# HOW CRIMES AND PARALLEL PROSECUTION CAN TRAP CIVIL LITIGATORS

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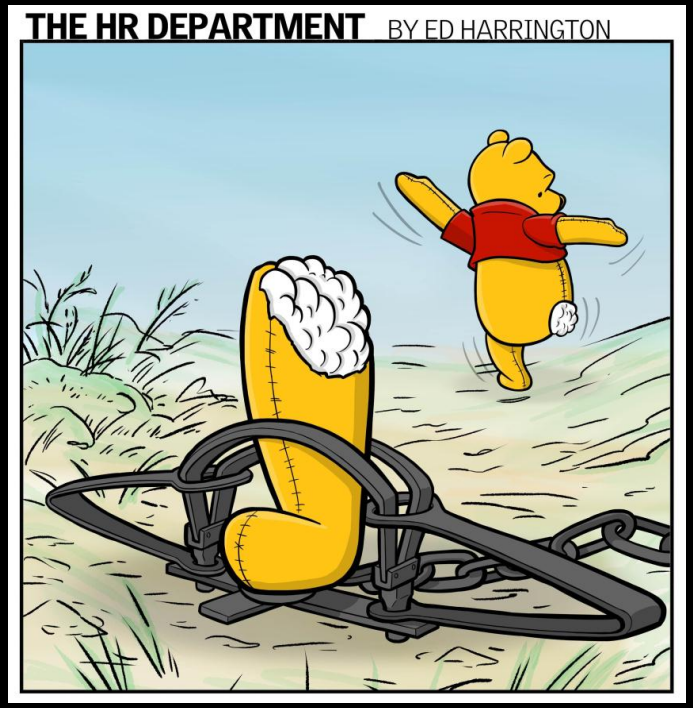
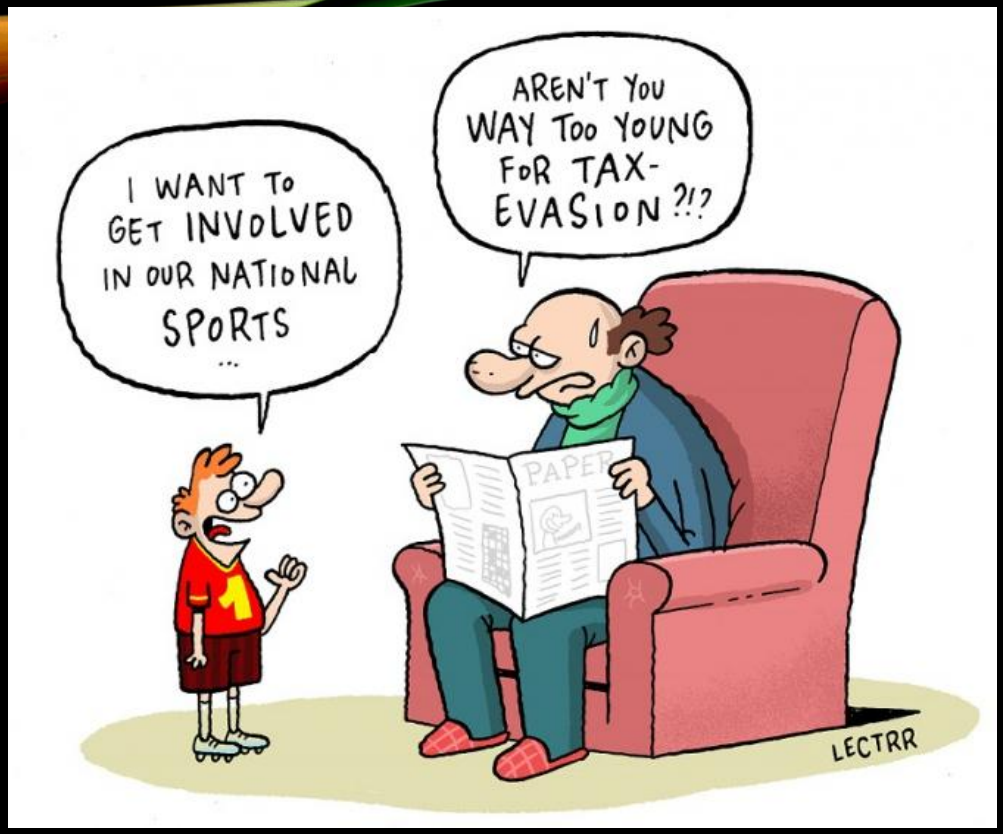



SOMETIMES, JUST TRYING TO DO YOUR JOB CAN COST YOU AND YOUR CLIENT AN ARM, A LEG, AND YOUR LIBERTY

Over the last 20 or so years, the separation between the practice of criminal law and the practice of civil litigation has shrunk. It is not uncommon for the lawyer to be charged in an effort to deny effective representation to white collar criminals as well as to access the perceived deep pockets of the attorney.

