

PARALLEL PROCEEDINGS

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
A. Parallel Proceedings Defined.....	1
II. ASSERTING THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF- INCRIMINATION	3
A. Who May Invoke the Privilege?.....	3
B. Benefits of Relying on the Privilege.....	3
C. Risks of Relying on the Privilege.....	4
D. Waiver of the Privilege.....	10
III. WAIVER OF WORK PRODUCT PROTECTION AND ATTORNEY-CLIENT PRIVILEGE.....	12
A. General Rule on Waiver	12
B. Selective Waiver.....	13
C. Suggestions for Attempting to Avoid Waiver of Privilege.....	21
D. The Attorney-Client Privilege and the Press.....	22
IV. STAYING THE CIVIL PROCEEDINGS.....	24
A. Pre-Trial Discovery Rules for Civil Proceedings Are Much Broader Than for Criminal Proceedings	24
B. Because the Government May Obtain Information in a Civil Case That Might Be Unavailable in a Criminal Proceeding, It Is Generally to the Defendant’s Advantage to Stay the Civil Proceeding Pending Resolution of the Criminal Case.....	25
C. Although the Court Has the Power to Stay the Civil Proceedings, It Is Not Constitutionally Required to Do So in the Absence of Substantial Prejudice to the Parties Involved	25
D. The Court Has Discretion to Enter a Stay Based on a Particularized Inquiry into the Circumstances and Factors in Each Case	26

TABLE OF CONTENTS
(continued)

	Page
E. The Government Is Generally Successful at Prevailing on Motions to Stay Civil Proceedings in Order to Impede Discovery Attempts by Criminal Defendants	29
F. Private Securities Litigation Reform Act (“PSLRA”) and Automatic Stays	30

I. INTRODUCTION

A. PARALLEL PROCEEDINGS DEFINED

1. “Parallel proceedings” occur when two or more investigations or actions, concerning allegations arising from the same (or substantially the same) set of facts, proceed simultaneously or successively against the same or related parties.
2. As recent events make painfully apparent, parallel proceedings are common in cases involving alleged violations of federal or state securities laws.
 - a. The Securities and Exchange Commission (“SEC”) has responsibility for civil enforcement of federal securities laws. The Department of Justice (“DOJ”) is charged with enforcing federal criminal securities laws. While the SEC has authority to investigate possible criminal and civil violations of the securities laws, it may not bring a criminal prosecution itself. However, the SEC may refer its investigative files to the DOJ or the local United States Attorney’s office if a criminal investigation seems appropriate.
 - b. The same set of facts may trigger investigations and enforcement proceedings by state, local and federal authorities and self-regulatory organizations such as the NASD or New York Stock Exchange, federal and state criminal investigations, congressional investigations, securities class actions, shareholder derivative actions and other private civil actions, all against the backdrop of a possible media onslaught and plummeting stock price.

- c. The high-profile role of the New York State Attorney General (in particular regarding the role of securities analysts and, more recently, market timing and late trading in mutual funds) and the Manhattan District Attorney's Office (in prosecuting former Tyco executives) has only added to the tangle of parallel proceedings.¹
- d. For example, both Attorney General Eliot Spitzer and the Manhattan District Attorney's Office have aggressively used New York's "blue-sky" statute, the Martin Act, N.Y. Gen. Bus. Law § 352, et seq., to prosecute these actions. The Martin Act, which defines fraud more broadly than federal securities laws, provides prosecutors with expansive investigative powers and theories of liability. The use of concurrent state and federal regulatory schemes mean that targets of investigations may now be subject to two sets of rules and standards.

¹ Investigations into "late trading" and "market timing" in mutual funds exemplify how both state and federal governmental agencies occasionally target particular firms or industries simultaneously. In addition to the New York State Attorney General's Office, the SEC and the U.S. Attorney's Office in the Southern District of New York are independently investigating the mutual fund and hedge fund industries. See Richard C. Schoenstein, Michael R. Rosella and Deborah Salzberg, Investigations of Mutual Fund Industry Still Gathering Steam, N.Y.L.J., Mar. 8, 2004, at 1. Nor is this phenomenon exclusive to New York. The Massachusetts Secretary of the Commonwealth recently entered into a \$110 million settlement with a securities firm in Boston following an investigation of and administrative proceedings brought against the firm. See John Hechinger, Putnam to Pay \$110 Million, Try to Rebound, Wall. St. J., Apr. 9, 2004, at C1.

II. ASSERTING THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

A. WHO MAY INVOKE THE PRIVILEGE?

1. The privilege against self-incrimination is available only to natural persons, and not to corporations. See United States v. White, 322 U.S. 694, 698-99 (1944).
2. Any witness may refuse to answer questions that might tend to incriminate him or her. See, e.g., Hoffman v. United States, 341 U.S. 479, 486 (1951).
3. The privilege is not limited to criminal proceedings, but may be asserted “in any proceeding, civil or criminal, administrative or judicial, investigatory, or adjudicatory.” See Kastigar v. United States, 406 U.S. 441, 444 (1972).

B. BENEFITS OF RELYING ON THE PRIVILEGE

1. Testifying may provide a “roadmap” for prosecution.
2. Providing testimony in an SEC or Congressional investigation may lock defendant into testimony in a criminal case, provide fertile ground for cross-examination and provide material that plaintiffs can use in a complaint or amended complaint.
3. The assertion of the privilege will help to avoid the risk of incurring perjury or obstruction of justice charges. Such charges greatly complicate the defense of a criminal case. Prosecutors argue that evidence of perjury and obstruction show consciousness of guilt of the underlying substantive offenses, and they argue that the substantive charges provide the motive for the perjury and obstruction.

