“To force a person to choose among self-incrimination, perjury and contempt offends notions of human dignity. There must be a fourth choice: the option to remain silent without facing contempt liability.”

Avoiding the “cruel trilemma” as the rationale for the privilege not to incriminate oneself has been accepted by the United States Supreme Court. The privilege is provided for in both the Arizona and U.S. Constitutions. In pertinent part, the Fifth Amendment provides, “No person ... shall be compelled in any criminal case to be a witness against himself.”

The Fifth's Modern Relevance
First, what will this article not cover? It will not concern whether Miranda rights were properly given or required, what is meant by interrogation while “in custody,” whether a confession is voluntary or whether certain statements of a defendant are admissible in court.

This article will deal solely with a review of what it literally means to invoke the Fifth Amendment, colloquially known as “taking the Fifth.” This is especially pertinent in this era of corporate and financial excesses, where corporate officers are routinely asserting the privilege before congressional and other investigative bodies.

The privilege has two aspects, both of which will be considered: the right of every person to refuse to answer a particular question creating a risk of incrimination and the right of a defendant in a criminal case not to testify at all.

The article will examine where, how and by whom a defendant is compelled to invoke; whether a blanket request is permissible; the principles involved in presenting an invoking witness before the jury in a criminal case; whether a witness can invoke as to some questions, but not all; what constitutes a waiver of the privilege and whether a waiver in one proceeding constitutes a waiver in all proceedings; the pitfalls involved where a prosecutor or judge advises a witness of the consequences of invoking the privilege; and what it means when there is an offer by the prosecuting authority (it is not the court’s to give) of use immunity to obtain testimony. The last sec-
tion concerns the effect of invoking the privilege in civil proceedings.

An additional impetus for revisiting “taking the Fifth” was the U.S. Supreme Court’s recent decision in Chavez v. Martinez,7 the first post-9/11 decision by our highest court, dealing with the rights of suspects in this War on Terror era. Pertinent for purposes of this article was the holding that questioning a suspect without reading him his Miranda rights or other coercive police interrogations alone do not violate the Fifth Amendment. It is not until the state attempts to use compelled testimony in a criminal case that the privilege against self-incrimination—which is a trial right—is violated.

Thus, elaboration of what it actually means to avoid the attempted use of compelled testimony and its ramifications in both the civil and criminal trial contexts is the focus of the following pages.

Who Can Assert

It is well settled that the privilege to refuse to answer a question may be asserted by any person called as a witness in any type of proceeding.8 The witness may exercise the privilege not only as to answers that would directly support criminal liability but as to answers that would furnish a link in the chain of evidence needed to prosecute him.9 Because the privilege protects the innocent as well as the guilty, a witness may declare his innocence and still assert the privilege.10

Construing the Fifth

Although the Fifth Amendment privilege is construed liberally,11 the witness “must be faced with real and substantial risks.”12 Once the judge concludes there is a reasonable basis that the answers might tend to convict the witness of crime, the court must uphold the privilege, without asking the witness to explain how an answer would incriminate him.13 Even if direct examination by the defendant of a witness would not cause the witness to incriminate herself, it is sufficient the cross-examination by the state would do so.14

Blanket Assertions

The privilege cannot be claimed in advance of questions actually propounded.15 Moreover, because the right is personal, it cannot be invoked for the protection of a third party.16 Thus, it is well established that one may not rely on a blanket assertion of the privilege against self-incrimination unless each question clearly seeks testimony incriminating the declarant asserting the privilege.17

The trial court is faced with a two-step process: first determining whether the person asserting the privilege may face personal criminal liability and then ensuring that the person is not permitted to go beyond the scope of the privilege and assert it improperly.

An example would be a claim of privilege as to incidents involving others for which one might have been merely a witness and in which one did not personally participate and for which one would have no personal liability. Permitting a blanket assertion where it is improper to do so in

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Taking the Fifth

**The Arizona Attorney**

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**The Fifth and Sixth Amendment Collisions**

When a witness other than the defendant asserts the Fifth Amendment during a criminal trial, the Sixth Amendment to the U.S. Constitution comes into play, creating a tension between the two rights.

