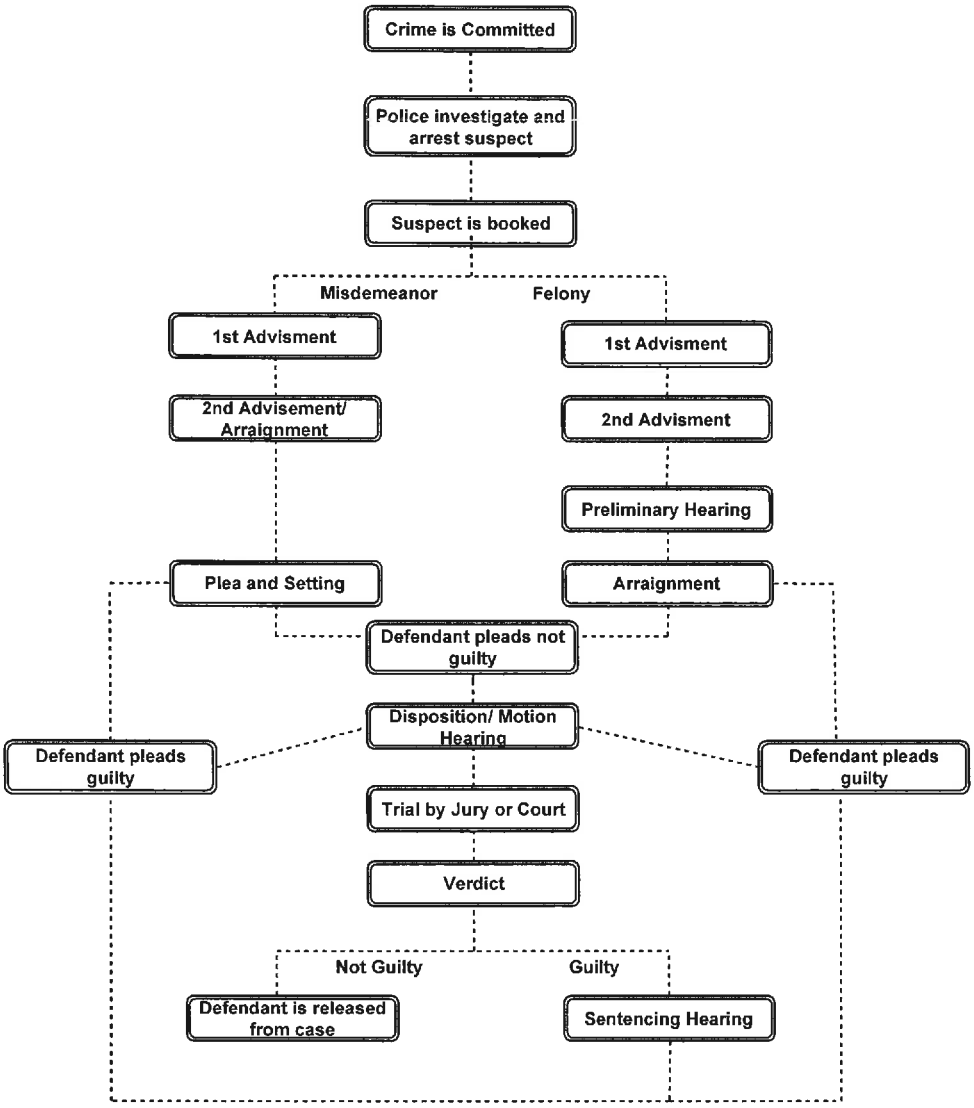
Misdemeanor and Felony

Criminal Justice Process



Contact your victim advocate to discuss how the criminal process may relate to your specific case and to be provided with further information on court hearings.

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Memorandum

February 10, 2020

TO: Interested Persons

FROM: Juliann Jenson, Research Analyst, 303-866-3264

SUBJECT: Statutes of Limitations

Summary

This memorandum provides an overview of statutes of limitations, including factors that impact length, such as statutes of repose and tolling. The memorandum also includes tables listing the various criminal and civil statutes of limitations and statutes of repose in the state.

