

The 5th Amendment In Civil Practice: 3 Big Considerations

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The right to remain silent and not testify at your own criminal trial is well known within the legal community and among the public. A defendant “taking the fifth” has been depicted in movies and television shows, and reported in real-life cases by the media.

Less understood is the impact of the Fifth Amendment privilege on civil litigation. But the issue does come up — particularly in civil litigation that is related in some way to criminal conduct. For example, there may be civil litigation where an employer has settled related criminal liability, but employees continue to have potential criminal exposure. Or, a company and its employees may be under criminal investigation while the company is a party in civil litigation that has not been stayed. With the increase in parallel proceedings and actions based on fraud and other white collar crimes, how to handle a company-related witness invoking the Fifth Amendment is becoming increasingly important in civil trials.



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In-house and outside corporate counsel must be aware of the consequences when a party or nonparty witness “takes the fifth” in a civil trial and how the circumstances differ depending on the forum. There are three fundamental considerations to keep in mind when analyzing the ramifications of a witness’s invocation of the Fifth Amendment.

1) Federal courts may force a witness to invoke the Fifth Amendment in front of the jury and may allow adverse inferences.

The Fifth Amendment protects individuals from providing incriminating statements against themselves. This applies in criminal and civil trials where a witness’ answers could subject them to criminal liability. Even where the witness may be the sole source of information necessary to prove a case, a court cannot force a witness to testify. But in a civil case, federal courts may force a witness to invoke the privilege on the stand. And courts may allow the jury to draw an adverse inference from a witness invoking the Fifth Amendment. Exactly how all this may play out will depend on the context.

When a party invokes the Fifth Amendment, the U.S. Supreme Court said in *Baxter v. Palmigiano* that an adverse inference is not forbidden. And the lower federal courts have determined that an adverse inference is proper under certain circumstances. The test is relatively well established: First, courts will weigh whether the value of presenting the evidence is substantially outweighed by the danger of unfair prejudice on the party asserting the privilege. Second, the inference must be corroborated by independent evidence. Third, the need for the evidence must be substantial with no less burdensome way to obtain it. Finally, any inference is limited to the scope of the specific questions where the witness invokes the privilege.

2) Federal courts may allow an adverse inference against a company from an employee’s or former employee’s invocation of the Fifth Amendment.

In many high-stakes antitrust or fraud trials, a company may be facing a situation where its employees and/or former employees are going to be called as witnesses by the opposing party and may invoke the Fifth Amendment. In fact, a plaintiff's attorney may call a defendant-related witness that the attorney knows will invoke the Fifth Amendment precisely because he or she believes (probably correctly) that it will help his or her trial presentation.

Making matters worse for a corporate defendant, beyond the optics of having a witness "take the fifth" in front of the jury — which may be terrible enough for the defendant — there are occasions where a court will even allow the jury to make an adverse inference against a corporate defendant from that employee's or former employee's invocation of the Fifth Amendment.

The seminal case on this issue is the Second Circuit's decision in *LiButti v. United States*, which has been followed by appellate and trial courts around the country. The ultimate concern in *LiButti* was "whether the adverse inference is trustworthy under all of the circumstances," and the Second Circuit laid out four nonexclusive factors for courts to consider in deciding whether to grant an adverse inference from a nonparty witness invoking the Fifth Amendment: (1) "the nature of the relevant relationships" between the witness and the parties; (2) "the degree of control of the party over the non-party witness"; (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."

3) State law differs from federal law: State courts may be better for the corporate defendant on this issue.

Many corporate defendants' knee-jerk reaction is that they are better off in federal court than in state court. And for many reasons that may be correct in any given case. But perhaps not on this issue, which could be a critical one if a case is headed to trial. California courts, for example, are not typically considered among the defense bar to be particularly friendly forums, but they offer far more protection from adverse inferences than federal courts. California law is clear that no adverse inference may be drawn from an invocation of the Fifth Amendment privilege regardless of who asserts the privilege or the type of trial. Indeed, Evidence Code Section 913 expressly prohibits such inferences. Even better for a defendant facing a potential invocation of the Fifth Amendment by a witness, California courts will not force a witness to invoke the privilege in front of a jury. The rationale for this practice is — consistent with the rule against allowing adverse inferences — that it invites the jury "to make an improper inference."

The bottom line is that while most lawyers rarely consider the Fifth Amendment in civil practice, it can be a critical part of a trial and very damaging to a litigant. Where it is an issue, counsel must analyze the controlling law in the relevant jurisdiction and forum to determine whether a court will make a witness invoke the Fifth Amendment in front of the jury, and the likelihood of adverse inferences from invoking the Fifth Amendment.

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