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# Civil Discovery and the Privilege Against Self-Incrimination

BY MICHAEL E. WOLFSON\*

An individual's privilege against self-incrimination can be claimed in any proceeding: criminal or civil, administrative or judicial, investigatory or adjudicatory.<sup>1</sup> The privilege protects disclosure of any information that an individual reasonably believes could be used against him or could lead to evidence that might be used against him in a criminal proceeding.<sup>2</sup> The privilege is based upon "the respect a government must accord to the dignity and integrity of its citizens."<sup>3</sup>

Civil practitioners who recall, albeit dimly, the scope and purpose of the privilege against self-incrimination usually view it in the reverential light exemplified by the above quotation. Reliance on such pronouncements, however, is often misleading. A litigant in a civil suit who believes that the privilege protects him from forced disclosure of potentially incriminating information is relying more on the rhetoric that surrounds the privilege than the substantive law that has come to interpret it. In civil litigation between private parties, the privilege has less application and effect than it does in the context of a criminal proceeding.<sup>4</sup>

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1. *In re Gault*, 387 U.S. 1, 47 (1967); see also *In re Duckett*, 76 Cal. App. 3d 692, 698, 143 Cal. Rptr. 100, 104 (1978) (quoting *In re Gault*); *Segretti v. State Bar of California*, 15 Cal. 3d 878, 886, 544 P.2d 929, 933, 126 Cal. Rptr. 793, 797 (1976).

2. *Gault*, 387 U.S. at 47-48.

3. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). See also *Couch v. United States*, 409 U.S. 322, 327 (1973). The privilege "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."

4. See *Fremont Indemnity Company v. Superior Court of Orange County*, 137

In the courts of California, the scope and effect of the privilege against self-incrimination in litigation between private parties depends to a great extent on whether the litigant claiming the privilege is a plaintiff or a defendant and on whether the case is pursued in a state or a federal court.<sup>5</sup> A comparison of the way the state and federal courts have handled the privilege in civil actions reveals not only substantial differences between the courts but also differences in the manner in which the privilege has been applied to plaintiffs and defendants. In the state courts, a plaintiff may not assert the privilege as to any information relevant to the relief sought in the action, while a defendant remains free to assert the privilege as to information of a potentially incriminating nature.<sup>6</sup> In the federal courts, the privilege has been accorded substantially broader application, particularly with regard to plaintiffs.<sup>7</sup>

The context in which the privilege against self-incrimination is asserted in a civil action is an important factor because of the potential detriment that the party claiming the privilege may suffer. In contrast to criminal proceedings,<sup>8</sup> both state and federal courts in California have held that a trier of fact may draw an adverse inference from the assertion of the privilege by a party to a civil action.<sup>9</sup> Counsel who are unaware of the variety of differences between application of the privilege in a civil and a criminal case will find that assertion of the privilege in a civil matter may, at times, be as costly to their client as would disclosure of the information that is sought to be protected. A thorough understanding of how the privilege is applied in a civil action, therefore, is essential when counsel seeks to protect a client from disclosure of potentially incriminating information during litigation.

In addition to the variety of requirements and restrictions placed on the privilege in a civil case, counsel also must be aware that the courts have found that a waiver of the privilege through disclosure of information during a civil action will permit introduction of the disclosed evidence in a subsequent criminal case.<sup>10</sup> A waiver may be found even when no criminal proceeding existed or was contemplated at the time the civil case was be-

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Cal. App. 3d 554, 187 Cal. Rptr. 137 (1982)(filing of civil action operated to waive constitutional privilege against self-incrimination with regard to factual issues).

5. *Id.* at 560, 187 Cal. Rptr. at 140; *see also* Campbell v. Gerrans, 592 F.2d 1054, 1056-57 (9th Cir. 1979).

6. *Shepherd v. Superior Court of Alameda County*, 17 Cal. 3d 107, 116-17, 550 P.2d 161, 165-66, 130 Cal. Rptr. 257, 261-62 (1976); *Fremont Indemnity*, 137 Cal. App. 3d at 559-60, 187 Cal. Rptr. at 140.

7. *See Gerrans*, 582 F.2d at 1058.

8. *See Davis v. Fendler*, 650 F.2d 1154, 1159-60 (9th Cir. 1981); *Baker v. Limber*, 647 F.2d 912, 916-17 (9th Cir. 1981); *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 566-67, 142 Cal. Rptr. 390, 398 (1977).

9. *Gerrans*, 592 F.2d at 1058; *Shepherd*, 17 Cal. 3d at 117, 550 P.2d at 165, 130 Cal. Rptr. at 261.

10. *London v. Patterson*, 463 F.2d 95, 97-98 (9th Cir. 1972).

ing litigated.<sup>11</sup> Protection of a client's interests, therefore, extends well beyond an existing civil case when potentially incriminating evidence is involved.

To provide a clear picture of the problems and solutions that have been addressed by the courts, this article will explore the current role of the privilege against self-incrimination in civil actions in both the state and federal courts of California. The article primarily will focus on the privilege in the context of pretrial discovery, since issues regarding the application and effect of the privilege often initially arise during the discovery stage of litigation. Finally, the article will examine the direction the courts appear to be headed when the privilege is applied in the context of civil litigation.

## CURRENT STATUS OF THE PRIVILEGE IN CIVIL LITIGATION

The privilege against self-incrimination is available to litigants during all phases of pretrial discovery. The drafters of both the California and federal rules of discovery have expressly declared that all information relevant to the subject matter of an action is discoverable, *except* information that is privileged.<sup>12</sup> One of the privileges contemplated by the exception is the privilege against self-incrimination.<sup>13</sup> However, a comparison of the approaches adopted by the state and federal courts in California when a litigant exercises the privilege in response to a request for pretrial discovery reveals a variety of solutions to the problems that arise when the privilege is asserted in a civil case.

### A. Plaintiff Asserts the Privilege

#### 1. The State Courts of California

In a civil suit, a plaintiff is deemed to have waived his privilege against self-incrimination as to any factual issues that arise from his complaint.<sup>14</sup> A party seeking civil relief "may not refuse on the grounds of the privilege to testify on matters relevant to his recovery."<sup>15</sup> Furthermore, waiver occurs upon the filing of plaintiff's complaint and is applicable throughout

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11. *Id.* at 97-98.

12. FED. R. CIV. P. 26(b)(1); CAL. CIV. PROC. CODE §2016(b).

13. *U.S. v. Reynolds*, 345 U.S. 1, 6-7 (1953); *Smith v. B. & O. R. Co.*, 473 F. Supp. 572, 585 (D. Md. 1979); *A & M Records*, 75 Cal. App. 3d at 566, 142 Cal. Rptr. at 397.