# MONEY LAUNDERING
# 18 U.S.C. SEC. 1956 & 1957




Money Laundering is guaranteed to get you in trouble in the United States.

18 U.S.C. § 1956:

**"Laundering of monetary instruments"**

prohibits anyone from engaging in financial transactions involving the proceeds of specified unlawful activities, with intent to promote the activity, and with knowledge that the transaction is designed to conceal the nature, source or ownership of the proceeds. 18 U.S.C. § 1956. **Generally, section 1956 is of little significance to the well intentioned litigator. It clearly requires knowledge of the unlawfulness of the underlying activity and an intent to promote it. However, section 1957 of the Money Laundering Control Act does not contain section 1956's strict intent and knowledge requirements.**

# 18 U.S.C. §1957

## ENGAGING IN MONETARY TRANSACTIONS IN PROPERTY DERIVED FROM SPECIFIED UNLAWFUL ACTIVITY

**(a)** Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

**(b)(1)** Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670) the punishment for the offense shall be the same as the punishment for an offense under section 670 unless the punishment under this subsection is greater.

**(2)** The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

**(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.**

**(d)** The circumstances referred to in subsection (a) are--

**(1)** that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

**(2)** that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

IN *CAPLIN & DRYSDALE CHARTERED V. UNITED STATES* AND *UNITED STATES V. MONSANTO* , THE SUPREME COURT WAS CALLED UPON TO DETERMINE THE CONSTITUTIONALITY OF FUNDS USED TO PAY ATTORNEYS OR INTENDED TO PAY ATTORNEYS. IN EACH CASE, THE SUPREME COURT FOUND THAT FREEZING AND/OR FORFEITURE OF SUCH ASSETS WAS NOT UNCONSTITUTIONAL IN THE CRIMINAL REPRESENTATION CONTEXT. THE COURT FIRST REJECTED THE ARGUMENT THAT THE FREEZING AND FORFEITURE PROVISIONS IMPERMISSIBLY BURDENED A DEFENDANT'S RIGHT TO "SELECT AND BE REPRESENTED BY ONE'S PREFERRED ATTORNEY." SPEAKING OF THE SIXTH AMENDMENT, THE SUPREME COURT NOTED:

THE AMENDMENT GUARANTEES DEFENDANTS IN CRIMINAL CASES THE RIGHT TO ADEQUATE REPRESENTATION, BUT THOSE WHO DO NOT HAVE THE MEANS TO HIRE THEIR OWN LAWYERS HAVE NO COGNIZABLE COMPLAINT SO LONG AS THEY ARE ADEQUATELY REPRESENTED BY ATTORNEYS APPOINTED BY THE COURTS. "A DEFENDANT MAY NOT INSIST ON REPRESENTATION BY AN ATTORNEY HE CANNOT AFFORD." . . . THE FORFEITURE STATUTES DO NOT PREVENT A DEFENDANT WHO HAS NONFORFEITABLE ASSETS FROM RETAINING ANY ATTORNEY OF HIS CHOOSING . . . . WHATEVER THE FULL EXTENT OF THE SIXTH AMENDMENT'S PROTECTION OF ONE'S RIGHT TO RETAIN COUNSEL OF HIS CHOOSING, THAT PROTECTION DOES NOT GO BEYOND 'THE INDIVIDUAL'S RIGHT TO SPEND HIS MONEY TO OBTAIN THE ADVICE AND ASSISTANCE OF . . . COUNSEL. . . . **THE DEFENDANT HAS NO RIGHT TO SPEND ANOTHER PERSON'S MONEY FOR SERVICES RENDERED BY AN ATTORNEY, EVEN IF THOSE FUNDS ARE THE ONLY WAY THAT THE DEFENDANT WILL BE ABLE TO RETAIN THE COUNSEL OF HIS CHOICE.**

**[N]O LAWYER, IN ANY CASE, . . . HAS THE RIGHT TO ACCEPT STOLEN PROPERTY . . . OR RANSOM MONEY, IN PAYMENT OF A FEE . . . THE PRIVILEGE TO PRACTICE LAW IS NOT A LICENSE TO STEAL.'**

