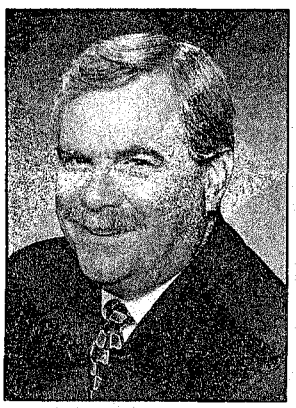
ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

Volume XXI No. 1 *October 1998*

Letter from the President

At the time of writing this column, the California Supreme Court has yet to decide the fate of California's MCLE program, and the State Bar is still awaiting some legislative solution to the Governor's veto of the funding bill in the Fall of 1997. Regardless of how the MCLE case is decided and whether the State Bar will administer an MCLE program, ABTL looks forward to another year of outstanding educational programs for business trial lawyers. While the ABTL Officers and Board monitor the MCLE situation and the future of the State Bar with interest, as do many lawyers in the state, those issues, fortunately, are not the types of issues that the ABTL historically has tackled. Instead, we can focus on those things that make ABTL different from other bar associations: presenting top-quality educational programs directed to the needs of business trial lawyers and improving communications and relationships among business trial lawyers and the local judiciary.



Richard J. Burdge, Jr.

With a primary mission of providing education for lawyers, some would think that the MCLE issue would be critical to the organization. We do make sure that our programs help the members and others who attend them satisfy any mandatory requirements, but this organization started and grew into what it is today long before MCLE was even a gleam in the eyes of the State Bar Board of Governors. This year's *Twenty-fifth* Annual Seminar, planned for October at the Four Seasons Wailea Resort in Maui, will be proof of that. I expect that, whatever the fate of the Bar's current MCLE program, ABTL will continue to strive to present the most relevant and stimulating programs available on business trial issues. That is the challenge on which the Board is focusing

(Continued on page 2)

INSIDE

Parallel Proceedings: Criminal and Civil Litigation

In high school geometry class we learned that parallel lines never meet. If only that were so in the world of litigation.

The phrase "parallel proceedings" refers to simultaneous or successive legal proceedings involving the same facts or parties. The usual three litigation tracks along which your client may have to proceed simultaneously are (1) civil litigation by the government or private parties (either direct actions or shareholder derivative actions), (2) criminal investigation or proceedings by federal or state authorities, and (3) administrative proceedings by federal, state, or local government agencies. Of course, these proceedings are not truly "parallel" in the way our high school geometry teacher defined the term. Rather, they intersect at a target, the alleged principal wrongdoer, which may be the person or company which has contacted you for representation.

Jan Nielsen Little

The last several years have seen an increase in regulation of industry, publicly through state and federal legislation and privately through aggressive litigation. The result has been an increase in the number of parallel proceedings. Civil defendants today in cases involving securities fraud, financial institution fraud, business fraud, healthcare fraud, antitrust violations, environmental torts, labor/ERISA issues, or trade secret/piracy issues, increasingly find themselves facing the scrutiny of criminal investigations or administrative proceedings while they simultaneously try to defend the civil litigation. Indeed, sophisticated general counsel of corporations who are victims of business torts may affirmatively enlist the aid of criminal or administrative regulators to redress perceived wrongs (and, perhaps, to gain leverage for civil litigation).

Much has been written on the topic of parallel proceedings. The following synopsis is intended to highlight several important areas which deserve close and careful attention by a litigator caught in the crossfire of parallel proceedings.

The Pressure Points

The following list of potential problems in parallel criminal, civil or administrative proceedings is by no means exhaustive.

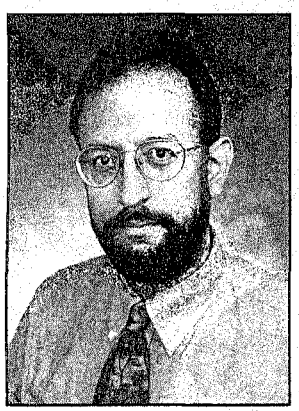
- Your client may not be in a position to give a deposition in a pending civil case, because his testimony could be used against him in a pending criminal case.

(Continued on page 2)

Parallel Proceedings

Continued from page 1

- Your client may need to invoke his Fifth Amendment privilege in pleadings in the civil case (such as the Answer or discovery responses) in order to avoid making admissions usable in the criminal case.
- Asserting Fifth Amendment defenses necessary for the criminal case may have an adverse impact on the civil case, because of evidentiary sanctions or the drawing of adverse inferences.
- The criminal prosecutor and civil plaintiffs' counsel may join forces. Plaintiffs' counsel may share deposition transcripts and investigation results with prosecutors, and prosecutors may, to a more limited extent, share investigation results and theories with plaintiffs' counsel. Federal prosecutors are subject to the restrictions of Federal Rule of Criminal Procedure 6(e), which guards the secrecy of grand jury proceedings. Rule 6(e) does not, however, preclude informal communications by the federal prosecutor concerning information from sources other than the grand jury, including any materials seized during a search of your client's business (or home). Also, state prosecutions may be governed by different rules. In California, grand jury transcripts are publicly available once charges have been filed, and state prosecutors may therefore be more likely to work cooperatively with plaintiffs' counsel.



Ragesh K. Tangri

- Civil plaintiffs may subpoena or otherwise seek to discover material from criminal investigators. *See, e.g., In Re Motion to Unseal Electronic Surveillance Evidence (Smith v. Lipton)*, 990 F.2d 1015 (8th Cir. 1993) (an 8-5 en banc decision, denying disclosure of government wiretap information to civil litigants in RICO action).
- The civil plaintiff may be able to use your client's criminal plea as an admission in the civil case.
- Your client's insurance carrier may balk at funding your client's defense in the civil case because the presence of criminal charges creates an inference that your client's conduct was intentional and criminal, and therefore excluded from coverage.
- Financial resources which would otherwise be committed to defending the civil case may need to be diverted to defending the criminal case.
- The presence of a criminal investigation or an administrative proceeding will require the retention of additional counsel skilled in these areas, as well as additional counsel for individual employees or officers, resulting in increased costs and coordination difficulties.
- The financial and emotional pressures of parallel proceedings may increase settlement pressure on your client in both the civil and criminal cases.
- The federal sentencing guidelines for individuals and for organizations place a premium on cooperation with federal authorities, creating incentives for self-reporting and for reporting of wrongdoing of others. Pressure to take advantage of these provisions on the criminal side may create or increase exposure for civil liability.

(Continued on page 3)

Letter from the President

Continued from page 1

in the 1998-1999 year, and we have made a tremendous start.

To begin with, there is the Silver Anniversary Annual Seminar, which we, and the other chapters around the state, have been planning for more than a year and which will take place over the weekend of October 9-13, 1998. The theme of the program is "Persuasion: How to Try a Business Case Effectively." Our Seminar Chair and ABTL Treasurer, Seth Aronson of O'Melveny & Myers LLP, has been assembling an extraordinary faculty and planning a program that is well worth attending.

The keynote speaker is Justice Kay Werdegar of the California Supreme Court, and Professor Charles Ogletree from Harvard Law School has agreed to close the program with one of his provocative roundtable discussions featuring a cross sample of the many judges and leading business trial lawyers who will be attending the Seminar. In between, two teams of accomplished trial lawyers will demonstrate their persuasive skills in arguing motions *in limine*, opening statements, witness examinations and closing arguments in a hypothetical case between a senior partner who was forced out of his law firm and the younger partners who forced him out. The trial teams mirror this tension between ages as one is composed of "up-and-coming" stars of the trial bar while the other team, featuring nationally-renowned Stephen Susman of Susman Godfrey, consists of lawyers who have enjoyed stellar reputations for some time. We owe a special thanks to the hypothetical committee, including our members Pat Cathcart of Hancock, Rothert & Bunshoft, LLP and Eddie Klein of O'Neill, Lysaght & Sun LLP, for creating an interesting and timely problem.

Topping off the Silver Anniversary Seminar will be a special presentation featuring the past presidents of ABTL who helped create twenty-five Seminars. This retrospective will trace the origins of the organization and its history of providing quality education for business trial lawyers in comfortable settings for exchanging ideas among business trial lawyers and the judiciary. All in all, we are looking forward to an extraordinary program and, as usual, plenty of opportunities to exchange ideas in the relaxing Hawaiian setting.

