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Parallel Proceedings

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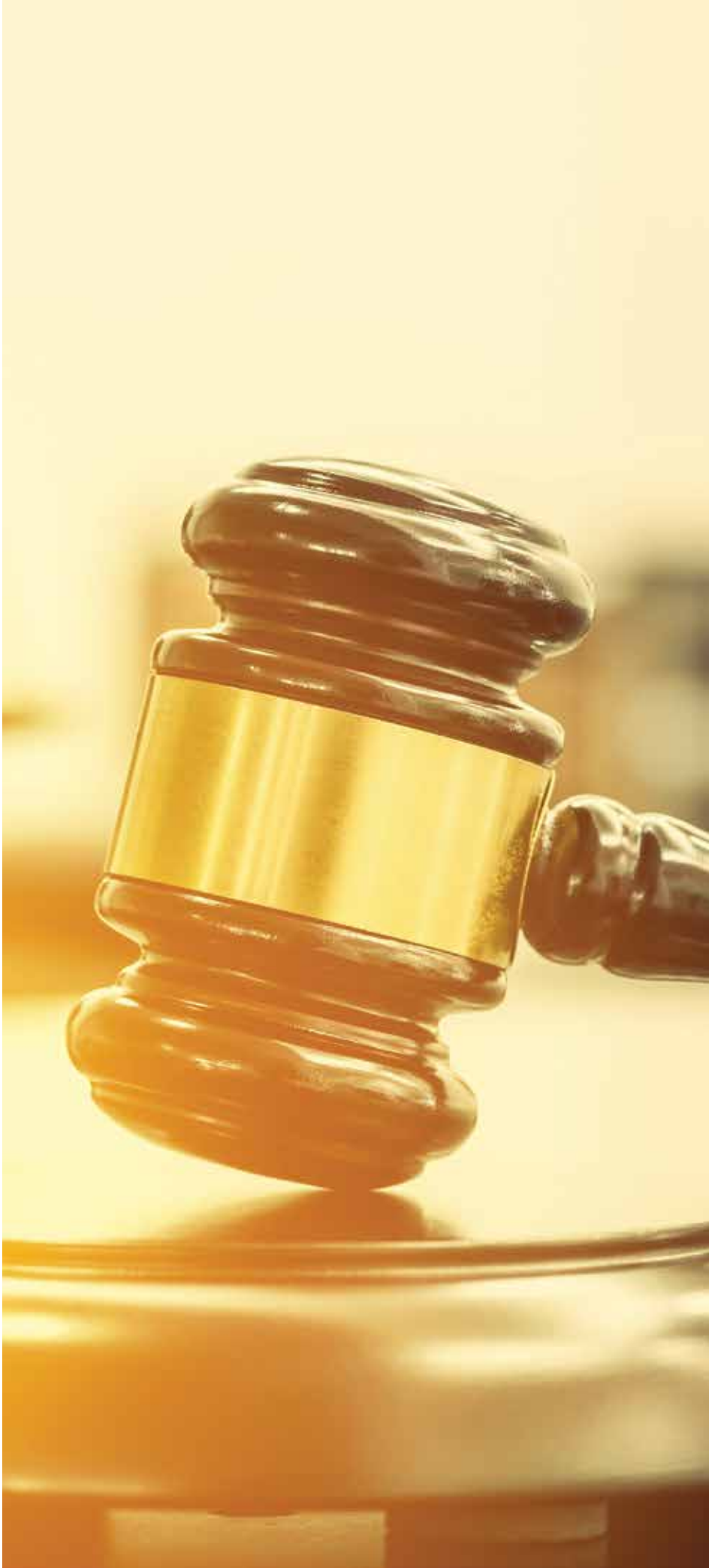
BY DON SAMUEL AND SCOTT GRUBMAN

Litigation has experienced its version of globalization, though perhaps Whac-A-Mole is a better metaphor. Various components of a controversy erupt in numerous venues, all of which need to be addressed and coordinated. The hurdles facing litigants in what are often referred to as "parallel proceedings" are escalating dramatically. Consider, for example, these scenarios:

- A doctor faces allegations of improper opioid prescription practices.
    - She faces a license revocation by the Georgia Composite Medical Board;
    - She faces losing her DEA license;
    - She faces a loss of hospital privileges;
    - She faces criminal prosecution for illegal drug distribution;
    - She is sued by the family of a patient who died from an overdose of oxycodone;
    - The state has filed a lawsuit seeking damages for the cost to the state resulting from the injuries and deaths of patients.



