

**CRIMINAL LAW AND CIVIL LITIGATORS:  
A REVIEW OF THREE LITTLE KNOWN FEDERAL STATUTES  
AND PARALLEL PROSECUTION**

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Table of Contents

**PART ONE**

I. MONEY LAUNDERING D-1

II. FALSE, FICTITIOUS OR FRAUDULENT STATEMENTS TO DEPARTMENTS  
OR AGENCIES OF THE UNITED STATES. D-5

III. RECORDS AND REPORTS ON MONETARY INSTRUMENTS TRANSACTIONS. D-6

**PART TWO**

I. PARALELL PROSECUTION OF CIVIL AND CRIMINAL PROCEEDINGS D-8

II. DISCUSSION D-8

A. Grant or Denial of Stay Within the District Court's Discretion D-8

B. The Appropriate Court D-9

C. Parties and Subject Matter D-10

D. Constitutional Considerations. D-11

E. Practical Consideration D-19

III. CONCLUSION D-20

**Criminal Law and Civil Litigators: A Review of Three Little Known Federal Statutes and Parallel Prosecution**

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In the past ten years, 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 is 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 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.

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 herein 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.

## **PART ONE-**

### **I. 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 a monetary transaction which knowledge or reason to know that the funds involved were derived from unlawful activity were necessary. The new 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 derived 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 new 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 the nature, source or ownership of the proceeds. 18 U.S.C. § 1956. Generally, section 1956 is of little significance to the well intentioned litigator. It clearly requires knowledge of the unlawfulness of the underlying activity and an intent to promote it. However, section 1957 of the Money Laundering Control Act does not contain section 1956's strict intent and knowledge requirements.

The second offense created by The Money Laundering Control Act of 1986 is defined 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 that is 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. (b)(2) The court may impose an alternative fine to that impossible 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). ....

(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 term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

18 U.S.C. § 1957. 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 (1<sup>st</sup> 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 of 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 (4<sup>th</sup> Cir. 1994), *cert. denied*, 115 S. Ct. 459 (1995); *accord United States v. Johnson*, 971 F.2d 562, 570 (10<sup>th</sup> 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 attorneys appointed by the courts. "A defendant may not insist on representation by an attorney he cannot afford." . . . The forfeiture statutes does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing . . . . Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his money to obtain the advice and assistance of . . . counsel. . . . The defendant has no right to spend another person's money for services rendered by an attorney, even if those funds are the only way that the defendant will be able to retain the counsel of his choice. [N]of 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.'

The Supreme Court next examined the argument that the forfeiture statute was merely a means to prevent fraudulent transfers and thus should fall in the face of the defendants Sixth Amendment rights. This argument was also rejected.

[T]he property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges. In § 853(c), the so called 'relation back' provision, Congress dictated that "[a]ll right, title and interest in property' obtained by criminal via the illicit means described in the statute 'vests in the United States upon commission of the act giving rise to the forfeiture.'" In sum, § 853(c) reflects the application of the long-recognized and lawful practice of vesting title to any forfeitable assets, in the United States, at the time the criminal act giving rise to the forfeiture.

The Supreme Court 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.

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 of 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. But when a defendant claims that he has suffered some substantial impairment of his Sixth Amendment right by virtue of the seizure or forfeiture of assets in his possession, such a complaint is no more than a reflection of "the 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 Supreme Court concluded its opinion by noting that "[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 criminal defense, one wonders 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 client funds which constituted criminally derived property, it would subject to criminal liability. The fact that the transaction arises or is a function of the attorney-client relationship is irrelevant.

## **II. FALSE, FICTITIOUS 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:

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

18 U.S.C. § 1001.

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 be "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 potential problems for attorney's 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 101. *See United States v. Maroun*, 739 F. Supp. 684 (D. Mass. 1990) (holding that parties charged with structuring transaction 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 possible that attorney 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 5313(a) of the Currency and Foreign Transaction Reporting Act provides:

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

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

Each financial institution other than a casino or the Postal Service shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution which involves a transaction in currency of more than \$10,000. Multiple currency transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in cash or cash out totalling more than \$10,000 during any one business day. Deposits made at night or over a weekend or holiday shall be treated as if received on the next business day following the deposit.

31 C.F.R. § 103.22(a)(1)(1990). It should be noted that there are a number of exceptions to the foregoing requirements. 31 C.F.R. §§ 103.22(a)(4)(b)(1) and (2). However, the exceptions seem to have little application to attorneys. The foregoing sections may have application to law firms and attorneys involved in real estate transactions where substantial funds pass through their accounts.