14. *See Britt v. Superior Court of San Diego County*, 20 Cal. 3d 844, 858, 574 P.2d 766, 774-75, 143 Cal. Rptr. 695, 703 (1978).

15. *Shepherd*, 17 Cal. 3d at 117, 550 P.2d at 165, 130 Cal. Rptr. at 261.

the litigation process.<sup>16</sup>

A number of courts have analogized the protections of the privilege against self-incrimination to those of the doctor-patient privilege.<sup>17</sup> The latter privilege is waived when a plaintiff places his health or physical condition in issue by the filing of a complaint. Similarly, the state courts have found a waiver when a plaintiff files a complaint raising issues involving information of a potentially incriminating nature.<sup>18</sup> Although the doctor-patient analogy is the vehicle the courts have used to find a waiver, the real impetus for precluding a plaintiff from effectively asserting the privilege against self-incrimination is the concept of fundamental fairness. A California court of appeal, in *Fremont Indemnity v. Superior Court*,<sup>19</sup> framed the issue as follows:

As we view it, the issue presented by the record here is whether a person can initiate a lawsuit and then by reliance upon the privilege against self-incrimination effectively prevent the party sued from getting at the facts by way of discovery, and thus prejudice preparation of his defense.<sup>20</sup>

The courts have used the concept of waiver to implement their view of fundamental fairness. A plaintiff cannot seek relief in the state courts and then refuse to disclose relevant information during the discovery process.<sup>21</sup>

A few courts have avoided the full impact of the waiver rule by holding that while disclosure is required prior to trial, the disclosed information may be barred at trial as confusing or misleading.<sup>22</sup> During pretrial discovery, however, disclosure of all information relevant to the case cannot be prevented by a plaintiff asserting the privilege against self-incrimination.<sup>23</sup> If a plaintiff refuses to disclose requested information during discovery by asserting the privilege, the state courts of California have responded by dismissing the plaintiff's complaint.<sup>24</sup> The courts have repeatedly stated that the plaintiff "cannot have his cake and eat it too"—if the plaintiff wants his lawsuit he must accept waiver of his privilege against self-incrimination and disclose the requested information.<sup>25</sup> If the plaintiff wishes to retain his privilege and keep secret the information

16. See *Fremont Indemnity*, 137 Cal. App. 3d at 560, 187 Cal. Rptr. at 140.

17. *Id.* at 557, 187 Cal. Rptr. at 137-39; *Newson v. City of Oakland*, 37 Cal. App. 3d 1050, 1055, 112 Cal. Rptr. 890, 893 (1974).

18. *Newson*, 37 Cal. App. 3d at 1055-57, 112 Cal. Rptr. at 893-94.

19. 137 Cal. App. 3d 554, 187 Cal. Rptr. 137 (1982).

20. *Id.* at 557, 187 Cal. Rptr. at 138.

21. *Newson*, 37 Cal. App. 3d at 1056-57, 112 Cal. Rptr. at 893-94.

22. See *Ellenberger v. Karr*, 127 Cal. App. 3d 423, 427, 179 Cal. Rptr. 583, 584 (1982).

23. See *supra* notes 14-16 and accompanying text.

24. See *id.*

25. *Fremont Indemnity*, 137 Cal. App. 3d at 560, 187 Cal. Rptr. at 140.

sought through discovery, then he must accept dismissal of his suit.<sup>26</sup> Not only in California, but in a number of state courts across the country, a plaintiff may not claim the privilege against self-incrimination and still maintain his lawsuit.<sup>27</sup>

Faced with the waiver/dismissal rule, how may an attorney seek to protect his client's interests? It would appear that, short of foregoing the law suit entirely, the best an attorney can do is to choose those issues and causes of action that, to the greatest extent possible, avoid areas which might involve information that could be used against the client in a subsequent criminal proceeding. For example, a client with potential causes of action for breach of contract and intentional infliction of emotional distress (as a result of the way the breach occurred) might be advised to forego the latter cause of action to protect against disclosure of potentially incriminating information regarding acts or events bearing on the client's emotional state during the particular period in question (e.g., possible drug related activities).

## 2. The Federal Courts in California

The protections of the privilege are somewhat broader when the plaintiff files suit in a federal court in California. In an early case, the Ninth Circuit Court of Appeals affirmed dismissal of a suit in which the plaintiff refused to respond to discovery based upon her privilege against self-incrimination.<sup>28</sup> The court, however, in a more recent decision, has adopted an entirely different approach.<sup>29</sup> The case of *Campbell v. Gerrans*<sup>30</sup> reflects an emerging trend in the federal courts of handling a plaintiff's assertion of the privilege by balancing the parties' interests, instead of automatically dismissing the plaintiff's complaint.<sup>31</sup>

*Gerrans* was a civil rights suit against several police officers.<sup>32</sup> During pretrial discovery, the defendants served the plaintiffs with a set of interrogatories containing thirty-four questions. The plaintiffs answered thirty of these questions, and asserted their privilege against self-incrimination as to the remaining four questions.<sup>33</sup> The district court, relying on

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26. *Id.*

27. Note, *Toward a Rational Treatment of Plaintiffs who Invoke the Privilege against Self-Incrimination During Discovery*, 66 IOWA L. REV. 575, 579-80 (1981); Annot. 4 A.L.R. 3d 545 (1965).

28. *Lyons v. Johnson*, 415 F.2d 540, 541-42 (9th Cir. 1969).

29. *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979).

30. *Id.*

31. See *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087-89 (5th Cir. 1979), *reh'g denied*, 611 F.2d 1026, 1028 (5th Cir. 1980).

32. *Gerrans*, 592 F.2d at 1055-56.

33. *Id.* at 1056.

the decision of the Ninth Circuit in *Lyons v. Johnson*,<sup>34</sup> ordered the plaintiffs to answer the disputed questions. When the plaintiffs again refused to answer, the district court dismissed their complaint. On appeal, the Ninth Circuit reversed. The court found that instead of flatly refusing to respond to any discovery as in *Lyons*, the plaintiffs in *Gerrans* had answered all discovery with the exception of the four marginally relevant and "highly questionable" interrogatory questions.<sup>35</sup> Further, the court stated: "In light of the Supreme Court decisions on the fifth amendment privilege, a plea based on this privilege in the discovery stage of a civil case cannot automatically be characterized as 'willful default' resulting in dismissal."<sup>36</sup> The court did not indicate the exact circumstances under which dismissal might be appropriate. However, the court did note that: (1) dismissal might be too harsh a sanction when a plaintiff asserts the privilege against self-incrimination in response to a request for discovery,<sup>37</sup> and (2) the plaintiffs in *Gerrans* had narrowly focused their assertion of the privilege while complying with all other requested discovery, instead of broadly refusing to respond at all.<sup>38</sup>

From a plaintiff's standpoint, the emerging approach set forth in *Gerrans* is more protective of potentially incriminating information than the waiver/dismissal rule employed by the state courts of California.<sup>39</sup> Selective assertion of a plaintiff's privilege against self-incrimination and full compliance with other legitimate discovery requests would appear to protect the plaintiff from disclosure of incriminating information in a federal court suit without substantial risk of dismissal of the plaintiff's case.

