New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 266—NO. 1
THURSDAY, JULY 1, 2021

Outside Counsel

Playing To Win: Defending Clients In Parallel Proceedings

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When an individual invokes her Fifth Amendment right against self-incrimination—*i.e.* "Take the Fifth"—during a criminal proceeding, it is well-settled that her silence cannot be used against her. But, when that same individual is named as a defendant in a parallel civil proceeding, brought by a regulator or a private plaintiff, silence can be quite costly. It can often lead to an "adverse inference"—i.e., the court directing the find-finder in the civil case to infer that that any non-answer provided by the party would not be favorable to that party. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976). But an individual facing parallel criminal and civil proceedings is not without options or hope when confronted with the need to invoke her Fifth Amendment rights. Below are ten considerations that are key to a winning trial strategy for a party taking the Fifth.

First, not all jurisdictions permit plaintiffs to obtain an adverse inference when an individual takes the Fifth. Indeed, by our count, 14 states prohibit parties to a litigation from obtaining an adverse inference based on a witness' invocation of her Fifth Amendment rights. For example, in Delaware, the courts have observed that "the Delaware Rules of Evidence do not permit the court to draw an adverse inference from the invocation of a Fifth Amendment right" in a civil case. *A. Schulman v. Citadel Plastic Holdings*, 2017 Del. Ch. LEXIS 783, at *8 (Del. Ch. Nov. 2, 2017) (citing Del. R. Evid. 512). Many other jurisdictions have also adopted this rule: Arkansas (Ark. R. Evid. 512), California (Cal. Evid. Code §913), Hawaii (Haw. Rev. Stat. §626-1, R. 513), Idaho (Idaho R. Evid. 512), Kentucky (Ky. R. Evid. 511), North Dakota (N.D. R. Evid. 512), Nebraska (Neb. Rev. Stat. §27-513), Nevada (Nev. Rev. Stat §49.405), New Jersey (N.J. R. Evid. 532), New Mexico (N.M. R. Evid. 11-513), Oklahoma (Okla. Stat. Ann. tit. 12, §2513), Oregon (Or. Rev. Stat. §40.290, R. 513), and Vermont (Vt. R. Evid. 512).

Second, even in jurisdictions where an adverse inference can be granted, a party's invocation of the Fifth Amendment is not always set in stone. A party can, in many instances, revisit that decision if the delay in providing discovery does not unduly prejudice the other parties. Of course, once a defendant in a civil proceeding takes the Fifth, plaintiffs will undoubtedly seek to preclude the defendant from changing course—locking her into various adverse inferences and strategic disadvantages. This might occur, for example, where a defendant in a civil proceeding takes the Fifth in connection with her testimony and later ascertains that she will not be criminally prosecuted and wants to withdraw the invocation and testify substantively. In such cases, the defendant will often be permitted to do so.

The U.S. Court of Appeals for the Second Circuit observed that "a

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district court should take a liberal view toward applications by civil litigants to withdraw their previously invoked Fifth Amendment privilege." *In re 650 Fifth Avenue & Related Properties*, 934 F.3d 147, 169-70 (2d Cir. 2019). In doing so, the trial court should "explore all possible measures for accommodating both parties" by weighing "the nature of the proceedings, how and when privilege was invoked, and the potential for harm or prejudice to opposing parties." *Id.* at 170 (citation omitted). Factors such as whether the change in course occurred at the "eleventh hour," what efforts the plaintiffs took to secure the testimony, and the state of the discovery record are all relevant considerations. Ultimately, a defendant who the court concludes is abusing the discovery process will be precluded from changing course. Id.; see also *Fid. Funding of Cal. v. Reinhold*, 190 F.R.D. 45, 51-52 (E.D.N.Y. 1997).

Third, even where a court imposes an adverse inference on a defendant for invoking her Fifth Amendment rights, the plaintiff cannot win the case relying on that adverse inference alone. Rather, to meet its burden, the plaintiff must present "sufficient independent evidence…upon which to base the negative inference." *Bank of Crete, S.A. v. Koskotas*, 733 F. Supp. 648, 653 (S.D.N.Y. 1990); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000).

In *Lipman v. Shapiro*, for example, plaintiff's counsel essentially read each allegation in the complaint and asked if it was true. *Lipman v. Shapiro*, 2016 WL 844714, No. 600222/2010 (Sup. Ct. N.Y. Cty. March 1, 2016), aff'd, 150 A.D.3d 517 (1st Dept. 2017). While the defendant took the Fifth in connection with each question, Justice O. Peter Sherwood still granted summary judgment for the *defendant* finding that plaintiff could not defeat a motion for summary judgment relying almost exclusively on potential adverse inferences. Id. The court explained (and the First Department affirmed) that inferences alone are not sufficient to make out a prima facie case. *Lipman*, 150 A.D.3d at 518 (1st Dept. 2017).