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- A successful businessman is accused of filing false quarterly statements about the company's assets and income.
  - The SEC has filed suit and is seeking to put the company in receivership;
  - The DOJ has presented evidence to a grand jury and has executed a search warrant;
  - The company files bankruptcy and the bankruptcy court has scheduled hearings that require the businessman's attendance and testimony.

Multiple proceedings can hobble the efforts of counsel to formulate a coherent strategy. A thorough understanding of various laws, legal doctrines and agency policies is required. This article discusses just some of the many relevant considerations.

Initiation of Civil and Criminal Cases Addressing the Same Misconduct

The phenomenon of litigating the same controversy in multiple venues is hardly new, and the resulting challenges culminated in the 1970 Supreme Court decision, *United States v. Kordel*.[1] In *Kordel*, the government alleged that a corporation had transported misbranded drugs in violation of the Food, Drug and Cosmetic Act. The government filed a condemnation action to seize the drugs and filed interrogatories seeking information from the corporation later used to assist the government in a criminal case against the corporation's president and vice-president. The case was complicated because the interrogatories were served on the corporation (which has no Fifth Amendment privilege), but the criminal prosecution focused on the individual officers. Putting that aside, the Court answered the more fundamental question: can the government exploit its ability to wage a two-front assault to acquire information in the civil proceeding that it would not be able to obtain in the criminal investigation? And the answer was unequivocally "yes."

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.[2]

But the Court did enumerate factors that might affect the Due Process calculus in other cases:

> We do not deal here with a case where the government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.[3]

One of the first decisions denouncing the improper use of a civil case to gain evidence in a criminal case arose in the former Fifth Circuit. In *United States v. Tweel*,[4] the court held that the civil division of the IRS used unconscionable deceit to convince the defendant taxpayer to consent to a disclosure of certain records that were then used by the DOJ to obtain an indictment. The Fifth Circuit held that this violated the defendant's Fourth Amendment rights: that is, the consent that resulted in the production of records was involuntary. The court cautioned that it is not necessary for the government to affirmatively advise the defendant of the existence of a criminal investigation, but deceit will not be tolerated.

> We conclude that the mere failure of a revenue agent . . . to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, and the showing must be clear and convincing.

The court then quoted from a prior Fifth Circuit decision:

> Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.
>
> From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material.[5]

Tweel remains binding precedent in the Eleventh Circuit condemning affirmative misrepresentations about the existence of a related criminal case to induce a waiver of Fourth Amendment rights.[6] *United States v. Scrushy*[7] criticized the same kind of governmental deception and held that this conduct violated the defendant's Fifth Amendment right to remain silent, because the stealth practice led the defendant to believe there was no criminal case on the horizon. As a result of this deception, the defendant did not seek a stay of the civil case or invoke his Fifth Amendment right.

Scrushy was under investigation by the DOJ in Alabama, and during the investigation, the SEC scheduled his deposition in an investigation focusing on the same conduct. Scrushy did not know that criminal charges were imminent. The DOJ prosecutor urged the SEC lawyers to take Scrushy's deposition in Birmingham in order to ensure that if he made any false statements, venue would be in the same jurisdiction as the planned indictment. The prosecutor also provided guidance to the SEC lawyers about the topics that should (and should not) be covered during the deposition.[8] The purpose of avoiding certain topics during the deposition was to avoid alerting Scrushy to the existence of the criminal investigation.[9] Scrushy was eventually indicted and charged, *inter alia*, with perjury committed during the deposition. The district

court dismissed the perjury charges and found the manipulative measures used by the government to secure the defendant's testimony violated due process.[10]

While *Tweel* and *Scrushy* put the brakes on the government's effort to secure evidence in a criminal case through a related civil case, the Ninth Circuit put the pedal to the metal in *United States v. Stringer*.[11] Two weeks after the SEC initiated an investigation of the defendants' company, the SEC held the first of several meetings with the U.S. Attorney's Office to discuss opening a criminal investigation.[12] The DOJ opened a criminal investigation shortly thereafter, and the SEC provided its investigative materials to the prosecutors, including documents received from the defendants' company.

