Charles R. Parker
Partner

Christopher D. Porter
Partner

What Every Civil Litigator Needs to Know About the 5th Amendment

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 in which civil defendants face criminal charges arising out of the same or related actions are occurring with increasing frequency. Though the examples of major litigation that has both civil and criminal components are too numerous to list, notable examples include: the litigation arising out of the BP oil spill which involved not only civil and criminal charges against BP but also criminal charges against individual BP employees;[1] the criminal and civil investigation of JPMorgan's sale of mortgage-backed securities in the run-up to the 2007-09 financial crisis;[1] Allen Stanford's conviction of both criminal and civil counts of selling fraudulent certificates;[1] and generally increasing private enforcement of laws such as RICO and the Foreign Corrupt Practices Act.[2] 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.[3] The Sixth Amendment also provides the right to an attorney.[4] The Fourth Amendment protects against unreasonable search and seizure.[5] The Fifth Amendment provides natural persons with the privilege against self-incrimination.[6] 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 of this paper examines the interplay between the Fifth Amendment and the civil litigation process. Part III explores the possibility of seeking a stay of civil litigation during the pendency of a criminal investigation. Part IV addresses the availability of protective orders, sealing testimony and documents produced during civil litigation that could impact a criminal investigation. Part V 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 also lead to criminal liability down the road.

I. A Client's or Attorney's Representations in a Civil Proceeding Can Affect a Criminal Proceeding

A civil litigator's first and foremost criminal law concern is to ensure that neither the client nor the litigator on behalf of the client makes representations in a civil proceeding that will later harm the client if introduced in a criminal proceeding. Any statements made by a client or his attorney in a civil proceeding can be admitted as evidence in a subsequent criminal proceeding as an opposing party admission.[7] The potential for opposing party admissions is particularly problematic if the client waives the Fifth Amendment privilege not to testify on incriminating matters.[8] 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.[9]This distinction, however, is largely meaningless because the mere admission of the defendant's prior incriminating statements is damaging enough without also requiring the defendant to testify.

The Fifth Amendment protects all people from being "compelled in any criminal case to be a witness against [themselves]." This privilege against self-incrimination is often referred to as the right to remain silent.[10] Though the Fifth Amendment is most commonly known as the province of criminal defense attorneys, the privilege against self-incrimination can be invoked in any proceeding, whether civil or criminal, administrative or judicial.[11] The Fifth Amendment, therefore, should be in the forefront of every civil litigator's mind when a client, defendant,[12] faces potential criminal proceedings related to the civil litigation.

The privilege against self-incrimination applies broadly; it can be used to prevent a witness from making "any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used."[13] Once a witness begins answering questions on a potentially incriminating subject, however, "the privilege cannot be invoked to avoid disclosure of the details."[14] If a defendant waives his privilege against self-incrimination in a civil proceeding, he may be forced to further incriminate himself in that proceeding. Any statements made during a civil proceeding, may in turn be used against the witness in criminal proceedings as an opposing party's admission. Advising a client in civil litigation about his Fifth Amendment rights is important not just for the client's well-being but also to protect the attorney. Clients who give incriminating testimony in civil matters and are later indicted based on that testimony may attempt to sue their attorney for breach of contract and breach of fiduciary duty.[15]

1. Invoking the Fifth Amendment

The privilege against self-incrimination must be invoked with a certain degree of specificity.[16] In the civil context, it is extremely rare for a court to allow a blanket assertion of privilege.[17] The privilege only protects a witness from answering questions that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."[18] While many attorneys assume that courts make the determination as to whether invocation of the Fifth Amendment is proper, the party invoking the Fifth Amendment is generally given considerable leeway and the burden of persuasion is on the party challenging the invocation.[19] Furthermore, assertions of the privilege against self-incrimination are not limited to trial, but rather can be employed, even in discovery, to avoid disclosing any information that "would furnish 'a link in the chain' of evidence needed to prosecute for a crime."[20] 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.[21]

The protections of the Fifth Amendment apply only to individuals and do not extend to corporations, partnerships, labor unions, or incorporated banks.[22] In *Braswell v. U.S.*,[23] the Supreme Court affirmed that "it is well established that . . . artificial entities, [like corporations,] are not protected by the Fifth Amendment." Though the defendant was the only member of the corporation, as the custodian of the corporation's records the defendant assumed certain obligations, including the obligation to produce corporate records on proper demand by the Government.[24]

The corporation's lack of rights against self-incrimination, however, 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 answer interrogatories without violating the rights against self-incrimination of the individual business owner and sole employee.[25] In such an instance, the Court noted that the proper remedy is to stay discovery until the conclusion of the criminal action.[26] 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 or agent of the corporation can respond to interrogatories or deposition questions without waiving his Fifth Amendment privilege.

