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What Every Civil Litigator Needs to Know About Criminal Law

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I. INTRODUCTION

Your office phone rings. On the other end is a client who has just been sued. You accept the case and proceed as you normally would before discovering that your client has just been indicted by a federal grand jury. Even worse, the indictment directly relates to the civil suit. Glancing at your desk, you realize that opposing counsel has served you with a variety of discovery requests. What do you do? Far from an aberration, situations such as this are occurring with increasing frequency, including increased private enforcement of laws such as RICO and the Foreign Corrupt Practices Act.[1] In addition, there are situations such as Stanford Financial with the criminal proceedings against Allen Stanford and company,[2] and the litany of civil complaints.[3] This paper provides the civil litigator with the basic information required to navigate civil proceedings in light of potential or pending criminal prosecution.

The Constitution of the United States provides a great many rights and liberties to natural persons that are not readily available elsewhere. The Sixth Amendment provides a criminal defendant with the right to speedy and public trial by a jury of his peers.[4] The Sixth Amendment also provides the right to an attorney.[5] The Fourth Amendment protects against unreasonable search and seizure.[6] The Fifth Amendment provides natural persons with the privilege against self-incrimination.[7] It is important to remember these rights in the context of civil litigation. Many civil practitioners never have to concern themselves with the issue of Constitutional rights and the possible waiver of those rights.

Part II examines the interplay between the Fifth Amendment and the civil litigation process. Part III examines the issue of dealing with multiple agencies for the same conduct. Part IV addresses the differences between criminal and civil discovery and the limitation on interagency cooperation.

The civil practitioner must remain focused on the big picture and resist the urge to think about the civil aspect of litigation without consideration of the ramifications on subsequent criminal proceedings. Short-sited actions that might aid the client with regard to the civil process might lead to criminal liability down the road.

II. INTERPLAY BETWEEN THE FIFTH AMENDMENT AND THE CIVIL LITIGATION PROCESS

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself."[8] The Fifth Amendment provides natural persons with the

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[1] *See* Nathan Vardi, *Plaintiff Lawyers Join the Bribery Racket*, THE JUNGLE – FORBES (Aug. 16, 2010), http://blogs.forbes.com/nathanvardi/2010/08/16/plaintiff-lawyers-fcpa-bribery-racket/.
[2] *See* Bill McQuillen, et al., *Allen Stanford Indicted by U.S. in $7 Billion Scam*, BLOOMBERG (Jun. 19, 2009), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aMEDm0Rhcnbo.
[3] *See, e.g.*, Scott Cohn, *Stanford Receiver Sues 66 Former Employees*, CNBC (Apr. 16, 2009), http://www.cnbc.com/id/30238725/Stanford_Receiver_Sues_66_Former_Employees.
[4] *See* U.S. CONST. amend. VI.
[5] *See id.*
[6] *See* U.S. CONST. amend. IV.
[7] *See* U.S. CONST. amend. V.
[8] U.S. CONST. amend. V.

privilege against self incrimination, often referred to as the right to remain silent.[9] While generally thought of in the criminal context, the Fifth Amendment can also be employed in the civil context when a witness's answers might incriminate him in subsequent criminal proceedings.[10] A defendant's[11] ability to exercise Fifth Amendment rights in civil proceedings raises several issues, namely: (1) the possible waiver of Fifth Amendment rights in civil proceedings and the use of actions in civil proceedings as party admission evidence in subsequent criminal proceedings; (2) the application of an adverse inference from the exercise of Fifth Amendment rights; (3) motions to stay based on pending or potential criminal proceedings; (4) other limitations on discovery to permit active defense of suits, yet protect the defendant from criminal liability; and (5) the exercise of the Fifth Amendment in the context of a corporation. This section examines each of these issues in turn.

A. Waiver of Fifth Amendment privilege against self incrimination

There are two related issues with regard to Fifth Amendment rights against self-incrimination: (1) the use of pleadings, discovery, and testimony in a civil proceeding as a party admission in a subsequent criminal proceedings; and (2) pleadings, discovery, and testimony as waiver of the Fifth Amendment right against self incrimination in that proceeding. Thus, while waiver of one's right against self-incrimination is limited to the particular proceeding in which the right was waived, the actions leading to waiver may nevertheless be used as evidence in a subsequent criminal proceeding as a party admission.

1. Pleadings and Discovery as Party Admissions

Related, though not necessarily the same as the issue of waiver is the use of pleadings, discovery, and testimony from civil proceedings as party admissions in subsequent criminal proceedings. Under the Federal Rules of Evidence, hearsay or "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted" is generally inadmissible.[12] One notable exclusion of the hearsay rule is the party admission. A statement does not constitute hearsay if

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[9] *See, e.g.*, Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1337 (2003) (using "privilege against self-incrimination" and "right to remain silent" interchangeably); Marvin Shiller, *On the Jurisprudence of the Fifth Amendment Right to Silence*, 16 AM. CRIM. L. REV. 197, 197 (1979) (the same).