Statutes of Limitations Overview

A statute of limitations is a law that specifies the maximum length of time allowed for plaintiffs in civil cases, or victims and prosecutors in criminal cases, to initiate legal proceedings. The general purpose of these laws is to encourage the swift and efficient prosecution of crimes or closure of civil claims. They are specifically designed to ensure that physical evidence or eyewitness testimony has not deteriorated or become less reliable over time.

All 50 states have criminal and civil statutes of limitations, varying in both type and length. The following outlines some of the key terminology and factors used to assess whether a civil action or criminal case fits within its respective statutes of limitations or is eligible for an extension.

Different time limits. The type of crime or personal injury claim affects the time limit. Violent crimes have a longer statute of limitations, and with some crimes, such as murder, there are no statutes of limitations at all. Misdemeanor offenses, in contrast, often have a short window, such as 18 months, to bring charges against an alleged perpetrator. In civil cases, certain defamation cases may be granted longer time limits, while medical malpractice generally has a shorter resolution period.

Date of accrual. Generally, statutes of limitations either begin on the date the wrongdoing occurred or when the wrongdoing caused harm. The latter is called the discovery rule, which is based on when the incident or injury is discovered, or reasonably should have been discovered. An injury that caused a wrongful death or medical malpractice claim, for example, may not be apparent when it first

occurred, such as asbestos-related lung cancer that is discovered 15 years after exposure. This rule may also apply in certain sexual assault or abuse cases.

Tolling. Tolling is a legal term that refers to allowing statutes of limitations to be legally suspended in certain instances so that charges may be pressed or lawsuits may be filed after the expiration date. Tolling essentially pauses or stops the clock during this time and restarts it after an event takes place that changes the situation. In civil cases, for example, statutes of limitations may be tolled when a defendant engages in fraudulent concealment, or in some misleading or deceptive act, designed to hide the existence of a cause of action. Criminal statutes of limitations may be tolled when the offender is absent from the state.

Statute of repose. Statutes of repose apply to specific kinds of civil cases, such as product liability, product defect, construction defect, or medical malpractice. While a statute of limitation sets a lawsuit-filing time limit based on when the potential plaintiff suffered harm, a statute of repose is triggered by a specified event or a fixed date, such as the completion of an improvement to real property or after a product's first use or sale. For example, the statute of limitations may give a plaintiff four years to file a complaint after discovering a construction defect. But, if the state's statute of repose is seven years from the time the construction is completed, and the defect is not discovered until the fifth year, there is only two years to file a claim. Statutes of repose may not be tolled.

Minors. If the plaintiff is a minor, he or she cannot sue the defendant until he or she reaches the age of majority, or 18 years old. Therefore, if the victim is a minor, he or she has until the age of 18, plus the number of years provided under the statute of limitations.

See Appendices A, B, and C for a listing of civil and criminal statutes of limitations and statutes of repose in Colorado.

Table 1
Criminal Statutes of Limitations in Colorado

Statutes of Limitations	Crime
None	Murder, kidnapping, treason, any sex offense against a child, and any forgery regardless of the penalty provided. This also applies to attempt, conspiracy, or solicitation to commit murder, kidnapping, treason, forgery, or any sex offense against a child.
6 years	Actions pursuant to the Colorado Antitrust Act of 1992, such as monopolization and bid-rigging, with the statute of limitations clock starting when the act of complaint occurred.
5 years	Vehicular homicide, leaving a scene of an accident that resulted in death, and criminal violations of the Colorado Commodity Code. The statutes of limitations run upon discovery of the criminal act or upon commission of the offense, respectively.
3 years	All other felonies; clock begins upon the commission of the offense.
18 months	Misdemeanors; clock begins upon discovery of the criminal act.
1 year	Class 1 and 2 misdemeanor traffic offenses; clock begins upon the discovery of the criminal act.
6 months	Petty offenses; clock begins upon discovery of the criminal act.

Source: Sections 6-4-118 and 16-5-401, C.R.S.

