

# INSIGHTS

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## SECURITIES LITIGATION

### “The Fifth Amendment Can & Will Be Used Against You In a (Federal) Court of Law”

*Although it may sound completely counterintuitive and unfair, an individual's exercise of his constitutional right against self-incrimination could jeopardize a company's right to defend itself in civil litigation. In fact, even when former employees and non-parties “take the Fifth,” an adverse inference of wrongdoing could arise against the company.*

By David A. Battaglia and  
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Attorneys and lay citizens alike feel that they have at least a passing familiarity with the Fifth Amendment to the United States constitution and its protection against self-incrimination—they know that it will protect them and their clients from being forced to give testimony that may incriminate them. Corporate in-house counsel may believe that the Fifth Amendment does not have much of a bearing on their day-to-day civil practice, and think of it as mostly a creature of the criminal courts—a place where they rarely find themselves. While the Fifth Amendment

certainly appears most frequently in the popular imagination in criminal courtroom dramas and high-profile prosecutions, it also can have a crucial and even a case-determinative effect in just the type of civil litigation that in-house counsel must deal with day in and day out. Some frequently overlooked quirks of Fifth Amendment jurisprudence in the civil arena may become traps for civil litigators and in-house counsel if they are ignored or not fully appreciated in evaluating and defending a dispute. This is true whether the dispute involves issues relating to securities, antitrust, consumer protection, or other business related laws. In essence, and contrary to popular opinion, assertion of the Fifth Amendment by present or former employees can lead to an adverse inference of improper or wrongful conduct by the corporation in civil litigation, in certain circumstances and often within a court's discretion. Accordingly, care is required in addressing this potential issue.

### Background

The Fifth Amendment to the United States constitution protects individuals from (among other things) being forced to incriminate themselves. The protection afforded by the Fifth Amendment is broad, applying in civil and criminal proceedings, and to guilty and innocent parties.<sup>1</sup> A witness may assert his Fifth Amendment rights and refuse to provide any “answers [that] could reasonably furnish a link in the chain of evidence against him.”<sup>2</sup>

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A witness also may assert his Fifth Amendment privilege any time that “a responsive answer to the question or an explanation or why it cannot be answered *might* be dangerous because injurious disclosure *could* result.”<sup>3</sup> The Fifth Amendment privilege is broad because “truthful responses of an innocent witness...may provide...incriminating evidence from the speaker’s own mouth.”<sup>4</sup> It follows naturally from this protection that silence following an invocation of the Fifth Amendment privilege may not be used to support a criminal conviction, and that a jury in a criminal proceeding may draw no inference from a witness’s invocation of his or her Fifth Amendment rights.

In civil trials in most state courts, the same rule holds true.<sup>5</sup> A witness may invoke Fifth Amendment rights in a civil proceeding, and the jury may not make any inference based on that invocation that the witness is guilty of some wrongdoing. Indeed, if at all possible, the jury should be prevented from hearing the invocation at all. However, this currently is not the case in Federal court. Under the Federal Rules of Civil Procedure and the relevant case law,<sup>6</sup> if a witness invokes his or her Fifth Amendment right not to incriminate himself in a civil trial, a jury may, in certain circumstances, make an inference of guilt or wrongdoing by the party against whom the testimony is offered. Such an inference may be permissible regardless of whether or not the witness is a party himself.

### **When Are Negative Inferences Protected?**

In stark contrast to most states’ laws, federal law can permit a jury to hear and draw negative inferences based on invocations of the Fifth Amendment privilege against self-incrimination in civil trials.<sup>7</sup> Under federal law, an adverse inference can follow from a witness’s exercise of his or her rights under the Fifth Amendment to the United States Constitution when two conditions are met.

First, the proponent of the inference must show that the inference sought is separately

supported by independent evidence.<sup>8</sup> Second, the proponent must show that there is a substantial need for the evidence sought, and that no less burdensome way to get it exists.<sup>9,10</sup>

In addition to these two prerequisites, the type of adverse inference that can be made is limited. An inference may be made only about the answers to the specific questions asked of the witness asserting his rights. An inference may be no broader than the question asked, and the jury must be instructed about this limitation.<sup>11</sup> Put another way, no inference can be made if the questions that would give rise to that *specific* inference were not asked of the witness.<sup>12</sup> Though these basic tenets of federal privilege law are relatively clear and well established, when they apply is murkier.

