

By Mark Mermelstein and Joel M. Athey

# In the Fifth Dimension

Practitioners face predicaments worthy of the *Twilight Zone* when a witness invokes the Fifth Amendment in a civil lawsuit

**I**t is a dilemma few civil litigators want to encounter. Days before the deposition of a client in a civil litigation, the lawyer for the client learns that the government is investigating the client's former employer. Calls to the investigating agency yield no concrete answers about whether the client is viewed as a possible subject or target of the government's investigation. Understandably, the client wants to avoid any possible criminal exposure that might arise from the deposition. The lawyer, although not a criminal law specialist, generally is aware that the client's deposition testimony could someday be used against the client by the government.

Another lawyer, representing a corporate client in a civil trial, is informed that some current and former corporate employees who are essential to the case have just learned that they are possible subjects or targets of a criminal investigation. They will therefore assert their Fifth Amendment privilege and refuse to answer questions at the civil trial. Consequently, shortly before trial, the inability to call these witnesses to testify leaves the lawyer with virtually no case.

Many seasoned civil litigators, even those who consider themselves experienced general practitioners, stop short of advising clients on criminal matters, believing them to

be best handled by specialists in the field. But with increasing frequency, civil practitioners must confront the dilemmas posed when civil proceedings intersect with criminal investigations. Given the current surge of criminal investigations in the corporate sector, civil practitioners need to have at least a basic understanding of criminal law, particularly the effects of simultaneous criminal and civil proceedings, in order to advise their clients properly. Further complicating matters is the fact that often the civil litigant and the potential target or subject of the criminal investigation require separate counsel and have opposing interests.

In order to appreciate the implications of concurrent civil and criminal proceedings, it is important to remember what the Fifth Amendment does and how it works in practice. To do so requires a review of four basic

---

*Mark Mermelstein and Joel M. Athey are associates in the Los Angeles office of Gibson, Dunn & Crutcher, LLP, and are members of the firm's litigation practice group as well as the business crimes and investigations practice group. The authors would like to thank Tom Holliday, Marcellus McRae, and Stephen Miller for commenting on drafts of the article and Eileen Ahern for her contribution.*



principles about the Fifth Amendment privilege against self-incrimination: 1) when it may be asserted, 2) who may assert it, 3) how it may be asserted, and 4) what effect its assertion may have on a civil proceeding.

## Proper Invocation of the Fifth Amendment

The Fifth Amendment privilege, which is applicable to the states through the Fourteenth Amendment,<sup>1</sup> provides that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>2</sup> Federal decisions have made clear that the Fifth Amendment privilege may actually be asserted more broadly “in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,” in which the witness reasonably believes that the information sought or discoverable as a result of testimony or a statement could be used in a subsequent state or federal criminal proceeding.<sup>3</sup>

California statutes and decisional law afford similar protection. California’s Evidence Code allows any witness, whether in a civil trial or criminal proceeding, to “refuse to disclose any matter that may tend to incriminate him or her.”<sup>4</sup> According to case law, any party or nonparty witness in a discovery proceeding may assert the Fifth Amendment privilege against disclosing information that might tend to be incriminating under either federal or state law.<sup>5</sup> The privilege extends to compelled testimony in any form and may properly be invoked in response to deposition questions,<sup>6</sup> interrogatories,<sup>7</sup> or trial testimony.

In short, whenever individuals are asked to give sworn testimony, whether at a deposition or trial, they may assert the Fifth Amendment and refuse to answer a question if there is a good faith belief that the answer “would in [itself] support a conviction...[or] would furnish a link in the chain of evidence needed to prosecute” them.<sup>8</sup> This good faith belief exists when there is a reasonable belief that the individual is the subject or target of a criminal investigation.<sup>9</sup>

Who may assert the privilege? Significantly, the privilege protects only natural persons; it does not apply to corporations.<sup>10</sup> Consequently, for an individual to assert the Fifth Amendment privilege, the witness must fear actual self-incrimination. Individuals who assert the privilege for testimony that would only incriminate another person—or, as happens often, a current or former employer—are doing so improperly.<sup>11</sup>