The Sixth Amendment in pertinent part and its Arizona Constitution counterpart guarantee the right of the criminal defendant “to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor.” Though an adequate opportunity for cross-examination is the primary interest granted by the Sixth Amendment, it also sets forth the right to compel the attendance of witnesses whose testimony “is both material and favorable to the defense.” However, no “material and favorable evidence” is lost when a court in its discretion properly decides that a witness may invoke the privilege. Therefore, the tension between the Fifth and Sixth Amendments has been resolved in favor of the Fifth Amendment: The defendant does not have a right to compel a witness to waive the privilege against self-incrimination once it has been properly asserted by the witness.

**Whether To Present the Invoking Witness Before Jury**

Earlier Arizona cases held that both the defendant and the state had an absolute right to present before the jury a witness taking the Fifth. This view was modified, and more recent cases provide that it is within the court’s discretion to excuse the invoking witness without a jury appearance, if the judge concludes that the witness will not exercise the privilege. Reading transcripts or having avowals made concerning any deposition or interview given by the invoking witness, and determining from the attorney for the witness whether a recommendation to assert the privilege was made.

**In Camera Proceeding**

What is the preferred procedure? It is a hearing conducted by the judge outside the presence of the jury with the court asking the invoking witness questions.

Recent cases, however, advise that questioning of the witness by the judge is not a requirement. Those cases indicate that the judge can gain the extensive knowledge required by questioning defense counsel and the prosecuting attorney to gain their insight as to why the witness might be inclined to assert the privilege; reading transcripts or having avowals made concerning any deposition or interview given by the invoking witness; and determining from the attorney for the witness whether a recommendation to assert the privilege was made.

**Rule 403 Analysis**

What follows comes mainly from State v. Corrales, in an opinion written by Justice Feldman in which the Namet v United States rules of the U.S. Supreme Court were first applied in Arizona (for a detailed discussion of Namet and its progeny, see the sidebar on page 41).

If the court finds that the Fifth Amendment will be properly invoked, it still has discretion to permit the presence of the witness to call the witness and elicit the claim of privilege before the jury. The court must determine “whether the interest of the person calling the witness outweighs the possible prejudice resulting from the inferences the jury may draw from the witness’s exercise of the privilege.”

A proper purpose in a given case may be to provide the jury with an explanation why a witness who would ordinarily be expected to testify “to prove the charge or establish the defense” is not going to testify. Another valid reason to force the privilege to be taken before the jury exists where it is not possible the witness will not exercise the privilege or will answer some questions. If the witness will testify at all, both the state and the defendant have the right to put the witness on the stand. It is said that in the latter instance both parties must have a reasonable opportunity to test whether the testimony will be produced by the witness and, if not, whether it can be compelled.

That question will ordinarily be put to the strongest test if the witness is forced to exercise the privilege in open court, before judge, counsel and jury. If after applying a Rule 403 analysis, the court determines the benefits to be gained will be outweighed by the danger of prejudice, it must refuse to allow the witness to be called to invoke the privilege in front of the jury. It also must refuse, said the Corrales court, where either prong of the Namet rule will be violated.

**Advising Witness of Consequences**

When a witness intends to invoke the privilege after advice of counsel, may the prosecutor and/or trial judge advise the witness outside the presence of the jury of the possible consequences of his decision?

Yes, but only within limits. A prosecutor’s threat of a perjury prosecution to a witness can constitute witness intimidation and is improper, as is a judge’s threatening remarks. But it is not prosecutorial misconduct when the prosecutor merely informs the witness of the possible effect of his testimony. The trial judge also may advise of the penalties for testifying falsely. The prosecutor can contact the witness’s counsel to inform of the possible conse-
quences of perjurious testimony.36

Keep in mind, however, that misconduct of counsel alone will not cause a reversal unless the defendant has been denied a fair trial as a result of counsel’s improper actions.37 But such conduct should in any event be brought to the attention of the trial judge to deal with it responsibly, which may include contempt and/or a referral to the State Bar.

