III. SUBPOENAS

A. Scope of Subpoena Power

A grand jury's subpoena power is coextensive with its broad power to investigate. Accordingly, it may subpoena all witnesses, nonprivileged documents and other physical evidence relevant to its investigation, provided that the subpoenas are not unreasonably burdensome. Probable cause is not a prerequisite to the issuance of a subpoena.[1] There is a strong presumption of regularity that accompanies a grand jury subpoena.[2]

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[1] United States v. R. Enterprises, Inc., __ U.S. __, __ (1991); United States v. Sahley, 526 F.2d 913 (5th Cir. 1976); In re Womack, 333 F. Supp. 479 (N.D. Ill. 1971), aff'd, 466 F.2d 555 (7th Cir. 1972).

[2] United States v. R. Enterprises, Inc., __ U.S. at __; In re Grand Jury Subpoena, 920 F.2d 235, 244 (4th Cir. 1990); In re Grand Jury Proceedings, 896 F.2d 1267, 1278 (11th Cir. 1990).

1. Subpoenas must seek relevant evidence

a. Subpoenas may not constitute a "fishing expedition"

The Government may not use a subpoena to conduct a "fishing expedition";[3] however, a subpoena is rarely invalidated because of a finding that it sought information irrelevant to the grand jury's investigation. In the face of general allegations that a subpoena seeks irrelevant information, the standard of "relevance" is easy to meet.

In United States v. R. Enterprises, Inc., __ U.S. __, __ (1991), the Supreme Court held that a grand jury subpoena is valid "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury investigation."

Earlier circuit court opinions have articulated a variety of different standards to be used in determining whether a subpoena is valid. In the Fourth Circuit, a subpoena is valid if it might aid the grand jury in its investigation, despite a possibility that the prosecutor may use the subpoena for some purpose other than obtaining evidence for the grand jury.[4] In the Third Circuit, the Government must establish by affidavit that the subpoena seeks relevant information

[3]United States v. R. Enterprises, Inc., __ U.S. __, __ (1991); FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924).

[4]United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978 (1983).

by stating that: 1) the item that a subpoena seeks is relevant to a grand jury's investigation; 2) the investigation is properly within the grand jury's jurisdiction; and 3) the Government does not seek the item primarily for a purpose other than to contribute to the grand jury's investigation.[5] In this circuit, once established by affidavit, a subpoena recipient may not challenge the relevance of a subpoena. The Eleventh Circuit does not require the Government to make any preliminary showing that a subpoena seeks relevant evidence; a validly-issued subpoena is presumed to seek such evidence.[6] Likewise, the Second, Seventh, and Ninth Circuits do not require an affidavit to establish relevance.[7]

The Third Circuit's affidavit requirement is highly suspect in light of the Supreme Court's determination that an initial burden should not be placed on the Government and that the Government should only be required to "reveal the general subject of the grand jury's investigation."[8]

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[5]In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

[6]In re Slaughter, 694 F.2d 1258 (11th Cir. 1982).

[7]See In re Grand Jury Proceeding, 721 F.2d 1221 (9th Cir. 1983); In re Grand Jury Subpoena Duces Tecum to John Doe Corp., 570 F. Supp. 1476 (S.D.N.Y. 1983); In re Grand Jury Proceedings of June 6, 1981, 519 F. Supp. 791 (E.D. Wis. 1981).

[8]United States v. R. Enterprises, Inc., __ U.S. at __.

b. Subpoenas may not be used for trial discovery

The Government may not use the grand jury and its subpoena power after indictment of a defendant for the gathering of evidence, or, otherwise, for pretrial discovery or trial preparation for a trial against that defendant.[9] A prosecutor may, however, use the grand jury to gather evidence at any time prior to indictment, though the prosecutor may believe that the grand jury has already received evidence that will support an indictment.[10]

Following indictment, the Government may use grand jury subpoenas that might have some relationship to a trial, if the Government's ongoing investigation is related to a possible later indictment of additional defendants,[11] or to additional crimes for which the grand jury has not issued indictments.[12] This is true even if such an inquiry might uncover further evidence against a person whom the grand jury has already indicted.[13] Witnesses before the grand jury may include prospective witnesses in a pending trial, provided that their testimony is directed at

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[9]In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 429 U.S. 1062 (1977); United States v. Star, 470 F.2d 1214 (9th Cir. 1972).

[10]United States v. Picketts, 655 F.2d 837 (7th Cir.), cert. denied, 454 U.S. 1056 (1981).

[11]See United States v. Gibbons, 607 F.2d 1320, 1323 (10th Cir. 1979).

[12]United States v. Dyer, 722 F.2d 174 (5th Cir. 1983); In re Grand Jury Proceedings (Pressman), 586 F.2d 724 (9th Cir. 1978); In re Grand Jury Proceedings, 896 F.2d 1267, 1279 (11th Cir. 1990).

[13]In re Grand Jury Proceedings, 814 F.2d supra; In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980).

offenses other than those upon which indictments have already been brought. Further, the Government may utilize any collateral fruits of such testimony.[14] A former grand jury witness may be recalled before the grand jury -- regardless of whether his testimony may relate to an existing indictment -- for the purpose of having him recount his prior grand jury testimony.[15] In any event, the return of an indictment, alone, does not provide a subpoena recipient with a legal basis for refusing to comply with a subpoena.[16]

c. Grand jury may not be used to conduct a civil investigation

The Government may not use a grand jury to conduct a civil investigation.[17] Some courts have held that a complainant may raise the question of improper use for a civil investigation only 1) if a civil suit develops, and 2) in the context of an appropriate motion.[18]

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[14]Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974); United States v. Sellaro, 514 F.2d 114 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975).

[15]United States v. Beasley, 550 F.2d 261 (5th Cir.), cert. denied, 434 U.S. 863 (1977).

[16]In re Grand Jury Proceedings, 632 F.2d supra.

[17]United States v. Sells Eng'g Inc., 463 U.S. 418, 431-33 (1983).

[18]See In re Grand Jury Subpoena Duces Tecum, 520 F. Supp. 253 (S.D. Tex. 1981).

Some courts have accepted an affidavit from prosecutors to satisfy questions of misuse of grand jury process for a civil investigation.[19]

d. Subpoenas may not be used to harass or intimidate

Courts will refuse to enforce subpoenas used to harass or intimidate any person.[20] Prohibited harassment includes the use of a grand jury subpoena to coerce a plea bargain, when such use has no relation to a proper purpose of the grand jury.[21] To succeed in opposing a subpoena on the grounds of alleged prosecutorial harassment, a complainant must show that the grand jury has lost its independence.[22] This is a difficult burden to meet.[23]

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[19]In re Grand Jury Subpoenas, April 1978, 581 F.2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

[20]United States v. R. Enterprises, Inc., __ U.S. __, __ (1991); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

[21]United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978 (1983).

[22]United States v. Doe, 541 F.2d 490 (5th Cir. 1976).

[23]See, e.g., In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948) (subpoena not harassing, despite delivery of many files under prior subpoenas and fact that all previous investigations of petitioner indicated innocence).

2. Scope of subpoenas duces tecum

a. "Reasonableness"; overview

Provided that it is relevant to the grand jury's investigation, a subpoena duces tecum may seek all nonprivileged documents and physical evidence,[24] including documents or information which another party may have already produced,[25] or information which may readily be available other than from the subpoenaed party.[26] Moreover, a subpoena duces tecum may require the production of original documents.[27] This may be especially important; for example, where it is important to capture notations, erasures, or colored markings on documents that may not show up on copies. Physical evidence sought by a subpoena duces tecum may include handwriting exemplars, photographs, and fingerprints.[28]

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[24]See In re Corrado Bros. Inc., 367 F. Supp. 1126 (D. Del. 1973).

[25]United States v. Davis, 636 F.2d 1028 (5th Cir. Unit A Feb. 1981), cert. denied, 454 U.S. 862 (1981).

[26]See In re Grand Jury Subpoena Duces Tecum Issued to S. Motors Carriers Rate Conference, Inc., 405 F. Supp. 1192 (N.D. Ga. 1975).

[27]See In re Certain Chinese Family B. & D. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956).

[28]United States v. Santucci, 674 F.2d 624 (7th Cir. 1982), cert. denied, 459

(continued...)

The subpoena duces tecum, however, must be "reasonable" in scope.[29] Moreover, subpoenas may not seek documents or other physical evidence from some classes of persons (such as foreign governments), and may only seek evidence from others (such as Congress and telephone companies) if certain procedures are followed. The paragraphs that follow discuss the obligations that a subpoena duces tecum places on its recipient and the persons and entities upon which a subpoena duces tecum may be served.

b. Continuing obligation to provide documents

The recipient of a subpoena has a continuing obligation to produce all documents and other evidence that fall within the time frame of the subpoena, including those which it discovers after its response to the subpoena.[30]

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[28](...continued)
U.S. 1109 (1983).

[29]United States v. R. Enterprises, Inc., __ U.S. __ (1991).

[30]United States v. Barth, 745 F.2d 184, 189 (2d Cir. 1984), cert. denied, 470 U.S. 1004 (1985).

c. Subpoenas duces tecum may be served on any natural person, legal entity or corporation

Subpoenas duces tecum may be served on any natural person, legal entity, or corporation. A grand jury's jurisdiction is coextensive with the court to which the grand jury is appended.[31] Thus, any person within the court's jurisdiction may be served with a grand jury subpoena.

Documents or other tangible items may be obtained by subpoena duces tecum from any person who is either in physical or constructive possession or control of them.[32] Once a subpoena duces tecum is served on a person, another cannot claim to re-take possession of required evidence to prevent the person served from complying with the subpoena.[33]

Service on a corporation may be secured by serving an officer or managing or general agent of the corporation,[34] or, where state law permits, by

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[31]Hale v. Henkel, 201 U.S. 43, 55 (1906); In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522, 530 (W.D. Tex. 1973).

