

**PROPOSED REVISIONS TO THE RULES OF EVIDENCE
PROPOSAL 2023-017**

March 24, 2023

The Rules of Evidence Committee has recommended amendments to Rule 11-513 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 24, 2023, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

11-513. Comment upon or inference from claim of privilege; instruction.

A. **Comment or inference not permitted.** Neither the court nor counsel may comment when a privilege has been claimed at any time. No inference may be drawn from any claim of privilege.

B. **Claiming privilege without knowledge of jury.** To the extent possible, the court shall conduct jury trials to allow claims of privilege to be made without the jury's knowledge.

C. **Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to a jury instruction that no inference may be drawn from the claim of privilege.

D. **Application; Self-Incrimination.** Paragraphs A through C of this rule shall not apply to a claim of the privilege against self-incrimination a non-criminal proceeding.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Paragraph D is patterned after similar rules of evidence in other states recognizing the Supreme Court of the United States' opinion in *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[As adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 03/21/2023, 10:01 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Tue, Mar 21, 2023 at 10:01 AM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your
Name: Adam C. Flores

Phone
Number: 505-364-3858

Email: adam@nmcivilrights.com

Proposal
Number: 2023-017

Comment: I'm commenting in support of the rule change. The current rule is an outlier, virtually non-existent in other jurisdictions, and is unworkable. We often bring civil cases (particularly sex abuse cases) against people who have been charged with a crime. Unlike other jurisdictions, the rule prohibits us from getting an adverse inference when the defendant pleads the fifth in his deposition, and so the cases go to trial. The jury expects to hear from the defendant, but we can't put the defendant on the stand to plead the fifth and we can't even comment on it or explain to the jury why the defendant isn't testifying. These cases, usually involving heinous rights violations, are very difficult to bring successfully. This change is a good step in the right direction.



**New Mexico
Courts**

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 03/24/2023, 3:05 pm

1 message

web-admin@nmcourts.gov <nmcourtswbforms@nmcourts.gov>

Fri, Mar 24, 2023 at 3:05 PM

Reply-To: nmcourtswbforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Jonathan Ibarra

Phone Number: 505-369-3600

Email: jonathanl.ibarra@lopdnm.us

Proposal
Number: 2023-017

Comment: I think the added sentence is missing a word - it likely is meant to say "... against self-incrimination _in_
a non-criminal proceeding."



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on 11-513 proposed rule change

1 message

Alex C. Walker <acw@modrall.com>

Tue, Mar 28, 2023 at 7:55 AM

Reply-To: acw@modrall.com

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

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As a general matter, this is a "fix" to a problem that does not exist. As it stands, New Mexico recognizes the importance of an individual's right to assert the 5th Amendment without penalty; the assertion of a 5th Amendment privilege should not be costly. This proposal, however, will essentially force litigants to decide between speaking (thereby compromising a criminal defense) and being penalized (in civil court) for not speaking. That is a costly penalty indeed, particularly in civil cases that effectively mirror pending criminal cases.

Even if there were a need to change NM law, this proposal gets it wrong by misinterpreting the US Supreme Court decision in Baxter. While that case held that the 5th Amendment does not "preclude the inference where the privilege is claimed by a party to a civil cause", the courts are still required to examine whether undue prejudice exists in allowing such an inference. Baxter itself sets forth the criteria for drawing an adverse inference (assuming as a preliminary matter no undue prejudice), and the proposal from the committee does not even acknowledge this, such that the proposal goes well beyond Baxter, because in many circumstances an adverse inference should not be allowed, even if the proceeding is civil in nature. And the proposal doesn't distinguish between parties and non-parties, which is crucial.