In the federal courts of California, the plaintiff clearly gains a measure of protection by asserting the privilege against self-incrimination, while the defendant loses the ability to obtain relevant and critical information that would normally be disclosed through the discovery process. Often, the plaintiff is the primary source of information upon which the defendant must rely for the formulation of his defense. As a result, the inability to obtain otherwise discoverable information due to the plaintiff's assertion of the privilege may substantially disadvantage a defendant who already is an unwilling participant in the litigation. As a matter of due process, it would therefore seem appropriate for a federal court to attempt to redress this imbalance between the parties.<sup>40</sup>

*Gerrans* did not eliminate all potentially detrimental consequences for

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34. See *supra* note 28.

35. *Gerrans*, 592 F.2d at 1057-58.

36. *Id.* at 1058.

37. See *id.* at 1057-58.

38. See *id.* at 1057.

39. See *supra* notes 14-26 and accompanying text.

40. See *Baker*, 647 F.2d at 918 n.6.

a plaintiff who asserts the privilege against self-incrimination in a civil action. Although holding that dismissal of the complaint when the plaintiff asserts the privilege may be too harsh a consequence, the court left open the possibility of imposing other sanctions. The court expressly pointed to the language of Rule 37 of the Federal Rules of Civil Procedure giving a court the power to make orders "which are just" when a party fails to respond properly to discovery.<sup>41</sup> Further, the court emphasized that a trier of fact may draw an adverse inference from a plaintiff's assertion of the privilege in a civil suit, citing the decision of the United States Supreme Court in *Baxter v. Palmigiano*.<sup>42</sup> Finally, the court cited a Second Circuit case, *Gill v. Stolon*,<sup>43</sup> which held that a court has the responsibility to "do justice between man and man."<sup>44</sup> With these principles in mind, a defendant might seek an order precluding the plaintiff from offering evidence at trial that had not been disclosed to the defendant based on the plaintiff's assertion of the privilege against self-incrimination during pretrial discovery. The defendant might also seek an order striking a particular cause of action when the defendant was precluded from asserting a valid defense because of information withheld as a result of plaintiff's claim of the privilege. Clearly, these types of relief fall within the prescribed ambit of Rule 37.

### B. Defendant Asserts the Privilege

When the defendant asserts the privilege against self-incrimination in response to a request for discovery, no significant difference appears to exist between the approaches employed by the state and federal courts of California.<sup>45</sup> Both courts have recognized that a defendant may validly assert the privilege against self-incrimination during the discovery process and generally cannot be compelled to divulge the allegedly privileged information sought by the opposing party.<sup>46</sup>

The state courts justify the disparate treatment accorded plaintiffs and defendants in civil cases on the basis that a party may not refuse, on the grounds of the privilege, to provide information on matters directly relevant to the relief they *affirmatively seek in the action*.<sup>47</sup> Fundamental fair-

41. *Gerrans*, 592 F.2d at 1058.

42. *Id.*; *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

43. 240 F.2d 669 (2nd Cir. 1957).

44. *Id.* at 670.

45. *State Courts: See Shepherd*, 17 Cal. 3d at 116-17, 550 P.2d at 165-66, 130 Cal. Rptr. at 261-62; *A & M Records*, 75 Cal. App. 3d at 566, 142 Cal. Rptr. at 397. *Federal Courts: see Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981); *Davis v. Fendler*, 650 F.2d 1154, 1159-61 (9th Cir. 1981).

46. *See supra* note 45.

47. *Shepherd*, 17 Cal. 3d at 117, 550 P.2d at 165, 130 Cal. Rptr. at 261; *Fremont Indemnity*, 137 Cal. App. 3d at 559-60, 187 Cal. Rptr. at 140; *see also Minor v. Minor*, 232 So.



ness and the defendant's right to due process appear to lie at the heart of the state court rationale.<sup>48</sup> A party cannot affirmatively seek relief in a lawsuit and then refuse to provide relevant information based upon an assertion of the privilege against self-incrimination.<sup>49</sup> The state courts have not imposed upon defendants the same concept of waiver, since a defendant is usually not in the position of seeking affirmative relief, but is simply defending against a plaintiff's claims.<sup>50</sup>

Since recent Ninth Circuit decisions appear to hold that both plaintiffs and defendants may validly assert the privilege during pretrial discovery, disparate treatment of parties, which is so clearly evident in the state courts, is not an issue when a case proceeds through the federal courts in California.<sup>51</sup> It should be clear, however, that the courts, both state and federal, have shown a distinct inclination to accord the privilege a less sweeping role in civil litigation than it occupies in criminal proceedings.

### *1. Consequences of Asserting or Failing to Assert the Privilege*

The most striking difference between a defendant's assertion of the privilege in a civil case and in a criminal proceeding is that "juristic consequences" may be imposed upon the defendant for asserting the privilege in civil litigation.<sup>52</sup> The United States Supreme Court has held that a trier of fact may draw an adverse inference from the assertion of the privilege by a civil litigant.<sup>53</sup> Furthermore, counsel for the opposing party may argue the adverse inference to the trier of fact. Although *Griffin v. California*<sup>54</sup> prohibits this tactic in a criminal proceeding, *Baxter v. Palmigiano*<sup>55</sup> expressly removes civil cases from the prohibitions set forth in *Griffin*.<sup>56</sup>

The state courts of California have followed the adverse inference holding of *Baxter*, and additionally have precluded a defendant from offering evidence at trial that was withheld during pretrial discovery by assertion

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2d 746, 747 (Fla. 1970) (different treatment accorded the party invoking the privilege when that party has voluntarily and affirmatively sought relief in the action).

48. See *supra* note 47.

49. *Fremont Indemnity*, 137 Cal. App. 3d at 559-60, 187 Cal. Rptr. at 140; *A & M Records*, 75 Cal. App. 3d at 566, 142 Cal. Rptr. at 397-98.

50. See *Shepherd*, 17 Cal. 3d at 116-17, 550 P.2d at 165-66, 130 Cal. Rptr. at 261-62.

51. See *Davis v. Fendler*, 650 F.2d 1154, 1159-60 (9th Cir. 1981); *Baker v. Limber*, 647 F.2d 912, 916-17 (9th Cir. 1981); *Campbell v. Gerrans*, 592 F.2d 1054, 1056-58 (9th Cir. 1979).

