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## EMPLOYMENT LAW

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### What a Former Employee Doesn't Say May Hurt You

Permissibility of an adverse inference from an ex-employee's invocation of the privilege against self-incrimination

In the post-Enron legal climate, the slightest whiff of corporate wrongdoing can trigger a criminal investigation that often spawns parallel civil litigation. In both the civil and criminal context, corporate employees may be the most bountiful sources of relevant information. Depending on the sequence of proceedings and the scope of immunities conferred, knowledgeable corporate representatives may be forced to consider whether their personal interests are better served by responding to inquiries or invoking the privilege against self-incrimination. This article addresses whether invocation of the privilege by an ex-employee warrants an inference that, had the person elected to testify, the substance of the testimony would have been adverse to the corporation.

The seminal case on the effect of an ex-employee's invocation of the Fifth Amendment is *Brinks, Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983). The Second U.S. Circuit Court of Appeals took a circuitous route to reso-

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lution of the issue, laboriously tracing a line of case law to derive the proposition that there is no constitutional impediment to the drawing of an adverse inference against a civil litigant who invokes the privilege. Though tangentially relevant, the authorities did not address the propriety of an inference against a party based on a nonparty's reliance on the privilege. The court then noted that invocations of the privilege by a corporate party's current employees could be viewed as vicarious admissions by the corporation. The court resolved the key issue in unsatisfyingly conclusory fashion, declaring: "the fact that the invokers of the privilege are no longer employees of the defendant does not necessarily bar admittance of their refusals to testify ..." *Id.* at 710. (quoting *Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases*, 91 *Yale L.J.* 1062, 1087-88 (1982)). The court went on to conclude that the invocations' probative value outweighed their prejudicial effect. The majority decision provoked a strong dissent. Among other things, the dissent pointed out that the majority omitted a key caveat from Professor *Heidt's* article — privilege invocations should be admissible only if the former employee is shown to have some continued loyal-

ty to the employer.

In *RAD Services, Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271 (3d Cir. 1986), the court dismissed a host of objections to admissibility, stating:

First, a witness truly bent on incriminating his former employer would likely offer damaging testimony directly, instead of hoping for an adverse inference from a Fifth Amendment invocation. Second, the trial judge could test the propriety of an invocation to ensure against irrelevant claims of privilege. Third, counsel may argue to the jury concerning the weight which it should afford the invocation and any inferences therefrom. Fourth, a rule precluding evidence of a former employee's invocation would allow a corporate party ... to stymie the discovery process with expedience by discharging those potentially responsible for the alleged wrongdoing. Nothing, in short, favors keeping a former agent's claim of privilege from the jury. *Id.* at 275-76.

Standing alone, the above passage could be interpreted as an adoption of a bright-line rule of admissibility. The Third Circuit did indicate, however, that a showing of the ex-employee's contin-

ued loyalty is a relevant factor but the court seemed to stop short of making it a sine qua non to admissibility.

In *LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997), the court prescribed a multifactorial analysis to guide rulings on the issue:

1. *The Nature of the Relevant Relationships*: While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. ... The 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 Over the Non-Party Witness*: The degree of control which the party has vested in the non-party witness in regard to the key facts and the general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2) and may accordingly be viewed, as in *Brinks*, as a vicarious admission.

3. *The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation*: The trial court should evaluate whether the non-party witness is pragmatically a non-captioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.

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 in respect to any of the underlying aspects also logi-

cally merits consideration by the trial court. Id. at 123-24.

The court added that “[w]hether these or other circumstances unique to a particular case are considered by the trial court, the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth.” Id. at 124. The court approved the admission of the invocation and found support from other circuits. *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 45 F.3d 969 (5th Cir. 1995); *Cerro Gordos Charity v. Fireman’s Fund Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984). Several courts have deemed invocations of privilege inadmissible in similar circumstances. *Veranda Beach Club v. Western Surety Co.*, 936 F.2d 1364 (1st Cir. 1991); *Banks v. Yokemick*, 144 F.Supp. 272 (S.D.N.Y. 2001); *Green v. St. Paul Fire & Marine Ins. Co.*, 691 F.Supp. 700 (S.D.N.Y. 1988); *Kontos v. Kontos*, 968 F.Supp. 400, (S.D. Ind. 1997); see also *Lionti v. Lloyd’s Ins. Co.*, 709 F.2d 237 (3d Cir. 1983) (Stern, J., dissenting) (criticizing *Brink’s* decision).

As Judge Winter pointed out in his *Brink’s* dissent, the danger of admissibility is that it effectively ascribes evidentiary weight to questions, and deprives any opportunity for cross-examination. If faced with a series of leading questions suggestive of criminal behavior, an ex-employee who invokes the privilege, of course, would offer no substantive denial. The corporation, in turn, would not be able to offer a substantive rebuttal or even elicit any information regarding the ex-employee’s motivation for invoking the privilege. As noted by a commentator, it is dangerous to assume that the corporation defendant has access to alternative evidence to counter any adverse inferences that may be drawn from an ex-employee’s invocation of the privilege. *Note, Adverse Inferences Based on Non-Party Invocations: The Real Magic Trick in Fifth Amendment Cases*, 60 Notre Dame L. Rev. 370 (1985).

In *RAD*, the court incorrectly presumed that the former employer stood to be prejudiced only if the ex-employee were “bent” on incriminating his former employer. In fact, it is equally possible that invocation may be attributable to understandable anxiety concerning prosecution, particularly considering that a former employee may have no incentive to offer testimony in support of his ex-employer if it portends any risk of incrimination. A claim of privilege by an ex-employee can be equally prejudicial whether based on hostility or hyper-cautiousness.

The “vicarious admission” theory was the basis for *Brink’s* and its progeny, including *RAD*. There is, however, an obvious flaw in the theory to the extent it is applied to former employees. Under Fed. R. Evid. 801(d)(2)(E) and N.J.R.E. 803(b)(4), an admission by an employee may be attributed to the employer only if it was made “during the existence of the [employment] relationship.” A statement by a former employee, therefore, cannot constitute an admission.

The rationale underlying the classification of admissions as nonhearsay also provides no support. Admissions are excepted from the hearsay rule not because they carry particular trustworthiness. Rather, the classification is based on the “adversary theory of litigation,” particularly the notion that a party should not be heard to complain about deprivation of an opportunity to, in essence, cross-examine itself about an out-of-court statement. *J. Strong McCormick on Evidence, Vol. II*, p.136 (West 1999). In the case of an ex-employee invoking the privilege, the considerations favoring admissibility clearly do not apply.

There are more apt analogies from other areas of evidence law. Given the essentially nontestimonial nature of a privilege invocation, the more apposite doctrines are those dealing with failures to produce evidence or respond to accusations, see *State v. Clawans*, 38 N.J. 162, 170 (1962); N.J.R.E. 803(b)(2). Both rules generally permit adverse inferences only if the circumstances are such that the silent party ordinarily

would be expected to be forthcoming with responsive information. If analyzed under those rubrics, the prospects

for admissibility of the invocation likely would drop dramatically as the specter of criminal prosecution appears

to be a classic explanation for the failure of a witness to testify, dispelling the reliability of an adverse inference. ■