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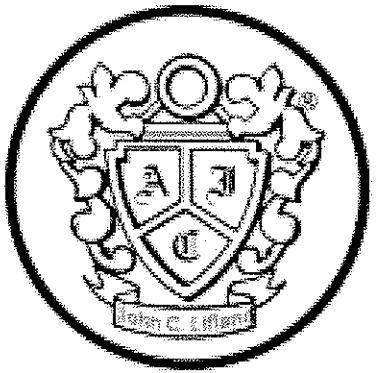

AMERICAN INNS of COURT

Invoking the 5th Amendment in Parallel Proceedings

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ARTICLE: BALANCE OF SILENCE: WEIGHING THE RIGHT TO REMAIN SILENT AGAINST THE RIGHT OF ACCESS TO FLORIDA CIVIL COURTS

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LexisNexis Summary

... The focus will then turn to three particularly relevant and litigated issues that confront trial courts when a civil litigant asserts his or her ***FifthAmendment*** right to refuse to testify: (i) whether to stay the civil lawsuit prior to the completion of parallel criminal proceedings; (ii) how to weigh discovery disputes and access to information against a party's ***FifthAmendment*** privilege; and (iii) what substantive effect, if any, a litigant's refusal to testify has on the outcome of the civil proceedings. ... A real threat of self-incrimination, on the other hand, may well warrant some intrusion upon the civil plaintiff's constitutional right of access to the courts, or, at least, support further consideration of other factors implicated in the case, perhaps along the lines of those described in other jurisdictions. ... Here again, the civil plaintiff's constitutional right of access all but announces its presence as the justification for each denial of a defendant's motion to stay a civil case; the right of access necessarily encompasses some degree of promptness in the adjudication of claims. ... When Florida courts decide whether or not to stay civil proceedings to accommodate a ***FifthAmendment*** objection, they are tacitly balancing two competing constitutional rights at three different points. ... One who voluntarily assumes a legal duty to prepare an accounting record essentially waives the right to later assert that discharging the duty could lead to self-incrimination. ... The court then reframed the discovery sanctions issue as one of minimizing the amount of potential harm between the plaintiff and defendant's respective interests: "When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant." ... Yet, it is within the admittedly unique holdings of Wehling, Aridi, and Brancaccio that we clearly see the right of access emerging as an issue within this niche of civil discovery law.

Text

[*2]

I. Introduction

A lawyer in Ft. Lauderdale convinces his wealthiest clients to invest their money in court bonds for civil settlements that he, in fact, fabricated. [1] A developer sells hundreds of vacant lots in north Florida it may have never owned. [2] From brazen Ponzi schemes, endemic financial, consumer, and mortgage fraud, to corporate malfeasance, in the wake of the real estate market's collapse and the Great Recession, there has been a tremendous upsurge in financial crime investigations in Florida and throughout the country. [3] In every one of these cases, the allegations of criminal

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[1] Warren Richey, How Scott Rothstein Rode $ 1.2 Billion Ponzi Scheme to Wealth and Power, Christian Sci. Monitor, Jan. 27, 2010, available at http://www.csmonitor.com/USA/ 2010/0127/How-Scott-Rothstein-rode-1.2-billion-Ponzi-scheme-to-wealth-and-power.

[2] Catherine E. Shoichet, Firm May Have Sold Land It Didn't Own, St. Petersburg Times, Oct. 27, 2006, available at http://www.sptimes.com/2006/10/27/Citrus/Firm may have sold la.shtml).

[3] See U.S. Dep't of Justice, Federal Bureau of Investigation, Financial Crimes Report to the Public (Fiscal Year 2009) (measuring between Oct. 1, 2008, and Sept. 30, 2009, reflecting nearly 40% increase in pending corporate fraud cases, a 32.5% increase in pending securities and commodities fraud cases, and a 287.5% increase in pending mortgage fraud cases); Florida Dep't

conduct may be similar, if not identical, to the elements that would support compensable civil claims. Indeed, criminal and civil cases can often intertwine, branching from the same root set of facts, making it difficult to discern where one legal proceeding begins and the other ends. [4] Beyond the issues of criminal punishment or civil redress, there are also constitutional implications which span the whole of these proceedings that are as dynamic as they are different, depending on the forum in which they are raised. Nowhere are these implications more evident than with the ***FifthAmendment*** right against self-incrimination.

Suppose the suspect in a white collar criminal case is sued in civil court by an alleged victim of the financial crime under investigation. He objects to answering any questions in the civil case on the ground that it might incriminate him in the criminal investigation. Where his refusal to [*3] testify could not be used against him in the criminal case, it becomes "fair game," so to speak, in the civil proceedings and can even become the basis to impose a legal inference against him on any matter about which he refuses to testify. [5] Yet this refusal to provide testimony adversely affects the civil plaintiff, as well. A private litigant is empowered by the rules of civil procedure to obtain discovery from his or her adversary regardless of whether the defendant elects to participate in the discovery process. [6] The defendant may well be the best source of knowledge on the critical subjects of the civil case. By exercising his ***FifthAmendment*** right, the defendant could bar the civil plaintiff from obtaining the most important testimony and evidence in the lawsuit. [7]

Given these competing considerations, should the trial court simply stay the civil action until the criminal proceedings have run their course? If the civil case proceeds, can the defendant ignore the plaintiff's discovery requests or court orders that might arguably implicate criminal testimony, and, if so, what effect should that refusal have in adjudicating the merits of the civil case? In short, what limits can the court impose to safeguard the defendant's right to remain silent while assuring that the civil plaintiff's case is not unfairly hindered?

While criminal defendants, for a variety of reasons, may not generally be expected to testify in their own defense, [8] civil defendants are-and their refusal to testify often results in a remarkably different, [*4] even hostile, juridical response compared to that which a criminal defendant's refusal would elicit under the same set of facts. The distinction in treatment between civil and criminal proceedings is not simply the byproduct of an individual asserting the

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of Law Enforcement 2009-2010 Annual Performance Report, Investigations and Forensics Services Highlights (reporting on department's investigation of $ 400 million mortgage fraud case; "The investigation was launched in response to the epidemic of mortgage fraud throughout Florida which began during the state's real estate boom earlier this decade . . ."), available at http://www.fdle.state.fl.us/Content/getdoc/1465a2f4-5605-431e-acda- 4e3d540e3f0d/year-end-highlights-ifs.aspx (retrieved on Nov. 4, 2010). See also Mark Puente, Reality Limits Real Estate Oversight, St. Petersburg Times, Feb. 13, 2011 (reporting on status of 1595 cases of alleged real estate broker fraud Florida Division of Real Estate referred to state attorneys' offices between Jan. 1, 2009 and Dec. 31, 2010), available at http://www.tampabay. com/news/business/realestate/article1151002.ece).

[4] See Mary M. Cheh, Constitutional Limits of Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L.J. 1325 (1991).

[5] See infra Part V.

[6] See infra note 117 and accompanying text.

[7] In what may be the seminal law review article on this subject, Professor Robert Heidt posited that a defendant's persistent refusal to provide evidence or testimony in a civil case "precludes discovery and frustrates the truth- determining capacity of the litigation process to an alarming extent" to the point that the plaintiff's case may suffer from a "failure of proof" that could result in outright dismissal of the claims. See Robert Heidt, The Conjurer's Circle-The ***FifthAmendment*** Privilege in Civil Cases, 91 Yale L.J. 1062, 1135, 1081 (1982). That may be something of an overstatement (the only example given of such a proof failure is a hypothetical price-fixing conspiracy where no documents or testimony could possibly be obtained from any independent sources), but the other impediments imposed on civil plaintiffs-delay, increased litigation costs, possible gamesmanship in the timing of the right's assertion-are all, without argument, real and considerable. Id.

[8] See Jeffrey Bellin, Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify, 76 U. Cin. L. Rev. 851 (2008) ("A large percentage of criminal defendants decline to testify, forcing juries to decide the question of the defendant's guilt without ever hearing from the person most knowledgeable on the subject."); Theodore Eisenberg & Valerie P. Hans, Taking a Stand on Taking the Stand: The Effect of Prior Criminal Record on the Decision to Testify, 94 Cornell L. Rev. 1353, 1389 (2009) (concluding that evidence of bias in cases where criminal defendants had prior convictions may suggest "the value of exploring the development of legal rules that encourage defendants, even those with criminal records, to testify."); Gordon Van Kessel, Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Remain Silent, 35 Ind. L. Rev. 925 (2002).

FifthAmendment right in a forum where that right is not as frequently invoked. It is also the result of who the other party is in most civil disputes. Unlike the government in criminal proceedings, private civil plaintiffs have their own constitutional rights, such as the right to access and use the courts-rights that may be thwarted the moment a defendant utters the ***FifthAmendment***'s invocation. [9] How, then, does a civil court make enough room for one party's right against self-incrimination without infringing upon the other litigant's right to use the court?

This Article will attempt to highlight some of the more notable rulings that have arisen when Florida courts have grappled with these conflicting interests, and, it is hoped, trace a theme of competing constitutional rights that underlies them. First, a brief overview of the history and development of the right to remain silent and the right of access to courts will be considered. The focus will then turn to three particularly relevant and litigated issues that confront trial courts when a civil litigant asserts his or her ***FifthAmendment*** right to refuse to testify: (i) whether to stay the civil lawsuit prior to the completion of parallel criminal proceedings; (ii) how to weigh discovery disputes and access to information against a party's ***FifthAmendment*** privilege; and (iii) what substantive effect, if any, a litigant's refusal to testify has on the outcome of the civil proceedings. The decisions arising from the cases examined will illustrate the point that when a civil court confronts a party's invocation of the right to remain silent, it is not just defining the boundaries of one individual's constitutional protection under the [*5] ***FifthAmendment***; the court is actually balancing conflicting constitutional rights between two parties. One party's constitutional right to remain silent may well determine another's constitutional right to be heard in civil court-or vice versa.

II. The Two Rights in Review

A. The Right to Refuse to Testify

An individual's right to remain silent and refuse to give self-incriminating testimony is one that arguably traces its origins to Talmudic law in the ancient Rabbinical courts. [10] The right took root in ecclesiastical jurisprudence under the maxim nemo tenetur seipsum prodere [No one is bound to betray himself], [11] from which it would later grow and develop-albeit unsteadily- in the courts of England. [12] As the faith of Britain's sovereigns oscillated between the Church of Rome and the Church of England throughout the seventeenth century, the privilege gradually developed "in response to practices that were troubling in large part because of the crimes being prosecuted-crimes of religious belief or political expression." [13]

Whatever its precise point of origin, the privilege to be free from incriminating oneself is a right that has resonated deeply down through the ages. Justice Fortas cast it in a spiritual light:

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[9] Heidt's article also touched upon this point, noting it as a potential source of conflict in civil cases: "[D]efendants' full exploitation of this constitutional privilege [against self-incrimination] may deny plaintiffs any opportunity for meaningful access to the courts, an opportunity that is itself becoming a right worthy of constitutional status." See Heidt, supra note 7, at 1082. That a potential conflict could exist between the right to remain silent and the right of court access is a subject that has, thus far, generated relatively little judicial attention. Cf. Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 566 (5th Cir. 1987) ("The district court in a civil case so crippled by the [F]ifth [A]mendment as this one, must balance the defendants' rights not to incriminate themselves against the plaintiff's right to a meaningful remedy."); Gordon v. FDIC, 427 F.2d 578, 580 (D.C. Cir. 1970) (reviewing parameters of civil stay, fact that defendant had been indicted could not by itself justify a stay because "[t]he overall interest of the courts . . . may very well require that the compensation and remedy due a civil plaintiff should not be delayed (and possibly denied)."); Green v. Champion Ins. Co., 577 So. 2d 249, 262 (La. Ct. App. 1991) (discussing conflict of interest arising when a stay is requested: "A plaintiff has a right to a trial [citing the provision of the Louisiana Constitution that provides for a right of access] . . . . The court must weigh the civil plaintiff's constitutional right to be compensated without unreasonable delay against the criminal defendant's rights under the ***FifthAmendment***.").

[10] See Moses v. Allard, 779 F. Supp. 857 (E.D. Mich. 1991) (comparing N. Lamm, The ***FifthAmendment*** and its Equivalent in Jewish Law, 17 Decalogue 1, 12 (1967), with L. Levy, Origin of the ***FifthAmendment*** Right Against Self-Incrimination 439-41 (2d ed. 1986)).

[11] No one is bound to betray himself." Black's Law Dictionary 1039 (6th ed. 1990).

[12] See R.H. Helmholz, Origins of the Privilege Against Self- Incrimination: The Role of the European Ius Commune, 65 N.Y.U. L. Rev. 962 (1990); Steven Penney, Theories of Confession Admissibility: A Historical View, 25 Am. J. Crim. L. 309 (1998).

[13] William J. Stuntz, The Substantive Origins of Criminal Procedure, 105 Yale L.J. 393, 411-12 (1995).

The fundamental value that the privilege reflects is intangible, it is true; but so is liberty, and so is man's immortal soul. A man may be punished, even put to death, by the state; but . . . he should not be made to prostrate himself before its majesty. Mea culpa belongs to a man and his God. It is a plea that cannot be exacted from free men by human authority. To require it is to insist that the state is the superior of the individuals who compose it, instead of their instrument. [14]

[*6]

The right against self-incrimination came to be enshrined within the U.S. Constitution, not as a free-standing provision of the original enactment, but rather as one of several clauses strung together in the middle of a subsequent ***amendment***. [15] Nestled between the Double Jeopardy and Due Process Clauses of the ***FifthAmendment*** to the U.S. Constitution, the right against self-incrimination appears: "nor shall any person . . . be compelled in any criminal case to be a witness against himself." [16] The Florida Constitution contains a nearly identical expression of the right to refuse to testify in its Declaration of Rights: "No personal shall . . . be compelled in any criminal matter to be a witness against oneself." [17]

When invoked, this right is practically sacrosanct throughout the course of criminal proceedings: persons taken into custody must be informed that they have the right to remain silent; [18] the right can be exercised, to its fullest extent, by "even the most feeble attempt" at claiming it; [19] once the right is claimed, police interrogation of a suspect **[*7]** must immediately cease; [20] a waiver of the right can be revoked in a later proceeding; [21] and prosecuting attorneys may not even mention to a jury the fact that a criminal defendant has chosen to exercise his or her right to refuse to testify. [22] The courts have afforded the ***FifthAmendment*** an extraordinarily liberal construction in criminal cases, [23] mindful of the atrocities its absence historically fostered. [24]

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[14] Abe Fortas, The ***FifthAmendment***: Nemo Tenetur Prodere Seipsum, 25 J. Clev. B. Ass'n, 91, 99-100 (1954). See also Application of Gault, 387 U.S. 1, 47 (1967) ("The roots of the privilege . . . tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and-in a philosophical sense-insists upon the equality of the individual and the state.").

[15] See Craig Peyton Gaumer & Charles L. Nail, Jr., Truth or Consequences: The Dilemma of Asserting the ***FifthAmendment*** Privilege Against Self-Incrimination in Bankruptcy Proceedings, 76 Neb. L. Rev. 497, 515 (1997) (recounting its passage as part of the Bill of Rights submitted by James Madison shortly after President Washington's inauguration). It has been suggested that Madison deliberately drafted the ***FifthAmendment*** as a loosely related bundling of rights to ensure passage of the less popularly recognized right of just compensation found in the Takings Clause. See Akhil Reed Amar, The Bill of Rights 77-78 (1998).

[16] U.S. Const. amend. V. The protections provided under the ***FifthAmendment*** apply to the states by operation of the Fourteenth ***Amendment***. See Berkemer v. McCarty, 468 U.S 420, 428 (1984).

[17] Fla. Const. art. I, § 9. For the sake of convenience only, the remainder of this Article will use the term ***"FifthAmendment"*** broadly to refer to both the federal and state constitutional protections of the right to refuse to testify, as that is the term more common in general usage and in the jurisprudence covered by this Article's topic. Cf. Cuervo v. State, 967 So. 2d 155, 160 (Fla. 2007) (noting that Florida's constitutional right is "mirrored" in the ***FifthAmendment***); City of Hollywood v. Washington, 384 So. 2d 1315, 1318 (Fla. Dist. Ct. App. 1980) (comparing state and federal privileges against self-incrimination, stating "For the most part, Florida cases fall in line with the federal cases . . . ."). That is not meant to diminish, in any way, the distinctions that have arisen in criminal cases where courts have analyzed the scope of the state constitutional protection differently than its federal counterpart. Cuervo, 967 So. 2d at 168 (Bell, J., dissenting) (arguing that majority's opinion departs from federal standard regarding police interrogation after suspect asserts his or her ***FifthAmendment*** right); Rigterink v. State, 2 So. 3d 221, 241 (Fla. 2009) ("the federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart.").

[18] Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).

[19] United States v. Goodwin, 470 F.2d 893, 902 (5th Cir. 1972) (citing Quinn v. United States, 349 U.S. 155 (1955)).

[20] Fare v. Michael C., 442 U.S. 707, 717 (1979); Miranda, 384 U.S. at 473-74.

[21] In re Master Key Litigation, 507 F.2d 292, 294 (9th Cir. 1974);United States v. Goodman, 289 F.2d 256, 259 (4th Cir. 1961).

[22] Griffin v. California, 380 U.S. 609, 615 (1965); Fla. R. Crim. P. 3.250.

[23] Ullman v. United States, 350 U.S. 422, 427 (1956);United States v. Castro, 129 F.3d 226, 229 (1st Cir. 1997).

The right also serves utilitarian functions within the criminal justice process, as well. First, it acts as a safeguard "to assure that admissions or confessions are reasonably trustworthy, that they are not the mere fruits of fear or coercion, but are reliable expressions of the truth." [25] The right to remain silent also protects "the innocent but inarticulate" defendant from wrongful conviction by a skilled prosecutor, [26] further ensuring the integrity of the truth-seeking process in criminal cases.

Although its text speaks in terms of incrimination, the ***FifthAmendment*** right to remain silent includes an ambit of protection from the threat of certain non-criminal penalties, as well. [27] Our law recognizes that involuntary incarceration is not the only means of compelling incriminating testimony from a person. [28] The government may not levy fines or taxes against an individual in such a way that would effectively compel self-incriminating testimony. [29] One can also refuse to testify where the governmental threat is the revocation of an administrative or professional license or the termination of public employment. [30] In such cases, the courts have reasoned that the specter **[*8]** of losing one's livelihood or professional status is indeed as powerful an instrument of compulsion as "the use of legal process to force from the lips of the accused individual the evidence necessary to convict him. . . ." [31]

Nor is the right to remain silent dependent upon the forum in which it is raised, be it civil, administrative, or criminal; [32] its protections are not relegated to one particular division within a courthouse:

Denomination of a particular proceeding as either "civil" or "criminal" is not a talismanic exercise, but rather attaches "labels of convenience," and tends to inhibit factual inquiry into the nature of the proceeding itself. The Supreme Court has determined that the "sole concern (of the self-incrimination clause) is, as its name indicates, with

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[24] See Pennsylvania v. Muniz, 496 U.S. 582, 595-96 (1990) ("At its core, the privilege reflects our fierce 'unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,' [] that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.") (citation omitted, quoting Doe v. United States, 487 U.S. 201, 212 (1988)).

[25] In re Gault, 387 U.S. 1, 47 (1967).

[26] Amar, supra note 15, at 116.

[27] Kastigar v. United States, 406 U.S. 441, 444-45 (1972).

[28] See, e.g., Lynum v. Illinois, 372 U.S. 528, 531-34 (1963) (single mother confessed to selling drugs during interrogation when police repeatedly told her she would lose custody of both her children); Slochower v. Bd. of Higher Educ. of N.Y., 350 U.S. 551, 553 (1956) (city college professor's employment summarily terminated because of his prior assertion of ***FifthAmendment*** right during McCarthy hearings).

[29] Marchetti v. United States, 390 U.S. 39, 51, 60-61 (1968);Grosso v. United States, 390 U.S. 62, 66-67 (1968).

[30] See, e.g., Spevack v. Klein, 385 U.S. 511, 519 (1967) (reversing disbarment that was based on lawyer's refusal to surrender financial documents or to testify); In re Shearer, 377 So. 2d 970 (Fla. 1979) (dismissing Judicial Qualifications Commission's disciplinary proceeding against judge who had refused to testify in response to police investigation regarding car accident); State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 492-93 (Fla. 1973) (real estate commission prohibited from revoking broker's license because broker refused to answer questions after asserting ***FifthAmendment*** right); United States v. Vangates, 287 F.3d 1315, 1320 (11th Cir. 2002) ("a public employee may not be coerced into surrendering his [F]ifth [A]mendment privilege by threat of being fired or subjected to other sanctions."); Best Pool & Spa Serv. Co. v. Romanik, 622 So. 2d 65 (Fla. Dist. Ct. App. 1993) (pool maintenance contractor not required to answer interrogatories regarding insurance coverage because of potential county license infraction); McDonald v. Dep't of Prof'l Regulation, Bd. of Pilot Comm'rs, 582 So. 2d 660, 662 n.2 (Fla. Dist. Ct. App. 1991) ("Because license revocation or suspension proceedings are penal in nature, the [F]ifth [A]mendment right to remain silent applies.").

[31] Spevack, 385 U.S. at 516.

[32] See infra note 34; William M. Acker, Jr., United States v. Handley: A New Direction in ***FifthAmendment*** Jurisprudence in the Eleventh Circuit, or an Aberration?, 44 Ala. L. Rev. 143, 143-45 (1992).

the danger to a witness forced to give testimony leading to the infliction of 'penalties affixed to criminal acts . . . .'" [33]

Nevertheless, a distinction does exist between penal proceedings and those that are merely remedial in nature. [34] In the latter, the right may be deemed inapposite because such cases often do not feature the principal actor that looms largest in ***FifthAmendment*** jurisprudence: the government, as a litigant, exerting some form of pressure, or **[*9]** compulsion, to obtain potentially incriminating testimony. [35] In most civil cases, the right's antagonist is not a unit or office of government, but a private party, on more or less equal footing as the one claiming the right, asking nothing more than to use a court for redress of an alleged wrong.

B. The Right of Access to the Courts

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." [36]

Our nation's Founders spoke frequently and forcefully to the issue of judicial access in the Declaration of Independence, charging England's King George III with having "obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers," making judges "dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," subjecting the people "to a jurisdiction foreign to our constitution," depriving the people "of the benefits of Trial by Jury," and transporting them overseas for trial of "pretended offences." [37] The American colonists would sever centuries of allegiance, in part, because of the British government's failure to provide them with a native, impartial arbiter to hear their complaints.

An individual's right of access to the courts may be nearly as hallowed as his or her right to refuse to testify if called into court. [38] But unlike the right to remain silent, the right of citizens to seek redress in court is not one that can be readily discerned from the text of the Constitution; in fact, its connection to our founding document is somewhat convoluted. [39] Only by pulling together several related rights **[*10]** that are expressly stated have the courts come to construe the Constitution to afford not only the establishment of courts to adjudicate disputes, but the right to use them as well. In federal law, the right of court access is really a coalescing of principles drawn from the Privileges and Immunities Clause, the First ***Amendment***'s Petition Clause, the ***FifthAmendment***'s Due Process Clause, and the Fourteenth ***Amendment***'s Due Process and Equal Protection Clauses-an amalgam that the Supreme

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[33] In re Daley, 549 F.2d 469, 474 (7th Cir. 1977) (citations omitted); Slochower v. Bd. of Higher Educ. of N.Y., 350 U.S. 551, 553 (1956). See also State ex rel. Mitchell v. Kelly, 71 So. 2d 887, 889 (Fla. 1954) (The privilege "applies to all types of proceedings wherein testimony is given and applies alike to a witness as well as a party. . .").

[34] Daley, 549 F.2d at 475. See also State, ex rel. Mitchell, 71 So. 2d at 889 ("It should be noted that ordinarily the privilege does not protect from the revealing of facts concerning a civil liability . . . .").

[35] See United States v. Doe, 465 U.S. 605, 610 (1984) ("As we noted in Fisher, the ***FifthAmendment*** protects the person asserting the privilege only from compelled self-incrimination.") (citing Fisher v. United States, 425 U.S. 391, 396 (1976)).

[36] Marbury v. Madison, 5 U.S. 137, 163 (1803).

[37] The Declaration of Independence paras. 10-11, 15, 20-21 (U.S. 1776).

[38] William C. Koch, Jr., Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution, 27 U. Mem. L. Rev. 333, 341 (1997) ("In some states, [the right to seek redress] is second only to the due process clause in importance . . . .").

[39] Compare Risa E. Kaufman, Access to the Courts as a Privilege or Immunity of National Citizenship, 40 Conn. L. Rev. 1477, 1485-88 (2008) (arguing that the Fourteenth ***Amendment***'s Privileges and Immunities Clause best protects the right of access), with Carol Rice Andrews, A Right of Access to Court Under the Petition Clause of the First ***Amendment***: Defining the Right, 60 Ohio St. L.J. 557, 560 (1999) (arguing that the First ***Amendment***'s Petition Clause offers a better basis for defining the right of access). See also Norman B. Smith, "Shall Make No Law Abridging . . .": An Analysis of the Neglected, but Nearly Absolute, Right of Petition, 54 U. Cin. L. Rev. 1153, 1154-57 (1986) (tracing the medieval history of the right to petition in England and noting that proposed parliamentary laws, "just like individual grievances, were presented in the form of petitions to the king.").

Court once remarked was an admittedly unsettled basis from which to construct a constitutional right. [40] But the right's footing, however subtle, is no less accepted or valid. [41] As the Eleventh Circuit summarized the right:

Access to the courts is clearly a constitutional right, grounded in the First ***Amendment***, the Article IV Privileges and Immunities Clause, the ***FifthAmendment***, and/or the Fourteenth ***Amendment***. To pass constitutional muster, access to the courts must be more than merely formal; it must also be adequate, effective, and meaningful. [42]

In Florida law, as in many other states, the right has a far more direct expression within the constitution. [43] Dating back to its 1838 enactment, the Florida Constitution has historically included an explicit right of access to courts in words that leave no room to doubt its prominence or its pedigree. [44] The right is separately enumerated in the constitution's declaration of rights and is worded cogently: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." [45] In essence, this **[*11]** declaration affords Floridians a fundamental right "to go to court to resolve our disputes." [46] Like the ***FifthAmendment*** right to refuse to testify, the state constitutional right of access to courts is construed liberally. [47] It hearkens to basic principles of equity, as one court held, by bringing "life and vitality to the maxim: 'For every wrong there is a remedy.'" [48]

While the ***FifthAmendment***'s protection is tethered to the threat of criminal proceedings, the right of access to courts is linked to civil remedies. [49] Although propelled from different origins, the right to remain silent and the right of access to courts may collide when a litigant asserts the right against self- incrimination in a civil case. Either one can negate the other, [50] or some boundary must be discerned within the civil proceeding where the competing rights have sufficient space to co-exist in a meaningful way. Where that line between the rights is drawn may shape the course of the entire civil case, and indeed, as discussed next, may determine whether the civil case should proceed at all.

III. Staying Cases or Shutting Courthouse Doors

Often the first issue to present itself when civil and criminal proceedings intersect is whether to stay the pending civil proceedings, or, if a trial has been set, continue the trial in order to allow the criminal proceedings to reach their conclusion. All things considered, someone facing both criminal and civil liability for the same alleged acts will

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[40] Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002).

[41] See id. at 415. See also David C. Hawkins, Florida Constitutional Law: A Ten-Year Retrospective on the State Bill of Rights, 14 Nova L. Rev. 693, 807 (1990).

[42] Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003) (citations omitted).

[43] Mitchell v. Moore, 786 So. 2d 521, 525 (Fla. 2001). Notwithstanding the explicitness and similarity in verbiage among state constitutions, the right of access to courts has been the subject of widely divergent applications throughout the states. See Jonathan M. Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or. L. Rev. 1279, 1282 (1995) (noting a "total disarray over how to interpret [the right of access]" among state courts).

[44] Hawkins, supra note 41, at 807 ("An expressly declared right [of access] offers the immediate advantage of avoiding debate over its source and the level of protection that it deserves.").

[45] Fla. Const. art. I, § 21. See also Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 269 (Fla. 1991) ("This Court has an independent duty and authority as a constitutionally coequal and coordinate branch of the government of the State of Florida to guarantee the rights of the people to have access to a functioning and efficient judicial system.").

[46] *DR Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach, 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002).*

[47] Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992), receded from on other grounds, 678 So. 2d 1239, 1253 (Fla. 1996).

[48] Swain v. Curry, 595 So. 2d 168, 174 (Fla. Dist. Ct. App. 1992) (quoting Holland v. Mayes, 19 So. 2d 709 (Fla. 1944)).

[49] Christopher v. Harbury, 536 U.S. 403, 414-15 (2002) (right of access to courts "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court"); Cunningham v. Dist. Atty's Office for Escambia Cnty., 592 F.3d 1237, 1271 (11th Cir. 2010) ("[T]he plaintiff must have an underlying cause of action the vindication of which is prevented by the denial of access to the courts."). See also Thomas R. Phillips, The Constitutional Right to a Remedy, 78 N.Y.U. L. Rev. 1309 (2003).

[50] See Heidt, supra note 7.

usually focus attention and resources on the criminal proceedings. Certainly the threat of imprisonment is far graver than the threat of having to pay a money judgment. [51] Even so, an adverse judgment in a civil case carries considerable repercussions in its own right-financial, **[*12]** social, and, for many, moral and ethical-consequences that force the civil defendant who wishes to remain silent to elect from a choice of evils. The defendant must either waive the ***FifthAmendment*** right in order to mount a defense in the civil litigation or else sit in silence while the plaintiff's case receives a substantial advantage from the defendant's exercise of the right (the extent of which, discussed later on, can be far-reaching indeed). Rather than picking either of these unpleasant alternatives, in many cases, the defendant will seek to halt the civil proceedings altogether.

Does a civil defendant subject to potential criminal exposure have a constitutional right to stay the civil proceedings because he or she exercises the right to refuse to testify? As an absolute, the answer is clearly no. The blanket assertion of a ***FifthAmendment*** privilege, in itself, does not entitle a party to stay ongoing civil proceedings. [52] On the other hand, a civil trial court generally has broad discretion to stay or refuse to stay a case pending before it. [53] In certain instances, courts have recognized that a limited stay might be the most practicable means of securing a civil defendant's ***FifthAmendment*** privilege without sacrificing his defense in the civil case. [54]

In contrast to other jurisdictions, Florida case law does not currently identify or prioritize any specific factors in deciding stay motions under these circumstances. [55] Over time, though, what could be characterized as three preconditions to stay a civil case because of a ***FifthAmendment*** objection have gradually coallesced. They include: (i) the propriety of the assertion of the ***FifthAmendment*** right (the "proper assertion"); (ii) the likelihood that testimony or discovery sought in the civil case could actually implicate the defendant criminally (the "proper link"); and (iii) the length of time that the case would need to be stayed while the defendant asserts the right (the "proper length"). [56] These three issues, **[*13]** either explicitly or implicitly, have emerged from the various reported decisions of whether a pending civil case should or should not be stayed due to parallel criminal proceedings. When viewed conjunctively, the beginning of an analysis premised upon balancing the parties' constitutional rights can be seen.

A. The Proper Assertion ("On Advice of Counsel, I Respectfully Invoke My Right to Remain Silent and Decline to Answer Your Question.")

Before deciding whether to grant a stay, the first inquiry the civil court must resolve is whether the defendant has actually invoked the ***FifthAmendment***. A person might verbalize a refusal to testify in such a way as to leave no room for doubt that he or she is exercising their ***FifthAmendment*** privilege, such as in the quotation above. [57] Sometimes,

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[51] Cf. Matter of Daniels, 570 A.2d 416, 424 (N.J. 1990) ("There is a difference between money and freedom. No one can deny that the loss of liberty, next to the loss of life, is the greatest deprivation that a free citizen can suffer.").

[52] Urquiza v. Kendall Healthcare Grp., 994 So. 2d 476, 477-78 (Fla. Dist. Ct. App. 2008). See also Creative Consumer Concepts, Inc. v. Kreisler, 563 F.3d 1070, 1080 (10th Cir. 2009) ("The Constitution does not generally require a stay of civil proceedings pending the outcome of criminal proceedings, absent substantial prejudice to a party's rights.") (citations omitted).

[53] *Eicoff v. Denson, 896 So. 2d 795, 799 (Fla. Dist. Ct. App. 2005);*Regan, Inc. v. Val-Ro, Ltd., 396 So. 2d 834, 835 (Fla. Dist. Ct. App. 1981).