The Annual Seminar is not all the Board has on its plate. Our dinner and luncheon programs for 1998-1999 are also receiving a great deal of attention. Our Programs Committee of lawyers and judges, chaired by Bob Span of Paul, Hastings, Janofsky & Walker LLP, has been planning events for the entire year. The first dinner program, on September 22, 1998, addressed the two recent U.S. Supreme Court decisions on sexual harassment by supervisors and the implications of those decisions for state and federal litigation. We picked this timely topic because it raised issues that more and more business trial lawyers seem to be facing in both state and federal courts. Our next dinner program will be on Tuesday, December 8, and will feature the art of advocacy.

On November 10, 1998, we will present the first of four "members only" luncheon programs planned for 1998-1999. Jeff Westerman of Milberg Weiss Bershad Hynes & Lerach LLP, chairs a subcommittee that is considering a number of innovative ideas for more narrowly focused programs that are expected to appeal to many of our members, but not necessarily the entire membership. The November program will focus on strategic and tactical issues in trial preparation, including development of a theme and incorporation of it into your trial preparation, selecting consultants and using technology to your advantage.

We hope you will attend some or all of these programs. For current information on programs and other matters pertaining to ABTL in Los Angeles and the other chapters, we ask you to visit

(Continued on page 12)

Continued from page 2

- Voluntary disclosure programs with government agencies to avoid or minimize punishment in suspension or debarment proceedings may also be at odds with strategic decisions in the criminal and civil cases. Similarly, the demonstration of "present responsibility" in order to minimize suspension and debarment sanctions may require corporate actions (*e.g.*, termination of employees) which could have negative ramifications in civil litigation.

The criminal defense attorney who is an eternal optimist may identify a few potential strategic advantages in the presence of parallel proceedings:

- The criminal case may provide a valid ground to stay all or part of the pending civil proceedings.
- The civil case may provide a forum to obtain discovery which might not otherwise be available in the criminal case.
- The work product generated in the investigation and preparation of the civil case, which may be funded by insurance carriers, may be transferable for use in the criminal case.
- In some instances, insurance carriers may be persuaded to fund, at least partially, the defense of a criminal case, on the theory that the outcome of the criminal case will potentially have an impact on the civil case, or on the theory that the work product generated can be used in the defense of both the criminal and the civil case.
- The civil plaintiff's awareness that available funds are being spent on the criminal case may spur an earlier and more favorable civil settlement, before assets are gone.
- A successful civil settlement may provide arguments to present to criminal prosecutors, or to suspension and debarment officials, for a declination or for decreased penalties based on adequate restitution to the "victims." Compare California Penal Code §§ 1377-1378 (certain criminal offenses may be discharged with the court's permission following civil settlement).

The Privilege Against Self-Incrimination

Perhaps no single issue relating to "parallel proceedings" creates as much concern to civil attorneys as the propriety and consequences of exercising one's Fifth Amendment privilege in a civil case. Fifth Amendment issues are at the core of the usual disputes which arise between civil and criminal counsel in parallel proceedings: the criminal counsel will invariably counsel that their client cannot possibly testify or provide evidence, and civil counsel will moan that the client's testimony is critical to defend the civil case and to avoid evidentiary sanctions or adverse inferences.

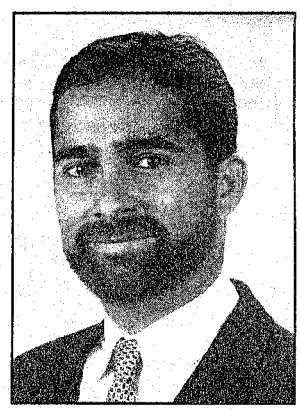
The Privilege As Applied To An Individual. An individual cannot be compelled to answer any question which may incriminate him, *Ullmann v. United States*, 350 U.S. 422, 426 (1956), or which might provide a "link in the chain" of evidence necessary to incriminate him. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The protection of the Fifth Amendment's privilege against self-incrimination is not limited to criminal proceedings, and extends to civil and administrative proceedings, *Kastigar v. United States*, 406 U.S. 441, 444 (1972). It applies in both federal and state proceedings, and may be asserted by a witness who fears prosecution by either federal or state authorities. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964); *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 77-78 (1964).

The privilege may be invoked in civil proceedings even where

(Continued on page 4)

Recent Developments in Contract Attorney Fee Provisions

Many contracts include a provision for an award of attorneys' fees to the prevailing party for litigation arising out of the contract. Until recently, California courts were split on whether, and under what circumstances, a plaintiff's voluntary dismissal precluded a defendant from recovering attorneys' fees under such a provision. In *Santisas v. J. J. Goodin*, (1998) 17 Cal. 4th 599, the Supreme Court resolved some issues regarding the effect of a voluntary dismissal on a defendant's contractual right to attorneys' fees.


Steven C. Uribe

The split between the appellate courts revolved around the scope and effect of Civil Code Section 1717 and the Supreme Court's decision in *International Industries, Inc. v. Olen*, 21 Cal.3d 218. Section 1717 by its terms, applies to litigation involving the enforcement of contracts that include an attorneys' fee provision. The primary purpose of Section 1717 is to the ensure mutuality of an attorneys' fee provision. As explained by *Santisas*, mutuality occurs in two situations. First is when an attorneys' fee provision is unilateral. In such a case, Section 1717 makes the provision reciprocal, and the prevailing party has the right to request attorneys' fees. Second is when a party sued on a contract that includes an attorneys' fee provision, successfully argues the contract is invalid. The successful party may then request attorneys' fees under the fee provision in the invalid contract.

In *Olen*, the plaintiff in an unlawful detainer action, voluntarily dismissed the action after the defendant vacated the premises. The defendant filed a request for attorneys' fees and costs. The Supreme Court allowed the defendant costs but denied, under Section 1717, the attorneys' fees request. When the Supreme Court decided Olen, Section 1717 defined "prevailing party" as the party in whose favor final judgment is rendered. Based on case law and equitable considerations, the *Olen* Court determined that the defendant was not the prevailing party under Section 1717 and, therefore, denied the request for attorneys' fees.

In 1981, the Legislature amended Section 1717 and adopted the holding of *Olen*. Section 1717(b)(2) now provides: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no party prevailing on the contract for purposes of this section." Since the amendment, appellate courts have interpreted the scope of Section 1717 and *Olen* differently. One set of cases held that *Olen's* interpretation of Section 1717 established that a pretrial voluntary dismissal always precludes an award of attorneys' fees pursuant to an attorneys' fee provision. Other cases held that Section 1717 only applied when the attorneys' fee provision was unilateral and that attorneys' fee provisions that were reciprocal were not necessarily governed by Section 1717.

Santisas resolved many of these issues. In Santisas, homebuyers filed a lawsuit against the sellers for alleged defects in the home. The complaint contained causes of action for breach of contract and tort relating to the purchase. Prior to trial, plaintiffs voluntarily dismissed the lawsuit with prejudice and defendants

(Continued on page 4)

Contract Attorney Fee Provisions

Continued from page 3

then moved to recover their attorneys' fees. Defendants argued their attorneys' fees were authorized under various sections of the Code of Civil Procedure and the attorneys' fee provision in the Real Estate Purchase Agreement. This argument followed the reasoning of cases limiting the scope of Section 1717 to unilateral provisions.

In opposition, plaintiffs argued that the attorneys' fee provision was not applicable because their pretrial voluntary dismissal precluded an award of attorneys' fees under Section 1717 and *Olen*. The trial court agreed with the defendants and awarded them attorneys' fees. The Court of Appeal affirmed.

In reversing, the Supreme Court interpreted Section 1717 differently from either line of previous appellate authority. According to *Santisas*, an attorneys' fee provision is now subject to the following rules: (1) Under Section 1717, attorneys' fees incurred in defending contract claims are barred if the plaintiff files a pretrial voluntary dismissal. Moreover, parties cannot contract around Section 1717 by allowing recovery of attorneys' fees in the event of a voluntary dismissal or by defining "prevailing party" as including the party in whose favor a dismissal is entered; (2) Section 1717 is not applicable to a request for attorneys' fees incurred in defending tort or noncontract claims; and (3) whether attorneys' fees incurred in defending tort or other noncontractual claims are recoverable following a pretrial voluntary dismissal, depends on the terms of the attorneys' fees provision.