The DOJ decided to let the SEC continue its investigation without the prosecutors "surfacing" to enhance the possibility of a false statement or perjury case against the targets, by scheduling the targets' depositions in the jurisdiction where venue lay for the criminal case.[13] The Ninth Circuit found that while these coordination efforts were designed to maximize the strength of the criminal case, the SEC did not "hide" the possibility, or "even likelihood," of a criminal investigation.[14] In fact, the SEC sent Form 1662 to the defendants, advising them that the SEC often shares information with other agencies, including federal and state prosecutors. The form also explicitly advised the defendants of their Fifth Amendment rights.[15] At no time did the SEC provide any false information to the defendants or their lawyers. The district court dismissed the ensuing criminal charges and also ordered that if a criminal trial were to be held, the defendants' statements to the SEC would be suppressed.[16]

On appeal the Ninth Circuit reversed. Relying on *Kordel*, the appellate court held that there was no overt deception that deprived the defendants of their ability to assert the Fifth Amendment, and there was nothing inherently wrong with the simultaneous pursuit of civil and criminal cases, even if the criminal case was below the radar. The court also noted the civil case was not pursued in bad faith solely for the purpose of gaining evidence for an existing criminal case.[17] The court warned that a government official must not affirmatively mislead the subject of parallel civil and criminal investigations into believing that the investigation is exclusively civil in nature.[18] Yet that is not what occurred in *Stringer* and as a result, neither the Fourth Amendment nor Due Process rights of the defendants were violated.[19]

Since *Stringer*, there have been no published decisions in the federal appellate courts dismissing a prosecution based on a Due Process, Fifth Amendment or Fourth Amendment violation envisioned by *Tweel, Kordel* and *Scrushy*, though defendants have tried to invoke *Scrushy* and *Tweel*.[20]

Fifth Amendment Privilege Against Compelled Self-Incrimination

The most frequent issue in cases involving tandem civil and criminal cases involves the invocation of the Fifth Amendment in civil discovery. Because the problem arises in a variety of contexts, there are a myriad of considerations for a court to consider. Preliminarily, the privilege against self-incrimination "extends not only to those answers that would in themselves support a conviction, but also to answers creating a 'real and appreciable' danger of establishing a link in the chain of evidence needed to prosecute."[21]

Assuming the invocation of the privilege is valid, the defendant must consider the consequences of invoking the privilege in the civil case. In a criminal case, invoking the right against self-incrimination is essentially cost-free.[22] There is no penalty if the defendant refuses to answer questions while expressly invoking his Fifth Amendment right, and the jury is not even informed that the defendant asserted the right against self-incrimination.[23] But when a party invokes the right against self-incrimination in a civil, regulatory or administrative proceeding, the fact-finder is *permitted* to infer that the answer to the question would incriminate that party.[24] But this dilemma can be mitigated or eliminated because the fact-finder is not *required* to draw such an inference.[25] Chief Justice Warren Burger wrote that the circumstances dictate whether and to what extent any adverse inference should be drawn.[26] Relevant factors and questions include, but are not limited to:

- If your client initiated the civil litigation (especially if to gain some discovery that could be useful in the criminal case), the court will be less sympathetic to a claim that the client should suffer no adverse inference than if the government initiated the suit.[27]
- Is the invocation being used as a shield to avoid providing information, while at the same time the client is affirmatively seeking discovery?
- If the criminal case is pending, the judge is more likely to recognize the immediacy of the defendant's dilemma and will be less likely to use the invocation of the Fifth Amendment to determine critical facts.[28]
- Is the civil litigant deprived of the ability to obtain necessary information that in all fairness the party needs, or is the civil litigant only trying to force your client to answer incriminating questions?[29]
- Is your client invoking the privilege at a point in the litigation that it will permanently impair the opposing party's ability to prepare, or can the "damage" be repaired at a later time (for example, if the criminal case is nearing completion)? Is your client invoking the privilege now, but likely to answer questions later when it might be too late for the opposing party to investigate the answers (for example, refusing to answer questions at a deposition, but later offering an affidavit to avoid summary judgment)?[30]
- Are the questions being asked in the civil proceeding outcome determinative? In other words, if the inference is drawn, will summary judgment be granted to the party asking the questions?[31]

- If the criminal case is in the nascent stage (search warrants have been executed, but the affidavits have not been unsealed) at the same time that the SEC is seeking to take your client's deposition, no client should be advised to answer the SEC's deposition questions, and the judge in the SEC case would be unlikely to draw any adverse inference at that time.

