CARLTON FIELDS

Taking Number Five In a Civil Proceeding: What You Need To Know

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The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment protects witnesses against making disclosures that they reasonably believe might incriminate them in future proceedings. However, invoking the Fifth Amendment does not preclude the fact finder in a civil matter from drawing an adverse inference. **When May a Witness Invoke Number Five** A party to a civil action may invoke the Fifth Amendment privilege if the party has reasonable grounds to believe that a direct answer would support a conviction or furnish a link in the chain of evidence needed to prove a crime, criminal charges need not be actually pending. *Marchetti v. United States*, 390 U.S. 39, 53 (1968). The propriety of the Fifth Amendment assertion depends on whether the witness can make a showing of a realistic possibility that his answer will be used against him. *Zicarelli v. New Jersey State Commission of Investigation*, 406 U.S. 472, 478 (1972). The privilege "protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 411, 444-45 (1972). **How to Invoke Number Five** The general rule is that a blanket assertion of the Fifth Amendment during a deposition is impermissible. *United States v. Bowe*, 698 F.2d 560, 566 (2d Cir. 1983) ("[A] blanket assertion" of a Fifth Amendment privilege is insufficient); *United States v. Bates*, 552 F.3d 472 (6th Cir. 2009) (finding that long standing rule that a blanket assertion is insufficient); *United States v. Schmidt*, 816 F.2d 1477, 1482 (10th Cir. 1987); *United States v. Thornton*, 733 F.2d 121, 125-26 (D.C. Cir. 1984); *United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996); *United States v. Goodwin*, 625 F.3d 693, 701 (5th Cir. 1980); *General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). In fact, a witness invoking the privilege must do so for each question. *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991). Then, if counsel wishes to compel the testimony and/or test the validity of the assertion, the matter is taken before the court on a motion to compel. The court must review the assertions of the privilege on a question-by-question basis. *Id.* This is sometimes accomplished in an *in camera* proceeding wherein the witness is given the opportunity to substantiate his claims of the privilege and the district court is able to consider

the questions asked and the documents requested. *See United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir.1969) ("The district court may then determine by reviewing ... records and by considering each question whether, in each instance, the claim of self-incrimination is well-founded."). **Sanctions Against a Party Defendant for Invoking Number Five in a Civil Proceeding** The fundamental nature of the privilege against self-incrimination limits the imposition of sanctions against a defendant who invokes it in a civil litigation. *Spevack v. Klein*, 385 US 511 (1967) (holding that impermissible to penalize the invocation of the Fifth Amendment privilege). However, the Court may compel a defendant to take the stand in trial and assert the privilege in response to questions. And the plaintiff is entitled to an adverse inference in response to the unanswered questions and counsel is entitled to argue it. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Specifically, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 318. The Supreme Court has instructed that "silence" in the face of an accusation is a relevant fact and is "often evidence of the most persuasive character." *Id.* at 319. This means that the trier-of-fact may consider a person's silence or failure to contest an accusation as evidence of acquiescence in the accused conduct. *Id.* In some instances, the Court may stay the civil proceedings pending the resolution of the criminal investigation and/or prosecution. Generally, a court has discretion to stay a civil case pending resolution of a related criminal action. *United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970). When deciding whether to grant a stay, a court considers several factors, such as (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of a case, including whether a defense has been indicted; (3) the private interests of a plaintiff in proceeding expeditiously with the civil litigation as balanced against the prejudice to a plaintiff if delayed; (4) the private interests of and burden on a defendant; (5) the interests of the court; and (6) the public interest. *See Kariomona Invs. v. Weinreb*, No. 02-CV-1792, 2003 WL 9411404, at *2 (S.D.N.Y. Mar. 7, 2003); *In re Worldcom, Inc. Sec. Litig.*, Nos. 02civ3288 02 Civ. 4816, 2002 WL 31729501, at *4 (S.D.N.Y. Dec. 5, 2002). However, Florida district courts take a slightly different view. Specifically, Florida district courts have noted that "the Constitution does not require a stay of civil proceedings pending the outcome of related criminal proceedings. *Shell Oil Co. v. Altina Associates, Inc.*, 866 F. Supp. 536, 540 (M.D. Fla. 1994). Instead, these courts have held that courts must stay civil proceedings "only when special circumstances so require in the interest of justice." *United States v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F.3d 359, 364 (11th Cir. 1994) (citing *United States v. Kordel*, 397 U.S. 1, 12 & n. 27 (1970). "Special circumstances that may necessitate granting a stay include the following: (1) if the government brought the civil action solely to obtain evidence for its criminal prosecution; (2) if the government failed to advise the defendant in the civil proceeding that it contemplates his criminal prosecution; (3) if the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; or (4) any other special circumstances indicating unconstitutionality or even impropriety." *Hilliard v. Black*, No. 1:00cv80, 200 U.S. Dist. Lexis 20329, at *8 (N.D. Fla. Nov. 9, 2000). Unlike the district courts, Florida state courts do not have a standard for granting a stay of civil proceedings. Instead, Florida state courts have held that a stay may be proper, but an indefinite stay is not. *Kebren v. Intercontinental Bank*, 573 So. 2d 976 (Fla. 5th

DCA 1991). **Sanctions Against a Plaintiff for Invoking Number Five in a Civil Proceeding** A party bringing a claim cannot institute suit and then prevent the party defending the action from hearing anything about the action through discovery by invoking the Fifth Amendment privilege against self-incrimination. *Stop and Shop Companies, Inc. v. Goodman*, 111 F.R.D. 105, 107 (D. Mass 1986). In other words, a party bringing a claim, by way of complaint or counterclaim, "cannot hope to gain an unequal advantage against the party he has chosen to sue." *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979). And a voluntary litigant may not utilize the Fifth Amendment privilege against self-incrimination as both a sword and a shield. *Lyons v. Johnson*, 415 F.2d 540, 542 (9 Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970). Accordingly, a plaintiff's assertion to the privilege against self-incrimination to an inquiry during discovery can result in a dismissal of a lawsuit. *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996) (holding that dismissal of a case was proper where the plaintiff asserted his Fifth Amendment privilege in a civil action, which resulted in the defendants being unable to obtain information which was central to the case against them); *see also Minor v. Minor*, 240 So. 2d 746, 747 (Fla. 1970) (holding that dismissal of case did not render plaintiff's assertion of privilege "costly" because the plaintiff has freedom to choose his destiny).

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