52. *Baxter*, 425 U.S. at 318; *Shepherd*, 17 Cal. 3d at 117, 550 P.2d at 165, 130 Cal. Rptr. at 261.

53. *Baxter*, 425 U.S. at 318.

54. 380 U.S. 609 (1965) (comment to the jury by a prosecutor in a state criminal trial upon a defendant's failure to testify).

55. 425 U.S. 308 (1976) (inmate, charged with breach of prison rules, remained silent at his disciplinary hearing and an adverse inference was drawn from his refusal to testify).

56. *Baxter*, 425 U.S. at 317-18.

of the privilege against self-incrimination.<sup>57</sup> As a California court of appeal stated, a defendant must be prevented from “. . . claiming his constitutional privilege against self-incrimination in discovery and then waiving the privilege and testifying at trial. Such a strategy subjects the opposing party to unwarranted surprise. A litigant cannot be permitted to blow hot and cold in this manner.”<sup>58</sup> A defendant also cannot be permitted to introduce documentary evidence at trial when he has shielded such evidence from disclosure during discovery by claiming the privilege.<sup>59</sup>

Although the federal courts have yet to go beyond the adverse inference holding of *Baxter*, the “juristic consequences” approach employed by the state courts would probably be acceptable, to some degree, in the federal courts.<sup>60</sup> In *Gerrans*, the Ninth Circuit pointed out that dismissal of an action may be an inappropriate remedy for assertion of the privilege against self-incrimination by a civil litigant, but the court suggested that under different circumstances a refusal to respond to a valid discovery request could subject the litigant to Rule 37 sanctions.<sup>61</sup> In the *Gerrans* opinion, the court was primarily referring to the sanction of dismissal, although Rule 37 also refers to lesser sanctions such as the striking of claims or defenses, the preclusion of testimony or evidence, and the making of an order declaring that certain facts are deemed established for the purposes of the litigation.<sup>62</sup> These same types of “juristic consequences” have been employed by the state courts when a defendant asserted the privilege against self-incrimination in a civil case.<sup>63</sup>

The courts have also shown substantial concern regarding the time and manner in which the assertion is made during the discovery process.<sup>64</sup> Assertion of the privilege can preclude an opposing party from obtaining relevant and critical discovery. The courts, therefore, have insisted that the privilege be validly taken, asserted in a timely manner, and limited to information that clearly falls within its ambit.<sup>65</sup> To place proper limitations on the privilege, the courts have required the party asserting the privilege to make a particularized showing of the potentially incriminating nature

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57. See *supra* note 45 (state courts).

58. *A & M Records*, 75 Cal. App. 3d at 566, 142 Cal. Rptr. at 397-98.

59. While the concept of “juristic consequences” may afford some protection, at the time of trial, to the party who is denied disclosure of otherwise discoverable information, it does little to solve the problem of how that party is to gather evidence in preparation for trial, particularly when the opposing party may be the only viable source of information regarding the issues involved in the action. The ability to effectively prepare a case under such circumstances is rendered difficult, at best, and impossible, at worst.

60. See *Gerrans*, 592 F.2d at 1057.

61. *Id.* at 1057-58; see also FED. R. CIV. P. 37.

62. FED. R. CIV. P. 37(b)(2).

63. See *supra* note 45 (state courts).

64. See *Baker*, 647 F.2d at 918-19; *Davis*, 650 F.2d at 1160.

65. See *supra* note 64.

of *each question asked or document sought*.<sup>66</sup> This showing is necessary to permit a court to rule on the merits of the privilege claim.<sup>67</sup> Blanket refusals to answer questions or disclose information in response to a valid discovery request are insufficient to relieve a party of the duty to respond to *each* question asked or to *each* document sought by the opposing party. The litigant's remedy is not the assertion of a blanket refusal to produce records or testify; instead, the litigant must decide to assert the privilege as to each question asked and each document requested.<sup>68</sup> Requiring a party to object with specificity to the information sought permits the trial court to rule on the validity of each of the litigant's individual claims of privilege, thus achieving the goal of limiting application of the privilege to only that information which clearly falls within the scope of the privilege.<sup>69</sup>

By itself, the pendency of a criminal proceeding does not excuse a litigant from the obligation to answer questions or provide information in an existing civil action.<sup>70</sup> A nexus between the risk of criminal conviction and the information requested must exist before the privilege can be validly applied.<sup>71</sup> Without a particularized assertion as to each question or request for information, a party cannot carry the burden of demonstrating the existence of the required nexus.<sup>72</sup> Absent this showing, the court will order the party to respond to the requested discovery and will enter judgment against the party for failure to comply.<sup>73</sup>

## 2. Timely Assertion of the Privilege

Substantial problems arise when a party fails to assert the privilege against self-incrimination in a timely manner. The United States Supreme Court has observed that "the Fifth Amendment is not a self executing mechanism. It can be affirmatively waived or lost by not asserting it in a

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66. See *Davis*, 650 F.2d at 1160; see also *S.E.C. v. First Financial Group of Texas, Inc.*, 659 F.2d 660, 668 (5th Cir. 1981).

67. "The claimant is not the final arbiter of the validity of his assertion. A proper assertion of a Fifth Amendment privilege requires, at a minimum, a good faith effort to provide the trial judge with sufficient information from which he can make an intelligent evaluation of the claim" (emphasis in the original). *Davis*, 650 F.2d at 1160; see also *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "The privilege normally is not asserted properly by merely declaring that an answer will incriminate." *Brunswick Corp. v. Doff*, 638 F.2d 108, 110 (9th Cir. 1981).

68. *United States v. Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969); see also *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir. 1974); Comment, *Plaintiff as Deponent, Invoking the Fifth Amendment*, 48 U. CHI. L. REV. 158 (1981).

69. See *Davis*, 650 F.2d at 1160.

70. *Baker*, 647 F.2d at 917; *Martin-Trigona v. Gouletas*, 634 F.2d 354, 360 (7th Cir. 1980) (cited with approval in *Baker*, 647 F.2d at 917).

71. See *supra* note 70.

72. See *Davis*, 650 F.2d at 1160.

73. See *supra* note 64.

timely fashion."<sup>74</sup>

Unless an extension of time is granted, failure to object to a discovery request within the time fixed by the applicable discovery rule or statute acts as a waiver of available objections.<sup>75</sup> This is true even for an objection that the information sought is privileged.<sup>76</sup> The automatic waiver provisions that exist in conjunction with a number of the discovery rules, including interrogatories,<sup>77</sup> requests for admission,<sup>78</sup> and requests for production,<sup>79</sup> make imperative the assertion of the privilege on a timely basis. Silence will cost the litigant all right to assert his privilege against self-incrimination in response to such discovery.