[32]Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

[33]In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851 (3d Cir. 1979).

[34]In re Electric & Musical Indus. Ltd., Middlesex, England, 155 F. Supp. 892 (S.D.N.Y. 1957).

serving the Secretary of the state in which the corporation is located or transacts business.[35]

d. Foreign persons; persons in the U.S. related to foreign persons; U.S. corporate entities located abroad

Subpoenas duces tecum may be served on 1) foreign corporations over which the supervising court has jurisdiction, 2) all corporate presences within the United States (which have either foreign or U.S. parents) to secure documents located in the United States or abroad, or 3) foreign-located U.S. corporate affiliates. Separate considerations apply to each of these categories; however, in all cases where a foreign entity is involved, the appropriate foreign government must be notified prior to issuing the subpoena.

1) Documents located within the U.S. Documents of foreign corporations located within the United States have the same general status as documents of United States corporations.

[35]In re Canadian Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947).

2) Foreign persons holding foreign-located documents. Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty. For example, courts may decline to require production of documents on comity grounds.[36] Further, foreign blocking statutes, such as those of Germany, Australia, France and Great Britain, may prohibit production of documents. There is little that can be done if a foreign corporation, especially one with tenuous contacts with the United States, declines to produce documents.

3) U.S. affiliates holding foreign-located documents. Subpoenas calling for documents from the overseas offices or affiliates of U.S. corporations that are located abroad also present problems involving comity and foreign blocking statutes. However, such subpoenas do not involve enforcement problems since the U.S. corporation is within U.S. jurisdiction. Further, it may be possible to avoid the application of foreign blocking statutes

[36]See Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378 (9th Cir.), cert. denied, 472 U.S. 1032 (1984).

by obtaining the consent of the U.S. corporation to the disclosure of the foreign-located documents.[37]

4) Notifications. A number of international agreements require signatory governments to notify any other party to the agreement, which has jurisdiction over the party to be served with judicial process, (including grand jury subpoenas), that the subpoena will be served. These agreements include the following: 1) 1979 OECD Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade (among OECD member countries; the U.S., United Kingdom, France, Belgium, Denmark, The Netherlands, Luxembourg, Federal Republic of Germany, Italy, Norway, and Japan); 2) The Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices; 3) other Bilateral Agreements between the United States and Australia and the United States and Canada; and 4) the November 1, 1977 Pliattsky/Shenefield Understanding.

Before a grand jury subpoena is served on any foreign corporation or United States subsidiary of a foreign corporation, attorneys must notify the

[37] See Doe v. United States, 487 U.S. 201 (1988).

Chief of the Division's Foreign Commerce Section. This Section will arrange for notification of the member governments under the various agreements. No subpoena may be issued until proper notification has been made, and the Foreign Commerce Section has so notified the attorneys involved. Moreover, the Foreign Commerce Section can provide Division staffs with information concerning foreign blocking statutes and other bilateral agreements.

e. Congressional documents

Congressional documents may only be subpoenaed with the consent of the Chamber subpoenaed.[38] This is consistent with the Speech and Debate Clause of the United States Constitution, that protects certain activities within the Congress.[39] The documents of individual congressmen or senators that do not come within their speech and debate privileges may be subpoenaed without prior permission.[40] However, Division and Department directives require that the Attorney General be notified of investigations involving public officials.[41]

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[38]Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

[39]See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), modified, 724 F.2d 201 (D.C. Cir. 1984).

[40]See Gravel v. United States, 408 U.S. 606, 626 (1972).

[41]See ATD Manual III-81 and Division Directive ATR 3300.1.

f. Federal Government agencies

A grand jury may seek documents from Federal Government agencies.[42]

g. Foreign governments may not be subpoenaed

Under the doctrine of sovereign immunity, as embodied in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, foreign governments may not be subpoenaed unless the subpoena is directed at activities which are purely of a commercial nature.[43]

[42]In re Grand Jury Subpoenas Issued to United States Postal Serv., 535 F. Supp. 31 (E.D. Tenn. 1981).

[43]Gadaby & Hannah v. Socialist Republic of Romania, 698 F. Supp. 483 (S.D.N.Y. 1988).

h. May subpoena state and local government documents

Grand jury subpoena power extends to state and local government documents, because of the supremacy of federal law.[44] A state statute that limits disclosure of information, therefore, does not exempt that information from production under a federal subpoena duces tecum.[45] However, the Office of Operations should be notified before issuing a subpoena for state and local government documents.

i. Telephone companies

It is common to subpoena records from telephone companies. Under 18 U.S.C. § 2703(c)(1)(B) and (c)(2), the subscriber need not be notified of a grand jury subpoena. However, most telephone companies require a certification that the subpoena is issued in connection with a criminal

[44]See In re Special 1977 Grand Jury, 581 F.2d 589 (7th Cir.), cert. denied, 439 U.S. 1046 (1978).

[45]United States v. Blasi, 462 F. Supp. 373 (M.D. Ala. 1979); United States v. Grand Jury Investigation, 417 F. Supp. 389 (E.D. Pa. 1976). Contra In re Grand Jury Subpoena for N.Y. State Income Tax Records, 468 F. Supp. 575 (N.D.N.Y.), appeal dismissed, 607 F.2d 566 (2d Cir. 1979).

investigation. A grand jury subpoena for toll records of members of the news media may be sought only with the express approval of the Attorney General unless there are exigent circumstances.[46]

j. Financial institutions: Right to Financial Privacy Act of 1978

Subpoenas duces tecum may seek a customer's financial records directly from his bank.[47] The Right to Financial Privacy Act of 1978 ("Act"), 12 U.S.C. 1301, et seq. (1983) requires that all such subpoenas be "returned and actually presented to the grand jury". The return may be made by a representative of the financial institution or, with the financial institution's permission, by a Division attorney.[48] When records of financial institutions are involved, Division attorneys must assure that the records are presented to the grand jury on the return date or as soon as possible thereafter. The Act does

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[46]See § C.2.a. and 28 C.F.R. § 50.10; see also ATD Manual III-82 and U.S.A.M. 9-2.161.

[47]In re Seiffert, 446 F. Supp. 1153 (N.D.N.Y. 1978); United States v. Nelson, 486 F. Supp. 464 (W.D. Mich. 1980). The prescribed form for such subpoenas is found at Appendix III-1.

[48]United States v. Kington, 801 F.2d 733 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987); United States v. A Residence Located at 218 3rd St., 805 F.2d 256 (7th Cir. 1986).

not entitle financial institutions to reimbursement for compliance with a subpoena duces tecum.[49]

The Act also requires that after completion of the grand jury's investigation, all documents must be destroyed or returned to the financial institution if not used in connection with an indictment or disclosed under Fed. R. Crim. P. 6(e). During the grand jury's investigation, the financial records must be maintained separately, sealed and marked as grand jury exhibits.

k. Consumer credit reporting agency: Fair Credit Report Act

The Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., authorizes a consumer reporting agency, such as a credit agency, to furnish consumer reports only in response to "an order of the court." There is a split among the courts as to whether a grand jury subpoena is "an order of the court" under the Fair Credit Reporting Act.[50] If information is to be subpoenaed from a

[49]In re Grand Jury Proceedings, 636 F.2d 81 (5th Cir. Unit B Jan. 1981).

[50]See In re Gren, 633 F.2d 825 (9th Cir. 1980) (grand jury subpoena is not an order); United States v. Retail Credit Men's Ass'n of Jacksonville, 501 F. Supp. 21 (M.D. Fla. 1980) (grand jury subpoena is an order).

consumer reporting agency, it may be advisable to seek a special court order under 15 U.S.C. § 1681 (b)(1) to obtain the information.[51]

l. Subpoenas to the media

The Attorney General has prescribed specific procedures for subpoenas to the media that are set forth at 28 C.F.R. § 50.10. The requirements of 28 C.F.R. § 50.10 only apply to subpoenas regarding news gathering functions and do not apply if the subpoena seeks only business documents.[52] Nonetheless, Division policy provides that "no form of compulsory process should be addressed to a news organization by the Antitrust Division . . . unless the Assistant Attorney General in charge personally approves, following his determination that the request relates to purely commercial or financial information."[53]

If the investigation involves media news gathering functions, the staff should first attempt to obtain the necessary information from non-media

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[51] See U.S.A.M. 9-11.141.

[52] 28 C.F.R. § 50.10(m).

[53] See Memorandum to Sanford M. Litvack, Assistant Attorney General, Antitrust Division, from Benjamin R. Civiletti, Attorney General, "Subpoenas For Commercial Information Addressed To The News Media." April 28, 1980.

sources before considering subpoenaing members of the news media. If these attempts are unsuccessful and news media sources are the only reasonable sources of the relevant information, the staff should attempt to negotiate with the news media member or organization to obtain the information voluntarily. If such negotiations fail, the staff must seek the express approval of the Attorney General before issuing a subpoena. The standards applicable in seeking the approval of the Attorney General are set forth at 28 C.F.R. § 50.10.[54]

To obtain the Attorney General's approval, the staff should prepare a memorandum explaining the circumstances of the subpoena request and forward it to the Office of Operations, together with a memorandum to the Attorney General from the Assistant Attorney General, Antitrust Division, setting forth the factual situation and the reasons for the request, in accordance with the principles in 28 C.F.R. § 50.10. Upon approval by the Assistant Attorney General, Antitrust Division, the memorandum will be forwarded to the Attorney General for his consideration.

During the time the Assistant Attorney General and the Attorney General are reviewing the request, the staff should not take any steps to begin

[54]See also U.S.A.M. 9-2.161 and § C.2.a., infra.

the process of subpoenaing or otherwise interrogating the member of the news media. Staff should allow substantial review time for such a request.