In addition to clarifying the reach and effect of Section 1717, *Santisas* is also important because it provides guidance for the interpretation of the term "prevailing party" in an attorneys' fee provision. Absent a definition of "prevailing party" in the contract, the Supreme Court held that the "prevailing party" is generally the party that achieves its litigation objectives. Thus, in Santisas, plaintiffs failed to achieve their objective of obtaining the relief requested in the complaint. Defendants, however, did accomplish their objective by preventing plaintiffs from obtaining the relief sought. Thus, defendants were the prevailing party.

Finally, it is worth noting that the Supreme Court identified an important issue that has not yet been resolved: Does a defendant have the right to recover attorneys' fees incurred in defending issues common to both the contract and tort or noncontract claims? However, with three additional appellate cases involving attorneys' fee provisions and Section 1717 currently before the Supreme Court, we may shortly receive additional guidance.

—Steven C. Uribe

Contributors to this Issue

Richard J. Burdge, Jr., is President of ABTL and a partner with Dewey Ballantine LLP in Los Angeles.

Dennis M. Cusack is a partner with Farella, Braun & Martel in San Francisco.

Jeffrey W. Kramer is a partner with Troy & Gould and *Denise M. Parga* is Of Counsel with Wolf, Rifkin & Shapiro in Los Angeles.

Gig Kyriacou is a principal with Plotkin, Marutani & Kyriacou in the San Fernando Valley.

Jan Nielsen Little is a partner and *Ragesh K. Tangri* is an associate with Keker & Van Nest in San Francisco.

Steven C. Uribe is an associate with Pillsbury, Madison & Sutro in San Diego.

Parallel Proceedings

Continued from page 3

there are no criminal charges pending, and even where the risk of criminal prosecution is "remote." *In Re Corrugated Container Antitrust Litigation*, 620 F.2d 1086, 1091 (5th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981). The privilege may be asserted in civil proceedings even where the witness has received informal "assurances" that he will not be criminally prosecuted. *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649-50 (2d Cir. 1990); *Belmonte v. Lawson*, 750 F. Supp. 735, 737-38 (E.D. Va. 1990). The privilege may be asserted in a civil proceeding even after the witness has been criminally convicted, if the possibility for further prosecution remains open. *Kemmerer Bottling Group v. Central Truck Parts Co.*, 717 F. Supp. 552, 553 (N.D. Ill. 1989). *Compare Securities and Exchange Com'n v. Rehtorik*, 755 F. Supp. 1018, 1019 (S.D. Fla. 1990) (suggesting that Fifth Amendment rights of civil litigant will expire at the time the litigant receives his criminal sentence).

The privilege against self-incrimination also prevents compulsory production of an individual's personal documents, if the act of production is "testimonial in nature" and therefore incriminating. *United States v. Doe*, 465 U.S. 605, 612-14 (1984) (court finds that for a sole proprietor to produce documentary records would constitute an implicit admission of possession, control, and authenticity of the records). Where such "act of production" issues exist, prosecutors will often grant limited use immunity for the "act of production" of documents. Or, in some cases, the courtesy of a grand jury subpoena is abandoned in favor of document retrieval effected through execution of a search warrant, making Fifth Amendment concerns irrelevant.

Often it is unclear whether documents, such as office calendars or phone records, are "personal" or "corporate" records. *See, e.g., In Re Grand Jury Subpoenas Dated October 22, 1991, and November 1, 1991*, 959 F.2d 1158, 1164 (2nd Cir. 1992) (corporate president's phone records for his private office line are corporate, not personal, records). Courts apply a "functionality test" to determine whether records are "personal" or "corporate." *See In Re Sealed Case (Government Records)*, 950 F.2d 736, 740-41 (D.C. Cir. 1991) (discussing cases); *United States v. Wujkowski*, 929 F.2d 981, 984 (4th Cir. 1991) (remanding to district court for particularized inquiry into whether entries in appointment books were personal or business records); *In Re Grand Jury Subpoena dated April 23, 1981*, 657 F.2d 5, 8 (2nd Cir. 1981) (creating six point functionality test); *McBryar v. International Union of United Auto. Aerospace & Agricultural Workers*, 160 F.R.D. 691 (S.D. Ind. 1993) (applying multi-part functionality test); *In Re Grand Jury Subpoena Duces Tecum Dated Jan. 30, 1992*, 804 F. Supp. 582, 584 (S.D.N.Y. 1992) (denying permission to redact personal entries from corporate records).

The Privilege As Applied To Corporations. Corporate clients present a different challenge. Corporations do not have a Fifth Amendment privilege. *Braswell v. United States*, 487 U.S. 99, 102 (1988). Thus, the privilege may not be invoked to protect a corporation from compulsory disclosure of corporate records, even if those records incriminate the corporation or its employees. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 289 (1968). In response to a subpoena directed to a corporation, an officer of a corporation must produce records of the company kept in the officer's representative capacity, even though the records might also personally incriminate the officer, because the act of production is considered to be the act of the corporation, not the individual. *Braswell v. United States, supra*, 487 U.S. at 109-110. This rule also applies to former employees who are custodians of records. *Matter of Grand Jury Subpoenas*, 959 F.2d

(Continued next page)

Continued from page 4

1158, 1163-64 (2nd Cir. 1992); *In Re Grand Jury Subpoena, dated Nov. 12, 1991*, 957 F.2d 807, 811-12 (11th Cir. 1992).

The corporate officer or employee's own personal privilege against self-incrimination does remain intact, and it is a violation of that privilege to compel the officer to give testimony about the corporate records he is producing if such testimony might incriminate the officer. *Curcio v. United States*, 354 U.S. 118, 124 (1957); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 317-18 (2d Cir. 1979) (agent retains personal privilege against self-incrimination). A corporate representative may, however, be requested to give testimony "auxiliary to the production," e.g. to authenticate the documents or to state the lack of possession of documents. *United States v. O'Henry's Film Works, supra*, 598 F.2d at 318; *In Re Custodian of Records of Variety Distributing, Inc.*, 927 F.2d 244, 250-51 (6th Cir. 1991) (records custodian may be compelled to make statements to authenticate records, because to do so "merely makes explicit what is implicit in the act of production and [subjects] the custodian...to little, if any, further danger of incrimination.").

Consequences of Asserting the Fifth Amendment Privilege in a Civil Case

Adverse Inferences. While adverse inferences may not be drawn against a criminal defendant who asserts his Fifth Amendment right not to testify, *Carter v. Kentucky*, 450 U.S. 288, 300 (1981), the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence against them. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see, e.g., Securities and Exchange Commission v. Rehtorik*, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990) (permitting adverse inferences to be drawn in SEC civil suit). Accordingly, the assertion of a Fifth Amendment privilege in a federal civil case may result in the drawing of an adverse inference by the trier of fact that the answers to the questions would have been adverse to the witness' interest. *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 929-30 (7th Cir. 1983); *Brink's, Inc. v. City of New York*, 717 F.2d 700, 707-710 (2nd Cir. 1983). *Compare* Cal. Evid. Code § 913 (prohibiting the trier of fact from drawing "any inference...as to the credibility of the witness or as to any matter at issue in the proceeding if the witness exercises the privilege against self-incrimination"). Moreover, the invocation of the privilege by corporate employees may result in the drawing of an adverse inference against the corporation. *Brink's, Inc. v. City of New York, supra*, 717 F.2d at 707; *Rad Services, Inc. v. Aetna Cas. and Sur. Co.*, 808 F.2d 271, 274 (3rd Cir. 1986) (former employee); *Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co.*, 819 F.2d 1471, 1482 (8th Cir. 1987). *But see Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1374 (1st Cir. 1991) (without more, individuals' invocation of personal privilege against self-incrimination cannot be held against his corporate employer).

