THE FIFTH AMENDMENT IN CIVIL LITIGATION

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With the ever-increasing focus on white collar prosecutions, the line between civil fraud, on the one hand, and mail or wire fraud,[1] on the other, is becoming harder to distinguish. The difficulty finding this line is illustrated by the frequency with which civil RICO complaints allege predicate acts based on wire or mail fraud.[2]

Because fraud allegations can quickly result in a grand jury investigation or a prosecution, it is important for civil litigators to be aware of the need to employ carefully the Fifth Amendment privilege against self-incrimination. Failure to make a timely invocation of the privilege can have disastrous consequences. An inadvertent waiver can make a bad situation much worse.

The purpose of this article is to point out frequent situations encountered in civil litigation where the invocation of the privilege should seriously be considered and how the privilege should be invoked.

The starting point is to determine whether your client has a privilege against self-incrimination. Under the Georgia Constitution "[n]o person shall be compelled to give testimony tending in any manner to be self-incriminating."[3] Furthermore, the Official Code of Georgia provides that "[n]o party or witness shall be required to testify as to any matter which may incriminate or tend to incriminate himself..."[4] A person incriminates himself when he furnishes evidence which subjects him to a penalty, forfeiture or punishment for a crime.[5]

When deciding whether a witness is entitled to invoke the privilege against self-incrimination, the court need only find that the witness might conceivably be criminally implicated.[6] A party or witness may raise the Fifth Amendment in response to any discovery if the answer "might be a link in an incriminating chain or provide a lead to other usable evidence."[7] A witness in a state court can claim the privilege against self-incrimination as to matters which might tend to incriminate him or her under either state or federal law.[8]

If the invocation of the privilege is challenged, the trial court must determine whether the answers could incriminate the witness. If so, then the decision whether it might incriminate the witness is left to the witness.[9] On the other hand, where the trial court determines that the answers could not incriminate the witness, the witness must testify (or be subject to the court's sanction).[10] It is for the trial court to decide if the danger of incrimination is "real and appreciable."[11]

When deciding whether the danger of incrimination is "real and appreciable," the trial court considers the implications of each question to which the privilege is raised and the setting in which it is asked.[12] Because the trial court cannot evaluate the invocation of the privilege in a vacuum, the privilege cannot be asserted in advance of the questions actually being asked during an examination or at a hearing.[13] Where "questions are on their face innocent," the party raising the privilege "may be required to provide sufficient information on which the court may find that a real danger of incrimination exists."[14]

The trial judge must be absolutely certain after a careful consideration of all of the circumstances in the case that the witness is mistaken and that the answers cannot possibly have a tendency to incriminate before he denies the witness the protection of the privilege.[15]

Given the breadth of the federal mail fraud statute, it should be relatively easy for a witness to establish that a line of questioning might tend to incriminate him or her. For example, the Department of Justice Manual contains the following discussion about the term "scheme" used in both the federal mail and wire fraud statutes:

> "The fraudulent aspect to the scheme to defraud is to be measured by nontechnical standards and is not restricted by any common-law definition of false pretenses. The law puts its imprimatur on the accepted moral standards and condemns conduct which fails to match the "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[16]

Of course, the invocation of the privilege has consequences. Unlike criminal prosecutions, the invocation of the privilege raises an inference in civil litigation which is admissible against the party invoking the privilege.[17]

The dilemma of deciding whether to invoke the privilege only applies to individuals, since corporations do

not have a Fifth Amendment privilege against self-incrimination.[18] Thus, by suing both a corporation and individuals associated with the corporation, a plaintiff can obtain the double benefit of obtaining incriminating information from a corporation while simultaneously forcing individual defendants to invoke the privilege against self-incrimination.[19]

The first situation in civil litigation where invocation of the privilege should be considered is in the answer to the complaint. One strategy which may be employed in order to avoid having to invoke the privilege against self-incrimination in the answer is the use of Rule 12(b) motions which, at least in federal court,[20] although not in Georgia state courts,[21] precludes the need to file an answer. This has the effect of either delaying the time for publicly invoking the privilege, or doing away with it altogether.

