CRIMINAL LAW AND CIVIL LITIGATORS: PARALLEL PROSECUTION, THE FIFTH AMENDMENT AND A REVIEW OF THREE LITTLE KNOWN FEDERAL STATUTES

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INTRODUCTION

In the two decades, the gulf between criminal practice and civil practice has narrowed considerably. There are several causes for this. One is the explosion of white-collar criminal litigation. More pervasive use of forfeiture statutes in the pursuit of attorney's fees has also served to bring civil litigators under the purview of criminal law. The savings and loan and drug crises have also done their part to bring civil litigators' conduct under the scrutiny of criminal statutes. Additionally, more aggressive use of grand jury proceedings has exposed civil litigators to the workings of criminal law. Law enforcement authorities are resorting to prosecutions against attorneys more frequently because attorneys are often deep pockets and as a means to undermine the most effective representation of the accused. Of note 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).

This paper will briefly examine some of the potential collisions between the civil attorney and criminal law. It will address situations where the civil attorney may become exposed to criminal liability in the course of rendering legal services. It will also address parallel civil and criminal proceedings.

The issues discussed may be somewhat obscure now. However, as law enforcement officials look for more effective tools to accomplish their ends, the trend is toward focusing more and more attention on attorneys. Michael Cohen's conviction is a stark and recent example of this focus.

PART ONE

PARALLEL PROSECUTION OF CIVIL AND CRIMINAL PROCEEDINGS

I. INTRODUCTION

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 phenomenon is "**parallel prosecution**." From the perspective 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. This paper will focus on issues primarily from the perspective 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 paper discusses, in general terms, present law regarding the circumstances under which a stay will 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.

II. DISCUSSION

A. Grant or Denial of Stay Within the District Court's Discretion.

Since Justice Cardoza's Statement in *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants" it has been axiomatic that a trial court has the authority to grant stays of proceedings pending before it. Whether or not this power should be exercised is a matter committed to the sound discretion of the trial judge, who must weigh the hardship to the movant of denying a stay against the hardship to the opposing party of granting one, the balancing analysis has been described thus:

> "It is unquestioned that the Court's control of its docket, including the power to grant stays, rests in the sound discretion of the trial judge. The Court must weigh all the factors involved, including the saving of time and effort by the Court, counsel and the litigants any hardship on either party and the expedition of the case on the Court's calendar." *Clark v. Lutcher*, 77 F.R.D. 415, 418 (M.D. Pa. 1977)

The person seeking the stay has a heavy burden of showing that the balance of hardship tips in his direction:

> "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis*, 299 U.S. at 254

The discretionary nature of the decision and the allocation of the burden have been codified in Rule 26(c) of the Federal Rules of Civil Procedure, which provides, in part, that:

"The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;
(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
(C) prescribing a discovery method other than the one selected by the party seeking discovery;
(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
(E) designating the persons who may be present while the discovery is conducted;
(F) requiring that a deposition be sealed and opened only on court order;
(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs."

Texas also provides a mechanism for the protection of the party at Texas Rules of Civil Procedure, Rule 192.4, Limitations on Scope of Discovery:

"The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:
(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or
(b) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues."

As in the federal system, Texas embraces the concept that "[t]he power to temporarily stay a lawsuit 'is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants.'" *In re Messervey Trust,* 2001 WL 55642 *4 (Tex. App.-San Antonio Jan. 24, 2001, orig. proceeding).

Reversals of orders denying stays are rare, while grants of stays have on occasion between overturned or modified.

B. The Appropriate Court.

Except in the case of protective orders in connection with the taking of a deposition, application must be made to the court in which the civil action is pending. Federal Rules of Civil Procedure 26(c) was amended in 1970 to provide that in the case of depositions, the motion may be made either in the court in which the action is pending or in the court in the district in which the deposition is to be taken. *See SEC v. United Brands Co.,* [1975] Fed. Sec. L. Rep. ¶ 95,357 at 98,775 (S.D.N.Y. 1975) (action pending in District of Columbia; deposition subpoena issued in Southern District of Columbia; deposition subpoena issued in Southern District of New York). Otherwise, the motion should be made in the court having jurisdiction over the civil action. Although it has been suggested that if the civil court refused to grant the stay, the defendant might secure an injunction from the judge before whom the criminal case was being tried, *see* Note, *Stay of Discovery in Civil Court to Protect Proceedings in Concurrent Action – The Pattern of Remedies*, 66 Mich. L. Rev. 738, 745-746 (1968), such inter-court injunctions are frowned upon.

"No federal district court in a criminal case has ever enjoined a party to a civil action in another jurisdiction from litigating the civil action or taking testimony in it, either under the All Writs Act...or under the supervisory power, which the Supreme Court has implemented by formulating rules for the conduct of criminal trials." *United States v. Simon*, 373 F.2d 649, 652 (2d Cir. 1967), *vacated as moot sub. nom. Simon v. Warton*, 389 U.S. 425 (1967):

United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201, 203-204 (3d Cir. 1967), *cert. denied,* 390 U.S. 922 (1968) (if civil court denied stay, "sister court should hold its hand"). In egregious cases, however, there is the possibility of mandamus. "Developments in the Law-Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions," 92 Harv. L. Rev. 1227, 1336 (1979)

C. Parties and Subject Matter

In *Landis v. North American Co.*, the Supreme Court found itself "unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same and the issues identical." 299 U.S. at 254. Common sense suggests, however, that the greater the similarity of parties and issues, the stronger a showing of prejudice to the movant can be made.

With respect to the question of who may move for a stay, Federal Rules of Civil Procedure 26(c) provides that a motion for a protective order may be made by a party or by the person from whom discovery is sought. While the cases do not require that the movant be already under indictment, *see SEC v. Vesco*, 16 F.R. Serv. 2d 1237, 1240

(S.D.N.Y. 1973), the possibility of prejudice is more immediate where the movant is a criminal defendant than where he merely fears prosecution. *See Driver v. Helms*, 402 F. Supp. 683, 685 (D.R.I. 1975) (stay denied; "the criminal proceedings to which the defendants urge this court to defer are still only at the stage or preliminary investigations")

The government, on the other hand, is often granted a stay of discovery sought by a civil party who has not yet been indicted.

> "When a civil proceeding may interfere with a criminal investigation, it is not uncommon that the United States will seek to stay discovery in the civil action in order to protect the criminal investigation. In such circumstances, the stay is often sought until an indictment is returned or until the conclusion of the criminal trial...However, the defendant also has due process rights and the grant of a stay should not be indefinite." *U.S. v Any and All Assets of That Certain Business Known as Shane Co.,* 147 F.R.D. 99, 101 (M.D. North Carolina 1992).

"The basic reason for this is that the policies that necessitate limiting civil discovery when it would interfere with a criminal investigation ... are equally applicable whether the plaintiff seeking discovery is a defendant or merely the subject of a grand jury investigation." *The Founding Church of Scientology of Washington, D.C., Inc. v. Kelley*, 77 F.R.D. 378, 380 n.4 (D.D.C. 1977); *see United States v. 5709 Hillingdon Rd.,* 141 F.R.D. 429, 430 (W.D. N.C. 1992) ("The Government should not be forced to choose between meeting the demand of secrecy in a criminal investigation and complying with the demands of civil discovery.") *see also SEC v. Control Metals Corp.,* 57 R.F.D. 56 (S.D.N.Y. 1972). It should be noted that the government does not have "general" standing to seek discovery in a suit to which it is not a party. It must properly intervene in order to seek a stay. *See White v. Mapco Gas. Prods., Inc.,* 116 F.R.D. 498, 501 (E.D. Ark. 1987)

As to the relationship between the subject matter of the two proceedings, the cases do not, of course, require that the civil and criminal issues be identical. Typically, the court simply notes that the two cases relate to some or all of the same transactions or events. However, that is not always the case.

In order to show good cause to support a stay of civil discovery, the government must show that the two proceedings are related and substantially similar so that the same evidentiary material likely will be involved and that government's case may be compromised. *Any & All Assets of That Certain Business Known as Shane Co.,* 147 F.R.D. at 101. Again, it is obvious that the greater the similarity of subject matter, the more likely it is that the movant will be able to demonstrate a likelihood of prejudice to his criminal defense. *See National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236, 237 (E.D. Mich. 1952) (deposition stayed in civil action wherein "the fabric of the fraud is identical with the fraud embraced by the allegations contained in the criminal proceeding now pending").

In *Venn v. United States*, 400 F.2d 207 (5th Cir. 1968), an IRS summons was issued to Venn in connection with a civil suit against another taxpayer. Venn moved to quash the summons on the ground that he was a defendant in a pending criminal antitrust prosecution. The court affirmed the denial of Venn's motion to quash holding that:

> "The existence of an unrelated criminal prosecution does not tie the hands of the Internal Revenue Service when the [civil] defendant happens to have material relating to a third party's tax liability which is under investigation." *Venn* at 209.

A somewhat unusual situation was presented in *Board of Governors of the Fed. Reserve Sys. v. Pharaon*. 140 F.R.D. 634 (S.D.N.Y. 1991). In *Pharaon*, a state district attorney was allowed to intervene in a civil action in which the Federal Reserve Board was seeking monetary penalties against Pharaon. The state district attorney sought the stay of discovery to prevent Pharaon from deposing three nonparty witnesses in the Federal Reserve lawsuit. Pharaon had obtained an injunction from an English court which prevented the district attorney from obtaining discovery from the nonparty witnesses. The district attorney sought the stay in order to protect the grand jury investigation and to prevent Pharaon from conducting the very same discovery. Pharaon, by procuring the English injunction, contributed to the delay in the Grand Jury's decision on whether or not to indict him. The district court granted the stay concluding that the interests of the parties weighed in favor of the district attorney and the grand jury proceeding. *Pharaon*, 140 F.R.D. at 641.

D. Constitutional Considerations.

In the court's balancing analysis, infringement of the movant's constitutional rights is a form of hardship that will outweigh virtually any hardship the opposing party can point to and militates strongly in favor of the grant of a stay. Therefore, two grounds upon which stays are frequently sought are that the concurrent civil discovery permits the government to thwart the privilege against self-incrimination, and it circumvents the limits imposed on criminal discovery in violation of due process.