[54] See, e.g., *In re J.E.B., 971 So. 2d 187, 188 n.1 (Fla. Dist. Ct. App. 2007)* (noting a continuance "might have been advisable" in juvenile dependency hearing where parent had invoked ***FifthAmendment*** right in response to questions regarding alleged child abuse); Kerben v. Intercontinental Bank, 573 So. 2d 976, 978 (Fla. Dist. Ct. App. 1991) (in cases where defendants request a stay pending criminal investigation "courts will often find it appropriate to stay the lawsuit so that the defendant's assertion of this constitutional right does not preclude him from defending a civil suit.").

[55] Other state courts have adopted enumerated lists of various factors that a trial court should weigh when deciding a stay motion under these circumstances. See infra Part III.D.

[56] See infra Part III.A, B, & C.

[57] The quotation is from Michaele and Tareq Salahi's repeated responses to questioning from the House Homeland Security Committee regarding the Salahis' alleged "crashing" of a November 2009 White House dinner party. See Janie Lorber, Uninvited White House Guests Take the ***Fifth*** at Hearing, N.Y. Times, Jan. 21, 2010, available at http://www.nytimes.com/2010/01/21/us/politics/21crasher.html. Although there is no prescribed form, those words, or some variant of them, seem to have become something of an accepted litany commonly used to invoke the ***FifthAmendment*** right to refuse to testify. See, e.g.,United States v. King, 461 F.2d 53, 56 n.3 (8th Cir. 1972) (record of union member witness's responses in criminal prosecution against

though, the court is confronted with something not quite so obvious. [58] A party could state, "I'm not going to answer that question," without indicating why. Or a witness might say nothing at all. There is no special password needed to invoke the right to remain silent in a civil proceeding, [59] but can one simply refuse to answer a question without explanation and still remain under the protection of the ***FifthAmendment***? [60]

On this issue something of a bright line has emerged. A civil defendant must actually declare that he or she is exercising the right to **[*14]** refuse to testify in response to a question or a discovery request in order to claim the constitutional protection. [61] An articulated and explicit assertion of the right is necessary before a court can make a ruling regarding its effect in the civil case. Rappaport v. Levy, a case from Florida's Third District Court of Appeal, illustrates the importance of this precondition. [62] In Rappaport, a civil dispute between veterinarians over their practice turned into a criminal complaint of alleged theft and improper use of the clinic's medicines. [63] The civil trial court initially stayed the civil proceedings in their entirety to allow the parallel criminal case to run its course. [64] The trial court later relented somewhat, lifting the stay on discovery, but ruling that the matter would not be set for trial until the criminal suspect "was 'in a position where he can testify at trial without compromising his ***FifthAmendment*** Privilege,'" even though he had not yet actually asserted a ***FifthAmendment*** privilege in response to any discovery request. [65] The appellate court found the stay, premised as it was on the mere possibility that a party would invoke his ***FifthAmendment*** right, to be premature and granted certiorari relief. [66] What the Rappaport decision did not explain was why the possibility alone would not warrant staying the civil case, given what was at stake for the criminal suspect.

A few years later, however, the same court had an opportunity to expound on the justification for denying a stay in these circumstances. In Eller Media Co. v. Serrano, the appellate court upheld the denial of a request to stay a wrongful death case in which one of the defendants claimed, through his counsel, that he would invoke his ***Fifth*** **[*15]** ***Amendment*** privilege if called to testify because of related criminal charges for manslaughter by culpable

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fellow members accused of setting off a dynamite explosion during a labor strike); In re Wincek, 202 B.R. 161, 164 (Bankr. M.D. Fla. 1996) (individual bankruptcy debtor's written invocation of the ***FifthAmendment*** in his Statement of Income and Expenses in response to request for information concerning his occupation and take home pay).

[58] As happened in one of the infamous McCarthy hearings, a witness might invoke multiple constitutional ***amendments***, along with the Constitution in its entirety, provide his personal commentary on the Constitution's sacred importance, and remark that he was not really declining to answer a question, as part of a valid refusal to testify. See Quinn v. United States, 349 U.S. 155, 180-83 (1955).

[59] Id. at 162-63.

[60] The sufficiency of a witness's ***FifthAmendment*** assertion in the course of a criminal interrogation raises very different issues, and hence, involves a different analysis than what is being discussed here. See, e.g., Jacobs v. Singletary, 952 F.2d 1282, 1291-92 (11th Cir. 1992) (collecting cases, holding that interrogation must cease even if a suspect gives an ambiguous or equivocal invocation, and that "[t]he suspect must only in some manner evidence a refusal to talk further.") (citations and quotations omitted).

[61] Eller Media Co. v. Serrano, 761 So. 2d 464, 466 (Fla. Dist. Ct. App. 2000);Rappaport v. Levy, 696 So. 2d 526, 527 (Fla. Dist. Ct. App. 1997) ("The cases which discuss the effect of a party's claim of ***FifthAmendment*** privilege uniformly involve situations in which the claimant has already invoked the privilege, usually at deposition.") (collecting cases); Fischer v. E.F. Hutton & Co., 463 So. 2d 289, 291 (Fla. Dist. Ct. App. 1984) (denying certiorari regarding order compelling discovery and noting petitioner's failure to raise the objection or file a written response with the objection in response to deposition questioning or request for documents by stating that "[p]etitioner is required to make a specific objection to a particular question and, at that time, assert his ***fifthamendment*** privilege."). The Fischer court went so far as to hold that the defendant's failure to articulate his ***FifthAmendment*** objection to a request for production of documents not only precluded appellate review, but required the defendant to produce the documents requested. Fischer, 463 So. 2d at 291. See also Global Aerospace, Inc. v. Platinum Jet Mgmt., LLC, No. 09-60756-CIV, 2009 WL 2589116, at *1-2 (S.D. Fla. 2009) (collecting Eleventh Circuit authorities that "blanket assertion" of ***FifthAmendment*** privilege cannot justify stay in civil proceedings).

[62] Rappaport, 696 So. 2d at 526.

[63] In fact, the defendant veterinarian in the civil case initiated the criminal complaint against his former business partner. Id.

[64] Id. at 527.

[65] Id.

[66] Id. at 527-28.

negligence. [67] Among other issues, the Eller Media court noted that no one had actually asserted a ***FifthAmendment*** privilege. [68] The court was particularly troubled by what a stay would mean to the civil plaintiffs' case:

Cabrera's parents will be prejudiced by a stay in this case pending the outcome of the criminal prosecution. The statute of limitations on a wrongful death case is two years and will run before the criminal case is tried as scheduled in January 2001, or in October 2002, when the criminal statute of limitations expires. In their affirmative defenses, Eller Media and Garcia have alleged that the negligence of third parties caused the incident in question. However, Cabrera's parents will be precluded from joining these additional parties if Eller Media and Garcia are not compelled to disclose their identity until after the limitations period expires. [69]

That the court considered and ultimately gave deference to the prejudice a stay would impose on the civil plaintiffs is hardly surprising, [70] but the scope of the interests the court describes-the potential loss of claims, including those against future, unknown parties-is worth noting. The prejudices catalogued in Eller Media that precluded the defendant's requested stay were not contemporaneous in the sense that the plaintiffs had demonstrated some increased cost or a loss of available evidence that a stay would entail. They instead related entirely to the potential detrimental impact a stay might have on the plaintiffs' eventual recovery under their claims. In other words, to borrow from pronouncements on the constitutional right of access, a stay in the civil case could have left a wrong without a remedy. [71]

B. The Proper Link

In order to obtain a stay over the civil proceedings based on a ***FifthAmendment*** privilege, the civil defendant must not only claim the right, the defendant must also identify some link between potential criminality and the issues, or questions, or discovery requests that cannot be **[*16]** responded to while exercising the right. [72] In depositions and with interrogatories, this is usually a fairly straight-forward, if not time-consuming, problem: the responding party's claims of privilege are analyzed question-by-question to determine whether the ***FifthAmendment*** privilege applies to each inquiry. [73] Similarly, a ***FifthAmendment*** objection to a request for production of documents requires analysis of the documents described in each request and whether producing such documents could lead to self incrimination. [74] The trial court must make an objective determination regarding the reasonableness of the ***FifthAmendment*** claim in light of the topic of inquiry and the issues in the case. [75] The court must ask whether it is reasonably possible that providing responsive testimony could, in some way, incriminate the defendant in either a pending or a possible

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[67] Eller Media Co. v. Serrano, 761 So. 2d 464, 464 (Fla. Dist. Ct. App. 2000).

[68] Id. at 466.

[69] Id.

[70] Office Depot, Inc. v. Marsh & McLennan Cos., 937 So. 2d 1139, 1140 (Fla. Dist. Ct. App. 2006) (noting trial courts' broad discretion to grant or deny stays in civil proceedings); see also *Eicoff v. Denson, 896 So. 2d 795, 799 (Fla. Dist. Ct. App. 2005).*

[71] See Swain v. Curry, 595 So. 2d 168, 174 (Fla. Dist. Ct. App. 1992).

[72] Urquiza v. Kendall Healthcare Grp., 994 So. 2d 476, 477-78 (Fla. Dist. Ct. App. 2008);DeLeo v. Wachovia Bank, N.A., 946 So. 2d 626, 628 (Fla. Dist. Ct. App. 2007).

[73] Belniak v. McWilliams, 44 So. 3d 1282 (Fla. Dist. Ct. App. 2010) (granting certiorari of overbroad order compelling deponent to provide answers to six "lines" of questioning over ***FifthAmendment*** objection); *Hitchcock v. Proudfoot Consulting Co., 19 So. 3d 1183 (Fla. Dist. Ct. App. 2009)* (trial court departed from essential requirements of law by failing to examine ***FifthAmendment*** objection on question-by-question basis); DeLeo, 946 So. 2d at 628 ("We agree that the trial court was required to analyze each question to which DeLeo objected to determine if the ***FifthAmendment*** privilege applied."); Raass v. Borgia, 644 So. 2d 121, 121 (Fla. Dist. Ct. App. 1994) (granting in part and denying in part petition for certiorari based on individual interrogatories subject to trial court's discovery order).

[74] Boyle v. Buck, 858 So. 2d 391, 393 (Fla. Dist. Ct. App. 2003). The ***FifthAmendment*** privilege applies somewhat less frequently to document requests because the act of producing documents ordinarily carries less of a testimonial aspect to it. See infra Part IV.

[75] DeLeo, 946 So. 2d at 629.

criminal case. [76] If the defendant's response could potentially form "a link in the chain of evidence which might lead to criminal prosecution," then the ***FifthAmendment*** may be invoked [77] and it might be appropriate to stay the civil case.

Sorting real from trivial threats of self-incrimination calls for judicial discretion. [78] Notably, Florida appellate courts have articulated two standards for trial courts to employ in discerning whether a sufficient link to incrimination exists. One expression of the standard would seem to favor a broader application of the ***FifthAmendment*** right, not unlike a presumption of validity, so that the objection will be sustained unless **[*17]** it is "perfectly clear . . . that the witness is mistaken, and that the answer cannot possibly have" an incriminating tendency. [79] On the other hand, there is case law that supports a more restrictive (or, at least, more restrictively worded) standard, where it would be incumbent upon the witness to show a "substantial and real threat of incrimination," as opposed to one that is "merely trifling or imaginary," before availing the right to remain silent in the civil case. [80] In truth, both expressions of the analysis revolve around the same determinative factor: objective reasonableness; the trial court is charged with ascertaining whether the individual's assertion of a ***FifthAmendment*** objection is reasonable under the circumstances. [81]

Of course, whether a litigant's belief of potential criminality is reasonable or not defies any fixed standard or definitive pronouncement. [82] Judicial decisions concerning reasonableness are inherently exercises of discretion of weighing competing factors and circumstances in a given context. [83] Although the concept of reasonableness has been decried as a "notoriously general term" to rely upon in constitutional analysis, [84] its generality imbues it with the flexibility needed for this specific judicial task. Without a crystal ball, a trial judge has little else to rely upon other than standards of reasonableness to measure the true potential for incrimination within the bounds of his or her sound discretion. Here as well, then, this precondition of the civil stay analysis seems inexorably pointed toward engaging in some manner of a balancing test between competing **[*18]** interests.

C. The Proper Length

Finally, Florida civil courts have paid close attention to the length of time a requested stay would need to be in place to accommodate a ***FifthAmendment*** privilege claim. The venerable maxim, "justice delayed is justice denied,"

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[76] Eller Media Co. v. Serrano, 761 So. 2d 464, 466 (Fla. Dist. Ct. App. 2000). See also State v. Mitrani, 19 So. 3d 1065, 1068 (Fla. Dist. Ct. App. 2009) ("The threat of incrimination must be 'substantial and real' and not 'merely trifling or imaginary.'") (quoting United States v. Doe, 465 U.S. 605, 614 n.13 (1964);United States v. Apfelbaum, 445 U.S. 115, 128 (1980)).

[77] Eller Media, 761 So. 2d at 466 (citing Delisi v. Smith, 423 So. 2d 934, 938 (Fla. Dist. Ct. App. 1982));Mitrani, 19 So. 3d at 1068.

[78] DeLisi, 423 So. 2d at 938 (stating that measuring the propriety of a ***FifthAmendment*** objection in a civil case is "a matter which requires the exercise of the sound discretion of the trial court under all the circumstances of the case.").

[79] See Raass v. Borgia, 644 So. 2d 121, 122 (Fla. Dist. Ct. App. 1994) (quoting United States v. Goodwin, 625 F.2d 693, 700-01 (5th Cir. 1980)).

[80] See Marchetti v. United States, 390 U.S. 39, 53 (1968);Belniak v. McWilliams, 44 So. 3d 1282, 1284-85 (Fla. Dist. Ct. App. 2010) (reciting both standards); Mitrani, 19 So. 3d at 1068.

[81] See McKay v. Great Am. Ins. Co., 876 So. 2d 666, 674 (Fla. Dist. Ct. App. 2004) (***FifthAmendment*** objection improper where state had given prosecutorial immunity to defendant. "A litigant may assert the ***FifthAmendment*** privilege when the litigant has reasonable grounds to believe that the response to a discovery request would furnish a link in the chain of evidence needed to prove a crime against the litigant."); O'Neal v. Sun Bank, N.A., 754 So. 2d 170, 171-72 (Fla. Dist. Ct. App. 2000) (civil litigant may use ***FifthAmendment*** privilege when there are reasonable grounds to believe that answering discovery could be used in criminal proceedings against him or her); Rainerman v. Eagle Nat'l Bank of Miami, 541 So. 2d 740, 741 (Fla. Dist. Ct. App. 1989).

[82] On a more basic level, determining whether a potential sanction is truly "criminal" or not, and therefore sufficiently linked to a witness's attempt to invoke the ***FifthAmendment***, is a subject that has generated conflicting holdings from the Supreme Court. See Cheh, supra note 4, at 1384-89.

[83] See New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (in deciding Fourth ***Amendment*** claim against school official's search of student's purse, "what is reasonable depends on the context within which a search takes place.").

[84] Michael R. Dimino, Sr., Police Paternalism: Community Caretaking, Assistance Searches, and Fourth ***Amendment*** Reasonableness, 66 Wash. & Lee L. Rev. 1485, 1499 (2009).

[85] features prominently in this regard. Requests for relatively short durations of time with a finite ending point have generally received more favorable consideration, while protracted, indefinite stays to accommodate ongoing investigations or lengthy criminal proceedings are often rejected. In various reported decisions, courts have refused what would necessarily amount to indeterminate or prolonged stays in cases such as: a termination of parental rights proceeding where the father also faced charges of murdering his child's sibling that could have taken more than a year to try; [86] post-judgment collection proceedings where a key witness asserted her ***FifthAmendment*** right, but there was "nothing in the record to indicate the duration of [the] abatement"; [87] and a breach of contract action against a corporation and an individual guarantor (both of whom were under investigation by the U.S. Department of Justice), where the trial court's stay order had lasted nearly a year. [88] As to this last example, while noting the trial court's discretion to enter stays, Florida's Third District Court of Appeal offered an important facet of the analysis: a stay might be reasonable at first, but "there comes a time when a stay becomes unreasonable under all circumstances." [89]

On the other hand, courts in Florida have shown more indulgence **[*19]** when the requested stay of the civil proceedings would be for a more measured or limited time. Examples of sanctioned durations include: a civil litigant awaiting re- trial on a murder case, where "there is a reasonably foreseeable end in sight for the criminal exposure"; [90] the first nine months of a grand jury's investigation into a company's financial dealings; [91] a stay on mandated accounting during the defendant's pending grand jury investigation for alleged securities fraud; [92] and, in a worker's compensation case, a limited stay regarding the claimant's testimony and a final decision on the merits while criminal charges of worker's compensation fraud were pending against the claimant. [93]

This final precondition for a stay, the proper length, much like the second precondition, hinges on whether the length of time needed to resolve the defendant's criminal proceedings would be "reasonable and finite." [94] Such a standard purposely defies fixed declarations. Thus, civil trial courts have broad discretion and relatively few constraints regarding what the proper length of a stay should be beyond the charge to mind, and then monitor, its duration. This calls for some measure of prediction because neither the defendant nor the officials responsible for investigating and prosecuting the defendant are likely to know the precise length of time the investigation will require or how long the criminal case will take to try. [95] An equally important aspect of this consideration is that it requires due regard for the rights and interests of the plaintiff to proceed expeditiously with his or her civil case, interests that must,

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[85] *J. Sourine Painting, Inc. v. Johnson Paints, Inc., 809 So. 2d 95, 98 (Fla. Dist. Ct. App. 2002)* (quoting adage and noting its application to both civil and criminal cases). This concept is much more than a cliche of aspiration as Judge Harris pointedly reminded the bench in his concurring opinion in *Ritter v. Dep't of Children and Family Servs., 700 So. 2d 804, 806 (Fla. Dist. Ct. App. 1997):* [L]itigants' rights die because of judicial indecision-the property in litigation loses value or is lost due to foreclosure of a prior mortgage, the inability to pursue or collect a debt leads to bankruptcy, or the child involved in the custody dispute is permitted to bond with the wrong parent. It should be the highest aspiration of every judge to see the justice of the cause and, pursuant to the law and the evidence, expeditiously achieve it. "Justice delayed is justice denied" is not merely a slogan; it is a life truism.

[86] C.J. v. Dep't of Children and Families, 756 So. 2d 1108, 1110 (Fla. Dist. Ct. App. 2000).

[87] Kerben v. Intercontinental Bank, 573 So. 2d 976, 979 (Fla. Dist. Ct. App. 1991).

[88] Klein v. Royale Grp., Ltd., 524 So. 2d 1061, 1061 (Fla. Dist. Ct. App. 1988).

[89] Id. at 1062-63.

[90] Brancaccio v. Mediplex Mgmt. of Port St. Lucie, Inc., 711 So. 2d 1206, 1211-12 (Fla. Dist. Ct. App. 1998).

[91] Klein, 524 So. 2d at 1061.

[92] SEC v. Rehtorik, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990).

[93] Elliott-Gentry v. City of Altamonte Springs, OJCC Case No. 02- 39275TGP, Order Staying Proceedings, July 1, 2005 (Fla. Div. of Admin. Hearings, Office of the Judge of Compensation Claims), available at http://www.jcc.state.fl.us/jccdocs20/ORL/Seminole/ 2002/039275/2242311.pdf.

[94] Kerben v. Intercontinental Bank, 573 So. 2d 976, 978 (Fla. Dist. Ct. App. 1991).

[95] Even if investigating law enforcement officers have some idea of their investigation's predicted length, they are generally under no mandate to inform the civil court of their opinions. Cf. Fla. Stat. § 119.071(2)(c)(1) (2010) (exempting criminal intelligence and investigative information from public records disclosure requirements); Fla. R. Crim. P. 3.220(g)(1) (2010) (protecting

the courts remind us, be given weight. [96] Finding where the balance should fall between these interests requires both a global view of what they are and a more honed understanding of their underlying principles.

[*20]

D. Balancing the Stay Factors

The three preconditions outlined are by no means exclusive of other potential concerns, nor are they necessarily the most pragmatic means of categorization for adjudicating stay motions. In fashioning legal standards for when a civil case should be stayed during parallel criminal proceedings, appellate courts in other jurisdictions have identified a variety of specific elements and factors-often as an enumerated list-for their trial courts to consider. [97] A typical example is the catalogue of factors the Alabama Supreme Court established, which calls upon trial courts to weigh:

(1) The interest of the plaintiff in proceeding expeditiously with the civil litigation;

(2) The private interest of the defendant and the burden that the civil proceedings may impose;

(3) The extent that the defendant's ***FifthAmendment*** rights are implicated;

(4) The efficiency of managing judicial resources;

(5) The interests of non-parties to the civil litigation;

(6) The interest of the public in the pending criminal and civil cases;

(7) The status of the criminal case; and

(8) The timing of the motion to stay. [98]

Note that these factors could be grouped, delineated, or sub-divided any number of ways. [99] Regardless of how they are cast, two instructions appear universally throughout all the cases implementing any list of elements for trial courts to consider regarding these motions. First, the trial courts are told to give due consideration to the civil plaintiffs' interest in the expeditious resolution of their cases. [100] Second, **[*21]** irrespective of how many factors a particular jurisdiction chooses to apply, they must be "weighed" or "balanced" according to the facts of the case. [101] In both regards, while Florida has not yet adopted an express list of stay factors for these cases, its law aligns with the crux of our sister states' jurisprudence. That is to say, the three strands I have drawn from Florida case law are guideposts that lead ultimately to a larger balancing inquiry, the same inquiry other courts make within the frameworks of their own analyses, which, among other things, requires consideration of the civil plaintiffs' interests.

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prosecuting attorneys' work product from disclosure under criminal rules of discovery); 5 U.S.C. § 552(c) (2010) (exempting under Federal Freedom of Information Act requested records relate to criminal investigations).

[96] Kerben, 573 So. 2d at 978 (citing Arden Way Assocs. v. Boesky, 660 F. Supp. 1494 (S.D.N.Y. 1987)).

[97] See, e.g., Ex parte Ebbers, 871 So. 2d 776, 789-90 (Ala. 2007) (eight factors can potentially be weighed and balanced); State v. Deal, 740 N.W. 2d 755, 766 (Minn. 2007) (seven factors to balance in deciding civil stay); State ex rel. Stovall v. Meneley, 22 P.3d 124, 130 (Kan. 2001) (applying five factors, including plaintiff's interest in proceeding expeditiously with case, to affirm denial of civil stay); Bell v. Todd, 206 S.W. 3d 86, 94 (Tenn. Ct. App. 2005) (outlining five non- exclusive factors to consider for civil stay motions); Avant! Corp. v. Superior Court, 79 Cal. App. 4th 876, 885 (Cal. Ct. App. 2000) (outlining five factors to consider on request for civil stay due to parallel criminal proceedings); King v. Olympic Pipeline Co., 16 P.3d 45, 52-53 (Wash. Ct. App. 2000) (reviewing federal law, identifying eight factors, including the extent to which the defendant's ***FifthAmendment*** rights are implicated).

[98] Ebbers, 871 So. 2d at 789-90.

[99] Supra text accompanying note 97. See also State ex rel. Wright v. Stucky, 517 S.E.2d 36, 41 n.7 (W. Va. 1999) (noting "there are many permutations of this balancing act" of whether to stay civil proceedings because of a ***FifthAmendment*** claim).

[100] Often that is the first factor listed. See Ebbers, 871 So. 2d at 789- 90; Meneley, 22 P.3d at 138; Avant!, 79 Cal. App. 4th at 887.

[101] See supra text accompanying notes 97 & 99.

What must be balanced? A senior district judge once deadpanned that it is an exercise of balancing competing equities, and that it "can get a little complicated." [102] Although the relative equities are certainly a foremost concern whenever a stay is requested in a civil case (and there are assuredly complexities involved), there is something more at work here. When Florida courts look to the propriety of the ***FifthAmendment***'s claim, or the link between the claim and potential criminality, or the length of the stay that is requested, the asserting party's right to remain silent is, of course, the first point of reference. However, there is also an element of the opposing party's constitutional right of access to the civil court lurking close by. Reframing some of the previous discussion even further into the view of that party, the constitutional issues may be seen more clearly.

First, whether a proper claim has been made can be understood as a preliminary gatekeeping inquiry by considering the underlying purpose for this precondition. Why, one might ask, should it matter whether the civil defendant has formally asserted a ***FifthAmendment*** objection to a pending question, so long as he or she makes clear that they will ultimately refuse to testify in the case? Given the breadth of the ***FifthAmendment***'s historic protection and the potential evils it is supposed to protect against, should not a defendant's representation alone suffice to invoke the full extent of the right's protections?

The answer lies in what such an unfettered invocation could mean to the civil plaintiff's constitutional right of access to the courts. Until the ***FifthAmendment*** right is actually claimed, its precise dimensions within the case are, at best, conjecture, [103] and that is a poor basis for a **[*22]** court to justify staying the plaintiff's right to have its case adjudicated. If a civil defendant fails to make a valid and contemporaneous assertion of his or her ***FifthAmendment*** right in response to a specific inquiry, then, in truth, there is nothing more to consider-that is, nothing to balance-against the right of the civil plaintiff to maintain its cause of action in court, which takes precedence over what is merely a potential, inchoate, and unasserted privilege. That is precisely what occurred in Eller Media, where the court, in essence, did nothing more than weigh what was at stake for the civil defendant who had not actually claimed his ***FifthAmendment*** right against the civil plaintiffs' ability to ultimately obtain redress for their injuries. [104] The plaintiffs' interests prevailed because there was nothing to counter their importance. The outlines of the plaintiffs' constitutional interests may have only been faintly sketched in the Eller Media opinion, but they are present nonetheless, impressions, if you will, of what the constitutional right of meaningful access to the judicial system would entail. [105] Only when one party's constitutional right to remain silent has actually been claimed can a true balancing against the opposing party's constitutional right of access begin with consideration of the second precondition.

A court's determination of whether there exists a reasonable link between the testimony sought and potential incrimination can likewise be understood as part of a process of weighing the substantiality of the defendant's ***FifthAmendment*** right against some countervailing interest. The standards that have come down from the courts are phrased as such. The threat of incrimination from testifying must be "substantial and 'real,'" not "trifling" or "imaginary," for the defendant to avoid obliging its adversary with responsive testimony. [106] This is quintessential balancing terminology, for its presence raises a question: "trifling" as compared to what? Even the slightest possibility that one's testimony might lead to criminal prosecution, however remote that chance may be, would ordinarily be a matter of tremendous importance to litigants who fear the prospect of imprisonment. In criminal cases, this minimal restriction on the ***FifthAmendment***'s exercise balances an unwarranted refusal to testify against the practical necessity that the state must be able to obtain evidence in order to prosecute criminal activity. [107] Criminal courts

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[102] Milton Pollack, "Parallel Civil and Criminal Proceedings," Transferee Judges' Conference, Oct. 17-19, 1989 (reported at 129 F.R.D. 201, 203).

[103] For example, a blanket claim that a defendant will refuse to testify on ***FifthAmendment*** grounds, without more, leaves no room for the possibility that some specific testimony or discovery requested of the defendant may have no real tendency to incriminate, or that the defendant might choose to waive the right in certain lines of less self-incriminating testimony in order to defend against the civil case.

[104] Eller Media Co. v. Serrano, 761 So. 2d 464, 465-67 (Fla. Dist. Ct. App. 2000).

[105] Cf. Chappell v. Rich, 340 F.3d 1279, 1282-83 (11th Cir. 2003). ("access to the courts must be more than merely formal; it must also be adequate, effective, and meaningful.").

[106] See Marchetti v. United States, 390 U.S. 39, 53 (1968); Belniak, 44 So. 3d at 1284-85.

[107] Duckworth v. Eagan, 492 U.S. 195, 206 (1989) (O'Connor, J., concurring).

will not countenance a "fanciful" ***FifthAmendment*** objection because, as the Supreme Court observed in Brown v. Walker, "[e]very good citizen is bound to aid in the **[*23]** enforcement of the law." [108]

The societal interest in prosecuting alleged criminal activity is not apparent in a civil case, and yet the same limitation has come to be applied. [109] Considering the gravity of a witness or litigant's right to be free from self-incrimination in civil court, a forum devoted to civil redress, any barrier to prevent the exercise of the ***FifthAmendment***'s protection (such as a trial court examining, question by question, whether the threat of incrimination is minimal, or all but certain, or something in between) must surely have an independent justification in the proceedings. This justification is found in the apparent counterweight of the civil plaintiff's constitutional right of access to courts. A trivial chance of possibly infringing one person's constitutional right will not justify the certain deprivation of another's. A real threat of self-incrimination, on the other hand, may well warrant some intrusion upon the civil plaintiff's constitutional right of access to the courts, or, at least, support further consideration of other factors implicated in the case, perhaps along the lines of those described in other jurisdictions. Viewed in the guise of a balancing test, the reasonable link precondition holds a readily defensible purpose. It is a safeguard to ensure that civil defendants have something of substance to place into their side of the scales against what already lies in the other.

Finally, the general injunction against limitless stays, as well as the apparent indulgence of motions seeking stays for only a limited duration, could not be anything other than a balancing of interests between the parties. Excessive delay in a civil case must surely foil someone's rights, or else the courts would simply stay every civil case as a matter of course until the parallel criminal proceedings had reached a definitive conclusion. Here again, the civil plaintiff's constitutional right of access all but announces its presence as the justification for each denial of a defendant's motion to stay a civil case; the right of access necessarily encompasses some degree of promptness in the adjudication of claims. [110] An interminable delay to accommodate a ***FifthAmendment*** objection vouchsafes the right to remain silent, true, yet it also effectuates a denial of judicial access. The exercise of one right becomes antithetical to the realization of the other, leaving to the trial court the task of weighing their respective precedence.

When Florida courts decide whether or not to stay civil proceedings to accommodate a ***FifthAmendment*** objection, they are tacitly **[*24]** balancing two competing constitutional rights at three different points. The defendant's constitutional right to remain silent-a right that a defendant must actually assert in response to a real threat of incrimination for a measurable duration-is weighed against the plaintiff's constitutional right of access to the courts to timely adjudicate its claims. This same constitutional struggle will appear again and in even more pronounced ways should the civil case move forward.

IV. Access or Silence in Civil Discovery

Much of the civil litigation process revolves around discovery. In Florida there is a liberal scope of what constitutes permissible discovery in a civil case, the very nature of which necessitates a considerable amount of mutual disclosure from civil litigants. [111] A broad discovery process promotes a more fair and transparent trial, one that hopefully will be free from "surprise, trickery, bluff and legal gymnastics." [112] Mutual disclosure through discovery also furthers the possibility that litigants, if given a free and open view of their opponent's case, might be more inclined

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[108] Brown v. Walker, 161 U.S. 591, 600 (1896).

[109] Belniak v. McWilliams, 44 So. 3d 1282, 1284-85 (Fla. Dist. Ct. App. 2010); Eller Media, 761 So. 2d at 466.

[110] Chappell, 340 F.3d at 1282-83. See also Deboles v. State, 960 So. 2d 899, 900 (Fla. Dist. Ct. App. 2007) (granting mandamus to require trial court to rule on motion that had been pending for two years; "[W]e are concerned that the failure to rule on the motion filed by Mr. Deboles so long ago might impair his right of access to the courts.").

[111] Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 995 (Fla. 1999);Grinnell Corp. v. Palms 2100 Ocean Blvd., Ltd., 924 So. 2d 887, 893 (Fla. Dist. Ct. App. 2006). See also Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1203 (Fed. Cir. 1987) (noting under federal rules of civil procedure, "[t]he scope of civil discovery is broad and requires nearly total mutual disclosure of each party's evidence prior to trial") (citing Hickman v. Taylor, 329 U.S. 495, 507 (1947)).

[112] Surf Drugs, Inc. v. Vermette, 236 So. 2d 108, 111 (Fla. 1970).

to settle their disputes, another laudable goal Florida courts have repeatedly encouraged. [113] When one side withholds information that would otherwise be discoverable, the truth-finding process contemplated by the rules of civil procedure is impeded, as is the opposing party's ability to prepare its case. [114] Thus, the potential sanctions for failing to comply with a Florida court's discovery orders, including striking a party's pleadings or entering an order of contempt, are intentionally severe. [115]

There is, however, another aspect of civil discovery that merits consideration, which could arguably be its most important aspect for purposes of the present discussion. Beyond facilitating access to information, civil discovery fosters another kind of access as well. Most plaintiffs bring their disputes into civil court to avail themselves of the [*25] court's constituted power. [116] Part of that power lies within the Florida Rules of Civil Procedure, which provide the means for taking depositions, securing access to documents, inspecting land, and propounding interrogatories and requests for admission. [117] These discovery procedures, as part of the rules of civil procedure, seek "to secure the just, speedy, and inexpensive determination of every [civil] action." [118]

One could then argue that a litigant not only has a right to present a claim in court, but to use the court's truth-searching powers of discovery to develop that claim. In that light, it would seem to follow that the right to obtain discovery becomes a feature, albeit one of debatable magnitude, of an individual's constitutional right of access to the judicial system. The Supreme Court of Washington reached this very conclusion in Doe v. Puget Sound Blood Center, a difficult case that pitted a blood donor's right of privacy against an injured plaintiff's right to discover how he was infected with contaminated blood. [119] In describing the parameters of the conflicting interests, the Puget Sound court did not equivocate about what the plaintiff's interest in civil discovery entailed:

Plaintiff has a right of access to the courts. In this civil case that right of access includes the right of discovery authorized by the civil rules subject to the limitations contained therein. [] The court rules recognize and implement the right of access. The discovery rules . . . grant a broad right of discovery which is subject to the relatively narrow restrictions of CR 26(c). This broad right of discovery is necessary to ensure access to the party [*26] seeking the discovery. It is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff's claim or a defendant's defense. Thus, the right of access as previously discussed is a general principle, implicated whenever a party seeks discovery. [120]

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[113] Id. See also Royal Caribbean Cruises, Ltd. v. Cox, 974 So. 2d 462, 466 (Fla. Dist. Ct. App. 2008).