On a related note, a plaintiff's exclusive reliance on adverse inferences will at least be sufficient to defeat summary judgment in the plaintiff's favor because, at that stage, inferences are typically drawn in favor of the non-moving party. *See Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 55 (2d Cir. 2005).

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Fourth, the Fifth Amendment must be invoked on a "question by question basis" and "adverse inferences can only be drawn to questions that are actually asked." *In re Bernard L. Madoff Investment Secs.*, 560 B.R. 208, 226-27 (Bankr. S.D.N.Y. 2016) (collecting cases). This puts pressure on plaintiff's counsel to ask carefully-worded questions where any adverse inference flowing from that question will be clear. Poorly phrased questions can open the door for defense counsel to argue to the judge or jury that inferences sought by plaintiff is not reasonable.

Consider the following illustration from the U.S. Court of Appeals for the Ninth Circuit—a civil defendant takes the Fifth in response to the question "did you ever pick up the gun?" If the plaintiff then introduces evidence that the defendant's fingerprints were on the gun, it would be appropriate (though not required) for the jury to infer from the invocation and the fingerprints that the defendant picked up the gun. "However, it cannot be instructed that it can infer from defendant's refusal to answer that particular question, that the defendant fired the gun, or that he disposed of the gun at the crime scene. That would be constructing an inference on another inference.

These other inferences could only come into play if the specific questions pertaining to such inferences are asked, are met with a Fifth Amendment privilege response, and are corroborated by other evidence to the specific fact being questioned." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1266 n.2 (9th Cir. 2000)

Indeed, the inference flowing from the question must be "relevant, reliable, and not unduly prejudicial." *Woods v. START Treatment & Recovery Centers*, 864 F.3d 158, 170 (2d Cir.

2017). In many cases, a question may be phrased in a manner where the invocation of the Fifth Amendment is of minimal probative value and thus inadmissible under, among other things, Federal Rule of Evidence 403. See 864 F.3d at 171; *United States v. Tuzman*, 15 cr. 536 (PGG), 2017 WL 5903356, at *8 (S.D.N.Y. Nov. 27, 2017). And even if admitted, it is ultimately up to the fact finder to determine the extent to which it will draw an inference at all. *Brink's v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983); *Mirlis v. Greer*, 952 F.3d 36, 44-45 (2d Cir. 2020) (jurors "may, but are not required" to take an adverse inference).

Fifth, the "strength" of a particular adverse inference may vary based on the elements of proof for a particular cause of action. On one hand, adverse inferences that speak to the defendant's knowledge or intent are likely to be "stronger" or more persuasive to the jury. For example, a fairly strong inference might be drawn from a non-answer to the question "Were you aware that your company's earnings were $10 million dollars lower than disclosed?"

On the other hand, adverse inferences that speak to the materiality of a particular statement or other more "objective" inquiries should result in "weaker" inferences, if any, drawn by the jury. For example, a non-answer to the question "Would the $10 million-dollar shortfall have mattered to your investors?" should have little bearing on the fact-finder because for materiality what ultimately matters is how a reasonable person (and not the speaker) would have perceived the statement. See, e.g., *Matrixx Initiatives v. Siracusano*, 563 U.S. 27 (2011).

Sixth, counsel for a party invoking the Fifth Amendment may be able to rein in, or eliminate, an adverse inference where the questioning attorney has engaged in "sharp practice"—i.e., asking the defendant "loaded," highly prejudicial questions when the examiner knows that the defendant will take the Fifth. When faced with these types of questions, defense counsel can make a strong argument under Federal Rule of Evidence 403 that the questions serve to only inflame the passions of the jury and have minimal probative value.

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As the late Second Circuit Judge Ralph Winter explained, permitting an adverse inference in such circumstances "inevitably invites jurors to give evidentiary weight to questions rather than answers. Moreover, it leaves the examiner free, once having determined that the privilege will be invoked, to pose those questions which are most damaging to the adversary, safe from any contradiction by the witness no matter what the actual facts." *Brink's*, 717 F.2d at 716 (Winter, J. dissenting).

