

**PRESENTED AT**

Webcast

June 12, 2020

## **Parallel Civil and Criminal Proceedings**

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# PARALLEL CIVIL AND CRIMINAL PROCEEDINGS

Quentin Brogdon

## I. INTRODUCTION

Parallel criminal and civil cases arising out of the same event occur with some frequency. They can occur, for example, in a motor vehicle wreck case when the driver of one of the vehicles is charged with DWI or some other criminal charge, when the government pursues criminal charges against the officers of a corporation, in a premises liability case involving a criminal assault, or in a dramshop case involving a drunken driver who was over-served by a bar.

The pendency of parallel criminal and civil cases presents civil litigators with unique challenges and opportunities. Critical questions arise, such as:

1. Must the civil case be abated until the criminal case is resolved, or can the cases proceed forward simultaneously?
2. What are the potential consequences of the assertion of the Fifth Amendment privilege against self-incrimination by a party or a witness? and
3. What are the potential effects of differences in the scope of discovery in the civil case and the scope of discovery in the parallel criminal case?

## II. WHICH CASE GOES FIRST?

When there are parallel civil and criminal cases, the first issue that must be resolved is whether the civil case must be abated, pending resolution of the criminal case. The criminal defendant or the civil defendant sometimes tries to have the civil case abated, on the grounds that the criminal's actual or anticipated assertion of a Fifth Amendment privilege against self-incrimination will unfairly impede the defense of the civil case. Defendants also sometimes try to have parallel civil cases abated on the grounds that critical evidence in the criminal case that is necessary for the defense of the civil case is unavailable to the civil litigants due to statutory or other prohibitions on its release.

State and federal courts in Texas balance a number of factors in determining whether the civil proceedings may proceed forward without abatements in such circumstances. These courts usually reason that the pendency of a criminal matter does not prevent proceeding with a contemporaneous civil matter involving the same issues or parties, and that abatement of the civil proceedings is akin to a blanket assertion of the Fifth Amendment privilege against self-incrimination, which is not permitted. *See* Q. Brogdon, "Parallel Criminal and Civil Cases: Which Goes First?" *Texas Lawyer*, May 11, 2015.

In *In re R.R.*, 26 S.W.3d 574 (Tex. App.–Dallas, 2000, no pet.), the Dallas Court of Appeals found that a trial court abused its discretion when it halted discovery in a civil action brought by a father to modify his visitation rights involving his daughter. The trial court's order followed the filing of criminal charges against the father for allegedly molesting the mother's daughter from a previous marriage. The court of

appeals found that the abatement order was an impermissible blanket stoppage of all discovery in the civil case. The court reasoned that, “a party is entitled to full, fair discovery within a reasonable period of time” and that “the pendency of a criminal matter does not impair a court’s proceeding with a contemporaneous civil matter involving the same issues or parties.” *In re R.R.*, 26 S.W.3d at 574.

In *Gebhart v. Gallardo*, 891 S.W.2d 327 (Tex. App.–San Antonio 1995, no writ), the San Antonio Court of Appeals found that a trial court abused its discretion when it issued an order severing a negligence claim from a civil conspiracy claim and abating the negligence claim, pending the resolution of parallel criminal proceedings. The court of appeals reasoned that abatement of the civil proceedings was akin to a blanket assertion of the Fifth Amendment privilege against self-incrimination, and that blanket assertions of the privilege are not permitted. *Gebhart*, 891 S.W.2d at 330. Instead, a criminal defendant must assert a Fifth Amendment privilege in response to each specific inquiry in the civil case, as appropriate, and each assertion of the privilege must rest on its own circumstances. *Id.*

The *Gebhart* court pointedly noted that, although a criminal jury cannot draw any adverse inference from a defendant’s assertion of the privilege, a civil jury is allowed to draw such an adverse inference. *Id.* at 331. The court reasoned that the abatement “vitiates” the civil negligence claim because the plaintiff was prevented from preserving the defendants’ testimony through oral depositions on the negligence issues while the abatement order was in effect, and that “as time goes on, memories will likely dim and evidence become unavailable.” *Id.* at 332.

In *McInnis v. State*, 618 S.W.2d 389 (Tex. App.–Beaumont 1981, writ ref’d n.r.e.), an attorney hired a hit man to kill the attorney’s client’s husband, and the attorney later gave a false statement. The trial court denied the attorney’s request that disbarment proceedings against the attorney be continued, pending the resolution of criminal perjury charges, and disbarred the attorney. The Beaumont Court of Appeals upheld the denial of the continuance, observing that there were no constitutional or statutory provisions granting the attorney the right to choose whether the criminal case or civil case first proceeded to trial, and that if the disbarment trial was continued until all criminal charges against the attorney were resolved, the disbarment suit “may well be delayed for several months or years.” *McInnis*, 618 S.W.2d at 393.

Defendants seeking stays in Texas state courts sometimes cite a 1995 Texas Supreme Court case, *Texas Department of Public Safety Officers Association v. Denton*, 897 S.W.2d 757 (Tex. 1995), for the proposition that delaying a civil trial is an appropriate remedy when there is a conflict between the constitutional right of one party to avoid self-incrimination and the constitutional right of another party to due process and a fair trial. The limited holding of *Denton*, however, was based on a fact-specific application of the “offensive use doctrine” – a doctrine that limits a plaintiff’s ability to pursue civil claims while simultaneously using a Fifth Amendment privilege as a sword in the civil litigation. In *Denton*, the Texas Supreme Court simply found that a trial court could consider delaying a plaintiff’s civil suit when the plaintiff asserted his Fifth Amendment privilege to avoid answering discovery about his civil claims. *Denton*, 897 S.W.2d at 763.

In cases involving parallel criminal and civil proceedings, the “offensive use doctrine” discussed in *Denton* usually is not in play because it is most often the defendant, not the plaintiff, who is asserting a Fifth Amendment privilege. But, if the plaintiff is the party asserting the privilege, the holding of *Denton* may prevent the parallel civil case from proceeding forward.

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First appeared as part of the conference materials for the  
2020 Parallel Civil and Criminal Proceedings session  
"Parallel Civil and Criminal Proceedings"