[10] Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1086 (5th Cir. 1979) ("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.") (citing Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977)); *see also* G. Ray Kolb, Jr. & William L. Pfeifer, Jr., *Assertion of the Fifth Amendment Privilege Against Self-Incrimination in Civil Proceedings*, 67 ALA. LAW. 40, 40 (2006); Martin I. Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation: A Critical Analysis*, 39 BROOK. L. REV. 121, 123 (1972).

[11] The term "defendant" is used because most frequently it is a civil defendant that is the subject of criminal investigation or indictment. Note that this is not always the case, as any party or witness may exercise his Fifth Amendment right against self-incrimination where his answer might incriminate him. *See Wehling*, 608 F.2d at 1087 (stating that plaintiff Wehling possessed the "right to invoke the constitutional privilege against self-incrimination" despite being a plaintiff). The defendant in *Wehling* sought to have the action dismissed because of plaintiff's resistance to discovery through exercise of the privilege against self-incrimination. *Id.* The Fifth Circuit rejected this attempt as "constitutionally impermissible." *Id.*

[12] FED. R. EVID. 801, 802.

offered against a party and is

> (A) the party's own statement, in either an individual or representative capacity or
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> (B) a statement of which the party has manifested an adoption or belief in its truth, or
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> (C) a statement by a person authorized by the party to make a statement concerning the subject, or
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> (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or
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> (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy[13]

Therefore, under the Federal Rules of Evidence, a statement[14] of a party to a criminal proceeding in a prior civil proceeding, whether his own statement or through his attorney, is admissible against that party in the criminal proceeding.

Note that this is separate and apart from the waiver of Fifth Amendment rights with regard to criminal proceedings. The prevailing rule regarding waiver of the privilege against self-incrimination is that waiver in one proceeding does not waive the privilege with regard to later proceedings.[15] This distinction is largely meaningless, however, as the mere admission of the defendant's prior incriminating statements is damaging enough without also requiring the defendant to testify.

Because of the possibility of the use of statements in a civil proceeding against a party in a subsequent criminal proceeding, attorneys for individuals facing the possibility of parallel civil and criminal proceedings must remain cognizant of the fact that their representations in a civil proceeding could be used against their clients in future criminal prosecutions.

2. Waiver

In addition to the issue of the use of statements from civil proceedings as party admissions in later criminal proceedings, attorneys must also guard against potential waiver of

[13] FED. R. EVID. 801.

[14] The Federal Rules of Evidence define "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a).

[15] *See* United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979); United States v. Cain, 544 F.2d 1113, 1117 (1st Cir. 1976); *but see* Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969) ("While the prevailing rule is that a waiver of Fifth Amendment privilege at one proceeding does not carry through to another proceeding, there appears to be no controlling authority in this circuit. We think that rule unsound, at least for the circumstance before use, and decline to adopt it.").

the right against self-incrimination. Like all other privileges, the Fifth Amendment privilege against self incrimination may be waived. Such a waiver may be inferred from a witness's prior statements regarding the subject matter of the case, even if the witness did not consciously decide to waive privilege. However, testimonial waiver is not to be lightly inferred.[16]

As detailed above, the general rule is that waiver of the privilege against self-incrimination is that such waiver is limited to that particular proceeding. This means that a defendant who testifies at a civil proceeding has not waived his privilege to refuse to testify in a subsequent criminal proceeding.[17] However, if a defendant waives his privilege against self-incrimination with regard to a civil proceeding, he may be forced to incriminate himself in that proceeding, which may be in turn used as a party admission.[18]

The Second Circuit in *Klein v. Harris*[19] established a test for testimonial waiver that has been adopted by several other circuits.[20] In the civil context, one waives his privilege against self-incrimination when (1) the trier of fact is left with or prone to rely on a distorted view of the truth and (2) the party has reason to believe that their actions would be interpreted as waiver.[21]

In order for a party to have reason to believe that their actions would be interpreted as waiver, the party's statement must be "testimonial" and "incriminating."[22] "Testimonial" means "voluntarily made under oath in the context of the same judicial proceeding."[23] "Incriminating" means not merely dealing with collateral matters to the circumstances surrounding the commission of the crime.[24] The following sections examine the potential for waiver in pleadings, discovery, and testimony.