Another type of timing problem may arise if the civil complaint contains allegations that later could become the subject of a criminal prosecution. This situation is exemplified by the case of *London v. Patterson*.<sup>80</sup> London was a financial advisor who was sued by one of his clients. Among other things, the client charged that London had defrauded her. During the discovery stage of the litigation, London's deposition was taken in which he made various statements. Approximately three months later, London was indicted for forgery and grand theft arising out of a transaction that was a part of the subject matter of the civil suit. At the time of his deposition, London allegedly was unaware that a possible criminal prosecution was in the making. At his criminal trial, London did not testify, but the prosecution read portions of his deposition to the jury and London was convicted. In a subsequent habeas corpus proceeding, London argued that the use of his deposition by the prosecution violated his privilege against self-incrimination. London theorized that the deposition answers he gave were not entirely knowing and voluntary because he had no notice of the pendency of the criminal matter. London claimed he was presented the "coercive choice" of either remaining silent at the deposition and possibly having a large default judgment entered against him or answering the questions asked at the deposition and possibly having his responses used in a subsequent criminal prosecution.<sup>81</sup>

74. *Davis*, 650 F.2d at 1160 (citing *Maness v. Meyers*, 419 U.S. 449, 466 (1975)).

75. *Davis*, 650 F.2d at 1160.

76. *United States v. 58.16 Acres of Land*, 66 F.R.D. 570 (E.D. Ill. 1975) (cited in *Davis*, 650 F.2d at 1160).

77. *Shenker v. Sportelli*, 83 F.R.D. 365 (E.D. Penn. 1979); *Leach v. Superior Court of Shasta County*, 111 Cal. App. 3d 841, 169 Cal. Rptr. 42 (1980); FED. R. CIV. P. 33; CAL. CIV. PROC. CODE §2030.

78. *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D. Ala. 1976); *Schaff v. Superior Court of Merced County*, 146 Cal. App. 3d 921, 924-25, 194 Cal. Rptr. 546, 548 (1983); FED. R. CIV. P. 36; CAL. CIV. PROC. CODE §2031; 4A MOORE'S FEDERAL PRACTICE § 37.02 (2nd ed., 1975).

79. *Balistreri v. Holtzman*, 55 F.R.D. 470, 472-73 (E.D. Wis. 1972); *Jack v. Wood*, 258 Cal. App. 2d 639, 65 Cal. Rptr. 856 (1968); FED. R. CIV. P. 34; CAL. CIV. PROC. CODE §2033; 4A MOORE'S FEDERAL PRACTICE §36.03 (2nd ed., 1975).

80. *London v. Patterson*, 463 F.2d 95 (9th Cir. 1972).

81. *Id.* at 97-98.

The appellate court rejected London's contentions and affirmed the denial of his petition for habeas corpus relief.<sup>82</sup> The affirmance of the trial court was based primarily on the grounds that London was represented at the deposition by counsel and the civil complaint alleged facts that constituted a basis for potential criminal prosecution. Because no objection had been raised at the deposition, nor had a proper protective order been sought, the court found London's deposition statements to have been voluntary and thus properly admitted at his criminal trial.<sup>83</sup>

The implications of *London* are clear. Civil practitioners must be attuned to possible criminal charges that can arise out of the events underlying a civil complaint, and they must assert appropriate objections or seek a protective order in a timely manner, regardless of whether the client is the focus of a current criminal proceeding. Without the timely efforts of counsel, the client will be deemed to have voluntarily waived his privilege against self-incrimination as to all statements and information he has provided in a civil action.<sup>84</sup> The client may then find this same information introduced against him in a subsequent criminal proceeding.<sup>85</sup>

In considering whether to assert the privilege against self-incrimination, a litigant must weigh a variety of factors to determine the appropriate course to follow during the discovery phase of a civil action. A simple outline of the factors to be considered in such a situation should include the following:

- a. Is the discovery that is being sought relevant to the subject matter of the action?
- b. Assuming the allegations contained in the complaint and subsequent pleadings are true, do they constitute, in whole or in part, the basis for a possible criminal prosecution? Has the statute of limitations run on the potential criminal charges?
- c. What "juristic consequences" may be imposed by the court if the party asserts the privilege as to the discovery requested?
- d. When must the party either answer or object to the requested discovery based upon the applicable procedural rule?
- e. What information being sought by the opposing party clearly falls within the scope of the privilege?
- f. What type of particularized showing can be made so that the validity of the privilege is clear to the court, yet the informa-

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82. *Id.* at 98.

83. *Id.*

84. *Id.*; see also *United States v. Kordel*, 397 U.S. 1, 8-9 (1970); *United States v. Solomon*, 509 F.2d 863 (2nd Cir. 1975).

85. See *supra* note 84.

tion sought to be protected remains undisclosed?

By answering the above questions, counsel can determine which information should be objected to on the grounds of the privilege; when and how the objection should be made; and what consequences or costs might result from interposing the privilege as an objection to an otherwise valid discovery request. Clearly, careful analysis of the privilege issue is required. As this article has shown, defendants in civil cases retain the right to assert their privilege against self-incrimination, but potentially serious and detrimental costs can be assessed against litigants who assert the privilege to prevent disclosure of potentially incriminating information.

### THE FUTURE ROLE OF THE PRIVILEGE IN CIVIL LITIGATION

The current treatment of the privilege against self-incrimination in the context of civil discovery shows a clear conflict between one party's right to obtain relevant information through the discovery process and the opposing party's right to claim the privilege while having the merits of the underlying civil action determined by a trier of fact.<sup>86</sup> The approaches taken by the courts to resolve this conflict cover a wide range of solutions, but appear to tilt in favor of defendants. The courts apparently believe that defendants have neither initiated the action nor sought affirmative relief and therefore, are due an added measure of protection.<sup>87</sup> The question may be asked, however, whether the solutions currently favored by the courts can be counted on in the future. Once again, the answer seems to depend upon whether a party is litigating in a state or a federal court.

#### A. *State Courts of California*

In the state courts of California, the role of the privilege during civil discovery has been so well defined that major changes are unlikely. Both the California Supreme Court and the courts of appeal have consistently held that a party seeking affirmative civil relief may not refuse to provide information on matters relevant to their recovery based upon the privilege against self-incrimination. Moreover, the party is deemed to have waived his right to assert the privilege upon the filing of the complaint.<sup>88</sup> In contrast, a defendant in a civil matter may validly assert the privilege, but ap-

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86. See generally Note, *supra* note 27, at 576-94 (discussing conflicting constitutional rights when privilege is claimed in discovery).

87. *Keller v. Hilgendorf*, 79 F.R.D. 687, 689 (E.D. Wis. 1978) ("fundamental fairness requires that a civil defendant be given access to information that may be used against him during a civil trial"); see also *supra* note 4.