**Invoking Witness Unavailable**
A witness who asserts the Fifth Amendment right not to testify is unavailable.38 Although beyond the scope of this article, if there are out-of-court statements of an unavailable invoking declarant, they may be admissible if they either fall within a firmly rooted hearsay exception or are supported by a showing of particularized guaranties of trustworthiness such as under Evidence Rules 804(b)(3) or 804(b)(5)—the latter rule being identical to reliable hearsay not meeting an exception in Rule 803 (24).39

**Effect of Appeal and Rule 32 Petition**
The privilege against self-incrimination remains available to a convicted person as long as the conviction or sentence is being appealed.40 It is not available if there was no appeal and the appeals time has run, the appeal is final, the defendant was acquitted or pardoned or where the statute of limitations has run.41 A witness who still has time to file a Rule 32 petition can assert the privilege in a co-defendant’s trial.42 The privilege may be raised in juvenile proceedings to determine delinquency but not at a post-disposition hearing where the court imposes drug court as a term of probation.43

**Granting Use Immunity by the State**
To avoid the effect of the Fifth Amendment, the state—not the trial judge—has the discretion to offer use immunity under A.R.S. § 13-4064. The immunity must be as extensive as the privilege itself,44 which under the statute means no testimony, evidence or information “directly or indirectly” derived therefrom may be “used against the person in any proceeding or prosecution for a crime or offense concerning which he gave answer or produced evidence under court order.”45

A witness granted use immunity by the court after a prosecutor’s request who thereafter refuses to testify after ordered to
Taking Fifth

discretion in granting immunity to witness-

to a defense witness where the state has
delayed to withhold the granting of use immunity

finds no violation of

effect when requested by the defendant (or

privilege or to assert any inferences there-

a witness not the defendant has taken the

er to refer in a criminal case to the fact that

Defendant's Right Not To Testify

In a criminal case, the defendant has a con-

Because of that right cannot be considered by

The Fifth Amendment is the basis for that
typical instruction in a criminal case. As

such, a criminal jury may not draw any inferences
from the circumstance that
defendant does not testify. Moreover, in a
criminal case, the jury is not entitled to
draw any inferences from the decision of a
witness who is not the defendant to exer-
cise his Fifth Amendment privilege.

Improper Arguments

It is obviously very prejudicial and improp-
er to refer in a criminal case to the fact that

a defendant has chosen not to testify or that

witness not the defendant has taken the

privilege or to assert any inferences there-

An appropriate instruction to this

effected when requested by the defendant (or

the state when the court in its discretion

finds no violation of N ame by letting the

state's witness invoke before the jury) should be given by the trial court.

It is improper for an attorney to argue

an adverse inference from the failure of

the opponent to call a witness where that attor-
nay knows the opponent could not do so

because the witness asserted the Fifth

Amendment privilege and thus could not

be compelled to testify. It is also improper,

of course, for a party who has claimed a

privilege to thereafter argue how the other

case failed to produce a witness or of the

failure of necessary testimony, caused solely

by the invocation of the privilege. Asking

another witness to speculate on testimony

that might have been given by someone

who has invoked the privilege is also

improper.

Waiver of the Privilege

The self-incrimination privilege may be

waived. The waiver, however, affects only

the particular proceeding in which the

waiver occurs, so that a witness may testify

before a grand jury and subsequently take

the Fifth at trial. Thus, such other prior

testimony may be admissible.