Seventh, counsel for a party invoking the Fifth Amendment may be able to eliminate some of the more unfairly prejudicial aspects of the inference by ensuring that the invocations are presented to the jury in a manner least likely to unduly prejudice the defendant. Indeed, counsel examining a witness invoking the Fifth may attempt to put a defendant's invocations of the Fifth Amendment in front of the jury in multiple, inflammatory ways—including introducing deposition testimony (or a video recording) of the defendant taking the Fifth. Plaintiffs might also call the defendant at trial so that the defendant has to repeatedly take the Fifth in front of the jury. But defense counsel is not powerless.

As the Second Circuit made clear in *In re 650 Fifth Avenue & Related Properties*, a defendant's Fifth Amendment invocations should be conveyed to the jury in a manner that minimizes undue prejudice. 934 F.3d 147 (2d Cir. 2019). There, the court suggested a stipulation would be the appropriate mechanism and rejected the plaintiff's "extreme" tactic of playing a number of video clips of the defendant taking the Fifth during his deposition. Id.; see also *SEC v. Graystone Nash*, 25 F.3d 187, 192 (3d Cir. 1994) ("Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side.")

Eighth, a defendant may also be able to offer evidence that

contextualizes his or her invocation of the Fifth Amendment. For example, in *650 Fifth Avenue*, the Second Circuit determined that the defendants should have been permitted to offer evidence at trial that the plaintiff in a civil forfeiture action (i.e., the U.S. government) improperly threatened the defendants with criminal charges in order to force them to take the Fifth. 934 F.3d at 172-73. Similarly, in *SEC v. DiBella*, a trial court permitted a defendant to take the stand and testify why his previous invocations of the Fifth Amendment do not incriminate him. *SEC v. DiBella*, No. 3:04-cv-1342 (EBB), 2007 WL 1395105, at *2 (D. Conn. May 8, 2007). There, the defendant had previously taken the Fifth in an SEC investigative interview but then chose to substantively testify in a follow-on enforcement action. Id.

While the court concluded that it would give an adverse inference instruction, it reasoned that there was nothing stopping the defendant from taking the stand and explaining why the answers he would have given in the investigative interview would not have incriminated him. Id. at *4. Notably, the court stopped short of permitting the defendant from testifying as to why he took the Fifth in the first place—pointing out that this information was privileged because the defendant had asserted that he had taken the Fifth on the advice of counsel. Id. The court noted that such testimony would only be appropriate if the defendant waived the attorney-client privilege. Id.

Ninth, to mitigate undue prejudice on the defendant, defense counsel should seek limiting jury instructions early and often. These instructions should emphasize three points. *First*, a jury is never required to drawn an adverse inference and can decline to do so. *LiButti v. United States*, 107 F.3d 110, 123-25 (2d Cir. 1997). *Second*, an adverse inference cannot be drawn without sufficient corroborating evidence. *Bank of Crete, S.A. v. Koskotas*, 733 F. Supp. 648, 653 (S.D.N.Y. 1990). *Third,* in taking the Fifth, a witness is not necessarily admitting this her response would incriminate her. Rather, she simply believes that such evidence may be used in a "link in the chain of evidence needed" to possibly prosecute her. *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

Tenth, as a general matter, a defendant's invocation of the Fifth Amendment (or waiver thereof) cannot be "carried over" by opposing counsel to another proceeding. *Klein v. Harris*, 667 F.2d 274, 288 (2d Cir. 1981). Some trial courts have granted a narrow exception in the context of enforcement proceedings brought by the Securities and Exchange Commission. As described above, in *SEC v. DiBella*, the trial court granted an adverse inference where the defendant took the Fifth in connection with certain investigative testimony to the SEC and DOJ but then sought to testify after an enforcement proceeding was initiated. *SEC v. DiBella*, No. 3:04-cv-1342 (EBB), 2007 WL 1395105, at *2 (D. Conn. May 8, 2007); see also *SEC v. Cassano*, No. 99 Civ. 3822 (LAK), 2000 WL 1512617 (S.D.N.Y. Oct. 11, 2000). There, the court noted the SEC's repeated warnings that it intended to seek an adverse inference and the defendant's making known his decision to testify almost a year into discovery both favored granting the adverse inference. Id.

Conclusion

Of course, the mere act of a defendant in a civil proceeding taking the Fifth, regardless of its legal significance, can itself have a profound effect on the jurors in that case. From films to TV to high-profile Congressional hearings, popular culture teaches us that individuals that are guilty "hide behind" the Fifth Amendment. And there can be no doubt that plaintiff's counsel will seek to weaponize this perception—seeking to create a dramatic moment fit for the silver screen at trial.

While adverse inferences and the cultural stigmas can be considerable challenges, a Fifth Amendment invocation cannot (and should not) be a white flag in civil litigation. And defense counsel has a number of tools to ensure that the client gets her day in court.

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