person necessarily charged with producing Pro Image documents that the person making the production might assert a Fifth Amendment privilege." Id. at *3. Finally, the Court permitted third party discovery and motion practice between the parties to continue.

Similarly, in In re CFS-Related Sec. Fraud Litig., the Court devised its own remedial measures to protect the invoking party's right and prevent prejudice to the other party. 256 F. Supp. 2d 1227, 1236-37 (N.D. Okla. 2003). The Court held that a complete stay was unwarranted given the prejudice that would be caused to securities fraud plaintiffs, but that the lesser measure of sealing the defendant's deposition and preventing its use for any purpose outside the civil proceeding would adequately protect defendant's self-incrimination privilege.

In Slagowski v. Central Washington Asphalt, Inc., the court issued a protective order to accommodate the party invoking Fifth Amendment. 291 F.R.D. 563 (D. Nev. 2013). The case arose out of a fatal automobile accident. The plaintiff contended that the defendants caused the accident and the defendants feared prosecution for crimes related to the accident. Therefore, they sought to stay their depositions in the civil case until the statute of limitations on most of the potential criminal charges expired. The court allowed individual defendants to be deposed immediately under the following conditions: (1) they could assert their Fifth Amendment rights on a question-by-question basis; and (2) Plaintiffs could re-depose them after December 12, 2013 [when the statute of limitations on criminal charges had expired] with regard to questions to which they asserted the privilege. Alternatively, the parties could postpone the depositions in their entirety until after December 12, 2013, provided that the depositions were completed by January 3, 2014. Id. at *9.

Finally, courts will not always provide invoking parties with remedial measures. In S.E.C. v. Banc de Binary, the Securities Exchange Commission filed a civil enforcement action against Banc de Binay for allegedly trading unregistered securities in the U.S. See No. 2:13–CV–993–RCJ–VCF, 2014 WL 1030862 (D. Nev. March 14, 2014). An executive for Binay de Banc, a Cypress company, refused to testify at a deposition in the United States because of the judge's prior order on a motion for preliminary judgment which stated that the executive could be criminally liable under RICO. See 949 F. Supp. 2d 1229 (D. Nev. 2013). Binay de Banc filed a motion for protective order seeking to change the location of the deposition to Cypress. Among the numerous factors in determining that the deposition would take place in Washington D.C., the Court noted that it did not consider the defendant's intention to take the Fifth Amendment privilege. The court stated that it would be inappropriate for a court to act as a prosecutor and order the defendant to be deposed in the United States as a means for furthering a criminal

prosecution. The court also stated it would be equally inappropriate to allow the defendant's potential criminal liability to create a strategic advantage in the case.

The Fifth Amendment At Trial

Once you have navigated through discovery and summary judgment dealing with an opposing party's assertion of the Fifth Amendment privilege, you are faced with the issue of whether they will be permitted (or required) to testify at trial in front of the jury, even when it is known that they will assert their Fifth Amendment right. Will a court permit a witness to take the stand when it is already known that he or she will plead the Fifth? Will a court permit a witness to testify substantively if he or she has taken the Fifth during discovery?

Some Federal Courts have recognized the potential for prejudice inherent in presenting a witness to the jury whose entire testimony consists of repeated invocations of the Fifth Amendment. See e.g. Arredondo v. Ortiz, 365 F. 3d 778, 781 (9th Cir. 2004) (holding that trial court was correct in refusing to permit a witness to testify when it had been informed in advance that the witness would assert the Fifth Amendment privilege). Nonetheless, federal courts are likely to recognize the need to call a witness to testify at trial for the purpose of invoking the Fifth Amendment in front of the jury.