Table 2
Civil Statutes of Limitations in Colorado

Statutes of Limitations	Cause of Action
1 year	• Assault, battery, false imprisonment, false arrest, libel, slander • Escape of prisoners • Sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement abuse of authority • Penalty or forfeiture of any penal statutes • Violation of the Motor Vehicle Repair Act of 1977 • Class A or B traffic infraction *Source: Section 13-80-103, C.R.S.*
2 years	• Tort actions, including but not limited to, negligence, trespass, malicious abuse of process, malicious prosecution, outrageous conduct, interference with relationships, and tortious breach of contract • Strict liability, absolute liability, or failure to instruct or warn • Veterinarians, professional malfeasance • Wrongful death, with exceptions • Action against public or governmental entity or any employee, including cases for which insurance coverage is provided • Liability created by a federal statute where no period of limitation is provided and every kind of other actions for which no other period of limitation is provided • Violation regarding sales of used motor vehicles • Construction defect, product liability, medical malpractice • Recovery for bounced checks *Source: Sections 13-80-102, 13-80-102.5, 13-80-104, and 13-80-106 C.R.S.*
3 years	• Violation of written and oral contracts • Fraud, misrepresentations, concealment, or deceit • Breach of trust or fiduciary duty • Uniform Consumer Credit Code claims • Replevin or taking, detaining, or converting goods or chattel • Violation of Motor Vehicle Financial Responsibility Act • Auto insurance claims • Outside of state actions claims • Violations concerning plowing along railroad tracks • Erroneous or excessive tax refunds • Motor vehicle-related bodily injury or property damage *Source: Section 13-80-101, C.R.S.*
6 years	• Debt collection where there was a contract • Collection of rent claims • Bounced checks • Unpaid contributions to Public Employees' Retirement Association *Source: Section 13-80-103.5, C.R.S.*

Table 3
Statutes of Repose in Colorado

Statutes of Repose	Cause of Action
3 years with exceptions	Medical malpractice
6 years, may be extended up to two years if the defect is discovered during the fifth or sixth year after completion	Construction defect
7 years for manufacturing products; 10 year rebuttable presumption for other products	Product liability

Source: Sections 13-80-102.5, 13-80-104, 13-80-107, and 13-21-403, C.R.S.

When a Defendant's Employee Takes the Fifth During a Deposition

by Charles Kopel | Jan 26, 2020 | Blog | 0 comments

Corporate civil defendants and their employees occasionally face criminal liability for the same conduct that forms the basis of the civil lawsuit against them. In such cases, plaintiffs' counsel deposing defendants' employees need to be prepared for the possibility that the employees will assert their Fifth Amendment privilege against self-incrimination in response to questions that implicate them in criminal activity. This post will explain how, although assertion of "the Fifth" cannot be used against the employees by government prosecutors in a criminal action, it can and most definitely should be used by a plaintiffs' counsel in its prosecution of a civil action against the deponents' employer.

Background

The Fifth Amendment to the United States Constitution provides a privilege against self-incriminating testimony, including any testimony that "would furnish a link in the chain of evidence needed to prosecute the claimant."[1] This privilege extends to testimony given in a civil deposition, when the content of such testimony may subject the deponent to criminal liability.[2] Accordingly, when plaintiffs' counsel seeks deposition testimony from a defendant's employee or former employee concerning that individual's involvement in potentially criminal activity on behalf of the defendant, the deponent—especially one that has retained independent counsel—can almost surely be expected to make full use of the Fifth Amendment protection.

However, a deponent's assertion of the privilege may itself serve as relevant evidence in a civil action. Although the Fifth Amendment prohibits juries from treating a criminal defendant's assertion of the privilege as evidence of guilt, this "adverse inference" may permissibly be drawn against parties to a civil action.[3] The Supreme Court has recognized the validity of an adverse inference against a party that "refuse[s] to testify in response to probative evidence offered against" him or her,[4] and several Circuits of the United States

Court of Appeals have extended this principle to allow adverse inferences against a party on the basis of a *nonparty's* assertion of the privilege.[5]