88. See *supra* notes 14-16.

appropriate "juristic consequences" may be imposed by the court.<sup>89</sup>

The approach of the state courts to the existence, scope, and effect of the privilege in civil litigation has the advantage of simplicity, clarity, and consistency. Litigants and the courts should have little trouble understanding and applying the principles of waiver and "juristic consequences" to the wide variety of civil cases in which a party may seek to assert the privilege against self-incrimination.

### 1. *The Problem Posed by the Filing of a Cross-Complaint*

When a defendant asserts a cross-complaint against the plaintiff, has he waived his privilege against self-incrimination as to information relevant to the affirmative relief sought? Based on the approach taken by the state courts, it would appear that waiver has occurred. But what if the cross-complaint is compulsory instead of permissive? In other words, the filing of the cross-complaint was not entirely volitional on the part of the defendant, but a result of the subject matter of the plaintiff's suit.<sup>90</sup> This apparent lack of a volitional act would appear to preclude application of the waiver theory to a defendant's filing of a compulsory cross-complaint, thus leaving him free to assert his privilege against self-incrimination.<sup>91</sup>

Finding waiver as to permissive cross-complaints and not as to compulsory cross-complaints is the kind of definitional hairsplitting for which both lawyers and judges are consistently criticized. Furthermore, this hairsplitting is completely unnecessary in deciding whether or not waiver has occurred in such situations. For even if a cross-complaint is compulsory, a defendant can decide to forego asserting it and suffer the penalty of permanent loss of his claim. The compulsory cross-complaint provisions of the California Code of Civil Procedure do not require a party to file a cross-complaint. However, if a party wishes to assert certain claims against the opposing party, a complaint must be asserted in the instant action or the claims are lost.<sup>92</sup> In a similar fashion, a plaintiff who foregoes the filing of a suit loses his claim as a result of the running of the statute of limitations.<sup>93</sup> The filing of a suit and the assertion of a cross-complaint are

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89. See *supra* note 45 (state courts). These consequences may include drawing of an adverse inference for the information sought to be protected by the privilege, limiting of evidence that the asserting party may introduce at trial and even the preclusion of a particular claim or defense.

90. Compare CAL. CIV. PROC. CODE §426.10-426.70 (compulsory cross-complaints) with *id.* §428.10-428.80 (cross-complaints).

91. A compulsory cross-complaint would place the defendant back in a defensive posture thus the rationale for permitting assertion of the privilege against self-incrimination would seem to apply.

92. CAL. CIV. PROC. CODE §426.30.

93. See, e.g., *Davies v. Krasna*, 14 Cal. 3d 502, 535 P. 2d 1161, 131 Cal. Rptr. 705 (1975).

both volitional and therefore, whether a cross-complaint is compulsory or permissive, is of no consequence in deciding whether a waiver of the defendant's privilege against self-incrimination has occurred. Based on the approach consistently applied by the state courts, a defendant who asserts a cross-complaint, whether compulsory or permissive, would seem to have waived his privilege against self-incrimination as to any information relevant to the affirmative relief sought in the cross-complaint.<sup>94</sup>

## 2. Conflicts With Federal Constitutional Interpretations

Although the waiver/dismissal rule employed by the California courts is simple and straightforward, the rule seems to be in conflict with the holding of the United States Supreme Court in *Lefkowitz v. Cunningham*.<sup>95</sup> In *Lefkowitz*, the appellee challenged a New York statute that terminated a public official's term of office if the official refused to testify about his conduct in office when subpoenaed by a grand jury or other authorized tribunal. The Court, holding the statute invalid, distinguished its adverse inference decision in *Baxter*<sup>96</sup> and stated that the inference drawn from a party's refusal to testify was only one factor to be considered in the decision to impose sanctions. Conversely, the statute in *Lefkowitz* automatically terminated a public official's term of office once the official refused to testify.<sup>97</sup> The Court found the statutory sanction impermissible because no other factor needed to be considered.

The state courts of California employ an approach similar to the statute in *Lefkowitz*. A party seeking affirmative relief in a civil suit, who refuses to respond to a valid discovery request based on the privilege against self-incrimination, will subject his claim for relief to automatic dismissal. The refusal to testify is not merely a factor to be considered in imposing sanctions, but rather, it is the sole determining factor that the claim will be dismissed. *Lefkowitz*, however, would seem to cast doubt on such an approach to the privilege problem.

Although the issue apparently has never arisen, a number of distinguishing factors in *Lefkowitz* seem to weaken substantially application of the case to the waiver/dismissal rule employed by the California courts.

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94. See *Fremont Indemnity*, 137 Cal. App. 3d at 559-60, 187 Cal. Rptr. at 140.

95. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

96. See *Baxter*, *supra* note 42.

97. The court said:

*Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent'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; here, refusal to waive the Fifth Amendment privilege leads automatically and without more to the imposition of sanctions.

*Lefkowitz*, 431 U.S. at 808 n.5.



First, *Lefkowitz* involved a grand jury proceeding in which the State of New York was seeking to compel the respondent's testimony. Second, the respondent was not in the position of voluntarily seeking affirmative relief before the grand jury. *Lefkowitz*, therefore, appears inapplicable on its facts because the waiver/dismissal rule is limited to civil actions and to parties who voluntarily assert affirmative claims for relief. The holding in *Lefkowitz* nonetheless raises questions about the efficacy of the waiver/dismissal solution when applied to the problem of a party's assertion of the privilege in response to an otherwise valid discovery request.

More troubling than the concerns raised in *Lefkowitz*, however, is a series of Supreme Court decisions holding that although a state may give its citizens greater protections than the federal constitution provides, a state may not deny its citizens the minimum protections accorded by the federal constitution.<sup>98</sup> The Ninth Circuit in *Gerrans* held that the federal Constitution, as interpreted by the Supreme Court, precludes the automatic dismissal of a civil suit when a party asserts the privilege against self-incrimination during pretrial discovery.<sup>99</sup> The California waiver/dismissal rule, therefore, may accord California citizens less substantive rights than those provided by the federal Constitution. If this is indeed the case, then the California rule would have to give way to those standards the federal courts, in *Gerrans* and other cases, have declared constitute the minimum substantive rights accorded by the federal Constitution.

*Gerrans*, however, may be inapplicable to the waiver/dismissal solution employed by the California courts. The issue in *Gerrans* was whether a party's refusal to respond to discovery, based upon the assertion of the privilege against self-incrimination, constituted a willful default sufficient to result in dismissal of the suit. The California cases have not viewed the issue in the same light.<sup>100</sup> The state courts have found a knowing and voluntary waiver of a party's privilege against self-incrimination, thus eliminating the constitutional issue entirely.<sup>101</sup> Although arguments based on *Lefkowitz* and *Gerrans* have never been raised in the state courts, it appears that the waiver/dismissal approach to the problem of a plaintiff who asserts the privilege against self-incrimination during pretrial discovery is firmly established in the state court system.