If the staff, or a section or field office Chief, have any questions as to the applicability of this procedure, the matter should be discussed with the Office of Operations.

m. Subpoenas to attorneys

Because of the potential effect upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the representation of a client, the Department has determined that all litigating divisions must obtain the authorization of their respective Assistant Attorneys General before issuing such subpoenas in any matter, criminal or civil.[55] The Assistant Attorney General must be satisfied that the following conditions are met before approving the issuance of a grand jury subpoena:

[55]In general, there is no special judicially imposed requirement that need or relevance be shown before a lawyer can be compelled to appear before a grand jury. See In re Grand Jury Proceedings 88-9 (Mia.), 899 F.2d 1039 (11th Cir. 1990).

1) that the information is reasonably necessary to investigate or prosecute a crime that is being or has been committed by any person;

2) all reasonable attempts to secure the information from alternative sources have failed;

3) the need for the information outweighs the adverse impact on the attorney-client relationship; and

4) the information is not protected by a valid claim of privilege.[56]

To obtain the approval of the Assistant Attorney General, the staff should submit a memorandum to the Office of Operations setting forth the factual circumstances, reasons for the request, and any information bearing on the standards the Assistant Attorney General must apply. The Office of Operations will review the memorandum, and if appropriate, forward it to the Assistant Attorney General for his approval.

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[56]See U.S.A.M. 9-2.161(a) and § C.1.a., infra.

3. Scope of subpoenas ad testificandum

a. May subpoena any witness with potentially relevant testimony

The grand jury "has the right to everyone's testimony".[57] Accordingly, with only rare exceptions, the grand jury may subpoena any witness who has testimony that is potentially relevant to the grand jury's investigation.[58]

b. Subpoenas may not be used to compel interviews

An attorney may not use a subpoena to compel a witness interview with no intention of having the witness appear before the grand jury.[59] Nothing prohibits voluntary interviews with a witness who has appeared before the

[57]Garner v. United States, 424 U.S. 648, 658 n.11 (1976).

[58]See In re Wood, 430 F. Supp. 41 (S.D.N.Y. 1977).

[59]See Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954); ABA Project on Standards for Criminal Justice Standards Relating to the Administration of Criminal Justice 71-98, § 3.1(d).

grand jury.[60] Also, with the grand jury's authorization, attorneys may use a subpoena to take a sworn statement of a witness who is unable to appear physically before the grand jury.

An attorney often will interview a subpoenaed witness prior to his scheduled grand jury appearance and, as a result of that interview, determine either that the witness could not offer testimony of value to the grand jury, or that the witness' testimony would not best be heard by the grand jury at that particular time. In such instances, attorneys may decide to excuse the witness or to postpone his grand jury appearance. To establish that excusing or postponing a witness appearance has been done properly, attorneys should generally advise the grand jury of the reason for not calling a witness. This will give the grand jury the opportunity to request the witness' appearance and there will be no question that the attorneys have withheld evidence from the grand jury.

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[60] In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211 (D. D.C. 1980); United States v. Mandel, 415 F. Supp. 1033, 1039-40 (D. Md. 1976), vacated, 591 F.2d 1347 (4th Cir.), aff'd on rehearing, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980).

c. Subpoenas to investigation targets

Subpoenas may be issued to investigation targets.[61] The Department's policy, however, is to subpoena targets to testify only if it is essential to the investigation to do so. A target should be excused from testifying if his attorney advises, in a notarized letter, that the target intends to assert the 5th Amendment privilege before the grand jury. Subjects or targets of an investigation should be permitted to appear voluntarily before the grand jury if they wish, but they must agree to answer all questions posed by the attorneys and the grand jury.[62] They may not merely read a prepared statement and then leave the room.

It is also Division policy to inform someone who has been served with a subpoena that he is or is not a target of a grand jury's investigation. This policy is not required by case law except in the Second Circuit.[63]

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[61] United States v. Mandujano, 425 U.S. 564, 572-75 (1976); see generally J. Holderman, Pre-Indictment Prosecutorial Conduct in the Federal System, 71 J. Criminal Law and Criminology 1, 21-23 (1980).

[62] See U.S.A.M. 9-11.151.

[63] United States v. Jacobs, 547 F.2d 772 (2d Cir. 1977), cert. dismissed, 436 U.S. 31 (1978).

4. Court has power to enforce subpoena

Failure to appear or testify before the grand jury can lead to either criminal contempt charges under 18 U.S.C. § 401 or Fed. R. Crim. P. 42, or civil contempt charges under 28 U.S.C. § 1826. Failure to comply fully with a subpoena duces tecum, moreover, may amount to obstruction of justice.[64] Power to enforce a subpoena is vested in the United States district court, and not with the prosecutor or with the grand jury.[65] A district court must be satisfied with the propriety of a subpoena before it enforces the subpoena.[66]

[64]United States v. Weiss, 491 F.2d 460, 466 (2d Cir.), cert. denied, 419 U.S. 833 (1974).

[65]See United States v. Ryan, 455 F.2d 728 (9th Cir. 1972); In re Grand Jury Subpoena Duces Tecum (Dorokee Co.), 697 F.2d 277 (10th Cir. 1983).

[66]In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

5. Service of subpoenas

Grand jury subpoenas may be served anywhere within the United States, its commonwealths and its possessions. Subpoenas may also be served on U.S. installations abroad.[67] Subpoenas may also be served abroad on a United States national or resident.[68]

To subpoena aliens outside the United States, letters rogatory must be issued from the United States District Court to the relevant court in which the alien witness is located. The Division's policy is that if aliens appear before the grand jury, the grand jury gains jurisdiction over them, and their appearance can be extended or the grand jury can require the aliens to appear again.

If a subpoena is to be issued to a foreign national residing outside the United States, INS may be requested to institute a border watch. If the foreign national thereafter enters the United States, INS will notify the Division so that the subpoena may be served. The Foreign Commerce Section should be contacted to assist in instituting the border watch.[69]

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[67]Fed. R. Crim. P. 17(e)(2).

[68]Fed R. Crim. P. 17(e)(2); 28 U.S.C. § 1783; see U.S.A.M. 9-11.140.

[69]See ATD Manual I-14 and VII-18 for additional information regarding border watches.

B. Mechanics of Issuing and Serving Subpoenas

Fed. R. Crim. P. 17 sets forth the basic rules for the use of subpoenas, including grand jury subpoenas. Attorneys should also consult local court rules and determine the usual procedures of the appropriate United States Attorney's Office with respect to the issuance of grand jury subpoenas.

1. Issuance of the subpoena

a. Obtaining the subpoena

Rule 17(a) specifies that subpoenas are issued to counsel by the clerk of the court, signed and imprinted with the seal of the court, but otherwise in blank. Counsel then completes the subpoenas and causes them to be served, without requesting leave of the court.[70] Clerks in some districts, however, issue only blank, unsigned subpoenas because the local practice is that only a completed subpoena ready for service may be signed. In other districts, the staff obtains signed subpoenas by executing a praecipe. Praecipes for subpoenas for witnesses are not required by Fed. R. Crim. P. 17(a) and

[70]See United States v. Gel Spice Co., 601 F. Supp. 1214, 1224 (E.D.N.Y.), aff'd, 773 F.2d 427 (2d Cir. 1985), cert. denied, 474 U.S. 1060 (1986).

should not be prepared unless local rules or practice makes their use mandatory.[71]

To avoid administrative delays, attorneys should obtain a supply of subpoenas for use throughout the term of the grand jury. This practice requires the cooperation of the clerk in the district in which the grand jury is sitting. It is particularly important to obtain such a supply when the grand jury is sitting in a district distant from the office or section conducting the investigation. Most field offices maintain supplies of signed blank subpoenas for those districts in which grand juries are frequently held, particularly the district in which the field office is located.

b. Authority to issue subpoenas

Counsel may determine which persons and/or entities will be served with grand jury subpoenas. Counsel need not obtain the grand jury's authorization for the issuance of subpoenas.[72] However, some jurisdictions require that the grand jury be notified of subpoenas issued on their behalf. Other jurisdictions require the foreman to initial a copy of each subpoena,

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[71]See U.S.A.M. 1-14.112.

[72]See United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974).

signifying that he has been notified of its issuance. Attorneys have no authority to issue subpoenas for other than grand jury purposes.[73] For example, "request subpoenas", directing a witness to appear before the United States Attorney or his assistants, are not permissible and are an abuse of the subpoena power.[74]

c. Time for issuing the subpoena

Practice varies within the Division as to the issuance of subpoenas before a grand jury is actually empanelled. Generally, the wiser rule is not to issue them beforehand. However, if a grand jury is sitting to which the documents can be returned, or if a grand jury is to be empanelled on a date certain and the subpoenas are made returnable on that or a later date, then motions attacking the subpoena should be easily defeated. This practice is sometimes useful because conserving grand jury time is often necessary for the efficient investigation of crime.[75]

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[73]See United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953); In re Pacific Tel. & Telegraph Co., 38 F.2d 833 (N.D. Cal. 1930).

[74]See Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954).

[75]United States v. Miller, 508 F.2d 588, 593 (5th Cir. 1975); see also United States v. Culver, 224 F. Supp. 419 (D. Md. 1963).

Documents subpoenaed by one grand jury may be transferred to a subsequent grand jury without a court order.[76] Frequently, this procedure expedites the investigation and may be critical in those jurisdictions where the grand jury is empanelled for a comparatively short time.

Under certain circumstances, a forthwith subpoena may call for compliance within a particularly short period of time. The following factors should be considered in determining whether a forthwith subpoena is appropriate: 1) risk of flight; 2) the risk of destruction or fabrication of evidence; 3) the need for the orderly presentation of evidence; and 4) the degree of inconvenience to the witness.[77]

2. Service of the subpoena and return by marshal

a. The mechanics

Fed. R. Crim. P. 17(d), provides:

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[76]Fed. R. Crim. P. 6(e)(3)(C)(iii); In re Grand Jury Proceeding (Sutton), 658 F.2d 782 (10th Cir. 1981).

[77]See § H., infra and U.S.A.M. § 9-11.140.

> A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. . . .