C. RISKS OF RELYING ON THE PRIVILEGE

1. It is widely recognized that an adverse inference may be drawn against a person who has asserted the privilege in civil and administrative cases. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (holding that respondent's Fifth Amendment rights were not violated where he was advised that he was not required to testify, but that his silence could be held against him); Keating v. Office of Thrift Supervision, 45 F.3d 322, 326 (9th Cir. 1994) (same); LaSalle Bank Lake View v. Seguban, 54 F.3d 387, 390-91 (7th Cir. 1995) (same).²
2. A year after the Baxter decision, the Supreme Court clarified that holding and explained that an adverse inference may not be drawn from silence alone, and must be considered as one of several factors. See Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5 (1977) (stating that "[r]espondent's silence in Baxter was only one of a number of factors to be considered by the finder of fact in assessing a penalty and was given no more probative value than the facts of the case warranted"); SEC v. Colello, 139 F.3d 674, 678 (9th Cir. 1998) (explaining that "Lefkowitz and Baxter require that there be evidence in addition to the adverse inference to support a court's ruling").
3. In light of Baxter, adverse inferences *may* be drawn from the defendant's assertion of Fifth Amendment rights only where the privilege was invoked: (1) in a *civil* proceeding and (2) in response to *evidence* offered against the person asserting the privilege. Thus, the adverse inference should not be drawn from

² An adverse inference may not be drawn against a defendant in a criminal case due to the defendant's silence. See, e.g., Mitchell v. United States, 526 U.S. 314, 328 (1999); Griffin v. California, 380 U.S. 609, 615 (1965).

a witness's taking the Fifth during an SEC investigation (as distinct from taking the Fifth during a filed SEC civil case).³

- a. Courts have broadly construed the concept of what constitutes a "civil proceeding."
 - See, e.g., United States v. Solano-Godines, 120 F.3d 957, 962 (9th Cir. 1997) (explaining that because "[d]eportation proceedings are civil proceedings," an immigration judge could draw an adverse inference from defendant's silence);
 - Reasonover v. Washington, 60 F. Supp. 2d 937, 960-61 (E.D. Mo. 1999) (permitting adverse inferences to be drawn from defendant's silence during hearings on petition for writ of habeas corpus, because habeas corpus is a civil proceeding).
- b. A negative inference is permissible only where independent evidence exists to corroborate the fact under inquiry; silence in response to an inquiry, in and of itself, is not sufficient. See Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1264 (9th Cir. 2000); Colello, 139 F.3d at 678.
 - Compare Nat'l Acceptance Co. of Am. v. Bathalter, 705 F.2d 924, 932 (7th Cir. 1983) (concluding that "even in a civil case a judgment imposing liability cannot rest solely upon a privileged refusal to admit or deny at the pleading stage");

³ Carl H. Loewenson, Jr. and Daniel W. Levy, Taking the Fifth During SEC Probe, N.Y.L.J., July 16, 2001, at 9.

- with Seguban, 54 F.3d at 390-92 (permitting adverse inference where defendant asserted privilege against self-incrimination in response to statement of material facts submitted in support of summary judgment motion because of evidentiary content of statement of material facts).
4. A strong argument can be made that it is constitutionally impermissible to draw an adverse inference based on a witness's assertion of the privilege against self-incrimination during an SEC investigation (as opposed to a pending SEC case).
- a. The assertion of the privilege is not affirmative proof of wrongdoing. See United States v. Stelmokas, 100 F.3d 302, 311 (3d Cir. 1996).
 - b. Assertion of the privilege is meaningful only where "it would have been natural under the circumstances to object to the assertion in question." See United States v. Hale, 422 U.S. 171, 176 (1975).
 - c. An SEC investigation does not have many of the distinguishing characteristics of a traditional civil case.⁴
 - i. Legal rights are not adjudicated in an SEC investigation. See SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 742 (1984) (noting that the Due Process Clause of the Fifth Amendment is not implicated in the context of an administrative investigation because it is not adjudicatory).

⁴ Id.

- ii. Although the investigation itself may have serious practical consequences, and may result in a recommendation from the SEC staff that the Commission authorize the institution of proceedings, the legal rights of a target are not directly at stake.⁵
 - iii. An SEC investigation is not burdened with “trial-like procedures.” See, e.g., Hannah v. Larche, 363 U.S. 420, 447-48 (1960).
 - iv. An SEC investigation is not “unambiguously civil” in nature. In such an investigation, the SEC warns each person who supplies information that a possible result of the investigation is the institution of criminal charges.⁶
5. Practical repercussions that could result from assertion of the privilege:
- a. Asserting the privilege against self-incrimination could have a negative impact on the decision-making process of government investigators. For example, the SEC considers an individual’s refusal to testify to be a significant factor in determining whether to bring charges against that person.
 - b. Taking the Fifth may be untenable for elected officials and other public figures. (Caveat: The lesson of Martha Stewart, who visited too soon with prosecutors, will be remembered for years to come.)

⁵ Id.

⁶ Id.

