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Published by Aspatore Books, a Thomson Reuters business

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CHAPTER TITLE: Strategies for Managing Parallel Proceedings with Fifth

Amendment Implications

# Introduction

The DOJ Tax Division has long recognized the efficacy of parallel criminal and civil proceedings and actively pursues them in its current endeavor at increased enforcement. Parallel proceedings often present complicated issues that create additional challenges for taxpayers and their attorneys. When a parallel proceeding is pending, the invocation of the Fifth Amendment by either the taxpayer, a tax advisor, or other non-party witness can create adverse implications in a subsequent proceeding.

For example, many taxpayers invoke the Fifth Amendment privilege while criminal proceedings are pending. When the criminal case concludes and the possibility of self-incrimination expires, the taxpayer often seeks to testify in his defense in the subsequent civil proceedings. In these cases, issues arise as to whether the prior invocation creates an adverse inference against the taxpayer in the subsequent civil proceeding and whether the taxpayer is precluded from testifying in the subsequent proceeding on account of his prior invocation.

Similarly, where a tax advisor or a non-party witness invokes the privilege, issues arise as to whether an adverse inference will work against the taxpayer in the current proceeding, whether it will work against the taxpayer in a subsequent proceeding, and whether the non-party witness is precluded from testifying in the subsequent civil proceeding on account of his prior invocation.

Where both civil and criminal proceedings are pending, the practitioner must balance a witness’ invocation of the Fifth Amendment privilege and the advantages of silence against the disadvantages of a possible adverse inference based on the Fifth Amendment invocation. Although the Fifth Amendment privileges an individual from testifying in any proceeding, criminal or civil, the effect of an invocation depends on the nature of the proceedings. In the context of a criminal prosecution where a civil examination is a likely possibility, taxpayers should be aware that the court has discretion to permit an adverse inference in the civil proceeding, in appropriate circumstances.

Taxpayers and their attorneys must carefully navigate the risk of an adverse inference against the taxpayer under the circumstances of the particular case. The well-informed attorney can prepare to face all of these issues and effectively navigate the specific facts of his or her case. The following discussion will explain and analyze: the effect of a party’s invocation in independent proceedings, the effect of a party’s invocation in parallel proceedings, the implications of a non-party’s invocation, and whether an invoker can waive the privilege and later testify.

# I. A Party’s Invocation in Independent Proceedings

## A. Criminal Proceedings

In criminal cases, it is generally impermissible to penalize an individual who invokes the Fifth Amendment privileges. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981); *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977); *Griffin v. California*, 380 U.S. 609, 614 (1965).In a criminal case, the judge “has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify” by instructing the jury not to draw an adverse inference from the defendant’s silence. *Carter*, 450 U.S. at 305. A prosecutor cannot argue, and the court may not suggest, that the jury can infer guilt from the defendant’s invocation. *Griffin*, 380 U.S. at 609.

## B. Civil Proceedings

In civil cases, the jury is permitted—but not required—to draw an adverse inference from a party’s invocation of the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 328 (1999); *Baxter v. Palmigiano*, 425 U.S. 308, 310, 317 (1976); *Pyles v. Johnson*, 136 F.3d 986, 997 (5th Cir. 1988) (the “fact that the Fifth Amendment does not prohibit such inferences does not imply that the fact-finder is required to make them.”) (emphasis in original).[[1]](#footnote-1) Thus, in *Baxter*, where the party invoked his privilege in a prior civil disciplinary proceeding, the Court admitted an inference in a subsequent civil proceeding. 425 U.S. at 316-20.

The invocation, however, cannot be the sole basis for a finding of liability and is inadmissible where there is no other evidence of liability. *Id*. at 318-320; *Petzoldt v. Comm’r*, 92 T.C. 661, 683-86 (1989); *Dellacroce v. Comm’r*, 83 T.C. 269, 285-86 (1984). That is, the taxpayer’s invocation is to be considered only as part of the evidence establishing liability. *Lefkowitz*, 431 U.S. at 808.