**IT IS IMPERATIVE TO BE ALERT TO THIS STATUTORY FRAMEWORK AS WELL AS THE FACT THAT TEXAS RECENTLY PASSED ITS OWN MONEY LAUNDERING STATUTE, EFFECTIVE SEPTEMBER 1, 2015 LOCATED AT:**

# PENAL CODE AT §34.02.

THE STATE MONEY LAUNDERING STATUTE PROVIDES THAT:

(A) A PERSON COMMITS AN OFFENSE IF THE PERSON KNOWINGLY:
(1) ACQUIRES OR MAINTAINS AN INTEREST IN, CONCEALS, POSSESSES, TRANSFERS, OR TRANSPORTS THE PROCEEDS OF CRIMINAL ACTIVITY;
(2) CONDUCTS, SUPERVISES, OR FACILITATES A TRANSACTION INVOLVING THE PROCEEDS OF CRIMINAL ACTIVITY;
(3) INVESTS, EXPENDS, OR RECEIVES, OR OFFERS TO INVEST, EXPEND, OR RECEIVE, THE PROCEEDS OF CRIMINAL ACTIVITY OR FUNDS THAT THE PERSON BELIEVES ARE THE PROCEEDS OF CRIMINAL ACTIVITY; OR
(4) FINANCES OR INVESTS OR INTENDS TO FINANCE OR INVEST FUNDS THAT THE PERSON BELIEVES ARE INTENDED TO FURTHER THE COMMISSION OF CRIMINAL ACTIVITY.
(A-1) KNOWLEDGE OF THE SPECIFIC NATURE OF THE CRIMINAL ACTIVITY GIVING RISE TO THE PROCEEDS IS NOT REQUIRED TO ESTABLISH A CULPABLE MENTAL STATE UNDER THIS SECTION.

THE TEXAS MONEY LAUNDERING STATUTE ALSO PROVIDES THAT IF CONDUCT THAT CONSTITUTES AN OFFENSE UNDER THIS SECTION ALSO CONSTITUTES AN OFFENSE UNDER ANY OTHER LAW, THE ACTOR MAY BE PROSECUTED UNDER THIS SECTION, THE OTHER LAW,

OR BOTH.

# DEMOND V. STATE, 452 S.W.3RD 435 (TEX. APP. –AUSTIN 2014, DISC. REVIEW REF'D)

- Take the case of former attorney, Walter E. Demond, licensed in 1976 and resigned in lieu of disciplinary action. Demond was a partner at Clark, Thomas & Winters, PC. A jury found Demond guilty of misapplication of fiduciary property, theft by deception and money laundering (34.02). Demond was the head of Clark Thomas's "energy group" which was the section representing the PEC. In a complex fact scenario, the court determined that it amounted to money laundering for the lawyer to assist a PEC general manager (Bennie Fuelberg) to funnel PEC money to Fuelberg's brother and William Price, the son of a former PEC board member. The Court held that the transfer of funds to Curtis and price constituted money laundering because it was a transaction involving the proceeds of criminal activity. **THE COURT DETERMINED THAT ONCE THE FUNDS WENT TO CLARK THOMAS THEY BECAME PROCEEDS OF CRIMINAL ACTIVITY.**

THE CASE OF WALTER DEMOND, FORMALLY WITH CLARK, THOMAS AND WINTER (ONCE THE OLDEST CONTINUALLY OPERATING LAW FIRM IN AUSTIN—CLOSED 2011. THE FIRM HAD 120 LAWYERS IN 2009

SEE: DEMOND V. STATE, 452 S.W.3RD 435 (TEX. APP. –AUSTIN 2014, NO WRIT)

**DISCIPLINARY STATUS: RESIGNED IN LIEU OF DISCIPLINARY ACTION**

Walter Demond was convicted of money laundering under the State Money Laundering Statute:

"Given that the Texas money-laundering statute broadly defines (1) criminal activity to include inchoate crimes and (2) proceeds of criminal activity to include indirect gains and mojney used to assist in the commission of the criminal activity – neither of which is present in th federal steatute – it is by no means that the predicate offense must be complete before it can create proceeds of criminal activity.