There is no general federal constitutional, statutory, or common law rule barring the simultaneous prosecution of separate civil and criminal actions by different federal agencies or private parties against the same defendants involving the same transactions. *SEC v. First Fin. Group,* 659 F.2d 660, 666 (5th Cir. 1981). Indeed, parallel civil and criminal proceedings by different federal agencies are not uncommon. Such parallel prosecution has been approved and almost endorsed by the United States Supreme Court. *United States v. Kordel*, 397 U.S. 1 (1970) ("It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.") Nonetheless, specific constitutional provisions may be invoked to prevent or limit simultaneous civil and criminal prosecution.

1. The Privilege Against Compulsory Self-Incrimination.

A. Individuals.

With respect to the Fifth Amendment privilege against self-incrimination, defendants complain, in essence, that evidence may be extracted from them in the civil proceeding and thereafter used against them in the criminal case. Compulsion is said to derive from the fact that defendants will be deterred from invoking the privilege because such exercise will trigger adverse business and personal consequences. A defendant in such a situation is thus on the horns of a dilemma; either he testifies fully in the civil proceeding, thereby jeopardizing his defense in the criminal case, or he invokes the privilege in the civil proceeding and risks an adverse judgment. Such a choice between Scylla and Charybdis, so the argument runs, is unconstitutional according to the Supreme Court's decisions in *Garrity v. New Jersey*, 385 U.S. 493 (1966) (exercise of privilege against self-incrimination may not be conditioned upon job forfeiture because this forces a choice "between the rock and the whirlpool") and its progeny. This point was made clear by the Supreme Court in *United States v. Kordel*, when it stated "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering forfeiture of his property." 397 U.S. at 11; *see* S. Wilson and A. Matz, *Obtaining Evidence for Federal Economic Crime Prosecutions an Overview and Analysis of Investigative Methods,*" 14 Am. Crim. L. Rev. 651, 702-703 (1977). However, it must be noted that "it is not unconstitutional to force a litigant to chose between invoking the Fifth Amendment in a civil case, thus risking a loss there, or answering the questions in the civil context, thus risking subsequent prosecution." *Brock v. Tolkow*, 109 F.R.D. 116 (E.D. N.Y. 1985); *see Baxter v. Palmigiano*, 425 U.S. 308 (1976)

Arguments based on the individual's privilege against self-incrimination have achieved a certain measure of success. Even before *Garrity*, a few cases stayed civil discovery out of solicitude for the defendant's Fifth Amendment rights without explicitly considering the pressure exerted by the threat of civil sanctions. Thus, in *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc.,*14 F.R.D. 333, 335 (E.D. Pa. 1953), a protective order was issued postponing discovery in a civil antitrust action, insofar as such discovery related to the indicted defendants, until termination of a criminal antitrust action.

While this will, undoubtedly, cause inconvenience and delay to the plaintiff, protection of the defendants' constitutional rights is the more important consideration.

Paul Harrigan & Sons, Inc., 14 F.R.D. at 335; *see also Holzbaugh.*, 13 F.R.D. at 237. In *Perry v. McGuire*, 36 F.R.D. 272, 23 (S.D.N.Y. 1964), civil discovery was stayed pending the determination of parallel criminal proceedings, since "it seems clear that to require defendant Blumner to respond to over 100 interrogatories at this time would be oppressive and would infringe on his constitutional rights."

Some post-*Garrity* cases have tended to focus on the adverse civil consequences stemming from exercise of the right to remain silent. In *Jones v. B.C. Christopher & Co.*, 466 F. Supp. 213, 224 (D. Kan. 1979), for example, the court recognized that civil defendants (also defendants in a closely-related criminal case) who invoke the privilege "must be protected as a matter of common sense," for "[o]therwise such persons might run the risk of suffering sanctions or default in a civil action on the one hand, or assisting their own criminal prosecution on the other." But because the movant in *Jones* was the civil plaintiff, the court declined to grant the relief that would "routinely" grant to a civil defendant. In *In re Siegal Trading Company, Inc.,* [1979] Com. Fut. L. Rep. (CCH) ¶ 20,862 at 23,535 (C.T.F.C. 1979), where a corporation and certain of its officers and agents had been indicted for some of the same commodity future transactions which formed the basis for the Commission's proceeding, the Commission concluded that, while it was not required to stay the administrative proceeding, it would nevertheless do so in order to minimize the chilling effect on the defendant's right to remain silent.

In *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C. Cir. 1970), the court recognized that:

> "There may be cases where the requirement that a criminal defendant participate in a civil action, at peril of being denied some portion of his worldly goods, violates concepts of elementary fairness in view of the defendant's position in an inter-related criminal prosecution."

In such a case, "a court properly provides a protective order to prevent discovery, such as interrogatories, which 'may well provide proof to the Government from which it may establish the criminal charges against the indicted defendants.'" *Gordon*, 427 F.2d at 580. In *Gordon*, therefore, while the Court of Appeals could not say that the district court abused its discretion in denying a total stay of the civil litigation, the cause was remanded to permit reconsideration, in light of the possibility of self-incrimination, of the district court's" order denying defendants' motion to strike requests for admissions.

Finally, in *SEC v. Vesco*, 16 F.R. Serv. 2d 1237, 1240 (S.D. NY 1973), an SEC injunctive action against defendants who faced "imminent" criminal prosecution, the court granted a protective order, unless the SEC conferred immunity upon defendants, because it was "highly probable that defendants will suffer grave, irreparable civil and criminal consequences should they choose either course of action, testifying at the depositions or invoking the protections of the Fifth Amendment." Balancing the relative hardships, the court concluded that the threatened harm to defendants' constitutional rights outweighed the SEC's interest in enjoining any scheme to defraud.

The basis of this motion appeared to be that defendants would be denied due process if forced to choose between giving testimony at a civil deposition, which testimony may be used against them in a parallel criminal prosecution, and refusing to testify, based on the Fifth Amendment of the United States Constitution, thereby possibly incurring severe civil sanctions. The Court held that:

> "While we concur in the Commission's concern with respect to the gravity of the charges alleged in the complaint and the need for a prompt disposition of this matter on the merits, nevertheless, the defendants' motion raises substantial constitutional questions as to the propriety of proceeding with the depositions noticed and we conclude a protective order must issue in favor of the defendants." *Vesco*, 16 F.R. Serv. At 1239 (footnote omitted.).

A number of courts have held that relief from discovery may be necessary to protect substantial rights under "special circumstances" where concurrent civil and criminal prosecutions are at issue. Courts issuing discretionary stays based on Fifth Amendment considerations have relied on the apparent unfairness of forcing a litigant to choose between invoking the Fifth Amendment in a civil case, thus risking loss there or answering questions in the civil context, thus risking subsequent criminal prosecution. *Arden Way Assocs. v. Boesky*, 660 F. Supp. 1494 (S.D.N.Y. 1987). Numerous civil proceedings have been stayed, at least in part, where to continue them would expose a litigant to undue risk of losing the civil case or facing criminal prosecution. *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084 (5th Cir. 1979) (case stayed until statute of limitations ran on potential criminal prosecution); *United States v. A Certain Parcel of Land*, Moultonboro, 781 F. Supp. 830, 834 (D. N.H. 1992) ("Courts should endeavor to accommodate the claimant's fifth amendment rights in forfeiture proceedings."); *Clark v. United States*, 481 F. Supp. 1086 (S.D.N.Y. 1977) (deposition stayed); *Dienstag v. Bronsen*, 49 F.R.D. 327 (S.D.N.Y. 1970) (protective order granted/deposition stayed); *see also, Afro-Lacon, Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987) (denial of stay reversed and remanded to district court for balancing of interest in stay against prejudice of delay); *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 19819) (case remanded for reconsideration of dismissal based upon invocation of First and Fifth Amendment privileges against discovery); *United States v. U.S. Currency,* 626 F.2d 11 (6th Cir. 1980) (dismissal reversed, "Clearly, appellees should not be compelled to choose between the exercise of their Fifth Amendment privilege and the substantial sums of money which are the subject of this forfeiture proceeding ... Therefore, the courts must seek to accommodate both the constitutional right against self-incrimination as well as the legislative intent behind the forfeiture provisions."); *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979) (dismissal based upon refusal to answer four of the thirty-four "questionable" interrogatories reversed); *Thomas v. United States*, 531 F.2d 746 (5th Cir. 1976) (remanded for entry of an appropriate protective order to protect Fifth Amendment interests)

Some lower federal courts have rejected *Garrity*-type arguments on the ground that the casual connection between invocation of the privilege against self-incrimination and any adverse civil consequence was sufficiently attenuated so as not to constitute a penalty upon exercise of the right, In *United States v. White*, 589 F.2d 1283 (5th Cir. 1979) for example, defendants were convicted of mail fraud and conspiracy in connection with a scheme which also formed the basis of a private civil suit. Citing *Baxter v. Palmigiano*, the Fifth Circuit rejected the argument that the parallel civil and criminal proceedings infringed upon the privilege of self-incrimination because remaining silent enhanced the likelihood of losing the civil case.

> "Keno contends that being forced to go to trial in a civil case while criminal charges arising out of the same conduct were pending forced him to choose between preserving his fifth amendment privilege and losing the civil suit. It appears to us, however, that Keno overstates his dilemma. He was not forced to surrender his privilege against self-incrimination in order to prevent a judgment against him; although he may have been denied his most effective defense by remaining silent, there is no indication that invocation of the fifth amendment would have necessarily resulted in an adverse judgment." *White*, 589 F.2d at 1286 (emphasis added; footnote omitted).

Similarly, in *SEC v. Gilbert*, 79 F.R.D. 683 (S.D.N.Y. 1978), the U.S. Attorney advised defendant, shortly after the SEC commenced a civil suit against him, that he was a target of a grand jury investigation based upon the same events as the civil action. When the SEC noticed defendant's deposition in the civil case, he moved for a protective order staying civil discovery until the termination of all parallel criminal proceedings. Defendant argued that his situation was governed by the *Garrity* line of cases because his silence at the deposition would result in the SEC's asking the trier of fact to draw an adverse inference, which could contribute to the risk that the civil action would produce an injunction restraining defendant from further violations which would then empower the SEC to bar defendant from associating with a broker or dealer. Citing *Baxter v. Palmigiano*, the court found that the casual connection embedded in this chain of events was too remote to bring defendant within the protection of *Garrity:*

> "[W]e conclude that as long as the only immediate sanction for refusal to testify is, as here, the possible raising of an adverse inference which would not, standing alone, support a finding of liability, then the spectre of loss of employment, which even a finding of liability would not automatically cause, does not put [defendant] to an unconstitutionally coercive choice." *Gilbert,* 79 F.R.D. at 686 (emphasis added).