Further, the decision to admit the invocation is largely within the court’s discretion, limited only by the Federal Rules of Evidence. *Farace v. Indep. Fire Ins.*, 699 F.2d 204, 210 (5th Cir. 1983). Thus, numerous courts have held that an invocation is admissible as relevant evidence unless otherwise excluded under Rule 403 on grounds of prejudice. *Doe v. Glanzer*, 232 F.3d 1258, 1266 (9th Cir. 2000); *Lyons v. Williams*, 91 F.3d 1308, 1312 (9th Cir. 1999); *Farace*, 699 F.2d at 209-11. Given the inherent prejudicial effect of an invocation, courts have excluded the inference where the invocation was an exercise of an abusive strategy to burden an opponent. *See, e.g., Nationwide Life Ins. v. Richards*, 541 F.3d 903, 909 (9th Cir. 2008).

The protections of the Fifth Amendment should serve as a shield and not a sword. *Id*. The distinction from the criminal prohibitions stems from the reasoning that because “parties are on a somewhat equal footing, one party's assertion of his or her constitutional right should not obliterate another party's right to a fair proceeding.” *Doe*, 232 F.2d at 1264. To that end, “no negative inference can be drawn against a civil litigant's assertion of his privilege against self-incrimination unless there is a substantial need for the information and there is not another less burdensome way of obtaining that information.” *Id*. at 1265, 1267 (refusing an adverse inference where there was no substantial need for information sought). Consequently, courts have held that an inference is inappropriate when the witness cooperates with the opposing party and avoids any surprise at trial. *See, e.g., Lyons*, 91 F.3d at 1312. In *Lyons*, the Ninth Circuit affirmed the exclusion of the inference where the plaintiff initially invoked the privilege in the police investigation, but later answered all the interrogatories and testified fully at his deposition. *Id*. at 1311-12.

Because the civil fraud addition to tax is generally not considered a punishment or a criminal penalty rising to the level of a criminal proceeding,[[2]](#footnote-2) an adverse inference from a taxpayer’s silence may be admissible in a civil case if this evidence meets the standards of Fed. R. Evid. 403—that is, when an adverse inference is probative, supported by corroborating evidence, not unduly prejudicial, and not the product of an abusive trial strategy.

# II. A Party’s Invocation in Parallel Proceedings

When parallel proceedings are pending, the adverse inference is rarely admitted, although there is no bright-line rule. The invocation in a prior civil case is clearly inadmissible in a subsequent criminal case under the general rule in *Griffin*. However, the issue of whether the invocation of a party while criminal proceedings are pending can create an adverse inference against the party in civil proceedings has not frequently been directly addressed by courts. Ultimately, the inference is subject to judicial discretion, and judges are likely to exclude it in appropriate circumstances. This is true whether or not the invoker later chooses to testify in the civil proceedings.[[3]](#footnote-3)

## A. Inference Permitted But Not Required

As in independent civil proceedings, because an invocation is not otherwise expressly excluded, courts have broad discretion to admit the prior invocation and allow an adverse inference in a subsequent civil proceeding. *See Baxter*, 425 U.S. at 318-320; *Farace*, 699 F.2d at 209-11; *e.g., Dellacroce*, 83 T.C. at 269 (applying *Baxter* in a civil trial following a criminal trial, but rejecting the inference because it was the only evidence of tax fraud). Still, the court must exclude the inference when the probative value is substantially outweighed by the prejudicial effect. *See* Fed. R. Evid. 403.