Moreover, unlike a criminal defendant,
a witness cannot refuse to take the stand,

unless the trial court in an in camera pro-
ceeding has gained such extensive knowl-
edge of the case that it rules the witness

will take the Fifth Amendment on all relevant

questions and no valid purpose would be

served by presenting the witness to the jury

to invoke the privilege. The normal rule is

that the witness on the stand must claim

the privilege as to each question he believes

will incriminate him. As to any question

he answers, he has generally waived the

privilege.

Although a defendant in a criminal case

has a right not to be called to testify, if he

does testify on direct, he has waived the

privilege and can be cross-examined the

same as any other witness. As noted in the

following section, because the defendant

has chosen to make an issue of his credibil-
ity by testifying, the state can impeach him
even by asking questions he refuses to

answer by invoking his Fifth Amendment

privilege. A defendant in a criminal case

who testifies does not waive other privi-

leges, such as the attorney-client privilege

or the right of his spouse not to testify, and

the defendant may not be asked questions

in front of the jury to force a waiver of such

privileges.

Witness Invoking as to Some Questions

A witness may invoke the Fifth Amendment after testifying as to certain

matters, but then the trial judge has to

make a determination whether to strike all

or part of the prior testimony. What some-
times occurs is that the witness testifies fully

in response to questions on direct but then

is asked questions on cross-examination

not gone into on direct, prompting the

invocation of the privilege. In such cases

there is no bright-line rule requiring the

trial court to strike the direct testimony. It

is clear, however, that where an important

prosecution witness invokes on cross-

examination, such a refusal to answer will

violate a defendant's Sixth Amendment

right, and the court must strike all of the

witness's direct testimony, either in whole

or in part, where the witness invokes (1) on

cross-examination as to a matter elicited by

the state on direct examination or (2) with

respect to matters tending to establish

untruthfulness with respect to specific

events of the crime charged or (3) preclud-

ing the defense from demonstrating bias

and interest.

A different rule, of course, pertains

where it is the defendant himself asserting

the Fifth Amendment on cross-examina-

tion, because asking a testifying defendant

relevant questions that induce the assertion

of the privilege is permissible as a form of

comment on the defendant’s credibility.

Thus, there is no error in requiring a defen-

dant, who is going to or already has testi-

fied on direct, to invoke the privilege in

front of the jury on cross-examination and

no need (or right probably) to strike the

defendant's direct testimony. Precluding a

defendant from testifying at all or striking

his direct testimony when he invokes the

privilege on cross-examination undoubtedly

infringes on a defendant’s constitutional

right to testify in his own defense. If inad-

missible evidence is sought by the state on

cross-examination prompting defendant’s

invocation (such as evidence of other acts

inadmissible under Rule 404(b) and 403),

this may require a reversal of any convic-

tion.

Civil Proceedings

A party or a witness can claim the privilege
during discovery or at trial in a civil case

where there is a reasonable apprehension

of future criminal prosecution. As in criminal

cases, whether the privilege is properly

invoked is a question of law for the court to
decline.

With respect to discovery, the invoking

person can assert the privilege to justify a

refusal to respond to interrogatories,

answer deposition questions (once appear-
ing at the deposition64), produce docu-

ments or answer requests for admission. If

the privilege is properly invoked by a party
during discovery, the trial court may not

subject the party to sanctions such as strik-
ing an answer and entering default, because

a party does not violate discovery orders

when she has a constitutional right to
The Namet/Corrales Caveat

Namet v. United States, decided by the U.S. Supreme Court in 1963, involved a prosecution under the federal wagering tax law. Two co-defendants, a husband and wife, ran a retail business and previously advised the prosecutor that defendant was a bookie who collected the wagers made in their store and settled gambling debts with them. They changed their pleas to guilty on the day of trial and advised the prosecutor they would take the Fifth Amendment because they were still being investigated by the IRS. The prosecutor at the trial nevertheless called both witnesses, each of whom invoked the privilege with respect to incriminating questions concerning their relationship with the defendant.