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98. See *Oregon v. Haas*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *Mills v. Rogers*, 102 S.Ct. 2442, 2449 (1982). "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Id.*

99. See *supra* note 36.

100. See *Britt*, 20 Cal. 3d at 858, 574 P.2d at 774-75, 143 Cal. Rptr. at 703.

101. See *supra* note 94.

## B. The Federal Courts

The role that the privilege against self-incrimination plays in civil discovery in the federal courts is currently in a state of considerable flux. Until a few years ago, the prevailing view in the federal system was that a plaintiff waived his privilege against self-incrimination as to any information relevant to the issues raised by the complaint.<sup>102</sup> The courts reasoned that to hold otherwise would unfairly prejudice defendants in the preparation and presentation of their defense.<sup>103</sup> In 1979, the Fifth Circuit Court of Appeals decided *Wehling v. Columbia Broadcasting System*<sup>104</sup> and applied a somewhat different approach to the issue of the assertion of the privilege in civil litigation.

In *Wehling*, the plaintiff, who owned a number of trade schools, filed a suit for libel alleging that he had been defamed by a television news story. The broadcast stated that the plaintiff had defrauded both his students and the federal government by abusing federal student loan and grant programs. When Columbia Broadcasting System (hereinafter referred to as CBS) sought pretrial discovery from the plaintiff concerning operation of the schools, the plaintiff invoked his privilege against self-incrimination and asserted that a grand jury was in the process of investigating the operations of the schools. The trial court ordered the plaintiff to answer the questions posed to him by the defendant. The plaintiff then moved for a protective order asking the court to fashion some type of relief short of outright dismissal that would respect the rights of both parties. The trial court denied plaintiff's motion and ordered him to submit to discovery. Plaintiff once again refused based on his privilege against self-incrimination, and the court dismissed plaintiff's suit.<sup>105</sup>

*Wehling* epitomizes the case of a plaintiff who retreats behind the cloak of the privilege against self-incrimination to the substantial detriment of the party against whom the plaintiff has sought affirmative relief.<sup>106</sup> The privilege, therefore, was both a shield and a sword in the hands of the plaintiff. It protected him from disclosure of potentially incriminating information, while precluding the defendant from obtaining evidence that may have provided a valid defense to the plaintiff's allegations.<sup>107</sup>

On appeal, the Fifth Circuit sought to balance the defendant's need for

102. See Note, *supra* note 27, at 580 n. 43.

103. See *Independent Productions Corp. v. Loew's Inc.*, 22 F.R.D. 266, 276 (S.D.N.Y. 1958).

104. 608 F.2d 1084 (5th Cir. 1979), *reh'g denied*, 611 F.2d 1026 (5th Cir. 1980).

105. *Wehling*, 608 F.2d at 1085-86.

106. "In refusing to answer any questions regarding his operation of the schools, Wehling deprived CBS of information concerning the accuracy of its broadcast and thus thwarted discovery of issues at the heart of plaintiff's lawsuit." *Id.* at 1086.

107. *Id.* at 1087.

information against the constitutional protection that the plaintiff had a right to assert.<sup>108</sup> In particular, the court recognized that the plaintiff should not be penalized for asserting his privilege against self-incrimination, but neither should the defendant be placed at a disadvantage as a result of the plaintiff's assertion of his constitutional right:<sup>109</sup>

[W]e emphasize that a civil plaintiff has no absolute right to both his silence and his lawsuit. Neither, however, does the the civil defendant have an absolute right to have the action dismissed anytime a plaintiff invokes his constitutional privilege. When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.<sup>110</sup>

The court rejected a waiver/dismissal solution to the problem, and adopted a balancing of interests approach that attempted to measure the relative weights of the parties' competing interests with a view toward accommodating the interests of both sides.<sup>111</sup> In applying the balancing approach to the *Wehling* facts, the appeals court held that the balance tipped in favor of the plaintiff. While finding that CBS should not be prejudiced in developing facts that could relieve the broadcasting system of liability, the court declared that the plaintiff's constitutional protection against self-incrimination and his due process right to a judicial determination of the suit clearly predominated.<sup>112</sup> The dismissal by the trial court was reversed and the case was remanded for entry of a protective order that stayed discovery until the statute of limitations ran on plaintiff's potential criminal liability.<sup>113</sup>

Since *Wehling*, the balancing of interests approach has been expressly adopted by the District of Columbia Circuit<sup>114</sup> and by various district courts.<sup>115</sup> Although the Ninth Circuit has not fully adopted *Wehling*, the court noted in *Baker v. Limber*<sup>116</sup> the availability of the balancing approach to protect parties from unfairness during pretrial discovery. Because the decision of the Ninth Circuit in *Gerrans*<sup>117</sup> uses an approach

108. *Id.* at 1088.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 1089. "Although a three year hiatus in the lawsuit is undesirable from the standpoint of both the court and the defendant, permitting such inconvenience seems preferable at this point to requiring plaintiff to choose between his silence and his lawsuit." *Id.*

114. See *Black Panther Party v. Smith*, 661 F.2d 1243, 1270-74 (D.C. Cir. 1981), *vacated*, 102 S.Ct. 3505 (1982).

115. See *Rockwood Computer Corp. v. Morris*, 94 F.R.D. 64 (E.D.N.Y. 1982).

116. 647 F.2d at 918 n.6.

117. 592 F.2d 1054 (1979).

similar to the decision of the Fifth Circuit in *Wehling*, the Ninth Circuit, given the proper case, would apparently apply the balancing of interests approach to the problems that arise when civil litigants assert their privilege against self-incrimination during pretrial discovery.

The *Wehling* decision and its progeny clearly raise more questions than they answer. Although balancing of the competing interests of the parties protects and preserves the rights of each side, no clear criteria have emerged in weighing each interest during the balancing process. The decisions of *Wehling* and *Black Panther Party v. Smith*<sup>118</sup> indicate that a party's interest in asserting the privilege against self-incrimination usually outweighs any other competing interest. Similarly, both the substance and the rhetoric of these cases indicate that a stay of discovery pending the termination of potential criminal liability is the remedy preferred by the courts.<sup>119</sup>

Imposition of a stay of discovery, however, raises a multitude of issues. How long should the stay last, for example, and under what conditions? If a party is indicted, should the stay last until the trial is complete, or the appeal resolved, or until all possible habeas corpus petitions have been reviewed? Does the opposing party have any remedies for the delay and prejudice that a lengthy stay of discovery might impose?