How is the privilege asserted? The Fifth Amendment can only be invoked on a question-by-question basis because the court must have the opportunity to determine whether specific questions pose a threat of self-incrimination.<sup>12</sup>

Therefore, it is improper for a witness to make a blanket assertion of the Fifth Amendment privilege by, for example, refusing to answer any questions on a particular subject.<sup>13</sup> A witness who claims the Fifth Amendment privilege has the burden of showing that the testimony or other evidence could tend to be incriminating.<sup>14</sup> Once the privilege has been asserted, the court must make a “particularized inquiry” as to whether the claimant has met that burden with respect to each claim of privilege.<sup>15</sup> The court may conduct in camera hearings for this inquiry but must make its findings on the record as to whether the claim of privilege is valid for each question.<sup>16</sup>

As a result, for a noticed deposition, opposing counsel may not be content with a letter from the lawyer representing the deponent stating that his or her client will either not appear to testify or will assert the Fifth Amendment privilege in response to all questions. In practice, a court is likely to find such a tactic equally unpersuasive.<sup>17</sup> The bottom line is that a lawyer cannot simply call off a deposition upon learning that the deponent is the potential subject or target of a concurrent criminal investigation. Instead, the deponent and his or her lawyer will most likely have to endure the exercise of sitting through the deposition and asserting the deponent’s Fifth Amendment privilege to each and every question for which it may be properly invoked.

What are the ramifications of asserting the Fifth Amendment in a civil proceeding? The answer to this question is critical to deciding on a course of action. While it is true that no punishment can be imposed against a party or witness for claiming the Fifth Amendment privilege, it is also true that courts will not endorse parties taking advantage of their adversaries by invoking the Fifth Amendment. Thus, a party “may be required to either waive the privilege or accept the civil consequences of silence if he or she does exercise it.”<sup>18</sup>

So when the plaintiff in a civil litigation asserts the Fifth Amendment privilege, several things can happen. At the pleading stage, commencing a lawsuit waives the privilege as to the factual issues raised in the complaint, and a plaintiff who persists in refusing to answer risks dismissal of the lawsuit.<sup>19</sup> At the discovery stage, a plaintiff may suffer less drastic but equally damaging sanctions for refusing to answer questions. For example, a plaintiff may be barred from introducing evidence at trial on issues relating to discovery questions that he or she refused to answer.<sup>20</sup>

Likewise, defendants in both state and federal proceedings who claim the Fifth Amendment privilege during a deposition run the risk that the court will preclude their entire testimony at the time of trial.<sup>21</sup> Indeed,

a plaintiff is likely to seek a protective order barring a defendant from testifying at trial about matters on which the defendant refused to be deposed.<sup>22</sup> In addition, federal appellate courts have upheld trial courts that struck affidavits supporting or opposing summary judgment after parties offering the affidavits had asserted the privilege during discovery and refused to answer deposition questions on the subjects in the affidavits.<sup>23</sup>

However, there are limitations on the trial court’s authority to “punish” a defendant for asserting the Fifth Amendment privilege.<sup>24</sup> One decision by a state court held that a default judgment was not warranted against a defendant who asserted the Fifth Amendment during discovery and, while the defendant could not testify, the trial could proceed.<sup>25</sup> And while some federal courts have gone so far as to preclude a civil defendant from introducing any evidence at trial regarding matters covered by a Fifth Amendment assertion,<sup>26</sup> other federal courts have ruled that such stringent restrictions make asserting the Fifth Amendment privilege too “costly.”<sup>27</sup> Certainly, in either forum, the defendant may find the ability to defend a civil suit substantially compromised because of a parallel criminal investigation that precludes participating in discovery.