Moreover, under *Kordel* any prejudice to defendant was outweighed by the public interest: "such a curtailment of civil actions would be indefensible in a content where, as here, a federal agency has been specifically charged to protect the public through civil enforcement actions." *Gilbery*, 79 F.R.D. at 686. Thus, many cases have found the spectre of adverse civil consequences insufficient hardship to justify granting a stay and have required individual defendants either to participate fully in civil discovery or to assert their privilege with respect to specific questions.

It should be noted that the foregoing "rules of engagement" may be less applicable in instances where the government is simultaneously pursing civil and criminal prosecution. In such instances, the United States Supreme Court has recognized that public policy may require that both investigations be pursued unfettered. *See United States v. Kordel,* 397 U.S. 1 (1970)

B. Business Entities

A different approach is followed when a corporation or other business entity is involved. That a fictive "person" has no privilege against self-incrimination is, of course, no longer open to dispute. *Bellis v. United States*, 417 U.S. 85, 89-90 (1974); *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906). When a corporation is served with a discovery request, the normal requirement is that it comply via a corporate officer or employee who does not seek to assert his personal Fifth Amendment privilege. As the Court explained in *Kordel*,

> "To be sure, service of interrogatories obliged the corporation to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." *Kordel*, 397 U.S. at 8 (footnote omitted); see also Federal Rules of Civil Procedure 33(a); Wright & Miller, Federal Practice & Procedure: Civil §§ 2018, 2172, at 143-144, 536.

The Court, in *Kordel,* went on to consider hypothetically the situation of a corporation demonstrating that there was no authorized agent who could respond without subjecting himself to a "real and appreciable" risk of self-incrimination. In such a situation, the Court assumed, the district court should grant a stay:

> "For present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b) [the predecessor of Fed. R. Civ. P 26(c)], postponing civil discovery until termination of the criminal action." *Kordel*, 397 U.S. at 9 (footnote omitted).

This approach had already been adopted in *Paul Harrington & Sons, Inc.*, 14 F.R.D. at 334-335; *see also The Siegal Trading Co., v. Bagley,* No.77-1405, *slip op,* At 6 n.5 (7th Cir. July 7, 1977) ("If plaintiff's carry their burden of establishing the unavailability of an agent to answer for the corporation, we have no reason to believe that the CFTC will not afford appropriate relief.")

The United States District Court of the Eastern Division of Arkansas was more deferential to the interest of corporate employees.

> "[A]lthough corporate defendants do not have a Fifth Amendment privilege against self-incrimination, the corporate employees may have Fifth Amendment interests which could be jeopardized. The implication of the right against self-incrimination must be given serious consideration in the balancing of interests." *White*, 116 F.R.D. at 502 (citation omitted)

In *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210 n.1 (8th Cir. 1973), however, the court stated that protective orders should issue only in "extreme cases" which are unlikely to arise since "Rule 33(a) allows any agent of the corporation, even its attorney, to answer interrogatories on behalf of the corporation." Insufficient personal knowledge is no excuse, since knowledge of officers and employees is imputed to the

corporation, and the answering agent is "duty bound to secure all information available" to the corporation. *General Dynamics*, 481 F.2d at 1210. The *General Dynamics* case must be compared with *In re The Siegal Trading Co., In.,* [1978] Comm. Fut. L. Rep. 201,637 (1978). In *Siegal*, an administrative law judge had ruled that matters contained in requests for admission served upon the corporation should be deemed admitted because the corporation had failed to respond, stating that no employees other than those who were relying on their privilege against self-incrimination had sufficient personal information adequately to respond. The Commission vacated the ALJ's order because:

> "The cornerstone of the "deemed admitted" case against respondent STC appears to be items of discovery to which STC cannot respond because the necessary information upon which to base a response is solely within the personal knowledge of individual respondents who are asserting their Fifth Amendment rights. *In re Siegal Trading Corp.,* [1978] Comm. Fut. L. Rep. at 201,673.

In a separate concurring opinion, Commissioner Bagly chided the CFTC Division of Enforcement for trying "to get a defendant in a game of 'gotcha' and stated that "dismissal of this entire proceeding would better demonstrate the above lesson in elementary administrative and constitutional law.

This fact situation was also confronted in *Afro-Leon v. United States*, 820 F.2d 1198 (Fed. Cir. 1987). In *Afro-Leon*, it was contended that there was no person who could answer the interrogatories without facing the real and appreciable risk of self-incrimination. *Id* at 1207. The circuit court found that the findings before it were insufficient to determine this issue, thus it remanded the matter for determination of whether any individual could answer the interrogatories in issue without facing a risk of self-incrimination. *Id*. Dicta in the opinion indicated that the circuit court would have been inclined to issue a stay if there was a finding that no individual could have answered the interrogatories without running a substantial risk of self-incrimination.

2. Unfair Criminal Discovery

With respect to the rules governing discovery, the cases manifest concern both with the defendant's due process right to a fair trial and with the court's responsibility for the procedural integrity of the criminal process. Relevant to both interests are pronounced differences in the scope of discovery allowed under the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure. As Judge Wisdom explained in *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962):

> "In handling motions for a stay of a civil suit until the disposition of a criminal prosecution on related matters and in ruling on motions under the civil discovery procedures, a judge should be sensitive to the differences in the rules of discovery in civil and criminal cases. While the Federal Rules of Civil Procedure

> have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive. Compare Rules 26 through 37, Fed. R. Civ. P., 27 U.S.C.A. with Rules 15, 16 and 1, Fed. R. Crim. P., 18 U.S.C.A. Separate policies and objectives support these different rules.... A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit. Judicial discretion and procedural flexibility should not be utilized to harmonize the conflicting rules and to prevent the rules and policies applicable to one suit from doing violence to those pertaining to the other." *Campbell*, 307 F.2d at 487 (footnote omitted).

In short, civil discovery rests upon "a broad footing of full mutual disclosure of information," while the rules of criminal discovery "restrict disclosures to a minimum." *United States v. Simon*, 262 F. Supp. 64, 3 (S.D.N.Y. 1966), *rev'd on other grounds*, 373 F.2d 649 (2nd Cir. 1967), *cert granted sub nom., Simon v. Warton,* 386 U.S. 1030 (1967), *vacated as moot,* 389 U.S. 425 (1968). According to the district court in *Simon,*

> "If there is a reasonable probability that either the prosecution or the defense will be able to secure a full disclosure of the other side's case while relying on the rules to prevent disclosure of its own, there is, as I view it, unfairness likely to affect the result of the trial of such importance and significance as to require the intervention of the ...court to ensure the fair administration of criminal justice and the rules governing it." *Simon,* 262 F. Supp. At 73-74.

Defendants have sought stays or protective orders to prevent the government from circumventing the narrow rules of criminal discovery or from getting a preview of the defense. *See* Note, Concurrent Civil and Criminal Proceedings, 67 Colum. Law Rev. 1277, 129-1284 (1967)

The cases indicate that in the converse situation, when a criminal defendant initiates a civil suit against the government and requests discovery of material related to the criminal prosecution, the government's motion for a stay is usually granted. *Campbell v. Eastland*, is typical:

> "We take the view that whether or not the suit [for refund of taxes paid], as distinguished from the motion [for production of rep of Internal Revenue agents who had investigated plaintiff's for the fraud], was bona fide, the effect of granting the motion was to give pre-trial discovery of documents denied the taxpayer in the criminal case. The order nullified the effect of section 3500 [i.e., the Jencks Act]. It was an open invitation to taxpayers under criminal investigation to subvert the civil rules into a device for obtaining pre-trial discovery against the Government in criminal proceedings." *Campbell*, 307 F.2d at 488, *see also The Founding Church of Scientology Wash., D.C., Inc.,* 77 F.R.D. at 381.

Even where the criminal defendant is also a civil defendant, rather than the plaintiff, his efforts to get discovery from the government must be stayed. *See, e.g., United States v. Maine Lobstermen's Ass'n,* 22 F.R.D. 199, 201 (D. Me. 1958) ("defendants in criminal actions cannot properly take advantage of the coincidence of a companion civil case to obtain prosecution evidence which would not otherwise be available to the defendant under the Federal Rules of Criminal Procedure") *United States v. Linen Supply Insti. Of Greater N.Y., Inc.,* 18 F.R.D. 452, 453 (S.D.N.Y. 1955)*; United States v. Bridges*, 86 F. Supp. 931, 932 (N.D. Ca. 1949); *United States v. Steffes,* 35 F.R.D. 24, 27 (D. Mont. 1964); *Control Mutuals Corp.,* 57 F.R.D. at 57.

3. Civil Discovery Initiated by Government

Defendants often protest that the government is using the civil discovery rules – or, in the pre-litigation context, administrative summonses – to subvert limitations in criminal discovery. But, the government" is comprised of a host of different agencies performing a wide variety of regulatory and enforcement functions. Because some agencies have both civil and criminal responsibilities, because the jurisdictions of several agencies sometimes overlap, and because parallel investigations/prosecutions being conducted by different agencies may be at varying stages of completion, the problem of staying civil discovery by "the government" is multi-faceted and complex. The cases reveal that the question has arisen in the following situations where civil discovery by an agency may turn up evidence: (1) prompting the agency to refer the matter to the Department of Justice for criminal prosecution, (2) of transactions also subject to criminal sanctions under the agency's statutory mandate but the Justice Department is already conducting an independent criminal investigation or prosecution, (3) relevant to a criminal prosecution pending under another statute, and (4) relevant to a potential criminal investigation or prosecution under another statute.