[114] Heidt, supra note 7.

[115] See Fla. R. Civ. P. 1.380(b); Channel Components, Inc. v. Am. II Elecs., Inc., 915 So. 2d 1278, 1283-84 (Fla. Dist. Ct. App. 2005).

[116] Florida law generally prohibits trial courts from issuing rulings that are merely advisory, or which would have no practical force or effect. See *Dep't of Revenue v. Kuhnlein, 646 So. 2d 717, 720-21 (Fla. 1994)* (authority to issue purely advisory opinions limited by constitution); *McMullen v. Bennis, 20 So. 3d 890, 892 (Fla. Dist. Ct. App. 2009)* (trial courts are powerless to issue advisory rulings); *Langdon v. State, 947 So. 2d 460, 463 (Fla. Dist. Ct. App. 2006)* (Fletcher, J., concurring) (courts should "avoid legal wheel spinning").

[117] See generally Fla. R. Civ. P. 1.310 and 1.320 (oral and written depositions), 1.340 (interrogatories), 1.350 (productions of documents and things and entry upon land for inspection), 1.351 (subpoena for documents from non-parties), 1.370 (requests for admission).

[118] Fla. R. Civ. P. 1.010. Florida's rules of civil procedure are offspring of the judiciary's powers, adopted and implemented under the exclusive authority of the Florida Supreme Court pursuant to the constitution. See Fla. Const. art. V, § 2(a); TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995).

[119] Doe v. Puget Sound Blood Ctr., 819 P.2d 370, 372 (Wash. 1991) (en banc). It should be noted that the right of access provision in the Washington Constitution is worded more succinctly than the Florida constitution. Compare Wash. Const. art. I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."), with Fla. Const. art. I, § 21 ("The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.").

[120] Puget Sound, 819 P.2d at 374, 376.

No other court has gone quite so far as the Washington Supreme Court in likening every discovery request to an exercise of a constitutional right, [121] but some have indicated at least a tacit level of acceptance for the underlying assumption that the broader right of discovery is, in some way, a component of the constitutional right of access. [122] Indeed, in Florida law, the pure bill of discovery, an antiquated claim from equity jurisprudence, [123] maintains some limited vitality, in part because its abrogation could impinge upon a claimant's constitutional right of access to the courts. [124] A connection exists, however indefinable, between opening courts to resolve claims and keeping them open to engage in discovery. Before exploring that issue more thoroughly in Florida law, some further understanding of the kind of evidence the ***FifthAmendment*** may cover in civil discovery would be beneficial.

[*27]

A. The Contours of Testimonial Evidence

In a typical pre-trial discovery dispute, one party has propounded a request for some form of information-documents, answers to questions, responses to requests for admission [125] -and the party receiving the request, for some reason or another, refuses to furnish the information by making an objection. [126] The court holds a hearing on the issue, usually prompted by either a motion to compel from the propounding party or a motion for protective order from the objecting party, and then issues a ruling. [127] Under the Florida Rules of Civil Procedure, the trial court has a variety of means to fashion an appropriate remedy and to facilitate relevant, proper discovery. [128] Unlike the more common discovery objections, however, the discretion and the sanctioning powers of a civil court to resolve discovery disputes is markedly restrained when confronted with a proper ***FifthAmendment*** objection. [129] The case law that has evolved in this area bears some resemblance to the case law regarding stays.

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[121] More recently, the same court struck down a Washington statute that purported to require medical malpractice plaintiffs to obtain a "certificate of merit" before engaging in civil discovery as violating the right of access to courts. See Putman v. Wenatchee Valley Med. Ctr., P.S., 216 P.3d 374, 376 (Wash. 2009).

[122] See, e.g., Adventist Health Sys./Sunbelt, Inc. v. Hegwood, 569 So. 2d 1295, 1297 (Fla. Dist. Ct. App. 1990) (denial of plaintiff's pure bill of discovery regarding alleged medical malpractice could foreclose her lawsuit, which would amount to "a denial of access to the courts peculiar only to malpractice cases. That is fraught with constitutional problems.") (citing Fla. Const. art. I, § 21); Peter v. Progressive Corp., 986 P.2d 865, 872-73 (Alaska 1999) (noting that appointment of discovery master to oversee civil discovery disputes could be so costly as to infringe upon litigants' state constitutional right of access to courts); Stokes v. 835 N. Washington St., LLC, 784 A.2d 1142, 1149 (Md. Ct. Spec. App. 2001) ("Indeed, a rule denying a party's right to seek an equitable bill of discovery may well violate the party's constitutional right of access to the courts."); Long v. Am. Red Cross, 145 F.R.D. 658, 660 (S.D. Ohio 1993). "On a general level, the interest of an injured plaintiff in discovering information which is relevant . . . is an interest which has long been recognized by the judicial system and which may well be implicit in the Constitution." Id. (citing Puget Sound, 819 P.2d at 360).

[123] When properly pled, a plaintiff who is a putative party in a potential legal action may obtain listed discovery items from defendants named in the bill prior to filing an actual lawsuit for damages. Following the merger of Florida equity and law courts and the adoption of the rules of civil procedure for all civil actions, the bill "has limited use in today's legal environment." See Daniel Morman, The Complaint for a Pure Bill of Discovery a Living, Breathing Modern Day Dinosaur?, 78 Fla. B. J. 50, 54 (Mar. 2004).

[124] Hegwood, 569 So. 2d at 1295, 1297.

[125] Fla. R. Civ. P. 1.280(a) (describing discovery methods).

[126] E.g., Fla. R. Civ. P. 1.340(a) (describing requirements for objections to interrogatories); Fla. R. Civ. P. 1.350(b) (objections to production requests); Fla. R. Civ. P. 1.370(a) (objections to requests for admission); Fla. R. Civ. P. 1.330(d)(1)-(3) (objections during depositions).

[127] See Fla. R. Civ. P. 1.280(c) (protective orders); Fla. R. Civ. P. 1.380(a) (motions to compel).

[128] Fla. R. Civ. P. 1.380(b) (listing various sanctions for failure to comply with order permitting discovery); Fla. R. Civ. P. 1.380(d) (incorporating sanctions for failure to appear for deposition, respond to interrogatories, or permit inspection).

[129] Kastigar v. United States, 406 U.S. 441, 444-45 (1972) ("[T]he power to compel testimony is not absolute . . . . It [the ***FifthAmendment*** privilege] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory . . . ."); Burnette v. Stanton, 751 So. 2d 728, 728-29 (Fla. Dist. Ct. App. 2000) (quashing discovery order that would have compelled civil defendant to answer interrogatories concerning car accident while DUI manslaughter charges were pending).

First, the issue of whether responses to discovery may be compelled through the threat of sanctions in a civil case is preliminarily examined by comparing the questions or requests themselves with the plausible threat that answering them could expose the individual to criminal sanctions. [130] Again, this requires question-by-question consideration of the propounded discovery. [131] In the context of answering interrogatories, the rule has been described that "a court may compel a **[*28]** litigant to answer questions only if it is perfectly clear that the litigant is mistaken in his apprehension and that the answers to the interrogatories cannot possibly have a tendency to incriminate." [132] The same rule applies to oral questioning as well; aside from the imposition of an adverse inference, a civil court is powerless to coerce a party to answer a question over a ***FifthAmendment*** objection if a response could possibly provide an evidentiary link in a potential criminal investigation. [133] The prohibition is absolute, and its violation in civil proceedings could result not only in reversal on appeal, but suppression of the unlawfully coerced testimony, as well as the "fruits" of that testimony, in any subsequent criminal proceedings. [134]

With discovery, however, there arises a critical ***FifthAmendment*** distinction depending on the character of the evidence sought. The ***Amendment***'s text, and hence its protection, is anchored to testimony. [135] The act of testifying, whether orally or in writing, receives the greatest level of protection under the ***FifthAmendment*** because the ***amendment***'s principal aim has always been to prevent inquisitorial coercion of involuntary testimony, a prospect courts liken to the infamous Star Chamber hearings. [136] There is, thus, a demarcation between testimonial answers and non-testimonial, physical evidence requested in civil discovery, the latter remaining generally available to the litigant developing his or her case. [137]

The boundary between testimonial and non-testimonial evidence that has evolved from the Supreme Court over time was summarized in Doe v. United States.: "in order to be testimonial, an accused's communication, explicitly or implicitly, relate to a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." [138] Florida's case law holds similarly, "The ***FifthAmendment*** privilege does not shield every kind of incriminating evidence. Rather, it protects only testimonial or communicative evidence, not real or physical evidence which is not testimonial or communicative in nature." [139] Documents, such as those held by a **[*29]** witness or a party in the course of their business or in a fiduciary capacity, do not normally constitute protected communicative testimony within the ***FifthAmendment***'s ambit. [140] For example, corporate agents refusing to testify in their own individual right could not refuse to comply with a subpoena for corporate records that they would otherwise have a

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See also Sandra Guerra, Between a Rock and a Hard Place: Accommodating the ***FifthAmendment*** Privilege in Civil Forfeiture Cases, 15 Ga. St. U. L. Rev. 555, 561-65 (1999).

[130] DeLeo v. Wachovia Bank, N.A., 946 So. 2d 626, 626 (Fla. Dist. Ct. App. 2007);Eisenstein v. Citizens & S. Nat'l Bank of Fla., 561 So. 2d 1203, 1204 (Fla. Dist. Ct. App. 1990).

[131] Belniak v. McWilliams, 44 So. 3d 1282, 1285 (Fla. Dist. Ct. App. 2010);*Hitchcock v. Proudfoot Consulting Co., 19 So. 3d 1183, 1184 (Fla. Dist. Ct. App. 2009).*

[132] O'Neal v. Sun Bank, N.A., 754 So. 2d 170, 172 (Fla. Dist. Ct. App. 2000);Burnette v. Stanton, 751 So. 2d 728 (Fla. Dist. Ct. App. 2000).

[133] Magid v. Winter, 654 So. 2d 1037, 1038-39 (Fla. Dist. Ct. App. 1995).

[134] Pillsbury Co. v. Conboy, 459 U.S. 248, 281 n.7 (1983) (Blackmun, J., concurring); Maness v. Meyers, 419 U.S. 449, 473-74 (1975) (White, J., concurring).

[135] U.S. Const. amend. V.

[136] United States v. Hubbell, 530 U.S. 27, 34-35 (2000);Schmerber v. California, 384 U.S. 757, 762-64 (1966).

[137] Boyle v. Buck, 858 So. 2d 391, 392-93 (Fla. Dist. Ct. App. 2003).

[138] Doe v. United States, 487 U.S. 201, 210 (1988) (upholding contempt finding against defendant who refused, on ***FifthAmendment*** ground, to execute written directive authorizing foreign banks to release information requested in grand jury investigation).

[139] Boyle, 858 So. 2d at 393.

[140] Braswell v. United States, 487 U.S. 99, 110, 113-14 (1988).

fiduciary responsibility to produce. [141] Likewise, an attorney representing a client in a tax dispute with the IRS could not rely upon his client's ***FifthAmendment*** right and refuse to produce his client's accounting records. [142]

This boundary, though easily stated, is not always easy to find. Pisciotti v. Stephens [143] provides a good example of when the line between protected testimony and non-testimonial records might become blurred. In Pisciotti, a woman served as the personal representative for her deceased parents' estates. [144] When the personal representative's brother discovered some suspicious checks being disbursed, he instituted an adversary proceeding against her in probate court, removed her as the personal representative, and sought to compel her deposition testimony and an accounting of the estates' assets. [145] He also threatened to file a criminal complaint against her, which prompted her to assert her ***FifthAmendment*** right and refuse to either testify at her deposition or provide the accounting in the adversary proceeding. [146] In reversing the trial court's order compelling her responses to the deposition questions, the appellate court reiterated the distinction that the ***FifthAmendment*** protects only testimonial or communicative evidence, not real or physical evidence. [147] The accounting, however, posed a close **[*30]** question about that distinction, which split the Pisciotti panel. [148] Recalling precedent from the Florida First District Court of Appeal, the Pisciotti majority noted that, as to documents, the ***FifthAmendment*** generally extended only to personal papers or those that were held for a purely personal purpose, and did not protect documents held as a fiduciary or as a corporate agent. [149] Notwithstanding the fiduciary nature of a personal representative's financial accounting report, the majority found that such a paper falls more in line with communicative testimony that is shielded by the ***FifthAmendment***, because to hold otherwise would have had the "perverse effect" of compelling the personal representative to disclose the same incriminating evidence that would have been protected in her deposition. [150]

For the dissenting judge in Pisciotti, though, the distinction between compelled deposition testimony and legally mandated bookkeeping warrants different treatment under the ***FifthAmendment***. [151] According to the dissent, the accounting should have been compelled under the Florida Fourth District Court of Appeal's precedent of Wright v. Department of Health & Rehabilitation Services. [152] The Wright case is worth examining because it describes an interesting ripple of the ***FifthAmendment*** privilege against production of documents that have an arguably testimonial character to them. In that case, a professional guardian, who had been removed for exploiting her wards' funds, was jailed for contempt when she refused to prepare a statutorily required accounting, similar to what an estate's

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[141] Id.; *Federated Inst. for Patents & Trademark Registry v. Office of the Att'y Gen., 979 So. 2d 1162, 1165-66 (Fla. Dist. Ct. App. 2008).* However, the corporate agent cannot be compelled, over a ***FifthAmendment*** objection, to testify where the corporate documents are located if they are not already in his or her possession. See Grand Jury Subpoena Dated Apr. 9, 1996 v. Smith, 87 F.3d 1198, 1200 (11th Cir. 1996).

[142] Fisher v. United States, 425 U.S. 391, 400-01 (1976).

[143] Pisciotti v. Stephens, 940 So. 2d 1217 (Fla. Dist. Ct. App. 2006).

[144] Id. at 1219.

[145] Under the Florida Probate Rules, a court may require a removed personal representative to complete a financial accounting form listing the estate's assets, liabilities, and distributions, which the representative must verify under penalty of perjury. See Fla. Prob. R. 5.345 & 5.346.

[146] Pisciotti, 940 So. 2d at 1219.

[147] Id. at 1221. The ***FifthAmendment*** may also be invoked in response to a document request when the very act of producing the documents takes on some incriminating testimonial significance in its own right, apart from any potentially incriminating evidence that may be contained in the documents themselves. United States v. Hubbell, 530 U.S. 27, 36-37 (2000). These situations have been characterized as a "narrow slot" of cases where the government subpoenas a potential criminal defendant for documents that the government cannot identify with any particularity. *Federated Inst. for Patents & Trademark Registry v. Office of the Att'y Gen., 979 So. 2d 1162, 1185 (Fla. Dist. Ct. App. 2008);* In re Grand Jury Subpoena to John Doe, 475 F. Supp. 2d 1175, 1188 (M.D. Fla. 2006).

[148] Pisciotti, 940 So. 2d at 1221.

[149] Id. at 1220-21.

[150] Id. at 1221.

[151] Id.

[152] Wright v. Dep't of Health & Rehab. Servs., 668 So. 2d 661 (Fla. Dist. Ct. App. 1996).

personal representative's accounting would include. [153] Like the representative in Pisciotti, the former guardian asserted her ***FifthAmendment*** privilege against self-incrimination. [154] The Wright court, however, upheld the trial court's contempt order, effectively leaving the civil defendant in jail for trying to exercise her right to remain silent. [155] The court presumably recognized that the accounting had a testimonial aspect to it, but nevertheless upheld the compulsion of the accounting under the Supreme Court's "required records" exception to the ***FifthAmendment***. [156] One who voluntarily assumes a legal duty to prepare an accounting record essentially waives the right to later assert that **[*31]** discharging the duty could lead to self-incrimination. [157] Like other features of the ***FifthAmendment*** in civil litigation, the communicative aspect of writing and preparing a document is not protected as a matter of course; in some circumstances, the right could be trumped by other interests.

B. The Sword and Shield of the ***FifthAmendment***

Just as the type of discovery sought may affect the application of the ***FifthAmendment*** in civil proceedings, who a discovery request is directed to plays an important factor, as well. Although it is usually the case that a defendant or a non- party witness is compelled to assert their ***FifthAmendment*** right in a civil case, the privilege is by no means limited in civil cases to civil defendants or third party witnesses. In a few reported cases, plaintiffs have been allowed to invoke the constitutional right to refuse to testify in their own lawsuits free from adverse discovery sanctions.

Historically this was not the case. Under the so-called "sword and shield" doctrine, a plaintiff could not wage a civil lawsuit while refusing to respond to the defendant's discovery requests by using the "shield" of the ***FifthAmendment*** as if it were a "sword." [158] The result of a plaintiff exercising his or her right to remain silent was invariably to have his or her pleadings stricken or the case dismissed for refusing to comply with the trial court's discovery orders. The distinction between plaintiffs and defendants asserting their ***FifthAmendment*** right was justified on two grounds: first, the inherent unfairness in allowing the plaintiff to obtain discovery while not providing any to the defendant, whose presence in court, unlike the plaintiff's, was presumably involuntary; and second, that the filing of a civil lawsuit governed by the rules of discovery effectively waived the ***FifthAmendment*** right to refuse to respond to discovery requests. [159] Quoting a New York federal district court, the Florida Supreme Court stated:

[*32]

It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense. [160]

The ***Fifth*** Circuit's decision in Wehling v. Columbia Broadcasting System [161] marked something of a turning point for the doctrine in Florida. In Wehling, the owners of Texas trade schools had sued CBS in libel for airing a

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[153] Id. at 662.Florida Statute section 744.511 requires a removed guardian to provide a final report within twenty days of removal.

[154] Id.

[155] Id.

[156] Id. at 663 (citing Shapiro v. United States, 335 U.S. 1 (1948)).

[157] Under the exception these documents, by virtue of their regulatory and mandatory nature, are not truly testimonial because they are created for the benefit of the public, which precludes the assertion of a private privilege by one who is lawfully obligated to create them. See Shapiro, 335 U.S. at 17-18; Goethel v. Lawrence, 599 So. 2d 232, 233 (Fla. Dist. Ct. App. 1992).

[158] See Fassi v. Am. Fire & Cas. Co., 700 So. 2d 51, 52 (Fla. Dist. Ct. App. 1997);Kerben v. Intercontinental Bank, 573 So. 2d 976, 978 (Fla. Dist. Ct. App. 1991) (collecting Florida cases); Rollins Burdick Hunter of N.Y., Inc. v. Euroclassics Ltd., Inc., 502 So. 2d 959, 962 (Fla. Dist. Ct. App. 1987).

[159] Stockham v. Stockham, 168 So. 2d 320, 321 (Fla. 1964); Kerben, 573 So. 2d at 978 (citing Fischer v. E.F. Hutton & Co., Inc., 463 So. 2d 289 (Fla. Dist. Ct. App. 1984));City of St. Petersburg v. Houghton, 362 So. 2d 681, 683-84 (Fla. Dist. Ct. App. 1978).

[160] Stockham, 168 So. 2d at 322 (quoting Indep. Prods. Corp. v. Loew's, Inc., 22 F.R.D. 266, 276-77 (S.D.N.Y. 1958)).

[161] Wehling v. Columbia Broad. Sys., 608 F.2d 1084, 1085 (5th Cir. 1979).

less-than-flattering documentary that charged the owners with using student loan and grant programs to defraud the federal government. [162] When the school owners, who were also under investigation by a federal grand jury, asserted the ***FifthAmendment*** and refused to answer CBS's deposition questions, the district court dismissed their complaint with prejudice as a sanction. [163] The ***Fifth*** Circuit reversed and offered this reasoning:

We believe that dismissing a plaintiff's action with prejudice solely because he exercises his privilege against self-incrimination is constitutionally impermissible. Wehling had, in addition to his ***FifthAmendment*** right to silence, a due process right to a judicial determination of his civil action. When the district court ordered Wehling to answer CBS' questions or suffer dismissal, it forced plaintiff to choose between his silence and his lawsuit. [164]

The court then reframed the discovery sanctions issue as one of minimizing the amount of potential harm between the plaintiff and defendant's respective interests: "When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant." [165]

Two reported Florida appellate decisions have expressed a level of acceptance of the ruling in Wehling. First, in Village Inn Restaurant v. Aridi, where a worker's compensation claimant refused to respond to his employer's deposition questions, the First District Court of Appeal held that some form of sanction would be appropriate, but, in light of **[*33]** Wehling, it need not automatically be the dismissal of the employee's claim. [166] Nine years later, in Brancaccio v. Mediplex Management of Port St. Lucie, Inc., a professional negligence case in which the plaintiff's complaint had been dismissed because of his refusal to provide a presuit statement and deposition, the Fourth District Court of Appeal applied Wehling more forcefully and directed the trial court to stay the civil action until the plaintiff's retrial for murder was concluded, ruling that the sword and shield doctrine "does not inexorably require a dismissal." [167] These two opinions appear to stand alone in Florida's jurisprudence on this issue, and neither court purported to dispense with the sword and shield doctrine in its entirety. Thus, it is unclear whether Wehling supplanted the sword and shield doctrine in Florida or merely marked a temporary relaxation in its application. [168]

Regardless, both views of this doctrine serve to illustrate how the constitutional right of access can be implicated when a ***FifthAmendment*** objection is made to a civil discovery request. For the courts applying the sword and shield doctrine, the reasons they espouse appear to revolve, in some degree, around the larger right of constitutional access as much as anything else. Seeing this simply requires a shift in focus. The principal actor holding the right becomes the civil defendant, who has a constitutional right of due process throughout the proceedings, and, arguably, a separate constitutional right to have the justice of his opponent's claim administered without denial or delay. [169] No less than plaintiffs, defendants who are called into civil court are entitled to avail themselves of the procedural rules of discovery. And not infrequently it is the civil defendant clamoring for the earliest trial or a final hearing to

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[162] Id.

[163] Id.

[164] Id. at 1087-88.

[165] Id. at 1088.

[166] Vill. Inn Rest. v. Aridi, 543 So. 2d 778, 782 (Fla. Dist. Ct. App. 1989).

[167] Brancaccio v. Mediplex Mgmt. of Port St. Lucie, Inc., 711 So. 2d 1206, 1211 (Fla. Dist. Ct. App. 1998).

[168] More than likely the latter, judging from the number of case opinions released since Wehling that continue to apply the doctrine. See, e.g., Fassi, 700 So. 2d at 52; Kerben v. Intercontinental Bank, 573 So. 2d 976, 978 (Fla. Dist. Ct. App. 1991); Rollins Burdick Hunter of N.Y., Inc. v. Euroclassics Ltd., 502 So. 2d 959, 962 (Fla. Dist. Ct. App. 1987). See also Boys & Girls Club of Marion County, Inc. v. J.A., 22 So. 3d 855, 856 (Fla. Dist. Ct. App. 2009) (Griffin, J., concurring) (in certiorari proceeding of discovery order, commenting that the law is "well settled" that a civil plaintiff "is not entitled to both his silence and his lawsuit").

[169] Cf. Andrews, supra note 39, at 593-94 (noting disagreement among courts as to whether the right of access ends upon the filing of a complaint or extends throughout the course of civil litigation). Andrews argues for the more narrow view, albeit without this specific issue in mind, but notes the attendant requirement of affording constitutional due process throughout court proceedings once initial access has been granted. Id. at 645-47. There is, to use her words, "a good fit" between the right of access and the right of due process the courts must afford in judicial proceedings. Id. at 647.

dispense with what may be perceived as a frivolous lawsuit. Hindering that party's ability to **[*34]** develop and prove its defense or delaying an ultimate resolution of the case may indeed be "'uneven justice'" that warrants some leveling of the constitutional ground between the parties. [170]

Yet, it is within the admittedly unique holdings of Wehling, Aridi, and Brancaccio that we clearly see the right of access emerging as an issue within this niche of civil discovery law. The analysis in Wehling illustrates its prominence almost to the point of being blunt. The trial court's dismissal of Wehling's lawsuit was not improper because of a misapplied legal standard or an incorrect conclusion drawn from the plaintiff's alleged facts; rather it was "constitutionally impermissible" because it violated the plaintiff's rights of due process to have a "judicial determination of his civil action." [171] According to the Wehling court, the plaintiff should never have been forced "to choose between his silence and his lawsuit" as a matter of constitutional imperative. [172] The trial court's powers to sanction discovery violations were bounded not only by the ***FifthAmendment***, but by the additional constitutional directive to provide meaningful access to the courts.

V. The Effects of Asserting the Right to Remain Silent in a Civil Trial

We turn now to the effect of the ***FifthAmendment*** in civil law where the right of access may well loom the largest: how the right to remain silent affects the merits of a civil case. Assuming a civil action proceeds and the defendant's refusal to testify under the ***FifthAmendment*** does not yield significant discovery sanctions, the landscape of the case becomes remarkably altered. One could conceive of any number of repercussions a defendant's invocation of the right to remain silent might have on the merits of the plaintiff's claims. [173] Two principal ones are discussed here.

A. Pragmatic Effects

First and perhaps most obviously, a defendant who exercises the right to remain silent is placed at a significant strategic disadvantage before the finder of fact in the civil case. In order to avail himself or herself of the constitutional right, the defendant, confronted by his or her adversary, must remain silent; however the plaintiff, unconstrained by the prohibitions present in criminal proceedings, is afforded the **[*35]** opportunity to paint the defendant's actions in the worst possible light. The defendant will be unable to say anything to counter, or disprove, or mitigate the plaintiff's charges. Such a muted response may lend credence to the opposing party's claims, for, as Justice Brandeis once remarked, "[s]ilence is often evidence of the most persuasive character." [174] Yet the defendant's quandary is not just the necessity to remain silent, which could be damaging enough in its own right. A civil jury will usually be allowed to hear the defendant's spoken assertion of the constitutional right to remain silent, [175] a prompt that could tacitly link the prospect of potential criminality to the defendant's actions. And again, unlike criminal proceedings, there is no outright prohibition against openly commenting on a civil litigant's assertion of the right to refuse to testify, leaving advocates and parties more or less free to expound on the fact that their opponent is claiming a right against self-incrimination, and all that implies.

As damaging as such pragmatic considerations could be to the tactical presentation of a civil defense, there is also a substantive legal consequence that the ***FifthAmendment***'s invocation carries with respect to the merits of a plaintiff's claims. This second effect, and the constitutional access issues it implicates, is examined next.

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[170] Stockham v. Stockham, 168 So. 2d 320, 322 (Fla. 1964).

[171] Wehling, 608 F.2d at 1087-88 (emphasis added).

[172] Id. at 1088.

[173] Heidt, supra note 7; infra text accompanying note 175.

[174] United States, ex rel. Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923).

[175] Fraser v. Sec. & Inv. Corp., 615 So. 2d 841 (Fla. Dist. Ct. App. 1993);Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471, 1480- 81 (8th Cir. 1987); Cf. Wilson v. Misko, 508 N.W. 2d 238, 253 (Neb. 1993);Kramer v. Levitt, 558 A.2d 760, 763, 766-67 (Md. Ct. Spec. App. 1989) (both cases holding that requests for admissions and the defendant's ***FifthAmendment*** responses could be read to the jury). Note, however, in a somewhat unique bailment case, the Fourth District held that a plaintiff could not call a non-party witness for the sole purpose of having him assert his ***FifthAmendment*** privilege aloud before the jury. Ins. Co. of Pa. v. Estate of Guzman, 421 So. 2d 597, 603 (Fla. Dist. Ct. App. 1982). The Guzman court's reversal seemed to turn on the fact that the witness was not a party to the civil case. Id. at 603-04.

B. The Adverse Inference

A defendant's assertion of the ***FifthAmendment*** in a civil case carries one vital legal ramification that may drive the ultimate adjudication of the case's merits. In Florida, as in many jurisdictions, the finder of fact in a civil case may draw an adverse inference from the defendant's silence and permissibly assume that the defendant's response, had he or she answered a question or provided requested discovery, would have indeed contained unfavorable, damaging, or incriminating evidence. [176] Courts and commentators have advanced a **[*36]** variety of justifications for the inference: it derives from "'common sense'" that people will speak in their own defense when faced with a false accusation; it discourages frivolous invocations of the privilege; it fosters the ultimate search for truth. [177] Employing a familiar metaphor in its review of a contempt order arising out of an IRS proceeding, the Supreme Court observed that the ***FifthAmendment*** privilege is a shield, not a sword "whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." [178] In Florida law, the Fourth District Court of Appeal offered a fairly succinct justification for the inference in Fraser v. Security & Investment Corp.: "Such a rule is both logical and utilitarian. A party may not trample upon the rights of others and then escape the consequences by invoking a constitutional privilege-at least not in a civil setting." [179]

The effect of the adverse inference is not without limits. For example, under federal law, a court may not enter summary judgment or dismiss a complaint based solely on a party's assertion of the ***FifthAmendment*** and the adverse inference against the litigant's silence. [180] This follows from the basic proposition that whatever inference or persuasiveness it may give rise to, silence, by itself, is not a substitute for evidence. [181] Nor has any reported Florida decision upheld adjudication in favor of a plaintiff's claim absent some evidence in addition to the defendant's ***FifthAmendment*** objection. [182]

[*37]

Still, nowhere else in this area of the law is the contrast between civil and criminal proceedings more stark. Drawing an inference against a defendant who asserts the right to remain silent would be the complete antithesis of the law in criminal proceedings. [183] Take the same defendant who raises a ***FifthAmendment*** objection to the same questions under the same set of facts; a substantial evidentiary inference in the plaintiff's favor arises in the

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[176] See Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976);Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1304 (11th Cir. 2009) (citing United States v. White, 589 F.2d 1283, 1287 (5th Cir. 1979)); Arango v. U.S. Dep't of Treasury, 115 F.3d 922, 926 n.10 (11th Cir. 1997);Atlas v. Atlas, 708 So. 2d 296, 297 n.1, 299 (Fla. Dist. Ct. App. 1998); Fraser, 615 So. 2d at 842.

[177] See Baxter, 425 U.S. at 319 ("[The ***FifthAmendment***] has little to do with a fair trial and derogates rather than improves the chances for accurate decisions."); Charles H. Rabon, Jr., Evening the Odds in Civil Litigation: A Proposed Methodology for Using Adverse Inferences when Nonparty Witnesses Invoke the ***FifthAmendment***, 42 Vand. L. Rev. 507, 536-48 (1989) (collecting authorities); Katharine M. Traylor, Constitutional Law-A Reexamination of the Evidentiary Weight of Adverse Inferences Drawn from an Employee's Invocation of His ***FifthAmendment*** Silence-Harmon v. Mifflin Cnty. Sch. Dist., 713 A.2d 620 (Pa. 1998), 73 Temp. L. Rev. 379, 385-92 (2000) (reciting Pennsylvania authorities).

[178] United States v. Rylander, 460 U.S. 752, 757-58 (1983).

[179] Fraser, 615 So. 2d at 842.

[180] Eagle Hosp., 561 F.3d at 1304; United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991);FTC v. Transnet Wireless Corp., 506 F. Supp. 2d 1247, 1252 n.4 (S.D. Fla. 2007).

[181] Rylander, 460 U.S. at 758 (The ***FifthAmendment*** "has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production."). See also 8 John H. Wigmore, Wigmore on Evidence § 2272, at 429 n.14 (McNaughton ed. 1961) (collecting cases).

[182] Cf. Atlas v. Atlas, 708 So. 2d 296, 297 n.1, 299 (Fla. Dist. Ct. App. 1998) (affirming alimony modification and contempt order against former husband where, in addition to asserting his ***FifthAmendment*** privilege regarding his financial status, he had exhibited a pattern of failing to pay support obligations and then satisfying purge provisions of prior contempt orders at the "last minute" before incarceration).