If the defendant must answer the complaint, it may well be that admitting the allegations could be self-incriminating, especially since pleadings in a civil action may be admissible as an admission in any subsequent criminal prosecution.[22] However, if a defendant refuses to answer certain allegations by invoking the privilege, the defendant's claim of the privilege is treated as equivalent to a specific denial in the answer.[23] This prevents the entry of a default judgment so that the exercise of the privilege is not too costly.[24]

Furthermore, it does not appear that by merely answering a complaint, or by denying the factual allegations contained therein, the defendant waives the right to assert the privilege against self-incrimination later in the proceedings.[25] However, a defendant who does not invoke properly the privilege against self-incrimination in the answer may be subject to judgment on the pleadings.[26]

While a denial of a factual allegation in a complaint is probably not a waiver of the defendant's Fifth Amendment privilege, an admission in an answer without invoking one's privilege against self-incrimination can constitute such a waiver if the answer is verified.[27] According to one commentator, a civil defendant must file an answer and is "obliged to answer those allegations that he can and make a specific claim of the privilege as to the rest."[28]

Asserting an affirmative defense would likely not result in the waiver of the defendant's Fifth Amendment privilege.[29] However, it has been held that raising an affirmative defense might result in the waiver of the attorney-client privilege[30] if the party asserting the privilege placed information protected by the privilege in issue through the assertion of the affirmative defense.[31] By using the attorney-client privilege as a sword, rather than only as a shield, courts have found an implied waiver of the right to assert the privilege. Under such circumstances, the assertion of the privilege would be manifestly unfair to the opposing party who would be denied access to information vital to its response to the affirmative defense.

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However, since waivers of the Fifth Amendment privilege are not to be lightly inferred[32] and courts generally indulge every reasonable presumption against finding such a waiver,[33] it is unlikely that the mere raising of an affirmative defense would lead to a waiver of the privilege against self-incrimination, especially if the affirmative defense does not place information protected by the privilege in issue.

For example, if a defendant raised the affirmative defense of unclean hands, he would not impliedly waive the Fifth Amendment privilege because the affirmative defense focuses on the plaintiff's unclean hands, not the defendant's.[34] On the other hand, if the court balances the equities (or fault) of both parties when applying the unclean hands maxim, it is arguable that the defendant's conduct was placed in issue by raising the affirmative defense.[35] It is not clear whether this would result in an implied waiver of the privilege against self-incrimination. However, as the privilege against self-incrimination is based upon both the Georgia and United States Constitutions and courts generally indulge every reasonable presumption against finding such a waiver,[36] it is unlikely a court would find a waiver under these circumstances.

While the general rule is that by filing a lawsuit the plaintiff has not thereby waived his or her right to invoke the privilege against self-incrimination, this is not the universal rule.[37] In fact, some cases have adopted what has been called an "automatic waiver" rule.[38] In yet other cases the courts, while declining to hold that a plaintiff has waived the right to assert the Fifth Amendment privilege simply by filing a lawsuit, have nevertheless held that his complaint may be dismissed for asserting the privilege.[39] However, in these cases the courts apparently never considered whether the action should be stayed pending termination of the criminal proceedings.[40]

A defendant may also consider seeking a stay of civil litigation pending the outcome of a criminal investigation or prosecution. Once again, the purpose of seeking a stay is to avoid having to confront the dilemma of invoking the privilege in civil litigation, although by moving to stay a defendant may disclose the need to invoke the privilege as to the allegations in the complaint. However, generally, especially when the civil opponent is a government agency, stays are not granted, with some exceptions, unless there is a pending indictment.[41] Prior to indictment, stays of civil litigation may be difficult to obtain, although stays of discovery until the expiration of applicable statutes of limitations have been granted.[42]

Once the answer is filed, the next time that the privilege must be considered is when various discovery procedures are employed. Once again, the privilege against self-incrimination should be invoked if the response to the discovery might tend to subject the defendant to criminal prosecution. There must be a timely invocation of the privilege in order to avoid a waiver.

Generally, once a witness answers some questions regarding a particular subject matter, he may not be allowed to assert his privilege to refuse to answer as to the details of that particular topic.[43] However, the witness can invoke the privilege if further answers present a risk of further incrimination.[44]

One question which arises is if there has been a waiver of the privilege in civil litigation, does that waiver extend to a subsequent criminal prosecution? For example, if a civil defendant waived his privilege against self-incrimination and testified briefly at a deposition on a particular topic, can that defendant later invoke his privilege against self-incrimination if he is served with a grand jury subpoena where the prosecution intends to conduct a more thorough and complete cross-examination on that topic? Under both Georgia and federal law, the answer is probably that the defendant can invoke the privilege in any subsequent proceeding;[45] however, any admission previously made by the defendant in the civil litigation will probably be admissible in a subsequent criminal prosecution.[46] This is true even if the defendant attempted to reserve his right to object at a later time.[47]