At least one significant difference exists between state and federal civil practice when a witness asserts the Fifth Amendment privilege at trial. In federal practice, opposing counsel may comment to the jury during closing argument that a witness asserted the Fifth Amendment on the stand and the jury may draw a negative inference from that fact.<sup>28</sup> Under California law, however, neither the court nor counsel may comment on the fact that a witness asserted the Fifth Amendment privilege, and the jury may not draw any inferences—about the credibility of the witness or any other matters at issue in the trial—from that assertion.<sup>29</sup> Interestingly, this ban on commenting on a claim of privilege does not prevent counsel from commenting on gaps in the opposing party’s case resulting from the exercise of the Fifth Amendment privilege by a witness.<sup>30</sup> Clearly, then, even civil litigants who survive discovery sanctions and proceed to trial face a substantial obstacle when their witnesses invoke the Fifth Amendment privilege.

With all these considerations, the lawyer whose client may be the subject of a criminal investigation and is being asked to appear for a deposition in a civil case has a difficult decision to make. First, the lawyer needs to advise the client on whether it is proper for the client to assert the Fifth Amendment privilege. Next, even if such an assertion is proper, the lawyer should advise the client on whether

asserting the Fifth Amendment is a good move strategically. If the client refuses to testify or asserts the Fifth Amendment in the civil suit, the client may avoid disclosing incriminating information that could be used in a criminal proceeding. But invoking the Fifth Amendment may be tantamount to admitting defeat in the civil case, as the client may be precluded from testifying at the civil trial or, worse, called to testify knowing that the jury will be able to draw negative inferences from

postponing the civil proceedings. This alternative also gives parties the benefit of preserving the future testimony of nonparty witnesses who may need to assert the Fifth Amendment privilege.

The seminal case in this area is *Pacers, Inc. v. Superior Court*,<sup>31</sup> in which three individuals were simultaneously defendants in a civil action and under investigation by the U.S. Attorney's Office for the same conduct. The defendants sought to postpone their deposi-

It is important to note that a *Pacers* motion is not grounded in notions of due process, and there is no constitutional right to have a civil proceeding postponed because of a parallel criminal proceeding.<sup>38</sup> Rather, the motion is grounded in the court's inherent discretion to "stay civil proceedings when the interests of justice seem to require such action."<sup>39</sup>

One remedy is to bring a motion for a protective order to stay the civil deposition or vacate the trial date until a deponent or wit-

## In order to escape the quandary of either testifying to help the civil case and risking criminal exposure, or refusing to testify to avoid criminal exposure and risking defeat in the civil lawsuit, parties can look to California decisional law for an alternative that involves postponing the civil proceedings.

an assertion of the Fifth Amendment privilege. In short, the lawyer must weigh the relative exposure that the client faces in the civil and criminal proceedings and advise the client that he or she may essentially have a Hobson's choice.

Similarly, the lawyer representing a corporate client in a civil case with essential witnesses who are current or former employees facing a criminal investigation most likely has a conflict of interest in advising the witnesses whether to assert their Fifth Amendment privilege. For each witness, another lawyer—one qualified to handle a criminal defense and whose only concern is the interests of the witness rather than the corporation's civil and criminal exposure—generally should be consulted and will likely advise the witness to assert the Fifth Amendment privilege. Once this happens, corporate counsel is left in the unenviable position of having to proceed to trial while unable to elicit testimony that may be critical to the company's defense.

In these situations, the lawyers and the parties may face unpleasant choices. However, there may be another, more palatable option for clients whose civil cases require an assertion of the Fifth Amendment privilege.

### *Pacers* Motion

In order to escape the quandary of either testifying to help the civil case and risking criminal exposure, or refusing to testify to avoid criminal exposure and risking defeat in the civil lawsuit, parties can look to California decisional law for an alternative that involves

postponing the civil proceedings. This alternative also gives parties the benefit of preserving the future testimony of nonparty witnesses who may need to assert the Fifth Amendment privilege. The seminal case in this area is *Pacers, Inc. v. Superior Court*,<sup>31</sup> in which three individuals were simultaneously defendants in a civil action and under investigation by the U.S. Attorney's Office for the same conduct. The defendants sought to postpone their deposi-