# FALSE, FICTITIOUS OR FRAUDULENT STATEMENTS TO DEPARTMENTS OR AGENCIES OF THE UNITED STATES. 18 U.S.C. § 1001

Most attorneys find themselves dealing with departments or agencies of the federal government whether in the regulatory or litigation context. Often, they are in the roles of advocates. However, what would otherwise constitute reasonable advocacy and zealous representation of a client's interests may be a criminal offense when dealing with a department or agency of the federal government. Section 1001 of the United States Code provides as follows:

**Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.**

**18 U.S.C. § 1001.**

# JUDICIAL FUNCTION EXCEPTION TO 18 U.S.C. § 1001

IN THE WAKE OF *BRAMBLETT,* FEDERAL COURTS CARVED OUT THE 'JUDICIAL FUNCTION' EXCEPTION TO § 1001, UNDER WHICH § 1001 WAS FOUND 'NOT [TO] APPLY TO STATEMENTS MADE TO A COURT ACTING IN ITS JUDICIAL CAPACITY.' " *UNITED STATES V. TRACY,* 108 F.3D 473, 476 (2D CIR.1997) (QUOTING *UNITED STATES V. MASTERPOL,* 940 F.2D 760, 766 (2D CIR.1991)); *SEE ALSO DEFFENBAUGH INDUS.,* 957 F.2D AT 752; *UNITED STATES V. HOLMES,* 840 F.2D 246, 248 (4TH CIR.1988); *UNITED STATES V. MAYER,* 775 F.2D 1387, 1388–92 (9TH CIR.1985) (PER CURIAM); *UNITED STATES V. ABRAHAMS,* 604 F.2D 386, 393 (5TH CIR.1979); *MORGAN,* 309 F.2D AT 237.

"THIS JUDICIALLY-CRAFTED EXCEPTION PROVIDED THAT IF A FALSE STATEMENT OR CONCEALMENT CONCERNED A COURT'S 'JUDICIAL FUNCTION' IT WAS NOT ACTIONABLE UNDER § 1001; IF, HOWEVER, THE CONDUCT WAS ADDRESSED ONLY TO THE ADMINISTRATIVE FUNCTIONS OF THE COURT, IT WAS ACTIONABLE." O'SULLIVAN, 96 J.CRIM. L. & CRIMINOLOGY AT 709.

18 U.S.C. § 1001 (B):

**(B)** SUBSECTION (A) DOES NOT APPLY TO A PARTY TO A JUDICIAL PROCEEDING, **OR THAT PARTY'S COUNSEL**, FOR STATEMENTS, REPRESENTATIONS, WRITINGS OR DOCUMENTS SUBMITTED BY SUCH PARTY OR COUNSEL TO A JUDGE OR MAGISTRATE IN THAT PROCEEDING.

OF NOTE IN ADDRESSING 18 U.S.C. §1001 IS THE GUILTY PLEA OF MICHAEL COHEN WHERE HE PLED GUILTY TO CAMPAIGN FINANCE VIOLATIONS, TAX EVASION AND MAKING FALSE STATEMENTS TO A FINANCIAL INSTITUTION AS WELL AS LYING TO CONGRESS.

COUNT 1 OF COHEN'S INDICTMENT ALLEGED THAT HE MADE A MATERIALLY FALSE, FICTITIOUS, AND FRAUDULENT STATEMENT AND REPRESENTATION…IN A MATTER WITHIN THE JURISDICTION OF THE LEGISLATIVE BRANCH OF THE GOVERNMENT OF THE UNITED STATES," IN VIOLATION OF 18 U.S.C. § 1001(A) (2).

AND WE ALL KNOW WHERE HE NOW.

# RECORDS AND REPORTS ON MONETARY INSTRUMENTS TRANSACTIONS.

## 31 U.S.C. § 5311-5326

Section 5313(a) of the Currency and Foreign Transaction Reporting Act provides:

When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

Facially, section 5313(a) seems to have little application to attorneys. However, included in the definition of "financial institution" are "persons involved in real estate closing and settlements." 31 U.S.C. § 5312(a)(2)(U). Pursuant to 31 C.F.R. section 103.22 (1990).

EACH FINANCIAL INSTITUTION OTHER THAN A CASINO OR THE POSTAL SERVICE SHALL FILE A REPORT OF EACH DEPOSIT, WITHDRAWAL, EXCHANGE OF CURRENCY OR OTHER PAYMENT OR TRANSFER, BY, THROUGH, OR TO SUCH FINANCIAL INSTITUTION WHICH INVOLVES A TRANSACTION IN CURRENCY OF MORE THAN $10,000. MULTIPLE CURRENCY TRANSACTIONS SHALL BE TREATED AS A SINGLE TRANSACTION IF THE FINANCIAL INSTITUTION HAS KNOWLEDGE THAT THEY ARE BY OR ON BEHALF OF ANY PERSON AND RESULT IN CASH OR CASH OUT TOTALING MORE THAN $10,000 DURING ANY ONE BUSINESS DAY. DEPOSITS MADE AT NIGHT OR OVER A WEEKEND OR HOLIDAY SHALL BE TREATED AS IF RECEIVED ON THE NEXT BUSINESS DAY FOLLOWING THE DEPOSIT.