Imputing the Adverse Inference

Courts allow the adverse inference from a nonparty deponent's assertion of the privilege to be imputed to a party, such as the deponent's employer or former employer, only when the circumstances of the case suggest that the deponent's silence reasonably reflects the party's own liability. The leading case guiding this determination was handed down by the Second Circuit in 1997. LiButti v. United States ("LiButti") articulates a list of four "non-exclusive factors" that determine the admissibility of a nonparty's assertion of the Fifth Amendment privilege as evidence against a party to a civil action:

First, courts probe "the nature of the relevant relationships," to determine whether and to what extent the nonparty witness is loyal to a party to the action. "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." For that reason, a close relationship between the nonparty and the party tends to support imputation of the adverse inference from the nonparty's assertion of the Fifth to the party. Second, the greater "the degree of control of the party over the non-party witness," the more the nonparty's assertion of the Fifth may be interpreted as a vicarious admission by the party. Third, courts consider "the compatibility of the interests of the party and the non-party witness in the outcome of the litigation." If the nonparty's "assertion of the privilege advances the interests of both" the nonparty and the party, the court may pragmatically regard the assertion as having been made by the party itself. Finally, "the role of the non-party witness in the litigation" merits consideration. The more important the nonparty's role in the underlying facts of the case, the more relevant his or her assertion of the fifth is to the case against the party.[6]

This fact-specific assessment of the circumstances of the nonparty's relationship with the party does not depend on the nonparty's formal status vis-à-vis the party.[7] Indeed, courts

across the country have applied the *LiButti* factors to allow an adverse inference from parties' former employees,[8] and even parties' competitors' former employees.[9]

Strategy Guide

Plaintiffs' counsel seeking to elicit adverse inferences from a defendant's employees or former employees should pay careful attention to the LiButti factors and plan deposition questions accordingly. For instance, plaintiffs' counsel can design a line of questioning to satisfy these factors, laying the foundation for the admissibility of the deponent's assertions of the Fifth Amendment. If the deponent's answers shed light on the close nature of the deponent's relationship with the defendant, the extent of the defendant's control over the deponent, the alignment of the deponent's interests with those of the defendant, and/or the importance of the deponent's role in the facts underlying the litigation, it will be more difficult for defendant's counsel to later contest the relevance of the deponent's assertion of the privilege in response to questions about wrongdoing. Of course, the deponent may try to assert the Fifth Amendment privilege even to avoid answering these threshold LiButti questions, but the further that these questions stay away from the core facts of wrongdoing, the more tenuous the deponent's Fifth Amendment argument will be, providing an opportunity for plaintiffs to compel testimony on those issues later in the litigation.

Further, plaintiff's counsel can sharpen the impact of the adverse inference by posing specific questions about the deponent's wrongdoing that frame the facts of the case in terms favorable to plaintiff's theory. When the deponent asserts the privilege in response to such a question, he or she signals that the truthful answer to the question would confirm the plaintiff's theory of liability. Plaintiff's counsel should, however, take care to avoid paragraph-length questions, and to pose questions as questions, rather than statements followed by "correct?" Numerous judges have criticized such attempts by deposing counsel to "effectively testif[y] for the invoking witness,"[10] and courts reserve the discretion, under Fed. R. Evid. 403, to exclude artfully packaged deposition evidence from a jury.[11]

Still, as long as plaintiffs' counsel does not abuse the question-and-answer format, it enjoys considerable leeway in framing questions designed to elicit a powerful adverse inference. For example, courts have admitted into evidence the adverse inferences from nonparties' assertion of the Fifth in response to these questions:

1) In an action by an insurance company seeking a declaration that it need not cover damages sustained by a vessel because the vessel's captain (an employee of defendant) was intoxicated at the time of the incident, this question posed in a deposition of the

captain: "Were you intoxicated and disoriented on the evening of August 1, 2007 as you operated the vessel Tar Baby approaching the Perdido Pass at or near Orange Beach, Alabama?"

2) In a motion seeking pre-judgment attachment of defendants' assets, these questions posed in a deposition of an individual defendant who was also the sole owner of all corporate defendants: "Has Leverage Management, LLC made any transfers of property in violation of the temporary restraining order?. . .Have you personally made any transactions in violation of the court's restraining order?"[13]

Conclusion

The Fifth Amendment privilege against self-incrimination serves, by design, as a basis for withholding relevant, truthful testimony. Nonetheless, by familiarizing oneself with the case law on imputation of adverse inferences, a plaintiff's attorney may affirmatively use this privilege to elicit and shape evidence in favor of the plaintiff's case.

