

## Fifth Amendment Privilege

### A Defendants' Assertion of Fifth Amendment Rights Can Impact Your Civil EADACPA Case

#### Litigation Lore

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In cases where the defendant is facing criminal charges, or even the threat of such charges, for conduct relating to your clients' EADACPA case, an assertion of a defendants' privilege against compelled self-incrimination can leave a plaintiffs' attorney

with a lot of questions about how to proceed.

Having dealt with this issue in two recent cases (one where the defendant was later arrested for criminal elder abuse having to do with another resident at the same RCFE, and the other in a molestation case), I have become familiar with the unique circumstances that can arise when a defendant refuses to give deposition testimony. At first blush, the assertion of the Fifth Amendment privilege can seem like the next best thing to an admission of guilt. A closer look at the law makes clear that this is not the boon it might first appear to be.

While in most jurisdictions, the trier of fact is allowed to draw an adverse inference against a party or witness who invokes the Fifth Amendment, in California, pursuant to *Evidence Code §913*, neither the court nor counsel can comment on the fact that a witness has claimed a privilege. (See *Evidence Code §913(a)*.) In fact, the issue of a witness' assertion of their Fifth Amendment privilege must be raised outside the presence of the jury and the jury will likely never get to hear that the Fifth Amendment is being invoked. (*People v. Holloway* (2004) 33 Cal.4th 96, 131.)

When the party invoking the Fifth Amendment is a defendant, courts will often approve orders precluding that defendants' testimony to prevent them from later waiving the privilege at the last minute and testifying at trial in order to prevent surprise testimony. (See, e.g., *A&M Records, Inc. v. Heilman* (1977) 75 Cal.App.3d 554, 566; *Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 306 (concluding that, although the defendants had not yet asserted their Fifth Amendment rights, if they were asserted in discovery, the court could impose an irrevocable deadline after which defendants would be barred from waiving the privilege.))

Either side can seek a stay of the civil case pending the running of the criminal statute of limitations and/or the completion of the criminal proceedings as long as the testimony of the party or witness invoking the privilege is integral. However, in EADACPA cases where our clients are often elderly, sick or both, it will most often be defendants that seek to stay the proceedings. The court has discretion to grant a stay of civil proceedings if the interests of justice seem to require it after considering the following factors: (1) the plaintiffs' interest in proceeding in the civil action, and the potential prejudice to plaintiffs of a delay; (2) the burden the proceedings may impose on defendants; (3) the convenience of the court and available judicial resources; (4) the interests of persons who are not a party to the civil action; and (5) the public's interest in the pending civil and criminal litigation. (See *Avant! Corporation v. Superior Court* (2000) 79 Cal.App.4th 876, 886.) Especially in cases where you have a living elder, there is a strong chance that the court will deny a defendants' motion to stay proceedings pending resolution of the defendants' criminal action.

In the event that the deposition of a defendant or witness claiming their Fifth Amendment rights does go forward, the privilege must be asserted on a question-by-question basis and there is no blanket right to refuse to answer questions. (*Warford v. Medeiros* (1984) 160 Cal.App.3d 1035, 1045.) If and when the matter goes to trial, the trial court will inquire about each claim of privilege to determine whether it is justified. (Id.)

Although it may be painstaking to do so, it is in your clients' interest to ask each and every question and require the defendant to invoke his or her Fifth Amendment rights or to answer your questions, to oppose a request for a stay, and to seek an order preventing the defendant from testifying at trial if they invoked the privilege at their deposition. You never know what might shake loose.

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