## B. Inference Excluded When Prejudice Outweighs Probative Value

Because an invocation may have an incredibly prejudicial effect and little probative value, numerous courts have held that an adverse inference is prejudicial and non-probative. *See, e.g., Farace*, 699 F.2d at 209-11; *United States v. Two Parcels of Real Prop. Located in Russell County*, 92 F.3d 1123, 1129-30 (11th Cir. 1996) (finding the inference impermissible when the claimant in a civil case is also the defendant in a criminal case and is forced to choose between waiving privilege and losing the case on summary judgment). In *Farace*, a witness who invoked his Fifth Amendment right in the earlier criminal proceeding later changed his position and testified in the civil case. 699 F.2d at 210. The Fifth Circuit concluded that his original invocation should not be used against him and affirmed the district court’s exclusion, which stated, “I find it difficult to say that he has a right to refuse to talk and then to say that when he refuses to talk there is some implication against him.” *Id*. at 209 n.5. The court further distinguished this situation from other civil cases where both parties are private because “no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from exercise of the privilege does not implicate the policy considerations underlying the privilege.” *Id*. at 210 (citing *Baxter*, 452 U.S. at 355-36 (Brennan, J., dissenting)).

## C. Inference Excluded When Invoked in Good Faith

Recently, several courts have found a good-faith invocation of the privilege sufficient to preclude an inference in a subsequent civil trial. *Evans v. City of Chicago*, 513 F.3d 735, 743-44 (7th Cir. 2008); *Martinez v. Fresno*, Nos. 1:06-CV-00233 OWW GSA, 1:06-cv-01851, 2010 WL 761109, \*3-4 (E.D. Cal. 2010). When the privilege is invoked during an active criminal proceeding and a good-faith invocation exists, the potential for abusive “gaming” and prejudice is eliminated and the invocation is inadmissible. *Evans*, 513 F.3d at 743. In both *Evans* and *Martinez*, the court not only excluded an inference but also refused to estop the invoker from later testifying in the civil proceedings. *Id*.; *Martinez*, 2010 WL 761109, at \*3-4.[[4]](#footnote-4)

## D. Suggestions for Tax Practitioners

Taxpayers have the right to assert the Fifth Amendment privilege when criminal proceedings are pending without necessarily creating an adverse inference in the subsequent civil examination, but should do so with full knowledge of the potential consequences. Because the inference is not automatic, counsel can oppose it by demonstrating the taxpayer’s good-faith invocation and cooperation in the current proceeding. Further, counsel should address the irrelevancy of the prior invocation and the potential prejudicial effect of the inference in light of the insignificant probative value.

## E. Against a Party When a Non-Party Invokes the Fifth

The admissibility of an adverse inference against the taxpayer when a non-party invokes the privilege is similarly determined on a case-by-case basis. *Libutti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997); *Cerro Gordo Charity v. Fireman’s Fund*, 819 F.2d 1471, 1481 (8th Cir. 1987) (rejecting a “blanket rule legitimizing all attempts to require a witness to invoke the privilege in the presence of a jury.”). Many courts have adopted the factorial analysis of the Second Circuit set forth in *Libutti*. *See* 107 F.3d at 121. Ultimately, the trial court has wide discretion for admitting or excluding the inference against the taxpayer under the Federal Rules of Evidence. *Curtis v. M&S Petroleum, Inc.*, 174 F.3d at 661, 674 (5th Cir. 1999); *Libutti*, 107 F.3d at 121.

## F. Factorial Analysis

In determining whether or not to admit the invocation, “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 121. In determining whether the nonparty witness’ invocation and the drawing of adverse inferences are admissible, the court must consider the following nonexclusive factors:

1. “The Nature of the Relevant Relationships:” examined from the perspective of the non-party witness’ loyalty to the party; “[t]he closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship[;]”

2. “The Degree of Control of the Party Over the Non-Party Witness:” in regard to “key facts and general subject matter of the litigation;” akin to a vicarious admission admissible under Fed. R. Evid. 801(d)(2);

3. “The Compatibility of the Interests of the Party and Non-party Witness:” whether the non-party witness is “pragmatically a noncaptioned party in interest” and whether the assertion “advances the interests of both[;]” and

4. “The Role of the Non-party Witness in the Litigation:” whether the non-party witness was a “key figure in the litigation and played a controlling role” with respect to the underlying aspects and merits of the case.