31 C.F.R. § 103.22(A)(1)(1990). IT SHOULD BE NOTED THAT THERE ARE A NUMBER OF EXCEPTIONS TO THE FOREGOING REQUIREMENTS. 31 C.F.R. §§ 103.22(A)(4)(B)(1) AND (2). HOWEVER, THE EXCEPTIONS SEEM TO HAVE LITTLE APPLICATION TO ATTORNEYS. THE FOREGOING SECTIONS MAY HAVE APPLICATION TO LAW FIRMS AND ATTORNEYS INVOLVED IN REAL ESTATE TRANSACTIONS WHERE SUBSTANTIAL FUNDS PASS THROUGH THEIR ACCOUNTS.

SECTION 5314 OF THE CURRENCY AND FOREIGN TRANSACTION REPORTING ACT REQUIRES REPORTS REGARDING TRANSACTION BETWEEN A RESIDENT OR UNITED STATES CITIZEN OR A PERSON DOING BUSINESS IN THE UNITED STATES TO KEEP CERTAIN RECORDS AND FILE CERTAIN REPORTS WHEN ENGAGING IN TRANSACTIONS WITH FOREIGN FINANCIAL INSTITUTIONS.

Section 5316 covers reporting requirements for arising from the importation or exportation of monetary instruments and provides in relevant part:

(a) . . . a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent or bailee knowingly –

(1) transports, is about to transport or has transported monetary instruments of more than $10,000 at one time –

(A) from a place in the United States to or through a place outside the United States; or (B) to a place in the United States from or through a place outside the United States; or

(2) receives monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States.

A report filed pursuant to section 5316 must state the amount in issue, the date of receipt, the form of the monetary instruments, and the person from whom the instruments were received. 31 C.F.R. § 103.23(b) (1990). It should be noted that "[a] transfer of funds through normal banking procedures which does not involve the physical transportation of currency or monetary instruments is not required to be reported by [§5316]."

REPORTS MADE PURSUANT TO SECTIONS 5313, 5314 AND 5316 ARE MADE AVAILABLE TO FEDERAL AGENCIES UPON REQUEST OF THE AGENCY'S HEAD. THE REPORTS ARE TO BE MADE AVAILABLE FOR PURPOSES CONSISTENT WITH THOSE SECTIONS OR A REGULATION PRESCRIBED UNDER THOSE SECTIONS. 31 U.S.C. § 5319. THE AVAILABILITY OF SUCH REPORTS GIVES RISE TO SERIOUS ATTORNEY -CLIENT COMMUNICATION QUESTIONS WHICH THE CAUTIOUS LITIGATOR SHOULD BE MINDFUL. *SEE UNITED STATES V. MONNAT*, 853 F. SUPP. 1301 (D. KAN. 1994).

**A PERSON WHO WILLFULLY VIOLATES SECTIONS 5313, 5314 OR 5316 OR A REGULATION PROMULGATED PURSUANT TO THE CURRENCY AND FOREIGN TRANSACTION REPORTING ACT IS SUBJECT TO FINES OF NOT MORE THAN $250,000, IMPRISONMENT FOR NOT MORE THAN FIVE YEARS, OR BOTH. 31 U.S.C. § 5322.**

ATTORNEYS, AND THEIR CLIENTS, MUST BE AWARE OF THE SEVERE PENALTIES THAT ARISE FROM A VIOLATION OF 31 USC § 5324, "STRUCTURING TRANSACTIONS TO EVADE REPORTING REQUIREMENT PROHIBITED." § 5324 PROVIDES, IN PART, AS FOLLOWS:

**(A) DOMESTIC COIN AND CURRENCY TRANSACTIONS INVOLVING FINANCIAL INSTITUTIONS.**

--NO PERSON SHALL, FOR THE PURPOSE OF EVADING THE REPORTING REQUIREMENTS OF SECTION 5313(A) OR 5325 OR ANY REGULATION PRESCRIBED UNDER ANY SUCH SECTION, THE REPORTING OR RECORDKEEPING REQUIREMENTS IMPOSED BY ANY ORDER ISSUED UNDER SECTION 5326, OR THE RECORDKEEPING REQUIREMENTS IMPOSED BY ANY REGULATION PRESCRIBED UNDER SECTION 21 OF THE FEDERAL DEPOSIT INSURANCE ACT OR SECTION 123 OF PUBLIC LAW 91-508—