Under Georgia law, when invoking the privilege in response to discovery it is not clear that it is always necessary to explicitly refer to the privilege. The Georgia Supreme Court has held that a refusal to answer is sufficient when it was "plain from the context of the questioning in general that plaintiff was invoking the fifth amendment privilege against self-incrimination."[48]

Although the Georgia Court of Appeals has also acknowledged this "silent" invocation of the privilege, in one case it analyzed "the limited and unique circumstances" and found that the assertion of the privilege post-appeal "was pure afterthought" and there had been no silent invocation earlier. Thus, the Court concluded that the "privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it."[49]

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More recently, however, the Georgia Supreme Court has stated "that where a party asserts the Fifth Amendment privilege against self-incrimination to matters sought to be discovered, he must respond to each question asked, asserting the privilege to those questions he deems necessary."[50] Of course, the question remains whether the assertion of the privilege must be explicit or may be "silent."[51]

There may be situations where the "silent" invocation of the privilege, rather than an explicit invocation, needs to be seriously considered. There are situations where an opposing party will attempt to interrogate a deponent on a topic of dubious relevance for the very purpose of forcing the deponent to publicly invoke his or her privilege against self-incrimination. In such instances, a "silent" invocation of the privilege should be seriously considered if in the context of the questioning it is clear that the answer might tend to incriminate the deponent.[52] The "silent" invocation of the privilege permits the deponent to preserve his or her privileges against self-incrimination while simultaneously preventing an opponent from obtaining an unfair advantage by forcing a public invocation of the privilege (which would, of course, then be available for public dissemination).

In lieu of a "silent" invocation of the privilege, there might be situations where a witness could consider invoking the privilege under seal to avoid any unfair use of its invocation in public. For example, a protective order might be sought to have the deposition conducted with no one present except persons designated by the Court and to have the transcript sealed and opened only by order of the Court.[53] One problem with this approach may be the Uniform Superior Court Rule which declares that all court records are public and available for public inspection.[54]

When invoking the privilege, either explicitly or silently, there may be other procedural requirements. In federal court the deponent must not only make a timely invocation of the privilege, but also may be required to immediately seek a protective order. Under federal case law, counsel cannot direct a witness not to answer and then leave it to his or her opponent to bring the matter before the court in a motion to compel.[55]

In Georgia, on the other hand, the Supreme Court has declared that when a party invokes the privilege against self-incrimination the "party seeking discovery is then entitled to make a motion to compel discovery."[56] "It thereafter becomes the responsibility of the trial court to determine whether the refusal to respond to discovery is within the privilege claimed."[57]

Before invoking the privilege against self-incrimination, a witness should make sure that the discovery sought would be relevant. At least under Georgia law, if the discovery is not relevant, then the witness may wish to invoke the "privilege" to be free from irrelevant questions.[58] Moreover, if the question is relevant only as to the credibility of the witness, the witness may wish to in-

voke the privilege against answering questions which would tend to bring infamy, disgrace or public contempt upon himself.[59] In both of these instances, the witness can avoid publicly invoking the privilege against self-incrimination. However, counsel must be careful to avoid a waiver of the privilege against self-incrimination.[60]

When responding to interrogatories, production requests or requests for admissions, the responding party is required to make a timely objection to the discovery request or waive objections.[61] However, it is unclear whether there can be a silent or implicit invoking of the privilege as to written discovery requests.

If the party served with a request for admission does not serve a timely answer or objection and does not move for an extension of time, the matter stands admitted.[62] Admissions made pursuant to a request for admissions are for the purposes of the pending action only.[63] Thus, an admission may not be admissible later in a criminal prosecution; however, it may still be used to provide leads which result in the discovery of incriminating evidence.