An adverse inference may not, however, be the sole basis for a finding of liability; independent, corroborative evidence of wrongdoing must be shown. *United States v. Premises Located at Route 13*, 946 F.2d 749 (11th Cir. 1991); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983).

Evidentiary Sanctions. Invocation of the Fifth Amendment privilege in one proceeding may lead to exclusion as a trial witness in later proceedings, see *In Re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988), or the striking of prior testimony if the privilege is invoked after

(Continued on page 7)

Top Ten Tips for Mediating Commercial Disputes

The growth in the use and popularity of mediation in the Los Angeles Superior Court system is most impressive. Mediation was first implemented in 1994 through the Civil Action Mediation Act ("Mediation Act") as an infrequent alternative to judicial arbitration pursuant to Rules 1630 et seq. of the California Rules of Court.

Pursuant to the Rules of Court, judges have the authority to refer those cases where the parties' claims do not exceed $50,000 each, or where the parties otherwise stipulate, to mediation instead of arbitration. In the first few years of the program, the percentage of cases referred to mediation was far less than arbitration. In the first six months of 1998, however, approximately the same number of Los Angeles Superior Court ("LASC") cases were referred to mediation as arbitration according to the ADR Program Report of the LASC ADR Committee (January-June 1998).

Gig Kyriacou

This growth in popularity is due in part to the higher resolution rates achieved through the mediation program. In fact, according to the ADR Program Report the resolution rate of those Superior Court cases referred to mediation (52%) far exceeds those referred to judicial arbitration (32%) in the first six months of 1998. Moreover, private voluntary mediations enjoy a much higher rate of resolution. According to AAA's *Dispute Resolution Times* (Summer 1997 Western Edition), roughly 90% of the 7,300 AAA cases mediated in Los Angeles and San Francisco between 1994 and 1997 settled.

Another reason for the growth in mediation is the flexibility it provides to fashion more appropriate resolutions. This is particularly evident in commercial disputes where mediation allows the parties the opportunity to preserve business relationships that are often more valuable than the particular dispute being litigated. Further, parties can factor in business transactions into settlement agreements in order to provide a larger benefit at a smaller cost. As a result, attorneys and their business clients are turning to mediation in order to achieve favorable resolutions which allow their clients to continue business relationships, save expense and limit time away from productive business operations.

As familiarity with mediation improves, the use of mediation is likely to grow further. More attorneys, clients and even judges are taking advantage of the opportunities and resolution rates of mediation. Indeed, one branch of the Los Angeles Superior Court, the Northwest District in Van Nuys, no longer refers any of its cases to arbitration, opting for the better results of mediation. In addition, Senate Bill 19 is pending before the State Legislature which would expand the use of mediation by giving judges authority to refer any case over $50,000 to mediation.

The bottom line is that mediation is fast becoming commonplace in the litigation of Los Angeles Superior Court cases. In order to achieve favorable results for their clients, attorneys must be aware of how to best use the process while avoiding many of

(Continued on page 6)

Continued from page 5

the common pitfalls. Set forth below are ten tips to achieve favorable results in the mediation process.

Number One:

Prepare, Prepare, Prepare

Given the high percentage of cases which settle in mediation, the importance of preparation should go without saying. No one would consider going into trial unprepared, but a surprising number of attorneys and their clients approach mediation in just such a fashion.

Moreover, unlike trial, there is no appeal from a binding settlement agreement. As a result, unprepared parties often end up receiving too little or giving up too much. In theory, the solution is simple: be prepared and make sure the client is prepared. In practice, there are many common mistakes to be avoided. Lack of preparation is the first.

Number Two:

Advise the Client Regarding the Process

Many attorneys allow their clients to participate in a mediation without a clue about the process and the beneficial opportunities it provides. This includes its informal, confidential nature, direct participation of the parties, and the opportunity for the parties to test their perceptions and positions against those of an impartial third party mediator. Just as with trial, the client's appearance and presentation have a persuasive effect.

Thus, the client's appearance and role should be discussed. This includes the manner of dress and manner of speech. The client should rarely, if ever, argue. They should simply tell the story. Whether this requires a business-like demeanor or a client who expresses emotion depends on the circumstances. Attorneys should rehearse clients with regard to their level of verbal participation, including how to respond to likely questions from the mediator or the opposition, who to face when speaking, and when not to speak. In business disputes, a determination should be made as to who will best represent the company given the foregoing criteria.

Number Three:

Don't Unduly Limit the Client's Involvement

While there may be reasons to limit the client's involvement, especially at the outset of the mediation, this can also have adverse effects. Attorneys who attempt to mute their clients entirely are often sending unintended messages about their client's credibility and value as a witness. On the other hand, effective use of clients who tell their story in a sincere and straightforward manner is a very valuable tool.

Number Four:

Realistically Weigh the Alternatives

Parties often reject offers out of hand without considering the high cost of pursuing litigation through trial. A realistic evaluation includes the likelihood of success, the cost of going forward (time away from work and legal fees and expenses), the emotional toll involved in litigating, the ability to collect on a judgment, and control over the ultimate resolution.

An evaluation of each party's alternatives and true interests should be considered before mediation is commenced. Is the goal to protect business interests, to preserve a relationship or simply dollars? This may help in seeking more creative solutions.

Number Five:

Don't Engage in Personal Attacks

Since the ultimate decision-maker is not the mediator, but the parties, alienating the adversary makes no sense. Attacking the opposing parties' integrity, ridicule and personal attacks are taboo. Calling someone a "liar" or "cheat" will do nothing to increase the chances of favorable settlement. Parties should treat the opposing side as they would treat the judge and jury. The facts and legal arguments can be set forth with conviction, even forcefully, but always tempered with an appropriate amount of respect.

Number Six:

Acknowledge and Address the Adversary's Concerns

One of the main goals in mediation is to build trust and credibility with the opposing parties. An effective way of doing this is to carefully listen to, acknowledge and address the concerns of the opposition. Parties who fail to pay attention to or readily interrupt the statements of their opposition are alienating their adversary as much as those who engage in personal attacks.

Acknowledging the other side's position does not mean that it has to be accepted, only that it has to be addressed. If the opposition believes their positions have been given due consideration, then they will be more willing to listen to those facts and arguments which challenge such positions. Many parties derive substantial satisfaction from simply having their story truly heard by their adversary.

Number Seven:

Don't Discuss Dollars Too Soon

Parties are often anxious to get to the bottom line and discuss numbers from the outset. This is can be a huge error. It is extremely difficult to build trust and credibility with the opposing side when you are demanding a large amount of money or offering next to nothing (i.e., typical opening offers in most mediations). It takes time to adjust the opposition's expectations to be more in line with the realities of settlement. Moreover, bottom-liners often overlook creative alternatives. Thus, it is best to leave money matters to the private sessions with the mediator where strategies and alternatives can also be discussed.

Number Eight:

Don't Make Outrageous Demands Which Are Not Tied To Any Rational Basis

One of the largest mistakes plaintiffs make during mediation is demanding outrageous amounts without reference to any rational basis in law or fact. This is usually met with contempt and an equally outrageous counter-offer. Moreover, outrageously large, round numbers which are not tied to some ascertainable standard are simply not credible and typically convey a willingness to move down in large, round numbers.

Conversely, a defendant's refusal to offer anything (or thereabouts) even when the circumstances warrant it, leads only to frustration. Credible offers/demands should be tied to some objective standard or formula. These might include verdicts or settlements in similar cases; a reasonable percentage of total damages based on the likelihood of success at trial; standards used in a particular industry; litigation costs; the parties' ability to litigate and the like.

Parties should also avoid round numbers wherever possible. If the special damages add up to an odd number, then the offer should be based on such figure. Just as an expert's opinion is only as good as its underlying support, a settlement demand/offer is only as credible as the basis upon which it is drawn.

(Continued on page 7)

Continued from page 6

Number Nine:
Don't Demand Total Capitulation

Those who argue in absolutes and refuse to concede any fact, issue or settlement term are often their own worst enemy. Settlements close at hand are sometimes lost because the party with leverage attempts to dictate all the terms.