The narrow question presented, as framed by the Supreme Court, was whether it was reversible error to permit the government to question the two invoking witnesses after it was known they were going to invoke their privilege not to incriminate themselves. The defendant argued that when a witness is asked whether he participated in criminal activity with the defendant, a refusal to answer based on the privilege against self-incrimination tends to imply to the jury that a truthful answer would be in the affirmative and that such an inference cannot properly be used as evidence against a defendant in a criminal case.

The Supreme Court, without determining the correctness of certain lower court opinions on which defendant relied, referred to two distinct grounds of error urged by the defendant and found in such opinions:

One ground is prosecutorial misconduct “when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from the use of the testimonial privilege,” especially where the prosecutor in closing argument attempts “to make use of the adverse inferences.”

A second ground is where in a given case “inferences from a witness’ refusal to answer added critical weight to the prosecution’s case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant,” such as where the challenged inferences were the only corroboration for the prosecutor’s case.

The Namet Court, in a 7-2 opinion, upheld the defendant’s conviction on the basis that prosecutorial misconduct was not present. It also determined that where the prosecutor only asked four questions held to be privileged, such lapses, when the trial was viewed as a whole, did not amount to a deliberate attempt “to make capital out of witnesses’ refusals to testify.”

In Douglas v. Alabama, decided two years later, the Court recognized the constitutional bases of the Namet rule and applied them to the states.

In State v. Caldwell, decided in 1977, the Arizona Supreme Court discussed Namet and its rules, indicating that in a given situation where a prosecutor called an invoking witness to the stand, Namet might be violated. In Caldwell, where an alleged accomplice invoked the privilege, Namet was not implicated because the prosecutor was not certain the witness would refuse to answer questions and a prosecutor (as well as a defendant) always has a right to present a witness to a jury under such circumstances. Moreover, the prosecutor withdrew the witness as soon as the privilege was invoked.

This led to State v. Corrales. There, in 1983, the Arizona Supreme Court used Namet principles to reverse convictions, including first-degree murder, kidnapping and aggravated assault. The trial court had permitted the prosecutor to call defendant’s alleged accomplice, who had been previously convicted and sentenced, even though court and counsel knew he would invoke his privilege against self-incrimination. The trial court erroneously had ordered the witness to testify under the mistaken belief that the right to invoke the Fifth Amendment ended on sentencing. The witness nevertheless refused to testify and asserted his privilege. The prosecutor continued to ask the witness separate questions that implied defendant’s guilt, such as whether he was involved in the burglary of and theft from the victim’s residence, whether he knew the defendant, and whether he was involved in the death of the victim.

This line of questioning after the prosecutor knew the defendant was not going to follow the judge’s order to answer the questions was held to violate both parts of the Namet rule and violated defendant’s Sixth Amendment right to confrontation and his Fourteenth Amendment right to due process and a fair trial.

The Court noted what the proper procedure should have been: Once the prosecutor knew the witness was going to invoke the privilege with respect to all questions, instruct the witness and determine whether he was going to obey the court’s instructions. Failing that, the witness could have been withdrawn without serious harm to defendant’s rights.

In Corrales, the prosecutor should not have called the invoking witness before the jury but rather let the court decide the witness’s claim of privilege outside the jury’s presence. After all, the witness already had been convicted of first-degree murder and sentenced to life imprisonment. In Corrales, the Arizona Supreme Court noted the scarcity of cases holding that Namet is violated by the mere act of the state calling a witness to the stand to invoke before the jury any suggestive question. But, the Court went on, it could “easily hypothesize situations where the prosecution could add critical weight to its case merely by putting the witness on the stand.” The Court offered the example of a defendant charged with selling narcotics who denies the transaction involved drugs. It would be improper to force the buyer (not a police officer) to claim the privilege before the jury as it “might well lend critical weight to the state’s case.”

endnotes

2. Id. at 186.
3. Id. at 187.
4. Id. at 189.
7. Id. at 873. See also State v. Corrales, 676 P.2d 615, 620 (Ariz. 1983); State v. Blankinship, 622 P.2d 66 (Ariz. Ct. App. 1980) (where prosecutor has no prior knowledge that witness will refuse to answer, witness may be called to stand).
10. See State v. Skinner, 515 P.2d 880, 891 (Ariz. 1973), for a further discussion of Namet and for an analysis of factors that may be considered on the “critical weight” issue.
11. Corrales, 676 P.2d at 626.
12. 1d.
13. 1d. n. 4.
14. 1d.