tions until after the statute of limitations had run on their alleged criminal conduct. The trial court denied this request and held that the three individuals could not testify in their own defense at the civil trial because they had refused to sit for depositions.<sup>32</sup> The court of appeal overruled, holding, "A party asserting the Fifth Amendment privilege should suffer no penalty for his silence,"<sup>33</sup> and commenting that "in this context 'penalty' is not restricted to fine or imprisonment...[but] the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'"<sup>34</sup> The *Pacers* court further held that "where, as here, a defendant's silence [as to the criminal investigation] is constitutionally guaranteed, the court should weigh the parties' competing interest with a view toward accommodating the interests of both parties, if possible."<sup>35</sup> The court ruled, in what may seem an extraordinary remedy, that the defendants' depositions (essentially the entire civil discovery) should be postponed for a year and a half until the criminal statute of limitations had run.

This remedy is in accord with federal practice, in which it has been consistently held that when both civil and criminal proceedings arise out of the same related transactions, the trial court has discretion to grant an objecting party a stay of discovery in the civil action until there is a disposition of the criminal matter.<sup>36</sup> Federal courts have recognized the need to balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment.<sup>37</sup>

ness can freely answer questions without having to assert the Fifth Amendment privilege. The deponent or witness could do so after the criminal statute of limitations has run or once the deponent or witness is no longer a potential subject or target of a government investigation. The strongest case for deferring civil proceedings until after a criminal prosecution is completed occurs when a party being investigated for a serious offense is also involved in a civil action concerning the same matter.<sup>40</sup> The fact that an indictment has not yet been returned in the criminal proceeding is a factor to be considered by the court but does not make a *Pacers* motion to stay civil proceedings any less appropriate.<sup>41</sup>

Generally, a court will consider five factors when deciding whether to delay civil proceedings—which can constitute a single deposition, all discovery, or the entire trial—in the face of parallel criminal proceedings:

- 1) The interest of the plaintiff in proceeding expeditiously, and the potential prejudice to the plaintiff of a delay.
- 2) The burden that any particular aspect of the civil proceedings may impose on defendants.
- 3) The convenience of the court in the management of its cases.
- 4) The interests of persons not parties to the civil litigation.
- 5) The interest of the public in the pending civil and criminal litigation.<sup>42</sup>

It is important to note that a *Pacers* motion is far from a perfect solution. First, a typical *Pacers* motion seeking to stay civil discovery until the criminal proceedings are resolved is



**On The Record™**

The Trial Presentation Professionals

www.ontherecord.com

**Computerized  
Evidence  
Presentation**

- Document Imaging • Digital Video
- Presentation + War Room Equipment
- On-Site Support • Courtroom Technicians

Los Angeles (310) 342-7170 • San Francisco (415) 835-5958

## ATTORNEY-CPA-LITIGATION CONSULTANT

Experienced Expert Witness Since 1957  
Professor of Law and Accounting  
Special Master, Mediator, Arbitrator

AUTHOR • LECTURER

**DAVID OSTROVE ■ ATTORNEY-CPA**

TELEPHONE 323/939-3400 • FAX 323/939-3500

5757 WILSHIRE BOULEVARD, SUITE 535, LOS ANGELES, CALIFORNIA 90036



an extraordinary remedy. This is true because the government may investigate and seek an indictment during the entire statute-of-limitations period, which, for example, is generally five years for nonviolent federal crimes and ten years for crimes affecting federally insured financial institutions.<sup>43</sup> For nonviolent state crimes, the statute of limitations generally varies from three to six years.<sup>44</sup> Complicating the situation is that, as a practical matter, prosecutors rarely indicate that an investigation is closed or confirm that an individual is no longer an active subject or target. Typically, the only time a potential witness knows for certain that there is no longer a risk of self-incrimination by testifying in a civil proceeding is after the criminal statute of limitations has run. Thus, civil litigants who file *Pacers* motions could theoretically be seeking a stay of the civil proceedings for up to six years or even for ten years if a financial institution is a putative victim. Courts rarely grant stays in civil litigation for six years or more.<sup>45</sup>