**(1)** CAUSE OR ATTEMPT TO CAUSE A DOMESTIC FINANCIAL INSTITUTION TO FAIL TO FILE A REPORT REQUIRED UNDER SECTION 5313(A) OR 5325 OR ANY REGULATION PRESCRIBED UNDER ANY SUCH SECTION, TO FILE A REPORT OR TO MAINTAIN A RECORD REQUIRED BY AN ORDER ISSUED UNDER SECTION 5326, OR TO MAINTAIN A RECORD REQUIRED PURSUANT TO ANY REGULATION PRESCRIBED UNDER SECTION 21 OF THE FEDERAL DEPOSIT INSURANCE ACT OR SECTION 123 OF PUBLIC LAW 91-508;

## HERE IS WHERE THIS GETS INTERESTING:

This statute (31 U.S.C. § 5324) has been employed to convict and suspend practicing lawyers under some very extenuated facts.

Take the case of Johnny S. Gaskins ("Gaskins"), an attorney admitted to the North Carolina Bar on August 19, 1979 and was an attorney licensed to practice in North Carolina. Gaskins was indicted for violations of 31 U.S.C. §§ 5324(a)(3) and (d) and 31 C.F.R. § 5313(a) and was subsequently found guilty by a jury on seven counts. On August 2, 2010 Gaskins was sentenced by the trial court for his convictions of "structuring" under 31 U.S.C. § 5324. The Disciplinary Hearing Commission of the North Carolina State Bar, in suspending Gaskins, wrote a detailed opinion about his case. In reviewing the Findings of Fact, Conclusions of Law and Order of Discipline in the Gaskins case, it is obvious that the North Carolina State Bar was very troubled by this conviction and the fact that they had no choice but to suspend Gaskin from the practice of law for a minimum of two years from the date of the order (December 20, 2010) or for the entire length of time that Gaskins was on supervised release (3 years) pursuant to the criminal judgment, which ever was longer.

The evidence showed that:

- Gaskin was not attempting to defraud the government;
- Gaskin had filed his income tax returns and fully reported for the relevant years;
- The government had no evidence that the cash deposits were structured for the purpose of evading income tax;
- The government had no evidence the cash Gaskins received was from any criminal activity;
- The government offered no motive as to why Gaskins structured his cash deposits in the manner in which he did;
- Gaskins had no dishonest or selfish motive;
- Gaskins properly accounted for and reported to the IRS for attorney's fees he received in cash exceeding $110,000.
- Gaskins presented overwhelming evidence of good character and reputation as a person and an attorney.
- CONVICTED AND SUSPENDED FROM THE BAR


# The Feds call it "Smurfing" and it is illegal

**Smurfing**. ... Certain countries such as the United States and Canada require financial institutions that are handling **transactions** which exceed $10,000 in cash to file a **currency transaction report** to prevent **money** laundering techniques such as **Smurfing**. '**Smurf**' is a colloquial name for a person who is **money** laundering.

# PARALLEL PROSECUTION OF CIVIL AND CRIMINAL PROCEEDINGS

OR

If you have to think about it more than 3 seconds, take the 5th


"WILL SOMEONE PLEASE TELL HER SHE HAS THE RIGHT TO REMAIN SILENT?"
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# AMENDMENT V

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; **NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF**, NOR BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.


IF THE TRUTH WILL SET YOU FREE, WHAT'S THE DEAL WITH THE FIFTH AMENDMENT?
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## THE CIVIL LITIGATOR MUST UNDERSTAND THAT THE FIFTH AMENDMENT IS SUBJECT TO NUMEROUS EXCEPTIONS.

DISTILLED TO ITS MOST BASIC FORM, IT ALLOWS A CRIMINAL DEFENDANT THE RIGHT NOT TO TESTIFY. IMPORTANTLY, JURORS ARE NOT ALLOWED TO CONSIDER A DEFENDANT'S RIGHT NOT TO TESTIFY AS EVIDENCE OF HIS OR HER GUILT **IN A CRIMINAL CASE.**

THE RULE AGAINST SELF-INCRIMINATION ALSO APPLIES IN CIVIL CASES IN WHICH TESTIMONY WOULD EXPOSE A PERSON TO CRIMINAL CHARGES. HOWEVER, IN CIVIL CASES, THE JURORS ARE FREE TO CONSIDER A PERSON'S UNWILLINGNESS TO TESTIFY IN DECIDING THE CASE. THIS A PROFOUND AND DANGEROUS DISTINCTION THAT CIVIL TRIAL LAWYERS MUST APPRECIATE.