- c. Invoking the Fifth Amendment may result in loss of employment, particularly in heavily regulated industries such as the securities industry. See, e.g., NASD Rule 8210.
- d. In some cases, terminating an employee based on his or her assertion of the privilege may be unconstitutional. See, e.g., Garrity v. New Jersey, 385 U.S. 493 (1967) (where police officers were questioned in municipal court regarding alleged fixing of traffic tickets, it was unconstitutional to give police officers the choice between self-incrimination and forfeiture of their jobs).⁷
 - i. The government may not terminate an employee based on his or her invocation of the privilege if she has been required to surrender her constitutional immunity.
 - See Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977) (holding state statute unconstitutional where attorney was divested of state political party offices and barred for five years from holding any other party or public office because he appeared before the grand jury and refused to waive immunity from prosecution);
 - Arrington v. County of Dallas, 970 F.2d 1441, 1446 (5th Cir. 1992) (holding that firing deputy constables for refusing to

⁷ One Circuit has recently held that placing a police officer on administrative leave because the officer asserts the privilege—as opposed to terminating him—does not amount to a per se constitutional violation. See Dwan v. City of Boston, 329 F.3d 275, 279-82 (1st Cir. 2003) (holding in part that the individual defendants were entitled to qualified immunity because they did not violate the officer’s constitutional rights when they placed him on administrative leave for asserting the privilege).

answer questions that could be used against them in criminal proceeding violated their Fifth Amendment rights).

- ii. Purely private actors are not barred from taking action against an employee based on his assertion of the Fifth Amendment privilege. See, e.g., D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir.), cert. denied, 123 S. Ct. 580 (2002).
- iii. A murkier question is whether self-regulatory organizations (“SRO’s”) are considered private actors.
 - Compare United States v. Solomon, 509 F.2d 863 (2d Cir. 1975) (holding that the New York Stock Exchange is a private actor) and Desiderio v. NASD, 191 F.3d 198, 206 (2d Cir. 1999) (stating that “[t]he NASD is a private actor, not a state actor”) with:
 - Intercontinental Indus., Inc. v. Am. Stock Exch., 452 F.2d 935, 941 (5th Cir. 1971) (noting that “contrary to numerous court decisions,” the American Stock Exchange’s “intimate involvement” with the SEC brings it within the “purview of the Fifth Amendment controls over governmental due process.”);
 - Sparta Surgical Corp. v. NASD, 159 F.3d 1209, 1214 (9th 1998) (NASD immune from suit because it “performs a variety of regulatory functions that would, in other circumstances, be performed by a government agency”);

- Barbara v. New York Stock Exch., 99 F.3d 49 (2d Cir. 1996) (accordng absolute immunity to Exchange from a suit for damages arising from allegedly unlawful conduct of an Exchange disciplinary proceeding, because the Exchange performs a variety of regulatory functions that would in other circumstances be performed by a government agency).

D. WAIVER OF THE PRIVILEGE

1. Most circuits have held that providing discovery in a civil or administrative proceeding, or giving testimony in an earlier trial or before a grand jury usually will not be found to constitute a waiver of the Fifth Amendment privilege in subsequent proceedings.
 - a. A waiver of the Fifth Amendment privilege is limited to the same proceeding in which the witness testifies. See, e.g., United States v. Gary, 74 F.3d 304, 312 (1st Cir. 1996) (defense witness who testified at first criminal trial retains valid Fifth Amendment privilege not to testify at retrial of same case); United States v. Cain, 544 F.2d 1113, 1117 (1st Cir. 1976) (co-defendants' submission to deposition in unrelated criminal proceeding not waiver of Fifth Amendment in proceeding in which co-defendant was called as witness); United States v. Licavoli, 604 F.2d 613, 623 (9th Cir. 1979).
 - b. The D.C. Circuit and the Eighth Circuit reflect the minority view. See Ellis v. United States, 416 F.2d 791, 801 (D.C. Cir. 1969) (holding that witness's testimony before grand jury waived his

right to assert privilege at the subsequent trial);⁸ Walker v. Lockhart, 763 F.2d 942, 951-52 (8th Cir. 1985) (holding that defendant waived Fifth Amendment right against self-incrimination during habeas corpus hearing).

2. Even within the same proceeding, a witness waives the privilege only with respect to details directly related to the topic on which he has voluntarily testified. See Rogers v. United States, 340 U.S. 367, 373 (1951).
 - a. The majority of courts follow the “further incrimination” test: where the witness might risk further incrimination based on his additional testimony, a waiver will not be found. See, e.g., In re Master Key Litig., 507 F.2d 292, 294 (9th Cir. 1974); In re Seper, 705 F.2d 1499, 1501 (9th Cir. 1983); In re Folding Carton Antitrust Litig., 609 F.2d 867, 873 (7th Cir. 1979); United States v. LaRiche, 549 F.2d 1088, 1096 (6th Cir. 1977); United States v. Cox, 836 F. Supp. 1189, 1201 (D. Md. 1993).

⁸ More recent D.C. Circuit case law limits the breadth of the Ellis decision (while not directly overruling it). In Ellis, the Court specifically held that a grand jury witness could not waive the privilege only to subsequently assert the privilege during the trial based on the “indictment returned by the grand jury that heard his testimony.” Ellis, 416 F.2d at 805. Later decisions in the Circuit indicate, however, that Ellis does not stand for the broad proposition that a witness waiving the privilege in one proceeding cannot assert the privilege at some later, independent proceeding. Rather, the Circuit views the grand jury proceeding in a case as part and parcel of the entire “proceeding” that is the criminal trial. See United States v. Miller, 904 F.2d 65, 67 (D.C. Cir. 1990). Furthermore, a more recent Circuit opinion appears to at least partially embrace the majority view. See In re Vitamins Antitrust Litig., 120 F. Supp. 2d 58, 66 (D.C. Cir. 2000) (citing with approval to the majority view when holding that a guilty plea to one charge did not prohibit the assertion of the privilege at another independent proceeding).