2. Waiver of the Fifth Amendment

The privilege against self-incrimination can be waived solely based on a witness's prior statements, regardless of whether he consciously chose to waive the privilege or even knew he had the right to remain silent.[27] A court will infer that a witness waived the Fifth Amendment only if: (1) the trier of fact is left with or prone to rely on a distorted view of the truth,[28] and (2) the witness had reason to believe that his statements or productions would be interpreted as waiver—meaning the statements were made voluntarily, under oath, and directly incriminate the witness.[29] A waiver is not to be lightly inferred.[30]

The privilege against self-incrimination is most clearly waived when a witness offers incriminating testimony, but a waiver also may be implied from a failure to assert the privilege in response to interrogatories, deposition questions, or document requests in a timely manner.[31] Therefore, it is a best practice for the recipient of a subpoena to raise all applicable objects in response to the subpoena or face the risk of at least having to overcome a waiver argument.[32] Waiver for failure to respond in a timely manner, however, is normally only found in particularly egregious cases.[33]

A. Answering a Complaint

A civil litigator should be concerned about the waiver issue from the moment a client answers a civil complaint. Waiver is not a major issue at the complaint stage in Texas state courts and some other state courts because a defendant may simply make a general denial.[34] In federal courts and state courts where the defendant must answer each paragraph of the complaint, however, civil litigators must make sure that their client's answers do not waive the privilege against self-incrimination.[35]

This is not a particularly difficult problem to avoid. The *Klein* test requires that a witness make a statement made under oath in order to waive the Fifth Amendment.[36] Rule 11 of the Federal Rules of Civil Procedure permits an attorney to sign pleadings and written motions instead of the client.[37] In the paramount case addressing waiver through answering a civil complaint, *ACLI International Commodity Service, Inc. v. Banque Populaire Suisse*,[38] the court applied the *Klein* test to hold that a defendant's answer did not waive his right against self-incrimination because it was signed by his attorney. It is important to note that the court specifically focused on the fact that the pleading was not verified.[39] Therefore, while an unverified pleading signed only by the party's

attorney will not constitute a waiver of the right against self-incrimination, a verified pleading signed by the party under oath very well may.

B. Responding to Discovery Requests

Most discovery requests present the potential for wavier of the right against self-incrimination because the client must respond under oath.[40] Though documents do not involve testimony, the act of producing the documents has testimonial aspects because it concedes the existence of the documents, as well as the witness's possession and control of them.[41] Therefore, responses to interrogatories, depositions, and requests for documents meet the *Klein* requirement of being "testimonial" in nature. To the extent that the other elements of waiver are satisfied,[42] a response to an interrogatory, a question in a deposition, or a request for documents can certainly constitute waiver.[43]

3. The Implications of Invoking the Fifth Amendment

While important to prevent the client from making representations that could be used in a criminal proceeding, invoking the Fifth Amendment has both consequences and limitations.

First, it is important to recognize the distinction between waiver and use of a statement as an opposing party admission.[44] Simply because a party's answer does not constitute a waiver does not mean that it is inadmissible in a criminal proceeding. Furthermore, "even where [the testimony presented at the civil trial] would not be direct evidence of wrongdoing with respect to the scheme charged in the criminal case, such testimony may be admissible as Fed. R. Evid. 404(b) evidence in any criminal trial."[45] Thus, civil litigators must be cognizant not only of any representations that could waive Fifth Amendment protections but also of any representations that may otherwise compromise their client's defense in any related criminal proceeding.

Second, invoking the Fifth Amendment may harm the client in the civil proceeding if the choice to invoke the Fifth Amendment is admitted into evidence, allowing the jury to draw an 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.[46] 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.[47]

Whether a party invoking the Fifth Amendment is subject to adverse inferences varies between jurisdictions because the Fifth Amendment permits adverse inferences but does not require them.[48] Thus, some jurisdictions allow a party to call a witness for the sole purpose of demonstrating that the witness plans to invoke the Fifth Amendment; whereas other jurisdictions allow all Fifth Amendment issues to proceed outside of the presence of the jury and prohibit the jury from drawing adverse inferences from a witness's invocation of the Fifth Amendment.[49] In jurisdictions that permit adverse inferences, the party seeking to draw the inference must have established a prima facie case separate and apart from the adverse inference.[50]