In the first situation, civil discovery probably will not be stayed unless the movant can show that the agency is not acting in good faith or is gathering evidence solely for use in a criminal prosecution. *Donaldson v. United States*, 400 U.S. 517 (1971); *United States v. Zack,* 521 F.2d 1366 (9th Cir. 1975). An allegation that an agency, charged with civil enforcement but also having the power to make criminal referrals, is using civil discovery solely for criminal purposes appears exceedingly difficult to sustain in view of the Supreme Court's decision in *United States v. LaSalle Nat'l Bank*, 437 U.S. 298 (1978). In *LaSalle,* the district court has refused to enforce IRS summonses, which were issued prior to referral to the Justice Department for criminal prosecution, because it found that the special agent who issued them "was conducting his investigation solely for the purposes of unearthing evidence of criminal conduct." *LaSalle*, 437 U.S. at 299. The Supreme Court disagreed that this finding justified the court in declining to enforce the summonses, and concluded that whether a pre-referral summons was issued in bad faith or solely criminal purposes must be determined not by looking at the subjective intent of the individual agent involved but rather by examining the institutional posture of the IRS.

[T]his means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service ... Without doubt, this burden is a heavy one. Because criminal and civil tax liabilities are coterminous, the service rarely will be found to have acted in bad faith by pursing the former.

While the court in *LaSalle* relied heavily on the fact the Internal Revenue Code represents "a law enforcement system in which criminal and civil elements are inherently entwined," 437 U.S. at 309, it must be noted that other federal statutes also reflect a hybrid purpose. *See Kordel,* 397 U.S. at 11 (Food, Drug and Cosmetic Act enforcement); *Standard Sanitary Mfg. Co.,* 226 U.S. at 51-52 (1912) (Sherman Act enforcement). *LaSalle* thus confirms that a stay will seldom be granted where the statute being enforced contemplates the wearing of two hats by the government or where the defendant's conduct may be subject to both civil and criminal sanctions. *In United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965), however, the court dismissed the indictment because the defendants had testified fully at the trial of an SEC injunctive action without being informed that the SEC had already recommended criminal prosecution, The Court's holding was very broad:

> "The court holds that the government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution." *Parrott*, 248 F. Supp. at 202.

The second situation is closely related to the first. Where an agency's statutory mandate contemplates both civil and criminal enforcement, civil discovery will rarely be stayed, absent bad faith or solely criminal purpose, even though an independent criminal investigation or prosecution by the Justice Department is already underway. To repeat the Supreme Court's admonition in *Kordel*,

> "It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forego recommendation of a criminal proceeding once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Kordel*, 397 U.S. at 11.

The underlying policy is that legitimate civil enforcement activities should not be hamstrung merely because the transactions at issue are also subject to criminal prosecution.

> "[T]he fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter. Justice is meted out in both civil and criminal litigation." *Gordon v. FDIC*, 427 F.2d 578 (D.D.C. 1970).

However, the cases denying are explicitly premised on the fact that there was no collusion between the Justice Department and the administrative agency; while the former may not be denied access to public documents, the latter may not covertly act as its discovery instrument. *See Dresser Indus., Inc.,* at 816 ("Although the Justice

Department has been granted access to SEC investigating files, the SEC has assured the court that the materials obtained through civil discovery are not being systematically given to the Justice Department"); *SEC v. United Brands Co.*, 21 F.R. Serv. 2d 66, 68 (D. Mass. 1975) ("absent any collusion between the SEC and the United States Attorney ... there should be no interference with the discovery process"). *In SEC v. Gilbert*, the court ordered the SEC not "specially" to furnish the U.S. Attorney with the fruits of its civil discovery. The Court explained:

> "The court would be justified in granting a protective order under the Due Process Clause or in its discretion under Rule 26(c) of the Federal Rules of Civil Procedure if the degree of cooperation between the Commission and the U.S. Attorney's office was unduly burdensome or unfair to [the defendant]." *Gilbert*, 79 F.R.D. at 687.

In the third situation, where the agency's discovery may unearth evidence relevant to a criminal prosecution under another statue, pre-*LaSalle* cases suggest that a stay might issue. In *Silver v. MaCamey*, 221 F.2d 873 (D.C. Cir. 1955), the appellant, a taxicab operator, was directed to answer charges of the hackers' licensing board that he was unfit to operate a public vehicle because he had sexually assaulted and robbed a passenger at gunpoint; at the time of the board's hearing the appellant was awaiting trial on a charge of rape growing out of the same incident. The district court reinstated his license, which had been revoked by the board. The Court of Appeals affirmed:

> "We agree with the District Court that due process is not observed if the accused person is subjected without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial." *Silver*, 221 F.2d at 874-875.

In *United States v. Henry*, 491 F.2d 702 (6th Cir. 1974), an IRS summons entitled "In the matter of the tax liability of Eddie Jackson" was addressed to Jackson's lawyer; at the time Jackson was under an indictment for narcotics violation. Cases upholding IRS summons where there was a probability of criminal prosecution for tax violations were distinguished on the ground that in *Henry* the IRS summons was being used in narcotics enforcement. The court upheld the quashing of the summons:

> "[W]here, as here, the information sought by the civil summons has an obvious and strong potential for supplying information needed in a pending [non-tax] federal criminal case, we believe the sue of the civil summons is as much an abuse of process as if a criminal tax case has been recommended or had actually been begun." *Henry*, 491 F.2d at 705

In *Venn v. United States*, 400 F.2d 207, 209 (5th Cir. 1968), where a criminal antitrust defendant was served with an IRS summons issued in connection with an investigation

into another person's tax liability, the district court declined to quash the summons after being assured by the government that nothing obtained by means of the summons would be used in the antitrust action. The Court of Appeals affirmed, but required the government to show that all the material sought was relevant to the tax investigation.

The forth situation, where the agency's civil discovery might spillover onto a criminal investigation into conduct not within the agency's jurisdiction, appears not to have been explicitly addressed. However, in *United States v. Hodges & Zweig*, 548 F.2d 1347, 1352 n.6 (9th Cir. 1977), the court acknowledged that "[d]ifferent considerations from those at issue in *Donaldson* [supra] might apply where one of the purposes of the summons is to aid in a criminal investigation that is not tax related." Moreover, in *LaSalle* the Court manifested concern that administrative discovery not be allowed "to infringe upon the role of the grand jury as the principal tool of criminal accusation." *LaSalle*, 437 U.S. at 312.

4. Civil Litigation Initiated by Private Party.

When the civil plaintiff is a private party, the movant can hardly argue that the government is exploiting civil discovery to obtain otherwise unavailable criminal discovery. But the private plaintiff's discovery may well be of practical benefit to the government by granting a preview of evidence also relevant to the criminal discovery. There is also the possibility of collusion between the plaintiff and the prosecution; even without actual collusion it is difficult to restrict the government's access to the fruits of civil discovery. Nevertheless, the cases indicate that the resulting prejudice to the defendant will rarely, if ever, justify a complete stay of civil discovery unless claims of privilege are made.

In *United States v. Simon*, 373 F.2d at 657, for example, the Second Circuit reversed the district court's order staying for 90 days civil discovery by the plaintiff's bankruptcy trustee. The court found that the public's interest in the expeditious progress of the trustee's suit outweighed the defendants' interest in preventing pre-trial discovery of their factual contentions in a parallel criminal proceeding. The appropriate course, when the criminal defendant has standing in the civil suit either as a party of as a deponent, is to prevent the government from gaining knowledge of the defense by requesting a protective order under Rule 26(c). *Driver*, 402 F. Supp. At 686. Such an order may restrict all but the parties and their counsel from attending the deposition, *D'Ippolito v. American Oil Co.,* 272 F. Supp. 310, 312 (S.D.N.Y. 1967), may require that the deposition be sealed, *The Democratic Nat'l Comm. V. McCord*, No. 1233-72 (D.D.C. 1972) (memorandum opinion of Richie, J.), or may enjoin opposing parties and counsel from disclosing the information learned, *American Radiator & Standard Corp.,* 333 F.2d at 205.

E. Practical Considerations

In balancing the interests of the movant for a stay against the interests of the opposing party, the courts have also taken certain practical factors into account.

Thus, interference with parallel civil litigation is deemed more tolerable when the plaintiff is seeking money damages for past harm rather than an injunction against present infringement of his rights. In *Gordon v. FDIC*, for example, the court stated:

> "Here, of course, the Government's need for civil relief which involves merely the collection of money, is not as strong as that in *Kordel*, which involved a libel brought by the FDA against certain drugs." *Gordon*, 427 F.2d at 580 (footnote omitted);

See also Parrott, 248 F. Supp. at 202 (defendants offered to escrow their stock and consented to maintenance of status quo by agreeing to continuance of preliminary injunctions. *Cf. Dellinger*, 442 F.2d at 787 (requirement that defendant show that his hardship overrides the injury to plaintiffs "is a particular importance where the claim being stayed involves a not substantial claim of present and continuing infringement of constitutional rights").

A factor militating against a stay is the plaintiff's need to depose witnesses in order to preserve their testimony. *In D'Ippolito v. American Oil Co.*, the court, through granting a protective order requiring that the depositions be sealed, refused to stay all civil discovery.

> '[A]t the rate in which the criminal litigation is proceeding, it is doubtful that the case will go to trial within the near future so that it does not seem likely that defendants will be unduly burdened by submitting to discovery at this time. On the other hand, it is plaintiff's undisputed contention that certain witnesses sought to be deposed are of advanced years, that others have already died, and that it is necessary to preserve testimony. It appears clear, therefore, that in balancing equities, plaintiff's present the stronger case." *D'Ippolito*, 272 F. Supp. At 312;

See also General Dynamics Corp., 481 F.2d at 1215 (in order to avoid loss of testimony, trial court should have permitted interrogatories and ordered answers sealed) Obviously, the opposing party's hardship in this respect is less likely to outweigh the movant's where the stay is to be of relatively short duration or where the evidence is not of an evanescent character.

Considerations of judicial economy may argue in favor of granting a stay of civil proceedings until a final determination has been reached in the criminal matter. The Third Circuit in *Borda*, declined to find an abuse of discretion in the trial court's "balancing of the equities," including the following consideration:

> "We are dealing with an anti-trust suit covering alleged illegal activity in a three-state area, going back many years. It may well be that the trial of the criminal case will reduce the scope of discovery in the civil action. And perhaps it might also simplify the issues." *Borda*, 383 F.2d at 609 (footnote omitted).

Moreover, it may become unnecessary to litigate issues in the civil case by virtue of them having been conclusively resolved in the criminal proceeding:

Any parallel matter conclusively adjudicated in the criminal action by a standard of proof equal to or greater than that necessary in these proceedings may well have been a collateral estoppel effecting the administrative hearing and therefore, a stay may be a wiser use of the limited resources of the Commission and the parties.

