

A plaintiff sued an individual defendant for injuries suffered in a collision between the plaintiff's car and the defendant's truck while the defendant's employee was driving the truck. The plaintiff sought discovery of any accident report the employee might have made to the defendant, but the defendant responded that no such report existed. Before trial, the defendant moved to preclude the plaintiff from asking the defendant in the presence of the jury whether he had destroyed such a report because the defendant would then invoke his privilege against self-incrimination.

Should the court allow the plaintiff to ask the defendant about the destruction of the report?

- A. No, because a report that was prepared in anticipation of litigation is not subject to discovery.
- B. No, because no inference may properly be drawn from invocation of a legitimate privilege.
- C. Yes, because a party in a civil action may not invoke the privilege against self-incrimination.
- D. Yes, because the defendant's destruction of the report could serve as the basis of an inference adverse to the defendant.

Explanation:

Fifth Amendment privilege against self-incrimination

Allows any witness (including party-witnesses) in civil & criminal proceedings to refuse to give potentially incriminating testimony

In civil case, opposing party may ask jury to draw adverse inference from witness's claim of privilege

In criminal case, prosecution cannot comment on defendant's failure to take stand & cannot ask jury to draw adverse inference from defendant's claim of privilege

A party can generally present evidence to support an **adverse inference** against the opposing party. For example, the intentional **destruction of relevant evidence** can create an adverse inference that such evidence would have been unfavorable to the party that destroyed it. And in **civil cases**, an adverse inference can also be drawn from a party's invocation of the Fifth Amendment **privilege against self-incrimination**. Therefore, the court should allow the plaintiff to ask the defendant about the destruction of the accident report to raise these inferences.

(Choice A) The accident report would qualify as **work product** if it was prepared by or for an attorney in anticipation of litigation—but that cannot be determined based on the facts provided. Even if it is work product, this privilege would only protect the report from discovery—not prevent the plaintiff from asking if the report had been destroyed.

(Choice B) Had this been a *criminal* case, the prosecutor would have been prohibited from commenting on the defendant's invocation of the privilege against self-incrimination. The jury would also have been barred from drawing a negative inference from the assertion of that privilege.

(Choice C) The Fifth Amendment privilege against self-incrimination applies in civil *and* criminal cases.

Educational objective:

A party can generally present evidence to support an adverse inference against the opposing party, including evidence on the intentional destruction of relevant evidence. And in civil cases only, a party can ask the jury to draw an adverse inference from the opposing party's invocation of the privilege against self-incrimination.

Copyright © 2014 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.