

# ***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 (1966).  
13 When police take you into custody, they must give you the "Miranda Warning" before they are allowed to interrogate you.  
14 If they forget to administer the warning, then any evidence they gather during interrogation of the prisoner is not admissible  
15 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 these*  
30 *routine administrative confrontations would be rendered ineffective to the citizen and his government by*  
31 *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 investigate*  
38 *a report of noncompliance with provisions of the city housing code or a game warden who hears shooting out-*  
39 *of-season stops a man he finds in the woods or a bank examiner questions a teller whose figures are out of*  
40 *balance, would each then have to give the Miranda warnings? In each case a governmental official is confronting*  
41 *a citizen and criminal charges may result. There are a thousand and one administrative inquiries routinely made*  
42 *every day in every city which could evoke responses that might form a part of the basis in proof for a charge of*  
43 *perjury, falsification of records, failure to file a report or perform a legal duty or other criminal conduct. Most*  
44 *of these routine administrative confrontations would be rendered ineffective to the citizen and his government by*  
45 *imposing Miranda requirements. Indeed, if the warning became too commonplace, the very purpose of its*  
46 *requirement could be undermined. If "authority" were allowed to supplant custody -- the deprivation of freedom*  
47 *-- as the determinant.*

48 [ . . . ]

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