Subpoenas are generally served by the U.S. Marshal, his deputies, or by FBI or other case agents. The prohibition against service by a party applies in practice only to the defendant. "There is no prohibition on service by a government attorney or other government employee, or by the defense attorney."[78] The better practice is for Government attorneys not to serve subpoenas, since some courts have frowned on this practice. The local practice should be checked with the clerk because the district court may by local rule require that service be made only by the marshal or his deputy.

Completed subpoenas, which are ready for service, generally are delivered in duplicate to the marshal responsible for service. If they are mailed, they should be sent certified, return receipt requested, so the staff can be sure they have been received. A follow-up phone call several days after the subpoenas are mailed is suggested whether the subpoenas were sent certified mail or otherwise. A letter of instruction should accompany the subpoenas. If time is of the essence or if special problems are anticipated, this should be

[78]8 Moore's Federal Practice, at ¶ 17.04.

stated in the instruction letter. The staff may also wish to call the marshal and alert him to the subpoena and any problems that may exist.

Practice varies from district to district as to the procedure to be followed when subpoenas are to be served on witnesses residing outside the district in which the grand jury is sitting. In some districts, the marshal in the district in which the grand jury is sitting will request that all subpoenas be sent to him. He will then forward the subpoenas for service to the marshal in the appropriate district. In other districts, the marshal will request that the subpoenas be sent directly to the marshal in the district in which the witness resides. The latter is the preferred procedure and the one generally followed within the Division. It expedites service of the subpoenas, gives the staff greater control and assurance that the letters are being sent to the proper parties in the proper fashion, and conserves time and work on the part of the marshal in the district in which the grand jury sits. Generally, the marshal in the district where the grand jury is sitting will request that he be kept informed in some manner of the issuance of subpoenas to out-of-district witnesses since he is ultimately responsible for the payment of their fees, travel allowances, etc.

Frequently, a deputy marshal will have his office closer to the witness than will the marshal. Notwithstanding this fact, the subpoena should be sent to the marshal unless different arrangements have been made with him.

Otherwise, the records which the marshal must keep may be inaccurate or incomplete.

b. Who can be served

Fed. R. Crim. P. 17(d) states:

> Service of the subpoena shall be made by delivering a copy thereof to the person named . . . .

This rule is strictly construed. For example, service of the subpoena on a former employer has been held ineffective.[79] Similarly, service on counsel for a party, as opposed to the party himself, is ineffective. Should the witness fail to appear, it is doubtful that the court would impose penalties for contempt.[80] However, service of the subpoena may be made upon the witness' attorney, subject to an agreement to that effect between the Government attorney and counsel. A written record should be made of the alternate arrangements and the actual method employed.

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[79]Ferrari v. United States, 244 F.2d 132, 141 (9th Cir. 1957).

[80]See Harrison v. Prather, 404 F.2d 267, 269 (5th Cir. 1968).

Occasionally, the attorney for a party will pick up the subpoena at the marshal's office. In still other instances, the subpoena is mailed directly to the witness or his counsel. Where such informal service is made, prior arrangements should be made, and a record kept of both the arrangement and the method used.

A subpoena duces tecum directed to a corporation (or to a partnership or other unincorporated association which is subject to suit under a common name) may be served on an officer, director, or general manager of the business entity.[81] The officer or agent accepting the subpoena on behalf of the business entity need not be explicitly authorized to accept service as prescribed in Fed. R. Civ. P. 4(d)(3); an implicit authorization will suffice.[82]

c. Filing the served subpoena

In some districts, the clerk's office maintains files of grand jury subpoenas that have been served. In these districts, if the marshal returns the executed subpoena to the staff's office, the subpoena file copy should be

[81] In re Electric & Musical Indus. Ltd., Middlesex, England, 155 F. Supp. 892 (S.D.N.Y. 1957); In re Vankoughnet, 184 F. Supp. 819 (E.D. Mich. 1960).

[82] See In re Grand Jury Subpoenas Issued to Thirteen Corps., 775 F.2d 43, 46 (2d Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

conformed and the executed subpoena (with the service noted) promptly filed with the clerk. Where the marshal does not return the subpoena to the staff's office, the staff should check with the office of either the marshal or the clerk to be certain that service has been made within a reasonable time and that the return is on file with the clerk.

In some districts, the clerk does not maintain files of grand jury subpoenas. In such instances, the served subpoenas, with the marshal's return noted thereon, are kept on file in the United States Attorney's office, or the Field or Section Office of the Antitrust Division.

3. Time necessary for compliance

Subpoenas ad testificandum should be mailed to the marshal approximately three weeks prior to the time the witness is to appear, unless special circumstances require a different period of time. Subpoenas duces tecum should generally be mailed one to two months prior to the submission date. With either type of subpoena, consideration should be given to the workload of the marshal's office and to the fact that the subpoena may have to be sent by the marshal to a deputy in another office. In some districts, the workload is such that it will take the marshal two or three weeks or longer to effectuate service.

If a corporation cannot comply with a subpoena duces tecum in the time specified, it may move for an appropriate order of the court extending the time for compliance.[83] Generally, appropriate extensions are granted on an informal basis by Government counsel after compliance difficulties have been pointed out by counsel for the subpoenaed corporation.

4. Place of return of subpoena

Subpoenas are sometimes made returnable in the office of the United States Attorney. The recommended practice, however, is that the subpoena be made returnable in either the office of the clerk or the grand jury room. The Eastern District of Pennsylvania has specifically disapproved of the practice of making subpoenas returnable in the United States Attorney's office.[84] The court in that district pointed out in a 1962 informal and unwritten opinion that the subpoena was the process of the court -- not the Government -- and should be made returnable on premises under the control of the court and not the prosecuting attorney. Accordingly, in that district, the practice has been

[83]See, e.g., United States v. Morton Salt Co., 216 F. Supp. 250, 253 (D. Minn. 1962).

[84]Cf. United States v. Johns-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962).

adopted of having the witness report directly to the grand jury room. After testifying, the witness is directed to the United States Attorney's office where the necessary data is obtained by a clerk who has no connection with the matter under investigation.

Documents demanded by a grand jury subpoena duces tecum are returnable before the grand jury. However, alternative arrangements can be made with the subpoena recipient to deliver the documents directly to Division attorneys.[85]

For all practical purposes, the life of a grand jury subpoena is measured by the life of the grand jury under which it was issued. If the investigation is continued before a succeeding grand jury, it is recommended that a new subpoena be issued for any incomplete compliance under the old subpoena. The documents received under the old subpoena would be resubpoenaed or held under the authority of an impounding order.[86]

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[85]See § E.1., infra.

[86]See Ch. IV, § E.1. for a discussion of impounding orders.

5. Scheduling of witnesses

Recipients of a grand jury subpoena are under a continuing duty to comply until they have been excused by the court, the foreman of the grand jury or the Government attorney.[87] This duty reflects each citizen's obligation to support the administration of justice by appearing in court and giving testimony when properly summoned.[88]

As a practical matter, without issuing a second subpoena, there is no way to compel a witness to appear prior to the date specified in the subpoena. If arrangements are made with counsel, however, a witness may appear earlier than required. If the witness does not appear on the agreed-upon earlier date, he remains under compulsion to appear on the later date specified in the subpoena. However, an informal agreement to appear on a date earlier than the one specified cannot be relied upon if the jury's term is about to expire or if more sessions cannot be scheduled.

The time for compliance with the grand jury subpoena may be extended by the Government in view of the witness' obligation to comply until

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[87]United States v. Snyder, 413 F.2d 288, 289 (9th Cir.), cert. denied, 396 U.S. 907 (1969).

[88]Blackmer v. United States, 284 U.S. 421 (1932).

excused by the court.[89] Rescheduling a witness to appear after the date specified on the subpoena may be arranged subject to an informal agreement with the witness or with counsel. Courts treat such agreements as binding and punish as contempt the failure to appear at the agreed-upon time.[90] A written record of an agreement to reschedule a witness should always be made. The written record may be either a letter of acknowledgement signed by the witness or his counsel, or a letter from the Government confirming the new date, sent by certified mail, return receipt requested.

If the witness refuses to change the date of appearance to a later time, a notification to appear at the later date may be sufficient.[91] Two safer alternatives are to resubpoena the witness or bring him before the grand jury on the originally-designated date and then request the foreman to instruct him to return at the later date.[92]

A witness may be excused at the end of an appearance, required to return for further examination or excused subject to recall under his initial

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[89]Id. at 443.

[90]United States v. Snyder, 413 F.2d at 289-90.

[91]Blackmer v. United States, 284 U.S. 421 (1932).

[92]See United States v. Germann, 370 F.2d 1019 (2d Cir.), vacated on other grounds, 389 U.S. 329 (1967).

subpoena. As stated in United States v. Germann, 370 F.2d 1019, 1021-22 (2d Cir.), vacated on other grounds, 389 U.S. 329 (1967):

> Once the witness has appeared before the grand jury, whether pursuant to subpoena or of his own volition, the witness is subject to the orders of the grand jury. The grand jury acts through its foreman or deputy foreman; they have the power to direct the witness to return at a stated time just as they have the power to administer an oath . . . .

If there is any possibility that it may be necessary to recall a witness, he should be excused temporarily (through the foreman) so that he need not be resubpoenaed. A standard direction in this regard is:

> The Foreman: There being no further questions, you are excused for the present. However, I inform you that you are subject to recall in the future under the same subpoena, pursuant to which you appeared today, if and when this Grand Jury requires further testimony from you.

Note that the power of the foreman to direct a witness to return at a stated time is not dependent on the convenience or consent of the witness.

After the grand jury has expired, a witness cannot be compelled to give testimony or produce documents,[93] since there is no grand jury before which to present such evidence.[94] Further, coercive imprisonment (where a witness is confined until compliance) cannot extend beyond the term of the grand jury.[95]

6. Witness fees

a. Certificate of attendance

Form OBD-3-Revised (Witness Attendance Fees, Travel and Miscellaneous Expense Claim) should be executed for each grand jury witness. A representative of the United States Attorney's office, or the Department of Justice attorney who actually conducts the investigation, should initial the witness' attendance daily in the appropriate block on the face of the form.