II. Seeking a Stay of Civil Proceedings to Avoid Compromising the Civil Case For the Benefit of the Criminal Case

Because the representations of the client and the civil litigator can have adverse effects on criminal litigation, it is often advisable for the civil litigator to seek a stay of the civil litigation until after the criminal issues have concluded. Though the ability of the courts to grant a stay of civil litigation pending parallel criminal proceedings is well recognized,[51] the decision rests within the reasonable discretion of the trial court.[52] Some courts consider a stay to be an "extraordinary remedy."[53] The Fifth Circuit views a stay as contemplating "special circumstances" and the need to avoid

"substantial and irreparable prejudice."[54] Courts generally consider six factors when determining whether granting a stay is warranted: (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.[55]

Though consideration of the factors is critical, it is important to remember that the decision of whether to grant a stay remains within the discretion of the district court; the factors "are not mechanical devices for churning out correct results."[56] A reviewing appellate court will ensure that the district court's exercise of discretion was reasonable and overturn a denial of a stay only when there is "demonstrated prejudice so great that, as a matter of law, it vitiates a defendant's constitutional rights or otherwise gravely and unnecessarily prejudices the defendant's ability to defend his or her rights."[57] With that caveat, it is nonetheless valuable to examine each factor independently.

1. The Extent of the Overlap Between the Issues in the Criminal Case and Those 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.[58] "If there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay."[59]

2. The 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,[60] such an indictment will weigh heavily in favor of the issuance of a stay.[61] Indeed, "the strongest case for deferring civil proceedings" is "where party under indictment for a serious offense is required to defend a civil or an administrative action involving the same matter."[62]

3. The Private Interests of the Plaintiff in Proceeding Expeditiously, Weighed Against the Prejudice to Plaintiff Caused by the Delay.

Generally, the plaintiff will have a significant interest in the expeditious resolution of the proceedings. First, a 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, decreasing the civil plaintiff's likelihood of recovery.[63] Further, the plaintiff might also face the possibility of degradation of evidence.[64]

The harm to the plaintiff in the civil suit frequently counsels towards shortening the grant of a stay rather than refusing to grant it at all. For example, though the Fifth Amendment privilege is generally retained by a criminal defendant throughout the pendency of his direct appeal, civil courts may reduce the burden on the plaintiff's interest by granting a stay that remains in effect only through the defendant's sentencing.[65]

4. The Private Interests of and the Burden to the Defendant.

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 asserting Fifth Amendment rights and defending a civil action.[66]

5. The Interests of the Courts.

The interest of the court is primarily in docket management.[67] 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.[68] Despite the fact that courts generally address the interest of the court in that fashion, a civil litigator 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.

6. 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.[69] 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."[70] 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."[71]

III. Resorting to a Protective Order to Prevent the Disclosure of Incriminating Evidence When a Stay is Unavailable

In some cases, the courts may adequately protect a party in civil litigation with pending criminal proceedings by entering a protective order, ordering that information exchanged in discovery be used only for purposes of the civil litigation and not publicized.[72] Protective orders are issued pursuant to Rule 26 of the Federal Rules of Civil Procedure which permit a party from whom discovery is sought to move for a protective order and permits a court to grant such an order "for good cause."[73]

Jurisdictions split over the enforceability of protective orders. In the seminal case on point, the Second Circuit determined that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance of compelling need . . . a witness should be entitle to rely upon the enforceability of a protective order against third parties, including the Government."[74] Thus, defendants who wish to retain their Fifth Amendment privilege against self-incrimination but still be able to vigorously defend related civil actions can testify without great concern if they are granted a Rule 26(c) protective order in a jurisdiction that follows *Martindell*.

Other jurisdictions, however, are less likely to enforce protective orders. For example, the Fourth, Ninth, and Eleventh Circuits have adopted a *per se* rule that protective orders cannot prevent discovery from a grand jury subpoena.[75] The First and Third Circuits created a middle path in the circuit split, placing the burden on the party seeking to avoid the subpoena to demonstrate why the subpoena should not be enforced, but allowing the party to overcome the presumption.[76]

Therefore, while a protective order might be better than nothing, counsel for a potential criminal defendant must realize that responses to discovery produced under a protective order may nonetheless be accessible by prosecutors, depending on the jurisdiction, the propriety of a district court's grant of a Rule 26(c) order, and the circumstances compelling the government's need for the information at issue. As such, the civil litigator must remain cautious when responding to discovery, even where a protective order is in place.