In re The Siegal Trading Co., Inc., [1978] Comm. Fut. L. Rep. at 535 n.14. Finally, where the government stands to benefit from the civil discovery by a private plaintiff, courts have been influenced to grant protective orders by the fact that many agencies already possess potent discovery devised that render unnecessary their exploitation of the fruits of private litigation. As the court explained in *GAF Corporation v. Eastman Kodak Company,* 415 F. Supp. 129, 132 (S.D.N.Y. 1976):

> "The Government as investigator has awesome powers, not lightly to be enhanced or supplemented by implication ... [I]ts inquisitorial powers are great, and certainly as great as Congress has determined they should be. Prior to the discovery devices available to any other litigants, the [antitrust] Division has the civil investigative demand, 15 U.S.C. § 1312(1970), and, of course, the grand jury. The potent instruments of inquiry bear corollary limits of propriety ... Ours is not an era for fashioning lightly, from conditions at best ambiguous, an adrenal of new implements for government intrusions."

See also *Zenith Radio Corp. v. Matsushita Elec. Induc. Co.,* 1978-1 Trade Cases (CCH) ¶ 62,019 (E.D. Pa. 1978); *Martindell v. International Tel. & Tel. Corp.,* 594 F.2d at 296.

SUMMARY

The availability of a stay or protection from discovery depends largely upon the procedural posture of the case. Generally, it will be very difficult to obtain relief where the concurrent proceedings are both being presented by the government. In contrast, there is a considerable body of precedent supporting the granting of relief on Fifth Amendment grounds where the civil proceeding is among private parties and where the privilege is properly invoked. In all of these cases, balancing of constitutional and public policy interests is involved. Thus, cautious counsel should be wary of the consequences of participation in civil discovery where the specter of criminal prosecution exists.

PART TWO

1. MONEY LAUNDERING

In 1984, the President's Commission on Organized Crime ("the Commission") concluded that money laundering was the life blood of organized crime. The Commission found that drug traffickers and racketeers exploited weaknesses in the Bank Secrecy Act to launder their income. The Commission found that new legislation which would hold criminally liable persons who conduct monetary transactions with knowledge or reason to know that the funds involved were derived from unlawful activity was necessary. The legislation intended that the offense be defined so that it would reach those who perform "ministerial duties" necessary for money laundering. Indeed, the broad language of the proposed legislation threatened anyone who received and banked money from illegal activities.

The broad reach of the Commission's proposed offense was well founded on existing legal precedent regarding the receipt of stolen property. The crime of receiving stolen property is usually constructed to impose liability on anyone who knowingly received property belonging to another with an intent to conceal it from the true owner. The crime usually does not require complicity in the underlying offense. A version of the Commission's proposed offense passed the House and Senate in October 1986 and was enacted as section 1957 of the Money Laundering Control Act of 1986.

The Money Laundering Control Act contains two significant offenses, Section 1956 entitled "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 or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity. It also prohibits carrying out a specified unlawful activity to avoid a transaction reporting requirement under State or Federal law. 18 U.S.C. § 1956. Generally, section 1956 is of little significance to the well-intentioned litigator. §1956 clearly requires knowledge of the unlawfulness of the underlying activity and an intent to promote it.

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 in the 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.

Revisiting federal law, §1957 of the Money Laundering Control Act does not contain section 1956's strict intent and knowledge requirements.

The second offense, §1957, created by the Money Laundering Control Act of 1986 provides as follows:

(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).
(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may

direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.
(f) As used in this section--
(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;
(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and
(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title.

Section 1957 does not require an intent to promote money laundering. The statute imposes significant criminal penalties on anyone who knowingly engages in a monetary transaction in criminally derived property, when the property is worth more than $10,000 and is derived from specified unlawful activity. It is important to note that the defendant must know that the subject property is criminally derived; however, the defendant need not know that it was derived from specified unlawful activity. See *United States v. Gabriele,* 63 F.3d 61, 65 (1st Cir. 1995)

There is some indication that Congress intended that the knowledge requirement of section 1957 have a "narrow and unusually limited meaning." However, the language of section 1957 is not limited. Knowledge of circumstantial evidence might satisfy the scienter requirement. Likewise, a potential defendant cannot be willfully blind to the illegal derivation of the money. This raises grave questions as to what burden is placed upon an attorney when accepting fees from or making transfers for a client.

The government is not required to prove that all the subject property or funds were criminally derived.

To satisfy this burden where the funds used in the particular transaction originated from a single source of commingled illegally-acquired and legally-acquired funds or from an asset purchased with such commingled funds, the government is not required to prove that no "untainted" funds were involved, or that the funds used in the transaction were exclusively derived from specified unlawful activity.... Money is fungible, and when funds obtained from unlawful activity have been combined with funds from lawful activity into a single asset, the illicitly-acquired funds and the legitimately-acquired funds (or the

respective portions of the property purchased with each) cannot be distinguished from each other; that is, they cannot be traced to any particular source, absent resort to accepted, but arbitrary accounting techniques. As a consequence, it may be presumed in such circumstances, as the language of section 1957 permits, that the transacted funds, at least up to the amount originally derived from the crime, were the proceeds of the criminal activity.

United States v. Moore, 27 F.3d 969, 976-77 (4th Cir. 1994), *cert. denied,* 115 S. Ct. 459 (1995);. *accord United States v. Johnson,* 971 F.2d 562, 570 (10th Cir. 1992).

Little solace can be taken from the portion of section 1957(f)(1) which provides that the term "monetary transaction" does "not include any transaction necessary to preserve a person's right to representation as guaranteed by the Sixth Amendment to the Constitution." The Sixth Amendment only applies to criminal prosecution. Further, the right to counsel of choice has always been a limited right. The limitations were made abundantly clear by the United States Supreme Court in two recent attorney fees forfeiture cases.

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 attorney's appointed by the courts. '[A] defendant may not insist on representation by an attorney he cannot afford." ... The forfeiture statute does not impermissibly burden a defendant's Sixth Amendment right to retain counsel of his choice. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney even if those funds are the only way that that defendant will be able to retain the attorney of his choice. Such money, though in his possession, is not rightfully his. Petitioner's contention that, since the Government's claim to forfeitable assets rests on a penal statute that is merely a mechanism for preventing fraudulent conveyances of the assets and is not a device for determining true title to property, the burden the statute places on a defendant's rights greatly outweighs the Government's interest in forfeiture is unsound.
> **A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.** A robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the robbery proceeds and refuses to permit the defendant to use them to pay for his

> defense. **'[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.'"** *Caplin & Drysdale, Chartered v. U.S.* at 2652-2653 (emphasis supplied).

The Supreme Court, in *Caplin & Drysdale* went on to find that the Government has a pecuniary interest in obtaining all forfeitable assets as such assets "are deposited in a Fund that supports law-enforcement efforts in a variety of important and useful ways." **The Supreme Court went so far as to acknowledge that one of the values of the statute is to prevent accused persons from obtaining the best counsel available. "[T]he harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy...The modern day Jean Valjean must be satisfied with appointed counsel. Yet the drug merchant claims that his possession of huge sums of money ... entitles him to something more. We reject this contention, and any notion of a constitutional right to use the proceeds of crime to finance an expensive defense."** *Caplin & Drysdale* at 2655.

Finally, as we have recognized previously, a major purpose of motivating congressional adoption and continued refinement of the RICO and CCE forfeiture provision has been the desire to lessen the economic power or organized crime and drug enterprises. *See Russello v. United States*, 464 U.S. 16, 27-28, 104 S. Ct. 296, 302-303, 78 L. Ed. 2d 17 (1983). This includes the use of such economic power to retain private counsel. As the Court of Appeals put it: 'Congress has already underscored the compelling public interest in stripping criminals such as Reckmeyer of their undeserved economic power, and part of that undeserved power may be the ability to command high-priced legal talent." 837 F.2d at 649. The notion that the government has a legitimate interest in depriving criminals of economic power, even so far as that power is used to retain counsel of choice, may be somewhat unsettling.

The Supreme Court concluded its opinion by noting "[f]orfeiture provisions are powerful weapons in the war on crime; like any such weapons, their impact can be devastating when used unjustly." As the Supreme Court has endorsed the use of forfeiture statutes as a means to undermine a criminal defense, it is an open question as to what, if anything, would constitute unjust use of the statutes.

In sum, section 1957 exposes every attorney to potential criminal liability for accepting payment from a client without knowing the source of the funds. Additionally, if a law firm were to act as a mere conduit of the client funds which constituted criminally derived property, it would be subject to criminal liability. The fact that the transaction arises or is a function of the attorney-client relationship is irrelevant.

II. FALSE, FICTICIOUS OR FRAUDULENT STATEMENTS TO DEPARTMENTS OR AGENCIES OF THE UNITED STATES.

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:

> "**(a)** Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
> **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or
> **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.
> **(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.
> **(c)** With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--
> **(1)** administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
> **(2)** any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate. 18 U.S.C. § 1001.

The terms "department" and "agency" are broadly defined. The Internal Revenue Service (including statements made to tax auditors), bankruptcy courts, civil rights, the Federal Energy Agency, the Immigration and Naturalization Service, the Department of Labor, the National Park Service, the Securities and Exchange Commission, the Small Business Administration, the United States Postal Service, the Department of Health and Human Services, and the Department of Housing and Urban Development have all been found to de facto "departments" and "agencies" within the meaning of section

1001. It is safe to say that RTC, FSLIC, FDIC and their sub-entities would also be considered departments or agencies.

Section 1001 raises serious potential problems for attorneys both in the litigation context and in the transactional/work out context. Advising a client as to methods of avoiding reporting requirements under other federal statutes may be actionable under section 1001. *See United States v. Maroun*, 739 F. Supp. 684 (D. Mass. 1990) (holding that parties charged with structuring transactions to evade currency reporting requirements could also be charged with knowingly and willfully making fraudulent statements under section 1001.) Is bluffing or puffery actionable under Section 1001? Conceivably, it is. Section 1001 could also be construed to require absolute candor and disclosure when dealing with government agencies and departments. Lack of full disclosure could be construed as concealment or a trick or scheme.