### **Adverse Inferences by Non-Parties**

A factor complicating adverse inferences from Fifth Amendment invocation in civil cases is the stature of the party invoking the Fifth Amendment. In other words, can a fact finder in a federal civil case be permitted to draw a negative inference against a party based on the invocation of the Fifth Amendment by a non-party? There is no definitive answer to this question. Rather, courts must engage in a fact-intensive inquiry that will inevitably be different in each case to determine how a non-party’s invocation of the Fifth Amendment may be used against a party.

The most prominent case on this issue comes from the Second Circuit and sets up a loose set of factors to determine when adverse inferences should be drawn. In *LiButti v. United States*, the court, after outlining the relevant case law, distilled four “non-exclusive factors which should guide the trial court” in making determinations regarding whether adverse inferences can be made from non-parties’ decisions to invoke the Fifth Amendment.<sup>13</sup> The four *LiButti* factors are:

1. ***The nature of the relevant relationships.*** While no particular relationship governs, the nature of

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the relationship will invariably be the most significant circumstance. The relationship should be examined from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer the bond between witness and party, the less likely the non-party witness would be to render testimony that would damage the relationship.

2. ***The degree of control of the party over the nonparty witness.*** The degree of control which the party has over the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony admissible under Fed. R. Evid. 801(d)(2), and may accordingly be viewed, as in *Brink's*, as a vicarious admission.

3. ***The compatibility of the interests of the party and non-party witness in the outcome of the litigation.*** The trial court should evaluate whether the nonparty witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.

4. ***The role of the nonparty witness in the litigation.*** Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.<sup>14</sup>

*LiButti* makes clear that the “overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth.”<sup>15</sup> The *LiButti* court thus set up a test that requires an intense, fact-based analysis in each case, putting broad discretion in the hands of the trial court and leaving lawyers guessing about which circumstances might produce a negative inference for their clients (or in what circumstance they may be able to procure an adverse inference that will be helpful to their clients).<sup>16</sup>

Former employees do fit within the *LiButti* framework. However, there also is a large body of case law that specifically addresses inferences based on privilege invocations by former employees. Generally, courts have held that the fact that a proffered witness invoking the Fifth Amendment is a former employee is not a *per se* bar to an adverse inference based on that testimony. For example, the Second Circuit addressed this issue in the case of *Brinks v. City of New York*.<sup>17</sup> In *Brinks*, the Second Circuit allowed the jury to make adverse inferences against Brinks due to the invocation of the Fifth Amendment by its former employees.<sup>18</sup> Similarly, the Third Circuit in *RAD Services Inc. v. Aetna Casualty and Surety Co.*, also allowed evidence of the invocation of the Fifth Amendment by former employees to be used to infer an answer unfavorable to the former employer.<sup>19</sup> In *RAD Services*, the Third Circuit wrote, “the mere fact that the witness no longer works for the corporate party should not preclude as evidence his invocation of the Fifth Amendment.”<sup>20</sup>

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***Courts have rejected a mechanical approach to determining whether the jury may make negative inferences about an employer because of an employee's silence.***

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In the employee or former employee context, courts generally are willing to allow the invocation of the Fifth Amendment by a non-party employee to be used to draw a negative inference against the employer, provided all of the other criteria for an inference are met. However, the issue is still a fact- and case-specific inquiry. As with adverse inferences generally, courts have rejected a mechanical approach to determining whether the jury may make negative inferences about an employer because of an employee's silence.<sup>21</sup> Instead, a court must perform a careful review of the facts in the

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particular case before it when deciding whether to permit an inference based on an invocation by an former employee, and the invocation alone—without further evidence—will not be held against the corporate employer party.<sup>22</sup>