### Modified *Pacers* Motion

There is however, another solution—a modified *Pacers* motion. Using this procedure, a party to the civil suit (whether an individual or corporation) would agree to allow the deposition to go forward. At the deposition, a deponent—whether a party or a nonparty witness—would assert the Fifth Amendment privilege as needed. Afterward, the party to the suit who is faced with the prejudice caused by the assertion of the privilege would bring a motion seeking an order mandating that if circumstances should change in the criminal investigation making it possible for the deponent to testify fully, a new deposition would be taken, thereby preserving the deponent's ability to testify at trial. This motion requests much more limited relief from the court than the *Pacers* motion and does not seek to delay civil proceedings. It also allows potential deponents time to either resolve the criminal matter or clarify whether the government views them as actual subjects or targets of a criminal investigation. The modified *Pacers* motion is not a perfect solution either, but when the traditional *Pacers* motion is unlikely to prevail or has already failed, it may be a suitable alternative.

In California, a civil court has the authority to grant a motion immunizing a potential witness from state criminal prosecutions,<sup>46</sup> which presents another potential solution to the dilemma—requesting immunity directly from the civil court.<sup>47</sup> But such a motion also must be served on the prosecutor's office, and the prosecutor merely needs to submit an opposing declaration stating that there are reasonable grounds to believe that the proposed grant of immunity might unduly hamper a criminal proceeding, including the subse-

# We Understand Bankruptcy

OVER 25 YEARS OF SUCCESS

**The Legal Side and  
The Human Side**

### Clients troubled by debts?

We are experts at:

- Debt Restructuring Plans
- Chapters 7, 11, and 13 Relief
- Conservative Asset Protection

### Refer your clients with confidence:

- AV Rating
- Free Consultations
- Reasonable Fees



Professional, Compassionate Solutions



**Laurence D. Merritt**  
Attorney at Law

Phone: 818.710.3823 • email: Lawlar@aol.com  
Internet: www.legalknight.com

Formerly with Merritt & Hagen

quent prosecution of that witness.<sup>48</sup> The trial court must treat the prosecutor's declaration as conclusively establishing that the potential witness's request for immunity cannot be granted.<sup>49</sup> Thus, this solution does not hold out much promise of success unless the individual was never a target or subject in the first place.

Sometimes plaintiffs benefit from civil litigation that overlaps with an existing or subsequently commenced criminal investigation. Indeed, from a less charitable standpoint, when a civil complaint is filed in the wake of a well-publicized criminal investigation, or when the civil and criminal complainants are the same (such as when the government is the victim of a fraud),<sup>50</sup> the motives of the civil plaintiff can be questioned. If the civil complainant is suing or noticing depositions to get the benefit of the negative inference of a party or third-party witness asserting the Fifth Amendment privilege, other remedies surface. For example, if the opposing party could demonstrate that a deposition was not reasonably calculated to lead to relevant evidence, grounds would exist to bar the deposition from going forward.<sup>51</sup> Assuming that one cannot demonstrate bad faith on the part of the civil plaintiff, a *Pacers* motion, or a modified *Pacers* motion, may be the answer.

Given the current climate of corporate

scandal and resulting investigations, civil practitioners need to stay alert to the ramifications that arise when the Fifth Amendment privilege is asserted in a civil proceeding. And lawyers should understand that there are options available if a civil proceeding is affected by a client or third-party witness who cannot participate in discovery or at trial because of concerns about self-incrimination. Pursuing these options might make it possible for clients to avoid facing an uncomfortable choice between vigorously prosecuting or defending a civil claim and protecting themselves against criminal exposure. ■

<sup>1</sup> Malloy v. Hogan, 378 U.S. 1, 6 (1964).

<sup>2</sup> U.S. CONST. art. V. The same privilege is included in the California Constitution. CAL. CONST. art. I, §15.

<sup>3</sup> United States v. Balsys, 524 U.S. 666, 672 (1998) (citing Kastigar v. United States, 406 U.S. 441, 444-45 (1972)); see also McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it").

<sup>4</sup> EVID. CODE §940. In addition, a defendant in a criminal case has a statutory privilege not to be called as a witness to testify. EVID. CODE §930.

<sup>5</sup> Zonver v. Superior Court, 270 Cal. App. 2d 613, 620-21 (1969).

