OUT OF THE FRYING PAN AND INTO THE FIRE – ASSERTING CONSTITUTIONAL RIGHTS ON BEHALF OF A CLOSELY HELD CORPORATION

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Your client is a closely held company that has been sued for fraudulent activity. To make matters worse, your client and its principals are also being actively investigated by state and federal law enforcement agencies. Under these difficult circumstances, both the client and the lawyer have the ability to navigate through these troubled waters employing privileges afforded by state and federal Constitutions, recent Supreme Court precedent, and under Virginia law, a quirky statute that has been the subject of substantial debate among practitioners and jurists alike.[1] In short, attorneys will sometimes be called upon to represent individuals and their companies when both are subject to concurrent civil and criminal proceedings. This article describes some of the tools at a practitioner's disposal to represent and protect the clients' interests.

In responding to written discovery requests and deposition questions under these circumstances, the law is settled that a civil litigant, in his or her individual capacity and subject to some limitations, can broadly assert Constitutional rights against self-incrimination and avoid providing substantive responses to these discovery requests. *See North American Mortg. Investors v. Pomponio*, 219 Va. 914, 919, 252 S.E.2d 345, 348 (1979). However, the issue becomes more complicated when a closely held corporation is called upon to provide this information. Its corporate representatives and designees, acting in their own self-interest, will assert their well-established personal Constitutional privileges. What happens when the closely-held defendant corporation, a separate legal entity that presumably is not afforded Constitutional privileges against self-incrimination, has no one to respond to discovery requests on its behalf?

Ordinarily, corporations cannot claim the privilege against self-incrimination in response to a legally binding request to turn over corporate records. *U.S. v. Kordel*, 397 U.S. 1, 8 n.9 (1970). At the same time, courts have held that a corporation can only act through its agents; when agents respond to discovery for the corporation, those agents are compelled to give testimony. Since the Fifth Amendment of the United States Constitution prohibits testimonial self-incrimination, agents of the corporation can assert the privilege on their own behalf."[2] *Kohn*, 336 N.W.2d at 298. Therefore, officers and agents of the corporation can claim the benefits afforded by the Fifth Amendment and state Constitutions in responding to a complaint or answering interrogatories, even when acting on behalf of the corporation. *Kohn v. State*, 336 N.W.2d 292, 298–99 (Minn. 1983); *see also Kordel*, 397 U.S. at 7–8.

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[1] Va. Code Ann. 8.01-223.1, which states: "In any civil action the exercise by a party of any constitutional protection shall not be used against him."

The threshold for determining testimonial self-incrimination is very low. The agent of the corporation does not have to prove that the evidence he provides for the corporation will directly lead to his indictment: the agent only has to establish that the answers to questions posed "may furnish a link in the chain of evidence to be used against him." *Pomponio*, 219 Va. 914, 919, 252 S.E.2d 345, 348.

While individuals who control a corporation may invoke privileges against self-incrimination to shield themselves from providing information about a corporation's activities, Virginia courts have yet to formally address this issue when there is no one in the corporation who can provide this information for the corporation without fear of their own self-incrimination. Similarly, it's unclear whether under those circumstances a corporation can be sanctioned or defaulted for failure to make discovery. Defense counsel faced with this situation should rely upon the very simple language in Va. Code Ann. 8.01-223.1. Assuming the Court adheres to the mandate to follow the law rather than make law, the Court will have no choice but to deny the inevitable request for discovery sanctions and default for a corporation's failure to make discovery. This analysis is bolstered by the 2010 Supreme Court decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010) in which the Court held for the first time that a corporation enjoys First Amendment rights of association and free speech. If articulated properly, the corporation which fails to respond to discovery under the circumstances presented here may be given a "pass". The result may seem unjust to plaintiffs, but the patchwork of case law and statutes, when read together, leads to this conclusion.