

## **Top 10 Tips to Keep Your Client from Getting Convicted by Something YOU Did In the Civil Case:**

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We have a lot in common.

Cases I have pending with you all:

1. Sexual assault
2. DWI with accident
3. Doctor Licenses/Teacher/Lawyer
4. Stalking
5. Family Violence

Things to be careful of:

Protective orders, cps inquiries, medical board licenses, licenses in general, family law cases with any criminal allegations, civil suits alleging any criminal violations- including intentional torts and those regarding neglectful supervision.

I spoke with my criminal defense friends, here are our top 10 tips we want civil practitioners to be aware of.

10. Be mindful of collateral consequences
9. Watch out for Licenses
8. Social Media Pitfalls
7. DFPS may not be your friend
6. Protective Orders
5. Mediated Settlement Agreements:
4. Discovery Requests
3. Agreeing to Findings of Family Violence, Protective Orders, even class C
2. Client Testifying
1. Consult with Us!

### **#10: Be mindful of collateral consequences.**

All criminal lawyers must be mindful of collateral consequences, but even the best sometimes slip up. If your case involves any allegations of abuse, drug/alcohol abuse, child abuse/neglect,

etc., you have to be aware that those things carry big rippling effects in someone's life. Besides people's licenses (see # 9) there are other issues, such as immigration consequences, criminal enhancements etc. Also, be careful of firearm situations.

Employment consequences- many times your client may have to answer to HR for allegations made in a civil or criminal matter. Please be careful in how you answer. The same for any kind of board, judiciary, state bar, medical etc.

When someone is accused of a crime, without even formal charges, their employment situation can change, custody situation, etc.

#### **#9: Licenses: what you don't know can hurt your client.**

What does your client do for a living? Are they a: doctor, lawyer, teacher, commercial truck driver, plumber, nurse, nursing assistant, welder, etc? You must know what licenses they hold. These could be in danger. Do they need to carry a firearm? Do they need a class c license? Remember a DWI can have an affect administratively on someone's license.

If your client has a license, the boards may come with many questions or want a hearing. These require specialized answers. Also, be careful how your client testifies because there are different standards for licensing hearings. I once represented a judge and when we went to testify before the judicial commission, the prosecutors showed up to listen to the testimony. Be careful how you

#### **#8: Watch out for social media pitfalls:**

This one should be obvious but often, your client doesn't think so. I tell my clients to pretend that they are on reality tv and the only people watching their show are government officials. I don't want them posting relationship status, photos of money and wealth, drinking/partying, etc. For example, if your client is getting a divorce, do we want photos of him/her dating? Drinking? What about if your client is accused of some sort of theft/embezzlement- photos of a nice house, car are not helpful. We don't want our clients to appear to be out having a great time if they are accused of something that we want them to appear remorseful for, etc.

#### **#7: DFPS: Department of Family Protective Services (formerly CPS) beware:**

I have been involved in many cases where I am the criminal lawyer on a case involving domestic violence or sexual assault accusations. Many of these stemmed from a family law case or other type of civil case. You don't realize it, but anything around children, even if it doesn't directly involve them, can cause DFPS to be involved. They will want to interview your client and get his/her take. You need to weigh the risk of that. Many people don't know DFPS works directly with the CPU of the police department, the children's hospital CARE Team, etc. Those statements are not made in a vacuum. Even if your client goes to seek medical care for the child, oftentimes the hospital staff will call DFPS on your client. Be careful of how your client talks to hospital staff social workers and DFPS at the scene.

#### **#6: Protective orders:**

Do not agree to any finding of Family Violence on protective orders! My first tip here is get a criminal lawyer involved. I've inherited cases where the civil lawyer/family lawyer has handled the protective order hearing. They have put my client on the stand to testify about the incident and much more. This hurts our client. Here you may have won the battle but end up losing the war. Remember, even if you get custody, win the civil case, if our client goes to prison because

of a statement made that is later held against him, we have lost the war. Also, as a criminal lawyer I want the opportunity to get discovery through that hearing and be able to observe and perhaps cross the complaining witness. It's an invaluable opportunity for me to see their demeanor on the stand and I want as many facts nailed down as possible so they cannot change them in the criminal trial. However, I do not want the same thing to happen to my client, so I generally do not let my client testify at such hearings.

#### **#5: Mediated Settlement Agreements:**

Sometimes we understand how much you want your case to go away successfully. However, this may have ramifications for the criminal suit. Most civil lawyers think the settlement cannot be brought into the criminal case, but it often is- through forms of impeachment and motive. We also have to be mindful that no prosecution can be settled in the civil case, and of claims of witness tampering.

I like to be involved in the settlement and the wording of some issues, just in case the settlement comes back into the criminal matter. Also, there may be times to not hurry up and settle a case. That settlement could come back to bite our client in the criminal proceeding.

#### **#4: Discovery Requests:**

Client can invoke the Fifth in a civil case. Our client must consider each question and determine whether the answer will incriminate or furnish a link in the chain that will lead to evidence that may tend to incriminate. In re Willie, 25 Fed. Cas. 38 (1807) (Chief Justice Marshall writing). Absent challenge, the assertion of privilege is good. Upon challenge, the client is entitled to be examined on a sealed record, without other counsel or parties present, to explain the assertion. If the judge overrules the plea, the client must be afforded the opportunity to appeal on a sealed record before he can be compelled to answer.