*Id*. at 123-24. In addition, admission of an invocation is subject to the general exclusion of evidence under relevancy and prejudice considerations. *Id*. And, as with party invocations, the invocation of a non-party should not be the sole basis for finding liability. *Id*. (citing *Baxter*, 425 U.S. at 318-320).

In *Libutti*, the court admitted the invocation of a father (non-party) against his daughter (party) upon his refusal to answer questions regarding the ownership of a certain business. *Id*. The court found a strong relationship and identical interests existed; both desired the assets of the business to be deemed the daughter’s so as to avoid a levy against the father. *Id*. The invocation was admitted because there was compelling evidence of ownership without the inference and because, in the context of a bench trial, the prejudicial effect was eliminated. *Id*. In this regard, the court stated, “many of the management problems which a trial court invariably has to wrestle with in order to guard against unfair prejudice when one takes the proverbial Fifth simply do not exist in the context of a bench trial.” *Id*.

## B. The Nature of the Relationship—the Most Important Factor

Although a special relationship is not required for a court to allow the negative inference, the closeness of the relationship is the most important factor of the test. Generally an attorney-client engagement will not satisfy this factor. Although the trial court must consider all four factors when determining whether to exclude an inference, the first factor is the most important factor. *Id*. Therefore, where a familial or an agency relationship exists, courts are more likely to admit the inference. Importantly, however, the attorney-client relationship does not generally permit the inference.

### 1. Agency Relationship

Courts have generally permitted the adverse inference where a principal-agent relationship exists because the testimony is akin to a vicarious admission. *See, e.g., In re High Fructose Corn Syrup*, 295 F.3d 651, 663 (7th Cir. 2002) (party corporation and non-party corporate representative); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d at 661 (5th Cir. 1999) (same); *Cerro Gordo Charity*, 819 F.2d at 1481 (party charity and non-party former president of charity); *RAD Serv., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986) (party former employer and nonparty former employee); *Brink’s Inc. v. City of New York*, 717 F.2d 707, 709 (2d Cir. 1983) (party employer and non-party employees); *AEL Indus. v. Alvarez*, Civ. No. 88-0391, 1989 WL 97394 (E.D. Pa. Aug. 17, 1989) (party sole corporate stockholder and non-party corporate employee). For example, in *RAD*, the Third Circuit allowed an adverse inference against a former employer when former employees invoked the privilege in a non-government civil suit and refused to answer questions concerning their employment. 808 F.2d at 275. The Third Circuit, reviewing the policies underlying *Baxter*, stated, “[t]he aims supporting the privilege simply apply less forcefully in civil than in criminal case,” and a “non-party’s silence in a civil proceeding implicates Fifth Amendment concerns to an even lesser degree.” *Id*. Similarly, in *Curtis*, the Fifth Circuit found the adverse inference was not unduly prejudicial because allowing the corporate agent to assert the privilege would effectively create a privilege for the corporation. 174 F.3d at 674.

### 2. Taxpayer-Adviser Relationship

Unlike the agency relationship, the typical attorney-client—taxpayer-adviser—relationship generally will not support the adverse inference. *See Murfam Farms LLC v. United States*, Nos. 06-245T, 06-246T, 06-247T, 2010 WL 3229939, at \*12 (Fed. Cl. 2010); *Stobie Creek Invs., LLC v. United States*, 82 Fed. Cl. 636, 660 (Fed. Cl. 2008). Unless the relationship is akin to an agency, the inference is likely excluded. *See Murfam Farms*, 2010 WL 3229939, at \*12. Although, the Court of Federal Claims recently imputed the knowledge and experience of a tax adviser to the taxpayer, the imputation to the taxpayer in *Murfam Farms* was that of a CPA employed full-time for the taxpayer corporation. *Id*. The court relied on general agency principles:

Imputation charges a principal with the legal consequences of having notice of a material fact, whether or not such fact would be useful and welcome. If an agent has actual knowledge of a fact, the principal is charged with the legal consequences of having reason to know the fact . . . . Imputation thus reduces the risk that a principal may deploy agents as a shield against the legal consequences of facts the principal would prefer not to know.