Since district courts employ the imputation analysis on a case by case basis, it is worthwhile to consider the factual circumstances underlying the most important precedent. In *Brink's Inc.*, the Second Circuit reviewed a district court judgment allowing the questioning of third-party defendants (including former employees) concerning matters about which they might (and ultimately did) invoke the Fifth Amendment, and allowing the jury to draw adverse inferences from their silence.<sup>23</sup> The case involved a contract in which Brink's agreed to collect coins from city parking meters. After several Brink's employees were convicted of stealing revenue from the meters, the City canceled the Brink's contract. Brink's sued for damages, the City counterclaimed for breach of contract and negligence, and Brink's filed a third-party complaint against twelve of its present and former employees and their supervisor. The Second Circuit affirmed the district court's judgments and concluded that the employee's claims of privilege were admissible and competent evidence under the circumstances of the case. Given the probative value of the evidence to the City's case, its admission was not considered unduly prejudicial.<sup>24</sup> The court also considered the fact that the same inference would be beneficial to Brink's in its third-party claims against its former employees.<sup>25</sup> As the court stated, Brink's "conflicting interests...illustrate[d] the difficulty, and perhaps the undesirability, of a bright-line rule against drawing inferences."<sup>26</sup>

In *RAD Services*, a plaintiff brought suit against its insurer to recover costs incurred in disposing of hazardous waste materials.<sup>27</sup> The defendant insurance company deposed an official and a managing employee of the plaintiff corporation, both of whom invoked their Fifth Amendment privilege.<sup>28</sup> Because the deponents asserted

the privilege in response to questions concerning their employment status, it was unclear whether the deponents were former or current employees.<sup>29</sup> Nonetheless, the court held that the employment status of the witnesses would not bar the admission of the invocations as vicarious admissions of the former employer.<sup>30</sup> The court also found that although present employment serves to reduce the chance that the witness will falsely testify, "any factors suggesting that a former employee retains some loyalty to his former employer—such as the fact that the employer is paying for his attorney—would serve the same purpose."<sup>31</sup> Thus, the Third Circuit rejected an argument that an ex-employee might seek to discredit or tarnish his former employer, and that for this reason a lack of the proof regarding his continuing loyalty to the employer should render an invocation of the Fifth Amendment privilege—and any inference arising therefrom—inadmissible.<sup>32</sup>

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***There is no absolute bar to permitting a jury to hear a Fifth Amendment invocation and make an adverse inference based on that invocation.***

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The Eighth Circuit also has held that inferences based on invocations by witnesses in a "similar" posture to ex-employees may be permissible.<sup>33</sup> First, in permitting an inference in *Cerro Gordo*, the court found that "[a]lthough it is true that Richards [non-party witness] is not presently listed as a director or voting member of the charity, there is some question whether he retained some control over the charity and whether his resignation as a voting member after these suits were filed was not purely a matter of litigation strategy... There is no evidence that would lead one to believe that Richards would assert the privilege solely to harm Cerro Gordo's chances of success in this litigation."<sup>34</sup> Second, the court concluded that the invocation of the

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privilege was only one of a number of factors that the jury considered in determining whether a fraud was committed, and there was other evidence presented at trial that supported the inference sought.<sup>35</sup> Third, the non-party was a key figure in the case.<sup>36</sup> Finally, the court engaged in an analysis under Rule 403 and concluded that the probative value of the evidence substantially outweighed any danger of unfair prejudice to the party opposing the inference.<sup>37</sup>

In other settings where the proffered witness is even further removed from the parties, courts are less willing to allow inferences to be drawn against a party based on the witness's invocation of the Fifth Amendment. For example, in *Kontos v. Kontos*, the court held that a negative inference could not be drawn against the beneficiary of a life insurance policy when the sister of that beneficiary invoked the Fifth Amendment when she was deposed.<sup>38</sup> However, even in *Kontos*, the analysis is fact-specific, and there is no absolute bar to permitting a jury to hear a Fifth Amendment invocation and make an adverse inference based on that invocation arising solely from the relationship between the witness and the parties (or lack thereof).<sup>39</sup>

## Choice of Law

Beyond the question of whether an inference is permissible under relevant federal law, courts must decide whether federal privilege law is applicable to particular claims at all, as federal courts sitting in diversity must apply the law of the state in which they sit to the claims before them, pursuant to *Erie* and its progeny. This well-worn proposition applies with equal force to privilege law, as articulated in Federal Rule of Evidence 501, as to substantive law. In federal courts sitting in most states, this means that any inferences based on an invocation of the Fifth Amendment would be flatly prohibited. However, in civil cases in which the Federal Court's jurisdiction is based on a federal question, pursuant to 28 U.S.C. § 1331, the court may permit an inference.