It is extremely important to allow the other party to save face at the end to avoid a last minute, irrational backlash. Sometimes the difference between saving face and losing face is a minor concession, a nominal dollar amount or a slightly extended period of time for payment. Allow the opposition some opportunity at the end to choose settlement in lieu of being backed into litigation.

Number Ten:
Understand and Take Advantage of the Mediator's Role

Even though they have no decision-making authority, mediators serve as powerful tools in the resolution process. Mediation allows each side to obtain an evaluation of the strengths and weaknesses of their case from an informed, neutral party. The parties are often too close to the case emotionally or financially to conduct a fair evaluation. Reality testing is a key function of the mediator. Experienced mediators are also skillful at using or defusing emotional tension and addressing difficult personality issues.

Often the greatest impediment to a successful resolution is a difficult party with unrealistic expectations. Parties will not accept an adversaries' version of the case. Some will not even accept rational advice from their own attorney who they perceive as weak for proposing a settlement which involves less than total capitulation. However, an effective mediator is much more adept at conveying the realities of litigation and at obtaining the concessions necessary to achieve a resolution. Further, those who believe it is necessary to take hard line positions can use the mediator to send conciliatory messages in order to keep the settlement negotiations moving forward.

A Final Word

How many clients are actually satisfied after an all-out battle through trial? The half who are unsuccessful certainly are not; and, even many who succeed are unhappy because the expense of trial was much higher than anticipated or the success was not as great as expected. Appeals, prolonged collection efforts and bankruptcies also adversely impact successful results. Business clients have little or no control over the expense of a trial, loss of productivity, time away from work or the ultimate outcome. Thus, satisfied clients after a commercial dispute litigated through trial are much more the exception than the rule.

This accounts in great part to the lure of the mediation alternative. Mediation has a proven track record for achieving binding resolutions in a high percentage of cases. At the same time, it provides a business client with greater control over the resolution as well as the legal fees and costs to be incurred. It also provides the opportunity to seek business solutions and to preserve business relationships where important. The goal of mediation therefore is to achieve the best result for the client under the totality of circumstances. Attorneys who avoid unnecessary mistakes and demonstrate their preparedness and confidence in their case and their client in a persuasive presentation ultimately achieve more favorable resolutions.

—Gig Kyriacou

Continued from page 4

some testimony has been already given. *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir.), *cert. denied* 488 U.S. 831 (1988). Sanctions may be in the form of a "preclusion order," preventing introduction by a party of any evidence as to matters upon which the party has asserted a Fifth Amendment privilege. *See S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985); *S.E.C. v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987). While courts have upheld a variety of evidentiary sanctions for invocation of the privilege, courts have generally held that dismissal is too harsh. *Campbell v. Gerrans*, 592 F.2d 1054, 1058 (9th Cir. 1979); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087-88 (5th Cir. 1979).

Public Perception. Perhaps the most profound consequence of assertion of the Fifth Amendment privilege is the public perception of it, or the fear of such public perception by your client. Although the law teaches us that the Fifth Amendment privilege "protects the innocent as well as the guilty," *Murphy v. Waterfront Com'n*, 378 U.S. 52, 55 (1964), the real world is less forgiving, and the business community in which your client operates may view the refusal to testify as a tacit admission of wrongdoing. A refusal to testify may also pique the interest of civil parties or administrative regulators.

Consequences of Not Asserting the Privilege

Given the potential for adverse inferences, the civil litigator's instinct will likely be to recommend that the client or witness not assert any Fifth Amendment privilege in the civil case. This course, however, is also fraught with problems.

Use Against the Client in Criminal Proceedings. The right not to provide evidence against oneself in a criminal case is absolute and valuable, and should not be lightly squandered. First and most obviously, the client's civil testimony (at a deposition or in interrogatory answers) may be used against the client in a subsequent criminal proceeding. *United States v. Kordel*, 397 U.S. 1 (1970), *cert. denied*, 400 U.S. 821 (1970); Fed. R. Evid. 801(d)(2). Also, providing testimony in the civil case may assist the criminal prosecutor's investigation by educating the prosecutor and revealing the client's defenses, information which would not otherwise be available to the prosecutor in criminal discovery. *See Pollack, Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 207-209 (discussing differing discovery rules in civil and criminal proceedings in the context of parallel proceedings). A deposition transcript also "locks in" the client's testimony, and commits counsel to a theory of defense which in a later criminal proceeding may seem ill-advised. It also may be the source of impeachment material, or perhaps even a false statement charge, should a criminal prosecution against your client proceed. Bear in mind, too, that testimony given in a federal proceeding might be of interest to a state prosecutor, and vice versa.

Waiver Issues. Second, and more subtle, are waiver issues. Once a witness begins to give testimony on a subject, the door is open to further questioning on related issues. To allow otherwise, the Supreme Court has ruled, "would open the way to distortion of facts by permitting the witness to select any stopping place in the testimony." *Rogers v. United States*, 340 U.S. 367, 371 (1951). Thus, a client cannot attend a deposition to give testimony "just on this one issue," and prevent inquiry into other related areas.

Similarly, failure to make a timely objection based on the Fifth Amendment privilege in response to a request for production of documents or interrogatories in civil discovery may

(Continued on page 8)

Continued from page 7

constitute a waiver. *Brock v. Gerace*, 110 F.R.D. 58, 63-65 (D. N.J. 1986). Civil litigators should be vigilant to avoid waiver issues. The Fifth Amendment privilege may be pleaded in an answer. *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983); *Arden Way Associates v. Boesky*, 660 F. Supp. 1494, 1499 (S.D.N.Y. 1987). The privilege may also be asserted in response to requests for production of documents. *de Antonio v. Solomon*, 42 F.R.D. 320, 322 (D. Mass 1967) or interrogatories, *Gordon v. Federal Deposit Ins. Co.*, 427 F.2d 578, 580 (D.C. Cir. 1970).

The effect of a waiver is limited to the particular proceeding in which the waiver occurs. Thus, if a witness waives his Fifth Amendment privilege and gives testimony in one proceeding, he will not be prevented from asserting the privilege in a later proceeding. *In Re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *contra, United States v. Miller*, 904 F.2d 65, 67 (D.C. Cir. 1990) (minority rule that testimony at one proceeding waives privilege and precludes assertion of privilege in subsequent proceedings). If a witness does assert his privilege at a later proceeding, he may be "deemed unavailable" as a witness in the later proceeding, such that the transcript of his prior testimony may be admissible against him. *See* Fed. R. of Evid. 804(a)(1) and (b)(1), *In Re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1158 (7th Cir. 1981), *aff'd.* on other grounds, 459 U.S. 248 (1983).

Conversely, asserting the Fifth Amendment privilege at a deposition does not as a matter of law preclude a witness from testifying at a later proceeding. However, a civil judge may bar such testimony if no opportunity for pretrial discovery is made available.

Possible Solutions to Fifth Amendment Problems

The existence of parallel civil and criminal proceedings presents the civil defendant with the Hobson's choice between suffering the embarrassment and adverse consequences of invoking his Fifth Amendment rights, or testifying and giving the prosecutor a windfall benefit either by incriminating himself or by revealing his defenses in a manner which would not otherwise be required under the more narrow rules applicable to criminal discovery. To address these and other inequities, courts are sometimes willing to fashion creative remedies.

Stays Of Civil Actions. Perhaps the cleanest way to resolve the parallel proceeding dilemma is to obtain a stay of civil proceedings pending the outcome of the criminal case. While there is no constitutional right to such a stay of civil proceedings, *Federal Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980), a court may, in its discretion, stay civil proceedings pending the outcome of parallel criminal proceedings "when the interests of justice seem [ ] to require such action." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (order denying motion to stay civil proceedings vacated). *See United States v. Kordel*, 397 U.S. 1, 9 (1970) (holding it appropriate to postpone civil discovery under F.R.C.P. 30(b) until termination of the criminal action); *Peden v. United States*, 512 F.2d 1099, 1103 (Ct.Cl. 1975) ("[I]t has long been the practice to 'freeze' civil proceeding when a criminal prosecution involving the same facts is warming up or under way"); *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1985) (staying all discovery in civil case pending outcome of possible criminal actions); *Gellis v. Casey*, 338 F. Supp. 651 (S.D.N.Y. 1972) (staying SEC administrative action pending criminal investigation). *Compare, Securities and Exchange Commission v. Rehtorik*, 755 F. Supp. 1018, 1019-20 (S.D. Fla. 1990) (granting stay of SEC accounting procedure but permitting SEC civil fraud suit to go forward despite parties' Fifth Amendment concerns).