*Id*. (citing Restatement (Third) of Agency, 5.03 (2008)). The court agreed with the government that “[i]mputation is clearly critical to the applicability of tax penalties because otherwise partnerships could easily avoid accuracy-related penalties simply by claiming that the managing partners’ authorized agent furnished them with little or no knowledge of the tax-avoidance nature of the transaction.” *Id*. Thus, because the taxpayer relied upon the adviser to handle the tax matters and because the adviser was so “intimately involved” in these transactions, the court found the adviser’s knowledge, experience, and sophistication imputed to the taxpayer. *Id*.

This relationship is distinguishable from most taxpayer-adviser relationships where imputed knowledge is likely inapplicable. Notably, the taxpayer in *Murfam Farms* received extensive tax advice from both the internal CPA and separate counsel at Ernst & Young (“E&Y”). *Id*. The court, however, refused to impute the knowledge and experience of the E&Y attorneys because of a vital distinction: “[a]lthough both [the CPA] and E&Y advised the Murfam partners, [the CPA]’s role as a Murphy Farms, Inc. employee and *consiglieri* to the Murphy family puts him in a different category than E&Y.” *Id*.

Although *Murfam Farms* did not involve the invocation of the Fifth Amendment privilege, an analysis under the first factor of the *Libutti* test, produces the same result. *See Libutti*, 107 F.3d at 121; *Stobie Creek*, 82 Fed. Cl. at 660 (discussed *infra*).

## C. Applying the Test in Tax Cases

In *Stobie Creek*, the Court of Federal Claims affirmed the trial court’s grant of the taxpayers’ motion in limine excluding evidence of the invocation of several tax advisers and attorneys, and refusing an adverse inference. *See* 82 Fed. Cl. at 659-661. Applying the *Libutti* test and finding that three of the four factors weighed in favor of the taxpayer, the trial court precluded the inference of several non-party invokers including: the lawyers who issued the tax opinions at issue, a lawyer frequently consulted in connection to the transaction, and the employees of the bank involved in the design and execution of the transaction. *See id*. (citing *Stobie Creek*, Order Entered Mar. 21, 2008, 4-5 (“*Stobie Creek* Order”)).

As in *Murfam Farms*, the court agreed with the taxpayers that the witnesses did “not have a ‘sufficiently close relationship’ with the taxpayers” such that the non-party’s testimony or invocation was “beholden,” or imputed, to the taxpayers. *Stobie Creek* Order at 2-3; *see also Murfam Farms*, 2010 WL 3229939, at \*12. Second, although the government did not contest the issue, the court noted that the taxpayers had no control over the non-party witnesses. *See Stobie Creek* Order at 3. As to the third factor, the court agreed with the taxpayers that the invocation did not advance the interests of the taxpayers. *Id*. at 3-4. Instead, as the taxpayers contended, the truthful testimony of these non-parties could possibly bolster the taxpayer’s reasonable reliance defense. *Id*.

Although the fourth factor weighed in favor of the government, it was not determinative. *Id*. at 4. The court considered each of the non-parties “key figures” in the litigation because their extensive involvement in designing and implementing the transactions at issue. *Id*. The court agreed with the government that the invoking non-parties’ actions formed the basis for the government’s affirmative defense of fraud, but found the other three factors outweighed this single factor. *Id*.

Therefore, the court ruled in favor of the taxpayer and declined to admit the adverse inference against the taxpayer on account of the Fifth Amendment invocation of the taxpayer’s attorneys and other advisers. *Id*.

## D. Suggestions for Tax Practitioners

Taxpayers opposing an adverse inference of a non-party’s invocation at trial can certainly argue the *Libutti* factorial test is not satisfied. The argument should focus on the frailty of the relationship between the taxpayer and the non-party witness. Also, in cases where the taxpayer and the non-party do not have identical interests, the defense can identify grounds for invocation and highlight diverging interests. Where it is possible that the non-party might be incriminated by his testimony and not necessary that the same testimony incriminates the taxpayer, counsel should consider arguing that the assertion of the privilege is irrelevant and non-probative evidence. This factor is particularly favorable if the taxpayer can establish a reasonable reliance defense.