In a case with some claims based on state law and some founded on federal law, *Erie* and its progeny require the court to apply state law to some claims and federal law to others. However, courts have found that, in cases where the court's jurisdiction is based on a Federal Question and a second, state law claim is before the court via supplemental jurisdiction, the court should apply federal privilege law to both claims. In the case in which two claims are before the court, and the court has jurisdiction over one as a federal question, and independently has jurisdiction over the other due to diversity, the path of the court is unclear. In such a case, the court would have jurisdiction over the state claim even if it were brought separately from the federal claim, and thus would clearly be bound to apply a state's more protective privilege law to that claim. As of this writing, no court has cogently addressed the issue of what should be done in this scenario—when the same evidence would be admissible to resolve one claim but not the other.

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In cases before the court pursuant to *supplemental* jurisdiction under 28 U.S.C. 1367, courts have held that they should apply federal privilege law to all claims.<sup>40</sup> In the case of an invocation of the Fifth Amendment, this means that the court would be able to permit adverse inferences by the jury to decide both claims. However, the cases dealing with this issue are sparse. Furthermore, even the cases cited above do not squarely address the problem as they deal with privileges that had never been recognized at all by federal law (*Agster*), or privileges that had been specifically rejected by federal law (*Jadwin*).

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The truly unresolved question is what a court should do when it is faced with two *independent* claims—a diversity claim and a federal question claim—rather than a federal question claim and a pendent state law claim. This issue has never been addressed by the US Supreme Court nor dealt with head-on by any federal appellate court. Independent claims are categorically different from pendent claims. Pendent jurisdiction is defined as “[a] court’s jurisdiction to hear and determine a claim *over which it would not otherwise have jurisdiction*, because the claim arises from the same transaction or occurrence as another claim that is properly before the court.”<sup>41</sup> Therefore, by definition, if a court has independent jurisdiction over a claim based on diversity, that claim is not “pendent.” In diversity cases, the privilege law of the state applies.<sup>42</sup> Thus, it would appear that a federal court would be bound to apply the state’s privilege law to a claim over which it has independent diversity jurisdiction, even if that claim is coupled with a federal question claim. However, the real-world result in such a case is far from clear.

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***Popular culture and American public consciousness make frequent and broad invocations of the privilege the rule rather than the exception.***

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The only case to address a similar issue is *Platypus Wear, Inc. v. R.D. Co.*<sup>43</sup> *Platypus* was a case with multiple claims: some state law claims over which the court had jurisdiction based on diversity, and some federal law claims over which the court had federal question jurisdiction. The court was asked to decide how to handle evidence that would be admissible under federal privilege law and excluded under the state’s privilege law, but that was relevant only to the state law claims.<sup>44</sup> The *Platypus* court first noted that the

Ninth Circuit had not explicitly addressed the issue of what privilege law should control in cases involving independent state and federal claims.<sup>45</sup> The court then applied state privilege law to the state privilege claims and federal privilege law to the federal claims in the case.<sup>46</sup> However, *Platypus* did not address this issue head-on, as the proffered evidence would have been relevant only to the state law claims in the case—the very claim for which the relevant privilege law excluded the evidence.<sup>47</sup>

The *Platypus* court also acknowledged in dicta the possibility that in some cases involving both federal and state claims a court might be required—for the sake of ease and consistency—to apply only one set of privilege laws to two sets of claims if identical evidence were required for both claims, and that in such a case it appeared that Federal law should govern.<sup>48</sup> But the court also acknowledged that “a bright line rule, requiring the application of federal common law privilege principles to a case containing any federal claim, is neither appropriate nor necessary.”<sup>49</sup>

*Platypus* may not provide a useful barometer for how courts should address this question vis-à-vis the Fifth Amendment for another reason. The privilege in question in *Platypus* was not the Fifth Amendment privilege against self incrimination, but rather the New Mexico state accountant-client privilege—a privilege that is not recognized by federal law at all and therefore could not reasonably be applied to any federal question.<sup>50</sup> Thus, courts and practitioners are left with very little guidance about what to expect when faced with a potential adverse inference based on the Fifth Amendment combined with state and federal law claims over which the court has independent jurisdiction.