The fact that defendant was a bookie may not offer personal testimony to support her case, but she may still offer other evidence to meet her burden of proof. Unlike in other jurisdictions, it has been held by the Arizona Supreme Court that a party who invokes the privilege during discovery may extinguish the negative inference by later choosing to testify at trial. It is difficult to believe in light of Rule 26.1 and Arizona’s strong policy against trial by surprise that this will remain law when the Arizona Supreme Court is again presented with the issue.

Finally, there is no constitutional right to a stay of a civil suit until parallel criminal proceedings are completed, but there may be circumstances where such relief should be granted in a given case.

Conclusion

Notwithstanding the cruel events of 9/11, hopefully this short sojourn through trilemmaland will reinforce the well-established notion that taking the Fifth in this
nation of constitutional mandates should always be available for the innocent and the not-so-innocent.

H on R. bert L. G ottsfield is a judge of the Maricopa County Superior Court in Phoenix. He appreciates the editorial assistance of Tim Eigo.

endnotes

2. Id. See also Murphy v. Waterfront Com'n of New York, 378 U.S. 52, 55 (1964).
4. The Fifth Amendment also provides for a compulsory process to submit to fingerprinting, photographing, measurements, to write or speak for identification and other such physical characteristics. The accused, Schmerber v. California, 384 U.S. 757, 763-64 (1966).
5. U.S. Const. amend. XIV; Mallory v. Hogan, 378 U.S. 1, 6 (1964) (Fifth Amendment applicable to states under Fourteenth Amendment).
6. The Fifth Amendment also offers no protection against compulsory process to submit to fingerprinting, photographing, measurements, to write or speak for identification and other such physical characteristics. See discussion by Livermore et al., supra note 1, § 501.8, at 170.
7. Id. See also note 8 supra.
9. Id.
11. See discussion and cases, Livermore et al., supra note 1, § 501.8, at 170.
16. A.R.S. § 13-4064. See also similar protection granted in administrative proceedings § 41-1066. See Mills, 995 P.2d at 713, where the court distinguishes a “free talk” interview from a grant of immunity.
17. Verduco, 602 P.2d at 475.
20. Id. Livermore et al., supra note 1, at 127.
21. Id.
23. United States v. Lcavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (witness gave prior grand jury testimony); D.ody, 930 P.2d at 452-53 (witness gave prior juvenile transfer hearing testimony).
24. See supra notes 22-24 and accompanying text.
25. See supra notes 15-18 and accompanying text.
26. Livermore et al., supra note 1, at 173.
27. Id. at 173-74.
30. See supra discussion accompanying note 57.
31. Id.
33. State v. Ott, 808 P.2d 305, 310 (Ariz. Ct. App. 1991), rev. denied, April 23, 1991. The privilege is available whether in a civil, criminal, administrative or congressional hearing and whether formal or informal. Corporations, unincorporated entities and partnerships cannot claim the privilege, because it protects only individuals, who cannot invoke their personal privilege to protect the entity. Livermore et al., supra note 1, at 164. Moreover, the Fifth Amendment offers no protection against compulsory process to submit to fingerprinting, photographing, measurements, to write or speak for identification and other such physical characteristics. Id. See also note 8 supra. In State v. Jones, 4 P.3d 345, 355-57 (Ariz. 2000), cert. denied, 532 U.S. 978 (2001), and cases there cited.
35. Id.
36. Id. at 620.
37. Id.
39. Corrales, 676 P.2d at 620. 40. Id. at 620.
41. Id.
42. Id. at 620.
44. Id.
45. Id.
46. Id.
47. Id.
48. Id.
51. Id. Livermore et al., supra note 1, at 127.
52. Id.
54. United States v. Lcavoli, 604 F.2d 613, 623 (9th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (witness gave prior grand jury testimony); D.ody, 930 P.2d at 452-53 (witness gave prior juvenile transfer hearing testimony).
55. See supra notes 22-24 and accompanying text.
56. See supra notes 15-18 and accompanying text.
57. Livermore et al., supra note 1, at 173.
58. Id. at 173-74.
61. See supra discussion accompanying note 57.
62. Id.
64. See supra note 18.
65. See excellent discussion of the area in Ott, 808 P.2d at 310, and the general rule that, in criminal cases, a blanket assertion of the privilege in a civil case is not permitted.
66. Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977) (state may not threaten to inflict