ONE OF THE BASIC GUIDELINES RELATING TO THE FIFTH AMENDMENT IS THAT **THE FIFTH AMENDMENT PRIVILEGE CAN BE A "USE-IT-OR-LOSE-IT" PROPOSITION.** AS THE UNITED STATES SUPREME COURT HAS MADE CLEAR, THE PRIVILEGE MAY BE WAIVED IF IT IS NOT ASSERTED IN A CIVIL PROCEEDING SINCE IT IS A BASIC PROPOSITION OF THE FIFTH AMENDMENT THAT THE **PRIVILEGE MUST BE ASSERTED AT THE EARLIEST POSSIBLE TIME.**

FOR YEARS CIVIL LITIGANTS HAVE BEEN FORCED, UPON OCCASION, TO CONSIDER THE IMPLICATIONS OF PROCEEDING WITH LITIGATION UNDER CIRCUMSTANCES WHERE A CRIMINAL INVESTIGATION HAS BEEN INSTITUTED. THE PHRASE MOST COMMONLY UTILIZED TO DESCRIBE THIS PHENOMENA IS **"PARALLEL PROSECUTION."** FROM THE PROSPECTIVE OF THE CIVIL ATTORNEY, THERE ARE SEVERAL AREAS OF ACUTE IMPORTANCE WHEN REPRESENTING EITHER THE PARTY THAT MAY AT SOME POINT BE DESIGNATED THE "TARGET" OR "SUBJECT" OF AN INVESTIGATION AND ALTERNATIVELY WHEN REPRESENTING EITHER THE LENDING INSTITUTION OR THE PARTY OR INDIVIDUAL IN A POSITION OF RELATIVE ALIGNMENT WITH THE STATE OR FEDERAL PROSECUTION OR INVESTIGATION.

REGARDLESS OF THE ALIGNMENT OF THE CIVIL LITIGATOR, IT IS OF EXTREME IMPORTANCE TO BE IN A POSITION TO RECOGNIZE THE EXISTENCE OF THE POTENTIAL PARALLEL PROSECUTION AND DEAL WITH IT APPROPRIATELY. AS A TRIAL LAWYER, YOU MUST CONSIDER THIS SCENARIO: THE PROSPECTIVE OF THE CIVIL CLIENT WHO IS ALSO A TARGET OR SUBJECT OF AN INVESTIGATION; HOWEVER, THE CONSIDERATIONS ARE SIMILAR REGARDLESS OF ONE'S ALIGNMENT.

THIS PORTION OF THE PRESENTATION DISCUSSES, IN GENERAL TERMS, PRESENT LAW REGARDING THE CIRCUMSTANCES UNDER WHICH A STAY MAY BE GRANTED – OR A PROTECTIVE ORDER ISSUED—AS TO DISCOVERY BEING CONDUCTED IN CONNECTION WITH CIVIL LITIGATION DEALING WITH ISSUES COINCIDING, AT LEAST IN PART, WITH THE SUBJECT-MATTER OF PENDING CRIMINAL PROCEEDINGS.

# SO WHAT DO I DO IN THE FACE OF PARALLEL PROSECUTION??

WHAT NEEDS TO BE DONE IS COMPLEX AND BEYOND THE SCOPE OF THIS PRESENTATION, BUT HERE IS WHAT YOU MUST CONSIDER:

DO I INSTRUCT MY CLIENT TO TAKE THE 5TH AMENDMENT AND REFUSE TO TESTIFY?

**THIS INSTRUCTION IS FRAUGHT WITH DANGER.** AS THE TEXAS SUPREME COURT HAS RULED, "[T]HE COURT CAN ALLOW A CIVIL JURY TO MAKE A NEGATIVE INFERENCE FROM THE ASSERTION OF THE PRIVILEGE." *TEXAS DEPARTMENT OF PUBLIC SAFETY OFFICERS ASS'N V. DENTON,* 897 S.W.2ND 757,763 (TEX. 1995). SEE ALSO: *BAXTER V. PALMIGIANO,* 425 U.S. 308, 318 (1976) WHERE THE UNITED STATES SUPREME COURT HAS ALLOWED JURIES IN CIVIL CASES TO MAKE NEGATIVE INFERENCES BASED UPON THE ASSERTION OF THE FIFTH AMENDMENT PRIVILEGE.