### **What Federal Courts Should Consider**

Courts faced with this issue should carefully consider whether or not they should prohibit any

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adverse inference based on the invocation of the Constitutional privilege against self-incrimination and (if the issue is applicable) whether to apply state privilege law or federal law to a state-law claim.

Courts also should carefully consider the evidentiary value of this type of evidence and whether, given the inherently unreliable nature of such evidence, its use should be limited to only those cases in which it is clearly admissible. In this respect, the Supreme Court has observed that “one of the Fifth Amendment’s basic functions is to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances.”<sup>51</sup> Witnesses frequently invoke the Fifth Amendment solely because they are advised to do so by counsel, regardless of whether they are guilty or innocent. As Justice Jackson noted, “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.”<sup>52</sup> Whether true or not, a person is well advised to heed the advice of their counsel when it comes to such matters. In addition, the breadth of the protection combined with the place the Fifth Amendment has taken in not only American law but also popular culture and American public consciousness make frequent and broad invocations of the privilege the rule rather than the exception.

Furthermore, an innocent witness may (very reasonably) believe that a prospective piece of testimony would tend to incriminate him in spite of the fact that he is innocent.<sup>53</sup> Therefore, the mere fact that a witness relies on the Fifth Amendment is indicative of nothing more than that he may have received the advice of counsel or may believe that his answer might potentially lead, however indirectly, to some piece of incriminating evidence, however small. It is not, however, even remotely or reliably indicative of guilt or wrongdoing and therefore has negligible probative value.

The choice of law issue also should not be taken lightly. In some instances permitting an

inference based on an invocation of the Fifth Amendment can only result in a deprivation of protections that both witnesses and litigants are entitled to in prosecuting their state law claims merely due to the chosen forum. In other cases applying disparate privilege laws to claims brought together may prove simply impractical and overly burdensome for the Court, and impossibly confusing to the jury. Applying federal privilege law to state law claims more often than necessary also has the potential to create differing results based solely on choice of forum, and therefore encourage forum shopping—an issue that federal courts consistently have sought to minimize. Indeed, this is exactly the problem that *Erie* and its progeny sought to avoid.<sup>54</sup> For this reason, courts should consider seriously the application of state privilege law to state law claims brought in federal court. This is true even if they are brought in conjunction with a federal question claim, and whether there is a risk that doing otherwise will encourage forum shopping unnecessarily.<sup>55</sup>

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***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.***

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In the interests of comity to the states, the protection of important constitutional rights, and fairness to witnesses and litigants, federal courts should consider carefully preventing juries from making inferences based on invocations of the Fifth Amendment in cases involving independent state law claims. To do otherwise threatens to erode rights guaranteed by the Fifth Amendment to the Constitution as well as state law, and should not be done lightly.

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## Taking the Stand to Take the Fifth

Despite all of these choices of all issues, in practice adverse inferences are often permitted in federal civil trials. A natural result of this is that witnesses are more frequently permitted (or required) to testify in front of the jury, even when it is known that they will assert their Fifth Amendment rights. This is not the case, for example, under California law, where there is a strong presumption against permitting the admission of testimony that consists only of a witness asserting their Fifth Amendment privilege.<sup>56</sup> The reason for this rule is based on the concern that an invocation of privilege may “have a disproportionate impact” on the jury’s deliberations, because a jury may view an invocation of the privilege as “high courtroom drama of probative significance.”<sup>57</sup>

Moreover, under California law, such testimony serves “no purpose.”<sup>58</sup> In fact, rather than serving a proper purpose, California courts have acknowledged that testimony of this type is proffered only for the purpose of creating the very inference that is prohibited under California law.<sup>59</sup> (Observing that the party presenting the testimony must have “sought to present to the jury” an adverse inference.) Permitting a party to put on witnesses who it knows in advance will invoke the privilege has been held to have only one foreseeable result: it can only serve to “invite the jury to make an improper inference” and waste the Court’s time with meaningless testimony.<sup>60</sup>

Federal courts also 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.<sup>61</sup> Nonetheless, federal courts are much more likely than state courts to permit this type of evidence, since inferences are permissible under federal law.