[183] See Fla. Crim. Jury Inst. 2.1 (the instruction is given at the defendant's request. "In every criminal proceeding a defendant has the absolute right to remain silent. At no time is it the duty of a defendant to prove [his or her] innocence. From the exercise of a defendant's right to remain silent, a jury is not permitted to draw any inference of guilt, and the fact that a defendant

civil case, while the jury in the criminal trial would be admonished not to consider the objection at all. Given the tactical advantages of what a defendant's assertion of the ***FifthAmendment*** objection could mean for a civil plaintiff's case, why is an adverse inference even needed? What further ends does it serve? Indeed, why not let the civil fact-finder draw its conclusions from a point of neutrality and balanced consideration, weighing the defendant's refusal to testify in whatever manner deemed appropriate in the light of all the other evidence? [184]

The short answer, according to some courts, is that there is simply more at stake in the criminal proceedings. [185] The ***FifthAmendment*** safeguards the right to be free from the threat of state-coerced incrimination. [186] That protection necessarily precludes any adverse criminal penalties from the exercise of the right. In a civil case, on the other hand, applying an adverse legal assumption is permissible, perhaps even necessary, because the ***FifthAmendment***'s principal aim is "to protect individuals from criminal, not civil liability." [187] As the Eleventh Circuit remarked in affirming a default judgment sanction, in a civil case, unlike a criminal case, "the decision to invoke the ***FifthAmendment*** does not have to be consequence-free." [188]

This may strike one as somewhat tautological, though; in essence, the inference is countenanced in civil proceedings because the proceedings are not criminal. Not only is this unsatisfying logically, such a justification fails to account for the relatively wide scope of non-criminal legal repercussions the courts have prohibited in various ***Fifth*** **[*38]** ***Amendment*** cases. [189] A more thoughtful answer to the question of why adverse legal inferences arise in civil cases may be found by focusing on the rights and interests of the other party affected by the ***FifthAmendment*** objection in a civil case. For the same reason that the civil case would not be automatically stayed because of a defendant's ***FifthAmendment*** privilege, the justification for the inference may also rest on the uneven status of the civil plaintiff in contrast to the government in a criminal prosecution. The Supreme Court in Mitchell v. United States pointed out the importance of this difference in upholding the use of adverse inferences in civil proceedings:

In ordinary civil cases, the party confronted with the invocation of the privilege by the opposing side has no capacity to avoid it, say, by offering immunity from prosecution. The rule allowing invocation of the privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed. [190]

The final phrase of this part of the opinion is especially noteworthy. The adverse inference comports with an "accommodation" of the right to remain silent that allows the civil litigation to proceed. The extent of the inference is prophylactic; or, as one district court characterized it, it is "necessarily fluid in light of the other evidence presented and may in reality prove quite limited" to the case. [191] But whatever its extent, the inference is an aid to help define and draw a line around competing interests: the right to remain silent, on the one hand, and having the civil litigation proceed, on the other. Accommodation takes on a larger meaning here with the inference minimizing the detriment that the defendant's refusal to testify inflicts upon the civil plaintiff. That detriment is unique to civil proceedings because the civil plaintiff had a constitutionally protected interest to have its case heard, which the defendant's refusal to testify undermines. Accommodation, in short, becomes the means of balancing the right of access to the court.

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did not take the witness stand must not influence your verdict in any manner whatsoever."); Isaacs v. Head, 300 F.3d 1232, 1270 (11th Cir. 2002).

[184] This question assumes particular significance when instructing a civil jury about the inference they may (or may not) make. See infra Part V.C.

[185] Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976).

[186] See supra Part II.A.

[187] Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 566 (5th Cir. 1987).

[188] Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc., 561 F.3d 1298, 1304 (11th Cir. 2009).

[189] See supra text accompanying notes 27-31.

[190] Mitchell v. United States, 526 U.S. 314, 328 (1999).

[191] Sec. & Exch. Comm'n v. Monterosso, 746 F. Supp. 2d 1253, 1263 (S.D. Fla. 2010). See also LiButti v. United States, 107 F.3d 110, 124-25 (2d Cir. 1997) (discussing applicability and weight of adverse inference in civil case).

A case from the ***Fifth*** Circuit further illustrates this point. In Federal Savings & Loan Insurance Corp. v. Dixon, the receiver of a failed savings and loan association sued several of the association's former officers for alleged fraud and misappropriation of the association's **[*39]** funds. [192] The receiver sought and eventually obtained a temporary restraining order and preliminary injunction against the defendants that froze their personal assets. [193] On appeal, the officers, who were also subjects of a pending criminal prosecution, argued that the trial court had improperly used their refusal to testify against them in entering its injunction orders. [194] While recognizing the somewhat extraordinary extent of the trial court's injunction-a freeze order, which one defendant complained would result in the loss of his house- the ***Fifth*** Circuit nevertheless affirmed.

The defendants allege that they have failed to cooperate because they must invoke their ***fifthamendment*** right not to incriminate themselves. This ***fifthamendment*** right serves to protect individuals from criminal, not civil, liability. The district court in a civil case so crippled by the ***fifthamendment*** as this one, must balance the defendant's rights not to incriminate themselves against the plaintiff's right to a meaningful remedy. Precedent supports the trial court's inference that the defendant's testimony, if provided, would have been adverse to each of them. [195]

Dixon's instruction to balance the right to remain silent against the plaintiff's right to "a meaningful remedy" (a term courts frequently use to describe the constitutional right of access to courts), [196] is followed in the very next sentence by an affirmation of the use of adverse inferences against a defendant. The inference here becomes a tool in the task of balancing these competing constitutional rights.

Linking the adverse inference to the constitutional right of access also explains the inference's presence in Florida law as well. While the appellate court in Fraser never expounded on precisely which rights were being "trampled" when the defendant asserted his ***FifthAmendment*** right to remain silent, such strident language resonates from the same nerve that was touched in Mitchell and Dixon. A defendant's refusal to testify when called upon in civil court, in and of itself, deprives the plaintiff not only of the testimony he or she would have been entitled to, but, more fundamentally, of a full hearing and a **[*40]** complete consideration of otherwise admissible evidence in the case. [197] Without some adverse inference in the civil case, according to Fraser, the defendant avoids any consequence stemming from that deprivation, [198] which results in a distorted and discordant balance between the right to remain silent and the right of access that the ***FifthAmendment*** does not require.

C. Instructing a Civil Jury

How to instruct a jury or, indeed, whether to instruct a jury at all, regarding the adverse inference raises a final consideration about the effect of a ***FifthAmendment*** objection in a civil case. In Florida, there does not appear to be decisional guidance that addresses the propriety of any specific civil jury instruction concerning a party's assertion of the ***FifthAmendment*** right to refuse to testify. [199] Courts throughout the country have upheld a variety of instructions depending on the circumstances. In several states, relatively terse instructions have been allowed that simply

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[192] Dixon, 835 F.2d at 556.

[193] Id. at 556-57. The circuit court conceded that this was an unusual remedy to fashion within a preliminary injunction, it really being more in the nature of a prejudgment attachment. Id. at 559-60.

[194] Id. at 559.

[195] Id. at 565 n.2, 566 (internal quotations and citations omitted).

[196] See, e.g., Fiser v. Dell Computer Corp., 188 P.3d 1215, 1220 (N.M. 2008);Cash Am. Int'l, Inc. v. Bennett, 35 S.W.3d 12, 21 (Tex. 2000);*Sorrell v. Thevenir, 633 N.E.2d 504, 513 (Ohio 1994)*;Chappell v. Rich, 340 F.3d 1279, 1282 (11th Cir. 2003).

[197] See Fraser v. Sec. & Inv. Corp., 615 So. 2d 841, 842 (Fla. Dist. Ct. App. 1993).

[198] Id.

[199] See School Bd. of Orange County v. Coffey, 524 So. 2d 1052, 1053 (Fla. Dist. Ct. App. 1988), which addresses one Florida court's civil jury instruction relating to a non-party witness' assertion of the ***FifthAmendment***, but not in the context of whether his assertion could create an adverse inference. The case involved a negligent retention and supervision claim against a school board and superintendent regarding the employment of a teacher who sexually abused a student. Id. Because the teacher's acts were apparently undisputed, the plaintiff was not allowed to call the teacher as a witness before the jury solely for the purpose of having him assert the ***FifthAmendment***. Id. The appellate court affirmed the trial court's instruction to the jury, which, from

inform the members of the jury that they may draw an adverse or negative inference against the defendant if the defendant (or, in some cases, the corporate defendant's employees or agents) asserts his or her ***FifthAmendment*** right. [200] Other instructions have been more nuanced, such as one upheld by the U.S. Third Circuit Court of Appeals, where the trial court explained to the jury the constitutional right of a witness to refuse to testify and then instructed the jury members that they may, but need not, infer that the witness's answers would have been adverse to his interests. [201] One Mississippi appellate court, reviewing a wrongful death case where a non-party witness refused to testify, upheld the trial court's instruction that the jury could **[*41]** draw "whatever conclusion you believe proper" from the witness's silence. [202]

Perhaps Florida's civil trial courts should exercise their own silence on this point and heed the Supreme Court's warning about judicial commentary on the ***FifthAmendment*** in criminal cases: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another." [203] Since civil litigants may remark on their adversary's silence, it could be argued that one party's assertion of the ***FifthAmendment*** in a civil case simply falls under one of the several factors regarding that witness's believability for the jury to weigh in accordance with the standard civil jury instruction. [204] Under such a laissez faire view, the fact that the objection was made becomes relegated to the status of any other evidentiary fact for the jury's deliberations on the evidence. [205] If the assertion truly holds the same status as any other evidence, perhaps jurors ought to be free to apply the fact that a witness has refused to testify however they see fit. The ***FifthAmendment*** objection might propel the entire verdict, or it might be ignored completely, or its effect might lie somewhere in between these two poles of persuasiveness.

On the other hand, failing to inform the jury of the adverse inference that may be drawn from the defendant's silence arguably deprives the plaintiff's case of the legal effect the courts have uniformly held may be applied, in addition to depriving the plaintiff of the defendant's testimony. It leaves the plaintiff in an unfair and unbalanced legal position that Mitchell and Dixon indicate the inference could rectify. [206] **[*42]** The lack of a clear instruction also leaves the jurors with a difficult puzzle to solve: how to consider, as they must, all of the factors of a witness's believability, including his or her silence, without impermissibly guessing what that witness's testimony might have been. [207] This is a hard enough temptation for most people to avoid even without the enticement of a

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what the opinion reports, informed the jury that the court had precluded counsel from asking the teacher about the specific instances based on the witness' constitutional rights. Id.

[200] See, e.g., Alderson v. Bonner, 132 P.3d 1261, 1272 (Idaho Ct. App. 2006);Andrew Corothers, M.D., P.C. v. Ins. Cos. Represented by Bruno, Gerbino & Soriano, LLP, 888 N.Y.S.2d 372, 382 (N.Y. Civ. Ct. 2009);Levine v. March, 266 S.W.3d 426, 442-44 (Tenn. Ct. App. 2007).

[201] Rad Servs., Inc. v. Aetna Cas. & Sur. Co., 808 F.2d 271, 277 (3d Cir. 1986).

[202] Gibson v. Wright, 870 So. 2d 1250, 1260 (Miss. Ct. App. 2004). Another potential issue that has not yet been addressed in any reported Florida decision involves the effect of a defendant's assertion of the ***FifthAmendment*** in response to requests for admission, a discovery device which ordinarily requires some definitive response within thirty days of service, failing which the requests are automatically deemed admitted. See Fla. R. Civ. P. 1.370. No compelling reason comes to mind for treating a timely, properly asserted ***FifthAmendment*** objection to a request for admission any differently from how the same response to a question on examination or an interrogatory would be treated. That is essentially the conclusion that was reached by two courts in Maryland and Nebraska. See Kramer v. Levitt, 558 A.2d 760, 766-67 (Md. Ct. Spec. App. 1989);Wilson v. Misko, 508 N.W.2d 238, 253 (Neb. 1993). In both cases, the courts held that the proper procedure would be to have the requests read into evidence, followed immediately by the responding party's ***FifthAmendment*** objection, followed then by an explanation of the adverse legal inference that could be drawn from that objection. See Kramer, 558 A.2d at 766-67; Wilson, 508 N.W. 2d at 253.

[203] Griffin, 380 U.S. at 614.

[204] See, e.g., Fla. Std. Jury Inst. (Civ.) 601.2(a) (listing factors jury may consider regarding the believability of any witness).

[205] See, e.g., Rad Servs., 808 F.2d at 277; Alderson, 132 P.3d at 1272; Corothers, 888 N.Y. S.2d at 382; Levine, 266 S.W.3d at 442-44.

[206] Mitchell v. United States, 526 U.S. 314, 328 (1999); Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.3d 554, 566 (5th Cir. 1987).

[207] See, e.g., Fla. Std. Jury Inst. (Civ) 601.1 ("You may draw reasonable inferences from the evidence. But you should not guess about things that were not covered here.").

self-incrimination objection. [208] An instruction along the lines of the Third Circuit's may be necessary, if nothing else, to eliminate the potential for confusion and to fully instruct the jury on the law when a party asserts his or her constitutional right to remain silent in a civil trial. [209]

VI. Conclusion

Silence can mean many things. It can be benign or oppressive, restful or restive, innocent or malevolent, depending on one's view and temperament. It is seldom ignored; [210] certainly not in a civil lawsuit when an individual, charged with allegations of wrongdoing and demands for compensation, chooses silence over self-incrimination.

Claiming the right to remain silent in a civil case can make something of an uproar throughout the course of the proceedings, stirring procedural, evidentiary, equitable, and constitutional issues into conflict, only a few of which have been touched upon in this Article. It is these competing constitutional interests that need the closest attention when the ***FifthAmendment*** privilege is asserted during civil proceedings because its assertion raises the stakes on both sides of the dispute. A defendant's right to remain silent might mean effectively closing the courthouse doors to a civil plaintiff before a hearing on the merits is ever held. Conversely, protecting the plaintiff's right of access to the courts and their procedures could very well mean inflicting [*43] serious and tangible harm against the defendant who would exercise his or her ***FifthAmendment*** right. The constitutional implications of the problem are, in truth, reciprocal.

Where, then, lies the line between unlawful compulsion against one party's right to remain silent and infringement of another party's right of access to the court? Drawing it inescapably involves a question of judgment. [211] An elusive definition of what the right of access necessarily entails, or pinpointing its source in federal jurisprudence, makes the work no easier. But if a court fails to recognize the full breadth of what is at issue when these interests collide in civil litigation, any decision it renders will be imprecise. Striking the right balance requires acknowledgment of both constitutional rights.

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[208] See Dale A. Nance, Adverse Inferences About Adverse Inferences: Restructuring Judicial Roles for Responding to Evidence Tampering by Parties to Litigation, 90 B.U. L. Rev. 1089, 1102 (2010) (positing that "the juror who accepts the adverse inference argument may well be imposing poetic justice, meaning a kind of justice that does not implement . . . the niceties of proof. This poetic justice is achieved by adjusting the burden of persuasion") (internal quotations and citations omitted). Cf. Macias v. State, 515 So. 2d 206, 210 (Fla. 1987) (Barkett, J., dissenting) (noting that, in a ***FifthAmendment*** objection by the defendant against providing a voice exemplar or performing field sobriety test during trial, the defendant may feel compelled to explain the performance, or, if unable to perform at trial, to testify to avoid speculation by the jury as to the reasons for the inability).

[209] See Rad Servs., 808 F.3d at 277.

[210] As Thoreau famously observed, silence is audible to all men. Henry David Thoreau, Journal of Henry David Thoreau, vol. I, at 64 (1962).

[211] McKune v. Lile, 536 U.S. 24, 41 (2002).

A Civil Litigator's Guide to the Privilege Against Self-incrimination in Florida's State and Federal Courts

by Marisa E. Rosen

When Hal Litchford reviewed decisional trends concerning the privilege against compelled self-incrimination in civil litigation for The Florida Bar *Journal* in 1983,[1] the invocation of that privilege was an infrequent concern to many civil practitioners. On the rare occasion the privilege was asserted in civil proceedings, the effect depended on which party asserted it. At the time, the Florida Supreme Court had a precedent of automatic dismissal of the plaintiff's claims when the plaintiff asserted the privilege.[2] Such consequences were often prefaced with the tenet that a litigant was not entitled to both silence and a lawsuit.[3]

In 1983, the constitutionality of the various consequences of asserting the privilege had been recently examined by the Fifth Circuit Court of Appeals in the landmark decision *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979). In *Wehling*, the predecessor court to the 11th Circuit Court of Appeals disapproved of the practice of automatic dismissal of complaints or claims upon the plaintiff's exercise of the privilege, and directed district courts to balance the competing interests of the litigants to determine a "less burdensome" remedy to reduce the prejudice caused by the privilege.[4]

Thirty years later, the assertion of the privilege against self-incrimination in a civil proceeding has lost its novelty, owing largely to a series of highly publicized lawsuits resulting from infamous corporate scandals.[5] Yet, the repercussions of asserting one's right to silence — legally and culturally — have not diminished greatly. It remains true that invoking the privilege against self-incrimination, or "taking the Fifth," may subject parties to adverse consequences in a civil action. The appropriate remedies (or sanctions, depending on your party affiliation) for a witness' invocation of the privilege are influenced, but no longer determined, by whether the witness invoking the privilege is a plaintiff, defendant, or nonparty.

While the basic rationale guiding the courts' handling of the invocation of the privilege has not changed significantly in the interim, the ramifications of the privilege have continued to emerge and, among jurisdictions, diverge. This article focuses on the current standards and practices with respect to the invocation of the privilege against compelled self-incrimination in civil proceedings in Florida's state and federal courts, calling attention to where the standards and practices differ and which issues remain unsettled.[6]

Basic Overview of the Privilege Against Self-incrimination

The Fifth Amendment to the U.S. Constitution and Fla. Const. art. I, §9 prohibit a natural person[7] from being compelled in any criminal case to be a witness against himself or herself.[8] These constitutional mandates protect one from compelled self-incrimination in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,"[9] whether the inculpation arises through oral or written testimony or the production of documents in one's possession.[10] However, the privilege is not absolute.

The privilege against self-incrimination may be properly invoked to justify withholding evidence where the evidence meets three criteria: It is compelled,[11] testimonial,[12] and incriminating.[13] The witness has the obligation to assert the privilege contemporaneously to the questioning.[14] One may not assert the privilege unless the testimony solicited is realistically self-incriminating, meaning there must be

reasonable grounds to believe that the testimony would furnish a link in the chain of evidence needed to prove a crime.[15] It does not shield responses that may lead to civil liability or may be embarrassing.[16]

A blanket assertion of the privilege against self-incrimination is insufficient to secure the protections of the privilege.[17] Rather, the witness must raise a specific objection to a particular question or document.[18] Though it is the witness' burden to claim the privilege, the judge ultimately decides whether the privilege is applicable.[19] In doing so, the court must assess the reasonableness of the privilege in relation to each question.[20] The failure of the witness to raise particularized objections, or the judge to evaluate the validity of the privilege, to each objectionable inquiry has been a common basis for reversal by Florida's appellate courts.[21]

Since the U.S. Supreme Court mandated in 1968 that the assertion of the Fifth Amendment privilege cannot be "costly" or "unduly burdensome," certain remedies have been recognized as improper punishment for the exercise of one's constitutional rights.[22] For example, the automatic entry of an adverse judgment due solely to the assertion of the privilege has been held impermissibly burdensome and, thus, unconstitutional under Florida and federal law.[23] The discretion of courts and legislative bodies to fashion a suitable remedy is constrained by the constitutional guarantees protecting individuals participating in a civil proceeding.

Invocation by the Plaintiff

The privilege against self-incrimination continues to have the most significant ramifications in civil litigation when it is invoked by the party seeking affirmative relief, typically the plaintiff. Yet, the remedies awarded to alleviate the prejudice caused by a plaintiff's assertion of the privilege are no longer invariably harsher than those awarded for a defendant's assertion of the privilege.

When the plaintiff invoked the privilege in civil litigation 30 years ago, the defendant's entitlement to a dismissal of the plaintiff's claim was "automatic" in Florida and nearly automatic in other jurisdictions.[24] Florida courts have since retreated from a practice of automatic dismissal.[25] Though it remains an appropriate sanction in some cases, such as when a plaintiff's claim of privilege prevents otherwise proper discovery, dismissal is no longer routine.[26]

Courts' historically harsher treatment of the plaintiff's assertion of the privilege reflects the well-established "sword and shield" doctrine. The sword and shield doctrine reasons that one who elects to seek judicial relief should not be able to use the privilege as both a sword to obstruct the opposing party's lawful discovery and a shield to avoid self-incrimination.[27] It applies to any person seeking affirmative relief, regardless of party designation.[28] While the doctrine justifies the court's imposition of remedies to counteract prejudice arising from the privilege, it does not require dismissal of the invoking party's claim.[29]

The sword and shield doctrine echoes the rationale of earlier courts, namely, that the party seeking affirmative relief is a "voluntary" party to the litigation and the defending party an "involuntary" party. A voluntary party who asserts the privilege to avoid discovery should be subjected to harsher sanctions.[30] Portraying the party seeking affirmative relief as a "voluntary" party has fallen out of favor. Even in *Wehling*, the court questioned the voluntariness logic as it attempted to balance the litigants' interests to create a remedy less prejudicial than dismissal of the plaintiff's claims.[31] The *Wehling* court was mindful that, generally, "a party 'voluntarily' becomes a plaintiff only because there is no other means of protecting legal rights."[32]

In 1990, the 11th Circuit revisited the voluntariness logic in *Pervis v. State Farm Fire & Casualty Company*, 901 F.2d 944 (11th Cir. 1990), in which the plaintiff exercised his privilege to avoid an examination by his insurer, which was a condition precedent to bringing an action against the insurer under his insurance policy. The court emphasized that the plaintiff "*instituted* this civil suit" and "chose to seek enforcement of a contract at a time when he had no right of action under that agreement," and then "chose between complete silence in response to [his insurer's] request and maintaining an action against [his insurer]."[33] The court observed that the Fifth Amendment ultimately preserves the right to choose.[34] Because the plaintiff was given a choice, and chose to remain silent during the civil trial, the trial court's entry of summary judgment against the plaintiff did not amount to a "deprivation of constitutional magnitude."[35]

Concerns about penalization based on voluntariness have been replaced with more practical concerns about the resulting prejudices to the parties. For example, automatic dismissal of the invoking party's claims has been deemed unconstitutional when the statute of limitations would bar refiling the claims after the threat of criminal prosecution ceased.[36] In *Brancaccio v. Mediplex Management of Port St. Lucie, Inc.*, 711 So. 2d 1206 (Fla. 4th DCA 1998), the plaintiff argued that the rule of automatic dismissal was developed in divorce cases for which there was no statute of limitations. The plaintiff claimed the trial court's dismissal of his tort claims due to his invocation of the privilege impermissibly infringed his constitutional rights because by the time the limitations period expired on plaintiff's criminal charges, the statute of limitations on his civil claims would bar refiling his action.[37] The court agreed, finding that the Florida Supreme Court ordered automatic dismissal only in cases when dismissal did not effectively terminate the plaintiff's cause of action.[38] The court granted a stay of the civil lawsuit since the statute of limitations had already run on the claim and there was "a reasonably foreseeable end in sight for the criminal exposure."[39]

The 11th Circuit courts use a balancing test to determine when dismissal of a claim may be justified as a consequence of the invocation of the Fifth Amendment.[40] Though a dismissal solely attributable to the exercise of the witness' privilege is constitutionally impermissible, dismissal may be used as a "remedy of last resort" to prevent unfairness to

the opposing party.[41] Federal courts in this circuit must balance the relative weights of the competing interests of the parties to ensure that the court considers the rights of both parties before it decides whose rights predominate.[42]

In *Eagle Hospital Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298 (11th Cir. 2009), a co-defendant secretly monitored the plaintiff's privileged attorney-client communications. Once discovered, he invoked the Fifth Amendment to avoid answering questions about whether he retained the ability to monitor the privileged communications. To remedy the misconduct, the trial court struck the defendants' answer and counterclaims, which led to the entry of a default judgment against the defendants.[43] The 11th Circuit found that dismissal of the defendants' claims was a result of the misconduct, and not the invocation of the Fifth Amendment.[44] Even if the dismissal resulted from the invocation, the default was not improper because the co-defendant's invocation would unduly prejudice the plaintiff, who was obstructed from determining the extent of the illicit monitoring or if it continued.[45] In a subsequent case involving similar factual circumstances, the Southern District of Florida recognized that less drastic sanctions should be considered, but concluded that "no lesser sanction than the dismissal of [the invoking party's] claims and the striking of his defenses would be appropriate."[46]

No single remedy is best suited to lessen the prejudice caused to the defendant by the plaintiff's assertion of the privilege. Remedies utilized against a party whose privilege prevents discovery include striking pleadings or testimony, granting a stay or continuance of the civil proceedings pending conclusion of the threat of criminal exposure, relieving an opposing party of its burden of proof, and dismissing the claims or entering an adverse judgment.[47] The appropriate remedy will depend on the facts of each case.

Invocation by the Defendant

The consequences to a defendant who asserts the privilege against self-incrimination have remained largely the same in the last 30 years. Courts have characterized the defendant as an involuntary party to the litigation, forced into a position in which asserting the privilege presents a "Catch 22" situation: Either remain silent and concede civil liability, or speak up and risk offering evidence that may subject one to criminal charges.[48] Courts are also aware that the defendant's right to remain silent may preclude discovery by the plaintiff, and recognize that allowing the

defendant to fight the battle of civil litigation armed with an unassailable constitutional shield is just as unfair.

To minimize prejudice to the plaintiff when the defendant invokes the privilege, courts have discretion to fashion an appropriate remedy.[49] As with plaintiffs, penalizing the exercise of a constitutional right is prohibited; the entry of an adverse judgment against the defendant solely due to his or her assertion of the Fifth Amendment privilege remains impermissible.[50] Courts commonly impose less severe sanctions against defendants who exercise the privilege, such as authorizing an adverse inference against the defendant, ordering a stay of the civil action pending resolution of criminal charges against the defendant, and excluding nonparty witness testimony or nontestimonial evidence.

Florida's state and federal courts have authorized adverse inferences against civil litigants who refuse to testify on Fifth Amendment grounds as a means to counteract the disadvantage to the party precluded from obtaining evidence as a result of the privilege.[51] Although an adverse inference against a defendant who invokes the right to remain silent is strictly prohibited in criminal trials, it is routinely permitted in civil proceedings. However, "there is an exception to this rule when a claimant in the civil case is also a defendant in the criminal case and is forced to choose between waiving the privilege and losing the case on summary judgment."[52]

In such cases, a stay of the civil action may be warranted.[53] The stay may remain in effect pending the resolution of the invoking party's criminal proceedings or the running of the statute of limitations for the crime for which the witness may be incriminated.

Florida's state courts and 11th Circuit courts evaluate the propriety of a stay under differing standards. The 11th Circuit strongly disfavors stays, and, in recent years, will deny a stay so long as the witness' assertion of the privilege does not compel an adverse judgment against the invoking party.[54] Courts in the 11th Circuit "must stay a civil proceeding pending resolution of a related criminal prosecution only when 'special circumstances' so require in the 'interests of justice.'"[55] Parallel criminal proceedings do not alone constitute "special circumstances."[56] Even short-term stays are not immune from scrutiny.[57]

Florida's state courts have proved more amenable to issuing a stay of the civil action pending the resolution of a party's related criminal proceedings.[58] Florida has not adopted the 11th Circuit's narrow approach; Florida state courts have opted for a balancing approach that considers the potential prejudice to the parties from a stay.[59] One court has even suggested it may depart from the essential requirements of law to deny a stay of a civil case due to pending criminal charges.[60] However, no stay will be granted on the basis of a blanket assertion of the privilege,[61] or the party's mere expectation of exercising the privilege.[62] Florida courts have also refused to stay a civil suit while

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a nonparty witness' criminal proceedings are in progress.[63]

Invocation by a Nonparty Witness

As with parties, a nonparty witness may not be compelled to answer questions over a valid assertion of the privilege against self-incrimination.[64] Similar remedies are available when a nonparty witness' privilege hinders a party's lawful discovery. Florida's state and federal courts are split on authorizing an adverse inference from a nonparty witness' claim of privilege against the party who indirectly benefits by that witness' silence.

In the 11th Circuit, adverse inferences are not limited to cases in which a party asserts the privilege. When a nonparty refuses to testify on the basis of the privilege, the court may allow an adverse inference against the implicated party when other evidence supports the adverse inference.[65] For instance, in *Bernal v. All American Investment Realty, Inc.*, 479 F. Supp. 2d 1291 (S.D. Fla. 2007), the Southern District of Florida permitted an adverse inference against the defendant when a nonparty witness invoked the privilege as to certain questions concerning the truthfulness of the affidavit he submitted on behalf of the defendant and alleged bribery by the defendant in procuring the affidavit.[66] Guided by the U.S. Supreme Court's declaration that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth," the court decided that the adverse inference was proper against the defendant because it was supported by sufficient additional evidence.[67]

To the contrary, Florida's decisional law indicates that an adverse inference may not be permitted against a party when the witness invoking the privilege is a nonparty.[68] It was ruled an error for the trial court in *Insurance Company of State of Pennsylvania v. Estate of Guzman*, 421 So. 2d 597, 603-04 (Fla. 4th DCA 1982), to permit a nonparty witness to take the witness stand at trial for the sole purpose of asserting the Fifth Amendment privilege before the jury because of undue weight given to the privilege by the jury. Instead, it would have been proper to exclude the nonparty witness from testifying.[69] Since *Guzman*, Florida's courts have not directly addressed the propriety of adverse inferences arising from a nonparty witness' privilege. Given the opportunity, Florida courts may reconsider this precedent and follow the lead of the 11th Circuit and other jurisdictions that have approved adverse inferences against a party due to a nonparty witness' privilege.[70]

Remedy Depends on the Materiality of the Privileged Testimony

A recurrent but often unmentioned consideration in determining the repercussions for invoking the privilege is the materiality of the evidence sought. When the effect of the privilege is to avoid responding to questions on matters material to the litigation, courts are more likely to impose sanctions to alleviate the resulting prejudice.

The materiality of a witness' testimony is the first of three factors that the First Circuit Court of Appeals set forth to determine the effect of an invocation of privilege in *Serafino v. Hasbro, Inc.*, 82 F.3d 515 (1st Cir. 1996). The *Serafino* factors are 1) the importance and relevance of the information sought; 2) whether there are alternative means to obtain the information; and 3) whether there are remedies less drastic than dismissal.[71] The 11th Circuit has considered the second and third factors expressly, while the first factor of materiality has been inconspicuously fundamental to the analysis.[72] For example, in *Pervis*, the 11th Circuit affirmed the dismissal of the plaintiffs' claims when they asserted a blanket privilege to avoid answering questions concerning the basis of their causes of action.[73] The *Pervis* court indicated that when a party's assertion of the privilege, even if proper, hinders the opposing party's ability to discover or prove the material elements of the claim against it, one alternative remedy is to relieve the opposing party of its burden of proof.[74] In *Eagle Hospital*, the 11th Circuit stated that, even if the dismissal of the defendants' counterclaims had been attributed solely to the co-defendant's assertion of the privilege, dismissal was not improper because the court carefully balanced the rights of both parties and determined that the severe prejudice caused by the co-defendant's withholding of evidence warranted the harsh sanction.[75] The Middle District of Florida found that an adverse inference was "unnecessary" in light of the "overwhelming" evidence presented against a defendant who had invoked his Fifth Amendment privilege.[76] These examples illustrate that the materiality of privileged testimony is not being overlooked by the 11th Circuit courts in determining just remedies.

When the testimony is directly material to the legal issues, practitioners may question the applicability of F.S. §90.510 (2012), the Florida Evidence Code provision authorizing dismissal of a claim for relief or affirmative

defense when a civil litigant asserts any privilege as to "a communication necessary to an adverse party." Though the statute has remained effective and unchanged since 1977, few appellate decisions have discussed it. In the rare decisions involving the privilege against self-incrimination, the courts found the statute inapt because the defendant invoking the privilege raised no claim or affirmative defense.[77] Noting that Florida law forbids punishing one who validly asserts the privilege against self-incrimination by entering a default judgment against him or her, these decisions indicate that the statute's application likely is preempted by the constitutional protections afforded by this privilege.[78]

Evidentiary Value of the Act of Asserting the Privilege

It is constitutionally guaranteed that Fifth Amendment-protected silence is not substantive evidence of guilt and may not be treated as such.[79] Yet, inartful reference to the invocation of the privilege being "an admission" or "evidence" of guilt begs the question: Once a witness has asserted the privilege in a civil case, what is the admissibility and evidentiary value of the act of invocation in proving the claims or defenses of a party?