Because an inference is highly prejudicial in most cases, the taxpayer should pursue exclusion under Fed. R. Evid. 403 where the prejudicial effect substantially outweighs the probative value. Similarly, where the government relies heavily upon the invocation for a finding of liability, the taxpayer should draw the court’s attention to the insufficiency of the evidence without the inference and pursue exclusion on these grounds.

# IV. Preclusion of Later Testimony

Witnesses who invoke the privilege in a criminal proceeding typically are not precluded from testifying at a later civil proceeding unless the invocation was an abusive strategy and unfair to the opposing party. Generally where a party or witness invokes the privilege in a civil proceeding, the trial court must balance the competing constitutional interests with the potential for abuse. When the privilege is invoked in a prior criminal proceeding, the potential for strategic abuse is diminished. Thus, many courts have held that the invoker was not precluded from later testifying because the constitutional interests outweighed the threat of abuse and prejudice.

## A. Independent Proceedings

When a party invokes the privilege in a purely civil proceeding, the court should balance the interests of the parties and refuse later testimony when the invocation is unwarranted, abusive, and prejudicial to the opposing party. *Nationwide Life Ins. v. Richards*, 541 F.3d 903, 909 (9th Cir. 2008); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 572-73 (1st Cir. 1989); *SEC v. Johnson*, 525 F. Supp. 2d 80, 82-84 (D.D.C. 2000) (refusing to preclude testimony where there was no serious prejudice to the opponent).

### 1. Testifying Without Waiving the Privilege

Courts have precluded later testimony where the taxpayer still asserts and relies upon the invocation. At least one court has held that a witness cannot “game the system” and “use the [F]ifth [A]mendment to shield herself from the opposition’s inquiries during discovery only to impale her accusers with surprise testimony at trial.” *Gutierrez-Rodriguez*, 882 F.2d at 576-77 (“[I]f a party is free to shield himself with the privilege during discovery, while having the full benefit of his testimony at trial, the whole process of discovery could be seriously hampered.”); *see also Nationwide*, 541 F.3d at 909; *Stobie Creek*, 82 Fed. Cl. at 660.

However, a preclusion order should be narrowly tailored to prevent unfair prejudice to the opposing party. *Nationwide*, 541 F.3d at 909; *Doe*, 232 F.3d at 1265 (the detriment to the invoker should be no more than needed to prevent unfair and unnecessary prejudice). Thus, in *Stobie Creek*, the court allowed the witness to testify but precluded what was unfair. 82 Fed. Cl. at 660. Specifically, the court precluded testimony of a non-party invocation or adverse inference against the taxpayer and also refused the taxpayer’s request to admit conversations between the government and the invokers. *Id*. The court reasoned, “it would be inequitable to allow [taxpayers] to testify with impunity about the communications with the [invokers] when the [government] was not able to introduce the [invocation] to rebut such testimony.” *Id*.

### 2. Testifying After Waiving the Privilege

Similarly, a strategic “eve of trial” waiver of the privilege may be prejudicial to the opponent and may warrant preclusion. For example, in *Nationwide*, the Ninth Circuit affirmed the trial court’s exclusion of testimony at a civil interpleader trial because the threat of abuse was compelling. 541 F.3d at 909. The court proscribed the “eve of trial” withdrawal where the opponent is forced to prepare the case without discovery. *Id*. Applying the same reasoning in a civil rights action, the First Circuit concluded that barring trial testimony when the invoker refused all discovery requests “did not burden [the officer’s] due process rights, [but] merely forced him to abide by his decision and protected [the] plaintiff from any unfair surprise at trial.” *Gutierrez-Rodriguez*, 882 F.2d at 577.

