

## STANDARD 11

### Adverse Inference – Invocation of the Constitutional Right Against Self-Incrimination

Under the Fifth Amendment to the U.S. Constitution, a person has the right to remain silent and refuse to answer a question if the answer might incriminate the person. During the case, [name of party] asserted (his) (her) constitutional right under the Fifth Amendment and refused to answer a question(s). You may, but are not required to, conclude that had [name of party] answered the question(s), the testimony would have been unfavorable to [name of party].

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**SOURCE:** *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *Montoya v. Superior Court*, 173 Ariz. 129 (App. 1992); *Castro v. Ballesteros-Suarez*, 222 Ariz. 48 (App. 2009).

**USE NOTE 1:** An issue that may arise is how the assertion of the right against self-incrimination is shown at trial. The party seeking an adverse inference instruction must present evidence that another party has refused to answer a question (or questions) based on his or her right against self-incrimination. Evidence of a refusal to answer may be established when a person is called as a witness at trial and refuses to answer a question (or questions) by invoking the right against self-incrimination. See *Castro*, 222 Ariz. at 51 (widow questioned about involvement in husband’s murder). A refusal to answer may also be shown by a discovery response. See *Montoya*, 173 Ariz. at 130 (father refused to answer requests for admissions). In *Montoya*, the court ruled that the father could withdraw his assertion of the right against self-incrimination by testifying at trial; nevertheless, if the father did not waive his right against self-incrimination, then the fact-finder could make a negative inference from the father’s refusal to answer the discovery requests. *Id.* at 131 (citing *Buzard v. Griffin*, 89 Ariz. 42 (1960)).

**USE NOTE 2:** A number of federal courts have addressed the issue of whether and when a non-party witness’s invocation of the right against self-incrimination can give rise to an adverse inference against a party. See, e.g., *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997); *F.D.I.C. v. Fidelity & Deposit Co. of Md.*, 45 F.3d 969 (5th Cir. 1995). The ABA Model Jury Instructions in Civil Antitrust Cases include an instruction (7.B.2) under which a jury may consider whether a non-party witness is sufficiently associated with a party to justify the jury drawing an adverse inference against that party. The Committee is not aware of any Arizona case addressing this non-party witness issue.

**COMMENT 1:** In *Baxter*, 425 U.S. 308, the Supreme Court adopted the so-called “adverse inference” rule when a party invokes the right against self-incrimination in a civil proceeding. The Court in *Baxter* explained: “Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.” *Id.* at 318. Arizona has adopted the adverse inference rule. See *Montoya*, 173 Ariz. at 131; *Castro*, 222 Ariz. at 53. In *Montoya*, the court held that under Arizona law, a party has the right to “extinguish the negative inference” by later choosing to testify. *Montoya*, 173 Ariz. at 131 (citing *Buzard v. Griffin*, 89 Ariz. 42 (1960)).