- a. Also note that invoking the right against self incrimination allows but does not require drawing adverse inferences in the civil case.

Things to consider: Abatement: There is no constitutional requirement that a civil action be stayed pending the disposition of a related criminal proceeding. \*In re R.R.\*, 26 S.W.3d 569, 574 (citing \*McInnis v. State\*, 618 S.W.2d 389, 393 (Tex. App. --Beaumont 1981, \*writ ref'd n.r.e.\*). However, a trial court, in the exercise of its discretion, may stay a civil proceeding to prevent interference with a criminal proceeding. \*Id\*. When deciding whether to delay a civil proceeding, a trial court should consider the effect of discovery in a civil case on pending criminal proceeding. \*Texas Attorney General's Office v. Adams\* 793 S.W.3d 771, 776 (Tex. App.--Forth Worth 1990, orig. proceeding).

The pendency of a criminal matter does not impair a court's proceeding with a contemporaneous civil matter involving the same issues or parties. \*Id\*. Courts disfavor absolute or "blanket" denial of a discovery order. \*See In re R.R.\*, 26 S.W.3d 569. Instead, a court should attempt to reconcile the litigants' competing interests, and the discovery order should be tailored to protect specific interests. \*See Underwood v. Bridewell\*, 931 S.W.2d 645, 646 (Tex. App.--Waco 1996, orig. proceeding). In \*Adams\*, civil defendants did not seek to stay the trial court discovery order, for a delay would harm their defense. Rather, it was the commissioner, a non-party to the civil and criminal proceedings, who was seeking a stay of the civil suit. Thus, the Fifth Amendment right and the right to fair trial of the party seeking a stay were not factors

relevant to the court's decision. In contrast, when a party is a defendant in a civil suit and a related parallel proceeding, the right to fair trial and Fifth Amendment right of the defendant demand that the civil suit be abated or stayed pending resolution of the criminal proceeding. The privilege of the Fifth Amendment must be exercised in connection with precise questions and NOT as a general excuse for refusing to appear in response to a subpoena. \*Meyer v. Tunks\*, 360 S.W.2d 518, 523 (Tex. 1962) (citing \*Rogers v. U.S.\*, 340 U.S. 367). The Fifth Circuit directs federal district courts to weigh six factors to determine whether a stay of the civil action pending resolution of the criminal action is warranted: (1) the extent to which the issue in both proceedings overlapped, (2) the posture of the criminal proceeding (whether the moving party has been indicted), (3) the interest of the plaintiff in proceeding quickly with the litigation, (4) the burden the civil suit could impose on a criminal defendant, (6) the public interest. Occasionally, a seventh factor is added to the list: interest of persons who are not parties to the civil litigation. \*Dominguez v. Hartford Financial Services Group, Inc\*., 530 F.Supp. 2d 902, 905 (S.D. Texas 2008).

### **#3: Admitting to Criminal Activity in Any Form, In Any Hearing/Document:**

I recently had a case where my client, a physician, was accused of touching a female friend in an inappropriate manner. She sued him civilly, and we were unsure if there would be criminal prosecution down the road. In the documentation, texts and demand letters, he wanted to admit to the touching, even though it was a consent issue.

Recently, I had a client release text messages in his civil discovery that included drug use. Once those text messages were sent to DFPS, they were then included in the criminal matter which was indecency with a child allegations. The State then tried to insinuate that not only did my client touch his daughter inappropriately, he also subjected her to abuse because she was around drugs/alcohol. In this case, pleading the 5<sup>th</sup> in response to the discovery would have been more beneficial to his criminal case

### **#2: Client Testifying:**

This one may seem obvious to many of you. However, I see many civil lawyers letting their clients answer questions either directly or indirectly that involve criminal allegations. They may not realize it, but those answers may come back to hurt your client in a criminal trial. Things to watch out for: any allegations of domestic violence, alcohol/drug use, neglect to children, inappropriateness with children, dangerous behavior around children. Previous relationships. Watch out for things involving dishonesty, tracking someone with a device, repeated phone calls, repeated texts. Looking through someone's phone, belongings, going through their house. Running someone's background via law enforcement, making false allegations against someone, admitting to false allegations in a police report.

I have seen clients testify to text messages amounting to threats, harassment, possible stalking charges. I have clients testify about their drug use, alcohol use and it come back in a neglect, child abuse case. Sexual allegations can be tricky as well. Will your client admit to sexual conduct with someone accusing them? If you think it's harmless in a civil suit it may come back

to bite us in the criminal suit because our defense has already been locked in stone because of the testimony.

### **#1: Consult with Us.**

Many times as lawyers our egos or our anxiety keeps us from asking questions. We think we have experience and passed the bar, so we can handle different types of law. While that may be true in general, it never hurts to have a few friends who handle different types of law such as immigration, criminal, personal injury and family law that you can reach out to. I never mind if my civil friends call me up with a criminal question. It's the only thing I'm good at and I get to appear smart for a few minutes. If you can't find someone to ask, please reach out to me, my contact information is on here and I'd be happy to help advise you if I can.