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[93]Cf. In re Grand Jury Investigation (Gen. Motors Corp.), 1960 Trade Cas. (CCH) ¶ 69,796, at 77,133 (S.D.N.Y.).

[94]It is not clear whether some other grand jury sitting in the district would be sufficient.

[95]Shillitani v. United States, 384 U.S. 364, 371 (1966).

After discharge of the witness, the certificate should be signed by the attorney conducting the investigation, the United States Attorney or an Assistant United States Attorney, depending upon the practice in the district.[96]

Practice differs from district to district as to who completes the remainder of the certificate which is signed by the witness. In some districts, it is done by a clerk in the U.S. Attorney's office; in other districts, it is done by a clerk in the marshal's office; and, in still other districts, it is completed, in part, by the Government attorney. In the last mentioned instance, the number of miles travelled is usually completed by a representative of the United States Attorney's office or the marshal's office.

The original should be forwarded to the marshal promptly or given to the witness for presentation to the marshal as his claim for allowances.[97]

b. Fees and allowances

28 U.S.C. § 1821 provides for a witness attendance fee of $30.00 per day for each day's attendance and for the time necessarily occupied in going to and returning from the place of giving testimony. In addition, a witness is

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[96]See 28 C.F.R. 21.7.

[97]A sample witness certificate is appended as Appendix III-2.

entitled to parking fees, airfare or mileage and subsistence allowances (when the distance or other circumstances require an overnight stay) equal to those to which Government employees would be entitled for official travel in the area of attendance.

c. Advances to witnesses

Under Fed. R. Crim. P. 17(d), fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States. This, of course, applies to grand jury witnesses. However, if it becomes apparent that an important witness who is regularly subpoenaed, or otherwise retained, on behalf of the United States and absolutely essential to the proper presentation of the case, is unable to attend a grand jury session for want of sufficient funds with which to defray expenses of travel and subsistence, counsel for the Government may request the marshal for the district in which the witness resides to supply sufficient funds to enable the witness to attend.[98] The marshal usually will only advance sufficient funds for one-way transportation and lodging. The remaining expenditures will be covered when the witness submits his attendance certificate. The subpoena itself should be

[98]See U.S.A.M., 1-14.122.

transmitted through the marshal in the issuing district. Counsel should also notify the marshal in the witness' district that the request for an advance has been made, stating where the witness is to testify. Advances to witnesses should not be requested as a matter of course.

C. Privileges

1. Common law privileges

a. Attorney-client

1) Definition of privilege. The attorney-client privilege protects confidential communications by a client to an attorney for the purpose of obtaining legal advice. The primary policy justification for the privilege is to encourage clients to be completely truthful with their attorneys, so that attorneys can give effective and reliable advice. In addition, by promoting open communication between the attorney and client, the privilege is said to foster voluntary compliance with laws.

The privilege applies only to the factual content of a communication by a client; it does not protect the underlying facts if they can be learned from some other source. Thus, pre-existing documents that would otherwise be

discoverable do not become privileged simply because they are delivered to an attorney for review or safe-keeping.[99]

The mere fact that the attorney-client relationship exists is not privileged; the general nature of the legal services the attorney was to perform and the terms of the engagement are not protected. Thus, courts have ordered disclosure of the identity of the client,[100] the time period in which the representation occurred,[101] the whereabouts of the client,[102] the nature of the legal services rendered,[103] the details of financial transactions between the attorney and client, including the identity of the party paying the attorney's

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[99]Fisher v. United States, 425 U.S. 391 (1976); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

[100]In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984); In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984); In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986), modified, 817 F.2d 64 (9th Cir. 1987); In re Grand Jury Subpoenas, 906 F.2d 1485, 1488 (10th Cir. 1990); In re Grand Jury Proceedings 88-9 (Mia.), 899 F.2d 1039, 1042 (11th Cir. 1990).

[101]Colton v. United States, 306 F.2d at 637.

[102]Burden v. Church of Scientology, 526 F. Supp. 44 (M.D. Fla. 1981).

[103]Colton v. United States, 306 F.2d at 638.

fees,[104] and the demeanor or activities of the client about which the attorney has personal knowledge.[105]

An exception to the rule that the identity of the client is not privileged is where disclosure of the identity itself would necessarily reveal other privileged information that would implicate the client in the very matter for which legal advice was sought. Under these circumstances, a few courts have held that the identity of the client need not be disclosed.[106]

The burden of establishing entitlement to the attorney-client privilege is on the party claiming the privilege. The mere existence of an attorney-client relationship is not sufficient; the applicability of the privilege must be demonstrated with respect to particular documents and inquiries.[107]

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[104]In re Grand Jury Matter (Doe I), 926 F.2d 348 (4th Cir. 1991); In re Grand Jury Subpoena for Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990); In re Grand Jury Proceedings, 803 F.2d at 498; In re Grand Jury Subpoenas, 906 F.2d at 1488.

[105]In re Sealed Case, 737 F.2d 94, 99-100 (D.C. Cir. 1984) (overheard discussion between client and competitor); In re Walsh, 623 F.2d 489, 494 (7th Cir.), cert. denied, 449 U.S. 994 (1980); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663, 665 (8th Cir. 1986) (authenticity of client's signature).

[106]See In re Grand Jury Proceedings (Jones), 517 F.2d at 1027; In re Grand Jury Proceedings, Cherney, 898 F.2d 565, 569 (7th Cir. 1990); In re Grand Jury Subpoenas, 803 F.2d supra; In re Grand Jury Proceedings, 896 F.2d 1267 (11th Cir. 1990).

[107]In re Grand Jury Proceeding, 721 F.2d 1221, 1223 (9th Cir. 1983).

2) Limitations. Not all communications between an attorney and client are privileged. There are five essential elements that must be established for the privilege to apply: (a) the holder of the privilege must be a client or have sought to be a client; (b) the person to whom the communication was made must be an attorney or subordinate of an attorney; (c) the communication must be made for the purpose of obtaining legal advice or assistance; (d) the communication sought to be protected must be confidential; and (e) the privilege must not have been waived.

Communications by a client: The privilege protects only communications by a client or someone seeking to become a client. Communications between an attorney and third parties are not protected by the privilege.[108] Communications by the attorney to the client, however, are protected if their disclosure would reveal the substance of the client's communication.[109] A few courts have gone further, holding that virtually all communications by an attorney to a client in the course of giving legal advice are privileged.[110]

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[108]Hickman v. Taylor, 329 U.S. 495, 508 (1947); Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

[109]In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984); In re Fischel, 557 F.2d 209, 212 (9th Cir. 1977); In re Ampicillin Antitrust Litig., 81 F.R.D. 395 (D.D.C. 1978).

[110]In re LTV Sec. Litig., 89 F.R.D. 595, 602-03 (N.D. Tex. 1981).

The attorney-client privilege may be asserted by a corporation. In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court adopted a "subject matter" test to determine whether the communications of corporate employees are privileged.[111] Applying that test, courts will consider the following factors in determining whether employees' communications are privileged: whether the communications were made to the corporation's counsel, acting as such; whether they were made at the direction of corporate superiors for the purpose of obtaining legal advice; whether the communication concerned matters within the scope of the employees' duties; and whether the employees were aware that the communications were intended to enable the corporation to obtain legal advice.[112]

Communications to an attorney: The communication must be made to a licensed member of a bar who is acting as an attorney at the time the communication is made. Communications to the agents or subordinates of an attorney, including law clerks, junior attorneys, office clerks, and secretaries, may also be protected, provided the services performed by the agent or

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[111]The Court rejected the "control group" test that was first applied in City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

[112]See Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 678 (S.D.N.Y. 1983); In re Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1253-54 (E.D.N.Y. 1982).

subordinate are directly related to assisting the attorney in providing legal services to the client.[113]

Communication for the purpose of obtaining legal advice: Communications to an attorney acting in a capacity other than as a legal advisor are not privileged. This is particularly important in cases involving in-house counsel, who may serve multiple functions within the company. Attorneys are often involved in negotiating contracts or giving business advice; communications to attorneys that concern largely business matters are not protected.[114] Where an attorney's role in a particular matter involves both legal and business matters, courts will generally look to the role that predominates to determine whether the privilege applies.[115]

Confidentiality: Communications are privileged only if they are made in confidence and are intended to remain confidential. Thus, information

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[113]See United States v. Brown, 478 F.2d 1038 (7th Cir. 1973) (communications between attorney, client, and accountant not privileged when purpose was to seek accounting services rather than legal advice); United States v. Cote, 456 F.2d 142 (8th Cir. 1972) (privilege applied to accountant hired to assist attorney in giving tax advice).

[114]SEC v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981).

[115]United States v. International Business Machs. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974); see also FTC v. TRW, Inc., 479 F. Supp. 160, 163 (D.D.C. 1979) (document prepared for simultaneous review by legal and nonlegal personnel, but not prepared primarily to obtain legal advice, is not privileged), aff'd, 628 F.2d 207 (D.C. Cir. 1980).

given to an attorney with the intent that the attorney distribute it to others is not privileged.[116] The presence of third parties at the time the communication is made may defeat the privilege. When two or more parties have a common interest, however, such as joint defendants or targets of a grand jury investigation, communications by one party to his attorney in the presence of another party may nevertheless be considered confidential and, therefore, privileged.[117]

When the client is a corporation, it must establish that its internal security practices would support a finding of confidentiality; privileged documents must have been made available only to those employees who needed to know their contents.[118]

Waiver: The attorney-client privilege belongs to, and can only be waived by, the client, or by the attorney acting with the client's express or implied consent.[119] As a practical matter, if the attorney has control over the client's litigation, the attorney has an implied authority to waive the privilege

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[116]Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); In re Ampicillin Antitrust Litig., 81 F.R.D. 395 (D.D.C. 1978).