3. Waiver by answering a complaint

The first question of waiver arises in answering a civil complaint. While not necessarily a major issue in state court like Texas where a defendant may simply make a general denial, the

[16] *See* Smith v. United States, 337 U.S. 137, 150 (1949).
[17] *See supra* note 15 and accompanying text.
[18] *See supra* Part II(A)(1).
[19] 667 F.2d 274 (2d Cir. 1981).
[20] *See In re* Edmond, 934 F.2d 1304, 1308-09 (4th Cir. 1991) (citing *Klein* for the proposition that a testimonial statement may waive the Fifth Amendment privilege against self-incrimination); United States v. Davenport, 929 F.2d 1169, 1174 (7th Cir. 1991) (citing *Klein* for the proposition a party may waiver his Fifth Amendment privilege against self-incrimination where testimony would distort the view of the fact-finder); United States v. Parcels of Land, 903 F.2d 36, 43 (1st Cir. 1990) (citing *Klein* for the proposition that the focus of the waiver determination is based on whether the actions are testimonial, not the specific nature of action).
[21] *Klein*, 667 F.2d at 287; *see also* Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1752 (1979). The basis of the distortion of the fact finder's view of the truth stems from the possibility that a person could testify about a matter up to a certain point, including all of the facts beneficial to his case, and then assert privilege when asked to reveal incriminating facts. *See* Mark W. Williams, *Pleading the Fifth in Civil Cases*, 20 LITIG., Spring 1994, at 32 ("A witness is not permitted to decide on his own when to stop testifying once he begins. The choice must be made at the beginning whether or not to invoke the privilege.").
[22] *Klein*, 667 F.2d at 288.
[23] *Id.*
[24] *Id.* at 288; *see also In re* Marble, No. 07-50099-RLJ-7, 2008 WL 2048025, at *2-3 (Bankr. N.D. Tex. 2008).

issue of waiver is more of a consideration in answering a civil complaint in federal court or other state courts where a defendant must respond specifically to each paragraph of the complaint.[25]

The paramount case addressing the issue of waiver through answering a civil complaint without assertion of the Fifth Amendment privilege is *ACLI International Commodity Service, Inc. v. Banque Populaire Suisse*.[26] The court in *ACLI* applied the *Klein* test to determine whether a defendant who answered a civil complaint without asserting his Fifth Amendment right against self-incrimination waived his privilege. Focusing on the "testimonial" and "incriminating" requirements, the court held that the defendant's answer did not waive his right against self-incrimination as the pleading was neither under oath and therefore not testimonial, nor incriminating.[27] It is important to note that the court specifically focused on the fact that the pleading was not verified.[28] Therefore, while an unverified pleading signed only by the party's attorney will likely not constitute a waiver of the right against self-incrimination, a verified pleading signed by the party under oath very well may.

Also, it is important to recognize the distinction between waiver and use of the statement as a party admission. Simply because a party's answer does not constitute a waiver does not mean that it is inadmissible in a criminal proceeding. Attorneys in cases with the potential for parallel criminal proceedings must remain cognizant of this distinction.

4. Waiver through response to discovery requests

Unlike many pleadings that do not need to be verified, some discovery requests do require the party verify the veracity of the response.[29] Therefore, responding to discovery requests certainly presents the potential for waiver of the right against self-incrimination. Interrogatories require a party to answer under oath, making statements in response to interrogatories "testimonial" in nature. Therefore, to the extent that the other elements of waiver are satisfied,[30] a response to an interrogatory can certainly constitute waiver. Similarly, a defendant may waive the privilege through deposition testimony.

In addition, because a defendant may invoke his Fifth Amendment rights with regard to the production of documents where the very act of production would be incriminating, the failure to invoke the privilege against self-incrimination may constitute a waiver of that privilege.[31]

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[25] *See* FED. R. CIV. P. 8(b)(3) ("A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.").
[26] 110 F.R.D. 278, 287-88 (S.D.N.Y. 1986).
[27] Specifically, the pleading was signed by the defendant's attorney only, not by the defendant himself, under oath.
[28] *See id.*
[29] For example, interrogatories must be responded to under oath. FED. R. CIV. P. 33(b)(3).
[30] The other elements of waiver are that the fact finder is left with a distorted view of the truth and that the statement is incriminating, meaning it deals with circumstances surrounding the commission of the crime.
[31] *See* United States v. Doe, 465 U.S. 605, 612 (1984) ("Although the contents of a document may not be privileged, the act of producing the document may be. A government subpoena compels the holder of the document to perform an act that may have *testimonial* aspects and an *incriminating* effect.") (emphasis added).

