

# REPRESENTING A CLIENT CONCURRENTLY IN A CIVIL AND A CRIMINAL MATTER

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## I. Situations wherein a civil/criminal dual representation may arise

- White collar/embezzlement
- Battery matters
- Vehicle collision matters with alleged criminal conduct (e.g., DUIs with injuries/death)
- Police Officers and other First Responders
- Sexual Assault matters
- Dissolution/family matters with alleged criminal conduct
- *Generally, crimes against persons*

## II. Order of Events

- Criminal case usually starts first
  - o Exception: statute of limitations where, for example, the investigation is taking a long time due to forensics, lots of evidence to analyze (white collar), numerous agencies involved, etc.
- Then the PI matter is filed later, either following the criminal matter, or at the SOL while criminal matter is still pending
  - o Usually, PI plaintiffs' attorney will wait for conviction, then file civil lawsuit
  - o Lots of times, however, PI plaintiffs' attorney will file on the heels of the criminal matter; but, there are few advantages (even disadvantages!) to doing this (e.g., costs of discovery, lack of information, lack of investigation, etc.)
  - o Filing early can cause issues for the victim (and prosecution), too, because it could open the victim up to discovery, and impeachment – a civil complaint can establish a motive for the victim (i.e., the victim is seeking money, not justice)

## III. Considerations arising out of a single fact pattern

- Statutes of limitations
- Constitutional matters (i.e., 5th Amendment to the United States Constitution)
- *Lybarger v. City of Los Angeles* (1985) 40 Cal. 3d 825 – *Garrity v. New Jersey* 385 U.S. 493 (1967) (*Lybarger's* federal equivalent) protections
  - o Place a statement on the record that the testimony is being compelled (this helps to ensure that the testimony from the civil case, which has been compelled, will not be used in the criminal matter)
  - o Will not be a party admission or otherwise admissible in the criminal matter
- DMV hearings in DUI matters – voluntary, so not compelled testimony; avoid these if you are counsel to defendant (and all other means by which your client might make admissible statements)
- Civil Compromise hearings, and impact on resolving civil side of the matter
- Right to invoke the 5th Amendment in civil and criminal court, but only where practical risk of incrim.
  - o File a motion under *Pacers v. Sup. Ct.* (1984) 162 Cal. App. 3d 686 – to stay discovery on the defendant with the 5th Amendment right, as a means of preventing self-incrimination
  - o Helps with discovery and deposition requests
- Settlement vis-à-vis client's insurance (e.g., cooperating with the insurance company in providing statements, etc.) – policy can be used to help the criminal defendant with restitution; statements admissible