- b. A minority of circuits, including the Second Circuit, follow the “distortion test”: if further testimony is necessary to avoid “distortion” of evidence already in the record, and the witness knew of his Fifth Amendment rights at the time he gave the testimony, then the privilege has been waived. See Klein v. Harris, 667 F.2d 274, 287-88 (2d Cir. 1981); United States v. Singer, 785 F.2d 228, 241 (8th Cir. 1986); E.F. Hutton & Co. v. Jupiter Dev. Corp., 91 F.R.D. 110, 116-17 (S.D.N.Y. 1981); Uni Supply, Inc. v. Gov’t of Israel, No. 92 Civ. 1489, 1993 WL 6204, at *2 (S.D.N.Y. Jan. 4, 1993).

III. WAIVER OF WORK PRODUCT PROTECTION AND ATTORNEY-CLIENT PRIVILEGE

A. GENERAL RULE ON WAIVER

1. Work-product protection and attorney-client privilege are normally waived by voluntary disclosure of privileged communications to third parties, or through conduct which implies a waiver of the privilege.
2. In determining whether a corporate officer may waive the attorney-client privilege and work-product protection on behalf of the corporation, the court should conduct a “fairness” analysis. See In re Grand Jury Proceedings, 219 F.3d 175, 189 (2d Cir. 2000) (remanding on issue of waiver of attorney-client privilege and work-product protection where corporate officer gave grand jury testimony while corporation asserted privilege and had no way of protecting itself against involuntary waiver).

B. SELECTIVE WAIVER

1. Under the theory of selective waiver, a party who discloses privileged communications to one party may continue to assert the privilege against other parties.
2. While most circuits have rejected the selective waiver doctrine, the selective waiver doctrine has survived to varying degrees in some jurisdictions.⁹
 - See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc) (recognizing selective waiver of attorney-client privilege from disclosure of interview memoranda to SEC in connection with internal investigation, and reasoning that a contrary ruling might discourage companies from conducting internal investigations);
 - In re Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (finding waiver of work-product protection from submission of memorandum of law to SEC, but declining to adopt “per se rule” against selective waiver on ground that such a rule would fail to anticipate cases in which the SEC and the disclosing party have a common interest or have entered into a confidentiality agreement);
 - In re Martin Marietta Corp., 856 F.2d 619, 625-26 (4th Cir. 1988) (holding that disclosures to

⁹ Although some courts use the terms “selective waiver” and “limited waiver” interchangeably, the term “selective waiver” better avoids confusion. The term “limited waiver” refers to two kinds of waivers: “selective waiver” and “partial waiver.” “Partial waiver” occurs where a party that has disclosed one portion of a privileged communication continues to assert the privilege as to remaining portions of the communication. See Westinghouse Elec. Corp. v. Republic of The Philippines, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991).

government constituted waiver of attorney-client privilege and non-opinion work product, but not waiver of opinion work product);

- Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at*7-*11 (Del. Ch. Nov. 13, 2002) (adopting a selective waiver rule for disclosures made to law enforcement agencies pursuant to confidentiality agreement) (unpublished opinion), aff'd, 818 A.2d 970 (Del. 2003);
 - but see In re Columbia/HCA Healthcare Corp. Billing Practices Litig., 293 F.3d 289, 303 (6th Cir. 2002) (rejecting the concept of selective waiver for both attorney-client privilege and work product);
 - United States v. Mass. Inst. of Tech., 129 F.3d 681, 684-86 (1st Cir. 1997) (same);
 - Westinghouse Elec. Corp. v. Republic of The Philippines, 951 F.2d 1414, 1429 (3d Cir. 1991) (holding that documents voluntarily disclosed to the SEC and the DOJ waived attorney-client privilege with respect to third parties);
 - Permian Corp. v. United States, 665 F.2d 1214, 1221-22 (D.C. Cir. 1981) (declining to apply the selective waiver doctrine because it would undermine the attorney-client privilege by allowing litigants to “pick and choose” disclosure among regulatory agencies).
3. Some courts have been more willing to apply the selective waiver doctrine where the parties have entered into an explicit confidentiality agreement.

- See In re Steinhardt Partners, 9 F.3d at 236 (noting that no confidentiality agreement was in place, but suggesting that it might find a selective waiver where the disclosing party has entered into an “explicit” confidentiality agreement with the SEC);
- Maruzen Co. v. HSBC USA, Inc., No. 00 Civ. 1079, 00 Civ. 1512, 2002 WL 1628782, at *1 (S.D.N.Y. July 23, 2002) (relying on Steinhardt in holding that the presence of a confidentiality agreement worked against finding a waiver);
- In re Leslie Fay Co. Sec. Litig., 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (ruling that confidentiality agreement covering documents produced to U.S. Attorney’s Office in connection with internal investigation was sufficient to preclude a broader waiver);
- Saito, 2002 WL 31657622, at *7 (finding that company had a “reasonable expectation of privacy” with respect to documents disclosed to SEC sufficient to preserve work product privilege given that documents were subject to confidentiality agreement);
- but see Westinghouse, 951 F.2d at 1427 (declining to find a selective waiver despite confidentiality agreement with the DOJ, and noting that “under traditional waiver doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else”);
- Permian Corp., 665 F.2d at 1216-21 (declining to apply selective waiver doctrine despite existence of a confidentiality agreement with the SEC where

agreement did not preclude SEC from disclosing documents to other government agencies);