New Mexico
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Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 04/09/2023, 6:15 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Sat, Apr 8, 2023 at 6:15 PM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Brian Grayson

Phone Number: 505-273-8570

Email: brian@graysonlawoffice.net

Proposal Number: Proposal 2023-017 – Fifth Amendment Invocation [Rule 11-513 NMRA]

Comment: It is well-past time for this change. In my practice, I have sued numerous people who have committed crimes, or were charged with crimes for the same acts in which I am suing them civilly, including the filing of wrongful death lawsuits against murderers. With rare exceptions, they plead the Fifth in response to written discovery questions and outright refuse to appear for a deposition. More than once, they or their attorneys have claimed that Rule 513 prohibits me from commenting on them taking the Fifth.

In a case I took to trial in 2020, I wrote a trial brief on the Fifth Amendment because I expected the civil Defendant to plead the Fifth at trial, which of course is what he did. Here is a portion of the brief.

Case law has established that facts concerning questions of civil liability are generally outside the scope of the Fifth Amendment privilege against self-incrimination. *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (constitutional privilege against self-incrimination does not relieve bankrupt from duty of surrendering books and papers as part of his estate). A defendant's right to plead the Fifth is not absolute. *Parker v. Hennepin Cty. Dist. Court*, 285 N.W.2d 81, 83 (Minn. 1979).

"[A] person ought not to be permitted to divulge only that part of the story favorable to his or her position and thus present a distorted and misleading picture of what has really happened." *Parker*, 281 N.W.2d at 883.

Where a civil Defendant refuses to answer questions on Fifth Amendment grounds, the court may, as a matter of law, draw adverse inferences from this refusal. Adverse inferences may be drawn against parties in a civil action who invoke their Fifth Amendment rights. *Id.* at 318-39. See also *Mid-America's Process Serv. v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985) (stating parties may assert a Fifth Amendment privilege in civil case, "in which event that may have to accept certain bad consequences that flow from that action"); *Hughes Tool Co. v. Meier*, 489 F. Supp. 354 374 (D. Utah 1977) (holding Fifth Amendment does not preclude judgment against party based in part on adverse inference arrived at through his assertion of Fifth Amendment in civil case). See also *SEC v. Jasper*, 678 F. 3d 1116, 1126 (9th Cir. 2012) (upholding the trial court's instruction regarding inferences that may be drawn by jurors due to the assertion of the fifth amendment privilege in a civil case); *Curtis v. 11/I&S Pehvlenni, Inc.*, 174 F.3d 661, 674 (5th Cir. 1999) (permitting adverse inference to be drawn against corporate defendant whose representative invoked the Fifth Amendment); *Montoya v. Superior Court*, 840 P.2d 305 (Ariz. App. Div. 1 1992); *Chaffin, Inc. v. Wallain*, 689 P.2d 684 (Colo. App. 1984); *Ikeda v. Curtis*, 261 P.2d 684, 690 (Wash. 1953); *Grognet v. Fox Valley Trucking*, 172 N.W.2d 812 (Wis. 1969). See also *Keating v. Office of Thrift Supervision*, 45 F. 3d 322, 324 (9th Cir. 1995) (finding that "a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege.").

The full trial brief has been uploaded for your review if interested.

I respectfully request that you approve the rule change as stated.

Upload: [33-06182020-Plaintiffs-Trial-Brief-on-Fifth-Amendment.pdf](#)



33-06182020-Plaintiffs-Trial-Brief-on-Fifth-Amendment.pdf

139K



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] "Comment upon inference from claim of privilege," Rule 11-513

1 message

Victor Lopez <albdvsl@nmcourts.gov>
Reply-To: albdvsl@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov

Fri, Apr 21, 2023 at 4:24 PM

Chief Clerk:

I hope you are doing well. We really miss you in the Second Judicial District Court. I am sure someone already noticed this in the proposed amendment, but I included the needed word in 11-513 (D). I would propose adding the word, "in" [as indicated in the bolded brackets below], to help make the Rule clearer.

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[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-

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Have a great weekend, and our best Regards,

Judge Victor S. Lopez
Second Judicial District Court,
Division XXVII
(505) 841-7454