5. Invoking the Fifth Amendment

Should a party decided to invoke his Fifth Amendment rights against self-incrimination, he must invoke them with a certain specificity. In the civil context, it is extremely rare for a court to allow the blanket assertion of privilege. The Fifth Amendment only protects a party from answering a question that poses a danger to incrimination. While it is generally thought that the court makes a determination as to whether invocation of the Fifth Amendment is proper, the person invoking the Fifth Amendment is generally given considerable leeway and burden of persuasion is on the party challenging the invocation.[32]

With regard to the invocation of the Fifth Amendment in the context of discovery, the party may have to create a privilege log as to why certain documents cannot be produced and why certain interrogatories cannot be answered.[33]

B. Adverse Inference

In the criminal context, the jury may not use a defendant's refusal to testify as an inference of the defendant's guilt.[34] In the civil context, however, the opposing party may argue that the defendant's failure to present evidence by exercising his Fifth Amendment rights permits the judge or jury to make an adverse inference against the defendant.[35] While such an adverse inference is permitted in such circumstances, it is not required.[36] In order for an adverse inference to be permitted, the action must be a civil action and the party seeking to draw the inference must have established a prima facie case separate and apart from the adverse inference.[37]

Even where the facts are sufficient to permit a court to draw an adverse inference, the Supreme Court jurisprudence permitting such an inference does not require it; therefore the

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[32] *See* Kaminsky, *supra* note 10, at 136-37; People v. Traylor, 23 Cal App.3d 323, 330 (1972) ("If the witness were required to prove the hazards he would be compelled to surrender the very protection the constitutional privilege is designed to guarantee.").

[33] *See* Starlight Int'l, Inc. v. Herlihy, 181 F.R.D. 494, 498 (D. Kan. 1998) (directing defendants to produce a privilege log in accordance with Federal Rule of Civil Procedure 26(b)(5)).

[34] Mitchell v. United States, 526 U.S. 314, 327-28 (1999). In addition to not being able to seek an adverse inference, a criminal prosecutor cannot even comment on the defendant's failure to testify. In situations where the only person who could contest a witness's testimony is the defendant, the prosecutor may not even assert that a witness's testimony is uncontroverted as such an assertion constitutes an indirect comment on the defendant's failure to testify. United States v. Hunt, 412 F. Supp. 2d 1277, 1287-88 (M.D. Ga. 2005).

[35] Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

[36] *See* State Farm Life Ins. Co. v. Gutterman, 896 F.2d 116, 119 (5th Cir. 1990).

[37] *Gutterman*, 896 F.2d at 119; Note, *Adverse Inferences Based on Non-party Invocations: The Real Magic Trick in Fifth Amendment Civil Cases*, 60 NOTRE DAME L. REV. 370, 380 (1985). Some have argued that there is an additional requirement that the person who refuses to testify based on the Fifth Amendment must be a party or an agent of the party in order for the court to permit the application of an adverse inference. *See id.* However, it appears that the Fifth Circuit has rejected this approach. *See* FDIC v. Fidelity & Deposit Co. of Md., 45 F.3d 969, 978 (5th Cir. 1995) (refusing "to adopt a rule that would categorically bar a party from calling, as a witness, a non-party who had no special relationship to the party, for the purpose of having that witness exercise his Fifth Amendment right").

ability to apply an adverse inference varies between jurisdictions.[38] Not only may a court decide not to permit an adverse inference from the invocation of the Fifth Amendment, it is within the trial court's discretion to permit the admission of the defendant's exercise of the Fifth Amendment into evidence.[39]

C. Motion to Stay

One method for combating the problems of potential parallel criminal proceedings, including the possibility of adverse inference is to file a motion to stay based on criminal proceedings. The Fifth Circuit has long recognized the ability of district courts to stay civil proceedings during the pendency of parallel criminal proceedings.[40] Issuance of a stay is proper where there are "special circumstances" and the need to avoid "substantial and irreparable prejudice" exists.[41] The factors that should be considered when determining whether "special circumstances" warrant a stay are: (1) the extent of the overlap between the issues in the criminal case and those in the civil case; (2) the status of the criminal case, including whether the defendant has been indicted; (3) the private interests of the plaintiff in proceeding expeditiously, weighed against the prejudice to plaintiff caused by the delay; (4) the private interests of and the burden to the defendant; (5) the interests of the courts; and (6) the public interest.[42]

1. Factors for granting a stay

a. Extent to which the issues in the criminal case overlap with those presented in the civil case

The extent of the overlap between the civil and criminal cases has been described as the most important factor in determining whether a court should grant a stay.[43] "If there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay."[44]

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[38] *See, e.g.*, Fischer v. Hooper, 143 N.H. 585, 596 (1999) (holding that the trial court must take reasonable steps to insure that the jury remains unaware of a party's invocation of his Fifth Amendment privilege).

[39] Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453, 1464-65 (5th Cir. 1992) (upholding trial court's refusal to allow witness's invocation of the Fifth Amendment into evidence under Rule 403 of the Federal Rules of Evidence where witness initially exercised his Fifth Amendment rights but later answered all questions); Farace v. Independent Fire Ins. Co., 699 F.2d 204, 210-11 (5th Cir. 1983) (affirming the trial court's holding refusing to admit evidence of plaintiff's initial refusal to answer questions fully).

