

SILENCE AS A WEAPON AND A DEFENSE IN LEGAL DISCOVERY

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1 "To sin by silence when they should protest makes cowards of men."
2 [Abraham Lincoln]

3 **1 Scope**

4 There are many occasions in your administrative dealings with the government, the legal profession, and during legal
5 discovery where a knowledge of the following may be very helpful to you:

- 6 1. Knowing how to use your Constitutional rights in order to avoid giving a response that will advantage your opponent.
- 7 2. Knowing the legal implications of a response of silence from the other party.
- 8 3. Knowing when to be silent and what to be silent about in order to protect your rights.

9 This paper will carefully analyze this most important subject so that you can use silence either on your part or on your
10 opponent's part in order to improve your chances of winning in a legal forum.

11 **2 Requirement for the Miranda Warning: "You have a right to remain silent. . ."**

12 The seminal case on the right to remain silent when in the custody of the police is *Miranda v. Arizona*, 384 U.S. 436
13 (1966). When police take you into custody, they must give you the "Miranda Warning" before they are allowed to
14 interrogate you. If they forget to administer the warning, then any evidence they gather during interrogation of the prisoner
15 is not admissible in court.

16 In the context of civil proceedings, such as IRS audits and examinations, IRS revenue agents are not required to give you a
17 Miranda Warning. This was discussed at length in the case of *U.S. v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), in which the
18 court said:

19 **We cannot agree that every administrative official who confronts a citizen with a request for information that**
20 **might disclose criminal conduct, thereby exerts a compulsion on the citizen that must be dispelled by the**
21 **Miranda placebo. In today's vast and complex network of widespread daily administrative contacts between**
22 **citizens and government officials, such a holding would open a veritable Pandora's box. When a census taker**
23 **returns to recheck information he has received or a building inspector comes to investigate a report of**
24 **noncompliance with provisions of the city housing code or a game warden who hears shooting out-of-season**
25 **stops a man he finds in the woods or a bank examiner questions a teller whose figures are out of balance, would**
26 **each then have to give the Miranda warnings? In each case a governmental official is confronting a citizen and**
27 **criminal charges may result. There are a thousand and one administrative inquiries routinely made every day**
28 **in every city which could evoke responses that might form a part of the basis in proof for a charge of perjury,**
29 **falsification of records, failure to file a report or perform a legal duty or other criminal conduct. Most of**
30 **these routine administrative confrontations would be rendered ineffective to the citizen and his government**
31 **by imposing Miranda requirements. Indeed, if the warning became too commonplace, the very purpose of its**
32 **requirement could be undermined. If "authority" were allowed to supplant custody -- the deprivation of freedom**
33 **-- as the determinant We cannot agree that every administrative official who confronts a citizen with a request**
34 **for information that might disclose criminal conduct, thereby exerts a compulsion on the citizen that must be**
35 **dispelled by the Miranda placebo. In today's vast and complex network of widespread daily administrative**
36 **contacts between citizens and government officials, such a holding would open a veritable Pandora's box.**
37 **When a census taker returns to recheck information he has received or a building inspector comes to**
38 **investigate a report of noncompliance with provisions of the city housing code or a game warden who hears**
39 **shooting out-of-season stops a man he finds in the woods or a bank examiner questions a teller whose figures**
40 **are out of balance, would each then have to give the Miranda warnings? In each case a governmental official is**
41 **confronting a citizen and criminal charges may result. There are a thousand and one administrative inquiries**
42 **routinely made every day in every city which could evoke responses that might form a part of the basis in proof**
43 **for a charge of perjury, falsification of records, failure to file a report or perform a legal duty or other criminal**
44 **conduct. Most of these routine administrative confrontations would be rendered ineffective to the citizen and his**
45 **government by imposing Miranda requirements. Indeed, if the warning became too commonplace, the very**
46 **purpose of its requirement could be undermined. If "authority" were allowed to supplant custody -- the**
47 **deprivation of freedom -- as the determinant.**

48 [. . .]