- In re Tyco Int'l, Inc. Multidist. Litig., No. MDL 02-1335-B, Civ. 02-352-B, 02-1357-B, 2004 WL 556715, *2 (D.N.H. Mar. 19, 2004) (holding that cover letters enclosed with documents produced to SEC and Manhattan District Attorney's Office stating that production "would not constitute a waiver of any privilege" and agreement that District Attorney would not assert that production constituted a waiver were not sufficient to preserve attorney-client or work product privilege, and agreeing with case law holding that "agreements with government agencies to maintain the privileged status of voluntarily produced documents are not enforceable against third parties");
- McKesson HBOC, Inc. v. Superior Court of San Francisco Cty., 9 Cal. Rptr. 3d 812, 819-21 (Cal. App. 1st Dist. 2004) (confidentiality agreements with U.S. Attorney's Office and SEC did not create a common interest with the government sufficient to avoid waiver of work product privilege through production of internal investigation report and interview memoranda to government);
- McKesson Corp. v. Green, Nos. A03A2428, A03A2429, 2004 WL 415286, at *4 (Ga. App. Mar. 8, 2004) (confidentiality agreements with U.S. Attorney's Office and SEC did not create common interest sufficient to maintain work product privilege given that agreements permitted government to disclose produced documents if such disclosure was "in furtherance of the [SEC's]

discharge” of its duties or as the U.S. Attorney’s Office “deem[ed] appropriate”);

- United States v. Bergonzi, 216 F.R.D. 487, 496-97 (N.D. Ca. 2003) (rejecting Saito, and holding that work product privilege was waived despite confidentiality agreements with U.S. Attorney’s Office and SEC where agreement to keep documents confidential was “not unconditional”).
4. Where communications are voluntarily disclosed to the government in the hope of inducing favorable treatment, the courts have more readily found a waiver of privilege.
- Compare, e.g., In re M&L Business Mach. Co., 161 B.R. 689, 696 (D. Colo. 1993) (finding no waiver where Bank did not cooperate with the government for the purpose of obtaining a benefit), with:
 - In re Grand Jury Proceedings, 219 F.3d 175, 191 (2d Cir. 2000) (explaining that disclosure of privileged materials in context of grand jury proceeding is “quite different from settlement negotiations or voluntary disclosure programs where the company, initially at least, stands to benefit directly from disclosing privileged materials”);
 - In re Steinhardt Partners, 9 F.3d at 234 (2d Cir. 1993) (concluding that where SEC and target “stood in an adversarial position,” the target’s voluntary submission of legal memorandum to the SEC waived the work product protection with respect to subsequent civil litigants);
 - In re Martin Marietta Corp., 856 F.2d at 625 (holding that a waiver of non-opinion work

product had occurred where disclosures were made to the Department of Defense and the United States Attorney's Office "in a direct attempt to settle active controversies" with the federal government);

- Bergonzi, 216 F.R.D. at 496 (finding that work product privilege was waived through production of investigation report and interview memoranda to SEC and U.S. Attorney's Office given that company "voluntarily disclosed privileged material to a government agency");¹⁰
- Bank of America, N.A. v. Terra Nova Ins. Co., 212 F.R.D. 166, 172 (S.D.N.Y. 2002) (noting that when materials are disclosed to a governmental authority for the purpose of "forestall[ing] prosecution or to obtain lenient treatment" the work-product protection is waived not only as to the governmental entity, but as to all other adverse parties);
- McKesson HBOC, 9 Cal. Rptr. 3d at 817-18 (disclosure of investigation report and interview memoranda to the government not "reasonably necessary" to accomplish purpose of legal representation, and thus, effected waiver of attorney-client privilege);¹¹

¹⁰ The Bergonzi Court also held that the attorney-client privilege had never attached, because the company had agreed to produce the investigation materials to the government before the report and memoranda were completed, and thus, the court reasoned, the company had never intended to keep the materials confidential. Bergonzi, 216 F.R.D. at 493-94.

¹¹ The holding in McKesson as to attorney-client privilege was based on the California Evidence Code, which permits disclosure of communications subject to the attorney-client privilege without waiver "when disclosure is reasonably necessary for the accomplishment of the purpose" for which the lawyer was consulted. McKesson, 9 Cal. Rptr. 3d at 817 (citation omitted).

- McKesson Corp., 2004 WL 415286, at *4 (finding waiver of work product privilege where, *inter alia*, company disclosed investigation materials “in order to gain leniency from the SEC”).
5. In two recent decisions, the First and Second Circuits have held that disclosure of privileged material only to the government, and not to a court, jury or comparable decision-maker in the course of litigation, does not result in a waiver of the attorney-client or work product privilege as to the subject matter of the disclosure, on the rationale that there is no “unfairness” to an adversary under these circumstances.
- See In re Grand Jury Proceedings John Doe Co. v. United States, 350 F.3d 299, 302-03 (2d Cir. 2003) (finding no waiver of work product privilege through letter to U.S. Attorney’s Office asserting company’s innocent state of mind, and noting: “the unfairness courts have found which justified imposing involuntary forfeiture generally resulted from a party’s advancing a claim to a court or jury (or perhaps another type of decision-maker) while relying on its privilege to withhold from a litigation adversary materials that the adversary might need to effectively contest or impeach the claim.”);
 - In re Keeper of the Records, 348 F.3d 16, 24-25 (1st Cir. 2003) (holding that phone conversation in