A situation which may affect the invocation of the privilege is when the discovery is sought from an individual who is designated to respond on behalf of the corporation. As stated previously, the corporation has no privilege of its own. However, the designated agent would have such a privilege. In this situation, the Supreme Court has stated that the corporation cannot designate an agent who, in response to the attempted discovery, invokes the privilege against self-incrimination.[64] If no agent of the corporation can respond without invoking the privilege, the proper remedy is to stay discovery until termination of the criminal action.[65]

The last situation where the invocation of the privilege against self-incrimination must be considered is the actual trial of the civil lawsuit. If the defendant has consistently invoked his or her privilege against self-incrimination in response to the complaint and during discovery, the trial court may well preclude that defendant from testifying at trial because to permit the testimony would allow the defendant to "sandbag" the opposition.[66]

As stated previously,[67] a party in a civil case is entitled to the adverse inference which results from an opponent's invoking of the Fifth Amendment privilege. Moreover, in civil litigation a party may generally call a witness even if it is known the witness intends to invoke his Fifth Amendment privilege.[68] And when the witness is an employee of a corporate party, or was an employee at the time of the incident in question, the influence might be drawn against the corporate party.[69]

Where a witness in a civil trial testifies during direct examination, but refuses to testify on cross-examination by invoking his privilege against self-incrimination, the witness' direct testimony may be stricken if the witness refuses to answer questions which are within the scope of the direct examination and relevant.[70] However, where the witness refuses to answer questions which are merely collateral to his direct testimony, e.g., those affecting the witness' credibility, the witness' direct testimony need not be stricken.[71]

Conclusion

The need to invoke the privilege against self-incrimination can arise in many types of civil lawsuits, e.g., fraud. Moreover, in deciding whether to invoke the privilege, counsel for a civil litigant must bear in mind the stage of the proceedings, the desire to avoid a waiver of the privilege, and the possible sanctions for invoking the privilege. However, if counsel will keep these considerations in mind, he or she can generally make an informed decision as to whether to invoke the privilege, and if so, when.

Footnotes

1. For example, 18 U.S.C. § 1341 makes it a felony to mail any document through the United States Postal Service in furtherance of a scheme to defraud.
2. The Federal RICO statute, 18 U.S.C. §§ 1961-68, provides that the pattern of racketeering activity necessary to state a claim must include at least two predicate acts which can include, among a long laundry list, violations of the mail and wire fraud statutes. For an idea as to the ever-increasing number of RICO cases being filed, see *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 481 n.1 (1985).
3. Ga. Const. Art. I, § I, ¶ XVI, *see also* U.S. Const. Am. V.
4. OCGA § 24-9-27(a).
5. *Marshall v. Riley*, 7 Ga. 367 (1889).
6. *Tennesco, Inc. v. Berger*, 144 Ga. App. 45, 240 S.E.2d 586 (1977); *Hoffman v. U.S.*, 341 U.S. 479 (1951); *U.S. v. Melchor Moreno*, 536 F.2d 1042 (5th Cir. 1976).
7. *Axson v. National Surety Corp.*, 254 Ga. 248, 250, 327 S.E. 2d 732 (1985); *see also Hoffman*, 341 U.S. 479.
8. *Mallin v. Mallin*, 227 Ga. 833, 183 S.E.2d 377 (1971); *Malloy v. Hogan*, 378 U.S. 111 (1964).
9. *Lawrence v. State*, 257 Ga. 423, 424, n.3, 360 S.E. 2d 716 (1987).
10. *Id.*
11. *Axson*, 254 Ga. at 250, 327 S.E.2d 732; *Hoffman*, 341 U.S. 479.
12. *Id.*
13. *Chastain v. State*, 113 Ga. App. 601, 149 S.E.2d 195 (1966).
14. McCormick, Evidence 2d ed. § 139 at 293; *Axson*, 254 Ga. at 250, 327 S.E.2d 732; *see Melchor Moreno*, 536 F.2d 1042.
15. *Malloy*, 378 U.S. at 12 (1964), *citing Hoffman*, 341 U.S. at 488.
16. The Department of Justice Manual, 9-43.210; *see also*, Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062 (1982).
17. *Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976); *Simpson v. Simpson*, 233 Ga. 17, 209 S.E.2d 611 (1974).
18. *Wilson v. U.S.*, 220 U.S. 361 (1911); *U.S. v. White*, 322 U.S. 694 (1944); *Classic Art Corp. v. State*, 245 Ga. 448, 265 S.E.2d 577 (1980).
19. *See U.S. v. Kordel*, 397 U.S. 1 (1970).
20. FRCP 12(a).
21. OCGA §§ 9-11-12(a) and (b).
22. *George v. State*, 103 Ga. App. 598, 120 S.E.2d 55 (1961) (verified answer in civil case admissible in criminal prosecution); *U.S. v. Jenkins*, 785 F.2d 1387, 1392-93 (9th Cir. 1986) *cert den* 479 U.S. 855 (deposition given in civil case admissible in subsequent criminal prosecution).
23. *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924 (7th Cir. 1983).
24. *de Antonio v. Solomon*, 42 F.R.D. 320 (D. Mass. 1967).
25. *ACLI International Commodity v. Banque Populaire Suisse*, 110 F.R.D. 278 (S.D. N.Y. 1986); *In re Knapp*, 536 So.2d 1330 (Miss. 1988); 10-Dix Building Corp. v. McDannel, 134 Ill. App. 3d 664, 480 N.E.2d 1212 (1985).
26. *North River Insurance Co., Inc. v. Stefanou*, 831 F.2d 484 (4th Cir. 1987).
27. *George*, 103 Ga. App. 598, 120 S.E.2d 55; *but see Chester v. Stage*, 162 Ga. App. 10,