[117]Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964) (the "joint defendant" exception applied even prior to indictment).

[118]SEC v. Gulf & Western Indus., Inc., 518 F. Supp. at 681.

[119]In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979).

on behalf of his client.[120] Thus, the client usually will be bound by the attorney's failure to assert the privilege.[121]

Any voluntary disclosure of a communication by the holder of the privilege is inconsistent with the confidentiality requirement and waives the privilege.[122] Inadvertent disclosure of privileged communications may also constitute waiver of the privilege.[123] Some courts have held that inadvertent disclosure does not destroy the privilege, provided reasonable precautions against disclosure had been taken.[124] The court in In re Grand Jury Investigation of Ocean Transport, 604 F.2d 672 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979), refused to allow the attorney-client privilege to be successfully asserted after it was explicitly, knowingly, albeit mistakenly, waived. The court further found that the risk of an error by the attorney in producing privileged documents is the burden of the client and that practical

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[120]Drimmer v. Appleton, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986).

[121]In re Grand Jury Investigation of Ocean Transp., 604 F.2d at 675; United States v. Mierzwicki, 500 F. Supp. 1331, 1334 (D. Md. 1980).

[122]United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

[123]In re Grand Jury Investigation of Ocean Transp., 604 F.2d at 675; In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984).

[124]Lois Sportswear, USA, Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982).

realities govern; if Government attorneys have studied the materials, the mistaken waiver of the privilege cannot be remedied and the privilege will be considered permanently destroyed. However, the inadvertent disclosure of documents under an accelerated discovery schedule has been held to be "compelled," so that the privilege could be claimed with respect to the same documents in subsequent litigation.[125]

Once privileged communications concerning a particular issue have been disclosed, the privilege is usually deemed waived for all communications concerning the same issue or subject matter.[126] A limited number of courts have created an exception to this rule for disclosures made in the course of settlement negotiations,[127] or when disclosure was inadvertent and there would be no unfairness to the other party by the refusal to disclose other communications.[128] In these cases, the privilege was deemed waived only with respect to the communications that had been disclosed.

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[125]International Business Machs. Corp. v. United States, 471 F.2d 507, 511 (2d Cir. 1972), rev'd en banc, 480 F.2d 293 (2d Cir. 1973), cert. denied, 416 U.S. 980 (1974).

[126]In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977).

[127]Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974).

[128]Hercules Inc. v. Exxon Corp., 434 F. Supp. at 156; but see In re Sealed Case, 877 F.2d at 980-81.

3) Exceptions

a) Ongoing or future crimes or frauds. The attorney-client privilege does not protect communications that relate to ongoing or contemplated but not-yet-committed crimes or frauds.[129] This is true even if the attorney was unaware that the services he performed were not for a legitimate purpose.[130] One court has even suggested that if co-conspirators agreed to provide an attorney's services if a member of the conspiracy was arrested, the attorney's services would be in furtherance of the conspiracy and the privilege would not apply.[131] The party challenging the applicability of the privilege on this ground must make out a prima facie case of illegality.[132]

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[129]United States v. Zolin, 491 U.S. 554 (1989); Clark v. United States, 289 U.S. 1, 14 (1933); In re Sealed Case, 754 F.2d 395, 399-402 (D.C. Cir. 1985); In re Grand Jury Subpoena, 884 F.2d 124 (4th Cir. 1989).

[130]In re Sealed Case, 676 F.2d 793, 812-13 (D.C. Cir. 1982); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

[131]In re Witness-Attorney Before Grand Jury No. 83-1, 613 F. Supp. 394, 397 (S.D. Fla. 1984).

[132]Clark v. United States, 289 U.S. 1, 14 (1933); In re Sealed Case, 676 F.2d at 812; In re Grand Jury Subpoena, 884 F.2d at 127; In re International Sys. and Control Corp., 693 F.2d 1235 (5th Cir. 1982); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986). But see In re John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982) (applying probable cause standard).

The court may review the allegedly privileged communications in camera to determine whether the crime-fraud exception applies; however, the party opposing the privilege must first "present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exceptions applicability."[133]

b) Making privileged communications an issue.

When a client puts communications with its attorney at issue in a case, the privilege does not apply.[134] Thus, the client may not disclose some communications with counsel in its own case without losing the privilege as to other communications involving the same subject matter.[135] Similarly, if the client asserts advice of counsel as a defense in a proceeding, the privilege is lost.[136]

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[133]United States v. Zolin, 491 U.S. 554 (1989); see also In re John Doe Corp., 675 F.2d supra; In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In re Grand Jury Proceedings, 857 F.2d 710 (10th Cir. 1988), cert. denied, 489 U.S. 1074 (1989); In re Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987).

[134]United States v. Aronoff, 466 F. Supp. 855, 861-62 (S.D.N.Y. 1979).

[135]United States v. Miller, 600 F.2d 498, 501-02 (5th Cir.), cert. denied, 444 U.S. 955 (1979).

[136]Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 248, 249 (1965); United States v. Miller, 600 F.2d at 501-02; United States v. Exxon Corp., 94 F.R.D. 246 (D.D.C. 1981)

4) Subpoenas to attorneys. Because of the potential effects on an attorney-client relationship that may result from the issuance of a subpoena to an attorney to obtain information concerning his client, the Department has established guidelines governing the issuance of such subpoenas. No attorney may be subpoenaed in any matter, criminal or civil, concerning the representation of a client without the approval of the Assistant Attorney General in charge of the Criminal Division. In a grand jury proceeding, no such subpoena will be approved unless the following conditions are met:

1) The information sought is reasonably necessary to prosecute a crime that is being or has been committed by any person;

2) all attempts to secure the information from alternate sources have failed;

3) the need for the information outweighs the adverse impact on the attorney-client relationship; and

4) the information is not protected by a valid claim of privilege.[137]

Attorneys should also be aware that the Massachusetts Supreme Judicial Court has adopted an ethical rule that states that it is unprofessional conduct for a prosecutor to subpoena an attorney to appear before a grand jury without prior judicial approval.[138] Similar rules have been proposed in other states.

b. Attorney work-product

1) Definition of privilege. The attorney work-product privilege, although often confused and muddled with the attorney-client privilege, is separate, distinct and broader than the attorney-client privilege.[139] It protects information assembled or created by an attorney in preparation for litigation. The privilege was first recognized in

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[137]See U.S.A.M., 9-2.161(a) and § A.2.m., supra.

[138]Rule 3:08, prosecution function 15. This rule was recently held applicable to federal prosecutors in Massachusetts. United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), aff'd, 832 F.2d 664 (1st Cir. 1987).

[139]United States v. Nobles, 422 U.S. 225, 238 (1975); In re Antitrust Grand Jury, 805 F.2d 155, 162-63 (6th Cir. 1986).

Hickman v. Taylor, 329 U.S. 495 (1947), and was subsequently codified for application in civil and criminal trials. Its application to grand jury proceedings, however, is based solely on common law.[140] The purpose of the privilege is to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.[141]

The work-product privilege covers materials prepared or collected by an attorney "in the course of preparation for possible litigation."[142] The interpretations of the phrase "possible litigation" range from "a real and imminent threat of litigation"[143] to the "motivating purpose behind creation or collection of the documents was to aid in possible future litigation."[144] The privilege will not apply if the prospect of future litigation is remote.[145]

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[140]See United States v. Nobles, 422 U.S. 225 (1975); In re Grand Jury Proceedings, 473 F.2d 840, 845 (8th Cir. 1973).

[141]Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

[142]Id. at 505.

[143]Diversified Indus. Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); In re Grand Jury Investigation, 412 F. Supp. 943 (E.D. Pa. 1976).

[144]United States v. Davis, 636 F.2d 1028 (5th Cir. Unit A Feb. 1981), cert. denied, 454 U.S. 862 (1981); In re Grand Jury Proceedings (Sutton), 658 F.2d 782 (10th Cir. 1981); see also In re Natta, 48 F.R.D. 319 (D. Del.) (privilege extends to materials prepared in anticipation of proceedings before the Patent and Trademark Office and the Board of Patent Interferences), aff'd, 410 F.2d 187 (3d Cir.), cert. denied, 396 U.S. 836 (1969).

[145]In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In

(continued...)

Similarly, the privilege will not apply if the materials were created predominantly for business or economic purposes.[146] For example, business records created to prepare tax returns[147] and routine business records which are subsequently used in connection with litigation[148] are not within the privilege.

The materials covered by the privilege include tangible documents such as memoranda, correspondence, and briefs, as well as intangible information such as personal recollection and mental impressions.[149] The term "materials" has been interpreted broadly to encompass all information collected or created by an attorney's investigative and strategic efforts on behalf of a client in litigation.[150] This includes the attorney's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy and recording of mental impressions.[151]

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[145](...continued)
re Grand Jury Investigation, 412 F. Supp. at 948.

[146]Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980).

[147]United States v. Davis, 636 F.2d supra.

[148]In re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979).

[149]Hickman v. Taylor, 329 U.S. 495, 511 (1947).

[150]In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976); see also Larkin, Federal Testimonial Privileges § 11.02 n.47 (1983).

[151]In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).

Nevertheless, non-privileged portions of an otherwise protected document must be disclosed.[152]

2) Limitations

a) Qualified vs. absolute privilege. The materials covered by the work-product privilege fall into two categories: fact work-product and opinion work-product.[153] Fact work-product are materials collected or prepared by the attorney which do not reflect his mental processes, conclusions, opinions or legal theories. The protection for fact work-product is qualified and may be overcome by a showing of need and hardship.[154]

The protection afforded opinion work-product has been disputed by the courts. Some courts have held the protection for opinion work-product is absolute.[155] They base their holdings on the sanctity of the attorney's thought processes, the unreliability of the evidence and the fear of turning the advocate

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[152]Hickman v. Taylor, 329 U.S. 495, 511 (1947).

[153]Id. at 512-13; In re Antitrust Grand Jury, 805 F.2d 155, 163-64 (6th Cir. 1986).