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.”<sup>62</sup> 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.”<sup>63</sup> Under this rationale the court decided it was permissible for a witness to be called to the stand, even when the calling party knew that the witness would merely invoke their Fifth Amendment rights.<sup>64</sup>

The Fifth Circuit has taken a similar approach, evaluating the prejudicial effect of such testimony weighed against its probative value on a case by case basis. In *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, it 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.<sup>65</sup> The court wrote, “[s]imilarly, we refuse 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.”<sup>66</sup>

This discretionary approach to certain witness testimony in federal civil cases is certainly not unique to the context of Fifth Amendment invocation, but in terms of trial preparation, preparing for the worst—assuming that both an adverse inference and live testimony of any invocations of the privilege will be permitted—is probably the safest course of action. However, a practitioner is not without a basis for arguing for the exclusion of the witness in his particular case, and motions in limine arguing that, even if an adverse inference is permitted the actual testimony should not be are not frivolous. Any practitioner seeking an inference must be careful to ask all of the relevant

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questions, because any inference that is permitted will be limited to the testimony that would have been elicited by the questions actually asked.<sup>67</sup> Thus, follow-up questions must be asked, as if the witness were giving substantive testimony.<sup>68</sup> Where possible, stipulations should be considered and accepted in lieu of live testimony.

## Conclusion

Companies involved in civil litigation presently do not have the clear protections they deserve when employees or former employees assert their privilege against self-incrimination pursuant to the Fifth Amendment. The assertion of constitutional rights, even potentially by third parties who are former employees, can be used against the company on the issue of liability, as counterintuitive or inequitable as that sounds. Companies should be aware of this potential and evaluate the civil action with this in mind.

Whether a court will or will not draw an adverse inference from a non-party's invocation of the Fifth Amendment currently is almost entirely within the discretion of the court. Further complicating matters is the unresolved issue of what a court should do in the face of conflicting state and federal privilege laws. The inevitable result of these variables is a shifting and unpredictable landscape which can render the prediction of probable results difficult or impossible. The required factual and case-by-case analysis required by the existent case law means that practitioners can make colorable and even highly persuasive arguments to either permit or exclude adverse inferences based on Fifth Amendment invocations in federal civil cases. The resulting current uncertainty should provide little comfort to corporate in-house counsel involved in civil litigation.

## NOTES

1. See, e.g., *Ohio v. Reiner*, 532 U.S. 17, 21 (2001).
2. 532 U.S. 17, 19 (internal quotations omitted); see also *Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (citing *Union Liquor Co. v. Gard*, 705 F.2d 1499, 1501 (9th Cir. 1983).