[40] *See, e.g.*, United States v. Little Al, 712 F.2d 133, 136 (5th Cir. 1983) ("Certainly, a district court may stay a civil proceeding during the pendency of a parallel criminal proceeding."); Wehling v. Columbia Broadcasting Sys., 608 F.2d 1084, 1088-89 (5th Cir. 1979) (finding that the district court abused its discretion in refusing to stay discovery).

[41] *Little Al*, 712 F.2d at 136.

[42] SEC v. Mutuals.com, Inc., No. Civ.A3:03-CV-2912-D, 2004 WL 1629929, at *3 (N.D. Tex. 2004); Frierson v. City of Terrell, No. Civ.A.3:02CV2340-H, 2003 WL 21355969, at * 2 (N.D. Tex. 2003); Heller Healthcare Fin., Inc. v. Boyes, No. Civ.A. 300CV1335D, 2002 WL 1558337, at * 2 (N.D. Tex. 2002); *see also* Microfinancial, Inc. v. Premier Holidays Int'l, Inc., 385 F.3d 72, 78 (1st Cir. 2004); Federal Savings & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902-03 (9th Cir. 1989); SEC v. Dresser, 628 F.2d 1368, 1375-76 (D.C. Cir. 1980).

[43] *Frierson*, 2003 WL 21355969, at *3.

[44] *Id.* (quoting Librado v. M.S. Carriers, Inc., No. Civ. A. 3:02-CV-2095D, 2002 WL 31495988, at *2 (N.D. Tex. Nov. 5, 2002)).

b. Status of the criminal case, including whether the defendant has been indicted

Also of importance is the status of the criminal case, for example whether the defendant has been indicted. While nothing requires a party to be under indictment to receive a stay,[45] such an indictment will weigh in favor of the issuance of a stay.[46] Indeed, "the strongest case for deferring civil proceedings" is where a criminal defendant is required to defend against a civil or an administrative action involving the same conduct.[47]

c. Private interests of the plaintiffs in proceeding expeditiously, weighed against the prejudice to plaintiffs caused by the delay

Generally, the plaintiff will have a significant interest in the expeditious resolution of the proceedings. First, plaintiff's chances of recovery decrease if the plaintiff needs to wait until the conclusion of the criminal prosecution. The defendant may expend a great deal of money defending the criminal prosecution and might face a significant fine and/or a prison sentence, significantly decreasing the likelihood of recovery.[48] Further, plaintiff might also face the possibility of degradation of evidence.[49]

d. Private interests and burden on the defendants

Particularly when the defendant is already under indictment, the burden on the defendant should the court deny a stay is substantial. Absent a stay, the defendant is faced with the unenviable choice between actively defending against the civil suit, likely waiving his Fifth Amendment right against self-incrimination and risking the use of his statements against him in subsequent criminal proceedings, and passively defending, likely allowing the plaintiff to take a judgment against him. A stay addresses this issue, alleviating the conflict between the assertion of Fifth Amendment rights and defending a civil action.[50]

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[45] *See Wehling*, 608 F.2d at 1089 (staying discovery despite only a threat of indictment); *Mutuals.com*, 2004 WL 1629929, at *3 ("In this case, no indictment has been returned, but a preliminary hearing was scheduled to take place on June 14, 2004. Although this factor does not support the government's motion, some courts have stayed discovery where a party in the civil case was only threatened with criminal prosecution.").

[46] *Frierson*, 2003 WL 21355969, at *3 ("Officer's indictment and the pending status of the criminal case weigh in favor of a stay."); *Boyes*, 2002 WL 1558337, at *3 ("Because Morehead is under indictment rather than merely under investigation, the court finds that the status of the criminal case weighs in favor of a stay.").

[47] SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375-76 (D.C. Cir. 1980).

[48] *See, e.g.*, Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 903 (9th Cir. 1989) (noting that Molinaro "continued to attempt to dispose of his assets").

[49] *See, e.g.*, *Frierson*, 2003 WL 21355969, at *3 (finding that prejudice to the plaintiff was minimal where the plaintiff could acquire most of the information sought through discovery from other parties).