The McKesson Court held that disclosure of the investigation report and related materials to the government was not “reasonably necessary,” within the meaning of the statute, to effectuate the purpose for which McKesson had retained the law firm that conducted the investigation—namely, “to provide legal advice” to the company and “assist” in pending litigation. Id. at 817-18. Thus, the weight of the McKesson decision in jurisdictions that do not have comparable statutory provisions is unclear.

which company counsel discussed company's legal position in the presence of third parties, a recording of which was subsequently obtained by U.S. Attorney's Office, did not result in subject matter waiver of attorney-client and work product privileges, and that "as a matter of first impression in this circuit, the extrajudicial disclosure of attorney-client communications, not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter").

6. Courts are less likely to find that a waiver has occurred where a privileged communication contains an attorney's mental impressions or legal analysis, even in the context of attorney-client privilege.
 - See In re Martin Marietta Corp., 856 F.2d at 626 (determining that subject matter waiver of work-product protection should not extend to "pure expressions of legal theory or mental impressions");
 - In re Leslie Fay, 161 F.R.D. at 284 (stating that subject matter waiver of attorney-client privilege should be "narrowly tailored," and determining that documents reflecting attorney's legal analysis or advice should not be produced, while interview notes and financial data summarized in audit committee report were discoverable);
 - In re Woolworth Corp. Sec. Class Action Litig., No. 94 Civ. 2217, 1996 WL 306576, at *3 (S.D.N.Y. June 7, 1996) (finding that notes and memoranda prepared by outside counsel in connection with internal investigation were subject to work product protection even though company publicized investigation report);

- but see In re Kidder Peabody Sec. Litig., 168 F.R.D. 459, 473 (S.D.N.Y. 1996) (holding that target’s “affirmative use of the [investigative] report and, by implication, of the underlying interview documents” triggered a waiver of the attorney-client privilege for those portions of the document containing factual summaries of the interviewee’s statements).

C. SUGGESTIONS FOR ATTEMPTING TO AVOID WAIVER OF PRIVILEGE

1. Negotiate an explicit, written confidentiality agreement with the government prior to making any disclosures.
2. Document evidence that the producing party and the government have a cooperative, non-adversarial relationship and share a common interest in developing legal theories and analyzing information. See, e.g., In re Steinhardt Partners, 9 F.3d at 236. (One example of such a common interest would be an investigation in which a company assists the SEC or prosecutors in targeting a rogue employee.)
3. If your company is conducting an internal investigation that will result in the issuance of a written report, do not directly quote, or even specifically paraphrase, any of the interviewee’s statements. If you do, another party may be able to obtain the transcripts of the underlying interviews. See, e.g., Kidder, 168 F.R.D. at 470. On the other hand, companies often turn over the notes with a report in order to get maximum points for cooperation with the authorities.

D. THE ATTORNEY-CLIENT PRIVILEGE AND THE PRESS

1. Because an attorney's handling of the press can often have important ramifications in civil and criminal proceedings, attorneys should be careful about talking to the press and in using public relations firms. See generally When Talk Is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases, 39 AM. CRIM. L. REV. 203, 205-06 (2001).
2. Since counsel frequently lack expertise in the area of responding to press inquiries, they will often seek to hand over duties to a professional public relations firm. The question then arises as to whether communications between the client, counsel and the public relations firm are ever covered by the attorney-client privilege. Judge Kaplan in the U.S. District Court for the Southern District of New York recently answered that question in the affirmative when he held that (1) confidential communications (2) between lawyers and public relations consultants (3) hired by lawyers to assist them in dealing with the media in cases such as this [a high-profile grand jury investigation] (4) that are made for the purpose of giving or receiving legal advice (5) directed at handling the client's legal problems are protected by the attorney-client privilege. See In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 330-31 (S.D.N.Y. 2003) (asserting that one of the policies behind the privilege—the administration of justice—is furthered because “in some instances, the advocacy of a client's case in the public forum will be important for the client's ability to achieve a fair and just result in the pending or threatened litigation”).

3. In re Grand Jury Subpoenas should not be read too broadly. First, the Court emphasized that the privilege would extend to communications between the attorney and the public relations firm *only* when the attorneys in the case employ the services of the public relations firm in the interests of furthering their client's position in the litigation. General use of the public relations firm for "spin control" in regards to public opinion will not suffice. See id. at 326; Haugh v. Schroder Invest. Mgmt. North Am., Inc., No. 02 Civ. 7955, 2003 WL 21998674, at *3 (S.D.N.Y. Aug. 25, 2003) (distinguishing In re Grand Jury Subpoenas on ground that plaintiff had not identified any legal advice requiring the services of a public relations consultant and noting that a "media campaign . . . does not transform [an attorney's] coordination of a campaign into legal advice"). Second, the general principles of attorney-client privilege law will apply, meaning that only communications that involve the client's seeking of legal advice from the public relations firm will be privileged.
4. The Court in In re Grand Jury Subpoenas distinguished a previous case in which the Court held that communications between the attorney and the public relations firm were not covered by the privilege. See Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 54 (S.D.N.Y. 2000) (holding that communications were not privileged because the public relations firm was performing "ordinary" services not directly related to the legal interests of the client). A potentially dispositive factor, therefore, is whether counsel hired the public relations firm to perform "ordinary" services (such as in Calvin Klein) or whether counsel retained the firm specifically to