IV. Dealing with Multiple Government Agencies

1. 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.[77] These parallel investigations most often involve at least two different government agencies. Successfully navigating parallel proceedings is a difficult process.

2. 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.[78] 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 . . . ."[79] 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.

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

In multi-issue negotiation, the civil litigator must identify the multiple issues, set priorities, and attempt to discover the other parties' interests.[80] 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.[81] 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.[82] 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.[83] 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.

V. 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."[84] 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 belong to the defendant.[85] The discovery rules are not only more restrictive for criminal defendants but also for 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 discovery from the government.[86] 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.[87]

Part of the pendency of parallel proceedings problem is the risk that the government may use the civil discovery process to gain access 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.[88] 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.[89]

The Supreme Court embraced the good faith requirement for permitting discovery in parallel civil proceedings in *United States v. Kordel*.[90] In *Kordel*, the Supreme Court reversed a Sixth Circuit opinion that suppressed evidence the government had gained through civil interrogatories.[91] 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.[92]

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*.[93] 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.[94] 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. [95]

VI. 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 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.

Charles Parker *focuses on complex business and securities litigation and has extensive experience conducting internal investigations and representing officers, directors, and corporations in SEC enforcement actions, along with litigation experience in FCPA, SEC and CFTC enforcement actions, minority shareholder oppression, derivative transactions, trade secrets, professional liability and class actions. He is consistently recognized by* Best Lawyers in America*, is a Fellow of the American College of Trial Lawyers, and is a member of the International Society of Barristers and American Board of Trial Advocates.*

Christopher Porter *focuses on the key disputes businesses can face – from breach of contract and trade secret claims to business torts and antitrust disputes. Representing plaintiffs and defendants in state and federal courts throughout Texas and beyond, he is consistently recognized as a "Texas Rising Star" by Thomson Reuters'* Super Lawyers*.*

---

[1] *See* Jeanine Ibrahim, *Allen Stanford: Descent from billionaire to Inmate # 35017-183*, CNBC.COM (Oct. 5, 2012), http://www.cnbc.com/id/49276842; Scott Cohn, *Five years after Stanford scandal, many victims penniless*, CNBC.COM (FEB. 15, 2015), http://www.cnbc.com/id/101418516#.

[2] *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/.

[3] *See* U.S. CONST. amend. VI.

[4] *See id.*

[5] *See* U.S. CONST. amend. IV.

[6] *See* U.S. CONST. amend. V.

[7] *See* Fed. R. Evid. 801 ("A statement that meets the following conditions is not hearsay, [and, therefore, can be admitted into evidence]: . . . (2) An Opposing Party's Statement. The statement is offered against an opposing party and: (A) was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject . . . .").

[8] The potential for giving incriminating testimony while defending a civil suit and that evidence being used in subsequent criminal proceedings should be the civil litigator's primary concern but there are other, related, privilege matters of which a civil litigator should also be aware. When a company defends a suit or complies with a request from an investigating agency, the company will sometimes be required to divulge the bad acts of some of its employees or of third parties. Those disclosures can cause additional problems for the company if the employee later sues for libel or slander. *See*, *e.g.* Writt v. Shell Oil Co., 409 S.W.3d 59, 62, 63 (Tex. App.—Houston [1st Dist.] 2013, pet. granted) (former employee of Shell alleged that Shell falsely accused him of engaging in unethical conduct in a report that Shell voluntarily submitted to the Department of Justice in connection with an investigation into a violation of the Foreign Corrupt Practices Act).

When a company produces a communication regarding an internal investigation, the company should ensure that the investigation pertains to a matter in which a criminal case is ongoing, actually contemplated, or under serious consideration. Judicial officers, attorneys, and witnesses in judicial proceedings enjoy an absolute privilege from libel suits based on communications made in their official capacity, for example communications made as witnesses in judicial proceedings. *See Writt*, 409 S.W.3d at 66 (citing Restatement (Second) of Torts 5 25 2 B Intro. Note, §§ 585-591 (1977). In contrast, a communication made to a public official outside of an ongoing or seriously considered investigation enjoys only a conditional privilege that exists as long as it is not abused, such as when the person making the statement knows the matter to be false or is motivated purely by malice instead of furthering a public interest. *Writt*, 409 S.W.3d at 66.