For example, in Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., the court found that letting the jury hear a non-party invoke the Fifth Amendment "informed the jury why the parties with the burden of proof…resorted to less direct and more circumstantial evidence" "[o]therwise, the jury might have inferred the companies did not call [the witness] because his testimony would have damaged their case." 819 F. 2d 1471, 1482 (8th Cir. 1987). Similarly, the Eighth Circuit in Rosebud Sioux Tribe v. A&P Steel, Inc. explained that the Fifth Amendment is concerned with "submitting any individual to the cruel trilemma of self-accusation, perjury or contempt" but "retaining the availability of the privilege in civil cases and simply allowing the jury to draw an adverse inference from its invocation neither jeopardizes the privilege nor the witness." 733 F. 2d 509, 521-22 (8th Cir. 1984) (internal quotations omitted). Under this rationale the Court decided it was permissible for witness to be called to the stand, even when the calling party knew that the witness would merely invoke their Fifth Amendment right.

The Fifth Circuit has taken a similar approach, weighing the prejudicial effect of such testimony against its probative value on a case-by-case basis. In Federal Deposit Ins. Corp. v. Fidelity & Deposit Co , the Court of Appeals left discretion to the district court to determine if a party was allowed to call a witness simply to have that witness invoke the Fifth Amendment in front of the jury. See 45 F. 3d 969, 978 (5th Cir. 1995). The Court "refuse[d] to adopt a rule that would categorically bar a party from calling, as a witness, a non-party who had no special relationship to the party, for the purpose of having the witness exercise his Fifth Amendment right." Id.

Finally, in Padilla v. City of Chicago, the Court took it one step further and granted the plaintiffs' motion compelling the defendants to stand at trial and re-assert the Fifth Amendment. See Case No. 06 C 5462, 2013 WL 63504169 (N.D. Ill. Dec. 3, 2013). In this case, one of the defendants resisted being called to the stand so that the jury could be apprised of the adverse inferences from such assertions. Id. at * 4. Other defendants sought to back away from their long-asserted invocation of the Fifth Amendment to allow them to testify at trial as a substantive matter. The District Court rejected the defendants' attempts on the eve of trial and stated:

"All of the discovery, and all of plaintiffs' strategic planning, in this case during its seven–year history have been predicated on the unbroken scenario in which defendants' exercise of the Fifth Amendment privilege has been an integral part. And with the case now ready for setting a trial date once the current motions in limine have been dealt with in this opinion, any notion of a further longitudinal extension is unacceptable." Id. The Court granted the entirety of the plaintiffs' motion in limine which asked the Court to:

(1) bind Defendants to the Fifth Amendment assertions they made throughout discovery and instruct the jury that it may draw an adverse inference from their assertions;

(2) permit Plaintiffs to call defendants to the stand at trial to re-assert the Fifth Amendment;

(3) bar Defendants from explaining their refusal to testify for any other reason other than their good faith belief that truthful answers may tend to incriminate them; and

(4) bar defense counsel from making improper arguments about the meaning of Defendants' assertions of the Fifth Amendment privilege. Id.

The "Take Home" About The Fifth Amendment

- In order for a party (or non-party witness) to invoke the Fifth Amendment privilege against self-incrimination he must have a reasonable and real fear of criminal prosecution. Assertions of the privilege made under the unlikely possibility of prosecution are objectionable.

- The Fifth Amendment privilege is personal. This means that if the party or witness believes that a truthful answer is incriminating, he is required to invoke the privilege himself. Counsel's assertion of the privilege on behalf of a client is invalid. Moreover, the Fifth Amendment privilege does not stop a party from eliciting incriminating statements from someone other than the individual who made the statements or prohibit gathering incriminating statements that the person may have made to others or in documents in the possession of others.

- A blanket assertion of the Fifth Amendment privilege is improper and may form the basis for a motion to compel discovery responses or deposition testimony.

- Corporations do not have a Fifth Amendment right against self-incrimination. Special attention should be given to the situation where you are deposing a 30(b)(6) witness or a records custodian who attempts to assert their Fifth Amendment privilege.