III. RECORDS AND REPORTS ON MONETARY INSTRUMENTS TRANSACTIONS

The Currency and Foreign Transactions Reporting Act, 31 U.S.C. § 5311-5326 (the "Currency and Foreign Transaction Reporting Act") sets forth reporting requirements for domestic and foreign monetary instrument transactions. It is quite probably that attorneys and law firms are required to file reports pursuant to Title 31. Likewise, it is possible for an attorney to incur liability for participating in or abetting an individual or entity in not filing a required report. *See United States v. Richter*, 610 F. Supp. 480 (D. Ill. 1985) *cert. denied.* 497 U.S. 55 (1986).

Section 5311 sets out the declaration of purpose for this subchapter of federal statutes:

> It is the purpose of this subchapter (except section 5315) to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism.

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

> **(a)** 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 a 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).

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)** Except as provided in subsection (c) of this section, 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.
> **(b)** A report under this section shall be filed at the time and place the Secretary of the Treasury prescribes. The report shall contain the following information to the extent the Secretary prescribes:
> **(1)** the legal capacity in which the person filing the report is acting.
> **(2)** the origin, destination, and route of the monetary instruments.
> **(3)** when the monetary instruments are not legally and beneficially owned by the person transporting the instruments, or if the person transporting the instruments personally is not going to use them, the identity of the person that gave the instruments to the person transporting them, the identity of the person who is to receive them, or both.
> **(4)** the amount and kind of monetary instruments transported.
> **(5)** additional information.
> **(c)** This section or a regulation under this section does not apply to a common carrier of passengers when a passenger possesses a monetary instrument, or to a common carrier of goods if the shipper does not declare the instrument.
> **(d) Cumulation of closely related events.**--The Secretary of the Treasury may prescribe regulations under this section defining the term "at one time" for purposes of subsection (a). Such regulations may permit the cumulation of closely related events in order that such events may collectively be considered to occur at one time for the purposes of subsection (a).

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 significant penalties:

> **(a)** A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, shall be fined not more than $250,000, or imprisoned for not more than five years, or both.
>
> **(b)** A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter (except section 5315 or 5324 of this title or a regulation prescribed under section 5315 or 5324), or willfully violating a regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned for not more than 10 years, or both.
>
> **(c)** For a violation of section 5318(a)(2) of this title or a regulation prescribed under section 5318(a)(2), a separate violation occurs for each day the violation continues and at each office, branch, or place of business at which a violation occurs or continues.
> **(d)** A financial institution or agency that violates any provision of subsection (i) or (j) of section 5318, or any special measures imposed under section 5318A, or any regulation prescribed under subsection (i) or (j) of section 5318 or section 5318A, shall be fined in an amount equal to not less than 2 times the amount of the transaction, but not more than $1, 000,000.

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 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;
(2) cause or attempt to cause a domestic financial institution 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 any order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed 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, that contains a material omission or misstatement of fact; or
(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.
(b) Domestic coin and currency transactions involving nonfinancial trades or businesses.--No person shall, for the purpose of evading the report requirements of section 5331 or any regulation prescribed under such section--
(1) cause or attempt to cause a nonfinancial trade or business to fail to file a report required under section 5331 or any regulation prescribed under such section;
(2) cause or attempt to cause a nonfinancial trade or business to file a report required under section 5331 or any regulation prescribed under such section that contains a material omission or misstatement of fact; or
(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with 1 or more nonfinancial trades or businesses.
(c) International monetary instrument transactions.--No person shall, for the purpose of evading the reporting requirements of section 5316--
(1) fail to file a report required by section 5316, or cause or attempt to cause a person to fail to file such a report;
(2) file or cause or attempt to cause a person to file a report required under section 5316 that contains a material omission or misstatement of fact; or
(3) structure or assist in structuring, or attempt to structure or assist in structuring, any importation or exportation of monetary instruments.
(d) Criminal penalty.--

(1) In general.--Whoever violates this section shall be fined in accordance with title 18, United States Code, imprisoned for not more than 5 years, or both.
(2) Enhanced penalty for aggravated cases.--Whoever violates this section while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period shall be fined twice the amount provided in subsection (b)(3) or (c)(3) (as the case may be) of section 3571 of title 18, United States Code, imprisoned for not more than 10 years, or both." (emphasis supplied).

This statute 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.[1] 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.

A review of the suspension order demonstrates the draconian impact of these statutes. The Disciplinary Hearing Commission noted that:

- Gaskins was not attempting to defraud the government when he deposited the cash into his bank accounts and did not deposit the cash into any other individuals account but only into his own properly identified personal or business account;
- The government had stipulated that Gaskins filed his income tax returns including schedule C's, reporting gross receipts, gross profits, and gross income for tax years 2004, 2005, and 2006;
- The government presented no evidence that the cash deposits were structured for the purposes of evading or avoiding income tax;
- The government presented no evidence that Defendant did not fully pay his federal income taxes for 2004, 2005, and 2006. Gaskins presented evidence that he did so;
- The government presented no evidence that the cash received and deposited by Gaskins was derived from any criminal activity;

[1] See Findings of Fact, Conclusions of Law and Order of Discipline in the matter of The North Carolina State Bar v. Johnny S. Gaskins, Attorney, filed December 30, 2010 and attached as Exhibit 1.

- 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 fees that he received in cash, exceeding $110,000.00, on IRS Form 8300 for the years contained in the indictment;
- Gaskins presented extensive and overwhelming evidence of good character and reputation as a person and an attorney.

Notwithstanding these facts, along with numerous other positive facts, Gaskins was convicted and suspended by the State Bar of North Carolina. Ultimately, on June 25, 2018, the United States Supreme Court entered a disbarment order against Gaskin. *See: In re Disbarment of Gaskins,* 138 S.Ct. 2699 (Mem) (2018).

Apparently, Gaskins received a number of cash payments from clients under the $10,000 reporting requirement and deposited them in the bank. The bank filed 4 SARs (Suspicious Activity Reports) including one amended report showing a total of $255,195 in cash deposits made by Gaskin. The Government, in the indictment, "grouped" multiple deposits below $10,000 and indicted Gaskin on violating 31 U.S.C. § 5324. Pursuant to 31 C.F.R. § 1010.313 Multiple Transactions, "[i]n the case of financial institutions other than casinos, for purposes of the transactions in currency reporting requirements of this chapter, 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 either cash in or cash out totaling more than $10,000 during any one business day...." The prosecution aggregated the deposits of Gaskins and convicted him of violation federal law.

It goes without saying that Johnny S. Gaskins' life, based on the evidence recited in the disbarment order, was in shambles. It is imperative for all attorneys to be aware of these statutes and comply with the specifics of each.

The illegal structuring of monetary transactions is not uniquely in the province of criminal lawyers. In *United States v. Coney,* 689 F.3rd 365 (5th Cir. 2012), the Fifth Circuit affirmed a judgment against Barbara Coney in the amount of $2,687,408.59 where her deceased husband, a plaintiff's personal injury attorney and sole shareholder of CLS, Inc., a law firm that primarily represented plaintiffs seeking to recover damages arising from automobile accidents failed to file the required CTRs. CLS, Inc. engaged in a high volume of cash transactions and used some of this cash to pay illegal kickbacks to "runners" in exchange for client referrals. In an effort to conceal the illegal kickbacks from the Government, Curtis Coney, Barbara Coney's deceased husband (he died while the case was pending in the district court), instructed CLS's staff to write checks to cash, either singly or in the aggregate, in amounts of less than $10,000 per day. The Fifth Circuit confirmed that structuring cash transactions to avoid the reporting requirements is a crime, citing 31 U.S.C. § 5324(a)(3), (d). Curtis Coney pled guilty to twelve counts in the indictment, including one count of conspiracy to structure financial transactions in violation of 31 U.S.C. § 5324, ten counts involving ten separate incidents

of structuring financial transactions in violation of 31 U.S.C. § 5324. Both Curtis and Barbara Coney pled guilty to one count of obstruction of justice. The Fifth Circuit affirmed the IRS's right to obtain a judgment against Barbara Coney in the amount of $2,687,408.59 barring her discharge in bankruptcy as to these amounts.

CONCLUSION

At the end of the day, the first step to avoiding getting the attorney and his or her client in trouble is a basic awareness of these statutes and pitfalls in the law. As always, knowledge is power.

STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 09 DHC 30
THE NORTH CAROLINA STATE BAR, Plaintiff v. JOHNNY S. GASKINS, Attorney, Defendant	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF DISCIPLINE

This matter came on to be heard and was heard before a hearing panel of the Disciplinary Hearing Commission composed of the Chair, Sharon B. Alexander, Harriett Smalls, and David L. Williams on November 12, 2010. The Plaintiff was represented by William N. Farrell, Deputy Counsel. Defendant was represented by R. Daniel Boyce.

The complaint in this matter was brought by the Plaintiff following Defendant's criminal convictions for violating 31 U.S.C. Section 5324. The criminal offenses of which Defendant was convicted are felonies under federal law.

The sole issue determined by the panel was the extent of discipline to be imposed. See Rule .0115(c) of the Discipline and Disability Rules of the North Carolina State Bar. Based upon the pleadings, the stipulated facts and the evidence introduced at the hearing, the hearing panel hereby finds by clear, cogent and convincing evidence the following:

FINDINGS OF FACT

1. Plaintiff, the North Carolina State Bar, is a body duly organized under the laws of North Carolina and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina, and the rules and regulations of the North Carolina State Bar promulgated thereunder.

2. Defendant, Johnny S. Gaskins, (hereinafter "Defendant" or "Gaskins"), was admitted to the North Carolina State Bar on August 19, 1979, and is an attorney at law licensed to practice in North Carolina, subject to the rules, regulations, and Rules of Professional Conduct of the North Carolina State Bar and the laws of the State of North Carolina.

3. During the times relevant herein, Defendant actively engaged in the practice of law in the State of North Carolina and maintained a law office in Raleigh, Wake County, North Carolina.

4. On or about 9 October 2009 in the United States District Court for the Eastern District of North Carolina, a jury rendered verdicts of guilty against Defendant on seven counts of violating 31 U.S.C. Section 5324(a)(3) and (d), and 31 C.F.R. Section 103.11 for structuring financial transactions with banks for the purpose of evading the reporting requirements of 31 U.S.C. Section 5313(a).