Section 5314 of the Currency and Foreign Transaction Reporting Act requires reports regarding transaction between a resident or United States citizen or a person doing business in the United States to keep certain records and file certain reports when engaging in transactions with foreign financial institutions. Section 5316 covers reporting requirements for arising from the importation or exportation of monetary instruments and provides in relevant part:

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

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

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

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

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

Reports made pursuant to sections 5313, 5314 and 5316 are made available to federal agencies upon request of the agency's head. The reports are to be made available for purposes consistent with those sections or a regulation prescribed under those sections. 31 U.S.C. § 5319. The availability of such reports gives rise to serious attorney-client communication questions which the cautious litigator should be mindful. *See United States v. Monnat*, 853 F. Supp. 1301 (D. Kan. 1994).

A person who willfully violates sections 5313, 5314 or 5316 or a regulation promulgated pursuant to the Currency and Foreign Transaction Reporting Act is subject to fines of not more than \$250,000, imprisonment for not more than five years, or both. 31 U.S.C. § 5322.

The Currency and Foreign Transaction Reporting act does provide for a mechanism for obtaining administrative rulings on the propriety of action which may be subject to the Act. However, the regulations promulgated regarding such administrative opinions may limit resort to them by attorneys:

(a) Each request for an administrative ruling must be in writing and contain the following information:

(1) A complete description of the situation for which the ruling is requested, (2) A complete statement of all material facts related to the subject transaction; (3) A concise and unambiguous question to be answered, (4) A statement certifying, to the best of the requestor's knowledge and belief, that the question to be answered is not applicable to any ongoing state or federal investigation, litigation, grand jury proceeding, or proceeding before any other governmental body involving either the requestor, any other party subject to the transaction, or any other party with whom the requestor has an agency relationship, (5) A statement identifying any information in the request that the requestor considers to be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552, and the reason therefor, (6) If the subject situation is hypothetical, a statement justifying why the particular situation described warrants issuance of a ruling, (7) The signature of the person making the request, or (8) If an agent made the request, the signature of the agent and a statement certifying the authority under which the request is made.

(b) A request filed by a corporation shall be signed by a corporate officer and a request filed by a partnership shall be signed by a partner.

(c) A request may advocate a particular proposed interpretation and may set forth the legal and factual basis for that interpretation.

(d) Requests shall be addressed to: Director, Office of Financial Enforcement, Office of the Assistant Secretary (Enforcement), U.S. Department of the Treasury, 1500 Pennsylvania Avenue, N.W., Room 4320, Washington, D.C. 20220.

## **PART TWO-**

### **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 phenomena is "parallel prosecution." From the prospective of the civil attorney, there are several areas of acute importance when representing either the party that may at some point be designated the "target" or "subject" of an investigation and alternatively when representing either the lending institution or the party or individual in a position of relative alignment with the state or federal prosecution or investigation.

Regardless of the alignment of the civil litigator, it is of extreme importance to be in a position to recognize the existence of the potential parallel prosecution and deal with it appropriately. This paper will focus on issues primarily from the prospective of the civil client who is also a target or subject of an investigation; however, the considerations are similar regardless of one's alignment.

This portion of the 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 Cardozo's Statement in *Landis*, 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," 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 discretion:

[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 "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the

court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." (emphasis added). *United States v. Any & All Assets of that Certain Business Known as Shane Co.*, 147 F.R.D. 99, 101 (M.D.N.C. 1993) ("The motion to stay, in reality, seeks a protective order pursuant to Fed. R. Civ. P. 26(c) and thus the petitioner must show good cause for such an order."); see Wright & Miller, *Federal Practice and Procedure Civil* § 2035 at 264-265; 4 Moore's *Federal Practice*, ¶ 26.68 at 26-491. As is the case generally with matters entrusted to the court's discretion, the standard for appellate review is the deferential one of "abuse of discretion." See, e.g., *Arthurs v. Stern*, 560 F.2d 477, 479-480 (1<sup>st</sup> Cir. 1977); *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3<sup>rd</sup> Cir. 1967); *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912). 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 a 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. *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) ("No federal district court in a criminal case has ever enjoined a party to civil action in another jurisdiction from litigation the civil action or taking testimony in it."); *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 of 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. See *Any & All Assets of Shane Co.*, 147 F.R.D. at 101 ("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."). "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 F.R.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 governments case may be compromised.