In *Writt v. Shell Oil Co.*, Shell conducted and produced an internal investigation in response to a DOJ inquiry after meeting with the DOJ, at the DOJ's request. *Id.* at 72. DOJ initially contacted Shell on July 3, 2007. *Id.* Shell submitted the relevant report to the DOJ on February 5, 2009. *Id.* The DOJ did not open a judicial proceeding and file a criminal complaint against Shell until November 4, 2010. *Id.* The court concluded that Shell was not protected by the absolute privilege against libel or defamation because the fact that DOJ

ultimately filed a judicial proceeding did not establish that it was proposing one when it contacted Shell or when Shell submitted the report. *Id.*

[9] *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.").

[10] *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).

[11] 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).

[12] 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.*

[13] Katsinger v. U.S., 406 U.S. 441, 445 (1972).

[14] Rogers v. U.S., 340 U.S. 367, 373 (1951).

[15] *See*, *e.g.*, *Futch v. Baker Botts, LLP*, 435 S.W.3d 383 (Tex.App.—Houston [14th Dist.] 2014, no pet. h.) (dismissing breach of contract claim because the law firm did not promise in the contract not to disclose confidential or privileged information and dismissing the breach of fiduciary duty claim pursuant to the *Peeler* doctrine, which severely limits a client's ability to bring civil claims against an attorney who committed malpractice unless the client has been exonerated of criminal charges because otherwise it is difficult to tell whether the client's criminal conduct is the sole proximate cause of the eventual conviction).

[16] *See* Zicarelli v. New Jersey State Commission of Investigation, 406 U.S. 472 (1972) ("It is well established that the privilege protects against real dangers, not remote and speculative possibilities."); *see also* North River Ins. Co., Inc. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987) (". . . a proper invocation of the privilege [does not] mean that a defendant is excused from the requirement to file a responsive pleading; he is obliged to answer those allegations that he can and to make a specific claim of the privilege as to the rest.").

[17] Gerald W. Heller, *Is "Pleading the Fifth" A Civil Matter? How the Constitution's Self-Incrimination Clause Presents Special Challenges for the Civil Litigator*, 42 Fed. Law 27, 29 (Sept. 1995).

[18] *Katsinger*, 406 U.S. at 444-45; *see also* Maness v. Meyers, 419 U.S. 449, 468 (1975) (target of a subpoena to produce magazines that had served the basis of past criminal prosecutions was justified in refusing to produce because future criminal prosecutions were a very definite possibility of future prosecution existed).

[19] *See* Kaminsky, *supra* note 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.").

[20] 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2018 (3d ed. 2014)

[21] *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)).

[22] Heller, *supra* note 18, at 28.

[23] 487 U.S. 99, 102 (1988).

[24] *Id.* at 110.

[25] United States v. Kordel, 397 U.S. 1, 8-9 (1970).

[26] *Id.* at 9.

[27] Klein v. Harris, 667 F.2d 274, 287 (2d. Cir. 1981)

[28] *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.").

[29] *Klein*, 667 F.2d at 287. The Second Circuit established this test to determine whether a witness waived his rights under the Fifth Amendment that has now been widely adopted by other courts. *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).

[30] *See* Smith v. United States, 337 U.S. 137, 150 (1949); *see also In re* Marble, No. 07-50099-RLJ-7, 2008 WL 2048025, at *2-3 (Bankr. N.D. Tex. 2008).

[31] *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981) ('[T]he Fifth Amendment can be waived or lost by not asserting it in a timely fashion."); *see* Heller, *supra* note 18, at 29.

[32] *See* S.E.C. v. Farmer, 560 Fed. Appx. 324, 326 (5th Cir. 2014) (per curiam opinion).

[33] *Compare Davis*, 650 F.2d at 1160 (witness did not assert Fifth Amendment privilege until fifteen month after receiving interrogatories—"long after he knew he was under investigation, long after he had been indicted in state court, long after his trial at which he testified in his own behalf, and months after he had been convicted in the state proceeding") *with Ex parte* White, 551 So.2d 923, 924-25 (Ala. 1989) (though assertion of Fifth Amendment rights came after the time allowed by the Alabama Rules of Civil Procedure for a response, respect for constitutional rights trumped state procedure rules).

[34] *See* Gunn v. Hess, 367 S.E.2d 399, 400-01 (N.C. Ct. App. 1988) (looking to decisions in Washington and New York to conclude that a general denial cannot waive the right against self-incrimination).

[35] *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.").

[36] *See Klein*, 667 F.2d at 287.

[37] FED. R. CIV. P. 11(A) ("Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name . . . .").

[38] 110 F.R.D. 278, 287-88 (S.D.N.Y. 1986).