5. The offenses of which Defendant was convicted are criminal offenses and felonies under federal law.

6. The felonies of which Defendant was convicted are criminal offenses showing professional unfitness as defined by Rule .0103(17) of the State Bar Discipline and Disability Rules.

7. On August 2, 2010 Defendant was sentenced by the trial court for his convictions of "structuring" under 31 U.S.C. Sec. 5324.

8. Defendant's punishment included one day of confinement, supervision by a United States probation officer for three years, and placement in a community confinement facility (half-way house) for the first nine months of supervision.

9. Defendant had served his one day of imprisonment and was undergoing confinement in the half-way house as of the date of this hearing.

10. The jury verdicts in the criminal cases are conclusive evidence of Defendant's guilt for the purpose of the disciplinary hearing.

11. The hearing panel can not re-examine the evidence that was presented to the jury to determine whether or not Defendant committed the offenses of which he was convicted.

12. Although the panel can not look behind the jury's verdicts as to the felony convictions, the panel notes that immediately following the jury's verdicts on the "structuring" indictment, the trial court instructed the jury to determine whether the $355,567.00, the total amount of cash alleged to have been structured in the indictment, was involved in or traceable to the structuring violations of which Defendant was convicted.

13. The jury answered this question "no" and further answered that zero was the amount involved in or traceable to or property involved in the structuring violation of which Defendant was convicted.

14. The panel is of the opinion that the jury's determination on this question is inconsistent with the jury's verdicts on the substantive felonies.

15. Defendant's explanation and evidence for what occurred leading up to his indictment and conviction can not change the fact that the panel must accept the jury's verdict, although the panel is of the opinion that the applicable federal statues and the case law that was interpreted in applying those statutes did not provide clear guidance to the Defendant in making the decisions that he needed to make in terms of depositing the cash.

16. Defendant was not attempting to defraud the government when he deposited the cash into his bank accounts. Significantly, Defendant did not deposit the cash into any other individuals account but only into his own properly identified personal or business account.

17. The government stipulated that Defendant filed his income tax returns, including schedule C's, reporting gross receipts, gross profits, and gross income for tax years 2004, 2005, and 2006.

18. The government presented no evidence that the cash deposits were structured for the purposes of evading or avoiding income tax.

19. The government presented no evidence that Defendant did not fully pay his federal income taxes for 2004, 2005, and 2006. Defendant presented affirmative evidence that he did so.

20. The government presented no evidence that the cash received and deposited by Defendant was derived from any criminal activity.

21. The government offered no motive as to why Defendant structured his cash deposits in the manner in which he did.

22. The Defendant had no dishonest or selfish motive

23. Defendant properly accounted for and reported to the IRS for attorney fees that he received in cash, exceeding $110,000.00, on IRS Form 8300 for the years contained in the indictment.

24. Defendant presented extensive and overwhelming evidence of good character and reputation as a person and an attorney.

25. Defendant has made positive contributions to the practice of law including representing many clients without compensation, establishing a scholarship at Campbell University School of Law for law students, representing many court appointed clients, representing more than twenty (20) clients in court appointed death penalty cases, and devoting his time in helping younger lawyers to learn how to practice law.

26. Defendant voluntarily closed his office on June 1, 2008 when he learned that the government intended to indict him and refunded attorney fees to clients that had retained him.

27. Defendant's felony convictions have caused him great personal and processional embarrassment.

28. Defendant suffered financial problems as a result of his indictment and convictions.

29. Defendant exhibited a cooperative attitude towards the State Bar proceedings.

30. Defendant has substantial experience in the practice of law.

31. Defendant was reprimanded by the Grievance Committee of the North Carolina State Bar in case number 08G0692 on May 17, 2010 for making extrajudicial statements to the media about a former client that he knew or reasonably should have known would be disseminated by means of public communication and would have substantial likelihood of materially prejudicing the case thereby violating Rule 3.6(a) and Rule 8.4(d) which prohibits engaging in conduct prejudicial to the administration of justice.

ADDITIONAL FINDINGS REGARDING DISCIPLINE

1. The panel deems it of some importance that the trial court did not determine to disbar Defendant as part of its criminal judgment.

2. The panel had no concern that any discipline was needed to protect the public.

3. Defendant's indictment and convictions are matters of public record and were reported in the media.

4. Defendant's felony convictions harm the reputation of the legal profession and bring the legal profession into disrepute and disgrace.

5. When a lawyer commits a felony it causes significant harm to the public's trust of the legal profession.

6. Defendant's action caused a negative impact of the public's perception of the legal profession and endangers public confidence in the legal profession.

Based upon the foregoing Findings of Fact and upon consideration of the factors set forth in 27 N.C.A.C. Chapter 1, Subchapter B, Section .0114(w), the hearing panel hereby enters the following:

CONCLUSIONS REGARDING DISCIPLINE

1. The hearing panel has carefully considered all of the different forms of discipline available to it. In addition, the hearing panel has considered all of the factors enumerated in 27 N.C.A.C. Chapter 1, Subchapter B, Section .0114(w) of the Rules and Regulations of the North Carolina State Bar and finds the following factors are applicable in this matter:

a. From Rule .0114(w)(1):

Subsection (e): negative impact of Defendant's actions on public's perception of the profession

b. From Rule .0114(w)(2):

Subsection (d): commission of felonies

c. From Rule .0114(w)(3):

Subsection (a): prior disciplinary offenses

Subsection (c): absence of a selfish motive

Subsection (f): a pattern of misconduct

Subsection (g): multiple offenses

Subsection (k): cooperative attitude toward the proceeding

Subsection (q): character or reputation

Subsection (s): degree of experience in the practice of law

Subsection (u): imposition of other sanctions or penalties

Subsection (v): other factors found to be pertinent to the consideration of the discipline to be imposed:

1. Defendant voluntarily closed his office when he learned the government intended to indict him.

2. Defendant had an excellent character and reputation prior to these convictions.

3. Defendant has made positive contributions to the practice of law during his career.

4. The applicable Federal statutes and the case law that was interpreted in applying these statutes did not, in the opinion of the panel, provide clear guidance to Defendant in making the decision that he needed to make in terms of depositing the cash.

5. The trial court judge did not determine to disbar the Defendant as part of the Federal criminal proceedings.

6. The panel considered the jury's general guilty verdict on the seven felonies and the jury's verdict on the special verdict, relating to the asset forfeitures, to be conflicting in the opinion of the panel.

2. Defendant's felony convictions caused significant harm to the reputation of the legal profession due to the public nature of his criminal indictment and convictions.

3. The hearing panel has carefully considered all forms of discipline including admonition, reprimand, censure, suspension and disbarment in considering the appropriate discipline in this case.

4. The hearing panel finds that admonition, reprimand and censure would not be sufficient discipline because of the gravity of harm to the legal profession in the present case.

5. The hearing panel concludes that discipline short of an active suspension would not adequately protect the legal profession and its reputation for the reasons stated above and for the following reasons:

a. Defendant repeatedly engaged in felonious criminal acts over a period of 2 ½ years. Felonies are by description offenses which show professional unfitness and reflect adversely on an attorney's dishonesty. Any felony offense is among the most serious misconduct that an attorney can commit.

b. Entry of an order imposing less serious discipline would fail to acknowledge the seriousness of defendant's misconduct and would send the wrong message to attorneys and the public regarding conduct expected of members of the Bar of this State.

c. The protection of the legal profession requires that Defendant be suspended from the practice of law.

Based on the foregoing Findings of Fact, Additional Findings and Conclusions Regarding Discipline, the hearing panel enters the following:

ORDER OF DISCIPLINE

1. Defendant, Johnny S. Gaskins, is hereby suspended from the practice of law for a minimum of two years from the date this order is entered or for the entire length of time that he is on supervised release pursuant to the criminal judgment, whichever is longer.

2. Defendant is taxed with the administrative fees and with actual costs permitted by law in connection with the proceeding. Defendant will pay the costs within 30 days of service upon him of the statement of costs by the Secretary of the Disciplinary Hearing Commission.

3. Because Defendant is presently suspended from the practice of law pursuant to an interim suspension, the wind down period contained in 27 N.C.A.C. Chapter 1, Subchapter B, Section .0124 is not necessary.

Signed by the Chair with the consent of the other panel members, this the 28 day of December, 2010.

Sharon B. Alexander, Chair
Disciplinary Hearing Panel

STATE OF NORTH CAROLINA WAKE COUNTY	BEFORE THE DISCIPLINARY HEARING COMMISSION OF THE NORTH CAROLINA STATE BAR 09 DHC 30
THE NORTH CAROLINA STATE BAR, Plaintiff v. JOHNNY S. GASKINS, Attorney, Defendant	DISSENTING OPINON

I, David L. Williams, concur with the first two paragraphs of the introduction, the FINDINGS OF FACT contained in paragraphs 1 through 5, 7 through 9 and 11 through 29, and the ADDITIONAL FINDINGS REGARDING DISCIPLINE contained in paragraphs 1 through 3, 5 and 6. I, however, respectfully dissent from first sentence of the third paragraph of the introduction, paragraphs 6 and 10 of the FINDINGS OF FACT, paragraph 4 of the ADDITIONAL FINDINGS OF REGARDING DISCIPLINE, the CONCLUSIONS REGARDING DISCIPLINE and the ORDER OF DISCIPLINE.

The matter before the hearing panel appeared, on the surface at least, to be simple and routine. A federal district court jury had convicted the Defendant on seven counts of violation of 31 U.S.C. Section 5324(a)(3) and (d) and 31 C.F.R. Section 103.11 for structuring financial transactions with banks for the purpose of evading the reporting requirements of 31 U.S.C. Section 5313(a). The Plaintiff alleged that the criminal offenses of which the Defendant was convicted are criminal offenses showing professional unfitness as defined by Rule .0103(17) of the State Bar Discipline & Disability Rules. The Plaintiff further alleged that the Defendant committed a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects in violation of Rule 8.4(b).

The task before the hearing panel was to determine if the Defendant had violated Rule 8.4(b) and, if so, to determine the appropriate discipline. Rule 8.4(b) MISCONDUCT reads in part: "It is professional misconduct for a lawyer to (b) COMMIT (emphasis added) a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule .0103 Definitions reads in part: "Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have

unless the context clearly indicates otherwise, the meaning given in rule....(17) Criminal offense showing professional unfitness—the COMMISSION (emphasis added) ...of any felony."