To Stay or Not to Stay

The surest way to avoid this dilemma is to stay civil discovery. Federal Rule of Civil Procedure 26(c) and the courts' inherent authority provide federal judges the discretion to stay discovery in a civil case. The Supreme Court in *Kordel* addressed the issuance of a stay in cases in which parallel criminal charges were envisioned. In such a case, the Court stated, "the appropriate remedy [to the Fifth Amendment dilemma] would be a protective order . . . postponing civil discovery until termination of the criminal action."[32]

The governing principles apply differently when the prosecution is requesting a stay, reflecting the different concerns motivating the party seeking a stay. The prosecutor's principal concern is ensuring the discovery rights of the defendant in the criminal case remain limited, while a defendant seeking a stay wants to avoid a Fifth Amendment dilemma. When a criminal case is pending in federal court and a related civil case is pending, federal prosecutors are seeking more frequently to intervene in the civil case and stay the discovery process to prevent the defendant from gaining access to information—by questioning witnesses and law enforcement agents in a deposition—which would not be available under federal criminal discovery rules.[33] Generally, the prosecutor is permitted to intervene in either a related federal civil proceeding or a related case in state court, but there are caveats.

First, courts generally caution prosecutors that if the prosecution initiated the criminal case and the related civil or administrative proceeding, the government should be prepared to proceed pursuant to the rules of discovery in both cases.[34] But the court will often limit discovery to some extent in order to prevent an "end-run" around the limited criminal discovery rules,[35] often demanding that the prosecution provide specific reasons why a particular witness should not be deposed by the defense.[36]

Various factors are considered in evaluating a request for a stay by the government: (1) the extent to which the issues in the civil and criminal cases overlap; (2) the status of the case, including whether the defendant has been indicted (if the defendant has been indicted, this factor is more important when it is the defendant seeking the stay; but is entitled to some weight when the government is seeking a stay); (3) the interests of the plaintiff in proceeding expeditiously versus the prejudice to the plaintiff resulting from the delay; (4) the interests of, and burden on, the defendant; (5) the interests of the Court; and (6) the public's interest.[37] Relying on these factors in *Rand*, Judge Alan Baverman granted the stay; the defendant was not permitted to take the deposition of certain identified witnesses who would appear in the criminal case.

The same considerations apply when a defendant is facing federal criminal charges and a civil case in state court. In *Morris Hardwick Schneider, LLC v. Nathan E. Hardwick*,[38] for example, Judge Melvin K. Westmoreland denied the federal government's request for a stay in a state civil case, but only on the condition that the defendant would not seek to question witnesses about statements made to law enforcement and would not request production of witness statements through civil discovery.[39]

In *Austin v. Nagareddy*,[40] the Court of Appeals of Georgia relied on federal precedent in deciding whether a stay should have been granted in a civil case in which a doctor was sued while a pending criminal case against the doctor for murder proceeded in Clayton County Superior Court. Noting that this was a case of first impression in Georgia, the court cited the multi-factor test that Magistrate Judge Baverman relied upon in *Rand*, but noted that "some sister states also look to the timing of the motion to stay."[41] In conclusion, Judge Tilman Self quoted the Second Circuit: "As the Second Circuit sagely recognized, '[t]hese tests, . . . no matter how carefully refined, can do no more than act as a rough guide for the [trial] court as it exercises its discretion.'"[42] Ultimately, the Court of Appeals declined to decide whether a stay should be granted in that case, because the trial court misapplied the factors and also erroneously concluded that forcing the defendant to invoke

the Fifth Amendment in the civil case would bar him from invoking the privilege in the criminal case (see below). The appellate court remanded the case to the trial court to reconsider the stay request under the proper standards.