Not all courts are willing to grant stays, and the trend in recent years has been to deny stays. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir.), *cert. denied*, 516 U.S. 827 (1995); *Federal Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989); *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805 (N.D. Cal. 1989).

One might draw a distinction between staying a civil action in its entirety, and just staying civil discovery. *See, e.g., Brock v. Tolkow*, 109 F.R.D. 116, 119-120, 129 (E.D.N.Y. 1985) (noting that the request at issue is only to stay *discovery*; "in all other aspects the civil case will go forward."). However, most opinions on this subject seem to treat a stay of civil proceedings and a stay of civil discovery as the same thing. *See, e.g., In Re Par Pharmaceutical, Inc. Securities Litigation*, 133 F.R.D. 12, 13 (S.D.N.Y. 1990) (referring alternatively to a "stay [of the] civil proceeding" and a "stay of discovery."). Indeed, one can imagine little left to accomplish in a civil action if all discovery is halted.

In considering a stay application, courts look at the particular circumstances and the competing interests involved in the case. The Ninth Circuit has set forth a five point test for determining the propriety of granting a stay, which includes consideration of (1) the plaintiff's interest in the expeditious resolution of the civil case; (2) the burden on the defendants; (3) the convenience of the courts; (4) the interest of third parties; and (5) the interests of the public. *FSLIC v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989). The *Molinaro* court denied the stay of civil proceedings, in large part because no criminal indictments had yet been returned. Id. at 903.

Some arguments which may be raised in support of a stay application include:

- The civil proceedings are simply unfair when they intrude upon the Fifth Amendment privilege. *See, e.g., Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1992); *Dienstag v. Bronsen*, 49 F.R.D. 327, 329 (S.D.N.Y. 1970). *But see United States v. Private Sanitation Industry Ass'n of Nassau/ Suffolk, Inc.*, 811 F. Supp. 802, 806-08 (E.D.N.Y. 1992) (declining to follow *Brock*).
- The broader scope of civil discovery will provide the criminal prosecutor with a windfall of information not otherwise available under closely prescribed criminal discovery rules. *Afro-Lecon v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987); *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13 (D. Mass. 1991) (collecting cases but denying stay).
- For a corporation whose employees are under criminal investigation, it is unfair to penalize the corporation in the civil case because its employees, whom it cannot control, assert Fifth Amendment rights, especially if a stay will potentially permit them to testify later in the civil action once criminal issues are resolved. *See Afro-Lecon v. United States, supra*, 820 F.2d at 1206-07.
- Assuming a quick resolution of the criminal case, a stay will not unduly prejudice the civil plaintiffs. *See, e.g., Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980).
- Judicial economy and efficiency may be promoted by resolution of the criminal rise before the civil case, due to *res*

(Continued next page)

Continued from page 8

judicata determinations or elimination of discovery battles. *White v. Mapco Gas Products*, 116 F.R.D. 498, 502 (E.D. Ark. 1987); *Golden Quality Ice Cream v. Deerfield*, 87 F.R.D. 53, 57-58 (E.D. Pa. 1980); *United States v. Mellon Bank*, 545 F.2d 869, 873 (3rd Cir. 1976).

A stay is much more likely to be granted where criminal charges are actually pending. *FSLIC v. Molinaro, supra*, 889 F.2d at 903; *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir.), *cert. denied*, 449 U.S. 933 (1980). *But see Keating*, 45 F.3d at 324-26 (upholding refusal to stay proceeding resulting in $36 million restitution order against Charles Keating notwithstanding that Keating was under federal indictment while the civil proceeding took place). If a criminal case is not yet pending, a stay will likely be denied. *See, e.g., United States v. Private Sanitation Industry Ass'n.*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992) (noting that the lack of a pending indictment was alone grounds for denying the stay); *United States v. District Council of New York City*, 782 F. Supp. 920, 925 (S.D.N.Y. 1992) (denial of stay when no indictment pending). Similarly, if a guilty plea has already been entered or criminal trial completed, an argument for a stay is less persuasive. *Arden Way v. Boesky*, 660 F. Supp. 1494, 1499 (S.D.N.Y. 1987). *But see Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1011 (E.D.N.Y. 1992) (granting stay when defendant has pled guilty but is awaiting sentence).

Note that the government may seek a stay of civil proceedings pending resolution of a criminal case, or may resist discovery efforts in civil actions, in order to prevent the defendant's circumvention of criminal discovery rules. The government has generally fared well in its efforts to control the timing of discovery. *See, e.g., United States v. Stewart*, 872 F.2d 957, 962-03 (10th Cir. 1989) (granting government protective order to prevent defendant from deposing or otherwise "harassing" government witnesses); *In Re Ivan F. Boesky Securities Litigation*, 128 F.R.D. 47 (S.D.N.Y. 1989); *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

Stays Of Particular Discovery. A less dramatic (and more likely successful) option available to a civil litigant when there are parallel proceedings is to try to stop or limit specific discovery in the civil case. For example, counsel might ask the court to stay the depositions of particular individuals only or to stay all discovery for only a set period of time. Given the lesser burden such limited requests place on the parties seeking discovery, such requests are much more likely to be granted. *See, e.g., S.E.C. v. Power Securities Corp.*, 142 F.R.D. 321, 323 (D. Colo. 1992) (granting request for protective order to postpone one deposition for three months).

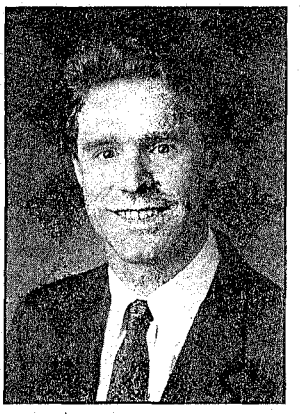
Protective Orders. It is also possible to request a protective order for a particular witness, or for particular subject areas of discovery, pursuant to Fed. R. Civ. Proc. 26(c). A protective order pursuant to Fed. R. Civ. Proc. 26(c) may be sought, or stipulated to, in an effort to provide a confidentiality shield through sealing of records, in order to keep the fruits of the discovery from being shared with governmental authorities. A growing majority of courts, however, has adopted a per se rule that a grand jury subpoena overcomes a civil protective order so that documents responsive to the subpoena must be produced notwithstanding the protective order. *See United States v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1222, 1226-27 (9th Cir. 1995); *In Re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1015-20 (11th Cir. 1993); *In Re Grand Jury Subpoena*, 836 F.2d 1468, 1474-78 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988) (all three

(Continued on page 10)

Should Insurance Carriers Pay for Counterclaims?

Does an insurance carrier with a duty to defend also have an obligation to pay for counterclaims? No California state court has addressed this issue to date. The California Supreme Court's recent decision in *Aerojet-General Corp. v. Transport Indemnity Co., 17* Cal. 4th 38 (1997), however, provides some indirect guidance. The answer is yes, perhaps fully in some cases, and at least in part in most cases.

Let's assume Company A sues a competitor, Company B (the insured) for breach of contract, trademark infringement, patent infringement and product disparagement, at least some of which trigger a duty to defend. Company B responds with a counterclaim for breach of contract and attempted monopolization and an answer asserting these claims as affirmative defenses.


Dennis M. Cusack

Counsel for the insured may have justifiably concluded that the only way to defend the lawsuit is to pursue the counterclaims. This may be true not just because they are compulsory counterclaims, but because Company A has deeper pockets and is using the lawsuit to try to drive the insured out of business. The threat of offsetting damages, a broader range of discovery, and challenges to Company A's credibility offered by the counterclaims may be the best leverage to bring Company A to a reasonable settlement or to convince a jury not to find Company B liable at all.