*Any & All Assets of 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 (5<sup>th</sup> 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:

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. *Holzbaugh*, 400 F.2d at 209. The government was obliged to demonstrate, however, that all the material sought was relevant to the tax investigation.

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 to 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 denied the district attorney by obtaining the English injunction. 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 the concurrent civil discovery permits the government to thwart the privilege against self-incrimination and to circumvent 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 (5<sup>th</sup> 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 choose 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, 119 (E.D. N.Y. 1985); see *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

Argument 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 Blummer 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 Siegel 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:

[T]here 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 a request for admissions. Finally, in *SEC v. Vesco*, 16 F.R. Serv. 2d at 1240, an SEC injunctive action against defendants who faced "imminent" criminal prosecution, the court decided to grant 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 appears 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. 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 in 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 question 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 (5<sup>th</sup> 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) ("Court 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. 1981) (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 (6<sup>th</sup> 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 provision."); *Campbell v. Gerrans*, 592 F.2d 1054 (9<sup>th</sup> Cir. 1979) (dismissal based upon refusal to answer four of the thirty-four "questionable" interrogatories reversed); *Thomas v. United States*, 531 F.2d 746 (5<sup>th</sup> 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 (5<sup>th</sup> 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 were pending forced him to choose between preserving his fifth amendment privilege and losing the civil suit. It appears to us, however, that Keno 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 innovation 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 causal 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." *Gilbert*, 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 pursuing 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); Jale 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 the 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 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 Harrigan & Sons, Inc., 14 F.R.D. at 334-335; see also The Siegel Trading Co., Inc. v. Bagley, No. 77-1405, slip op. At 6 n.5 (7 Cir. July 7, 1977) ("If plaintiffs 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 defendant 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 (8<sup>th</sup> 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 a 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 Siegel Trading Co., In., [1978] Comm. Fut. L. Rep. 201,637 (1978). In Siegel, 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 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 Siegel Trading Corp.*, [1978] *Comm. Fut. L. Rep.* at 201,673.. In a separate concurring opinion, Commissioner Bagley 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 could 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 (5 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 difference 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 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 (2d Cir. 1967), *cert. granted sub nom., Simon v. Wharton*, 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.*

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 plaintiffs 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 may 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 defendants 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.*

*When, however, the defendant seeks to postpone civil discovery, the courts appear to be more reluctant to exercise their power to grant stays. But cf. O'Brien v. McCord, No. 1233-72 (D.D.C. 19972) (order of Richey, J., stating that "the ends of justice may require that the depositions of [defendants] be stayed in view of the pendency of the criminal indictments"). Defendants have sought not only to forestall civil discovery that might incidentally benefit the government. In both situations, the trial court balances the interest in uninhibited exploration of the civil matter against the prejudice that may result to the defendant from the government's access to broad civil discovery.*

#### *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 (9<sup>th</sup> 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 had 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 purpose 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 for 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 pursuing 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, 580 (D.D.C. 1970). However, the cases denying stays 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 statute, pre-LaSalle cases suggest that a stay might issue. In Silver v. McCamey, 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 (6<sup>th</sup> 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 indictment for narcotics violations. 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 had been recommended or had actually been begun.*

*Henry, 491 F.2d at 705.*

*In Venn, 400 F.2d at 209, 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 fourth situation, where the agency's civil discovery might spill-over 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 (9<sup>th</sup> Cir. 1977), the court acknowledge 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.*

#### *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 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 defense. There is 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 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 or 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 Sanitary 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 Parrot, 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 insubstantial 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, though granting a protective order requiring that the depositions be sealed, refused to stay all civil discovery:*

*[A]t the rate at 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, plaintiffs 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. An perhaps it might also simplify the issues.*

*Borda, 383 F.2d at 609 (footnoted omitted). Moreover, it may become unnecessary to litigate issues in the civil case by virtue of their 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 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 Siegel Trading Co., Inc.*, [1978] *Comm. Fut. L. Rep.* at 535 n.14. Finally, where the government stands to benefit from civil discovery by a private plaintiff, courts have been influenced to grant protective orders by the fact that many agencies already possess potent discovery devices that render unnecessary their exploitation of the fruits of private litigation. As the court explained in *GAF Corp.*

*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 litigant, 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 arsenal of new implements for government intrusions.*

*GAF Corp.*, 415 F. Supp. at 132; see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 1978-1 Trade Cases (CCH) ¶62,019 (E.D. Pa. 1978); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d at 296.

### III. CONCLUSION

*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 spectre of criminal prosecution exists.*