The assertion of a privilege may arise during the pleadings stage, discovery, pre-trial motions practice, or trial of a case. The majority of remedies (such as stays, striking pleadings, and excluding evidence) will be implemented before the case comes to trial. When it comes to the disposition of the case, however, the role of an adverse inference calls for special attention.

The adverse inference arising from the act of exercising the privilege is neither evidence per se nor a presumption of liability; rather, it is a permissible deduction or conclusion from the lack of evidence proffered.[80] The trier of fact may reject an inference or accord it such probative value as it sees fit.[81] Once disposition of the case is at hand, often on a motion for summary judgment or at trial, the trier of fact must be mindful that adverse inferences are not a substitute for proof. The 11th Circuit has cautioned, "a dismissal following the assertion of the Fifth Amendment violates the Constitution where the inferences drawn from Fifth-Amendment-protected silence are treated as a substitute for the need for evidence on an ultimate issue of fact."[82] Courts may not allow an adverse inference to supply the sole evidence of an element of a claim for the purpose of approving a judgment against the party subject to the inference.[83] When a judge is deciding the case, a summary judgment granted partly in reliance on an adverse inference would not be improper when other evidence corroborates the inference.[84] If the case is put before a jury, courts must carefully educate the jury on the proper weight given such inferences.

Adverse inferences are widely accepted as proper when a witness has asserted the right to remain silent.

When a witness has invoked the privilege in a prior criminal case but later testifies to the same matter in a civil case, constitutional protections under Florida law prohibit introducing the prior invocation to the trier of fact.

However, when a witness claims the privilege and subsequently waives the privilege and substantively testifies, it is not clear whether a retraction by the witness will preclude an otherwise appropriate adverse inference. In Florida, admission of the prior invocation seems to depend on whether the privilege was invoked during the same case or in a prior proceeding.

When a witness has invoked the privilege in a prior criminal case but later testifies to the same matter in a civil case, constitutional protections under Florida law prohibit introducing the prior invocation to the trier of fact.[85] In *Walton v. Robert E. Haas Construction Corp.*, 259 So. 2d 731 (Fla. 3d DCA 1972), the trial court allowed the defendant's counsel to read the transcript of the plaintiff's deposition in a separate civil case arising out of the same accident, during which the plaintiff, as a nonparty witness, exercised his privilege against self-incrimination and declined to answer questions regarding the accident. In the plaintiff's own case, he answered all such questions in his deposition.[86] The appellate court, finding that admitting the prior exercise would tend to destroy or chill the exercise of the constitutional privilege and that the invocation was not relevant to any issue being tried in his own case, ruled that the invocation was not proper impeachment because "the fact that one claims a constitutional right may not be said to show a disregard for the truth."[87]

In contrast, when a party's assertion and waiver of the privilege occurred during the same case, no error resulted from introducing the party's prior assertion to the jury and allowing an adverse inference against that party.[88] In *Fraser v. Security and Investment Corp.*, 615 So. 2d 841 (Fla. 4th DCA 1993), a cross-defendant refused to answer questions at an initial deposition, but abandoned his privilege at a later deposition. The Fourth District Court of Appeal upheld the trial court's refusal to exclude the earlier assertion of privilege, relying on the U.S. Supreme Court's approval of adverse inferences against a party invoking the privilege.[89] Unlike the *Walton* court, the Fourth District was not persuaded that the act of asserting the privilege was immaterial.[90] Meanwhile, though the 11th Circuit appears not to have ruled on the issue in a civil suit, federal courts in general have not been so eager to permit an adverse inference when a witness has withdrawn an asserted privilege and answered all questions in the same proceeding.[91]

Conclusion

While the Florida and federal constitutions guarantee individuals a privilege against compelled and "costly" self-incrimination in criminal matters, the assertion of that privilege in civil litigation is not without certain costs.[92] "The decision to invoke the Fifth Amendment 'is always affected in some way by the exigencies of a particular situation.... [Parties] cannot be free from conflicting concerns and...must weigh the relative advantages of silence and explanation.'"[93] Though parties must consider their own conflicting interests, courts must be mindful of the constitutionally guaranteed protections afforded all individuals participating in civil proceedings. While the court's analysis in 1983 was influenced largely by which party invoked the privilege, modern courts are instructed to look at the underlying circumstances of the litigants, such as the risk their claims may be statutorily time-barred, and balance the relative prejudice of available remedies to the party invoking the privilege against self-incrimination and the party who must defend in spite of it. Courts continue to have wide discretion to fashion remedies appropriate for a particular case, and recent decisions have demonstrated that courts are now more inclined to consider remedies other than outright dismissal of a party's claims.❑

[1] Hal K. Litchford, *The Privilege Against Self-incrimination in Civil Litigation*, 57 FLA. B. J. 139 (1983).

[2] *See Minor v. Minor*, 232 So. 2d 746 (Fla. 2d DCA 1970), *aff'd*, 240 So. 2d 301 (Fla. 1970); *City of St. Petersburg v. Houghton*, 362 So. 2d 681 (Fla. 2d DCA 1978).

[3] *E.g., Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084 (5th Cir. 1979), *aff'd on rehrg.*, 611 F.2d 1026 (5th Cir. 1980).

[4] *Wehling*, 608 F.2d at 1088.

[5] *See, e.g., F.D.I.C. v. Fid. & Deposit Co. of Md.*, 2012 WL 5378922 *1 (M.D. Fla. Oct. 17, 2012) (associate of Ponzi schemer Louis Pearlman asserted privilege); *Coquina Invs. v. Rothstein*, 2012 WL 4479057 *1 (S.D. Fla. Sept. 28, 2012) (vice president of bank accused of aiding and abetting Scott Rothstein's Ponzi scheme invoked privilege); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 490 F. Supp. 2d 784, 825-26 (S.D. Tex. 2007) (former managing director of Merrill Lynch claimed privilege on matters relating to Enron).

[6] The repercussions of testimony under a grant of immunity exceeds the scope of this article.

[7] Generally, no privilege extends to testimony by or on behalf of a business entity. *Vann v. State*, 85 So. 2d 133, 137 (Fla. 1956) (citing *Wilson v. U.S.*, 221 U.S. 361 (1911)). *See also In re Keller Fin. Servs. of Fla., Inc.*, 259 B.R. 391 (Bankr. M.D. Fla. 2000) (denying sole shareholder of closely held corporation ability to assert privilege when production of documents is made in his or her capacity as corporate records custodian, even if documents incriminate

shareholder personally); *State v. Wellington Precious Metals, Inc.*, 510 So. 2d 902, 906 (Fla. 1987) (sole owner of corporation not entitled to raise privilege to avoid producing documents in response to subpoena directed to corporation).

[8] U.S. CONST. amend. V; FLA. CONST. art. 1 §9. *See also Malloy v. Hogan*, 378 U.S. 1 (1964) (deeming Fifth Amendment privilege incorporated into 14th Amendment and, thus, applicable against states). "[T]he constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." *U.S. v. Balsys*, 525 U.S. at 680 (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 77-78 (1964)).

[9] *U.S. v. Argomaniz*, 925 F.2d 1349, 1352-53 (11th Cir. 1991) (citing *Kastigar v. U.S.*, 406 U.S. 441, 445 (1972)).

[10] *E.g., State ex rel. Byer v. Willard*, 54 So. 2d 179, 182 (Fla. 1951). The privilege against self-incrimination applies to the compelled production of incriminatory documents, to the extent that the production proves the document's existence, authenticity, or possession by the witness in his or her personal capacity. *Id.* The privilege does not apply to other nontestimonial physical evidence. *St. George v. State*, 564 So. 2d 152, 154 (Fla. 5th DCA 1990).

[11] *E.g., Carson v. Jackson*, 466 So. 2d 1188, 1191 (Fla. 4th DCA 1985) (citing *Fisher v. U.S.*, 425 U.S. 391, 401 (1976)).

[12] Testimonial evidence includes discovery responses. *Cf. Boyle v. Buck*, 858 So. 2d 391, 392 (Fla. 4th DCA 2003) (citing *Magid v. Winter*, 654 So. 2d 1037, 1038-39 (Fla. 4th DCA 1995)).

[13] *See Doe v. U.S.*, 487 U.S. 201, 212 (1988); *Argomaniz*, 925 F.2d at 1352.

[14] *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951). When one fails to assert the privilege, testimony may not be considered compelled, *Carson*, 466 So. 2d at 1191, and the privilege may be irrevocably waived as to the subject of the testimony, *Jones v. Stoutenburgh*, 91 So. 2d 299, 303 (Fla. 1956) (citation omitted).

[15] *E.g., Hoffman*, 341 U.S. at 486; *O'Neal v. Sun Bank*, 754 So. 2d 170, 171-72 (Fla. 5th DCA 2000); *see also U.S. v. Reis*, 765 F.2d 1094, 1096 (11th Cir. 1985) (stating risk of prosecution must be "more than mere speculative, generalized allegations" of criminal prosecution). Subsequent prosecution of the witness in another court within the U.S. will support invocation of the privilege, *see State ex rel. Mitchell v. Kelly*, 71 So. 2d 887 (Fla. 1954), but not the threat of criminal prosecution by foreign governments, *see U.S. v. Balsys*, 525 U.S. at 699.

[16] *Cf. Hoffman*, 341 U.S. at 486; *O'Neal*, 754 So. 2d at 171-72.

[17] *E.g., Anglada v. Sprague*, 822 F.2d 1035, 1037 (11th Cir. 1986); *Urquiza v. Kendall Healthcare Group, Ltd.*, 994 So. 2d 476, 477 (Fla. 3d DCA 2008).

[18] *E.g., U.S. v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 364 (11th Cir. 1994); *Urquiza*, 994 So. 2d at 477; *Fischer v. E.F. Hutton & Co., Inc.*, 463 So. 2d 289, 291 (Fla. 2d DCA 1984). One court distinguished between unacceptable blanket assertions of privilege and "efficient" objections, finding that a witness who raised one objection to multiple requests for privileged communications acted properly because each request implicated specific inculpatory concerns. *Sallah v. Worldwide Clearing LLC*, 855 F. Supp. 2d 1364, 1371 (S.D. Fla. 2012).

[19] *Hoffman*, 341 U.S. at 486; *Eisenstein v. Citizens & So. Nat'l Bank of Fla.*, 561 So. 2d 1203, 1203 (Fla. 4th DCA 1990).

[20] *See DeLeo v. Wachovia Bank, N.A.*, 946 So. 2d 626, 628-29 (Fla. 2d DCA 2007) (quoting *Novak v. Snieda*, 659 So. 2d 1138, 1141 (Fla. 2d DCA 1995)).

[21] *See, e.g., DeLeo*, 946 So. 2d at 628-29; *Magid*, 654 So. 2d at 1039; *J.R. Brooks & Son Inc. v. Donovan*, 592 So. 2d 795, 796 (Fla. 3d DCA 1992).

[22] *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1304 (11th Cir. 2009) (citing *Wehling*, 608 F.2d at 1087).

[23] *Id.* (citing *Wehling*, 608 F.2d at 1087; *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976)); *Village Inn Rest. v. Aridi*, 543 So. 2d 778, 782 (Fla. 1st DCA 1989).

[24] *See* Litchford, *The Privilege Against Self-incrimination in Civil Litigation*, 57 FLA. B. J. at 143 (1983).

[25] *Village Inn Rest.*, 543 So. 2d at 782.

[26] *Eatmon v. Bonagura*, 590 So. 2d 4 (Fla. 1st DCA 1991).

[27] *Arango v. U.S. Dep't of Treasury*, 115 F.3d 922, 926 (11th Cir. 1997) (quoting *U.S. v. Rylander*, 460 U.S. 752, 758-59 (1983)); *Fassi v. Am. Fire & Cas. Co.*, 700 So. 2d 51, 52 (Fla. 5th DCA 1997); *Rollins Burdick Hunter of N.Y., Inc. v. Euroclassics Ltd., Inc.*, 502 So. 2d 959, 962 (Fla. 3d DCA 1987) (disapproving denial of motion to compel discovery when plaintiff refused to answer questions necessary to prove affirmative defenses and thereby "effectively deprived [defendant] of the opportunity to defend itself").

[28] *DePalma v. DePalma*, 538 So. 2d 1290, 1291 (Fla. 4th DCA 1989).

[29] *See Childs v. Solomon*, 615 So. 2d 865, 866 (Fla. 3d DCA 1993); *see also Wehling*, 608 F.2d at 1088 ("[A] civil plaintiff has no absolute right to both his silence and his lawsuit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege.").

[30] *See Minor*, 232 So. 2d at 747 (emphasis in original) ("Appellant's choice in this case is not, *involuntarily*, one between two totally disadvantageous alternatives . . . but rather, *voluntarily*, one between two alternatives one of which can be employed to some advantage.").

[31] *Wehling*, 608 F.2d at 1089 n.10.

[32] *Id.*

[33] *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 947-48 (11th Cir. 1990) (emphasis in original).

[34] *Id.* at 947.

[35] *Id.* at 948.

[36] *See Brancaccio v. Mediplex Mgmt. of Port St. Lucie, Inc.*, 711 So. 2d 1206 (Fla. 4th DCA 1998).

[37] *Id.* at 1211.

[38] *Id.*

[39] *Id.* at 1211-12.

[40] *See Eagle Hosp.*, 561 F.3d at 1305.

[41] *Id.* (citing *Wehling*, 608 F.2d at 1087 n.6).

[42] *Id.* (quoting *Wehling*, 608 F.2d at 1088).

[43] *Id.* at 1303.

[44] *Id.* at 1305.

[45] *Id.*

[46] *Leor Exploration & Prod. LLC v. Aguiar*, 2010 WL 2605087 *20 (S.D. Fla. June 29, 2010) (quoting *Eagle Hosp.*, 561 F.3d at 1306).

[47] *See, e.g., Eagle Hosp.*, 561 F.3d at 1305 (striking pleadings of party seeking relief); *Brancaccio*, 711 So. 2d at 1211-12 (advising trial court that a stay may be appropriate); *Pervis*, 901 F.2d at 948 (granting summary judgment against invoking party); *Roberts v. Jardine*, 358 So. 2d 588, 589 (Fla. 2d DCA 1978) (suggesting trial court may strike testimony, but not enter default judgment, against defendant whose claim of privilege prevents relevant discovery).

[48] *See Minor*, 232 So. 2d at 747.

[49] *Fernandez v. Blue Sky/Venecia Food Corp.*, 40 So. 3d 779, 781 (Fla. 1st DCA 2010) (quoting *Eatmon*, 590 So. 2d at 4).

[50] *See Brancaccio*, 711 So. 2d at 1210 (citing *Wehling*, 608 F.2d at 1088); *see also Daniels v. Cochran*, 654 So. 2d 609, 611 (Fla. 4th DCA 1995) (reversing default order of civil forfeiture against claimant who failed to respond to discovery on basis of Fifth Amendment privilege).

[51] *See, e.g., Eagle Hosp.*, 561 F.3d at 1303; *Arango*, 115 F.3d at 926; *Vasquez v. State*, 777 So. 2d 1200, 1203 (Fla. 3d DCA 2001) (dicta).

[52] *U.S. v. Two Parcels of Real Prop. Located in Russell County, Ala.*, 92 F.3d 1123, 1129 (11th Cir. 1996) (citations omitted) (finding exception inapplicable when claimants refusing to testify were not defendants in a criminal case).

[53] *See Shell Oil Co. v. Altina Assocs., Inc.*, 866 F. Supp. 536, 540-41 (M.D. Fla. 1994) (denying stay because defendant would not be subject to summary disposition due to adverse inference).

[54] *See, e.g., Court-Appointed Receiver of Lancer Mgmt. Group LLC v. Lauer* (S.D. Fla. 2009) (recognizing 11th Circuit's standard for issuing stays is narrower, as it requires invoking party to "face[] certain loss of the civil proceeding on summary judgment if the civil proceeding were to continue"); *In re Fin. Federated Title & Trust, Inc.*, 252 B.R. 834, 837 (Bankr. S.D. La. 2000) (explaining standard in 11th Circuit is "more narrow and less subjective" than other jurisdictions and even a "severe disadvantage" to defendant would not afford stay).

[55] *U.S. v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 364 (11th Cir. 1994) (citing *U.S. v. Kordel*, 397 U.S. 1, 11-12 & n.27 (1970)).

[56] *Global Aerospace, Inc. v. Platinum Jet Mgmt., LLC*, 2009 WL 2589116 *2 (S.D. Fla. 2009) (quoting *In re Blankenship*, 2009 WL 1607909 *4 (Bankr. N.D. Ala. 2009)).

[57] *See A.B. ex rel. Baez v. Seminole County School Bd.*, 2005 WL 2614622 *2 (M.D. Fla. 2005) (denying 60-day stay because it was not clear that criminal case would be resolved at that time).

[58] *See, e.g., Childs*, 615 So. 2d at 866 (citing *Miami Nat'l Bank v. Greenfield*, 488 So. 2d 559, 561 (Fla. 3d DCA 1986)) (suggesting trial court stay action as a result of exercise of privilege during counterclaimant's deposition when statute of limitations would bar refiling claim).

[59] *See Brancaccio*, 711 So. 2d at 1211-12.

[60] *McCreery v. Fernandez*, 882 So. 2d 498, 498 (Fla. 4th DCA 2004).

[61] *Urquiza*, 994 So. 2d at 478.

[62] *Eller Media Co. v. Serrano*, 761 So. 2d 464, 466 (Fla. 3d DCA 2000).

[63] *See Kerben v. Intercontinental Bank*, 573 So. 2d 976, 978 (Fla. 5th DCA 1991) (quashing trial court's indefinite order of abatement due to nonparty witness' "unavailability" due to privilege).

[64] *Pillsbury Co. v. Conboy*, 459 U.S. 248, 263-64 (1983).

[65] *E.g., Coquina Invs.*, 2012 WL 4479057 at *10 (approving explanation of adverse inference's weight to jury); *Bernal v. All Am. Inv. Realty, Inc.*, 479 F. Supp. 2d 1291, 1337 (S.D. Fla. 2007).

[66] *Bernal*, 479 F. Supp. 2d at 1337.

[67] *Id.* (quoting *Libutti v. U.S.*, 107 F.3d 110, 125 (2d Cir. 1997)); *accord Cole v. Am. Capital Partners Ltd., Inc.*, 2008 WL 2986444 *5 (S.D. Fla. 2008) (citing *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986)) (drawing adverse inference from invocation by individual defendants against corporate defendants because individuals were acting in the scope of their employment when they engaged in the conduct they refused to testify about).

[68] *See Ins. Co. of State of Pa. v. Estate of Guzman*, 421 So. 2d 597, 603-04 (Fla. 4th DCA 1982).

[69] *See id.* at 603. *Cf. U.S. Commodity Futures Trading Comm'n v. Capital Blu Mgmt., LLC*, 2011 WL 52994 (M.D. Fla. Jan. 7, 2011) (refusing to exclude nonparty witness expected to invoke privilege from taking stand in front of jury).

[70] *See, e.g., LiButti*, 107 F.3d 110, 123 (2d Cir. 1997) (listing nonexclusive factors for deciding to allow adverse inferences against a party due to invocation of privilege by a nonparty); *F.D.I.C. v. Fid. & Deposit Co. of Md.*, 45 F.3d 969 (5th Cir. 1995); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987); *RAD Servs., Inc.*, 808 F.2d 271.

[71] *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518-19 (1st Cir. 1996) (affirming dismissal of claims due to plaintiff's refusal to answer questions "[going] to the heart of" defenses and damages).

[72] *But see U.S. Commodity Futures Trading Comm'n*, 2001 WL 52994 (finding probative value of invocation not outweighed by possible prejudice under Federal Rule of Evidence 403).

[73] *Pervis*, 901 F.2d 944 at 946-947.

[74] *Eagle Hosp.*, 561 F.2d at 1305.

[75] *Id.* at 1305.

[76] *S.E.C. v. Kirkland*, 521 F. Supp. 2d 1281, 1286 n.1 (M.D. Fla. 2007).

[77] *See In re Keller*, 259 B.R. at 406-07; *In re Forfeiture of $13,000.00 U.S. Currency*, 522 So. 2d 408, 409-10 (Fla. 5th DCA 1988).

[78] *In re Keller*, 259 B.R. at 407 (*quoting In re Forfeiture*, 522 So. 2d at 410).

[79] *See Griffin v. Cal.*, 380 U.S. 609, 614-15 (1968).

[80] *Carnes v. Fender*, 936 So. 2d 11, 14 (Fla. 4th DCA 2006) (citing *Little v. Publix Supermarkets, Inc.*, 234 So. 2d 132, 133-34 (Fla. 4th DCA 1970)).

[81] *Id.*

[82] *Eagle Hosp.*, 561 F.3d at 1304 (citing *Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991)).

[83] *Coquina Invs.*, 2012 WL 4479057 at *10 (citing *LaSalle Bank Lake View v. Sequban*, 54 F.3d 387, 391 (7th Cir. 1995) (claiming privilege did not admit or deny facts to enable summary judgment)). *Cf. Zabrani v. Riveron*, 495 So. 2d 1195, 1199 (Fla. 3d DCA 1986) ("The fact that [claimant's] refusal to testify or otherwise plead leaves him without a defense to the motion for summary judgment does not mean that his privilege against compelled self-incrimination is violated.").

[84] *See, e.g., Two Parcels of Real Prop. Located in Russell County, Ala.*, 92 F.3d at 1129.

[85] *Walton v. Robert E. Haas Const. Corp.*, 259 So. 2d 731, 734 (Fla. 3d DCA 1972), *cert. denied*, 265 So. 2d 48 (Fla. 1972); *see also Clark v. State*, 68 Fla. 433 (Fla. 1914).

[86] *Id.* at 733.

[87] *Id.* at 734.

[88] *See Fraser v. Security & Inv. Corp.*, 615 So. 2d 841, 842 (Fla. 4th DCA 1993).

[89] *Id.* at 842.

[90] *Id.* (citation omitted) ("'Silence is often evidence of the most persuasive character.'").

[91] *E.g., Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1464-65 (5th Cir. 1992); *Farace v. Independent Fire Ins. Co.*, 699 F.2d 204, 210-11 (5th Cir. 1983).

[92] *Eagle Hosp.*, 561 F.2d at 1304 (citing *U.S. v. White*, 589 F.2d 1283, 1287 (5th Cir. 1979)).

[93] *Arango*, 115 F.3d at 927 (quoting *White*, 589 F.2d at 1287).

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Parallel Proceedings in Florida's State and Federal Courts - Fifth Amendment Considerations

by Michael R. Holt

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Crime victims rightfully demand justice. Justice, however, is not limited to Florida's criminal courts. Often, the same unlawful conduct prompting criminal prosecution also gives rise to civil liability. The civil court system not only provides an additional means of obtaining justice and closure, but it also enables victims to become financially whole. A well-known example is the case of O.J. Simpson. Although acquitted of murdering his ex-wife and another man in 1995, a jury found Simpson liable for wrongful death in 1997 and ordered him to pay $33.5 million to the victims' families.[1] A more recent example involves nearly 300 persons who were injured or who lost family members in a massive Rhode Island night club fire in 2003. Following the criminal sentencing of certain persons responsible for the tragedy, victims filed a civil lawsuit alleging negligence and carelessness against these and other defendants.[2]

In many instances, criminal proceedings conclude *before* the commencement of the civil suit. This is not always the case, however, and civil litigation and criminal proceedings often overlap. Special considerations arise in these parallel proceedings, particularly when the civil case moves forward at the same rate or more quickly than the criminal case. When this occurs, defendants in the civil litigation must make an extremely difficult choice: Participate in the civil matter and permanently waive their Fifth Amendment right against self-incrimination, or remain silent, and in all likelihood, face the probability of a sizable adverse judgment.[3]

This dilemma is not without a solution, and courts can alleviate any prejudice by temporarily suspending discovery or briefly continuing the civil case. The standards by which Florida's state and federal courts consider these requests, however, are not uniform. Florida's appellate courts have not developed well-defined guidelines. The 11th Circuit applies a more rigid test which affords relief only if waiving the Fifth Amendment protection would result in a certain loss of the civil case. This standard contrasts the multifactor balancing test employed by other federal and state courts.

The multifactor test enables courts to take additional matters into consideration when analyzing whether to stay or limit pretrial activity in a civil case. As set forth below, civil practitioners representing defendants in parallel proceedings must remain cognizant of the applicable standards when seeking relief. State court practitioners may urge application of the multifactor balancing test. Federal practitioners faced with the less flexible standard must focus on how asserting the Fifth Amendment privilege guarantees the loss of the civil proceeding.

Fifth Amendment Considerations in Florida State Courts

The Fifth Amendment to the U.S. Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."[4] It protects witnesses against making disclosures which they reasonably believe might incriminate them in future proceedings.[5] Invoking the Fifth Amendment does not, however, preclude the fact finder in a civil matter from drawing an adverse inference.[6] Moreover, litigants cannot make "blanket" assertions of the privilege; rather, they must invoke it on a question-by-question basis.[7] Once a witness waives the privilege, however, it is gone forever.[8]

The potential impact of invoking the Fifth Amendment in civil proceedings depends upon the status of the party invoking the privilege.

Litigants pursuing affirmative relief face an uphill battle. Courts are hesitant, and rightfully so, to permit civil plaintiffs to avoid discovery obligations or trial through invocation of the Fifth Amendment. In fact, "[w]hen a plaintiff in a civil action invokes the Fifth Amendment privilege, courts often dismiss the plaintiff's action or strike plaintiff's pleadings."[9] Conversely, "where a defendant has invoked the Fifth Amendment privilege against self-incrimination he will usually not suffer a similar detriment because a defendant is not generally seeking affirmative relief and is before the court involuntarily."[10] Defendants in the latter situation quite naturally seek stays of discovery or trial "so that the defendant's assertion of this constitutional right does not preclude him from defending a civil suit."[11]

Florida's appellate courts have not comprehensively addressed and resolved the issue of whether to grant a continuance or limit pretrial discovery when a defendant faces a parallel criminal prosecution. In *Kerben v. Intercontinental Bank*, 573 So. 2d 976 (Fla. 5th DCA 1991), the Fifth District granted certiorari to quash an order granting an indefinite stay of a civil proceeding pending the outcome of a criminal matter involving a nonparty witness.[12] The underlying civil action involved an attorney's claim against a bank for allegedly honoring dozens of checks forged by a former legal assistant.[13] The legal assistant was a defendant in the civil lawsuit, but had partial final judgment entered against her in September 1998.[14] The defendant bank deposed the legal assistant, who asserted her Fifth Amendment privilege throughout.[15] The defendant then filed a motion to stay or abate, arguing that, because the assistant was a key witness in the civil lawsuit, the ongoing criminal proceeding would impede the bank's ability to defend against the underlying accusations.[16] The trial court granted the motion, staying the case "'until the impediments for proceeding . . . have been alleviated.'"[17]

The plaintiff argued that an indefinite stay, pending resolution of charges against a nonparty witness, departed from the essential requirements of law. The appellate court agreed. The court noted that "[t]here is a dearth of authority dealing with the use of a stay based on invocation of the privilege against self-incrimination by a witness in a civil lawsuit."[18] The court rejected the defendants' claim that they would be "prejudiced" without the stay, noting that the assistant's testimony would not likely resolve the issue of whether the signatures were genuine and that the absence of the witness did not "make this lawsuit impossible for either party to try." The court also found prejudice to the plaintiff due to the indefinite nature of the stay. The court concluded that "[t]o abate this action indefinitely based solely on the ground that a key witness is 'unavailable' to the defendant is an abuse of the trial court's broad discretion and departs from the essential requirements of law."[19]

In *Rappaport v. Levy*, 696 So. 2d 526 (Fla. 3d DCA 1997), the Third District reversed an order staying a civil action where the defendant had yet to assert the Fifth Amendment privilege during a deposition.[20] The underlying civil action in that case involved a wrongful termination claim.[21] The defendants claimed the termination was justified based upon the plaintiff's improper use of medication and theft.[22] The defendants lodged a criminal complaint in connection with this conduct.[23] Following several agreed stays of discovery, the defendants noticed the civil case for trial. The plaintiff moved to strike the notice. The defendants argued that the plaintiff's parallel criminal proceeding thwarted their attempts to complete discovery and conduct the trial. In the meantime, the criminal proceedings against the plaintiff were dismissed and the state appealed the dismissal. That proceeding remained pending at the time of the court's opinion.

The trial court issued an order denying the motion to strike, lifting the previous stays of discovery and allowing both sides to take depositions. The court stayed the trial, however, until the plaintiff was "'in a position where he can testify at trial without compromising his Fifth Amendment Privilege.'"[24] The Third District Court of Appeal reversed the ruling as premature because the plaintiff had not yet asserted his Fifth Amendment right during a deposition.[25] The court then noted that if the plaintiff testified at a deposition without invoking the right, the matter would be moot.[26] If the plaintiff did invoke the privilege, "the trial court can enter a ruling based on a properly developed record."[27]

The Fourth District most recently confronted, but did not resolve the issue in *McCreery v. Wilhelm's Rattan, Inc.*, 882 So. 2d 498 (Fla. 4th DCA 2004). There, the defendant in a civil action involving a car accident faced criminal charges stemming from the same alleged misconduct.[28] The defendant applied for, and received, a stay of the civil proceedings pending the outcome of the criminal matter.[29] The trial court denied the motion and the defendant petitioned for a writ of common law certiorari.[30] The appellate court stated that the refusal to grant a continuance of a civil matter where the defendant faced pending felony charges "may well have been a departure from the essential requirements of law."[31] The court, however — without elaborating — ultimately dismissed the certiorari petition because the petitioner "failed to demonstrate that he has no adequate remedy on final appeal."[32]

In *Klein v. Royale Group Ltd.*, 524 So. 2d 1061 (Fla. 3d DCA 1988), the trial court stayed a civil matter pending resolution of a parallel criminal proceeding involving a defendant.[33] The trial court denied a motion to dissolve the stay some nine months later and the plaintiff filed a petition for certiorari. Although the appellate court found that the trial court acted within its discretion to grant the stay in the first instance, "[i]t appears that there comes a time when a stay becomes unreasonable under all circumstances."[34] Thus, the court granted the petition and ordered the stay dissolved.[35]

11th Circuit Standard

Unlike Florida's state courts, the 11th Circuit follows a narrower standard which makes it very difficult to obtain a continuance or stay of discovery. The court explicitly recognized this, stating "the standard set by the [11]th Circuit as to when a stay is mandated to prevent unconstitutional infringement is more narrow and less subjective."[36] Florida's district courts have noted that "the Constitution

does not require a stay of civil proceedings pending the outcome of related criminal proceedings."[37] Instead, courts *must* stay civil proceedings pending resolution of parallel criminal proceedings "only when 'special circumstances' so require in the 'interests of justice.'"[38] Such circumstances exist, and the Fifth Amendment is violated "when a person who is a defendant in both a civil and a criminal case is forced to choose between waiving his privilege against self-incrimination or losing the civil case on summary judgment."[39] Unless such a result would certainly occur, "defendants may exercise their Fifth Amendment rights by not presenting evidence which would implicate them in their criminal proceedings."[40] Stays or continuances, if warranted, may not be granted "for an indefinite period of time."[41]

The 11th Circuit did not always apply this rigid, less subjective test, and in a somewhat different procedural context, permitted a stay sought by a plaintiff invoking his Fifth Amendment rights in *Wehling v. CBS,* 608 F.2d 1084 (5th Cir. 1979). There, plaintiff Wehling, the owner of proprietary trade schools in Texas, brought a libel action against CBS following a broadcast accusing him of defrauding his students and the federal government.[42] CBS sought discovery regarding Wehling's operation of the schools, but Wehling invoked the Fifth Amendment throughout his deposition.[43] By refusing to answer questions, Wehling "deprived CBS of information concerning the accuracy of its broadcast and thus thwarted discovery of issues at the heart of plaintiff's lawsuit."[44] The district court dismissed Wehling's lawsuit with prejudice after he refused to answer the deposition questions.[45]

On appeal, Wehling argued that the dismissal of his lawsuit based upon his assertion of the Fifth Amendment privilege impermissibly "penalized him for exercising a fundamental constitutional right."[46] The Fifth Circuit sympathized with CBS's position but reversed the district court, stating that "[d]ismissing a plaintiff's action with prejudice solely because he exercised his privilege against self-incrimination is constitutionally impermissible."[47] The court observed that Wehling was not asking to proceed to trial without providing the sought-after discovery, but rather only asked for a stay "until all threat of criminal liability has ended."[48] The court found dismissal inappropriate because a) the Federal Rules of Civil Procedure did not warrant dismissal with prejudice for resisting discovery based upon a valid assertion of privilege; and b) a party may not be penalized for asserting the Fifth Amendment, and dismissal with prejudice based upon that assertion was indeed "costly."[49]

The court concluded that "[w]hen plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant."[50] The court specifically observed that "[i]nstead of arbitrarily adopting a rule favoring CBS, the court should have measured the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible" and that the "balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate."[51]

Applying this test, the court approved a three-year stay of discovery, noting that "[a]lthough a three-year hiatus in the lawsuit is undesirable from the standpoint of both the court and the defendant, permitting such inconvenience seems preferable at this point to requiring plaintiff to choose between his silence and his lawsuit."[52] The court also noted that if CBS could, at a later time, demonstrate prejudice as a result of the delay, "the court would be free to fashion whatever remedy is required to prevent unfairness to defendant."[53]

The 11th Circuit reversed course in *Anglada v. Sprague*, 822 F.2d 1035 (11th Cir. 1987). There, a lawsuit was brought against the defendants for defaulting on a promissory note in which "they personally guaranteed the mortgages."[54] Less than a year after the lawsuit commenced, criminal charges were brought against the same defendants for mortgage fraud and grand theft.[55] The district judge denied the defendants' motion to stay the civil proceedings pending the conclusion of the criminal proceedings.[56] The jury decided in favor of the plaintiffs and the defendants appealed.[57] On appeal, the 11th Circuit held that a stay is not warranted unless an indication existed "that the invocation of the Fifth Amendment would have necessarily resulted in an adverse judgment."[58] When asserting the Fifth Amendment privilege, it is "unacceptable" for a defendant to make a "blanket" refusal to answer all questions, rather he or she must assert the privilege on a question-by-question basis.[59] To allow otherwise would force the "court to speculate as to which questions would tend to incriminate."[60] Additionally, the court found a stay was not necessary in this situation because other remedies were available, including requesting a closed hearing, requesting a sealed record, and "presenting evidence other than through their own testimony."[61]

More recently, in *Baez v. Seminole County School Board*, 2005 U.S. Dist. LEXIS 35270, the plaintiff requested a 60-day stay in discovery of a civil matter pending the outcome of criminal proceedings.[62] She argued that if forced to participate in discovery of the civil matter, because some allegations against her overlapped with those in the criminal matter, her right to due process would be undermined.[63] However, the court feared that the defendant would continue to claim the Fifth Amendment privilege if the case was appealed.[64] Thus, the court found "[i]t would be detrimental to the progress of this litigation, and prejudicial to the plaintiff, to stay this case for the time required to resolve the underlying criminal proceeding."[65] Moreover, the defendant merely contended that her rights "*might* be undermined," and not that she would be subject to certain loss if the motion for stay was not granted.[66]

As these cases make clear, courts have discretion to stay a parallel civil action *only* when refusing to do so would result in certain judgment against the invoking party. As set forth below, however, this standard unnecessarily omits consideration of other potentially critical factors.