So then, if the Defendant COMMITTED a felony, by definition, the Defendant has shown professional unfitness in violation of Rule 8.4(b) and the panel must then determine the appropriate discipline. If, however, the panel does not find by clear, cogent and convincing evidence that the Defendant COMMITTED a felony, the panel must dismiss the case and, obviously, no discipline is appropriate. No other allegations of rules violations were before the panel.

It is a fact that the Defendant was CONVICTED of seven felony counts. The panel's first task then was to determine if those convictions rose to the level of COMMITTED. The Rules do not define "convicted" and "committed," but I think it is apparent that "committed" presupposes a higher burden than "convicted." To state the matter simply and, at least for purposes of this matter, we can think of "committed" as "did" and we can think of "convicted" as "having been determined by a jury to have done."

My review of the record presented to the panel indicated that in all referenced cases where a defendant was convicted of the offense the Defendant was convicted, or a similar offense, the discipline imposed by the relevant governing authority of the state issuing the license to practice law, was suspension or disbarment. However, in none of the referenced cases, to my knowledge, was there an incidence of conflicting/contradictory verdicts in the same case; accordingly, this matter is distinguishable from all the cases referenced during this hearing. A criminal felony conviction is generally viewed as conclusive evidence of the commission of a felony and the only matter before the panel is the determination of discipline. In this matter, however, because the inconsistent/contradictory verdicts constitute extenuating and mitigating circumstances, in the interest of justice, an exception to the general rule that a felony conviction automatically constitutes professional unfitness, is appropriate. I agree with the majority that the panel must not look beyond the verdicts of a jury and I did not do so in reaching my decision. I do, however, consider it not only appropriate, but in fact necessary to **consider all the verdicts** (plural) rendered by a jury in determining if a CONVICTION rises to the level of COMMITMENT of a felony, especially when the verdicts relate to the same alleged crime and the verdicts are inconsistent/contradictory. This is an extraordinary case characterized by unique facts, conflicting/contradictory verdicts and a lenient active prison sentence. Accordingly, the appropriate question to ask prior to a determination of discipline, if any, is: Did the Defendant, by clear, cogent and convincing evidence, COMMIT a felony as defined by Rule .0103(17)? After that question is answered, discipline, if any, should then and only then, be considered.

Based upon the pleadings, the stipulated facts and the evidence introduced at the hearing, I hereby find by clear, cogent and convincing evidence the following:

FINDINGS OF FACT

A. The panel found that..."the hearing panel cannot re-examine the evidence that was presented to the jury to determine whether or not Defendant committed the offenses of which he was convicted."

B. The panel found..."the jury's determination on this question (the forfeiture verdicts) is inconsistent with the jury's verdicts on the substantive felonies."

C. The majority found..."that the panel must accept the jury's verdict."

D. In its CONCLUSIONS REGARDING DISCIPLINE, the majority found..."pertinent to the consideration of the discipline to be imposed...the jury's general guilty verdict on the seven felonies and the jury's verdict on the special verdict, relating to the asset forfeitures, to be conflicting."

E. The panel considered the special verdicts regarding discipline. Logic, then, seems to demand that the panel fully consider all the jury's verdicts (plural), especially inconsistent/contradictory verdicts because such verdicts call into question the veracity of the jury's verdicts.

F. The panel may not look behind any of the jury's verdicts, but justice demands the panel look plainly and squarely at all the jury's verdicts, especially inconsistent or contradictory verdicts.

G. This matter involved 38 cash deposits by or for the Defendant at the Defendant's bank totaling $355,567 which the government grouped into 7 structuring counts and 1 forfeiture count for the same $355,567 total amount as the 7 structuring counts.

H. Between January 16, 2001 and November 4, 2006 the Defendant filed with the Internal Revenue Service 24 information returns on Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business) thereby the Defendant self-reported cash receipts of $481,000.

I. The Defendant's bank filed with the appropriate federal agency 4 CTRs (Currency Transaction Report) showing a total of $101,322 in cash deposits made by the Defendant.

J. The Defendant's bank filed with the appropriate federal agency 4 SARs (Suspicious Activity Report) including one amended report showing a total of $255,195 in cash deposits made by the Defendant.

K. Regarding the 7 structuring counts, Judge Britt instructed the jury, in part, as follows:

> It is your duty to determine the facts.
>
> Each count specifically charges that the Defendant structured bank cash deposits.
>
> Your verdict must be unanimous.
>
> In order to sustain its burden of proof for this offense, the government must prove the following elements beyond a reasonable doubt:
>
> First, that the Defendant knew of the domestic financial institution's legal obligation to report currency transactions in excess of $10,000;
>
> Second, that the Defendant knowingly structured or assisted in structuring a transaction; and,
>
> Third, that the Defendant did so with the purpose of evading currency reporting requirements under federal law.
>
> ...Domestic financial institutions are required to file a Currency Transaction Report for each deposit...which involves a transaction in currency of more than $10,000 during any one business day. Multiple currency transactions are treated as a single transaction if...they are in...cash totaling more than $10,000 during any one business day.

L. The jury was away from the courtroom for 5 hours 40 minutes.

M. The jury found the Defendant guilty on the 7 structuring counts.

N. Implicit in each verdict, in accordance with Judge Britt's instructions, was a finding of fact that the Defendant illegally structured at least $10,001 in connection with each of the 7 guilty verdicts (a minimum total finding of fact that the Defendant illegally structured at least $70,007 in connection with the 7 guilty verdicts). This is an essential "element" of each structuring count per Judge Britt's instructions.

O. The court then moved to the special verdict (the forfeiture count).

P. Regarding the forfeiture count, Judge Britt instructed the jury, in part, as follows:

> ...in view of your verdict that the Defendant is guilty of structuring a transaction to evade reporting requirements, you have one more task to perform before you are discharged. I must ask you to render a special verdict concerning the interest and property the United States has alleged are subject to forfeiture to the United States.
>
> ...any person who is found guilty of structuring a transaction...is required to forfeit to the United States all property...involved in the offense.
>
> It is your duty to determine what property, if any, should be forfeited. The government must prove its case for forfeiture by a preponderance of the evidence.
>
> To establish a fact by a preponderance of the evidence means to prove that something is more likely true than not true.
>
> In this case, the United States Government has alleged that...a sum of...$355,567...was involved in the structuring of the transaction.
>
> ...in your deliberations on the forfeiture issue, you will not revisit the issue of guilt or innocence. Those decisions have been made...
>
> A special verdict form has been prepared for your use. You will determine the total amount which you find...was involved in the structuring offenses for which you have found the Defendant guilty, and you will record that amount on the special verdict form.
>
> Your verdict, of course, must be unanimous. The verdict form reads: With respect to the below property, please answer the following question. Money judgment. One, does $355,567...constitute property involved in... the structuring violations of which the Defendant was convicted? There's a yes and no blank. You check it on one or the other.
>
> If you have answered "no" to the preceding question, what is the amount which constitutes property involved in...the structuring violations of which the Defendant was convicted? And there's a blank space for the entry of a dollar amount.

Q. The jury was away from the courtroom for 5 minutes.

> The verdict was handed to the clerk. Judge Britt asked the clerk to answer the following questions?
>
> One, does $355,567...constitute property involved in... the structuring violations of which the Defendant was convicted? You have answered that no.
>
> Two, if you have answered no to the preceding question, what is the amount which constitutes property involved in...the structuring violations of which the Defendant was convicted? You have answered that zero.

R. Judge Britt let stand the inconsistent/contradictory substantive and forfeiture verdicts.

S. The jury was excused and a sentencing date was set.

T. The Honorable Senior Judge Britt, an experienced judge not renowned for being soft on crime, gave the Defendant an active prison sentence of 1 day (0.008% of the maximum 35 year active sentence he could have imposed).

CONCLUSIONS OF LAW

1. Rule 8.4(b) MISCONDUCT reads in part: "It is professional misconduct for a lawyer to (b) COMMIT (emphasis added) a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Rule .0103 Definitions reads in part: "Subject to additional definitions contained in other provisions of this subchapter, the following words and phrases, when used in this subchapter, will have, unless the context clearly indicates otherwise, the meaning given in rule....(17) Criminal offense showing professional unfitness—the COMMISSION (emphasis added) ...of any felony."

2. If the Defendant COMMITTED a felony, by definition, the Defendant has violated Rule 8.4(b) and the panel must determine the appropriate discipline. If, however, the panel does not find by clear, cogent and convincing evidence that the Defendant COMMITTED a felony, the panel must dismiss the case and, obviously, no discipline is appropriate. No other allegations of rules violations were before the panel.

3. The 7 structuring verdicts, standing alone, are clear, cogent and convincing evidence that the Defendant COMMITTED a felony in violation of Rule 8.4(b).

4. The special verdicts finding as fact that zero dollars were structured, standing alone, are clear, cogent and convincing evidence that the Defendant did not COMMIT a felony or any other crime in violation of Rule 8.4(b).

5. The special verdict finding as fact that zero dollars were structured effectively eviscerated an essential "element," per Judge Britt's instructions, from the structuring convictions thereby calling into question the veracity of the 7 structuring verdicts.

6. The jury, when it rendered its special verdicts, wittingly or unwittingly, in contravention of Judge Britt's explicit instruction, effectively revisited the issue of guilt or innocence.

7. The structuring verdicts and the forfeiture verdicts, taken together, are neither clear, nor cogent nor convincing evidence that the Defendant COMMITTED a felony.

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW the complaint in this action should be DISMISSED.

CLOSING STATEMENT

As the public member of the panel, I have no formal legal training and no experience in legal writing. Accordingly, my dissent may contain errors of a legal nature that are obvious to trained legal professionals, but errors of which I am oblivious.

When on a panel I try to be reasonable, fair, respectful and mindful that the purpose of professional discipline is to protect the public, the courts and the legal profession. In my opinion, the public, the courts and the legal professional have no need of protection from Mr. Johnny S. Gaskins, the defendant in this matter. I would impose no discipline in this matter.

Signed by the dissenting panelist this the 21st day of December, 2010.

David L. Williams. Dissenting Panelist
Disciplinary Hearing Panel