The *Wehling* court recognized that its decision may have created more problems than it solved, and attempted to address a few of the more obvious issues. First, the court recognized that possible avenues of discovery open to CBS at the time the plaintiff asserted his privilege might be closed when the stay was finally lifted three years later. To solve this problem, the court held that if the postponing of discovery deprived CBS of crucial information that otherwise would have been available, and if there was a clear showing of prejudice to the ability of CBS to prove the truth, a district court would be free to fashion whatever remedy was required to prevent such unfairness.<sup>120</sup>

Next, the court made clear that the discovery stay was for a specific period of time and that its decision should not be read as requiring that the stay be extended until the termination of all criminal proceedings, regardless of their duration.

Although we have refused to presume that a three-year stay would necessarily prejudice CBS's efforts to defend against *Wehling's* claim, we are aware that a point may be reached where the likelihood of prejudice is so great that the trial court could be justified in requiring plaintiff to either submit to dis-

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118. See *supra* note 114.

119. *Wehling*, 608 F.2d at 1089; *Black Panther Party*, 661 F.2d at 1274.

120. See *Wehling*, 608 F.2d at 1089.

covery or forego his lawsuit.<sup>121</sup>

Finally, the court pointed out that the stay was not for all discovery, but only for discovery that exposed the plaintiff to the risk of self-incrimination.<sup>122</sup> CBS was free, therefore, to engage in all other discovery and even proceed immediately to trial without deposing the plaintiff.<sup>123</sup>

In its denial for rehearing, the court in *Wehling* pointed out that if CBS went to trial without full discovery, the plaintiff's continued invocation of his privilege against self-incrimination would allow the trier of fact to draw an inference unfavorable to the plaintiff.<sup>124</sup> This potentially negative inference is one "penalty" that the party who chooses silence and asserts the privilege still must suffer.

Clearly, room remains for creative representation of parties faced with the type of problem experienced by the parties in *Wehling*. The various factors used in weighing the competing interests of the parties, and the remedies chosen to protect those interests all are open to the creativity, persuasiveness, and acumen of counsel. A number of factors, however, should always be considered by counsel and the courts when approaching the issue of a party's assertion of the privilege against self-incrimination during pretrial discovery. Although the following list is far from exhaustive, it distills the issues the courts have examined when using the balancing of interests approach exemplified by *Wehling*.

a. Counsel should determine whether the privileged information is reasonably relevant to the subject matter of the action and falls within the parameters of Rule 26(b).<sup>125</sup> Assertion of the privilege as to requests for information that are of marginal relevance can be disposed of on the basis of relevance, and the issue of the privilege can be avoided entirely.<sup>126</sup>

b. If the requested information is relevant, counsel should examine whether the privilege has been properly invoked as to time, manner, and substance. If the privilege has not been properly invoked, then further inquiry would be unnecessary.<sup>127</sup>

c. If the requested information is relevant and the privilege properly invoked, then a balancing of interests should be undertaken. The party asserting the privilege must show the scope and immediacy of the risk of incrimination.<sup>128</sup> Certainly, a party who has been indicted on a related criminal charge can make a much stronger showing of potential risk than

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121. *Wehling, reh'g denied*, 611 F.2d at 1027.

122. *Id.*

123. *See id.*

124. *Id.*

125. FED. R. CIV. P. 26(b).

126. *See Gerrans*, 592 F.2d at 1057; *see also Note, supra* note 27, at 595-98.

127. *See supra* note 64.

128. *See supra* notes 112-14.

one who has never even been the subject of a criminal investigation. The party seeking discovery must then demonstrate his need for the information sought and the prejudice that would be suffered if he is denied disclosure of the requested information.<sup>129</sup> A party who can demonstrate that the information sought goes to the very heart of his claim or defense, and that no other avenue exists for obtaining the information, is in a substantially better position than a party seeking information relevant to only a small portion of the case for which possible alternative sources might exist.

d. Once the balancing process is complete and one party is found to have predominant rights and interests, an appropriate remedy should be fashioned. In this phase, both parties should make a showing of the scope and impact of each of the remedies proposed. The relationship of the remedy to the problem must also be examined. Certainly, if the information for which the privilege is asserted applies to only one relatively minor claim or defense, a complete stay of discovery is inappropriate. The prejudice that might result from the imposition of each of the proposed remedies is also an important factor to be considered. A remedy that threatens the irrevocable loss of critical information to one party or another must give way to a remedy that results in substantially lesser consequences.<sup>130</sup>

e. Even after the remedy is chosen and imposed, the parties must remain alert to changing circumstances. Modification of the remedy should be sought if the impact becomes disproportionate to the original problem.<sup>131</sup>

f. Even if a restrictive remedy of substantial duration or impact is imposed, a party may choose to forego the discovery sought, prepare his case from other sources, and proceed to trial. Following this course would permit the trier of fact to draw an adverse inference from the continued assertion of the privilege by the opposing party.<sup>132</sup> On the other hand, if the party asserting the privilege should suddenly decide at trial to waive the privilege and testify, a court could preclude this tactic on the basis of fundamental fairness and the potential prejudice that would be imposed upon the nonasserting party.<sup>133</sup>

## CONCLUSION

The state courts of California have developed a simple approach to the

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129. See *supra* note 114.

130. See *supra* notes 104 and 114.

131. See *supra* note 104.

132. See *Wehling, reh'g denied*, 611 F.2d at 1027.

133. See *supra* note 58 and accompanying text.

problems that arise when a party asserts the privilege against self-incrimination in response to a request for pretrial discovery. If the asserting party is the plaintiff, he is precluded from raising the privilege as to any information relevant to the relief he seeks in the action.<sup>134</sup> If the asserting party is the defendant, he may assert the privilege as to potentially incriminating information, but the court can impose a variety of penalties on him as a result of refusing to disclose discoverable information.<sup>135</sup>

The federal courts of California have allowed both the plaintiff and the defendant the right to assert the privilege in response to a request for discovery.<sup>136</sup> In recognizing each party's right to raise the privilege, the federal courts in California and elsewhere have embarked upon a developing process that, while still somewhat ill-defined, attempts to balance each party's competing interests in the particular information sought.<sup>137</sup>

Although the dismissal solution to the privilege problem still has its adherents in the state courts, the growing trend in the federal system is toward adoption of a balancing of interests approach. Based upon the Ninth Circuit decision in *Gerrans*<sup>138</sup> and the footnote mention of *Wehling*<sup>139</sup> in *Baker*,<sup>140</sup> it seems reasonably certain that the Ninth Circuit would apply the full balancing of interests solution to the privilege problem if faced with a case that raised the privilege issue in the context of civil discovery.

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134. See *supra* notes 14-26 and accompanying text.

135. See *supra* note 45 (*state courts*) and accompanying text (*state courts*).

136. See *supra* notes 29-46 and accompanying text.

137. See *supra* notes 104-17 and accompanying text.

138. See *supra* note 117.

139. See *supra* note 104.

140. See *supra* note 116.