290 S.E.2D 117 (1982) (unverified answer from condemnation proceeding admitted to show ownership).

28. 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1280 at 516. *See Stefanou*, 831 F.2d at 486.
29. *U.S. v. Of 47 Bottles, etc.*, 26 F.R.D. 4 (D. N.J. 1960).
30. As the privilege against self-incrimination is based on both the Georgia and United States Constitutions, it is necessarily afforded greater protection than the attorney-client privilege. Whereas waivers of the privilege against self-incrimination are not to be lightly inferred (see note 32 below) and courts generally indulge every reasonable presumption against finding such a waiver (see note 33 below), courts "confin[e] the attorney-client privilege to 'its narrowest permissible limits under the statute of its creation.'" *Atlantic Coastline Railroad Co. v. Daugherty*, 111 Ga. App. 144, 150, 141 S.E. 2d 112 (1965), quoting *Brookshire v. Penna R. Co.*, 14 F.R.D. 154 (N.D. Ohio 1953).
31. Defendants in a civil rights action who raised the affirmative defense of immunity waived their right to assert the attorney-client communications they received from the Attorney General with respect to issues of malice toward the plaintiff or knowledge of his constitutional rights. *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). The Court in *Hearn* reasoned that an implied waiver results when a party asserting the privilege places information protected by the privilege in issue through some affirmative act for his own benefit, and then attempts to use the privilege to protect against disclosure of the information. *See also, Gap Business Services, Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987)
32. *Smith v. United States*, 337 U.S. 137 (1949).
33. *Emspak v. U.S.*, 349 U.S. 190 (1955).
34. OCGA § 23-1-10 "who would have equity must do equity."
35. *See Atlanta Association of Fire Insurance Agents v. McDonald*, 181 Ga. 105, 181 S.E. 822 (1935).
36. *Emspak*, 349 U.S. 190.
37. *Compare Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), with *Brown v. Ames*, 346 F.Supp. 1176 (D. Minn. 1972) and *Independent Productions Corp. v. Loew's, Inc.*, 22 F.R.D. 266 (S.D. N.Y. 1958).
38. The reasoning underlying these decisions is similar to the reasoning in the decisions implying a waiver from the assertion of an affirmative defense. *See Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1204 (Fed. Cir. 1987), *citing Independent Productions Corp.*, 22 F.R.D. 266.
39. *Jones v. B.C. Christopher and Co.*, 466 F.Supp. 213 (D. Kan. 1979); *Brown*, 346 F.Supp. 1176; *Master v. Savannah Surety Associates, Inc.*, 148 Ga. App. 678, 252, S.E.2d 186 (1979).
40. *See Jones*, 466 F.Supp. at 227 (after holding that the complaint could be dismissed for plaintiff's asserting the Fifth Amendment privilege in response to discovery, court recognized that "perhaps some lesser sanction...which accommodates the interests of both sides" may be appropriate).
41. *Comptroller of the Currency v. Lance*, 632 F.Supp. 437, 442 (N.D. Ga. 1986); *but see, Wehling*, 608 F.2d at 1089.
42. *Wehling*, 608 F.2d at 1088-1089, *but see, Arden Way Associates v. Boesky*, 660 F.Supp. 1494 (S.D. N.Y. 1987); *Comptroller of the Currency v. Lance*, 632 F.Supp. 437 (N.D. Ga. 1986); Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D.