[50] *See Mutuals.com*, 2004 WL 1629929, at *4 ("[A] stay of discovery will relieve defendants of the burden of defending against civil and criminal cases simultaneously. Consequently, this factor weighs in favor of a stay."); *Boyes*, 2002 WL 1558337, at *3 ("This conflict [between asserting rights against self incrimination and defending a civil action] may be largely, if no completely, eliminated by granting a stay . . . . Therefore, the court finds that Morehead's private interest weighs in favor of a stay.").

e. Interests of the court

The interest of the court is generally in docket management.[51] Courts will generally focus on whether the interest of the courts weighs against granting a stay; only rarely will the court's interest weigh in favor of a stay.[52] Despite the fact that courts generally address the interest of the court in that fashion, one could argue that not issuing a stay might actually have an adverse effect on the court's docket, burdening the court with claims of privilege in response to discovery requests.

f. The public interest

Much of a court's consideration in evaluating the public interest requires the balancing of the public's interest in the protection of constitutional rights and the public's interest in the swift administration of justice. This balance can weigh in favor of granting a stay.[53] In *Frierson*, for example, the District Court for the Northern District of Texas stated that "[t]he public has an interest in the just and *constitutional* resolution of disputes with minimal delay."[54] The court then weighed the delay, which was minimal, against protection of constitutional rights that a stay would afford, concluding that "[t]he public's interest weighs in favor of a stay."[55]

2. Issuance of Stay is within the discretion of the court

It is important to note that even where a civil defendant has been indicted and there is extensive overlap between the civil and criminal cases, the decision to grant a stay remains within the discretion of the court.[56] It is possible that despite an indictment, the court may decide not to grant a stay.

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[51] *See, e.g.*, *Mutuals.com*, 2004 WL 1629929, at *4 ("The court concludes that granting a stay will not unduly interfere with the court's management of its docket. This factor does not weigh against granting the government's motion."); *Frierson*, 2003 WL 21355969, at *4 ("The Court concludes that granting a stay will not unduly interfere with the management of its docket. The Court's interests do no weigh against a stay."); *Boyes*, 2002 WL 1558337, at *3 ("Because the court concludes that granting a stay will not unduly interfere with the court's management of its docket, it finds that the court's interests do not weigh against a stay."); *see also* Federal Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 903 (9th Cir. 1989) (noting that "the action had been pending for a year, and the court had an interest in clearing its docket"); Microfinancial, Inc. v. Premier Holidays Int'l, Inc., 385 F.3d 72, 79 (1st Cir. 2004) (denying stay where the case had been pending for three years and the request to stay was made on the brink of trial).

[52] *Mutuals.com*, 2004 WL 1629929, at *4 ("The court concludes that granting a stay will not unduly interfere with the court's management of its docket. This factor does not weigh against granting the government's motion."); *Boyes*, 2002 WL 1558337, at *3 ("Because the court concludes that granting a stay will not unduly interfere with the court's management of its docket, it finds that the court's interests do not weigh against a stay.").

[53] *See Frierson*, 2003 WL 21355969, at *4 (finding public interest weighed in favor of stay as a stay would "allow for constitutional resolution of the concurrent disputes while protecting [the defendant] from unnecessary adverse consequences").

[54] *Frierson*, 2003 WL 21355969, at *4 (emphasis added).

[55] *Id.*

[56] SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) ("The Constitution, therefore, does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. Nevertheless, a court *may decide in its discretion* to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions 'when the interests of justice seem ( ) to require such action . . . .'") (emphasis added, citations omitted)

D. Limitations on Discovery when Stay Is Not Granted – Protective Orders

Should a court deny a defendant's motion to stay, a protective order is another tool that an attorney can use to protect his client from of incriminating discovery evidence in subsequent criminal prosecution. Attorneys may seek a protective order shielding documents produced in response to discovery from the government.[57] The major problem with protective orders is that there is no guarantee that the protective order will remain in effect to prevent prosecutors from accessing discovery material.[58]

For example, in *Martindell v. International Telephone & Telegraph Corp.*, the government intervened in a civil action to seek the reformation of a protective order to allow the government to access the defendant's deposition testimony.[59] While the Second Circuit refused to vacate or modify the protective order in that instance,[60] *Martindell* demonstrates that even the presence of a protective order will not bar prosecutors from attempting to access civil discovery material.

Moreover, other Circuits have not been so steadfast in their opposition to government attempts to avoid protective orders. For example, several circuits have adopted a per se rule that protective orders cannot prevent discovery from a grand jury subpoena.[61] The First Circuit, while not adopting the per se rule of the Fourth, Ninth, and Eleventh Circuits, nevertheless placed the burden on the party seeking to avoid the subpoena to demonstrate why the subpoena should not be enforced.[62]

Therefore, while a protective order might be better than nothing should a stay be denied, counsel for a potential criminal defendant must realize that responses to discovery produced under a protective order may not be inaccessible to prosecutors. As such, the civil litigator must remain cautious when responding to discovery, even where a protective order is in place.

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[57] *See id.* at 1376.