To Waive or Not to Waive

The waiver issue arises when your client (or, for that matter, any witness) decides to answer some questions or offer some evidence which might be construed as waiving the right to invoke the Fifth Amendment privilege thereafter.[43] The issue of waiver rests upon these principles:

- Answering questions or providing information in one proceeding never precludes invoking the Fifth Amendment in a subsequent, different proceeding.[44]
- Answering questions or providing information in one proceeding which operates to gain an advantage over the opposing party may amount to a waiver of the right to assert the privilege when the opposing party seeks to explore those answers later during the course of the same litigation.[45] But in some circumstances, further questioning about a subject matter already discussed may tend to increase the chances of incrimination, in which case the party may invoke the privilege at that point.[46]
- If a court holds that a party (or witness) has, for whatever reason, waived the right to invoke the Fifth Amendment and orders the party to answer the question, and the party refuses to do so, the court may hold the party in contempt.[47]
- In a criminal case, if a defendant answers questions on direct examination, but then relies on the Fifth Amendment to decline to answer questions on cross-examination, the trial court should instruct the jury to disregard the defendant's direct examination.[48]
- Any answer given during the course of any proceeding may be used against that party in a subsequent proceeding, because a party's prior statements are not hearsay.[49]

Conclusion

When a client is embroiled in numerous cases, familiarity with the rules of engagement is essential. Parallel proceedings provide opportunities and pitfalls to the defendant, like opportunities to learn more about the government's case through the use of more liberal discovery rules that prevail in civil cases, or risks that answering questions in the civil case will provide information otherwise unavailable to the criminal prosecutor. Minimizing the risks while maximizing the rewards can result in the defendant being the beneficiary rather than the victim of parallel proceedings. •

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Endnotes

1. 397 U.S. 1 (1970).
2. *Kordel*, 397 U.S. at 11.
3. *Id.* at 11-12.
4. 550 F.2d 297 (5th Cir. 1977).
5. *Tweel*, 550 F.2d at 299 (quoting United States v. Prudden, 424 F.2d 1021, 1032 (5th Cir. 1970)).
6. *See* United States v. Spivey, 861 F.3d 1207, 1213 (11th Cir. 2017) (noting that *Tweel* applies to vitiate the voluntariness of a consent to search only in the administrative context and only when the defendant is unaware of the criminal nature of the investigation).
7. 366 F.Supp.2d 1134 (N.D. Ala. 2005).
8. *Id.* at 1137.
9. *Id.* at 1138.
10. *Id.* at 1140.
11. 535 F.3d 929 (9th Cir. 2008).
12. *Id.* at 933.
13. *Id.* at 934.
14. *Id.*
15. *Id.* at 935.
16. *Id.*
17. *Id.* at 938 – 939.
18. *Id.*
19. *Id.* at 941
20. *See, e.g.*, United States v. Posada Carriles, 541 F.3d 344 (5th Cir. 2008); United States v. Bercoon, 2016 WL 9404865 (N.D. Ga. 2016); United States v. Kowalewski, 2014 WL 6667127 (N.D. Ga. 2014); United States v. Harris, 2010 WL 4967821 (N.D. Ga. 2010).
21. Hoffman v. United States, 341 U.S. 479, 486 (1951); Axson v. Nat. Surety Corp., 254 Ga. 248, 250, 327 S.E.2d 732 (1985); *see also* Begner v. State Ethics Comm., 250 Ga. App. 327, 330(1), 552 S.E.2d 431 (2001); Dempsey v. Kaminski Jewelry, Inc., 278 Ga. App. 814, 815, 630 S.E.2d 77, 80 (2006).
22. Mitchell v. United States, 526 U.S. 314 (1999).
23. Griffin v. California 380 U.S. 609 (1965). *See also* Salinas v. Texas, 570 U.S. 178 (2013).
24. Baxter v. Palmigiano, 425 U.S. 308 (1975); Simpson v. Simpson, 233 Ga. 17, 21, 209 S.E.2d 611, 614 (1974); Austin v. Nagareddy, 344 Ga. App. 636, 811 S.E.2d 68 (2018) ("Where a party chooses to invoke the privilege in a civil proceeding, the result is that the factfinder may infer that the documents would have been harmful"). There are consequences other than the possibility that the fact-finder may

draw an adverse inference; for example, the invocation of the privilege may be construed as a failure to cooperate with an insurer, thus negating coverage. *See, e.g.*, Anderson v. S. Guaranty Ins. Co. of Georgia, 235 Ga. App. 306, 508 S.E.2d 726 (1998).

