

**When Silence Isn't Golden:  
Claiming Protection of the Fifth Amendment in a Civil Proceeding**

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The following article addresses the dilemma of claiming protection of the Fifth Amendment in a civil proceeding, in particular a divorce proceeding, and when to advise your client to “speak up”.

Recently, the Second District reaffirmed the proposition that claiming protection of “the Fifth Amendment [allows for] adverse inferences against parties in civil actions when they refuse to testify in response to probative evidence offered against them.” People v. Houar, 365 Ill.App.3d 682, 688 (2d Dist. 2006). Black’s Law Dictionary (8<sup>th</sup> ed.) defines “adverse inference” as follows: “a detrimental conclusion drawn by the fact-finder from a party’s failure to produce evidence that is within the party’s control.”

In advising a client to plead the Fifth Amendment in the context of a civil proceeding – during the pre-trial or trial phase – the attorney should consider the subject matter of the proceeding and the evidence about which the witness is called to testify. Clearly, there may be reasons why a party or witness may not wish to testify about issues that they are embarrassed about or believe are morally wrong. Notwithstanding the subjective reasons for not wanting to testify, the Illinois Supreme Court in People v. Schultz, 380 Ill. 539, 544 (1942), stated as follows:

[T]o entitle a party, called as a witness, to the privilege of silence, it must appear from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is a reasonable ground to apprehend danger to the witness from his being compelled to answer.

The standard for application of the Fifth Amendment privilege is “whether the person claiming the privilege is confronted by substantial and real, not merely trifling or imaginary hazards of incrimination....speculation cannot support a claim of standing or establish violation of the privilege.” In re D.P., 327 Ill.App.3d 153, 160 (1st Dist. 2001).

In civil proceedings, during the discovery phase in particular, the application and purpose of the Fifth Amendment must be viewed in conjunction with the premise that the Illinois Supreme Court’s discovery rules are intended to aid in the truth-seeking process. The following hypothetical facts illustrate the relationship between the Fifth Amendment privilege against self-incrimination and the liberal scope of the discovery rules which “presuppose a range of relevance and materiality.” Monier v. Chamberlain, 35 Ill.2d 351, 357 (1966).

Husband and Wife were married in 1972 while Husband was in his third year of law school. Wife worked as a teacher. When Husband and Wife decided to have children they agreed that Wife would cease working to be at home with the children which she did in 1980.

In 1995, Husband started his own law practice and, along with Legal Secretary, opened the Law Firm. The Law Firm became a successful practice. Husband's gross income from 2000 through 2004 averaged \$1 million.

During 2004, Wife became suspicious that Husband was having an affair with Legal Secretary. Upon review of one of the joint credit card statements, Wife learned that Husband had incurred charges of over \$5,000 in one (1) month at women's clothing stores, for spa treatments, for dining expenses and for other entertainment none of which Wife was a part.

Wife filed her Petition for Dissolution of Marriage in November 2004. After issuing her discovery requests, Husband refused to produce his credit card or bank statements. Wife issued Subpoenas for Deposition (Documents Only) to the credit card companies and banks. Upon receipt of the credit card and bank statements covering the years 1995 through 2004, Wife (through her forensic accountant) estimated that Husband's expenditures on behalf of Legal Secretary for the period 1995 through 2004 totaled at least \$2 million.

During Husband's deposition, when questioned about the expenditures, he refused to provide answers claiming the protection of the Fifth Amendment against self-incrimination. When questioned about his basis for asserting the Fifth Amendment privilege, Husband's attorney stated that to the extent that Wife was going to allege that Husband had committed adultery, a crime in Illinois, Husband has a right to maintain his silence with respect to Husband's involvement with Legal Secretary and any expenditures that the wife alleged to be on behalf of Legal Secretary.

As will be demonstrated below, Husband has improperly assumed that he will be protected by the Fifth Amendment. First, there is no criminal action currently pending against Husband for adultery. See Lamson v. Boyden, 160 Ill. 613 (1896) (holding that a defendant may be denied the right to claim the Fifth Amendment privilege where no prosecution has been commenced for the alleged offense).

Second, to the extent that Husband's claim of the privilege is based on an alleged fear of being prosecuted for adultery, such "fear" is nonexistent as to the events exceeding the statute of limitations. The statute of limitations for prosecution of adultery is eighteen months pursuant to 720 ILCS 5/3-5(b). As the Illinois Supreme Court stated in People v. Boyle, 312 Ill. 586 (1924), "where the crime to which [the defendant's] testimony might expose him has been barred by the statute of limitations, he may be compelled to answer."

Finally, adultery is defined as follows: "Any person who has sexual intercourse with another not his spouse commits adultery, if the behavior is open and notorious, and...the person is not married and knows that the other person involved in such intercourse is married." 720 ILCS 5/11-7. "Behavior which is 'open and notorious' by definition means that such behavior is prominent, conspicuous and generally known and recognized by the public." People v. Cessna, 42 Ill.App.3d 746, 749 (5th Dist.1976). Husband's refusal to answer the questions regarding the expenditures at women's clothing stores, for spa treatments, for dining expenses and for other entertainment of which Wife was not a part do not speak to the elements of adultery thus his

refusal to answer based on the Fifth Amendment privilege is simply an incorrect application of the privilege.

For a client who wishes to avoid answering questions or responding to discovery requests on certain subjects, claiming the privilege of the Fifth Amendment is improper advice. To the extent that the party maintains his silence through trial under an improper application of the privilege, the Court is entitled to draw an adverse inference against him.

In the hypothetical, the Court would be entitled to draw the adverse inference that the \$2 million of expenditures were, in fact, made by Husband on behalf of Legal Secretary – a purpose unrelated to the marriage – and that had Wife been aware of Husband’s expenditures on behalf of Legal Secretary, she would have considered the marriage to be irretrievably broken. As such, the Court may conclude that Husband’s expenditures constitute dissipation of the marital estate.

Liberal discovery is favored under Illinois Supreme Court Rules. Accordingly, assuming that the questions posed to your client during a deposition and through other discovery devices are reasonably calculated to lead to the discovery of admissible evidence, your client’s best bet may be to supply the information requested in spite of the moral or ethical reasons for not wanting to do so as opposed to improperly asserting protection of the Fifth Amendment. The unintended result of improperly asserting protection of the Fifth Amendment may be an order by the judge compelling the party’s compliance with discovery and/or an adverse inference being drawn against the party – neither of which places your client in a favorable light before the Court.