Multifactor Test Applied by Other Jurisdictions

Many jurisdictions outside Florida apply a multifactor test in deciding whether to grant a temporary stay.[67] These factors have been the subject of discussion for many years.[68] The key criteria include:

1.) the extent to which the issues in the criminal and civil cases overlap; 2) the status of the case, including whether the defendants have been indicted; 3) the plaintiff's interest in proceeding expeditiously weighed against the prejudice to plaintiff caused by a delay; 4) the private interests of and burden on defendants; 5) the interests of the court; and 6) the public interest.[69]

Addressing the first factor, courts note that "the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter."[70] This is so, in part, "because of the danger that the government may use civil discovery to obtain evidence and information for use in its criminal prosecution, thereby circumventing the Fifth Amendment right against self-incrimination."[71] This could also be true even when government agencies are not prosecuting both the civil and criminal matters. The scope of discovery in civil matters is purposefully broad, and a civil litigant may be called upon to produce scores of documents or testimony which might adversely impact the defense of the criminal case. Thus, cases involving substantially overlapping allegations weigh heavily in favor of a stay.

The second factor, the status of the case, may also have a substantial bearing upon whether a stay is appropriate. Elaborating upon this factor, federal district courts have observed that "the potential harm to civil litigants arising from delaying them is reduced due to the promise of a fairly quick resolution of the criminal case under the Speedy Trial Act."[72] Some district courts focus upon whether a criminal proceeding has actually commenced.[73] Others find that the threat of criminal prosecution is sufficient to trigger the need for a stay.[74]

Addressing the third factor, courts have noted that "in evaluating the plaintiff's burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in her right to expeditiously pursue her claim."[75] Prejudice results when the passage of time allows memories to fade, witnesses to relocate, or otherwise become unavailable and "assets to dissipate."[76] Prejudice also results when a defendant seeks to gain a tactical advantage by seeking a stay.[77] However, the balancing test allows courts to take these factors into consideration when deciding whether a stay or continuance of discovery is appropriate in the first instance and if so, allows judges to fashion a remedy to alleviate any potential prejudice. As noted above, indefinite stays of discovery or trial are rarely appropriate.

The fourth factor, the burden on the defendant, is also of critical importance. At trial, a jury may construe the defendant's silence as incriminating. This is not only severely prejudicial, in many instances it will result in the automatic entry of judgment against the defendant. If the defendant decides to waive his or her Fifth Amendment rights, the decision is irrevocable. While this will enable the defendant to rebut the civil charges, any statements made in a deposition or in court can and will be used by the prosecution in the criminal proceedings. Moreover, the discovery and trial process allows the prosecuting party to access information to which it might not otherwise be entitled under the applicable rules of criminal procedure. If the defendant transparently seeks a stay for tactical reasons, the court is far less likely to grant relief. But in many cases, the prejudice suffered by the defendant involved in a parallel criminal proceeding will far outweigh the inconvenience to the plaintiff, warranting at least some form of limited relief.

Additionally, the interests of justice and the interests of the court are important considerations. On one hand, stays can often be "relatively indefinite, because there is no way to predict when the criminal investigation would end."[78] This uncertainty weighs against a stay because "[i]t is unrealistic to postpone indefinitely the pending action until criminal charges are brought or the statute of limitations has run for all crimes conceivably committed."[79] On the other hand, "[i]f the civil action is stayed until the conclusion of the criminal proceedings, then it obviates the need to make rulings regarding potential discovery disputes involving issues that may affect the criminal case."[80] In fact, "the outcome of the criminal proceedings may guide the parties in settlement discussions and potentially eliminate the need to litigate some or all of the issues" in the case.[81] Finally, courts can alleviate concerns about indefinite stays by "allowing the parties to petition the [c]ourt to lift or modify the stay if there is a change in circumstances warranting it."[82]

The public interest is likewise often enhanced by a stay of the civil litigation pending the outcome of the parallel criminal proceeding. For example, courts may deny stays in civil matters prosecuted by government agencies "intended to protect the public by halting the distribution of mislabeled drugs . . . or the dissemination of misleading information to the investing public."[83] When the potential harm to the public is lacking, a stay of the civil matter is often beneficial because it allows the criminal proceedings to quickly reach their conclusion.[84] This is particularly true in cases of substantial factual overlap.[85]

Conclusion

Against this background, practitioners must be mindful of their forum and the nature of the request when attempting to navigate or avoid parallel proceedings. Florida's state courts may be more willing to consider the multifactor approach adopted by other states and federal circuits. This test has distinct advantages, recognizing that all parallel litigation is not the same and that certain factors justifying relief in one situation may not compel the same result in another. The test also allows courts to consider public and private interests, and to grant a stay or continuance in the absence of any demonstrable prejudice to the plaintiffs.

A careful application of the relevant criteria will enable courts to make informed decisions. Regardless of whether the matter is in state

or federal court, the more narrowly tailored the request, the greater the odds of success. Keeping this in mind, practitioners are well served to tailor their requests so as not to seek indefinite stays of discovery or trial proceedings.

[1] *See Simpson Watches Removal of Piano; $20,000 Instrument to be Sold to Help Settle Damage Award*, **San Jose Mercury News** (California), Aug. 2, 1997, at 3B; Ruth Ryon & Carla Hall, *Simpson House Sold to Banker, Sources Say*, **L.A. Times**, Nov. 26, 1997, at B1.

[2] , **USA Today**, July 22, 2004, *available at* www.usatoday.com/news/nation/2004-07-22-nightclub-fire_x.htm.

[3] *See* Jennifer Rosinski, , **Boson Herald**, Feb. 1, 2005, at 16 (following assertion of Fifth Amendment privilege by a defendant in the Rhode Island nightclub fire matter, parent of a victim exclaimed "[i]t seems to me in history when people use the Fifth Amendment they are guilty....They always have something to hide.").

[4] **U.S. Const.** amend. V.

[5] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

[6] *Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976).

[7] *See, e.g., United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991).

[8] *See, e.g., Chandler v. State*, 848 So. 2d 1031, 1044 (Fla. 2003) ("Once a defendant takes the witness stand he waives his Fifth Amendment privilege and makes himself liable to cross-examination as an ordinary witness.").

[9] *Kerben v. Intercontinental Bank*, 573 So. 2d 976, 978 (Fla. 5th D.C.A. 1991) (citing *Stockham v. Stockham*, 168 So. 2d 320 (Fla. 1964)); *Village Inn Rest. v. Aridi*, 543 So. 2d 778 (Fla. 1st D.C.A. 1989); *Rollins Burdick Hunter of N.Y., Inc. v. Euroclassics Ltd., Inc.*, 502 So. 2d 959 (Fla. 3d D.C.A. 1987); *City of St. Petersburg v. Houghton*, 362 So. 2d 681 (Fla. 2d D.C.A. 1978)). Federal courts are similarly consistent. *Arango v. United States Dep't of the Treasury*, 115 F. 3d 922, 926 (11th Cir. 1997) (citing *United States v. Rylander*, 460 U.S. 752, 758-59 (1983)) ("A party who asserts the privilege may not 'convert [it] from the shield against compulsory self-incrimination which it was intended to be into a sword whereby [he] would be freed from adducing proof in support of a burden which would otherwise have been his.'").

[10] *Id.* (citing *Fischer v. E.F. Hutton & Co., Inc.*, 463 So. 2d 289 (Fla. 2d 1984)).

[11] *Id. See also Fraser v. Security and Investment Corp.*, 615 So. 2d 841, 842 (Fla. 4th D.C.A. 1993) ("Particular circumstances may give rise to the necessity for protecting . . . a party's interests, as, for example, granting a continuance because of pending criminal charges.").

[12] *Kerben*, 573 So. 2d at 978-79.

[13] *Id.* at 977.

[14] *Id.*

[15] *Id.* The assistant did not, however, assert the privilege in an earlier deposition conducted by the plaintiff.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 978.

[19] *Id.* at 979. The Fifth D.C.A. later referenced *Kerben*, stating "even where a clear and specific reason is offered for delaying proceedings, that any stay of discovery or trial should be for a reasonable and finite time, and that the least intrusive means of accommodating the need for delay should be used, with weight given to the plaintiff's legitimate need to proceed expeditiously." *State v. Antonucci*, 590 So. 2d 998, 1000 (Fla. 5th D.C.A. 1991) (granting certiorari and quashing two trial court orders continuing case pending outcome of parallel civil matter and suspending discovery for six months).

[20] *Rappaport v. Levy*, 696 So. 2d 526, 527 (Fla. 3d D.C.A. 1997).

[21] *Id.* at 526.

[22] *Id.*

[23] *Id.* at 527.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 527-28. *See also Eller Media Co. v. Serrano*, 761 So. 2d 464, 466-467 (Fla. 3d D.C.A. 2000) (affirming denial of defendant's motion to stay civil case pending outcome of criminal proceedings when the defendant had yet to formally invoke the privilege; plaintiffs would have been prejudiced because statute of limitations would have run on case before criminal trial date, precluding them from adding additional parties identified by defendant).

[28] *Id.* at 498.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 498.

[32] *Id.* at 499.

[33] *Klein v. Royale Group Ltd.*, 524 So. 2d 1061, 1062 (Fla. 3d D.C.A. 1988).

[34] *Id.* at 1061-1063.

[35] *Id.* at 1063.

[36] *Kozyak v. Poindexter (In re Financial Federated Title & Trust, Inc.)*, 252 B.R. 834, 837 (Bankr. S.D. Fla. 2000) (citing *United States v. Lot 5, Fox Grove*, 23 F. 3d 359, 364)). Other jurisdictions also adhere to this standard. *See U.S. v. Certain Real Property, Commonly Known as 6250 Ledge Road, Egg Harbor, Wis.*, 943 F.2d 721, 729 (7th Cir. 1991) (citation omitted) (in certain instances, a defendant must simply make a difficult choice "between preserving his privilege against self-incrimination and losing the civil suit.").

[37] *Shell Oil Co. v. Altina Associates, Inc.*, 866 F. Supp. 536, 540 (M.D. Fla. 1994).
[38] *United States v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F.3d 359, 364 (11th Cir. 1994) (citing *United States v. Kordel*, 397 U.S. 1, 12 & n. 27 (1970). *See Securities & Exch. Comm'n v. Dresser Indus.*, 202 U.S. App. D.C. 345, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980)). "Special circumstances that may necessitate granting a stay include the following: (1) if the government brought the civil action solely to obtain evidence for its criminal prosecution; (2) if the government failed to advise the defendant in the civil proceeding that it contemplates his criminal prosecution; (3) if the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; or (4) any other special circumstances indicating unconstitutionality or even impropriety." *Hilliard v. Black*, Case No. 1:00cv80 MMP, 2000 U.S. Dist. LEXIS 20329, at *8 (N.D. Fla. Nov. 9. 2000).
[39] *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991). *See also SEC v. Incendy*, 936 F. Supp. 952, 956, n.4 (S.D. Fla. 1996) ("To trigger this exception, the invocation of the privilege must result in automatic summary judgment, not merely the loss of the defendant's most 'effective defense'"); *SEC v. Keith Group of Cos.*, 1998 U.S. Dist. LEXIS 13011 (S.D. Fla. 1998) (denying motion for summary judgment based upon "special circumstances" where "Defendants' invocation of their privilege results not in a loss of their most effective defense, but rather in a loss of their *only* defense) (emphasis in original).
[40] *Shell Oil Co.*, 866 F. Supp. at 540. *See also United States v. Lot 5*, 23 F. 3d 359, 364 (11th Cir. 1994) ("A blanket assertion of the [Fifth Amendment] privilege is an inadequate basis for the issuance of a stay.").
[41] *Hilliard*, 2000 U.S. Dist. LEXIS 20329, at *7.
[42] *Wehling v. CBS*, 608 F.2d 1084, 1086 (5th Cir. 1979).
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.* at 1087.
[47] *Id.* (noting "We do not dispute CBS's assertion that it would be unfair to permit Wehling to proceed with his lawsuit and, at the same time, deprive CBS of information needed to prepare its truth defense.").
[48] *Id.*
[49] *Id.* at 1088.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 1089. The court also noted that CBS would not suffer prejudice as a result of the stay.
[53] *Id.*
[54] *Id.* at 1036.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Anglada*, 822 F.2d at 1037 (11th Cir. 1987) (citing *United States v. White*, 859 F.2d 1283, 1287 (5th Cir. 1979)). *But see Scheuerman v. City of Huntsville*, 373 F. Supp. 2d 1251 (N.D. Ala. 2005) (balancing several relevant factors to determine whether a stay was warranted).
[59] *Anglada*, 822 F.2d at 1037. The court noted that this distinguished the situation from *Wehling v. CBS*, 608 F.2d 1026 (5th Cir. 1979), *reh'g denied*, "refusal to participate in a trial on a blanket assertion of the Fifth Amendment privilege").
[60] *Id.*
[61] *Id.* (citing *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979)). The court also noted "the defendants' decision not to be present and testify, during the civil action, and to simply rely on a directed verdict, amounted to a pure trial strategy and clearly does not warrant a new trial."
[62] *Baez v. Seminole County School Board*, 2005 U.S. Dist. LEXIS 35270 at *5.
[63] *Id.*
[64] *Id.*
[65] *Id. See also id.* at *4 n.2 (rejecting the defendant's reliance on cases from other jurisdictions "which use a more lenient standard").
[66] *Id.*
[67] *Ashworth v. Albers Med., Inc.*, 229 F.R.D. 527, 530-531 (D. Va. 2005) (collecting state and federal cases adopting or applying the multifactor test).
[68] *See Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980).
[69] *Walsh Sec. v. Cristo Prop. Mgmt. Ltd.*, 7 F. Supp. 2d 523, 526-527 (D. N.J. 1998) (citation omitted); *Federal Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989); *Newby v. Enron Corp. (In re Enron Corp. Secs., Derivative & ERISA Litig.)*, MDL-1446, Civil Action No. H-01-3624 Consolidated Cases, 2007 U.S. Dist. LEXIS 17672, at *88 (D. Tex. 2007) (enumerating factors, including "the interests of third parties" and "the good faith of the litigants").
[70] *S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-1376 (D.C. Cir.) (en banc), *cert. denied*, 449 U.S. 993 (1980).
[71] *All Meat and Poultry Products Stored at LaGrou Cold Storage 2102 West Pershing Road, Chicago, Illinois*, 2003 U.S. Dist. 176777, at *6-7 (N.D. Ill. Oct. 2, 2003).
[72] *Walsh Securities, Inc.*, 7 F. Supp. 2d at 527 (quoting Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 203 (1989)).
[73] *Twenty-First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1011 (E.D.N.Y. 1992) ("Courts are more likely to grant stays when an

indictment has already been issued."); *Maloney v. Gordon*, 328 F. Supp. 2d 508, 512 (D. Del. 2004) (citations omitted) ("If criminal indictments are returned against the civil defendants, then a court should strongly consider staying the civil proceedings until the related criminal proceedings are resolved.").

[74] *SEC v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1326 (D. Ala. 2003) (citing *SEC v. Incendy*, 936 F. Supp. 952, 955 (S.D. Fla. 1996)) ("While a stay in a civil proceeding when no indictment has yet issued in the criminal proceeding is rare, issuing such a stay is within this court's inherent powers."). *See also Walsh Securities, Inc.*, 7 F. Supp. 2d at 527 (noting that case was a strong candidate for a stay where, even though the indictments had not yet been returned, the government "has executed search warrants and issued subpoenas to several defendants" and further, informed the defendants that they were "targets of the criminal investigation.").

[75] *Maloney v. Gordon*, 328 F. Supp. 2d 508, 512 (D. Del. 2004) (citing *In re Adelphia Communs. Secs. Litig.*, 2003 U.S. Dist. LEXIS 9736 at *10 (E.D. Pa. May 14, 2003)).

[76] *Walsh Securities, Inc.*, 7 F. Supp. 2d 528.

[77] *Id.*

[78] *Id.*

[79] *Id.* (citing *Citibank, N.A. v. Hakim*, 1993 U.S. Dist. LEXIS 16299, at *2 (S.D.N.Y. 1993)).

[80] *Maloney v. Gordon*, 328 F. Supp. 2d 508, 513 (D. Del. 2004) (citing *Cognex Corp. v. Nat'l. Instruments Corp.*, 2001 U.S. Dist. LEXIS 25555 (D. Del. June 29, 2001)); *Javier H. v. Garcia Botello*, 218 F.R.D. 72, 75 (W.D.N.Y. 2003) ("By proceeding first with the criminal prosecution, the [c]ourt makes efficient use of judicial time and resources by insuring that common issues of fact will be resolved and subsequent civil discovery will proceed unobstructed by concerns regarding self-incrimination.").

[81] *Maloney*, 328 F. Supp. 2d at 513 (D. Del. 2004).

[82] *Walsh Securities, Inc.*, 7 F. Supp. 2d at 529 (citing *Brock v. Tolkow*, 109 F.R.D. 116, 121 (E.D.N.Y. 1985)).

[83] *See* 1998 U.S. Dist. LEXIS at *15. (citing *United States v. Kordel*, 397 U.S. 1, 11 (1970); *Securities and Exchange Commission v. Dresser Indus.*, 202 U.S. App. D.C. 345, 628 F.2d 1368, 1377 (D.C. Cir. 1980)).

[84] *Maloney*, 328 F. Supp. 2d at 513 ("A stay in this case would benefit the public by allowing the criminal prosecution of the [d]efendants, who are public officials, to proceed unimpeded and unobstructed by any concerns that may arise in discovery in the civil case.").

[85] *Id.*

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PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

By Paula Cotter, NAAG Energy and Environment Counsel

Parallel criminal and civil litigation can raise ethical and practical concerns for attorneys general. Many state attorneys general have authority to prosecute criminal environmental cases as well as civil environmental cases, and in many cases, the Office of the Attorney General also represents the state in administrative proceedings. In those cases, the office is well advised to implement a plan to avoid potential unethical actions, such as disclosure of grand jury information, and to minimize practical problems.

There is no blanket prohibition against a state, or the federal government developing parallel cases, but there are risks. There is a fairly large body of federal law on parallel proceedings, but state law is likely relevant as well. Office leadership is wise to review it in formulating general plans or working on specific cases.

Cases tend to speak to subject matter in regulatory areas like securities, tax, environment, and so forth. Possible reasons include the fact that the governing statutes have multiple punitive and remedial schemes, i.e., civil penalties, criminal penalties, and administrative remedies. Also, because of the technical nature of the subject matter in the highly-regulated areas, the potential government witnesses in criminal and civil proceedings are sometimes limited to a single agency or unit, creating a possible inappropriate overlap.

The investigation and case development period of parallel proceedings can pose risks that that either the criminal or civil case will be dismissed, or that critical evidence will be excluded. During the investigative phase, and throughout parallel proceedings, one key theme is that a party -- most particularly a governmental party -- may not use one sort of process only to advance progress in the other. The concept is articulated by the D.C. Circuit in *Dresser*[1]; many state cases also adopt this idea.[2] In *Dresser*, the court spoke to civil or administrative investigations that feed into criminal investigations and ultimately to prosecutions. The court identified an investigation "conducted solely for [a] criminal enforcement purpose" as a bad faith

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use of process (although it did not find such bad faith in the case at hand).

If a good faith civil investigation turns up information that is germane to a criminal investigation, however, the law does not categorically preclude using that information in a criminal case. Federal cases explaining this rule include *Kordel*,[3] (a Food and Drug Administration case) and its progeny. In *Kordel*, the Supreme Court held:

> We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution. *(citations omitted)*

One state case example is *Stock v. State of Alaska*, where the court found no reason to prevent the development of a criminal case against the defendant although an administrative matter was also in progress. While holding that the state could appropriately move forward in the criminal case, the court noted that in some cases, immunity from prosecution based on admissions in civil proceedings is appropriate.[4] As in *Stock*, the parallel proceedings issue often emerges in the context of whether the privilege against self-incrimination may legitimately be invoked.

For instance, in *Stringer*, brought by the Securities and Exchange Commission (SEC), the Ninth Circuit also held that there can be parallel proceedings without a Due Process violation if the government does not act in bad faith. Points in that case that led the court to think the plaintiff had acted in good faith included the fact that the SEC had begun its civil investigation before the U.S. attorney was involved and instigated a criminal case, and the fact that the government had made some (admittedly broad) statements to the defendant that there was a potential for civil and/or criminal liability. The Court stated that the governmental authority cannot "affirmatively mislead" the defendant without veering into bad faith.[5]

Often a defendant will ask the court to stay the civil case while the criminal case proceeds to avoid giving rise to an inference of (civil) wrongdoing by invoking Fifth Amendment rights. It is legitimate not to testify against oneself, but if a defendant avoids it in a civil case, it can be used to make him look bad, unlike a criminal case, where such a failure to incriminate oneself cannot be used against the defendant. Thus a guilty defendant may want to avoid choosing between perjury, an outright admission, or a damaging inference, and move for a stay.

Granting a Stay

Courts are under no automatic obligation to grant a stay. Factors include the burden on the defendant (self-incrimination pressure/inference of wrongdoing), burden on the plaintiff, public interest in prompt resolution, and court resource management. For

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government cases, a key factor weighing in favor of denying a request for a stay is the ability to make the argument that the civil or administrative case is remedial or corrective, and not strictly punitive. If the non-criminal case is not punitive, the court may be more likely to permit both cases to go forward.

With respect to the flow of information from the criminal investigation to the civil investigation, there are two common risks: One risk is disclosure of grand jury information. The prohibition protects the integrity of the grand jury, helps witnesses feel comfortable that they will not suffer reprisal because their secret testimony will not be revealed, and prevents unsupported allegations from circulating. Another risk is the conversion of investigators in the civil case to participants in the criminal investigation. If the agency witness becomes involved in actually planning the criminal investigation, as opposed to gathering factual evidence, the (formerly) civil inspector or investigator can trigger criminal law requirements, and may not be able to resume activities as a civil inspector at the facility.

In the settlement phase it is also important to avoid manipulating one legal process to influence another. Specifically, this means that the government must never threaten criminal prosecution as a way to achieve settlement of a civil action. Global settlements (covering civil and criminal actions) are not precluded, but must be negotiated appropriately. Some prosecutors insist that an offer of a global settlement be documented by a written offer from the relevant defendant or defendants, to avoid the appearance of a *quid pro quo* between civil and criminal sanctions.

Double Jeopardy

Double jeopardy is also a potential issue where defendants are convicted of a crime that has elements in common with civil liability also imposed on them. The leading case in that area is *U.S v. Hudson.[6]* The analysis outlined there is a preliminary step and then a multi-part analysis as a second step. First the court must examine the statute to see if the legislature indicated whether a law is criminal or civil. If the legislative intent is found to be civil, the analysis must still go on to evaluate whether "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." (internal citations omitted).

The analysis of whether the statute was transformed by its harshness into a criminal law is governed by the *Mendoza[7]* factors: (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment -- retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

This is an important area that cannot be addressed *after* problems arise. Governmental counsel are best served if they develop and implement a plan incorporating general principles as well as any jurisdiction-specific law, and if staff are trained to identify possible problems in parallel criminal and civil (or administrative) litigation.

[1] *SEC v. Dresser Inc.*, 628 F 2d 1368 (D.C.Cir. 1980), *cert den'd*, 449 U.S. 993 (1980).

[2] E.g. *Farricielli et al. v. State of Connecticut, Department of Environmental Protection*, 1997 Conn. Super. LEXIS 66, *Commonwealth v. Hogan*, 389 Mass. 450 (1983).

[3] *U.S. v. Kordel*, 397 U.S. 1, 25 L. Ed. 2d 1 (1970).

[4] 526 P.2d 3 (1974); 1974 Alas. LEXIS 3241974.

[5] *U.S. v. Stringer*, 535 F.3d 929 (9th Cir. 2008), *cert. den'd*, 129 S. Ct. 662 (2008).

[6] *U.S. v. Hudson*, 522 U.S. 93, 118 S. Ct. 488 (1997).

[7] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554 (1963).

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Parallel Proceedings: Civil, Administrative/Regulatory, and Criminal

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The term "parallel proceedings" is shorthand for describing simultaneous civil, administrative, regulatory, or criminal investigations or formal proceedings. Although "prompt investigation of both civil and criminal claims can be necessary to the public interest," a stay of noncriminal proceedings may be required pending the outcome of criminal proceedings where the noncriminal proceeding threatens to violate the party's Fifth Amendment privilege against self-incrimination. *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980). When the noncriminal proceeding does move forward, "the separate investigations should be like the side-by-side train tracks that never intersect." *United States v. Scrushy*, 366 F.Supp.2d 1134, 1139 (N.D. Ala. 2005). Counsel for parties in parallel proceedings must be ever vigilant to ensure that the civil or administrative investigation is not used as a "Trojan horse for a parallel criminal investigation by gaining the cooperation of an unsuspecting criminal target, who would have otherwise invoked protections against self-incrimination." Hilder, Philip & Creech, Paul,*Texas Medicaid Fraud Control Unit, A Trojan Horse*, http://www.hilderlaw.com/publications. *See also Sterling Nat. Bank v. A-1 Hotels Intern., Inc.*, 175 F.Supp.2d 573, 579 (S.D.N.Y. 2001) (noting that where civil and criminal proceedings are conducted concurrently, "there is a special danger that the government can effectively undermine rights that would exist in a criminal investigation by conducting a *de facto* criminal investigation using nominally civil means").

Parallel proceedings are challenging because what may be a good strategic move in one forum or setting may be ill-advised in another. When deciding among difficult strategic choices, parallel proceedings require that counsel never lose sight of the client's priorities.

- Typically, the first priority is to stay out of prison, *i.e.*, liberty.
- Retention of a professional license often is high on the list of priorities, if not at the top of the list. Loss of license can be the "economic death penalty."
- Preservation of reputation is high on most clients' list of priorities.
- Preservation of one's assets is important, but may not be the highest priority, particularly when compared with loss of liberty.

Priorities need to be discussed with the client and clearly understood. They should guide your advice and your client's difficult choices.

Take for example the lawyer who represents a physician who is the subject of both a criminal prosecution and either a civil suit or an administrative proceeding before the state medical board or other licensing authority. If the physician is called upon to give a civil deposition or to testify at a board hearing, he or she may be faced with the dilemma of either waiving his or her Fifth Amendment privilege against self-incrimination, or invoking the privilege, which may, and often does, result in an adverse inference being drawn against him or her. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("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.").[1] You and your client must discuss the consequences of both options. With regard to the myriad implications of invoking the privilege, you should consider the following:

1. Will invocation of the privilege endanger your client's clinical privileges in hospitals where the physician is a member of the medical staff?
    1. Will peer review proceedings be initiated against the physician?
    2. Is the Hospital implicated by the physician's conduct, *e.g.*, is there a potential*Stark* or kickback violation?
    3. Will the Hospital enter into a common interest agreement concerning the investigation?
        1. *See In re Grand Jury Subpoena*, 415 F.3d 333 (4th Cir. 2005) (Common interest agreement between corporation that was subject of SEC investigation and employee who was also subject of that investigation could not serve as basis for employee's assertion of joint defense privilege against grand jury subpoenas seeking documents related to company's earlier internal investigation because at the time of the internal investigation, during which employee was interviewed by inside and outside counsel, a common interest

agreement was not yet in effect, and the interviews were not for the purpose of formulating a joint defense).

2. Will invocation of the privilege endanger the physician's employment?
    1. What are the events of default under his employment contract?
    2. Will his colleagues enter into a common interest-joint defense agreement?
    3. Will the physician's employer indemnify him?
        1. Do the practice's bylaws provide for indemnification?
        2. What are the State's corporate statutory requirements for indemnification/advancement of fees and expenses?
            1. Georgia
                1. O.C.G.A. 14-2-851(a): "Except as otherwise provided in this Code section, a corporation may indemnify an individual who is a party to a proceeding because he or she is or was a director against liability incurred in the proceeding if: (1) Such individual conducted himself or herself in good faith; and (2) Such individual reasonably believed: (A) In the case of conduct in his or her official capacity, that such conduct was in the best interests of the corporation; (B) In all other cases, that such conduct was at least not opposed to the best interests of the corporation; and (C) In the case of any criminal proceeding, that the individual had no reasonable cause to believe such conduct was unlawful."
                2. O.C.G.A. 14-2-857(a), (d): "A corporation may indemnify and advance expenses ... to an officer of the corporation who is a party to a proceeding because he or she is an officer of the corporation: (1) To the same extent as a director; and (2) If he or she is not a director, to such further extent as may be provided by the articles of incorporation, the bylaws, a resolution of the board of directors, or contract" and "may also indemnify and advance expenses to an employee or agent who is not a director to the extent, consistent with public policy, that may be provided by its articles of incorporation, bylaws, general or specific action of its board of directors, or contract."
                3. O.C.G.A. 14-2-853(a): "A corporation may, before final disposition of a proceeding, advance funds to pay for or reimburse the reasonable expenses incurred by a director who is a party to a proceeding because he or she is a director if he or she delivers to the corporation: (1) A written affirmation of his or her good faith belief that he or she has met the relevant standard of conduct described in Code Section 14-2-851 or that the proceeding involves conduct for which liability has been eliminated under a provision of the articles of incorporation as authorized by paragraph (4) of subsection (b) of Code Section 14-2-202; and (2) His or her written undertaking to repay any funds advanced if it is ultimately determined that the director is not entitled to indemnification under this part."
            2. Delaware
                1. 8 Del.C. 145(a): "A corporation shall have power to indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, ... against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful.
                2. 8 Del.C. 145(e): "Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section."
    4. Do any of his colleagues stand to profit by his elimination as a competitor?
3. Will invocation of the privilege endanger the physician's medical license with the State?
    1. Will the State Medical Board initiate an investigation?