25. There are Georgia cases stating that invoking the Fifth Amendment "is an implied admission that a truthful answer would prove that the witness had committed the act." *See, e.g.*, In the Interest of S.B., 242 Ga. App. 184, , 528 S.E.2d 278 (2000); but in Simpson v. Simpson, *supra*, n. 36, the Georgia Supreme Court stated that the inference is permissive, not mandatory, though that decision too, referred to the "implied admission" generated by the invocation of the privilege.
26. Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977).
27. Wehling v. Columbia Broadcasting, 608 F.2d 1084 (5th Cir. 1979); Guitierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989). *See also* Savannah Surety Assoc., Inc. v. Master, 240 Ga. 438, 241 S.E.2d 192 (1978) (discussing the difference between a plaintiff who initiates the civil suit and then invokes Fifth Amendment privilege and a defendant who is sued and invokes).
28. SEC v. Musella, 578 F. Supp. 425, 430 (S.D.N.Y. 1984).
29. SEC v. Graystone Nash, Inc., 25 F.3d 187 (3rd Cir. 1994); FTC v. Kitco of Nevada, Inc., 612 F.Supp. 1282 (D. Minn. 1985).
30. *See* SEC v. Zimmerman, 854 F.Supp. 896, 899 (N.D. Ga. 1993); Hartford Steam Boiler Inspection & Ins. Co. v. Int'l Glass Prods., LLC, 2014 WL 109078 (W.D. Pa. 2014).
31. *See, e.g.*, Anderson v. S. Guar. Ins. Co. of Georgia 235 Ga. App. 306, 311, 508 S.E.2d 726, 731 (1998). *See also* SEC v. Grossman, 121 F.R.D. 207 (S.D.N.Y. 1987) (if the inference the SEC seeks to draw is outcome-determinative, it is less likely to be drawn).
32. United States v. Kordel, 397 U.S. 1, 8 (1970).
33. *See* Fed. R. Crim. P. 16.
34. *See e.g.*, SEC v. Sandifur, 2006 WL 3292611 (W.D.Wash. 2006); Christopher v. State, 185 Ga. App. 532, 533 (1988) (denying stay in state forfeiture action where state made no specific showing that allowing discovery to proceed would impair the state ability to pursue the criminal case). Current state law provides that the State or the claimant may request a stay of discovery in a forfeiture action which shall be granted upon a showing of good cause. O.C.G.A. § 9-16-15.
35. Campbell v. Eastland, 307 F.2d 479 (5th Cir. 1962)
36. *See* SEC v. Rand, 2010 WL 11549601 (N.D. Ga. 2010).
37. Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc., 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995).
38. 2014 CV 250583 (Fulton County Superior Court 2016).
39. *Id.*
40. 344 Ga. App. 636, 811 S.E.2d 68 (2018).
41. Hardiman v. Cozmanoff, 4 N.E.3d 1148, 1153 n. 3 (Ind. 2014); *Ex parte* Ebbers, 871 So.2d 776, 790 (Ala. 2003).
42. Austin v. Nagareddy, 344 Ga. App. 636, 638–40, 811 S.E.2d 68, 70–71 (2018).
43. Two recent Georgia cases explained the basic principles governing the question of waiver. U-Haul Co. of Arizona v. Rutland, 348 Ga. App. 738, 824 S.E.2d 644 (2019); Austin v. Nagareddy 344 Ga. App. 636, 811 S.E.2d 68 (2018).
44. Anderson v. S. Guaranty Ins. Co. of Georgia, 235 Ga. App. 306, 508 S.E.2d 726 (1998).
45. Rogers v. United States, 340 U.S. 367 (1951).
46. Klein v. Harris, 667 F.2d 274 (2d Cir. 1981); *In re* Saunders, 528 B.R. 860, (N.D. Ga. 2015).
47. Brown v. United States, 356 U.S. 148 (1958); Klein v. Harris, 667 F.2d 274 (2d Cir. 1981); Cochran v. Carlin, 165 Ga. App. 141, 297 S.E.2d 54 (1982).
48. McKoy v. State, 303 Ga. 327, 812 S.E.2d 293 (2018).
49. O.C.G.A. § 24-8-801(d)(2)(A); Jardine v. Jardine, 236 Ga. 323, 223 S.E.2d 668 (1976).