49 *Marcus v. United States*, 422 F.2d 752 (5th Cir. 1970) is our latest decision which discusses this question.
50 *Marcus* was convicted for failing to file individual tax returns. One ground of his appeal was that he had not
51 been given Miranda warnings nor expressly told of the criminal nature of the investigation by special agents of
52 the Internal Revenue Service until after he had supplied records and made damaging admissions.*fn16 *Marcus*

1 contended, as Prudden now does, that Miranda applied to noncustodial tax fraud investigations. We rejected
2 this contention with the statement: "In a criminal tax fraud case, this Court has recently held that the
3 Miranda doctrine applies only to in-custody interrogation. Agoranos v. United States, 5 Cir., 1969, 409 F.2d
4 833. Since [the taxpayer] was at no time in custody during the Internal Revenue Service investigation, the
5 contention is without merit."*fn17
6 [U.S. v. Prudden, 424 F.2d 1021 (5th Cir. 1970)]

7 **3 First Amendment Response to Questions**

8 The First Amendment is the most powerful and yet most often overlooked tool of all to lawfully avoid disclosure of
9 information in legal discovery. The following subsections will describe how to invoke this right as a shield from legal
10 discovery.

11 **3.1 The right to NOT speak**

12 Very few people, in our experience, are aware that the First Amendment gives us a right to refrain from speaking or to
13 NOT speak, and that this right may be invoked to avoid speaking about any subject within the confines of legal discovery.
14 The best and least risky response to a question that you don't want to answer is to state the following:

15 "First Amendment. I have a right to NOT speak to the government or the state, and compelling me to do so
16 represents a form of compelled association."

17 Of the right to refrain from speaking, the book First Amendment Law in a Nutshell, Second Edition states the following:

18 *Just as there is freedom to speak, to associate, and to believe, so there is freedom not to speak, associate, or*
19 *believe.*

20 *"The right to speak and the right to refrain from speaking are complementary components of the*
21 *broader concept of 'individual freedom of mind.'" Wooley v. Maynard [430 U.S. 705] (1977).*

22 *Freedom of conscience dictates that no individual be forced to espouse ideological causes with which he*
23 *disagrees:*

24 *"[A]t the heart of the First Amendment is the notion that the individual should be free to believe as*
25 *he will, and that in a free society one's beliefs should be shaped by his mind and by his conscience,*
26 *rather than coerced by the State." Abood v. Detroit Bd. Of Educ. [431 U.S. 209] (1977)*

27 *[First Amendment Law in a Nutshell, Second Edition, pp. 266-267, Jerome A Barron, West Group, 2000; ISBN*
28 *0-314-22677-X]*

29 Of the right to refrain from speaking, the U.S. Supreme Court has said:

30 *Moreover, **freedom of thought and expression "includes both the right to speak freely and the right to refrain***
31 ***from speaking at all."** Wooley v. Maynard, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d 752 (1977)*
32 *(BURGER, C.J.). We do not suggest this right not to speak would sanction abuse of the copyright owner's*
33 *monopoly as an instrument to suppress facts. But in the words of New York's Chief Judge Fuld:*

34 *"The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public*
35 *expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is*
36 *necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves*
37 *the same ultimate end as freedom of speech in its affirmative aspect."* Estate of Hemingway v. Random House,
38 Inc., 23 N.Y.2d 341, 348, 296 N.Y.S.2d 771, 776, 244 N.E.2d 250, 255 (1968).
39 [Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 559, 105 S.Ct. 2218, 85 L.Ed.2d 588
40 (1985)]

41 Mention in the above holding about the right to avoid "public expression" is highly relevant to a court proceeding because:

- 42 1. All the jurists are "public officers". See 18 U.S.C. §201(a)(1).
- 43 2. The judge is a "public officer" who works for the government.
- 44 3. The attorneys are "officer of the court" and the court itself is a "public office". See:
45 <http://famguardian.org/Subjects/LawAndGovt/LegalEthics/Corruption/WhyYouDontWantAnAtty/WhyYouDon'tWantAnAttorney.htm>
- 46 4. All the records of the proceeding are "public records".