Coverage for Counterclaims

The carrier will almost certainly refuse to pay for any work relating to the counterclaim, on the grounds that such work is not the defense of claims for damages, but the prosecution of the insured's own claims. But isn't that position an elevation of form over substance? Few would doubt the defense counsel's judgment that filing the counterclaims was a necessary part of the defense. Failing to bring them would force Company B to defend the suit with one hand tied behind its back. If the counterclaims are a necessary part of the defense of the lawsuit, why shouldn't the carrier, obliged to act in good faith to defend the suit in full, pay for the counterclaims?

At least one unpublished decision has concluded that the carrier must pay to prosecute counterclaims. In *Aerosafe International, Inc. v. ITT Hartford of the Midwest*, 1993 U.S. Dist. LEXIS 10443 (N.D. Cal. 1993), the court held that a carrier defending a trade secrets action was obligated to pay for an antitrust cross-complaint and a separate federal antitrust complaint. The court concluded that these counterclaims were an integral part of the insured's overall defense strategy. *Id.* at *5.

Aerojet suggests that the California Supreme Court might agree. In *Aerojet*, one issue was whether the insured's "site investigation costs" are defense costs that the carrier must pay. The *Aerojet* Court held that they are covered defense costs if they amount to "a reasonable and necessary effort to avoid or at least minimize liability," as determined under an objective standard. 17 Cal. 4th at 62.

The *Aerojet* test is one that could apply equally to the carrier's obligation to pay for counterclaims. If, viewed objectively, the

(Continued on page 12)

Continued from page 9

holding that a civil protective order cannot be used to shield civil discovery documents from grand jury subpoena).

The opposing view is that a civil protective order will protect documents from a grand jury subpoena unless the government can show either "improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need." *Martindell v. International Tel. and Tel. Corp.*, 594 F.2d 291, 296 (2nd Cir. 1979). The Second Circuit has indicated that it will adhere to *Martindell* even after the Fourth Circuit's adoption of the contrary, per se rule, see *In Re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221 (2d Cir. 1991), and some district courts remain willing to uphold protective orders in the face of grand jury subpoenas. *See, e.g., Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13-15 (D. Mass 1991) (holding that "this court can seal answers to interrogatories and limit disclosures to counsel," denying a stay and instead ordering the parties to stipulate to a protective order).

The First Circuit has recently rejected both approaches, adopting a balancing test, albeit one in which the scales are weighted in favor of the grand jury subpoena and against the protective order. *See In Re Grand Jury Subpoena*, 138 F3d 442 (1st Cir. 1998).

In light of the emerging trend, however, it seems safest to assume that a Rule 26(c) protective order, no matter how broad, will not guarantee that evidence from civil discovery will not "somehow find its way into the government's hands for use in a...criminal prosecution." *United States v. A Certain Parcel of Land Moultonboro*, 781 F. Supp. 830, 834 (D. N.H. 1992) (*citing Andover Data Services v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2nd Cir. 1989).

The very act of seeking a stay or protective order in a civil case, however, may have collateral benefit in the criminal case. One court has observed that by seeking a civil protective order, "[the defendants] have adequately preserved their right to object to a subsequent criminal conviction based on their own incriminating statements made during civil discovery." *Mid-America's Process Service v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985).

Civil Immunity. California has a unique procedure for a private litigant to seek use immunity for a witness in a civil deposition. Under the authority of *Daly v. Superior Court*, 19 Cal. 3d 132 (1977), a civil litigant may move to compel answers under a protective order granting a witness use immunity. Notice is given to the District Attorney for the district in which the action is pending, the California Attorney General, and the United States Attorney for the district in which the county is located. If no prosecutor objects, the court may compel testimony under immunity. Obviously, this procedure will only be of value to the client who is not the target of a criminal investigation.

No comparable procedure is available in federal court, where only the Department of Justice may seek a testimony compulsion order (with attendant immunity) under 18 U.S.C. §§ 6001 *et seq. United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). However, a similar result might be achieved in certain cases through negotiations with federal prosecutors for "letter immunity" or a "witness assurance letter." *See, e.g., United States v. Levasseur*, 846 F.2d 786, 795, 798 (1st Cir.), cert. denied, 488, U.S. 894 (1988) (upholding use of letter immunity); *but see United States v. Biaggi*, 675 F.Supp. 790, 804 (S.D.N.Y. 1987) (frowning on use of informal or letter immunity and refusing to recognize in federal court an immunity letter provided by a state prosecutor).

If Everything Fails. Assuming your attempts to seek a complete stay, a partial stay, a protective order and immunity have all failed, your client will be faced with the Hobson's choice of testifying and potentially incriminating himself, or invoking his privilege and suffering the civil consequences. Different counsel representing your client or representing related parties will argue different strategies: civil counsel will favor testimony and criminal counsel will favor silence; corporate counsel will usually want their employees' testimony while the employees' individual counsel may hesitate. The final decision will be made on a case-by-case basis, depending on such factors as the likelihood of criminal prosecution, the content of the testimony, the rank or level of involvement of the witness (and, therefore, the degree of potential damage from adverse inferences), the financial or other personal interest of the witness in the outcome of the civil case, the availability of other witnesses in the civil case to supply otherwise "missing" testimony, the timing of the two proceedings, the likelihood of settling either proceeding, and other factors unique to the particular case.

Res Judicata and Collateral Estoppel

A felony criminal conviction may be used offensively as evidence in a subsequent civil action. Fed. R. Evid. 803(22). If issues are adjudicated adversely to a party in a criminal action, that party may be collaterally estopped from relitigating those issues in a subsequent civil suit. *See, e.g., United States v. Killough*, 848 F.2d 1523, 1528 (11th Cir. 1988); *United States v. Uzzell*, 648 F. Supp. 1362 (D. D.C. 1986) (criminal conviction as collateral estoppel on underlying facts of conviction). Indeed, a court may more readily apply the doctrine of collateral estoppel in a subsequent civil case because of the rigorous protections against unjust conviction in criminal cases, including the requirements of proof beyond a reasonable doubt and a unanimous verdict. The converse, however, is not true: a judgment unfavorable to a party in a civil or administrative context will not be *res judicata* in a subsequent criminal case. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1361 n.5 (9th Cir. 1987); Cf., Fed. R. Evid. 408 (civil settlement is not an admission of liability).

A plea of guilty in a criminal case represents not just a criminal conviction, but further is provable as an *admission* (or a declaration against interest) in a subsequent civil proceeding involving the same act or omission. Fed. R. Evid. 801(d)(2), 804(b)(3). A plea may be an admission in situations where a conviction would not, e.g., for a misdemeanor. *See Hancock v. Dodson*, 958 F.2d 1367, 1371 (6th Cir. 1992).

A plea of *nolo contendere* has different consequences. It may not be used as an admission in a civil suit based upon the same conduct giving rise to the criminal prosecution. Fed. R. Evid. 410(2); Fed. R. Crim. Pro. 11(e)(6)(B); *Doherty v. American Motors Corp.*, 728 F.2d 334, 337 (6th Cir. 1984). However, a nolo plea may still serve as a "conviction" for administrative purposes. *See, e.g., Pearce v. U.S. Dept. of Justice*, 836 F.2d 1028, 1029 (6th Cir. 1988) (physician's nolo contendere plea could be considered in administrative license revocation proceedings); *see also Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 843-44 (6th Cir. 1990) (nolo contendere plea admissible in administrative proceedings).

Note that an *acquittal* in a criminal case is not admissible "to prove innocence" in a subsequent civil case. *See United States v. Irvin*, 787 F.2d 1506, 1516-17 (11th Cir. 1986).

—Jan Nielsen Little and Ragesh K. Tangri

(Editor's Note: This article will conclude in our next issue with a discussion of settlement considerations, the joint defense privilege and sentencing.)

Cases of Note

Employment

In *Kummetz v. Tech-Mold, Inc.*, 98 Daily Journal D.A.R. 8873 (9th Cir. Aug. 18, 1998), the Ninth Circuit held that an employee's written acknowledgment that he had read his employer's Employment Information Booklet was not a knowing agreement to its arbitration provisions. The written acknowledgment signed by the employee stated that the employee had read the employer's booklet and agreed to the matters set forth in it. The booklet contained a provision that employment claims would be submitted to arbitration as provided in the employer's dispute resolution policy, which was available in the employer's accounting office. The employee filed suit pursuant to the Americans with Disabilities Act ("ADA") alleging discrimination. Citing *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997), the Court of Appeals reversed, holding that agreements to arbitrate must be knowing, meaning that "'the choice must be explicitly presented to the employee and the employee must waive the specific right in question.'" The court noted that the acknowledgement the employee signed made no explicit reference to arbitration or to a waiver of the right to sue, and that nothing in its language suggested the employee was entering into a contract. Summary judgment for the employer was reversed.