[154]See Larkin, Federal Testimonial Privileges § 11.04 nn.88 & 89 (1983); In re Thompson, 624 F.2d 17, 19 (5th Cir. 1980) (insufficient showing).

[155]In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976).

into a witness.[156] Other courts have held opinion work-product to be disclosable in rare situations.[157]

b) Corporate attorneys - employee interviews.

Materials collected and prepared by a corporate attorney in connection with employee interviews are usually covered by the corporation's attorney-client privilege.[158] Those materials that are not within the attorney-client privilege may still be covered by the attorney work-product privilege. The test is "not whether a particular employee comes within the ambit of the attorney-client privilege, but whether the communication to the corporate attorney by the employee is in furtherance of the attorney's duty to investigate the facts in order to advise the corporate client in anticipation of litigation."[159]

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[156]In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979).

[157]In re Grand Jury Subpoena, 599 F.2d 504, 511-12 (2d Cir. 1979); In re Natta, 410 F.2d 187, 192 (3d Cir.), cert. denied, 396 U.S. 836 (1969); In re Antitrust Grand Jury, 805 F.2d at 164; In re Grand Jury Subpoena, 524 F. Supp. 357, 363 (D. Md.), aff'd sub nom. In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

[158]See Upjohn Co. v. United States, 449 U.S. 383 (1981).

[159]In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979).

c) Disclosure of work-product material. Unlike the attorney-client privilege which is based on the need for confidentiality and is waived immediately upon disclosure of the privileged material, the attorney work-product privilege is based on the need to protect material from an opposing party in litigation and is not automatically waived upon disclosure. The test for waiver focuses on whether the transferor has "common interests" with the transferee.[160] Early cases construed "common interests" narrowly to allow disclosure only to persons on the same side of litigation.[161] Recent cases, however, have construed the phrase more broadly to allow disclosure to any person unless such disclosure would substantially increase the possibility of an opposing party obtaining the information.[162] For example, in GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46 (S.D.N.Y. 1979), the court held that the work-product privilege was not waived by disclosure of trial preparation documents by a private antitrust plaintiff to the Government. A middle ground was arrived at in United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980), in which the court held that "common interests" should be construed to allow disclosure "so long as transferor and transferee anticipate litigation against a

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[160]United States v. AT&T, 642 F.2d 1285, 1298 (D.C. Cir. 1980).

[161]See Stix Prods., Inc. v. United Merchants & Mfg., 47 F.R.D. 334, 338 (S.D.N.Y. 1969).

[162]In re Grand Jury Subpoenas Dated Dec. 18, 1981 and Jan. 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982).

common adversary on the same issue or issues." This interpretation was adopted and elaborated on in In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). In that case, the court held that release of otherwise protected material without an intent to limit its future disposition might forfeit work-product protection, regardless of the relationship between the attorney and the recipient of the material. The court found that the attorney had waived the privilege by unconditionally turning over the material to his client.[163]

d) Waiver by misconduct. Misconduct by the attorney or his client may waive the work-product privilege. This is often referred to as the crime-fraud exception. "Misconduct", in this context, has been defined by one court to be "fraud on the judicial processes perpetrated by a client or his attorney which could be something less than criminal activity, but certainly encompasses criminal activity subverting or attempting to subvert the judicial process."[164] To overcome an attorney's invocation of his work-product privilege based on his client's misconduct, a showing must be made that the evidence is

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[163]In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); see also In re Subpoenas Duces Tecum to Fulbright & Jaworski, 99 F.R.D. 582 (D.D.C. 1983), aff'd, 738 F.2d 1367 (D.C. Cir. 1984).

[164]In re Doe, 662 F.2d at 1079 n.4.

relevant to the grand jury's investigation, there is prima facie evidence of misconduct, and there is a connection between the documents and the alleged misconduct.[165] If such a showing is made, then the court, in camera, must find a valid relationship between the work-product subpoenaed and the prima facie misconduct.[166] Courts have had little difficulty disclosing information which was either written or orally communicated to the attorney.[167] But, the courts have refused to overcome the work-product privilege for an attorney's mental impressions, conclusions, opinions, and legal theories because of his client's misconduct.[168]

When the attorney is suspected of misconduct, the courts have been more willing to compel disclosure of not only fact work-product, but opinion work-product as well. In In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982), the attorney was suspected of advising his client to

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[165]In re Sealed Case, 676 F.2d 793, 814-15 (D.C. Cir. 1982); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803 (3d Cir. 1979); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986); In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

[166]In re Sealed Case, 676 F.2d at 814-15; In re International Sys. & Controls Corp., 693 F.2d 1235, 1242 (5th Cir. 1982).

[167]In re Special September 1978 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1980); cf. In re Grand Jury Proceedings, 604 F.2d 798, 802, 803 n.5 (3d Cir. 1979) (if client's crime had been completed before retaining attorney, then attorney privilege remains intact).

[168]In re Special September 1978 Grand Jury, 640 F.2d at 63.

testify falsely, alter or destroy documents, and bribe witnesses. The court rationalized disclosure of his opinion work-product by saying that the work-product privilege was "not designed as a fringe benefit for protecting lawyers who would, for their personal advantage, abuse it."[169] The court went on to say that the party seeking disclosure of opinion work-product must show not only undue hardship and prima facie misconduct, but also "a greater need" for the opinion work-product material than was necessary to obtain the fact work-product.[170]

c. Spousal privilege

The marital privilege, as recognized by the federal courts, is in actuality two separate privileges based on the marital relationship: the confidential communications privilege and the adverse testimony privilege. The former privilege bars testimony of one spouse as to confidential communications between the two; the latter provides that a witness can be neither compelled to testify nor foreclosed from testifying against his spouse.[171]

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[169]662 F.2d at 1080.

[170]Id. See In re Grand Jury Subpoena, 524 F. Supp. 357 (D. Md. 1981).

[171]Trammel v. United States, 445 U.S. 40 (1980).

Based in common law, the marital privilege was codified in Rule 501 of the Federal Rules of Evidence. The marital privilege is applicable before the grand jury as well as at trial.[172]

Both the adverse spousal testimony privilege and the confidential communications privilege require the existence of a valid marriage. Although the issue of whether the privilege exists in a particular case is a matter decided under federal law, the determination as to the validity of the marriage depends upon state law.[173] Thus, in a state which does not recognize common-law marriages, living together does not permit one to invoke the marital privilege.[174] The privilege is not conditioned on a judicial determination that the marriage is happy or successful, but only that it is valid.[175] The court will, however, reject the privilege if based upon a fraudulent, spurious marriage, not entered into in good faith.[176]

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[172]In re Snoonian, 502 F.2d 110 (1st Cir. 1974); In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir. Unit B Nov. 1981), cert. denied, 455 U.S. 1000 (1982); Fed. R. Evid. 1101(d).

[173]United States v. White, 545 F.2d 1129 (8th Cir. 1976); United States v. Lustig, 555 F.2d 737 (9th Cir.), cert. denied, 434 U.S. 926 (1977).

[174]United States v. Snyder, 707 F.2d 139 (5th Cir. 1983).

[175]United States v. Lilley, 581 F.2d 182 (8th Cir. 1978). But see United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977).

[176]United States v. Mathis, 559 F.2d 294 (5th Cir. 1977); United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975).

Since the modern justification for the adverse testimony privilege (fostering the harmony and sanctity of the marriage relationship) differs from that of the confidential communications privilege (encouraging full and frank communications between spouses), courts treat the two privileges differently.

Under the adverse testimony privilege, the test is whether a valid marriage exists at the time the testimony is sought. If met, the privilege then exists as to any testimony adverse to the other spouse, even as to acts predating the marriage. Under the confidential communications privilege, the test is whether a valid marriage existed at the time the communication was made. The confidential communications privilege survives the termination of the marriage. The adverse testimony privilege does not.[177] The ramification of what a legal separation would be upon the adverse testimony privilege is unclear.

Under the confidential communication privilege, either spouse has the right to interpose the privilege and preclude the testimony. Under the adverse testimony privilege, the witness spouse alone has the privilege to refuse to testify adversely. The witness spouse may neither be compelled to testify nor foreclosed from testifying.[178] Neither marital privilege encompasses

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[177]United States v. Lilley, 581 F.2d supra; United States v. Bolzer, 556 F.2d 948 (9th Cir. 1977).

[178]Trammel v. United States, 445 U.S. 40 (1980); United States v. Chapman, 866 F.2d 1326, 1332 (11th Cir.), cert. denied, 493 U.S. 932 (1989).

out-of-court statements made by a spouse and validly testified to by a third party.[179]

For the confidential communication privilege to exist, there must be a communication. The taking of fingerprints, handwriting samples and records have been held not to be testimonial communicative evidence in the context of the confidential communications privilege.[180] Likewise, acts or observations made in confidence have not been included in this privilege.[181] The privilege extends only to statements intended by one spouse to convey a message to the other and does not reach evidence concerning "objective facts having no per se effect" on the other spouse.[182] Similarly, the adverse testimony privilege does not extend to the production of voluntarily produced records that would not amount to "testimony" under a 5th Amendment analysis.[183]

The privilege also requires that the communication be made in confidence. Marital communications are presumptively confidential. The

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[179]United States v. Chapman, 866 F.2d at 1332-33.

[180]United States v. Thomann, 609 F.2d 560 (1st Cir. 1979); United States v. Cotton, 567 F.2d 958 (10th Cir. 1977), cert. denied, 436 U.S. 959 (1978).

[181]United States v. Smith, 533 F.2d 1077 (8th Cir. 1976); United States v. Lustig, 555 F.2d supra.