[58] *See In re* Grand Jury Subpoena, 138 F.3d 442, 445-46 (1st Cir. 1998); *In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes, 62 F.3d 1222, 1227 (9th Cir. 1995); *In re* Grand Jury Proceedings, Williams, 995 F.2d 1013, 1020 (11th Cir. 1993); *In re* Grand Jury Subpoena, 836 F.2d 1468, 1478 (4th Cir. 1988); Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 294 (2d Cir. 1979).

[59] *Martindell*, 594 F.2d at 294.

[60] *Id.* at 296.

> After balancing the interests at stake, we are satisfied that, absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation, either as evidence or as the subject of a possible perjury charge.

Id. Even under *Martindell*, it is possible for a court to find "some extraordinary circumstance" that justifies the vacation or modification of a protective order.

[61] *See In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes, 62 F.3d 1222, 1227 (9th Cir. 1995); *In re* Grand Jury Proceedings, Williams, 995 F.2d 1013, 1020 (11th Cir. 1993); *In re* Grand Jury Subpoena, 836 F.2d 1468, 1478 (4th Cir. 1988).

[62] *In re* Grand Jury Subpoena, 138 F.3d 442, 445-46 (1st Cir. 1998).

E. Use of the Fifth Amendment in the Context of Corporation

A corporation does not possess any Fifth Amendment rights against self-incrimination. However, the corporation's lack of rights against self-incrimination does not force the employees of a corporation to waive theirs. The Supreme Court has recognized that there may be instances when it is impossible for a corporation to comply with a discovery request without violating the rights against self-incrimination of the individual business owner and sole employee.[63] In such an instance, the Court noted that the proper remedy would be to stay discovery until the conclusion of the criminal action.[64] While courts in subsequent cases have been reticent to grant a stay of an action against a corporation based on *Kordel*, it may be possible when no employee nor agent of the corporation can comply with discovery requests without waiving his Fifth Amendment privilege.

III. DEALING WITH MULTIPLE GOVERNMENT AGENCIES

A. Civil enforcement frequently evolves into criminal proceedings

Parallel proceedings often arise when a single common set of facts gives rise to simultaneous or subsequent civil, administrative, and criminal investigations by different agencies or branches of government. Thus, what might start as a civil investigation quickly turns into two or more parallel investigations, both civil and criminal.[65] These parallel investigations most often involve at least two different government agencies. Successfully navigating parallel proceedings is a difficult process.

B. Overlap in jurisdiction between agencies

The reason for parallel proceedings can often be traced to the statutes granting the government agency the authority to examine a situation. For example, Section 78u of Title 15 of the United States Code grants the SEC the authority to investigate violations of securities laws and regulations.[66] Indeed, Section 78u explicitly provides that the SEC may transmit "such evidence as may be available concerning such acts or practices as may constitute a violation of any provision of this chapter or the rules or regulations thereunder to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings . . . ."[67] In short many statutes provide both for a civil penalty to be assessed by a government agency and for a criminal penalty if the violation is sufficiently severe. Because the statutes provide for both, actions that begin as civil investigations frequently spawn parallel criminal proceedings.

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[63] United States v. Kordel, 397 U.S. 1, 8-9 (1970).
[64] *Id.* at 9.
[65] *See* Charles Parker, et al., *Keeping Energy Companies Out of Trouble—Dealing with the SEC, Ethical Dilemmas, and Avoiding Criminal Liability*, 50 MIN. L. INST. 6-1, § 6.03 (2004) (describing the frequency with which SEC civil enforcement investigations evolve into criminal proceedings).
[66] 15 U.S.C. § 78u.
[67] 15 U.S.C. § 78u(d)(1).

C. Each agency will have its own set of priorities and goals

In multi-issue negotiation, one must identify the multiple issues, set priorities, and attempt to discover the other parties interests.[68] As difficult as it may be to negotiate multiple issues with one government agency, that difficulty is compounded when dealing with multiple agencies. Each agency will have its own interests, requirements, personnel, and attitude towards settlement.[69] In many cases, the disparate interests of the government agencies may slow or even prevent settlement.

Negotiating with government agencies poses an additional problem. While the use of conduct or statements made during settlement negotiations with private parties is prohibited, conduct or statements made to a government official may be offered in a criminal case.[70] Thus, if a defendant does settle with a civil enforcement agency, he must remain cognizant of the fact that any admission of fault made during those settlement negotiations may become the basis of subsequent criminal prosecution.[71] Therefore, a defendant must be wary of making any statement that could be seen as incriminating.

Dealing with multiple agencies is a difficult proposition. Involving all interested parties in the settlement negotiations is important, as it allows a determination of where each party's priorities and expectations lie. Even with early involvement, a great deal of persistence may be required to negotiate a settlement that is satisfactory for all parties.