<sup>6</sup> See Marriage of Hoffmeister, 161 Cal. App. 3d 1163, 1171 (1984).

<sup>7</sup> *Id.*

<sup>8</sup> Blackburn v. Superior Court, 21 Cal. App. 4th 414, 428 (1993). See also Hoffman v. United States, 341 U.S.

479, 486 (1951).

<sup>9</sup> A "target" is a person about whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the prosecutor's judgment, is a putative defendant. See UNITED STATES ATTORNEY'S OFFICE MANUAL ¶9-11.151 (2000-01 Supp.). A "subject" is a person whose conduct is within the scope of the prosecutor's or grand jury's investigation. *Id.*

<sup>10</sup> Braswell v. United States, 487 U.S. 99, 104 (1988) (a corporation has no Fifth Amendment privilege); Avant! Corp. v. Superior Court, 79 Cal. App. 4th 876, 883 (2000) (same); George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288 (1968) (same); see also Bellis v. United States, 417 U.S. 85, 100 (1974) (partnerships cannot claim privilege).

<sup>11</sup> See Rogers v. United States, 340 U.S. 367, 371 (1951).

<sup>12</sup> Fuller v. Superior Court, 87 Cal. App. 4th 299, 305 (2001).

<sup>13</sup> *Id.* See also Warford v. Medeiros, 160 Cal. App. 3d 1035, 1045 (1984) (requiring trial court to conduct particularized inquiry of questions to which Fifth Amendment privilege is asserted to determine if invocation was appropriate).

<sup>14</sup> Fuller, 87 Cal. App. 4th at 305.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Blackburn v. Superior Court, 21 Cal. App. 4th 414, 425-26 (1993).

<sup>19</sup> Fremont Indem. Co. v. Superior Court, 137 Cal. App. 3d 554, 557 (1982) ("Plaintiff cannot have his cake and eat it too.").

<sup>20</sup> Dwyer v. Crocker Nat'l Bank, 194 Cal. App. 3d 1418, 1432-33 (1987).

<sup>21</sup> Marriage of Hoffmeister, 161 Cal. App. 3d 1163, 1169 (1984); Guitierrez-Rodriguez v. Cartagena, 882 F. 2d

# ■ IMMIGRATION LAW ■

- CONSULAR PROCESSING
- EMPLOYER SANCTIONS (I-9)
- DESIGN CORPORATE IMMIGRATION POLICIES
- EXPERT TESTIMONIAL SERVICES
- TEMPORARY WORK VISAS
- Intra-Company Transfers
- Entertainers & Sports Professionals
- NAFTA (North American Free Trade Agreement) Visas
- Professionals & Investors
- Blue/White Collar Employee Immigration Assistance
- LABOR CERTIFICATIONS
- FAMILY RELATED PETITIONS
- OUTBOUND VISA CAPABILITY

## DON'T PLAY AROUND WHEN IT COMES TO IMMIGRATION LAW

**Newport Beach**  
4685 MacArthur Court, Suite 400  
Newport Beach, CA 92660  
phone 949-251-8844  
fax 949-251-1545  
email hirson@hirson.com



**HIRSON WEXLER PERL**  
ATTORNEYS AT LAW

AV Rated

**Los Angeles**  
6310 San Vicente Blvd., Suite 415  
Los Angeles, CA 90048  
phone 323-936-0200  
fax 323-936-4488  
email hirson-la@hirson.com

www.hirson.com • also in San Diego, CA • Phoenix, AZ • Las Vegas, NV • New York, NY • Wilton, CT • Toronto, Canada  
David Hirson and Mitchell L. Wexler are certified by the State Bar of California Board of Legal Specialization as specialists in Immigration and Nationality Law.  
All matters of California state law are provided by active members and/or under the supervision of active members of the California State Bar.

553, 577 (1st Cir. 1989) (“A defendant may not use the Fifth Amendment to shield herself from the opposition’s inquiry during discovery only to impale her accusers with surprise testimony at trial.”); *United States v. Sack*, 118 F.R.D. 500 (D. Neb. 1987).