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[1] Ohio v. Reiner, 532 U.S. 17, 20 (2001) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).

[2] See Pillsbury Co. v. Conboy, 459 U.S. 248, 263-64 (1983) (ruling that a civil deponent could not be compelled to testify over his valid assertion of the Fifth Amendment privilege, despite the fact that the questioning called for him to provide an answer closely tracking his prior immunized grand jury testimony).

[3] Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).
inference against a party that "refuse[s] to testify in response to probative evidence offered against" him or her, and several Circuits of the United States Court of Appeals have extended this principle to allow adverse inferences against a party on the basis of a *nonparty's* assertion of the privilege.

[4] *Id.*

[5] *See, e.g., Coquina Invs. v. TD Bank, N.A., 760 F.3d 1300, 1310 (11th Cir. 2014); LiButti v. United States, 107 F.3d 110, 121 (2d Cir. 1997); RAD Servs., Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 275 (3d Cir. 1986).*

[6] *LiButti, 107 F.3d at 123-24.* This fact-specific assessment of the circumstances of the nonparty's relationship with the party does not depend on the nonparty's formal status vis-à-vis the party. Indeed, courts across the country have applied the LiButti factors to allow

an adverse inference from parties' former employees and even parties' competitors' former employees.

[7] *Id.* at 121.

[8] *See, e.g., Coquina Invs.,* 760 F.3d at 1311 ("First, although Spinosa was no longer employed by TD Bank at the time of trial, there is reason to believe that Spinosa still retained some loyalty to TD Bank. The bank paid Spinosa's legal fees associated with this action."). *See also RAD Servs.,* 808 F.2d at 275 (explaining, in language quoted in LiButti, that "the mere fact that the witness no longer works for the corporate party should not preclude as evidence his invocation of the Fifth Amendment.").

[9] *See Encana Oil & Gas (USA), Inc. v. Zaremba Family Farms, Inc.,* No. 1:12-cv-369, 2016 WL 7971983, at *5 (W.D. Mich. Apr. 11, 2016) ("McClendon and Jacobson do not have any particular relationship with [party] Encana. The two non-party witnesses have no family or friendship ties with Encana. And, ordinarily, Encana and Chesapeake were business competitors. However, the allegation by the State of Michigan was that Encana and Chespeake were collaborating with each other rather than competing as rivals. Therefore, there business relationship between Encana and Chesapeake weighs in favor of the trustworthiness of the adverse inference from the non-party witnesses, who were executives for Chesapeake.").

[10] *LiButti,* 107 F.3d at 122 (quoting RAD Servs., 808 F.2d at 277-78).

[11] *See In re WorldCom, Inc. Sec. Litig.,* No. 02 CIV 3288 DLC., 2005 WL 375315, at *5 (S.D.N.Y. Feb. 17, 2005) ("Because of the potential for "lawyer abuse" when the examining attorney effectively testifies for the witness who is invoking the privilege, the court has discretion under Rule 403 to control the way in which the invocation of the privilege reaches the jury….A ruling on this issue is reserved until the eve of trial.").

[12] *N.H. Ins. Co. v. Blue Water Off Shore,* LLC, C.A. No. 07-0754-WS-M., 2009 WL 792530, at *7 (S.D. Ala. 2009) (citing LiButti, 107 F.3d at 123-24).

[13] *See Monteleone v. Leverage Grp.*, No. CV-08-1986(CPS)(SMG), 2008 WL 4541124, at *7 (E.D.N.Y. Oct. 7, 2008); Pls. Statement of Material Facts in Supp. of Pls.' Mot. for Pre-J. Attach. and Summ. J. at 10, Frances Monteleone, et al. v. The Leverage Group, et al., No. 08-CV-1986 (RRM)(SMG) (E.D.N.Y. Sept. 16, 2018), ECF No. 27.