IF YOUR CLIENT TAKES THE FIFTH AMENDMENT, THE OPPOSING PARTY CANNOT JUST SAY, OKAY, HE OR SHE IS TAKING THE 5TH, THAT'S ALL I NEED. YOU ARE MAKING A CRITICAL ERROR. YOU MUST EXPLORE THE FULL PARAMETERS OF THE FIFTH AMENDMENT. THIS IS A GOLDEN OPPORTUNITY TO PUT YOUR CASE ON WITH THE PERSON ASSERTING THE 5TH GETTING KILLED BY YOUR QUESTIONS. FOR EXAMPLE, "SO, YOU ADMIT THAT YOU DEFRAUDED MY CLIENT OUT OF $2,000,000.00. ANSWER: I ASSERT THE FIFTH. HOW DO YOU THINK THAT PLAYS TO THE JURY WHEN YOU READ IT IN, OR BETTER YET, PLAY THAT VIDEO TO THE JURY?

# THERE IS SOME POTENTIAL THAT YOU CAN SEEK A STAY OF THE LITIGATION PENDING THE OUTCOME OF THE CRIMINAL CASE.

UNFORTUNATELY, THIS ARGUMENT HAS MET WITH SIGNIFICANT HOSTILITY BY BOTH THE FEDERAL AND STATE COURTS.

"**A PARTY IS "ENTITLED TO FULL, FAIR DISCOVERY WITHIN A REASONABLE PERIOD OF TIME...."** *IN RE COLONIAL PIPELINE, CO.*, 968 S.W.2D AT 941 (QUOTING *ABLE SUPPLY CO. V. MOYE*, 898 S.W.2D 766, 773 (TEX.1995) (ORIG.PROCEEDING)**). IT IS TRUE THAT THE TRIAL COURT NEEDS TO GIVE CONSIDERATION TO THE EFFECT OF DISCOVERY IN A CIVIL CASE ON PENDING CRIMINAL PROCEEDINGS**. *SEE TEXAS ATTORNEY GENERAL'S OFFICE V. ADAMS*, 793 S.W.2D 771, 776 (TEX.APP.-FORT WORTH 1990, ORIG. PROCEEDING)**. HOWEVER, THE PENDENCY OF A CRIMINAL MATTER DOES NOT IMPAIR A COURT'S PROCEEDING WITH A CONTEMPORANEOUS CIVIL MATTER INVOLVING THE SAME ISSUES OR PARTIES.** *SEE MCINNIS V. STATE*, 618 S.W.2D 389, 393 (TEX.APP.-BEAUMONT 1981, WRIT REF'D N.R.E.)**. THERE ARE SPECIAL STATUTES AND RULES FOR DECIDING WHAT SPECIFIC PROTECTION IS ALLOWED; A BLANKET DENIAL OF ALL DISCOVERY IN A CIVIL CASE DUE TO A PENDING CRIMINAL CASE IS "NOT GOOD PUBLIC POLICY."** *SEE ADAMS*, 793 S.W.2D AT 777. **THERE IS NO CONSTITUTIONAL PROHIBITION AGAINST BOTH CASES GOING FORWARD SIMULTANEOUSLY.** *SEE MCINNIS*, 618 S.W.2D AT 393 **(DEFENDANT SOUGHT TO DELAY ONE CASE; COURT RULED DEFENDANT HAS NO RIGHT TO CHOOSE WHICH CASE PROCEEDS FIRST). A PARTY'S ATTEMPT TO DEVELOP EVIDENCE IN A CIVIL CASE DOES NOT LEAD TO ANY PRESUMPTION THAT A PARTY IS TRYING TO DEVELOP EVIDENCE FOR A CONTEMPORANEOUS CRIMINAL CASE.** *SEE MEYER V. TUNKS*, 360 S.W.2D 518, 522 (TEX.1962)

AN INDIVIDUAL WITNESS'S RIGHT TO CLAIM PROTECTION FROM DISCOVERY TO ANY PARTICULAR QUESTION IN THE CIVIL CASE DOES NOT STOP ALL PROCEEDINGS IN THE CIVIL CASE INVOLVING THE WITNESS. *ID.*" *IN RE R.R.*, 26 S.W.3RD 569, 574 (TEX. APP.-DALLAS 2000, NO WRIT).

DON'T COUNT ON THE STAY HELPING YOU.

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# IN EFFECT, IF YOU ARE CAUGHT IN A SITUATION INVOLVING PARALLEL PROSECUTION, YOU ARE TRAPPED BETWEEN THE DEVIL AND THE DEEP BLUE SEA