3. *Reiner*, 532 U.S. 17, 21 (internal quotations omitted) (emphasis added)
4. 532 U.S. 17, 21.
5. See, e.g.: Alaska R. Evid. 512(c); Ark. R. Evid. 512; Cal. Evid. Code § 913(a); Del. R. Evid. 512; Haw. Rev. Stat. § 626-1, R. 513; Idaho R. Evid. 512; Ky. R. Evid. 511; N.D. R. Evid. 512; Nev. Rev. Stat. § 27-513; Nev. Rev. Stat. 49.405; N.J. R. Evid. 532; N.M. R. Evid. 11-513; Okla. Stat. Ann. §2513; Or. Rev. Stat. § 40.290; Vt. R. Evid. 512.
6. *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976) (permitting adverse inference in civil case).
7. 425 U.S. 308, 317.
8. See *Baxter*, 425 U.S. 308, 317, *Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *Securities & Exchange Comm'n v. Colello*, 139 F.3d 674, 678 (9th Cir. 1998) (stating that the determination of whether an adverse inference arising from an invocation of the Fifth Amendment constituted reversible error “turns on whether [the proponent of the inference] presented additional evidence.”); *Pedrina v. Chun*, 97 F.3d 1296, 1300-1301 (9th Cir. 1996) (declining to draw an adverse inference from invocation of the Fifth Amendment, because the inference was “undermined” by other allegations).
9. See *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 912 (9th Cir. 2008).
10. Practitioners should always keep in mind that, in addition to the case law dealing directly with the issue of the admissibility of inferences based on invocations of the Fifth Amendment, the other Federal Rules of Evidence also apply. Therefore, arguments to exclude (or permit) such an inference should also address Rules 401 and 403.
11. See *Glanzer*, 232 F.3d 1258, 1266 & n.2.
12. See 232 F.3d 1258, 1266 & n.2.
13. 107 F.3d 110, 124 (2d Cir. 1997).
14. 107 F.3d 110, 123-124.
15. 107 F.3d 110, 124.
16. See, e.g., *Banks v. Yokemick*, 144 F. Supp. 2d 272, 290 (S.D.N.Y. 2001) (applying LiButti factors, and finding that that the record showed insufficient evidence of the relevant relationship and the necessary degree of control to support granting plaintiff's request for an adverse inference from the defendant's patrol partners' invocation of their Fifth Amendment privilege.); *In Re: Handy & Harman Refining Group, Inc.*, 266 B.R. 32 (D. Con. 2001) (concluding insufficient grounds existed under the LiButti factors for the court to order an inference that, if not for his exercise of the privilege, the witness would have testified adversely to the interest of the debtor or the committee, and denying motion to admit into evidence its list of proposed questions and an order finding the answers to be in the affirmative.); *Kontos v. Kontos*, 968 F. Supp. 400, 406 (S.D.N.Y. 1997) (holding that no adverse inference can be imputed to a defendant by the invocation of

the Fifth Amendment privilege by her sister, since the drawing of such an adverse inference would only hinder the search for truth.); *Garrish v. UAW*, 284 F. Supp. 2d 782, 798 (E.D. Mi. 2003) (allowing adverse inferences because the non-party witness was a key figure in the case, and had an interest in the dismissal of the lawsuit as the ultimate issues of liability involved his allegedly wrongful conduct, but also finding that the adverse inference did not save the other party from summary judgment).