- The Fifth Amendment privilege may be invoked by an individual to a civil action at any point during the litigation when that individual reasonably apprehends a risk of self-incrimination.

- The burden of establishing entitlement to invoke the Fifth Amendment privilege rests with the party asserting the privilege.

- In civil cases, an adverse inference may be drawn from a party's invocation of his Fifth Amendment privilege. The adverse inference given to juries is that the witness' testimony (or discovery responses), had it been given and not shielded by the privilege, would not have been favorable to the witness.

- An adverse inference drawn from a witness' invocation of his Fifth Amendment right to remain silent requires a finding that he had personal knowledge of the subject about which he refused to testify.

- An adverse inference will not relieve the plaintiff of the burden to prove its case. Therefore, before a plaintiff can count on utilizing an adverse inference, there must be some evidence, even if circumstantial, to support its claims.

- A non-party's invocation of the Fifth Amendment privilege may be imputed to a party where there is a relationship of loyalty.

- A party may not use the Fifth Amendment privilege as a sword and a shield. This means that a court will not permit a defendant to retract a Fifth Amendment assertion and testify substantively at trial after he asserted his Fifth Amendment privilege during discovery.

- An individual may waive his right against self-incrimination after voluntarily disclosing incriminating facts during discovery. This means that a party or witness may be compelled to answer discovery, be deposed or testify at trial with regard to the details of facts previously disclosed.

- Courts may make special accommodations for a party invoking the Fifth Amendment privilege. Accommodations include, but are not limited to, issuing a stay of the civil case pending the outcome of a criminal trial or postponing depositions after the statute of limitations has run on potential criminal charges.

- A witness or party may be compelled to take the stand at trial and testify in front of a jury even if it is known that he will plead the Fifth Amendment.

About David Spector

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David Spector has a broad based complex commercial litigation practice with an emphasis in the investigation and litigation of complex fraud schemes and unfair and deceptive practices on behalf of some of the nation's largest insurance companies. Through David's insurance litigation practice, he has developed an in-depth knowledge of the insurance industry and regularly consults with his clients on best practices of fraud detection and investigation. Further, David defends professional negligence claims and labor and employment disputes including litigation of national class actions, theft of trade secrets, and traditional employment discrimination and harassment matters. David has substantial jury trial experience and has tried cases in both federal and state courts throughout the United States.

Representative Work

- Representation of property and casualty insurer in action to recover insurance benefits which were paid to health care providers and clinic for services which were allegedly unlawful as the clinic was not properly licensed.
- Prosecuted RICO, fraud, and deceptive trade practice claims, including action on behalf of insurance carriers seeking in excess of $35 million in damages against physicians, surgery centers, and medical practice managers relating to certain spinal procedures performed on personal injury claimants.
- Representation of bio tech company in defense of breach of contract, trade secret, and conversion claims resulting from joint venture to promote new pharmaceutical products in which plaintiffs sought $82 million in economic damages.
- Representation of a 50% managing member in claims involving breach of fiduciary duty, defamation, and breach of Florida's LLC Act arising from restructuring of international aviation company.
- Representation of publicly traded commercial landowner involving alleged violations of FCC regulations and tortious interference.
- Representation of client in defense of action brought by minority interest holder in challenge for corporate control of entity and intellectual property rights to FDA cleared medical device.
- Representation of client in defense of federal court litigation commenced against Board of Directors of New York-based international law firm involving claims of breach of fiduciary duty partnership dispute asserted by former equity partners (New York and Florida law).
- Representation of publicly traded software company in litigation involving breach of contract, fraud, and request for receiver brought by former joint venture partner.
- Representation of client in multi-case litigation involving claims of alleged fraudulent transfers in connection with investments made in residential development entity and fraud claims brought against opposing 50% member in LLC.
- Representation of publicly traded international office supply retailer in defense of claims of consumer fraud and unfair and deceptive trade practices relating to pricing mechanisms

Education

- J.D., University of Miami School of Law, 1996
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