2. What happens if the physician refuses to be interviewed by an investigator with the State Medical Board?

4. Will invocation of the privilege endanger your client's eligibility as a provider in managed care groups?

    1. What, if any, due process rights does the physician have under agreements with managed care groups?

5. Will invocation of the privilege endanger eligibility with Medicare or Medicaid?

    1. Will there be an administrative audit or investigation?

    2. Will administrative subpoenas or civil investigative demands ("CIDs") be issued?

    3. How long is the potential exclusion from Medicare?

6. Will invocation of the privilege endanger your client's malpractice insurance coverage?

    1. Does invocation of the privilege constitute failure to cooperate in the defense?

    2. What exclusions are contained in the physician's insurance policy that could be implicated?

7. Will invocation of the privilege result in embarrassing media coverage?

    1. Does anyone have an incentive to leak information to the media?

    2. How will the physician's patients react?

    3. How will the physician's referral sources react?

8. Will the privilege be waived if it is not asserted?

    1. *See Minnesota v. Murphy*, 465 U.S. 420, 428 (1984) (holding that the privilege is lost if not affirmatively invoked, even where defendant did not make knowing and intelligent waiver).

Equally important are the possible implications of not invoking the privilege. In evaluating these, counsel must ask:

1. Why does your client insist on testifying, *e.g.*, paranoia that an invocation of the privilege will make the situation worse, anger the other side, or imply guilt?

2. Can you and your client make an intelligent waiver of the privilege?

    1. Do you and your client have all of the documents and evidence, *e.g.*, witness statements, relevant to his or her involvement in the events in question?

    2. Do you clearly understand what is being investigated?

    3. Do you clearly understand what your client allegedly did?

3. How broad is the waiver of the privilege (should the physician decide to testify)?

    1. Has the door been opened to future questioning in other settings?

4. Can the physician's testimony be used against him or her in the criminal investigation?

5. Can the physician's testimony be used against him or her by the Medical Board, Medicare, Medicaid, peer review committees at hospitals, insurance carriers, or managed care groups?

6. Can the physician agree with the opposing party to make confidential disclosures that will not be disclosed to third parties and that cannot be obtained by third parties?

7. Is there a common interest privilege?

    1. *McKesson Corp. v. Green*, 279 Ga. 95 (2005) (when a party discloses materials that are protected by the attorney work-product privilege to a government agency investigating allegations against it, party waives the protection, notwithstanding confidentiality agreement with government agency); *See also In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302 (6th Cir. 2002) (client may not selectively waive attorney-client privilege by releasing otherwise privileged documents to government agencies during investigation, but continue to assert privilege as to other parties).

8. Can a stay be obtained in order to avoid giving a deposition?

9. Is there any alternative to giving a deposition?

    1. Can an interview be given instead?

    2. Can written questions be answered in lieu of a deposition?

10. If the deposition does go forward:
    1. Can topics on which criminal exposure might exist be avoided?
    2. Can objections based on relevance be successfully asserted?
    3. Will the testimony be videotaped?
    4. Will the physician waive signature, or will he or she reserve the right to read and sign (to correct his or her testimony after having been afforded thirty days in which to read and study it)?
    5. Are there any other technical, procedural objections that can be used to avoid having to testify on sensitive topics?

Suppose your client were the subject of a civil SEC investigation. Similar questions, as well as many additional questions, arise when the SEC asks him or her to submit to a deposition.

1. What is your client's status in the eyes of the SEC?
    1. Is your client likely to receive a request for a "Wells submission"?
        1. During an SEC investigation, the party whose activities are being investigated may receive a notice that the SEC's Enforcement Division is close to recommending to the full Commission an action against the party. The party may submit a statement, referred to as a "Wells Submission," that sets forth the party's "interests and position in regard to the subject matter of the investigation." 17 C.F.R. 202.5(c) (2007).
    2. Was your client significantly enriched by the conduct under investigation?
    3. Has your client received a "target letter" from the Department of Justice? *United States v. Scrushy*, 366 F.Supp.2d 1134, 1139 (N.D. Ala. 2005) (stating that "[w]hen a defendant *knows* that he has been charged with a crime, or that a criminal investigation has targeted him, he can take actions to prevent the providing of information in an administrative or civil proceeding that could later be used against him in the criminal case. When a defendant does not know about the criminal investigation, the danger of prejudice increases").
2. What inference will be drawn against your client by the SEC if he or she invokes the privilege against self-incrimination?
3. Will invocation of the privilege endanger your client's employment?
    1. Are your client's attorneys' fees being advanced pursuant to an "undertaking" under a corporation's bylaw concerning indemnification?
    2. Does your client have a joint defense/common interest agreement with his or her employer?
    3. Has your client already given his or her employer an interview?
    4. Has the employer initiated an internal investigation?
4. If your client is a licensed professional, *e.g.*, CPA, stockbroker, or attorney, will invocation of the privilege endanger his or her license?
5. Can the testimony be used in parallel civil litigation, *e.g.*, class actions or derivative suits?
    1. Do you order the transcript?
        1. If you do not order the transcript, it will not be within your client's possession should he or she receive a production request in parallel civil litigation.
        2. On the other hand, if you do not order the transcript, your client will not be able to review it before testifying again on the same subject matter, thus increasing the risk of an inadvertent inconsistency.
6. Can the testimony be used in criminal investigations and prosecutions?
    1. *Scrushy*, 366 F.Supp.2d at 1140 (affirming district court's exclusion of defendant's SEC testimony where record showed that "the Government manipulated the simultaneous investigations for its own purposes, including the transfer of Mr. Scrushy's deposition into this district for venue purposes"); *United States v. Edwards*, 526 F.3d 747, 759 n. 36 (11th Cir. 2008) (affirming district court's denial of defendant's motion to suppress documents submitted to SEC during its investigation and later obtained by the US Attorney's Office for use in criminal prosecution where defendant failed to show "that the SEC and the United States Attorney somehow colluded to deny [defendant] his constitutional rights"); *United States v. Stringer*, 535 F.3d 929 (9th Cir. 2008) (reversing district court's grant of defendant's motion to suppress evidence provided by defendants to SEC during civil investigation where it was clear that civil investigation "was not a pretext for the USAO's criminal investigation of defendants"); *United States v. Mahaffey*, 446 F.Supp.2d 115, 126 (E.D.N.Y. 2006) (statements defendant made to SEC in earlier civil action were admissible in subsequent criminal proceeding where defendant and his attorney were "well-aware of the USAO's investigation prior to appearing for questioning in the civil investigation" and nothing in the record showed that the "USAO... manipulated S.E.C. with the intention of misrepresenting its true intentions to the defendants")

7. Can the testimony or the invocation of the privilege be used in administrative investigations, *e.g.*, by the NASD?

8. What leads will the SEC obtain during the deposition that can be developed derivatively?

9. Does your client possess information that could be valuable to the SEC?

    1. If so, should you attempt to obtain immunity or mitigation in return for your client's cooperation?

Other questions might arise in both contexts. For instance, is your client working with or supplying information to prosecutors or regulators, or perhaps a potential relator in a *qui tam* action? Or is your client a potential whistleblower? A disgruntled employee? This is just the beginning. At every step, in each parallel proceeding, counsel must be alert to the potential collateral damage or unintended consequences that might result from the selection of a strategic option. It is imperative that you explain these consequences to your client so that your client does not later ask you, "Why didn't you warn me about that?" With parallel proceedings, collateral consequences require constant vigilance.

You should also be alert to tactical advantages the government may attempt to gain by bringing simultaneous criminal and noncriminal proceedings. The *Scrushy* case is a helpful reminder of how careful a practitioner must be when representing a client in such circumstances. In *Scrushy*, the U.S. District Court for the Northern District of Alabama suppressed the SEC deposition testimony of HealthSouth Chairman and CEO Richard Scrushy, citing an impermissible "commingling" of the SEC civil investigation and the Justice Department's simultaneous criminal inquiry into Scrushy's role in an alleged financial fraud.*Scrushy*, 366 F.Supp.2d at 1140.

At an early stage in the SEC's investigation of HealthSouth, DOJ prosecutors, during a telephone call with the SEC, directed the SEC accountant conducting the SEC's investigation to ask Scrushy certain questions during his deposition. *Id.* at 1136-37. Although Scrushy's deposition had been scheduled to take place on in Atlanta, Georgia, the U.S. Attorney's office also requested that the location be changed to Birmingham so that if Scrushy failed to tell the truth, "he w[ould] be lying in our district." *Id.* at 1135-1136. During the deposition, Scrushy was asked a series of questions based on information the SEC learned during the call with the U.S. Attorney's Office. *Id.* at 1137. The SEC accountant testified that, had it not been for the call from the U.S. Attorney's office, those questions would not have been asked at the deposition. *Id.* at 1137. The SEC accountant also did not advise Scrushy or his attorneys that DOJ was at the time conducting a criminal investigation into the fraud at HealthSouth. *Id.* At the conclusion of Scrushy's deposition, the SEC accountant went directly to the U.S. Attorney's Office. The district court first found that these circumstances "reflected a serious overlap in those investigations," and that the "investigations were no longer parallel but were commingled." *Id.* at 1137, 1140. Specifically, the court found that the SEC's civil action and the USAO's criminal investigation "improperly merged ... when the U.S. Attorney's office called the S.E.C. office, gave the S.E.C. advice or 'preferences' regarding the content of the deposition and its location," and "recruit[ed] [the SEC accountant] to participate in the criminal investigation." *Id.* at 1137, 1139. The court further noted that the U.S. Attorney's office had given the SEC accountant "explicit directions ... concerning tailoring his examination of Mr. Scrushy" and had told him to avoid certain questions "to keep Mr. Scrushy in the dark regarding the criminal investigation." *Id.* at 1139.

The district court then observed that whether a parallel investigation is legitimate or improper turns upon the "determining principle" that "the prosecution may use evidence acquired in a civil action in a subsequent criminal proceeding unless the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice." *Id.* at 1138 (citing *United States v. Teyibo*, 877 F.Supp. 846 (S.D.N.Y. 1995). Noting that the danger of prejudice is much greater where a defendant does not know that he is the target of a criminal investigation, the court found that the government's failure to advise Scrushy or his attorneys that Scrushy was the target of a criminal investigation and that the deposition had been moved to Birmingham at the U.S. Attorney's request "cannot be said to be in keeping with the proper administration of justice." *Id.* at 1139.

Lawyers representing clients in parallel investigations involving the Justice Department and the SEC Enforcement Division must take special care to ensure that their clients appreciate the extent of that cooperation and the likelihood that information developed by the SEC will be shared with and used by the Department of Justice. You should caution your clients about the possibility that false testimony to the SEC could lead to criminal perjury charges, as well.

Lest you have any doubt about the extent of the cooperation between the SEC and DOJ, Chris Wray, former Assistant Attorney General of the Criminal Division of the Department of Justice, wrote an article in February 2005, in which he said:

> Recent investigations and prosecutions of corporate fraud cases have been expedited by the use of ... new tools ... These innovations include ... [b]ringing the collective resources and expertise of federal agencies to bear earlier in an investigation in order to complete the investigation and initiate prosecution more expeditiously. This frequently means using the resources of regulatory agencies, such as the [SEC], to conduct a joint investigation of corporate misconduct from the inception of an investigation, instead of awaiting completion of the SEC proceedings before commencing a criminal investigation ...[and] [a] ggressively pursuing civil and regulatory enforcement action, often in proceedings parallel to criminal prosecutions and investigations.

Wray, "Prosecuting Corporate Crimes," eJournal USA, February 2005.

Because healthcare fraud investigations often involve simultaneous civil and criminal investigations, healthcare attorneys must be particularly mindful of the traps of parallel proceedings and prepared to defend on all fronts. As Holly Pierson, one former AUSA, noted in a recent article, "[t]he tools available to the government for purposes of the civil investigation can have a tremendous impact on the criminal investigation." Pierson, *Here Come the Feds: The Significant Impact of Healthcare Reform on Government*

Investigations and Enforcement," The Champion, September/October 2010 at 29. The author points out that, prior to the new Healthcare Reform Law, civil and criminal prosecutors conducted parallel investigations and shared documentary information obtained through Administrative Investigative Demands ("AIDs"). Under the new Healthcare Reform Law, the DOJ now has authority to use Civil Investigative Demands ("CIDs"), which "permit the civil prosecutors to compel both documents and sworn testimony, and then to share this information with criminal prosecutors and counsel for whistleblowers" in *qui tam* cases. *Id.* at 30; 31 U.S.C. 3733(a)(1) (2010). Prior to the 2009 amendments to the Fraud Enforcement and Recovery Act ("FERA"), only the Attorney General could issue CIDs in False Claims Act investigations. Pierson at 30. Now, however, the Attorney General has the power to delegate the authority to issue CIDs to the individual U.S. Attorneys, which, one author predicts, "is certain to result in a significant increase in [CIDs'] utilization." *Id.* Given the expanded authority CIDs give law enforcement to gather and share evidence, it will be much more difficult for providers and their counsel "to negotiate the already treacherous waters of a parallel civil and criminal investigation." *Id.*

As the foregoing illustrates, attorneys representing clients against whom both criminal and noncriminal proceedings have been or may be initiated face a multitude of challenges. With the increasing popularity of such "parallel" proceedings, attorneys must understand and appreciate the significant risks to which their clients can be exposed when defending against a civil action while a criminal investigation is underway, and must be prepared to develop a global defense strategy designed to protect against infringement or violation of their clients' important constitutional rights.

[1] An adverse inference may not, however, be drawn against a defendant in a criminal case due to the defendant's refusal to testify. *See Mitchell v. United States*, 526 U.S. 314, 327-28 (1999) ("The normal rule in a criminal case is that no negative inference from the defendant's failure to testify is permitted.").

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Practice Tips

By Pravin B. Rao

Dealing with Parallel Investigations

If responding to a government investigation is not fraught with enough complications, the level of complexity and risk increases significantly when facing parallel investigations. These types of investigations occur when multiple civil regulatory and criminal law enforcement authorities simultaneously initiate proceedings that relate to the same facts or overlapping targets.

This is not a recent development; the government has been able to conduct parallel investigations for some time. In 1970, the Supreme Court approved of parallel investigations in *United States v. Kordell*, stating that "[i]t would stultify enforcement of federal law to require a government agency such as the FDA to invariably choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer criminal proceedings pending the ultimate outcome of a criminal trial." 397 U.S. 1, 11 (1970). At the same time, the Court acknowledged that due process and "proper standards in the administration of justice" imposed limitations on the conduct of parallel investigations, finding that the government would transgress these limits where it brought a civil action solely to obtain evidence for a criminal prosecution; it failed to advise a defendant in a civil proceeding that it was contemplating a criminal prosecution; a defendant was unrepresented; or there were special circumstances that might suggest the unconstitutionality or impropriety of a criminal prosecution. *Id.* at 11-12.

Some recent district court opinions, however, have placed even greater limitations on parallel investigations. In *United States v. Scrushy*, 366 F. Supp. 2d 1134 (N.D. Ala. 2005), a criminal fraud case, the district court for the Northern District of Alabama excluded a defendant's deposition testimony obtained during a civil investigation by the Securities and Exchange Commission ("SEC").

Pravin B. Rao is a Litigation partner in the Chicago office of Perkins Coie LLP. His prior experience includes prosecuting criminal cases as an Assistant U.S. Attorney in Chicago and enforcing the Securities laws as a Branch Chief and Senior Attorney with the SEC.

The district court found that the civil and criminal investigations had become impermissibly "commingled" when the Birmingham U.S. Attorneys' Office ("USAO") contacted the SEC two days before the defendant's scheduled SEC deposition and requested that the SEC attorney move the defendant's deposition from Atlanta to Birmingham (to establish venue for any false statements made during the deposition); avoid certain topics during questioning (in order to conceal the criminal investigation); and assist in examining key witnesses. As a result of this conduct and the failure to inform the defendant of the criminal investigation before he testified, the district court concluded that use of the defendant's deposition in the criminal case would depart from the proper administration of justice. "To be parallel," the district court instructed, "by definition, the separate investigations should be like the side-by-side train tracks that never intersect." *Id.* at 1139. The government did not appeal the decision.

In *United States v. Stringer*, 408 F. Supp. 2d 1083 (D. Or. 2006), the Oregon district court held that federal prosecutors may not work together with the SEC in a single investigation, building their criminal case while hiding behind the SEC in order to sidestep the defendants' constitutional rights. Shortly after the SEC initiated its investigation, and following a meeting with SEC officials, the Oregon USAO and the FBI opened a criminal inquiry. Concerned that disclosure of the criminal investigation would halt civil discovery, result in the defendants invoking their constitutional rights and trigger limits imposed by the Federal Rules of Criminal Procedure, the USAO decided to abate its parallel investigation and rely on the SEC to develop evidence for the criminal case. Similar to *Scrushy*, the USAO asked the SEC to move the defendant's deposition to Oregon to establish venue, instructed the SEC on how to conduct interviews with the defendants in order to create a record for use in a false statements prosecution and took steps to ensure the continued secrecy of the criminal investigation. Finding that "[a] government agency may not develop a criminal investigation under the auspices of a civil investigation," the district court held that "[t]he strategy to conceal the criminal investigation from defendants constituted an abuse of the investigative process." *Id.* at 1088-89.

This opinion was reversed, however, when the Ninth Circuit Court of Appeals rejected the contention that parallel investigations may not merge or that a criminal prosecution may not be developed by means of a civil investigation. *United States v. Stringer*, 521 F.3d 1189

(9th Cir. 2008). The court first noted that the SEC started its civil investigation before the criminal investigation began. On that basis, the court concluded that the civil proceeding was not commenced solely as a pretext to obtain evidence for a criminal case. Given the legitimate nature of the civil investigation, and Congress' express authorization of information sharing between the SEC and the Department of Justice to facilitate the prosecution of crimes, the Ninth Circuit found that the cooperation between the agencies was appropriate. Second, the court found that SEC Form 1662, attached to the defendant's subpoenas, stating that any information would be shared with law enforcement agencies where appropriate, provided sufficient notice of the possibility of criminal prosecution. Third, the court explained that "[a] government official must not 'affirmatively mislead' the subject of parallel civil and criminal investigations into believing the investigation is exclusively civil in nature and will not lead to criminal charges." *Stringer*, 521 F.3d at 1198 (internal citation omitted). Barring affirmative representations, however, the government had no legal duty to disclose the existence of the pending criminal investigation.

In sum, following the Ninth Circuit's decision in *Stringer*, while the government may not affirmatively mislead defendants to shield the existence of a criminal investigation, it is under no obligation to inform targets about a criminal investigation as long as the defendants are generally aware of the possibility of prosecution. Moreover, where a genuine civil investigation is initiated prior to a criminal inquiry, federal law enforcement agencies may use and guide the civil proceedings to develop evidence in the criminal case.

Although parallel investigations can provide the government with a powerful tool for investigating and prosecuting alleged criminal wrongdoing, they can present significant challenges to companies, their officers, directors, and employees on how to juggle multiple investigations and decide between sometimes inconsistent strategies. Responding to these challenges requires a coordinated legal strategy. Seemingly "routine" inquiries from a civil regulatory agency can lead to criminal investigations. Therefore, if companies or their counsel receive notice of a civil investigation, here are some tips on how to flush out parallel investigations involving other government actors and how best to deal with them:

1. Assume that a parallel criminal investigation has been initiated and consider confirming the existence of criminal exposure. Wherever possible, be on the lookout for the warning signs or red flags that a criminal investigation may be initiated or even underway in the background even if the initial inquiry from a civil regulatory agency or self regulatory organization (SRO) is part of a routine examination, inquiry, or standard informational request. These innocuous inquiries may bring to light certain conduct or issues that require the attention of senior management and counsel. Companies should have a standardized protocol on how to deal with these routine inquiries, how the resulting information is communicated within the organization, and the appropriate next steps to take to prepare for the worst case scenario. To mitigate the information imbalance, consider asking the civil authorities directly about the existence of a criminal investigation. However, such inquiries may unnecessarily "stir the pot." Also, the civil authorities may only provide a canned response such as "assume the worst." On the other hand, remaining silent may undermine future efforts to credibly assert that parallel investigations were conducted improperly. Information may be obtained indirectly by delving into the background of the civil agency and its investigators, their prior relationship with criminal authorities, and a history of the criminal referrals they've made. Finally, if a court proceeding has been initiated, the discovery process may be used to obtain information about a criminal investigation.

2. Understand that parallel does not mean simultaneous. Counsel should not be lulled into thinking the "parallel" designation means that such investigations always start at the same time and are always simultaneous. Although that is most often the case, a criminal investigation may start much later, especially in light of the recent *Stringer* opinion. The civil investigation or action may end before there is any indication by criminal authorities, through informal requests or subpoenas, that their investigation is active. Keep records collected from the civil investigation accessible until there is confirmation that the criminal portion is over.

3. Use an internal investigation to determine if the company has any criminal exposure, while being careful of possible employee whistleblowers who may have initiated the inquiry. A rigorous internal investigation may lessen the chance of government intervention, especially if such investigations can address internal complaints from disgruntled employees or whistleblowers whose broad complaints are many times the catalysts for parallel investigations. During such

internal investigations, though, the company should be careful that efforts to protect the confidentiality of certain business practices are not interpreted as ways to silence whistleblowers.

4. Understand that information produced to the civil authorities may be used in a criminal prosecution and that even grand jury information may be used in a civil action with court approval. The criminal authorities can use information gathered in civil proceedings to pursue their own leads. Through mechanisms such as "access requests", criminal law enforcement, whether it be prosecutors or agents, can obtain copies of interview memos, testimony transcripts, and documents generated by the regulatory investigation, or from civil court or administrative proceedings. The SEC even discloses in its Form 1662 that it "makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors." The prosecutor can also get the court's permission to allow information obtained during the grand jury process to be shared with civil authorities. The operating assumption should be that the criminal and civil authorities are sharing information and sometimes even coordinating their strategies, especially in formulating their requests for information.

5. Taking an overly aggressive position in civil litigation could lead to allegations of perjury, false statements or obstruction of justice; consider asserting Fifth Amendment rights rather than providing potentially incriminating statements. Even where the prosecutor may not have strongest case for proceeding criminally, it may be easier to bring a criminal obstruction or false statement case. As is often said: "It's not the crime that destroys you, but the cover-up." Where there is already a parallel proceeding underway, any information provided to civil authorities will receive heightened scrutiny by criminal authorities; in most instances, two sets of eyes will be looking for possible lies upon which to bring a criminal obstruction case. Avoid appearing to interfere with investigations or regulatory requests, and ensure that any production or statement (whether in a formal testimony or informal interview) is consistent, carefully done, and comprehensive. If supplying a statement would lead to incriminating evidence and greater criminal exposure, the best alternative for an individual may be to not provide one at all – instead, assert the Fifth Amendment. Speaking to the government, whether civil or criminal, can result in a memorialized statement (or even a formal transcript of sworn testimony) which can be used as evidence against the speaker. "Taking Five" for an individual, however, not only may serve as the basis for the civil authority to initiate an action against them, but also may create an adverse inference in a civil proceeding, and even more damaging, may be enough to catch the prosecutor's interest.

6. Consider self-disclosure to prosecutors to control the pace of a parallel investigation rather than having the civil authority present the case to the criminal authorities. The decision to disclose is a complicated one, where the timing and manner of such disclosure, as well as the audience, can influence its effectiveness. The timing is crucial; if it is done too early, the full scope or extent of the issue may not be known and premature criminal interest may frustrate a more measured internal investigation. If disclosure is made, however, efforts to cooperate should be full and complete. Simultaneous disclosure to the civil and criminal authorities may be the best approach and in certain cases (e.g., FCPA-related cases), may be the norm. Recognize that such self-disclosure and subsequent cooperation may precipitate a request for a voluntary waiver of attorney-client privilege. Finally, be aware that voluntary disclosure is a one-way street with the government still maintaining complete control over the process.

7. Immediately consult outside counsel who have experience with the civil agency (e.g., the SEC's complex rules), as well as expertise in sophisticated criminal investigations. Although in-house counsel can be a valuable resource in making the initial assessment of the consequences of a routine inquiry, developing a plan to deal with multiple agencies requires obtaining counsel who are familiar with the particular rules of the specific civil authority and understand the interaction (and limitations of such interaction) between the civil and criminal authorities. Besides the traditional selection criteria for choosing outside counsel, an additional consideration is whether to choose just one counsel to handle the entire matter or different ones for each agency. Either course may work as long as the chosen counsel have the requisite expertise to deal with the agencies in question.

8. Consider the collateral consequences of dealing with parallel investigations. As with a one-agency investigation, parallel investigations may still require public disclosure. There is the added element, however, that public disclosure may jeopardize the secret nature of the grand jury investigation.

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Practice Tips

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If a company is cooperating with the government, the better course is to inform the government of any future disclosure, walking the line between disclosure obligations and cooperation. Finally, resolving parallel proceedings successfully may still leave the company exposed to private litigation that can use prior admissions in guilty pleas from criminal cases. Protecting attorney-client privilege may be difficult if details of an internal investigation have been provided to the government as part of self-disclosure and cooperation. Accordingly, any such reporting should try to minimize the risk of waiving privilege.

The government's ability to engage in parallel investigations can seem to be an insurmountable obstacle for individuals and companies alike. By being proactive, maintaining vigilance, gathering as much information as possible during the process, and relying on the expertise of counsel with relevant experience, a more even playing field is possible.

Member News

Neal Sonnett Receives the John H. Pickering Award

Section officer and former chair of the Criminal Justice Section Neal R. Sonnett received the 2008 John H. Pickering Award of Achievement at a dinner held in his honor at the New York Athletic Club during the 2008 ABA Annual Meeting in New York City.

A former Assistant U.S. Attorney and Chief of the Criminal Division of the Southern District of Florida, Mr. Sonnett is the Managing Partner of his Miami-based law firm. He has received the Florida Bar Foundation Medal of Honor in 1989, the ABA Criminal Justice Section's Charles R. English Award in 2001, and several other prestigious acknowledgements for his contributions to the legal profession.

He also chairs a nonprofit agency dedicated to the rehabilitation of ex-offenders; and serves as the ABA's Observer for the Military Commission trials in Guantanamo; as Chair of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism; and as a Member of the ABA Task Force on Treatment of Enemy Combatants.

Feedback Welcome

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362 So.2d 681
District Court of Appeal of Florida, Second District.

CITY OF ST. PETERSBURG, Florida, a Municipal Corporation, Harold Mullendore, as Custodian of Evidence for the Grand Jury of Pinellas County, and Harold Mullendore, as Clerk of Court in and for the Sixth Judicial Circuit, Petitioners,
v.
W. R. HOUGHTON, Respondent.
W. R. HOUGHTON, Petitioner,
v.
CITY OF ST. PETERSBURG, Florida, a Municipal Corporation, Harold Mullendore, as Custodian of Evidence for the Grand Jury of Pinellas County, and Harold Mullendore, as Clerk of Court in and for the Sixth Judicial Circuit, Respondents.

Nos. 78-574, 78-748. | Aug. 11, 1978. | Rehearing Denied Sept. 20, 1978.

Following filing of a “no information” plaintiff sought to replevy money seized from him following arrest. The Circuit Court, Pinellas County, David F. Patterson, J., imposed sanctions as to one count because of plaintiff's failure to submit to discovery but denied sanctions as to remaining counts and petitions for writ of certiorari were filed and consolidated. The District Court of Appeal, Ryder, J., held that a plaintiff may not seek affirmative relief in a civil action and then invoke Fifth Amendment privilege to avoid giving discovery in matters pertinent to the litigation.

Affirmed in part; reversed in part.

Attorneys and Law Firms

***681** Michael S. Davis, Chief Asst. City Atty. and Richard Luce, Asst. City Atty., St. Petersburg, Philip W. Dann, St. Petersburg, for W. R. Houghton.

W. Gray Dunlap, County Atty., James A. Helinger, Jr., Chief Asst. County Atty., and Gerald A. Figurski, Asst. County Atty., Clearwater, for Harold Mullendore, as Clerk of Court in and for the Sixth Judicial Circuit.

***682** James T. Russell, State's Atty., D. Lee Fugate and Myron J. Mensch, Asst. State Attys., Clearwater, for Harold Mullendore, as Custodian of Evidence for the Grand Jury of Pinellas County.

Opinion

RYDER, Judge.

W. R. Houghton, the plaintiff below, filed a civil action against the City of St. Petersburg (City), Harold Mullendore (Mullendore), as Custodian of Evidence for the Grand Jury of Pinellas County, and also as Clerk of Circuit Court in and for the Sixth Judicial Circuit. [1]

The third amended complaint has three counts. Count I, an action in replevin, alleges, Inter alia, that $316,380.00 were seized from the custody and control of Houghton by certain law enforcement officers subsequent to a stop of his vehicle and arrest of Houghton on the charge of conspiracy to deliver thirty pounds of hashish. Sometime after his arrest, a “no information” was filed in regards to the charge against Houghton but the Pinellas County Grand Jury recommended forfeiture of the currency seized from Houghton. In August of 1977, the county court of Pinellas County dismissed the forfeiture proceedings on the ground that the seized currency was not subject to forfeiture under the laws of the State of Florida.

Count I further alleges that defendant Mullendore, as Custodian of Evidence for the Grand Jury, presently has custody of a certificate of deposit for the currency which was deposited in a bank; that all of the defendants have refused demand for the return of the currency; and that plaintiff Houghton is entitled to possession of the currency, the source of his right to possession of the money being his exclusive possession of same prior to its allegedly unlawful removal from his possession.

Count II realleges most of Count I and seeks declaratory relief alleging that Houghton has a possessory interest in the currency superior to all defendants who assert adverse interest thereto. However, Count II does not indicate how this possessory interest was obtained.

Count III realleges most of the previous two counts and avers that the officers of the City and the Sheriff deprived him of his constitutional rights in illegally seizing the money and seeks damages. The record is unclear as to whether or not Mullendore is a defendant in this particular count. Also, it should be noted that there has been no determination that the money was, in fact, illegally seized.

On December 19, 1977 Houghton was deposed by defendants. Houghton refused to answer thirty-eight questions on the ground of his Fifth Amendment privilege against self-incrimination. [2]

The City and Mullendore then filed motions to compel Houghton to answer these questions and to abate the cause for a reasonable time therefor; and, alternatively to dismiss the cause in the event Houghton did not respond within a given time period.

Upon hearing on the aforesaid motions, the court entered a four-part amended order on March 27, 1978 which (1) abated Count I (replevin) for sixty days from February 21, 1978 for the plaintiff to submit himself to further discovery; (2) if plaintiff did not submit to discovery or respond satisfactorily within the sixty-day period, Count I shall stand dismissed, without prejudice; (3) defendants' motions for sanctions were denied as to Count II (declaratory relief) and as to Count III (damages) and, further, ***683** the defendants were directed to respond thereto; and (4) denied the City's motion to compel and abate in all other respects.

Thereafter, the City answered Counts II and III, denying liability. Mullendore filed motions to dismiss and for a more definite statement. Houghton moved for summary judgment against the City on Count II, but has not submitted to further discovery.

Houghton filed a petition for writ of certiorari (Case 78-748) seeking reversal of paragraphs (1) and (2) of the aforementioned order. The City and Mullendore, in turn, filed petitions for writ of certiorari (Case 78-574) seeking reversal of paragraphs (3) and (4) of the above order. This court consolidated the cases.

[1] **[2]** The plaintiff claims a right to invoke his Fifth Amendment privilege in the course of discovery in this case, and to refuse to answer questions on deposition. His right to do so is the subject of an A.L.R. Annotation "Dismissing Action or Striking Testimony Where Party to Civil Action Asserts Privilege Against Self-Incrimination as to Pertinent Question," 4 A.L.R.3d 545 Et seq.

Houghton urges upon this court the idea that the trial court deviated from the essential requirements of law as to permit this discovery which will cause Houghton material injury for which appeal will be inadequate, citing to us our own case of Leithauser v. Harrison, 168 So.2d 95 (Fla. 2d DCA 1964). Houghton further argues the proposition that a state may not impose substantial economic sanctions on a non-immunized individual because he elects not to waive his Fifth Amendment privilege. Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1974); U. S. ex rel. Sanney v. Montanye, 500 F.2d 411 (2d Cir. 1974), Cert. denied, 419 U.S. 1027, 95 S.Ct. 506, 42 L.Ed.2d 302, and Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

Although the three federal cases cited above by Houghton relate to one's right to invoke the Fifth Amendment, they are distinguishable from the matter Sub judice. Lefkowitz v. Turley, supra, involves architects who were Summoned to testify before a New York State Grand Jury investigating various charges of conspiracy, bribery and larceny. This summons was issued pursuant to a New York statute which required public contractors, such as these architects, to testify before a grand jury relative to existing state contracts and if they refused to do so, they would suffer cancellation of their contracts and lose the right to bid on further state jobs. The architects refused to sign waivers of immunity, invoked the Fifth Amendment and, thereafter, challenged the New York State Statute. In U. S. ex rel. Sanney v. Montanye, supra, Sanney was a suspect in a murder and was later charged with manslaughter. In Lefkowitz v. Cunningham, supra, Cunningham, a public official, was subpoenaed before a grand jury for testimony concerning the conduct of his office. This is similar to the first Lefkowitz case cited by the plaintiff herein and the Supreme Court of the United States also ruled similarly. In each of these cases, the appellants were either suspect of murder or of other criminal wrongdoing and in both Lefkowitz cases the appellants who invoked the Fifth Amendment were subpoenaed before a grand jury and appeared involuntarily.