## B. A Higher Standard in Parallel Proceedings

Because a higher standard applies in parallel proceedings, a good faith-invocation usually will not preclude testimony in a subsequent civil trial. When the privilege is invoked during an active criminal proceeding and a good-faith invocation exists, the potential for abusive “gaming” and prejudice is reduced, and a court may choose not to preclude the invoker from later testifying in a civil case. *Evans*, 513 F.3d at 743; *Martinez*, 2010 WL 761109, at \*3-4. For example, in *Evans*, the Seventh Circuit found a good-faith invocation and affirmed the admission of trial testimony because the invokers were not “gaming” the system but were reasonably concerned about a prosecutor’s investigation. 513 F.3d at 743. In so holding, the court considered the ongoing investigations and the reliance on the advice of counsel to invoke. *Id*.

Moreover, any existing prejudice to the opposing party is usually reduced by the reopening of discovery in the subsequent proceeding. *Martinez*, 2010 WL 761109, at \*3-4 (citing *Evans*, 513 F.3d at 745 (“[The trial judge] reasonably could have determined that ordering additional discovery cured any prejudice”)). In *Martinez*, the court reopened discovery for the invoker’s deposition. 2010 WL 761109, at \*3-4. The court also noted that a stronger case for admitting the testimony exists where the opposing party has previously had an opportunity to develop the evidence. *Id*. (opponent had substantial evidence of the invoker’s testimony, including, deposition testimony in a related case, testimony at a preliminary hearing, statements during a city investigation, the invoker’s probable cause declaration, and testimony in his recent criminal trial). For example, the Third Circuit held that the district court had improperly precluded the affidavits and testimony of two defendants following their earlier invocation of the Fifth Amendment during civil discovery and during the pendency of a criminal investigation. *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190-94 (3d Cir. 1994). The court found significant the fact the invocation caused little, if any, unfair surprise: the SEC had several other avenues to obtain discovery, including document production and the testimony of two cooperating witnesses. *Id*.

As one commenter noted, precluding trial testimony of a party when the invocation is not a “strategic” advantage, but during an active criminal proceeding, is entirely unjust. *See* Heidt, *The Conjurer’s Circle--The Fifth Amendment in Civil Cases*, 91 Yale L. Rev. 1062, 1130-35 (1982). While supporting the general notion of precluding testimony where a party invokes during discovery, Heidt noted “[a] special situation arises when the defendant or employee from whom information is requested in a civil case is also a defendant in a pending criminal prosecution, where the risk of criminal prosecution in answering pre-trial discovery requests may be ‘acute.’” *Id*. at 1130-31.

Thus, if an invoker uses the privilege to avoid discovery and to surprise his opponent at trial, the court may preclude the invoker’s testimony. However, absent compelling abuse, the trial court likely will not preclude the testimony of a prior invoker because of the very real risks of participating in civil discovery while a criminal investigation is ongoing. In the case of a subsequent civil trial, the constitutional interests are heightened and the potential for abuse is reduced. In most cases, the prejudice to the government or other opposing party in a civil suit is low, because the information unavailable while the criminal case was pending can be made available through discovery in the civil proceeding after the potential for incrimination is eliminated.

# Conclusion

In conclusion, whether the invocation of the Fifth Amendment privilege gives rise to an adverse inference depends on the type of case, the person invoking the privilege, and the circumstances surrounding the invocation. When civil and criminal proceedings are pending, taxpayers and their counsel should understand and analyze the factors a judge considers when deciding whether to permit an adverse inference *before* invoking the privilege.

# Key Takeaways

* Because courts have broad discretion to admit a prior invocation and allow an adverse inference in a subsequent civil proceeding, taxpayers and their counsel should consider the implications of an adverse inference *before* invoking the Fifth Amendment in a criminal proceeding.
* When opposing the adverse inference of a party’s invocation in a subsequent proceeding, counsel might consider demonstrating the irrelevancy of the prior invocation, the potential prejudicial effect of an inference in light of the insignificant probative value, the client’s good-faith invocation, and the client’s cooperation in the current proceeding.
* When opposing the adverse inference of a non-party’s invocation in a subsequent proceeding, counsel should consider the *Libutti* factorial test, with particular focus on the relationship between the taxpayer and the non-party witness. Counsel might consider highlighting a frail relationship and any diverging interests between the taxpayer and non-party witness.
* Witnesses who invoke the privilege may be precluded from later testifying if the invocation and subsequent waiver is abusive and prejudicial to the opposing party. When seeking to admit the testimony of a prior invoker, counsel should consider the issue of creating surprise to the opposing party and the implications of an “eve of trial” waiver. Counsel might consider challenging preclusion when prejudice to the opposing party can be resolved by reopening discovery.