IV. DIFFERENCES IN CRIMINAL AND CIVIL DISCOVERY AND RESTRICTIONS ON THE USE OF CIVIL DISCOVERY TO OBTAIN THE UNOBTAINABLE IN A CRIMINAL CASE

There are notable and substantial differences between criminal and civil discovery. In a civil proceeding, anything relevant to the case which is not privileged is discoverable."[72] Contrast that with criminal discovery where, for example, a criminal defendant can only force the government to produce documents that are material to preparing the defense, that the government plans to use in its case-in-chief, or that were obtained from or that belong to the defendant.[73] The discovery rules are not just more restrictive as to criminal defendants, but also to prosecutors. The rules regarding discovery from a defendant are reciprocal, meaning that the defendant's duty to allow discovery is only triggered when the defendant asks for similar

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[68] DEEPAK MALHOTRA & MAX H. BAZERMAN, NEGOTIATION GENIUS: HOW TO OVERCOME OBSTACLES AND ACHIEVE BRILLIANT RESULTS AT THE BARGAINING TABLE AND BEYOND 72-74 (2007).

[69] Robert S. Bennett & Alan Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 PUB. CONT. L.J. 30, 41 (1986-87) (discussing negotiation with multiple government agencies in the contexts of developing a global settlement agreement in response to allegations of procurement fraud); *see also* Robert K. Huffman, et al., *The Perils of Parallel Civil and Criminal Proceedings: A Primer*, 10 HEALTH LAW., March 1998, at 6 (discussing settlement with multiple agencies in the context of health-care fraud).

[70] FED. R. EVID. 408(a)(2); *see also* Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. CIN. L. REV. 939, 940 (2008).

[71] *See* Story Thompson, *supra* note 70, at 940.

[72] Pankaj Sinha, *Parallel Civil and Criminal Proceedings*, 26 AM. CRIM. L. REV. 1217, 1218 (1989) (citing FED. R. CIV. P 26(b).

[73] FED. R. CRIM. P. 16(a)(1)(E).

discovery from the government.[74] Thus, just as a criminal defendant may use the civil process to gain access to information not available under the criminal discovery process, so too may the government seek information, forcing the criminal defendant to either provide the information or invoke the Fifth Amendment.[75]

Part of the pendency of parallel proceedings is the risk that the government may use the civil discovery process to gain assess to information that it could not through the criminal discovery process. In *Campbell v. Eastland*, the Fifth Circuit Court of Appeals addressed this issue where the criminal defendant was attempting to pry information about the prosecution's criminal case through the civil discovery process.[76] The Fifth Circuit held that the lack of good faith in the institution and discovery requests of the civil suit compelled the court to either stay the civil proceedings or end them through dismissal of the motion.[77]

The Supreme Court embraced the good faith requirement for permitting discovery in parallel civil proceedings in *United States v. Kordel*.[78] In *Kordel*, the Supreme Court reversed a Sixth Circuit opinion that suppressed evidence the government had gained through civil interrogatories.[79] In permitting the use of evidence acquired through civil litigation, the Supreme Court based its opinion in large part on the government's good faith in seeking the interrogatories in the first place.[80]

The examination of good faith as the basis for determining whether to permit civil discovery of material pertinent to a criminal investigation and the admission of that evidence in a criminal prosecution suffered a slight set-back in *United States v. LaSalle National Bank*.[81] In *LaSalle*, the Supreme Court held that the IRS must desist in its civil investigation of a matter once it is recommended to the Department of Justice for criminal prosecution.[82] The distinction between *Kordel* and *LaSalle* lay in the statutory authority of the IRS, which provided that the agency must cease investigation.

Despite criticism that the good faith standard espoused in *Kordel* is too lenient to the government, it nevertheless remains the test as to whether civil discovery will be permitted and allowed into evidence in a criminal prosecution. [83]

V. CONCLUSION

Conducting civil litigation in the shadow of potential or actual criminal prosecution is tricky business. Attorneys in those situations must assist their clients with the difficult choices of

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[74] FED. R. CRIM. P. 16(b).
[75] *See* David A. Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1389 (1997).
[76] Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962).
[77] *Campbell*, 307 F.2d at 488.
[78] 397 U.S. 1 (1970).
[79] *Kordel*, 397 U.S. at 12-13.
[80] *See Kordel*, 397 U.S. at 6-7.
[81] 437 U.S. 298 (1978).
[82] *LaSalle*, 437 U.S. at 312-13
[83] Sinha, *supra* note 72 at 1223-24, 1236-37.

whether to invoke their Fifth Amendment rights, seek to stay a civil case, or fully cooperate. Further, attorneys may face the prospect of negotiating with several government agencies simultaneously, each with a different priority and agenda. There are no easy solutions to these difficult situations. The best advice is to keep perspective as to how a client's civil matter fits into potential or actual criminal prosecution, and not allow the action on the civil side to cloud one's judgment.