In the case at hand, we see that Houghton is the plaintiff and is not involuntarily involved in litigation but, rather, initiated the suit himself.

Recently, this court has dealt with a Defendant's right to invoke the privilege against self-incrimination in a civil action. See Roberts v. Jardine, 358 So.2d 588 (Fla. 2d DCA 1978). However, here we are confronted with the question of the Plaintiff's right to invoke the Fifth Amendment privilege in a civil action.

Our attention, thus, is immediately drawn to a series of Florida cases beginning with Stockham v. Stockham, 168 So.2d 320 (Fla.1964) wherein the Supreme Court of Florida affirmed a decision of this court holding that the wife/

plaintiff who refused to respond to defendant's request for admissions must answer, and that upon her failure to do so (on claiming protection against self ***684** -incrimination) her suit for divorce would be dismissed. The Florida Supreme Court held that neither the provisions of Section 12 of the Declaration of Rights of the Florida Constitution nor the Fifth Amendment of the Federal Constitution, for protection against self-incrimination were available to the plaintiff in said suit, and if insisted upon, would result in dismissal of that party's suit.

Five years later, in another divorce case, Simkins v. Simkins, 219 So.2d 724 (Fla. 3d DCA 1969), plaintiff/husband refused to answer questions in a discovery deposition regarding the charge of adultery which the wife had leveled against him, invoking his constitutional privilege against self-incrimination. An interlocutory appeal was taken, but our sister court, the Third District Court of Appeal, declined to follow the Stockham case.

Thereafter, this court in Minor v. Minor, 232 So.2d 746 (Fla. 2d DCA 1970) again addressed the problem when in a pre-trial deposition of plaintiff/wife she invoked her Fifth Amendment privilege against self-incrimination in response to questions relating to defendant's charges of her adultery. Speaking for the court in a well reasoned opinion, then Judge McNulty observed that Simkins had departed from Stockham on the basis of the Supreme Court of the United States decisions in Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) and Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). After review of both Garrity and Spevack, Judge McNulty wrote:
"Now concededly, in those cases, the parties invoking the Fifth Amendment were wrongfully Penalized for their 'taking the Fifth.' They were forced to choose, as it is said, 'between Scylla and Charybdis.' But there they were Involuntarily thrust into such quandary, while here, the invoking party is Voluntarily the moving party affirmatively seeking equity. Appellant's choice in this case is not, Involuntarily, one between two totally disadvantageous alternatives, as were the choices in Garrity and Spevack, supra, but rather, Voluntarily, one between two alternatives one of which can be employed to Some advantage. Appellant Can gain the affirmative relief she seeks from her choice, and the choice is freely hers; in Garrity and Spevack on the other hand couldn't gain in any event, yet they were compelled to choose.

We conclude, then, that appellant suffers no 'penalty' in the sense spoken of in Spevack, and neither that case nor Garrity, supra, can operate to vitiate the holding of our Supreme Court in Stockham, supra, . . . " Page 747.

Upon review by the Florida Supreme Court by writ of certiorari of our decision in Minor, the Florida Supreme Court affirmed Minor and disapproved Simkins. See Minor v. Minor, 240 So.2d 301 (1970).

In Mahne v. Mahne, 124 N.J.Super. 23, 304 A.2d 577 (1973), the court cited, Inter alia, both the Minor and Stockham cases. Adopting the views supported by the two Florida cases, the court quoted from Christenson v. Christenson, 281 Minn. 507, 162 N.W.2d 194 (Minn.Sup.Ct.1968) as follows:
"Research indicates that with the exception of Bishop v. Bishop, 157 Ga. 408, 121 S.E. 305, all of the cases which have dealt with the legal questions presented herein have recognized that a motion to dismiss a complaint . . . should be sustained where the plaintiff has refused to answer the questions pertinent to the issues involved and on the ground of self-incrimination. These decisions appear to have been based upon the rationale that although the privilege against self-incrimination is available to either party to a civil action the party who seeks affirmative judicial relief from the court and at the same time invokes this privilege should not be permitted to prevail and, in effect, 'eat his cake and have it too' . . . ((162 N.W.2d) at 202)." (sic).

There are other non-domestic relation cases in point. Chronologically, Independent Productions Corporation v. Loews, Inc., 22 F.R.D. 266 (S.D.N.Y.1958) may well be the earliest case involving the assertion of the Fifth Amendment privileges by a ***685** plaintiff. The case was a private treble damage anti-trust action by two corporate plaintiffs and the president of one plaintiff claimed the privilege. The court wrote:
"It would be uneven justice to permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, to permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense.

"Plain justice dictates the view that regardless of plaintiffs' intention, plaintiffs must be deemed to have waived their assumed privilege by bringing this action. Moore, Federal Rules and Official Forms, 164 (1956)

"This view strikes home. Plaintiffs in this civil action have initiated the action and forced defendants into court. If

plaintiffs had not brought the action, they would not have been called on to testify. Even now, plaintiffs need not testify if they discontinue the action. They have freedom and reasonable choice of action. They cannot use this assertive privilege as both a sword and shield. Defendants ought not be denied a possible defense because plaintiffs seek to invoke an alleged privilege." Id. 276, 277.

Chief Justice Desmond and six other Justices of the New York Court of Appeals, further developed the sword and shield metaphor:

"The privilege against self-incrimination was intended to be used solely as a shield, and thus a plaintiff cannot use it as a sword to harass a defendant and to effectively thwart any attempt by defendant at a pre-trial discovery proceeding to obtain information relevant to the cause of action alleged, and possible defenses thereto. (See also Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483; Hazlett v. Bullis, 12 A.D.2d 784, 209 N.Y.S.2d 601 (2 Dept. 1961)); " Laverne v. Incorp. Village of Laurel Hollow, 18 N.Y.2d 635, 272 N.Y.S.2d 780, 219 N.E.2d 294 (1966).

In a civil action on a fire insurance policy wherein the insurer alleged arson by the insured as an affirmative defense, a Federal District Court in Wisconsin had the same issue before it. In Kisting v. Westchester Fire Insurance Company, 290 F.Supp. 141, 149 (W.D.Wis.1968), that court also verbalized its opinion in terms of the sword and shield metaphor holding: "Plaintiffs' next contention is that the privilege against self-incrimination justifies Kisting's refusal to answer the questions involved. Plaintiffs thus seek to utilize the privilege not only as a shield, but also as a sword. This they cannot do. A plaintiff in a civil action who exercises his privilege against self-incrimination to refuse to answer questions pertinent to the issues involved will have his complaint dismissed upon timely motion. See Stockham v. Stockham, 168 So.2d 320, 4 A.L.R.3d 539 (Fla.1964); Lund v. Lund, 161 So.2d 873 (Fla.App.1964); Levine v. Bornstein, 13 Misc.2d 161, 174 N.Y.S.2d 574 (S.Ct., Kings Co. 1958); aff'd, 7 A.D.2d 995, 183 N.Y.S.2d 868 (2d Dept.), aff'd, 6 N.Y.2d 892, 190 N.Y.S.2d 702, 160 N.E.2d 921 (1959); Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483 (1955); Ann., 4 A.L.R.3d 545. Cf. Zaczekv v. Zaczekv, 20 A.D.2d 902, 249 N.Y.S.2d 490 (2d Dept. 1964); " Id. 149.

See also Bramble v. Kleindienst, 357 F.Supp. 1028 (D.Colo.1973), aff'd, 498 F.2d 968 (10 Cir. 1974), Cert. denied, 419 U.S. 1069, 95 S.Ct. 656, 42 L.Ed.2d 665 and Penn Communications Specialties, Inc. v. Hess, 65 F.R.D. 510 (E.D.Pa.1975).

Thus, it appears that not only the Florida law, but the majority view in this land is that a plaintiff may not seek affirmative relief in a civil action and then invoke the Fifth Amendment to avoid giving discovery in matters pertinent to the litigation. Consequently, we grant certiorari, affirm the trial court's order as to paragraphs (1) and (2) and reverse the trial court's order as to paragraphs (3) and (4) and direct the circuit court to order Houghton to answer on discovery the pertinent and material questions as to the remaining counts of his suit and if he fails to answer them, then upon proper motion, to dismiss those counts to which those questions appertained.

***686** AFFIRMED in part; REVERSED in part.

SCHEB, A. C. J., and DANAHY, J., concur.

Footnotes

1 The Honorable W. T. Roberts, Sheriff of Pinellas County, is also a party to this action, but is not involved in this petition for writ of certiorari.

2 The questions which Houghton refused to answer related to source of title, such as, how and when Houghton came into possession of the money; how much money was actually in the box; what Houghton did to earn the money, and so forth, which are pertinent and material to the issue. Other questions which Houghton refused to answer such as where had he come from, where he was enroute to, and the like, may very well not be pertinent and material to the issue of the suit, but we do not reach that question at this point and prefer to permit the trial judge to rule on that point, if and when raised, in view of our eventual decision in this case.

Eight Hundred, Inc. *v.* State, 895 So. 2d 1185 (Fla. Dist. Ct. App. 2005)
District Court of Appeal of Florida

Date Filed: February 18th, 2005
Status: Precedential
Citations: 895 So. 2d 1185
Docket Number: 5D04-1405
Judges: Monaco
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895 So.2d 1185 (2005)

EIGHT HUNDRED, INC., et al., Appellant,
v.
STATE of Florida, Appellee.

No. 5D04-1405.
District Court of Appeal of Florida, Fifth District.

February 18, 2005.
*1186 Thomas F. Egan of Thomas F. Egan, P.A., Orlando, for Appellant.

No Appearance for Appellee.

MONACO, J.

This case in a number of different iterations has been a frequent visitor to this court.[1] Pondella Hall for Hire, Inc., n/k/a Eight Hundred, Inc. ("Eight Hundred"), and the other appellants in this appeal have been acquitted of all criminal charges against them, and seek the return of personal property seized by the State in connection with those charges. We are now faced with the issue of whether the motion for return of personal property filed by Eight Hundred sufficiently identified the seized property.

Eight Hundred's predecessor was a business that operated bingo halls in several counties. As a result of a multi-county criminal investigation, state and local authorities seized Eight Hundred's personal property, and sought to enjoin it from operating bingo games at various locations. Numerous criminal charges, as well as forfeiture and RICO actions, were brought against Eight Hundred's predecessor, none of which appear to be currently pending. After giving Eight Hundred many opportunities to describe the items of property with greater specificity, the trial court denied the motion seeking return of the property with prejudice as "legally insufficient," finding that the property had never been adequately identified by the movant. Eight Hundred appeals the order of dismissal.[2] For the most part we agree with the trial judge and commend him for his patience. Nevertheless, Eight Hundred does appear to have identified a few items with sufficient definition, and as to those items, we reverse.

A court has inherent power to direct the return of property seized from a criminal defendant if that property is no longer needed as evidence. *See Coon v. State,* 585 So.2d 1079 (Fla. 1st DCA 1991). To be facially sufficient, a motion for the return of seized property must allege that the property at issue was the movant's personal property, was not the fruit of criminal activity, and was not being held as evidence. Implied in this standard is the requirement that the defendant must specifically

identify the property at issue. *See Bolden v. State,* 875 So.2d 780 (Fla. 2d DCA 2004). In *Coon,* the court noted that the appellant's description of the property allegedly taken was "somewhat vague" as it merely set forth "tools, radios, speakers, etc." The court indicated, however, that since the alleged dates of the seizures were listed and a return search warrant inventory was included, the information provided was sufficient to satisfy any uncertainty regarding a proper description of the property sought. To some extent, we have the same circumstance here.

*1187 From our review of the record it appears that the following items were identified with enough particularity to permit the trial court to determine whether they should be returned to Eight Hundred:

A. Property seized in Orange County:

1. Bingo lottery drum.

2. Invoices and correspondence actually in possession of the Attorney General's Office.

B. Property seized in Lee County: DR-15 (sales tax documents), to the extent that the same are in the possession of the State and have not been destroyed.

C. Property seized in Osceola County: Items listed in the search warrant inventory and receipt dated March 30, 1994.

Accordingly, we affirm the dismissal in all respects, except as to the items listed above. We remand the case to the trial court for a determination regarding whether these items ought to be returned to Eight Hundred.

AFFIRMED in part, REVERSED in part, and REMANDED.

PLEUS and TORPY, JJ., concur.

NOTES

[1] Various interrelated cases have been reviewed by this court over the years. *See Pondella Hall for Hire, Inc. v. Lamar,*866 So.2d 719 (Fla. 5th DCA), *review denied,* 879 So.2d 623 (Fla.2004); *Pondella Hall for Hire, Inc. v. Lamar,* 860 So.2d 19 (Fla. 5th DCA 2003); *Pondella Hall for Hire, Inc. v. Croft,* 844 So.2d 696 (Fla. 5th DCA 2003); *Pondella Hall for Hire, Inc. v. City of St. Cloud,* 837 So.2d 510 (Fla. 5th DCA 2003); *Eight Hundred, Inc. v. State,* 781 So.2d 1187 (Fla. 5th DCA 2001). *See also, Dep't of Legal Affairs v. Bradenton Group, Inc.,* 727 So.2d 199 (Fla.1998).

[2] We have jurisdiction. *See* Fla. R.App. P. 9.130(a)(1)(C)(ii).

M E M O R A N D U M

TO: Yale T. Freeman

FROM: Thomas S. Biggs Inn of Court

DATE: September 15, 2014

SUBJECT: Team 1 – Research Memo

RE: Replevin / Monies Seized / Drug-monies / Attorney Concerns

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First, it behooves us to review the procedure for these actions. Replevin actions are available to recover or seek the return of property seized by law enforcement under the Florida Contraband Forfeiture Act ("FCFA"), which is codified in §§ 932.701-932.704, Fla. Stat. *See e.g., City of Pompano Beach v. Gen. Mobile Home Brokers, Inc*., 493 So. 2d 97, 98 (Fla. 4th DCA 1986). However, an action for replevin or other action for the return of property cannot be had unless "forfeiture proceedings [post-seizure] are not initiated within 45 days after the date of seizure." § 932.703(3), Fla. Stat. Neither can such action be initiated during the pendency of a forfeiture proceeding. *See e.g., City of Coral Gables v. Rodriguez*, 568 So. 2d 1302, 1303 (Fla. 3d DCA 1990); *Sarmiento v. State*, 816 So. 2d 826, 827 (Fla. 3d DCA 2002).

Relatedly, § 705.105, Fla. Stat., provides the procedure for title to unclaimed evidence or tangible personal property lawfully seized by law enforcement; such title vests "permanently in the law enforcement agency [that has custody of said property] 60 days after the conclusion of the [criminal] proceeding." Florida courts consistently hold that "[a] court has inherent power to direct the return of property seized from a criminal defendant if that property is no longer needed as evidence." *Eight Hundred, Inc. v. State*, 895 So. 2d 1185, 1186 (Fla. 5th DCA 2005). However, Florida courts also consistently hold and require that "[t]o be facially sufficient, a motion for the return of seized property must allege that the property at issue was the movant's personal property, *was not the fruit of criminal activity*, and was not being held as evidence." (emphasis added) *Eight Hundred, Inc.*, 895 So. 2d at 1186, citing *Bolden v. State*, 875

So. 2d 780, 781-782 (Fla. 2d DCA 2004) (same) (quoting *Durain v. State*, 765 So. 2d 880, 880 (Fla. 2d DCA 2000) (same)). While a motion for return of property need not be under oath, as with other postconviction motions, where the "facts are simply untrue, the motion may be summarily denied." *Bolden*, 875 So. 2d at 782 n.4. Notably, in *Bolden*, the criminal defendant seeking return of 'his' property was acting *pro se*. *See id*., n.2.

Assuming title has not permanently vested in the law enforcement agency and an action for replevin is procedurally available, § 78.055, Fla. Stat., sets forth the requisite allegations for a replevin complaint and includes as one such allegation "[a] statement that the plaintiff is the owner of the claimed property or is entitled to possession of it, describing the source of such title or right." § 78.055(2), Fla. Stat. This allegation potentially exposes an attorney signing and filing such pleading to sanction or penalty for lack of candor toward the tribunal (*see Fla. Bar Rule* 4-3.3 (Notes, P. 31)) where the necessary description of the source of title or right to possession misrepresents the illicit nature of contraband monies.

Contraband, as defined under the FCFA (*supra*), includes

> [a]ny personal property, including, but not limited to, any … item, object, tool, substance, device, … money, securities, … negotiable instruments, or currency, which was used or was attempted to be used as an instrumentality in the commission of, or in aiding or abetting in the commission of, any felony, whether or not comprising an element of the felony, or which is acquired by proceeds obtained as a result of a violation of the Florida Contraband Forfeiture Act.
> § 932.701(2)(a)5, Fla. Stat.

Second, as to ethical considerations, plainly an attorney cannot reveal privileged communications to him or her by the client that relate to *past* criminal acts. *See The Florida Bar v. Lange*, 711 So. 2d 518, 519-520, 524 (Fla. 1998). *See also Fla. Bar Rule* 4-1.6 (Notes, P. 25). Only where a client communicates information to the attorney that

indicates reasonably that the client *will* commit a crime or kill or inflict substantial bodily harm on another in the future does the attorney have an obligation to reveal such information and, expectedly, be free from penalty for so revealing. *See Lange*, 711 So. 2d at 520; *Fla*. *Bar Rule* 4-1.6(b) and Comment.

That being said, as noted above, Rule 4-3.3 expressly mandates that an attorney "shall not knowingly … make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer". R. 4-3.3(a)(1). Similarly, no lawyer shall knowingly "offer evidence that the lawyer knows to be false", including testimony or narrative. R. 4-3.3(a)(4). The Comment to Rule 4-3.3 expands further and makes clear that an attorney is an advocate and "is responsible for pleadings and other documents prepared for litigation". Interestingly, the Comment goes on to explain that the attorney "is usually not required to have personal knowledge of matters asserted therein, *for litigation documents ordinarily present assertions by the client*, or by someone on the client's behalf, and not assertions by the lawyer." (emphasis added) However, "[t]he obligation prescribed in rule 4-1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation."

So, it appears that an attorney who enjoys living on the edge may be able to tip-toe down the line of propriety so long as he or she makes no affirmative assertions that would stem from his or her personal knowledge (such as in an affidavit). Perhaps the most 'risky' endeavor would be the motion for return of property which requires an affirmative allegation that the subject property was not the fruit of illegal activity. Since this could in turn lead to testimony or similar by the client, which would plainly be false and cannot be presented to the tribunal (see above), it seems an ill-advised undertaking. The replevin complaint requires instead only a statement of ownership and the "source of such title or right". § 78.055(2), Fla. Stat.

608 F.2d 1084

5 Fed. R. Evid. Serv. 618, 5 Media L. Rep. 2228

Carl D. WEHLING and Geraldine D. Wehling, Plaintiffs-Appellants,

v.

COLUMBIA BROADCASTING SYSTEM, Defendant-Appellee.

No. 77-2840.

United States Court of Appeals, Fifth Circuit.

Dec. 28, 1979.
Rehearing Denied Feb. 14, 1980.
See 611 F.2d 1026.

Joel W. Westbrook, Bruce L. Goldston, San Antonio, Tex., for plaintiffs-appellants.

Thomas R. Phillips, Houston, Tex., for defendant-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before MORGAN, RONEY and GARZA, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge.

1 In this diversity case plaintiff[1] appeals from the dismissal of his libel action under Rule 37, Fed.R.Civ.P., for refusing to answer certain questions posed by CBS during plaintiff's oral deposition. Wehling asserted his Fifth Amendment privilege against compelled self-incrimination in response to the district court's order to comply with defendant's discovery request. The question presented is whether the court abused its discretion in denying Wehling's motion for a protective order and dismissing his complaint with prejudice. For reasons discussed below, we reverse the district court and remand so that the court might enter a protective order temporarily staying further discovery in this action.I.

2 Carl and Geraldine Wehling, the owners of a number of Texas proprietary and trade schools, filed this libel action alleging that they had been defamed by a television news story appearing on the CBS Evening News on August 18, 1975. The broadcast stated that Wehling had defrauded both his own students and the federal government through abuse of federal student loan and grant programs. When CBS sought pretrial discovery from plaintiff concerning the details of the operation of these schools, Wehling invoked his Fifth Amendment privilege against self-incrimination "as to all questions with respect to his

operation of the schools."[2]

3 The district court ordered Wehling to answer the questions posed to him at his deposition or suffer dismissal of his lawsuit for failure to make discovery. Wehling then filed a motion for a protective order asking the court to fashion some type of relief[3] short of outright dismissal which would respect the rights of both parties. The court denied plaintiff's Motion for Protective Order and again ordered him to submit to discovery. Wehling informed CBS that he would continue to claim his Fifth Amendment privilege, and on July 29, 1977, the court dismissed plaintiff's action with prejudice.

4 Prior to the broadcast, Wehling had been subpoenaed to appear before a federal grand jury investigating federally insured student loan programs. In all five of his appearances before the grand jury, Wehling asserted his Fifth Amendment privilege against self-incrimination. On the date CBS took plaintiff's oral deposition, Wehling's counsel stated that he had reason to believe that the grand jury investigation was continuing, that Wehling was a target of that investigation, and that CBS had been cooperating with the United States Attorney's office and the Attorney General of Texas.[4] Accordingly, counsel advised Wehling to invoke the Fifth Amendment 19 times during the course of the deposition in response to questions which related to the subject matter of the pending grand jury investigation. In refusing to answer any question regarding his operation of the schools, Wehling deprived CBS of information concerning the accuracy of its broadcast and thus thwarted discovery of issues at the heart of plaintiff's lawsuit.

II.

5 Under the federal discovery rules, any party to a civil action is entitled to all information relevant to the subject matter of the action before the court Unless such information is privileged. Fed.R.Civ.P. 26(b)(1). Even if the rules did not contain specific language exempting privileged information, it is clear that the Fifth Amendment would serve as a shield to any party who feared that complying with discovery would expose him to a risk of self-incrimination. The fact that the privilege is raised in a civil proceeding rather than a criminal prosecution does not deprive a party of its protection. Lefkowitz v. Cunningham, **431 U.S. 801**, 805, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977); McCarthy v. Arndstein, **266 U.S. 34**, 40, 45 S.Ct. 16, 69 L.Ed. 158 (1924). Thus, under both the Federal Rules of Civil Procedure and the Constitution, Wehling was under no obligation to disclose to CBS information that he reasonably believed might be used against him as an accused in a criminal prosecution. Maness v. Meyers, **419 U.S. 449**, 461, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975); Hoffman v. United States, **341 U.S. 479**, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).[5]

6 The question here, however, is not whether Wehling had a right to invoke the constitutional privilege against self-incrimination, which he did, but what effect the assertion of this privilege would have on his libel action against CBS. Wehling argues that dismissing his lawsuit because he asserted his self-incrimination privilege in effect penalized him for exercising a fundamental constitutional right. He claims that the district court abused its discretion by making the invocation of the Fifth Amendment privilege "costly." Malloy v. Hogan, **378 U.S. 1**,

84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). CBS, on the other hand, argues that the district court properly respected the rights of both parties when, though recognizing Wehling's right to assert the self-incrimination privilege, it remedied the resulting unfairness to CBS by dismissing the action. Furthermore, CBS contends that postponing discovery pending termination of the grand jury proceedings or expiration of the limitations period would prejudice its efforts to prepare a defense to Wehling's claim.

7 We do not dispute CBS's assertion that it would be unfair to permit Wehling to proceed with his lawsuit and, at the same time, deprive CBS of information needed to prepare its truth defense. The plaintiff who retreats under the cloak of the Fifth Amendment cannot hope to gain an unequal advantage against the party he has chosen to sue. To hold otherwise would, in terms of the customary metaphor, enable plaintiff to use his Fifth Amendment shield as a sword. This he cannot do. See, e. g., Lyons v. Johnson, **415 F.2d 540** (9th Cir. 1969); Kisting v. Westchester Fire Ins. Co., 290 F.Supp. 141 (W.D.Wis. 1968). Wehling, however, has not claimed the right to proceed to trial without answering the questions posed by CBS during the deposition. Instead, Wehling asks only that discovery be stayed until all threat of criminal liability has ended. We must decide whether, under the circumstances of this case, plaintiff should have been required to forego a valid cause of action in order to exercise his constitutional right to avoid self-incrimination.

8 We hold that the district court erred in concluding that plaintiff's assertion of his self-incrimination privilege during pretrial discovery automatically required the dismissal of his libel action. First, we find no provision in the federal discovery rules which authorizes a court to impose sanctions on a party who resists discovery by asserting a valid claim of privilege. See 8 C. Wright & A. Miller, Federal Practice and Procedure § 2018 (1970). Rule 26 limits the scope of discovery to matter that is "not privileged." Because CBS had no right to information protected by the privilege against self-incrimination, Wehling did not violate the discovery rules when he declined to answer the questions posed at his deposition. In short, the district court had no authority to order Wehling to disclose privileged information and, consequently, should not have imposed sanctions when Wehling declined to answer.[6]

9 Second, we believe that dismissing a plaintiff's action with prejudice solely because he exercises his privilege against self-incrimination is constitutionally impermissible. Wehling had, in addition to his Fifth Amendment right to silence, a due process right to a judicial determination of his civil action. When the district court ordered Wehling to answer CBS' questions or suffer dismissal, it forced plaintiff to choose between his silence and his lawsuit. The Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another. Simmons v. United States, **390 U.S. 377**, 394, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). Similarly, the Court has emphasized that a party claiming the Fifth Amendment privilege should suffer no penalty for his silence:

10 In this context "penalty" is not restricted to fine or imprisonment. It means, as we said in Griffin v. California, **380 U.S. 609**, 85 S.Ct. 1229, 14 L.Ed.2d 106, the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."

11 Spevack v. Klein, 385 U.S. 511, 515, 87 S.Ct. 625, 628, 17 L.Ed.2d 574 (1967). We agree with the Ninth Circuit's conclusion in Campbell v. Gerrans, 592 F.2d 1054, 1058 (9th Cir. 1979), that dismissing a party's action because he asserts his Fifth Amendment privilege makes resort to that privilege "costly."[7] See 8 C. Wright & A. Miller, Federal Practice and Procedure, § 2018 at 148.

12 We recognize, of course, that Wehling is not the only party to this action who has important rights that must be respected. As we have observed, CBS should not be required to defend against a party who refuses to reveal the very information which might absolve defendant of all liability. "While it may be true that an individual should suffer no penalty for the assertion of a constitutional right, neither should third parties sued by that individual who have no apparent interest in the criminal prosecution, be placed at a disadvantage thereby." Jones v. B. C. Christopher & Co., 466 F.Supp. 213, 227 (D.Kan.1979). Therefore we emphasize that a civil plaintiff has no absolute right to both his silence and his lawsuit. Neither, however, does the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege. When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.

13 The district court's task in this case was complicated by the presence of competing constitutional and procedural rights. In focusing solely on CBS' right to the requested information, the court failed to attribute any weight to Wehling's right to his day in court. Instead of arbitrarily adopting a rule favoring CBS, the court should have measured the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible. This balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate.[8]

14 We find that the balance in this case tips in favor of Wehling and against CBS. Wehling filed his suit against CBS on August 17, 1976, the last day before limitations ran on any libel action arising out of the August 18, 1975 broadcast. Wehling had disposed of his last interest in the trade schools in August of 1975 and, under the applicable statute of limitations,[9] was threatened with potential criminal prosecution until approximately September 1, 1980. Thus, when Wehling filed his Motion for Protective Order in July 1977, he in effect was asking the court to stay further discovery for approximately three years. Although a three-year hiatus in the lawsuit is undesirable from the standpoint of both the court and the defendant, permitting such inconvenience seems preferable at this point to requiring plaintiff to choose between his silence and his lawsuit. Dienstag v. Bronsen, 49 F.R.D. 327, 329 (S.D.N.Y.1970); Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., 14 F.R.D. 333 (E.D.Pa.1953); National Discount Corp. v. Holzbaugh, 13 F.R.D. 236 (E.D.Mich.1952).[10] Because staying discovery would not impose undue hardship on defendant and, therefore, would protect the party exercising a constitutional privilege from Unnecessary adverse consequences, we believe the court abused its discretion in denying Wehling's Motion for a Protective Order and dismissing the lawsuit.

15 Finally, we wish to emphasize that although dismissal of the lawsuit was premature at this

stage of the proceeding, the district court is not precluded from dismissing plaintiff's action if circumstances arise which require the use of this drastic remedy. It is possible that avenues of discovery open to CBS in 1977 will be closed by the time the stay is lifted in 1980. Should the district court determine that postponing discovery has deprived CBS of crucial information which otherwise would have been available and that the lack of such information has compromised CBS' ability to prove truth, the court would be free to fashion whatever remedy is required to prevent unfairness to defendant. However, prejudice to defendant must be established before any remedies are appropriate.

16 The dismissal of Wehling's lawsuit is reversed and the case remanded so that the court may enter a protective order staying further discovery until the applicable statute of limitations has run.

17 REVERSED and REMANDED.

1

Both Carl D. Wehling and his wife, Geraldine D. Wehling were named as plaintiffs in the complaint filed against CBS, and both of the Wehlings are appellants here. Because only Carl Wehling asserted his Fifth Amendment privilege during discovery, we will, for purposes of convenience, refer to appellants as either "Wehling" or "plaintiff."

2

Deposition of Carl D. Wehling, May 23, 1977

3

The Motion for Protective Order did not specify what relief the court should award plaintiff. However, the accompanying Memorandum Brief indicated that plaintiff desired a stay of further discovery until all threat of criminal liability had terminated

4

The Attorney General of Texas was, at that time, involved in litigation against Carl Wehling under the Texas Consumer Protection Act concerning Wehling's ownership and operation of proprietary schools. CBS has admitted that it interviewed a number of people at the United States Attorney's office, the state Attorney General's office, and the Department of Health, Education, and Welfare before formulating and broadcasting its news story

5

If a party reasonably apprehends a risk of self-incrimination, he may claim the privilege though no criminal charges are pending against him, Savannah Sur. Associates, Inc. v. Master, 240 Ga. 438, 439, 241 S.E.2d 192, 193 (1978), and even if the risk of prosecution is remote. In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir. 1974)

6

While dismissal is unavailable as a Sanction, the district court is not precluded from using dismissal as a Remedy to prevent unfairness to the defendant. As we indicate below, however, dismissal may only be used as a remedy of last resort where the plaintiff's refusal to submit to discovery is based on his exercise of a constitutional right

7

CBS distinguishes Campbell v. Gerrans on the basis that in that case plaintiffs refused to answer only peripheral questions which defendant had no right to have answered anyway. The court did note that the four unanswered interrogatories "were of a highly questionable nature." 592 F.2d at 1057. It is arguable, therefore, that the court reversed because the questions were irrelevant and not because plaintiffs asserted a constitutional privilege. While the court's discussion of privilege is perhaps unnecessary to its decision, the court's views on this question are clear and there is little doubt as to how the court would hold were the question of privilege squarely presented

8

See generally, Comment, Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination 24 U.Fla.L.Rev. 541, 547 (1972); Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 Va.L.Rev. 322, 335 (1966)

9

Counsel informs the court that under 18 U.S.C.A. § 3282 Wehling was subject to a five year statute of limitations for any criminal activity related to his operation of the schools. Although the Motion for Protective Order did not refer to the date on which the limitations period would expire, the court never suggested that that information would be important in its consideration of plaintiff's motion

10

We recognize that in each of these cases the self-incrimination privilege was claimed by a civil Defendant. CBS suggests that such cases are inapplicable where it is a plaintiff who invokes his constitutional right of silence. Although the plaintiff-defendant distinction has its advocates, See, e. g. Jones v. B. C. Christopher & Co., 466 F.Supp. 213 (D.Kan.1979); Minor v. Minor, 240 So.2d 301 (Fla.1970), we are unwilling to join their ranks. It is true that, as a voluntary litigant, the civil plaintiff has created the situation which requires him to choose between his silence and his lawsuit. In most cases, however, a party "voluntarily" becomes a plaintiff only because there is no other means of protecting legal rights. As one commentator has observed, although the plaintiff-defendant "distinction is superficially appealing, . . . civil plaintiffs seldom voluntarily seek situations requiring litigation." Comment, Supra note 8 at 545