**Related Resources:  
Cases:**

* Supreme Court Cases:
  + Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).
* U.S. Court of Appeals:
  + *United States v. MacDonald*, 531 F.2d 196, 199-200 (4th Cir. 1976), *cert. granted*, 432 U.S. 905 (1977), *rev’d*, 435 U.S. 850 (1978).
* State Court Cases (State Supreme Court of Ohio, for example):
  + *Herrick v. Lindley*, 391 N.E.2d 729, 731 (Ohio 1979).
* Cases Available on Electronic Media Only (Please use Westlaw rather than Lexis Nexis):
  + *Int’l Snowmobile Mfrs. Ass’n v. Norton*, No. 00-CV-229-B, 2004 WL 2337372, at \*3 (D. Wyo. Oct. 14, 2004).

**Short Form:**

* *MacDonald*, 531 F.2d at 197.
* *Id*. at 197.

**Statutes:**

* United States Code:
  + 11 U.S.C. § 545 (2010).

Note: Please cite to a year the first time the statute is used

**Journals:**

* David Rudovsky, *Police Abuse: Can the Violence Be Contained?*, 27 Harv. C.R.-C.L. L. Rev. 465, 500 (1992).

**Books:**

* Charles Dickens, Bleak House 49-55 (Norman Page ed., Penguin Books 1971) (1853).

**Internet Resources:**

* Online Journal/Article (Article Also Available in Print – Rule 18.1):
  + J.T. Westermeier, *Ethical Issues for Lawyers on the Internet and World Wide Web*, 6 Rich. L.J. & Tech. 5, ¶ 7 (1999), *available at* http://law.richmond.edu/jolt/v6i1/westermeier.html.
* Electronic Article (Not Available in Print)
  + Article With Date Posted (Use Date Article Was Posted):
    - Amy Benfer, *Cyber slammed*, Salon (Apr. 10, 2011), http://www.salon.com/life/feature/2001/07/03/cyber\_bullies/print.html.
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    - Amy Benfer, *Cyber slammed*, Salon, http://www.salon.com/life/feature/2001/07/03/cyber\_bullies/print.html (last visited Apr. 30, 2011).
* Website:
  + Dunkin’ Donuts, http://www.dunkindonuts.com (last visited Dec. 18, 2003).

Dentons counsel drafted this paper for a specific event which occurred in the past. As such, it reflects the state of the law at the time it was drafted, and is not necessarily a reflection of current developments. For an update on this topic, please contact the editors of USTaxDisputes.com.

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1. It should be noted, however, that several states have adopted rules of evidence which prohibit the jury from drawing negative inferences from an invocation in both civil and criminal cases. *See, e.g.*, N.H. R. Evid. 512. [↑](#footnote-ref-1)
2. *See Helvering v. Mitchell*, 303 U.S. 391 (1938); *Ianniello v. Comm’r*, 98 T.C. 165 (1992) (civil fraud addition not punishment). [↑](#footnote-ref-2)
3. Generally, when a witness testifies at trial, his prior testimony is admissible to impeach him. Fed. R. Evid. 801(d)(1). However, a witness’ prior silence is generally inadmissible to impeach him under the 403 analysis. *See also infra* Part IV, Preclusion of Later Testimony, addressing both party and nonparty witnesses. [↑](#footnote-ref-3)
4. *See infra* Part IV, Preclusion Of Later Testimony. [↑](#footnote-ref-4)