Jeffrey W. Kramer

Securities

In *U.S. v. Smith*, 98 Daily Journal D.A.R. 9127 (9th Cir. Aug. 25, 1998), the Ninth Circuit held that conviction for insider trading requires proof of actual use of material inside information, rather than mere possession of material inside information at the time of the trade. The opinion analyzes *U.S. v. Teicher*, 987 F.2d 112 (2d Cir. 1993), which suggests that "knowing possession" is sufficient to sustain an insider trading prosecution, but concludes that the weight of authority supports a "use" requirement. In rejecting the "possession" standard sought by the government and the Securities and Exchange Commission as *amicus curiae*, the court reasoned that "it is the insider's use, not his possession, that gives rise to an informational advantage and the requisite intent to defraud."

Insurance

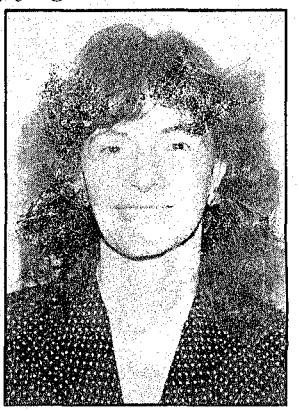
In *Maryland Casualty Co. v. Nationwide Co.*, 98 Daily Journal D.A.R. 7115 (Court of Appeal June 24, 1998), the Fourth Appellate District held that an insurance company owes a duty of defense to a general contractor who is added to a subcontractor's commercial general liability insurance policy as an additional named insured under an endorsement that states that the insurance applies only to the extent that the contractor is held liable for the subcontractor's acts or omissions.

In *Downey Venture v. LMI Insurance Co.*, 98 Daily Journal D.A.R. 9519 (Court of Appeal September 1, 1998), the Second Appellate District held that a liability insurer must defend a malicious prosecution action if the policy provides coverage for malicious prosecution but is not liable for indemnification against any resulting judgment because liability coverage for a claim of malicious prosecution is precluded by Insurance Code Section 533 which bars indemnity for "wilful acts" of an insured.

In *Quelimane Company, Inc. v. Stewart Title Guaranty Co.*, 98 Daily Journal D.A.R. 9230 (Supreme Court August 27, 1998), the California Supreme Court held that the Insurance Code does not prevent an action under the unfair competition statutes, Business & Professions Code sections 17200 through 17209, against title insurance companies for conspiracy to deny title insurance on titles derived from tax deeds.

Evidence

In *Stephen Kelley v. Leon Martin Trunk*, 98 Daily Journal D.A.R. 9515 (Court of Appeal September 1, 1998), the Second Appellate District held that summary judgment in favor of the defendant was improperly granted in a medical malpractice action which was based on the defense expert's declaration that "at all times [defendant] acted appropriately and within the standard of care under the circumstances presented" because the declaration was inadmissible as the expert did not disclose what he relied on in forming his opinion and a triable issue of material fact still existed by virtue of the plaintiff's expert's opposing declaration.



Denise M. Parga

Employment Law

In *Green v. Ralee Engineering Co.*, 98 Daily Journal D.A.R. 9379 (Supreme Court August 31, 1998), the California Supreme Court expanded the tort of wrongful termination in violation of a fundamental public policy by holding that administrative regulations implementing the Federal Aviation Act of 1958 should be included as a source of fundamental public policy that limits an employer's right to discharge an otherwise at-will employee.

—Jeffrey W. Kramer and Denise M. Parga

Members interested in joining the ABTL Federal Courts Committee should contact Michael Grace at (310) 201-7452 or mgrace@ggfcm.com.

Letter from the President

Continued from page 2

our new website at www.abtl.org.

At the risk of breaking one of our longstanding rules — avoiding "political" issues — I feel I must put in a good word for the judges who have supported the organization and who are standing for election in uncontested retention elections this November. As you may know, the margin of reelection in these uncontested elections has dropped from a somewhat comfortable 75% of the vote in 1986 to a much less comfortable 60% in the last election, and that is *where there is no organized opposition.* The most obvious result of the drop in voter support is a perceived need to campaign more actively, which means that you and I are receiving increasing numbers of solicitations for campaign contributions. That political issue I will avoid.

However, several of the justices who are up for reelection this year have contributed a considerable amount of their time and talents to support this organization, and, if only by voting, we now have an opportunity to support them. Justice Charles Vogel is a former ABTL President and a frequent speaker at programs, and Justices Croskey, Gilbert, Neal and Zebrowski all were ABTL Board members or have spoken at our programs. California Supreme Court Justices Chin and Brown were the keynote speakers at the last two Annual Seminars.

Not only have these justices contributed to ABTL, they, along with other Supreme Court and Second District justices facing retention elections this year, have received the highest rating given by the L.A. County Bar Association's Appellate Elections Evaluation Committee. The report of that committee can be accessed on the LACBA website, www.lacba.org. Every vote counts in these races, and I encourage you to vote, to urge your colleagues and friends to vote, and to consider doing more to support one or more of these justices.

—Richard J. Burdge, Jr.

Should Ins. Carriers Pay for Counterclaims?

Continued from page 9

counterclaims are a reasonable and necessary effort to avoid or minimize liability, the carrier ought to pay for them. In the hypothetical above, the test would be satisfied. Any reasonable defense attorney would conclude that the insured must pursue available counterclaims, especially compulsory ones, in order to avoid or minimize liability, either by leveraging a reasonable settlement, by offsetting damages at a trial, or even by convincing a jury not to find Company B liable.

Aerojet also provides an alternative approach, one that the California Supreme Court seems likely to adopt as a minimum rule. A second issue in *Aerojet* was whether an insured who is uninsured for one or more years of a claim that spans many years must contribute to the costs of defense. The Supreme Court answered that question by extending its decision in *Buss v. Superior Court*, 16 Cal. 4th 35 (1997), where the Court had held that a carrier must defend the entire action if any part of it is potentially covered, subject to the carrier's right at the end of the case to seek reimbursement of amounts allocable solely to non-covered claims. *Aerojet* extended *Buss* to hold that a carrier must defend entirely a claim involving continuing injury, even if the insured is uninsured for some period of time, subject to the carrier's right to seek reimbursement of amounts it can prove are allocable solely to the uninsured years. 17 Cal. 4th at 71. It is a short step to apply that rule to counterclaims. In fact, one federal decision has applied the *Buss/Aerojet* rationale to a carrier's obligation to pay for counterclaims. *See Etchell v. Royal Ins. Co.*, 165 F.R.D. 523, 562-564 (N.D. Cal. 1996).

The California Supreme Court seems likely at minimum to extend *Buss* and *Aerojet* to the costs of counterclaims. The carrier must pay all costs, including those for counterclaims, subject to its right to seek reimbursement of costs attributable solely to the counterclaims. In most cases, however, the bulk of discovery and pretrial preparation for the counterclaims will overlap with the work to defend the plaintiff's claims. In many cases, as in the hypothetical, the counterclaims are also asserted as affirmative defenses. At best, only some work to research discrete legal issues or analyze damages on the counterclaims could potentially be allocable under the *Buss* standard.

Think twice before you accept a carrier's refusal to pay for counterclaims. If a reasonable defense attorney would conclude that the counterclaims are necessary to properly defend the case, then the reasonable costs of the counterclaims may be recoverable. At minimum, the burden should be on the carrier to pay subject to its right to try to allocate at the end of the case. The carrier should not be allowed to prejudice the defense of the insured by refusing to fund necessary counterclaims.

—Dennis M. Cusack

abtl REPORT

P.O. Box 67C46
Los Angeles, California 90067
(323) 939-1999 • FAX: (323) 935-6622
e-mail: abtl@ earthlink.net • www.abtl.org