<sup>22</sup> *Pacers, Inc. v. Superior Court*, 162 Cal. App. 3d 686, 688-89 (1984).

<sup>23</sup> *In re Edmond*, 934 F. 2d 1304, 1308-09 (4th Cir. 1991); *United States v. Parcels of Land*, 903 F. 2d 36, 43 (1st Cir. 1990), *cert. denied*, 498 U.S. 916 (1990).

<sup>24</sup> *Securities & Exch. Comm’n v. Colello*, 139 F. 3d 674, 677 (9th Cir. 1998); *Wehling v. Columbia Broad. Sys.*, 608 F. 2d 1084, 1089 (5th Cir. 1979) (if invocation of the Fifth Amendment privilege prejudiced the other party, the district court “would be free to fashion whatever remedy is required to prevent unfairness”).

<sup>25</sup> *Alvarez v. Sanchez*, 158 Cal. App. 3d 709, 715 (1984).

<sup>26</sup> *Securities & Exch. Comm’n v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-50 (S.D. N.Y. 1985); *Securities & Exch. Comm’n v. Benson*, 657 F. Supp. 1122 (S.D. N.Y. 1987); *but see United States v. Talco Contractors, Inc.*, 153 F.R.D. 501, 507 (W.D. N.Y. 1994) (questioning the grant of total preclusion orders in *Cymaticolor* and *Benson*).

<sup>27</sup> *Securities & Exch. Comm’n v. Graystone Nash, Inc.*, 25 F. 3d 187, 192 (3d Cir. 1994); *Campbell v. Gerrans*, 592 F. 2d 1054, 1058 (9th Cir. 1979) (reversing district court’s dismissal of civil rights action due to defendant’s refusal to answer deposition questions based on the Fifth Amendment privilege).

<sup>28</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”); *see LiButti v. United States*, 107 F. 3d 110, 123 (2d Cir. 1997) (Fifth Amendment privilege claims are

admissible and competent evidence introduced for their adverse inferential value against a defendant). An adverse inference from the assertion of the Fifth Amendment privilege in a criminal proceeding is not permitted. *Mitchell v. United States*, 526 U.S. 314, 327-28 (1999).

<sup>29</sup> EVID. CODE §913(a).

<sup>30</sup> *People v. Redmond*, 29 Cal. 3d 904 (1981).

<sup>31</sup> *Pacers, Inc. v. Superior Court*, 162 Cal. App. 3d 686 (1984). This case is so well known that the motion made to seek this type of relief is known as a *Pacers* motion.

<sup>32</sup> *Id.* at 688.

<sup>33</sup> *Id.* at 689.

<sup>34</sup> *Id.* (quoting *Griffin v. California*, 380 U.S. 609, 614 (1965)).

<sup>35</sup> *Id.* at 690.

<sup>36</sup> *See, e.g., Campbell v. Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. den.*, 371 U.S. 955; *Perry v. McGuire*, 36 F.R.D. 272 (S.D. N.Y. 1964); *Paul Harrigan & Sons, Inc. v. Enterprise Animal Oil Co., Inc.*, 14 F.R.D. 333 (E.D. Pa. 1953); *National Discount Corp. v. Holzbaugh*, 13 F.R.D. 236 (E.D. Mich. 1952).

<sup>37</sup> *Securities & Exch. Comm’n v. Graystone Nash, Inc.*, 25 F. 3d 187, 192 (3d Cir. 1994); *Campbell v. Gerrans*, 592 F. 2d 1054, 1058 (9th Cir. 1979) (reversing district court’s dismissal of civil rights action due to defendant’s refusal to answer deposition questions based on the Fifth Amendment privilege).

<sup>38</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see also Blackburn v. Superior Court*, 21 Cal. App. 4th 414, 435-36 (1993); *People v. Coleman*, 13 Cal. 3d 867, 885 (1975).

<sup>39</sup> *Avant! Corp. v. Superior Court*, 79 Cal. App. 4th 876, 885 (2000). *See Klein v. Superior Court*, 198 Cal. App. 3d 894, 905 (1988).

