

# REAL ESTATE LAW



## “Embezzlement: An Employee Will Not Get Off The Hook By Asserting The 5<sup>th</sup> Amendment Privilege Against Self-Incrimination”

I am often confronted with a dismayed employer who has realized that a trusted employee has stolen and embezzled substantial sums of money. The employer then is faced with the civil action filed against the employee in order to recover the stolen monies. Correspondingly, the employer often approaches the criminal authorities to have an action brought for theft.

Once the civil action is initiated a deposition of the employee shortly follows. The employee, represented by counsel, will often invoke the 5<sup>th</sup> Amendment privilege against self-incrimination. The privilege against self-incrimination is available to all parties in a civil action and is designed to prevent a party from admitting facts which would lead to a criminal conviction. However, the employee has done himself no favor in the civil action.

Florida courts recognize that once a party in a civil case invokes the 5<sup>th</sup> Amendment, the opposing party is entitled to an inference that the answer would have been a negative and against that party's interest. *Fraser v. Security & Investment Corp.*, 615 So.2d 841, 841-42 (Fla. 4<sup>th</sup> DCA 1993). Further, a party's silence to questions will allow the court and jury to draw a negative inference. *McCreery v. Fernandez*, 882 So.2d 498 (Fla. 4<sup>th</sup> DCA 2004). Thus, an employee faced with a civil action may invoke the 5<sup>th</sup> Amendment or merely remain silent. In either event, the plaintiff's counsel may utilize the response to build its case.

On the other hand, the court oftentimes will merely abate the civil action until the criminal action is completed in order to avoid prejudice to a defendant. However, the court is constrained to only abate an action as long as there is a defined time limit to the completion of the criminal action. The plaintiff, employer, seeking redress for the stolen monies will not be held up indefinitely. Thus, refusing to answer questions of the 5<sup>th</sup> Amendment will not provide a safe harbor to the thief in a civil action.



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