[39] *See id.*

[40] *See*, *e.g.*, FED. R. CIV. P. 33(b)(3) (requiring interrogatories to be answered "fully in writing under oath").

[41] *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); *see also Farmer*, 560 Fed. Appx. 324, 326 (5th Cir. 2014).

[42] 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.

[43] *See*, *e.g.*, Mitchell v. Zenon Cost. Co., 149 F.R.D. 513, 515 (D. V.I. 1992) (finding the privilege against self-incrimination waived where the "defendant voluntarily disclosed the incriminating facts . . . in interrogatories and in deposition.").

[44] Recall that an opposing party admission is an exception to the hearsay rule. The exception permits any representations made by a party or someone authorized to represent him, such as his attorney, to be introduced in a subsequent criminal proceeding.

[45] Louis Vuitton Malletier S.A., v. LY USA, Inc., 676 F.3d 83, 98 (2012). Rule 404(b) of the Federal Rules of Evidence permits the admission of evidence of a crime or other wrong act for purposes other than as character evidence, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of evidence." Fed. R. Evid. 404(b)(2).

[46] 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).

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

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

[49] *See* Fischer v. Hooper, 732 A.2d 396, 403 (N.H. 1999).

[50] *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").

[51] *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*, 608 F.2d at 1088-89 (finding that the district court abused its discretion in refusing to stay discovery).

[52] SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) ("The Constitution . . . 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 interest of justice seem to require such action, sometimes at the request of the prosecution, sometimes at the request of the defense.") (internal citations omitted).

[53] Tr. of Plumbers and Pipefitters Nat'l Pension Fund. v. Transworld Mech., Inc., 886 F.Supp. 1134, 1139 (S.D.N.Y. 1995); *see also* John J. Falvey Jr., et al., *Staring Down Both Barrels in A Corporate Fraud Case: Can A Civil Stay Help the Defense?*, 8 Andrews Sec. Litig. & Reg. Rep. 3 (2003).

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

[55] 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); Dresser, 628 F.2d at 1375-76.

[56] *Louis Vuitton*, 676 F.3d at 99.

[57] *Id.* at 100.

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

[59] *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)).

[60] *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.").

[61] *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.").

[62] *Dresser*, 628 F.2d at 1375-76.

[63] *See*, *e.g.*, *Molinaro*, 889 F.2d at 903 (noting that Molinaro "continued to attempt to dispose of his assets").

[64] *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).

[65] *See*, *e.g.*, *Frierson*, 2003 WL 21355969, at *3.

[66] *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.").

[67] *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* Molinaro, 889 F.2d at 903 (noting that "the action had been pending for a year, and the court had an interest in clearing its docket"); Microfinancial, 385 F.3d at 79 (denying stay where the case had been pending for three years and the request to stay was made on the brink of trial).

[68] *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.").

[69] *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").

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

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

[72] Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578, 580 (D.C. Cir. 1970).

[73] Fed. R. Civ. Pro. 26(c).

[74] Martindell v. International Tel. and Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979).

[75] *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).

[76] *See In re* Grand Jury Subpoena, 138 F.3d 442, 445-46 (1st Cir. 1998) (rejecting both the *Martindell* rule and the *per se* rule that grand jury subpoenas always trump in favor of a rebuttable presumption in favor of grand jury subpoenas); *In re* Grand Jury, 286 F.3d 153, 158 (3d Cir. 2002) (same).

[77] *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).

[78] 15 U.S.C. § 78u.

[79] 15 U.S.C. § 78u(d)(1).

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

[81] 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).

[82] 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).

[83] *See* Story Thompson, *supra* note 73, at 940.

[84] Pankaj Sinha, *Parallel Civil and Criminal Proceedings*, 26 Am. Crim. L. Rev. 1217, 1218 (1989) (citing FED. R. CIV. P 26(b)).

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

[86] FED. R. CRIM. P. 16(b).

[87] *See* David A. Hyman, *When Rules Collide: Procedural Intersection and the Rule of Law*, 71 TUL. L. REV. 1389, 1389 (1997).

[88] Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962).

[89] *Campbell*, 307 F.2d at 488.

[90] 397 U.S. 1 (1970).

[91] *Kordel*, 397 U.S. at 12-13.

[92] *See Kordel*, 397 U.S. at 6-7.

[93] 437 U.S. 298 (1978).

[94] *LaSalle*, 437 U.S. at 312-13

[95] Sinha, *supra* note 75 at 1223-24, 1236-37.