advance the client's litigation position *vis-à-vis* the government.¹²

IV. STAYING THE CIVIL PROCEEDINGS

A. PRE-TRIAL DISCOVERY RULES FOR CIVIL PROCEEDINGS ARE MUCH BROADER THAN FOR CRIMINAL PROCEEDINGS

1. Under Fed. R. Crim. P. 16(a)(1), a defendant in a criminal proceeding is entitled to receive from the government only his own statements, his prior criminal record, items that are “material to preparing the defense,” items the government plans to use in its case-in-chief, and items which belonged to or were obtained from the defendant.
2. Similarly, under the Jencks Act, 18 U.S.C. § 3500, a criminal defendant may discover prior statements by a government witness only after the witness has testified on direct examination.
3. The government is only entitled to the defendant's evidence for its case-in-chief where the defendant has previously made a reciprocal request. Fed. R. Crim. P. 16(b)(1).
4. In contrast, in a civil action, both parties are entitled to all relevant, non-privileged material “reasonably

¹² A previous Court had also held that the communications between an attorney and a public relations firm were privileged, see In re Copper Mkt. Antitrust Litig., 200 F.R.D. 213 (S.D.N.Y. 2001), but the Court in In re Grand Jury Subpoena found the previous decision inapposite because the public relations firm in In re Cooper was deemed to be the “functional” equivalent of in-house counsel. See In re Grand Jury Subpoena, 265 F. Supp. 2d at 329.

calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

B. BECAUSE THE GOVERNMENT MAY OBTAIN INFORMATION IN A CIVIL CASE THAT MIGHT BE UNAVAILABLE IN A CRIMINAL PROCEEDING, IT IS GENERALLY TO THE DEFENDANT’S ADVANTAGE TO STAY THE CIVIL PROCEEDING PENDING RESOLUTION OF THE CRIMINAL CASE

1. If a criminal investigation is at an early stage, providing discovery in a civil proceeding may lock in the client’s testimony and provide the government with a road map for its investigation.
2. If civil discovery proceeds, the criminal defendant is at risk of waiving his Fifth Amendment privilege, or of asserting the privilege and adversely affecting the civil case (see Section II, supra).

C. ALTHOUGH THE COURT HAS THE POWER TO STAY THE CIVIL PROCEEDINGS, IT IS NOT CONSTITUTIONALLY REQUIRED TO DO SO IN THE ABSENCE OF SUBSTANTIAL PREJUDICE TO THE PARTIES INVOLVED

1. See In re CFS-Related Sec. Fraud Litig., 256 F. Supp. 2d 1227, 1239-41 (N.D. Okla. 2003) (denying motion to stay discovery in civil securities litigation where prejudice to defendant could be avoided by sealing deposition and directing that it not be used outside civil proceeding except in connection with perjury or impeachment);¹³

¹³ As an alternative to a stay, a district court may, pursuant to Federal Rule of Civil Procedure 26(c), enter a “Martindell order,” under which discovery materials in a civil case must be kept confidential and may be used only for

2. Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 175 F. Supp. 2d 573, 579-80 (S.D.N.Y. 2001) (declining to stay civil RICO action brought by private plaintiff where there was no suggestion that criminal indictment was imminent, and where civil action had been pending for eight months);
3. Arden Way Assocs. v. Boesky, 660 F. Supp. 1494, 1499 (S.D.N.Y. 1987) (rejecting defendant's argument that his assertion of the Fifth Amendment privilege in an answer in a civil case would affect his liability in related criminal proceeding).

D. THE COURT HAS DISCRETION TO ENTER A STAY BASED ON A PARTICULARIZED INQUIRY INTO THE CIRCUMSTANCES AND FACTORS IN EACH CASE

1. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (stating that a court may decide to stay civil proceedings in "light of the particular circumstances of each case").¹⁴

purposes of the civil proceeding. See Martindell v. Int'l Telephone and Telegraph Co., 594 F.2d 291, 295-97 (2d Cir. 1979). In the Second Circuit, such a protective order is presumed to trump a grand jury subpoena seeking material subject to the protective order. See In re Grand Jury Subpoena, 945 F.2d 1221, 1224-25 (2d Cir. 1991). Other federal courts of appeal, however, have held that a grand jury subpoena always takes precedence over a civil protective order, see In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes, 62 F.3d 1222 (9th Cir. 1995); Grand Jury Proceedings (Williams) v. U.S., 995 F.2d 1013 (11th Cir. 1993); In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir. 1988), or generally takes precedence absent extraordinary circumstances. See In re Grand Jury, 286 F.3d 153 (3d Cir. 2002); In re Grand Jury Subpoena, 138 F.3d 442 (1st Cir. 1998).

¹⁴ One court has recently held that a district court's power to stay discovery pending the outcome of criminal proceedings is limited to civil actions in the courts, and that federal courts lack authority to stay arbitration proceedings, except perhaps in the narrow circumstance where the parties

2. In deciding whether to grant a stay, the court will consider “the extent to which the defendant’s [F]ifth [A]mendment rights are implicated,”¹⁵ as well as various iterations of the following factors:
- the private interests of the plaintiffs in proceeding expeditiously balanced against the prejudice to the plaintiff if delayed;
 - the private interests of and burden on the defendant;
 - the convenience to the courts;
 - the interests of persons who are not parties to the litigation; and
 - the public interest.

