

## 'I'm being deposed.' Why take the Fifth? Why not?

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Why should a civil practitioner care about criminal law or procedure? One answer: When your client's deposition is underway, he or she pauses before answering, and then surprises you with a request for advice — about something private, embarrassing, buried, ugly. Better answer: When you

are prepared for the possibility that a private, embarrassing item might become part of an answer and that it deserves protection.

The privilege against self-incrimination is not limited to criminal matters. The trick in deciding whether to assert it lies in knowing how the assertion might play out. Who wants to make such an important decision within a 15-minute deposition break?

### Advantages of asserting the privilege

- It's your constitutional right — in civil, administrative and criminal proceedings
- Failure to assert the privilege on a timely basis may constitute waiver
- It can be asserted in lieu of testimony, as well as when faced with a document request
- Assertion limits discovery, so there will be less evidence available for trial or settlement negotiations.
- Assertion means there will be no incriminating statements for your adversary to share with law enforcement agencies
- Asserting the privilege avoids exposure to prosecutions for perjury or making false statements under oath
- Assertion may support a stay of the civil case

or discovery proceedings where there is parallel criminal exposure

- There is no negative inference in a civil proceeding from asserting the privilege (e.g., California state courts) Disadvantages of asserting the privilege
- Embarrassment may be the biggest disadvantage, particularly if the assertion could become public. Taking the Fifth is often equated — erroneously — with not accepting one's guilt.
- Financial consequences, such as injuring one's rights to indemnification, insurance or the advance of defense costs
- Employment consequences, such as discipline, discharge and licensing difficulties
- For public figures and officials, "silence implies consent." There will be a public perception that the public figure is hiding from some misconduct.
- Assertion could generate more investigation by one's adversary, particularly if the assertion comes as a complete surprise.
- Assertion may start a criminal investigation, or it could change the direction of an existing one.
- Sanctions might be imposed, such as dismissal of claims and evidence preclusion.
- In federal courts, assertion permits an adverse inference in civil proceedings. Note: an adverse inference can be caused by a non-party's refusal to testify without immunity, such as an employee or even a former employee. Good witness preparation should alert a civil practitioner to whether there is potential criminal exposure for a witness. Good deposition technique should find it. Like all privileges, once waived, gone forever.

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