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potent sanctions unless a witness surrenders his Fifth Amendment privilege, but it is permissible for an inference to be drawn in a case from a party’s refusal to testify); Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976) (prisoner’s silence in a disciplinary hearing can be used against him because any punishment had to be based on more than his assertion of the privilege); Welling v. Columbia Broad. Sys., 608 F.2d 1084, 1088 (5th Cir. 1979) (improper to order plaintiff to answer defendant’s questions or suffer dismissal, because it forced plaintiff to choose between his silence and his lawsuit); Campbell v. Gerrans 592 F.2d 1054, 1055 (9th Cir. 1979) (reversing dismissal of lawsuit entered because plaintiffs invoked and refused to answer certain interrogatories); Chadwick v. Superior Court, 908 P.2d 4 (Ariz. Ct. App. 1995), rev. denied, Dec. 19, 1995; Wohlstrom v. Buchanan, 884 P.2d 687, 689 (Ariz. 1994) (claimant to currency that was subject to forfeiture could not have claim struck for failure to disclose how he acquired the property); Montoya, 840 P.2d at 307 (reversing striking father’s pleadings, entering of default, and award of custody to mother, where father invoked and refused to answer questions about his past drug use); Ott, 808 P.2d at 310 (reversing order requiring defendant to respond to requests for admission and summary judgment entered thereon in a civil racketeering forfeiture action); Buzard v. Griffin, 358 P.2d 155, 163 (Ariz. 1960) (contestee in election contest could take Fifth at deposition, and trial court properly refused to compel him to answer so contestants not entitled to judgment on that basis).

67. See supra cases at note 66; Wilson v. Allstate Ins Co., 785 F.2d 311 (6th Cir. 1986) (plaintiff insureds at trial may assert privilege and need not produce tax returns, but insurer to prove defense of fraud, needed to cross-examine the plaintiffs and thus their direct testimony is struck and judgment appropriately entered in favor of Allstate); State v. Heinze, 993 P.2d 1090 (Ariz. Ct. App. 1999), rev. denied, Feb. 8, 2000 (state employee agreeing to invoke Fifth Amendment at trial as part of a Morris agreement in a civil case for damages against employee charged with sexual harassment, permits plaintiff’s counsel to comment on employee’s failure to testify and it is improper under facts presented but in accord with the general rule in civil cases); see also Mark R. Kosieradzki & Daniel T. Driscoll, When the Fifth Amendment Hurts Your Client, Trial, Dec. 2000, at 69-73.


69. Id.

70. Id.


73. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2018 (2d ed. 1987), criticizing Arizona’s rule that the negative inference can be extinguished because it allows a party to defeat discovery by taking the Fifth and then have full benefit of the testimony at trial.

74. See listing of cases in Chadwick, 908 P.2d at 4 (teacher had no right to have dismissal hearing stayed pending resolution of criminal charges especially where school board assured teacher his silence during administrative investigation would not be held against him); Ott, 808 P.2d at 310.