See, e.g., Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-25 (9th Cir. 1995); Karimona Invs., LLC v. Weinreb, No. 02 Civ. 1792, 2003 WL 941404, at *2 (S.D.N.Y. Mar. 7, 2003); In re Worldcom, Inc. Sec. Litig., Nos. 02 Civ. 3288, 02 Civ. 4816, 2002 WL 31729501, at *3-*4 (S.D.N.Y. Dec. 5, 2002); Travelers Cas. & Sur. Co. v. Vanderbilt Grp., LLC, No. 01 Civ. 7927, No. 01 Civ. 10695, 2002 WL 844345, at *2 (S.D.N.Y. May 3, 2002); Sterling Nat’l Bank, 175 F. Supp. 2d at 576.

3. A stay will be more readily granted to an indicted defendant than to a target of a criminal investigation that has not yet resulted in formal charges.

did not agree to arbitrate the dispute. See United States v. Eberhard, No. 03 CR 562, 2004 WL 616122, at *3 (S.D.N.Y. Mar. 30, 2004) (denying motion to stay NASD arbitrations).

¹⁵ Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902 (9th Cir. 1989).

- a. See Dresser Indus., 628 F.2d at 1375-76 (stating that “the strongest case for deferring civil proceedings” is where a criminal defendant is required to defend a civil administrative action involving the same matter);
 - b. In re Worldcom, 2002 WL 31729501, at *5 (explaining that “the likelihood that a defendant may make incriminating statements is greatest after an indictment is issued, and . . . the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations”);
 - c. Sterling Nat’l Bank, 175 F. Supp. 2d at 576-577 (noting that district courts in the Second Circuit will normally only grant a stay where the pending criminal investigation has ripened into a full-blown indictment);
 - d. but see Arden Way Assocs., 660 F. Supp. at 1495-99 (declining to grant a stay of the civil proceedings where the defendant had been indicted and was awaiting sentencing).
4. A federal district court in Alabama recently took the following factors into account in granting a stay of a civil proceeding even in the absence of an indictment: (1) the indictment of former CEO Richard Scrushy was an “eventuality”; (2) the civil and criminal proceedings had a great deal of overlap; and (3) the Court was concerned that the government was attempting to use the broad civil discovery rules in furtherance of its criminal investigation. See SEC v. Healthsouth Corp., et al., 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003).

E. THE GOVERNMENT IS GENERALLY SUCCESSFUL AT PREVAILING ON MOTIONS TO STAY CIVIL PROCEEDINGS IN ORDER TO IMPEDE DISCOVERY ATTEMPTS BY CRIMINAL DEFENDANTS

1. See SEC v. Chestman, 861 F.2d 49 (2d Cir. 1988) (per curiam) (upholding district court's grant of permissive intervention under Fed. R. Civ. P. 24(b) to the federal prosecutor where intervention was sought solely for the purpose of staying civil discovery); In re Royal Ahold N.V. Sec. & ERISA Litig., Civ. No. 1:03-MD-01539, 2004 WL 502558, at * 6 (D. Md. Mar. 12, 2004) (granting government's motion to stay discovery of investigative reports in securities fraud class actions); Javier H. v. Garcia-Botello, 218 F.R.D. 72, 74-76 (W.D.N.Y. 2003) (denying government's motion to intervene but nevertheless ordering stay of civil discovery until conclusion of evidence in related criminal case); SEC v. Doody, 186 F. Supp. 2d 379 (S.D.N.Y. 2002) (granting government's motion for leave to intervene and for limited stay of discovery in SEC action even though defendant was not a defendant in the related criminal case).
2. The burden is on the defendant in the civil action to demonstrate that the prejudice she will suffer from the granting of a stay outweighs the government's interest in obtaining a stay.
 - See Chestman, 861 F.2d at 49 (noting that "[t]he government had a discernable interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter," while the defendant had failed to demonstrate that

a stay would cause any prejudice to his ability to prepare for the civil case);

- Royal Ahold, 2004 WL 502558, at *6 (noting that a request by the government to stay discovery in civil proceedings “is presumptively reasonable, nothing else appearing,” and granting motion to stay even though no indictments had yet been issued in absence of showing of prejudice to defendants);
- Doody, 186 F. Supp. 2d at 382 (stating that defendant had failed to demonstrate that a delay in discovery would “mean the difference between his putting food on the table and starvation”).
- “It’s a good thing”: In a notable exception, Judge Sprizzo in the U.S. District Court for the Southern District of New York denied the government’s motion to stay all discovery in a shareholder class action against Martha Stewart Living Omnimedia, Inc. pending Martha Stewart’s recently concluded criminal trial. Lemon v. Stewart, 02 CV 6273 (S.D.N.Y. Sept. 30, 2003, hearing). The absence of a stay made it possible for Stewart’s defense team to take the depositions in the class action of some likely government witnesses, but, alas, not the critical ones.

F. PRIVATE SECURITIES LITIGATION REFORM ACT (“PSLRA”) AND AUTOMATIC STAYS

1. Discovery in a PSLRA action will be stayed pending disposition of motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B).
2. Due to the exigencies of a government investigation, a Rule 10b-5 class action defendant—who is simultaneously the target of a parallel SEC

investigation or congressional investigation—may find himself testifying during the pendency of a motion to dismiss, when he would normally be free from the risks of testimony. Thus, parallel proceedings can vitiate the benefits of the PSLRA's automatic stay.