<sup>40</sup> *Securities & Exch. Comm’n v. Dresser Indus., Inc.*, 682 F. 2d 1368, 1375-76 (D.C. Cir. 1980); *Newman v.*

*U.S.*, 1992 WL 115191, \*1 (N.D. Ohio 1992).

<sup>41</sup> *Brock v. Tolkow*, 109 F.R.D. 116 (E.D. N.Y. 1985) (considered *Pacers* issue in preindictment context).

<sup>42</sup> *Avant!*, 79 Cal. App. 4th at 510-11.

<sup>43</sup> 18 U.S.C. §3282 (forbidding prosecution, trial, or punishment “unless the indictment is found or the information is instituted within five years next after such offense shall have been committed”); 18 U.S.C. §3292 (setting forth 10-year statute of limitations for crimes affecting federally insured financial institutions).

<sup>44</sup> *See* PENAL CODE §§800, 801.

<sup>45</sup> *See Fuller v. Superior Court*, 87 Cal. App. 4th 299, 309 (2001) (stay is not favored when limitations period on criminal prosecution has years to run).

<sup>46</sup> *People v. Superior Court (Kaufman)*, 12 Cal. 3d 421 (1974).

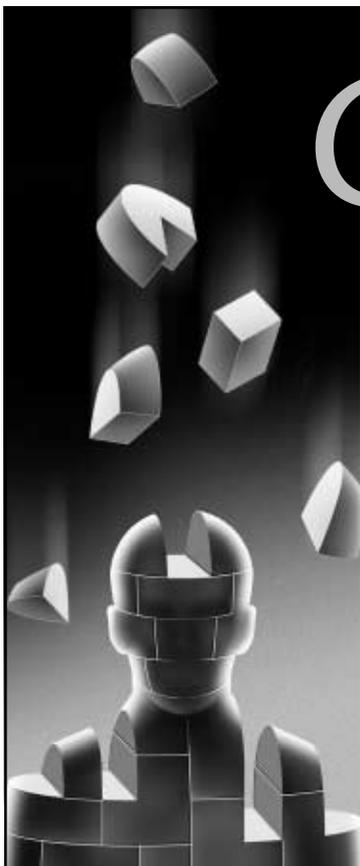
<sup>47</sup> *See, e.g., Blackburn v. Superior Court*, 21 Cal. App. 4th 414, 424 (1993).

<sup>48</sup> *See Philibosian v. Superior Court*, 149 Cal. App. 3d 938, 940 (1983).

<sup>49</sup> *Id.*

<sup>50</sup> At least one federal court has questioned the propriety of the government using a criminal investigation to further its own civil lawsuit. *See, e.g., United States v. Tweel*, 550 F. 2d 297 (5th Cir. 1977) (examining implications of parallel civil and criminal proceedings in the Fourth Amendment context).

<sup>51</sup> The court is empowered to issue a protective order quashing a deposition notice in order to protect a party or deponent against “unwarranted annoyance, embarrassment or oppression.” CODE CIV. PROC. §2025(i). The court may also do this if it determines that the “burden...or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.” CODE CIV. PROC. §2017(c).



## Crafting Litigation Strategy

National Jury Project brings a wealth of courtroom experience, professional insight, and real world data to devising winning litigation strategy.

- Over 5,000 cases
- 25 years of experience
- Successful, systematic approach
- Consultants trained in psychology, sociology, communication, and law

Our case involvement includes complex commercial litigation, tobacco litigation (*Boeken v. Philip Morris*), asbestos litigation, intellectual property (*Compaq v. Packard Bell*), employment (*Carroll v. Interstate Brands Corp.-Wonderbread*), personal injury, and criminal defense.

**NATIONAL  
JURY PROJECT**  
TRIAL CONSULTANTS

SETTING THE STANDARD SINCE 1975

(510) 832-2583

Email: [njpwest@njp.com](mailto:njpwest@njp.com) • [www.njp.com](http://www.njp.com)

CASE ANALYSIS • MOCK TRIALS • SURVEYS • JURY SELECTION • WITNESS PREPARATION