43. *Rogers v. U.S.*, 340 U.S. 367 (1951).
44. *In re Master Key Litigation*, 507 F.2d 292 (9th Cir. 1974).
45. *Ga. R.R. & Banking Co. v. Lybrend*, 99 Ga. 421, 27 S.E. 794 (1896) (waiver at former trial is immaterial); *Mallin*, 227 Ga. 833, 183 S.E.2d 377; *U.S. v. Licavoli*, 604 F.2d 613 (9th Cir. 1979). *But cf. Feig v. Feig*, 246 Ga. 763, 272 S.E.2d 723 (1980) (right to assert privilege voluntarily waived by consent agreement in prior divorce action); *U.S. v. Miller*, 904 F.2d 65 (D.C. Cir. 1990).
46. *Jenkins*, 785 F.2d 1387; *Farmer v. State*, 100 Ga. 41, 28 S.E. 26 (1896).
47. *U.S. v. White*, 846 F.2d 678, 690 (11th Cir. 1988).
48. *Temple v. Temple*, 228 Ga. 73, 74, 184 S.E.2d 183 (1971); *Bishop v. Bishop*, 157 Ga. 408, 121 S.E. 305 (1924).
49. *Cohran v. Carlin*, 165 Ga. App. 141, 144, 299 S.E.2d 738 (1983).
50. *Axson*, 254 Ga. at 249, 327 S.E.2d 732.
51. The Federal Rules of Civil Procedure may not provide for any type of "silent" invocation of the Fifth Amendment privilege. *See, e.g., National Life Insurance Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595 (3rd Cir. 1980).
52. *See Temple*, 228 Ga. 73, 184 S.E.2d 183.
53. OCGA § 9-11-26(c)(5) and (6).
54. Uniform Superior Court Rule 21; *Atlanta Journal v. Long*, 258 Ga. 410, 369 S.E.2d 755 (1988).
55. *Nutmeg Insurance Co. v. Atwell, Vogel & Sterling*, 120 F.R.D. 504, 508 (W.D. La. 1988) (attorney-client privilege).
56. *Axson*, 254 Ga. at 249, 327 S.E.2d 732.
57. *Id.*
58. Green, *Georgia Law of Evidence*, § 153.
59. OCGA § 24-9-27; *see* Green, § 155.1 at 308-9.
60. *See Cohran*, 165 Ga. App. 141, 299 S.E.2d 738.
61. *Drew v. Hagy*, 134 Ga. App. 852, 216 S.E.2d 676 (1975); *Ale-8-One of America, Inc. v. Graphic Color Services, Inc.*, 166 Ga. App. 506, 305 S.E.2d 14 (1983); *Tompkins v. McMickle*, 172 Ga. App. 62, 321 S.E.2d 797 (1984); *Smith v. National Bank of Georgia*, 182 Ga. App. 55, 354 S.E.2d 678 (1987).
62. *Strickland v. C&S National Bank*, 137 Ga. App. 538, 224 S.E.2d 504 (1976); *Booker v. Southern Steel & Aluminum Products, Inc.*, 150 Ga. App. 306, 257 S.E.2d 375 (1979); *Concert Promotions, Inc. v. Haas & Dodd, Inc.*, 167 Ga. App. 883, 307 S.E.2d 763 (1983).
63. OCGA § 9-11-36; Fed. R. Civ. P. 36.
64. *Kordel*, 397 U.S. 1; *see also General Dynamics Corp. v. Selb Manufacturing Co.*, 481 F.2d 1204, 1210 (8th Cir. 1973), *cert denied*, 414 U.S. 1162.
65. *See Kordel*, 397 U.S. at 9 (1970); *Afro-Lecon, Inc.*, 820 F.2d 1198.
66. *See Heidt, supra*, at 1130-32, *citing Duffy v. Currier*, 291 F.Supp. 810 (D. Minn. 1968).
67. *See* note 17, *supra*.
68. *See Cerro Gordo Charity v. Fireman's Fund American Life Insurance Company*, 819 F.2d 1471, 1480-82 (8th Cir. 1987) and the cases cited therein. Note, however, that in criminal actions a party may not call a witness, knowing that the witness will refuse to testify, for the purposes of having the witness assert his privilege before the jury. *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970) (*en banc*), *cert. denied*, 401 U.S. 995 (1971).
69. *See Brink's, Inc. v. City of New York*, 717 F.2d 700 (2nd Cir. 1983), relying in part on *Heidt, supra*.
70. *Heidt, supra*, at 1130-32.
71. *Id.*; *Howle v. Personnel Board of Appeals of East Point*, 122 Ga. App. 276, 176 S.E.2d 663 (1970).