17. 717 F.2d 700 (2d Cir. 1983).
18. 717 F.2d 700, 710; *see also* *Federal Deposit Insurance Corp. v. Fidelity & Deposit Company of Maryland*, 45 F.3d 969, 977 (5th Cir. 1995) (holding that “the fact that the witness no longer serves the party in an ‘official capacity’ does not present a bar to requiring the witness to assert the privilege in front of the jury.”).
19. 808 F.2d 271, 275 (3d Cir. 1986).
20. 808 F.2d 271, 275.
21. *Data General Corp.*, 825 F. Supp. at 352.
22. 825 F. Supp. at 352, *see also* *Veranda Beach Club Limited Partnership v. Western Surety Co., et al.*, 936 F.2d 1364, 1374 (1st Cir. 1991) (finding insufficient evidence to allow the invocation of the personal privilege to be imputed to the corporate defendants); *Data General*, 825 F. Supp. [xxx], 352 (distinguishing case from *Veranda Beach*, because plaintiff laid sufficient grounds for admission of employee deposition, where as in *Veranda Beach*, there was little evidence to show that the corporate employer was closely involved or aware of the disputed transaction and alleged wrongdoing.).
23. 717 F.2d 700.
24. 717 F.2d 700, 710.
25. 717 F.2d 700, 708.
26. 717 F.2d 700.
27. 808 F.2d 271.
28. 808 F.2d 271.
29. 808 F.2d 271, 275-276.
30. 808 F.2d 271, 276.
31. 808 F.2d 271, 276 (*citing* *The Conjurer’s Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1119 (1985)).
32. 808 F.2d 271, 276, *see also* *AEL Industries, Inc. v. Alvarez et al.*, No. 88-0391, 1989 U.S. Dist. LEXIS 9821, \*10 (E.D. Pa. August 17, 1989) (following *RAD Services*, and holding that the assertion of the Fifth Amendment privilege and an adverse inference from this assertion were admissible in light of the relationship between the parties (employee—stockholder), including the payment by defendant of the witness’s legal fees.).
33. *Cerro Gordo Charity v. Fireman’s Fund Ins.*, 819 F.2d 1471, 1481 (8th Cir. 1987).
34. 819 F.2d 1471, 1481-1482.
35. 819 F.2d 1471, 1481-1482.
36. 819 F.2d 1471, 1482.
37. 819 F.2d 1471, 1481.
38. 968 F. Supp. 400, 408 (S.D. Ind. 1997).
39. 968 F. Supp. 400, 408.
40. *See, e.g., Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005), *Jackson v. County of Sacramento*, 175 F.R.D. 653 (E.D. Cal. 1997); *Jadwin v. County of Kern*, No. 1:07-cv-0026-OWW-TAG, 2008 WL 2025093 (E.D. Cal. 2008).
41. *Black’s Law Dictionary* 876 (8th ed. 2004) (emphasis added).
42. *See* Fed. R. Evid. 501 (“[W]ith respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.”); *see also, e.g., Crenshaw v. Mony Life Ins. Co.*, 318 F. Supp. 2d 1015, 1024 (S.D. Cal. 2004).
43. 905 F. Supp. 808 (N.D. Cal. 1995).
44. 905 F. Supp. 808.
45. 905 F. Supp. 808, 811.
46. 905 F. Supp. 808, 811-812.
47. 905 F. Supp. 808, 811.
48. *See generally* 905 F. Supp. 808.
49. 905 F. Supp. 808, 812.
50. 905 F. Supp. 808, 810.
51. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001).
52. *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).
53. *Reiner*, 532 U.S. 17, 21.
54. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (superseded by statute on other grounds as stated in *Chapman & Cole v. Itel Container Int’l B.V.*, 865 F.2d 676 (5th Cir. 1989)); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001); *see also Stud v. Trans. Intern. Airlines*, 727 F.2d 880, 881 (9th Cir. 1984) (applying California law, because jurisdiction in that case was based on both diversity of citizenship and federal question).
55. *See Pasadena Oil & Gas Wyo. LLC v. Mont. Oil Props., Inc.*, No. 07-35896, 2009 WL 794678 at \*1 (9th Cir. March 26, 2009) (citing Fed. R. Evid. 501, last sentence).
56. *See People v. Holloway*, 33 Cal. 4th 96, 131-132 (Cal. 2004); *see also People v. Mincey*, 2 Cal. 4th 408, 441 (Cal. 1992) (holding that trial court’s refusal to compel a non-party witness to assert their Fifth Amendment privilege in the presence of the jury was proper).
57. *People v. Johnson*, 39 Cal. App. 3d 749, 760 (Cal. Ct. App. 1974) (quoting *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970)).
58. 39 Cal. App. 3d 749, 760.
59. *See Holloway*, 33 Cal. 4th 96, 132.
60. *People v. Frierson*, 53 Cal. 3d 730, 743 (Cal. 1991).

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61. See, e.g., *Arredondo v. Ortiz*, 365 F.3d 778, 781, 783-784 (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 his Fifth Amendment privilege); *Sanders v. United States*, 373 F.2d 735, 735-736 (9th Cir. 1967) (reversing on the grounds that requiring a witness to assert his privilege repeatedly on the stand was inherently prejudicial).
62. 819 F.2d 1471, 1482 (8th Cir. 1987).
63. 733 F.2d 509, 521-522 (8th Cir. 1984) (internal quotations omitted).
64. 733 F.2d 509, 522.
65. 45 F.3d 969 (5th Cir. 1995).
66. 45 F.3d 969, 978.
67. *Glanzer*, 232 F.3d 1258, 1266 & n.2.
68. 232 F.3d 1258, 1266 & n.2.

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