[182]United States v. Klayer, 707 F.2d 892, 894 (6th Cir. 1983), cert. denied, 464 U.S. 858 (1984); United States v. Brown, 605 F.2d 389, 396 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

[183]See In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988).

burden is upon the party seeking to avoid the privilege to overcome the presumption.[184] A confidential communication can lose this status and thus the privilege if the communication is later disclosed by the spouse claiming the privilege.[185]

The adverse testimony privilege requires that the testimony be adverse to the interest of the other spouse in the case under consideration. The issue is whether the answers to the questions posed would tend to incriminate the spouse.[186] Where the spouse is a target of an investigation, the incrimination justifying invocation of the privilege may be indirect or direct.[187]

Certain exceptions exist to the general rule that confidential communications between spouses are privileged. One exception is where both spouses are co-conspirators in the matter under inquiry. For example, conversations between a husband and a wife about crimes in which they are presently jointly participating are not within the protection of the privilege.[188]

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[184]In re Grand Jury Investigation, 603 F.2d 786, 788 (9th Cir. 1979).

[185]United States v. Lilley, 581 F.2d at 189.

[186]See In re Grand Jury Proceedings, 664 F.2d supra.

[187]In re Grand Jury Matter, 673 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 1015 (1982). But see United States v. Armstrong, 476 F.2d 313 (5th Cir. 1973).

[188]United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976); United States v. Ammar, 714 F.2d 238 (3d Cir.), cert. denied, (continued...)

The adverse testimony privilege also has certain exceptions. Where husband and wife are co-conspirators, some courts have held that acts made in furtherance of the conspiracy are outside the privilege.[189] Other courts have not recognized this exception.[190] If an offense has been committed by a party against his spouse, the victim spouse's testimony as to that activity is also outside the privilege.[191] This "offense against the spouse" exception includes an offense against the child of either spouse.[192]

A properly invoked adverse testimony privilege may be overcome under certain circumstances. In In re Snoonian, 502 F.2d 110 (1st Cir. 1974), the prosecutor stated to the grand jury that the wife of the witness was not a target of this grand jury investigation and the Government had no intent to prosecute the wife on the basis of the husband's testimony. The First Circuit held:

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[188](...continued)
464 U.S. 936 (1983); United States v. Mendoza, 574 F.2d 1373 (5th Cir.), cert. denied, 439 U.S. 988 (1978); United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974); United States v. Price, 577 F.2d 1356 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979).

[189]United States v. Clark, 712 F.2d 299 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), aff'd, 455 U.S. 40 (1980).

[190]In re Malfitano, 633 F.2d 276 (3d Cir. 1980).

[191]United States v. Smith, 533 F.2d supra.

[192]United States v. Cameron, 556 F.2d supra; United States v. Allery, 526 F.2d 1362 (8th Cir. 1975).

> In the present case the speculative nature of the threat to the wife, coupled with the Government's unequivocal and convincing promises not to use any of the testimony against her, nullifies any claim of privilege as grounds for (the witness') refusal to testify.[193]

Lesser promises by the Government have been held inadequate to overcome the privilege. In In re Malfitano, 633 F.2d 276 (3d Cir. 1980), the Government had promised not to use the wife's testimony in future proceedings against her husband. The husband had previously been sent a target letter. The court stated that the Government's promise was inadequate since the grand jury was free to consider the testimony in deciding whether to indict the spouse.[194] At least one court has specifically chosen not to extend the holding in Snoonian to the confidential communication privilege.[195]

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[193]502 F.2d at 113; see also In re Grand Jury Proceedings, 443 F. Supp. 1273 (D.S.D. 1978).

[194]See also In re Grand Jury Matter, 673 F.2d supra, (promise not to bring an indictment was inadequate because the Government was free to use the fruits of the testimony before a subsequent grand jury).

[195]In re Grand Jury Investigation, 603 F.2d supra. Given the language of this opinion, there is some doubt that the Ninth Circuit would adopt Snoonian even for the adverse testimony privilege.

Granting immunity to both spouses would appear to overcome both marital privileges.[196]

d. Physician/patient

A physician-patient privilege has not been recognized by common law. Federal courts have uniformly agreed that the physician-patient privilege is a statutory creation.[197]

e. Priest/penitent

Federal courts have recognized a priest-penitent privilege in very limited applications. The privilege covers communications by a penitent, seeking spiritual rehabilitation, to a clergyman. The communication must have been made in confidence to the clergyman in his capacity as a religious counselor, with the expectation of receiving religious consolation and

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[196]United States v. Doe, 478 F.2d 194 (1st Cir. 1973); see also In re Lochiatto, 497 F.2d 803, 805 n.3 (1st Cir. 1974) (the marital privilege cannot be asserted where both spouses have immunity and the sole claim is that inconsistent spousal testimony may result in a perjury prosecution).

[197]See Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977).

guidance.[198] Conversations between penitent and priest that relate to a business rather than a spiritual relationship are not privileged.[199] Similarly, communications about a third party or made with the intent of passing information to a third party are not privileged.[200]

f. Accountant/client

Federal courts have refused to recognize an accountant-client privilege.[201] One court, however, has held a client's confidential communication to his attorney's accountant, made for the purpose of obtaining legal advice from his attorney, to be privileged. The court viewed the accountant as the attorney's agent and found the communication to be within the attorney-client privilege.[202]

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[198]See Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971); In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990); United States v. Webb, 615 F.2d 828 (9th Cir. 1980).

[199]United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981).

[200]See 3 Wharton's Criminal Evidence § 527 (14th ed. 1987).

[201]United States v. Arthur Young & Co., 465 U.S. 805 (1984); Couch v. United States, 409 U.S. 322, 335 (1973).

[202]United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961).

g. Intra-family

The majority of federal courts have refused to recognize a testimonial privilege between family members.[203] In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983), is the only federal court which has recognized a family privilege. Nonetheless, Department and Division policy usually is not to seek close family confidential communications unless they consist of business communications among close family members.[204]

[203]See In re Grand Jury Subpoena of Santarelli, 740 F.2d 816 (11th Cir. 1984); see also In re Matthews, 714 F.2d 223, 224 (2d Cir. 1983) (antitrust case -- no privilege against testifying about in-laws); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (no privilege for son testifying about father); In re Grand Jury Proceedings (Starr), 647 F.2d 511, 512-13 (5th Cir. Unit A May 1981) (no privilege for daughter testifying about mother and step-father); United States v. Penn, 647 F.2d 876, 885 (9th Cir.), cert. denied, 449 U.S. 903 (1980) (no privilege for children testifying about mother).

[204]See U.S.A.M. 9-23.211 and Ch. V § L.

2. Constitutional privileges

a. 1st Amendment

The 1st Amendment provides little support for a refusal to honor a grand jury subpoena. Important limitations are imposed on subpoenas, however, by Departmental regulations concerning the issuance of compulsory process to members of the news media.

Procedures and standards regarding the issuance of subpoenas to members of the news media, and subpoenas for the telephone toll record of members of the news media are set forth in 28 C.F.R. § 50.10.[205] Subject to limited exceptions, this section requires the express approval of the Attorney General before a subpoena may be issued. 28 C.F.R. § 50.10 does not apply to CIDs or subpoenas directed to news media organizations for purely commercial or financial information related to an antitrust investigation.

Several litigants have raised 1st Amendment objections to a subpoena. In general, the courts have refused to recognize a 1st Amendment testimonial privilege. A so-called "newsman's testimonial privilege" was rejected in the case of Branzburg v. Hayes, 408 U.S. 665 (1972). The Supreme

[205] See § A.2.l., supra for a more detailed discussion of these procedures; see also U.S.A.M. 9-2.161 and ATD Manual III-82 to 83.

Court, in a plurality opinion by Justice White, noted that "the administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."[206] The Court reasoned that a reporter was also a citizen and subject to the duty of citizens generally to respond and testify, and that this, as well as the public interest in law enforcement, was sufficient to override the consequential effect on the gathering of news.

Nonetheless, the plurality opinion in Branzburg did suggest that several factors might support the quashing of a subpoena to a newsman on 1st Amendment grounds. These included harassment, bad faith or grand jury abuse. Further, Justice Powell's concurrence in Branzburg suggests that even absent such grounds, a limited 1st Amendment newsman's privilege exists, a view which has received some support in the lower courts.[207]

Outside of the newsgathering area, the courts have recognized very limited 1st Amendment privileges against subpoenas; in particular, those that may infringe on rights of free association. In the antitrust context, challenges based on a possible "chilling effect" on the right of free association may arise in response to subpoenas for documents showing communications or attendance at

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[206]408 U.S. at 703-04.

[207]See In re Possible Violations of 18 U.S.C. 371, 641, 1503, 564 F.2d 567 (D.C. Cir. 1977) (Robinson, J., concurring); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert. denied, 449 U.S. 1113 (1981).

meetings. The cases suggest, however, that unless such challenges are grounded on allegations of serious potential or actual harassment of political or religious groups, or grand jury abuse, they are unlikely to succeed.[208]

In cases not involving serious potential or actual harassment of political or religious groups, the likelihood of quashing a subpoena on freedom of association grounds appears to be diminished. Moreover, the cases suggest that under the balancing approach of NAACP v. Alabama, 357 U.S. 449 (1958), possible chilling effects or even substantial interference with the right of free association will be tolerated if there is a significant Government interest implicated in compelling disclosure.[209]

Similarly, attempts to invoke Noerr-Pennington as grounds for a motion to quash have also been unsuccessful.[210] The mere fact that activities

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[208]Compare NAACP v. Alabama, 357 U.S. 449 (1958) (disclosure by the NAACP of its membership rolls); United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980) (focus of inquiry on membership information for taxpayer protest groups); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (inquiry on Black Panther party membership information); In re 1st Nat'l Bank, Englewood, Colo., 701 F.2d 115 (10th Cir. 1983) with United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir. Unit A Sept. 1981) (I.R.S. subpoena to determine tax liability of church minister is unlike subpoena to tax protest group in that it would not affect church's ability to solicit members or support), cert. denied, 455 U.S. 920 (1982).

[209]See Buckley v. Valeo, 424 U.S. 1 (1976); In re Rabbinical Seminary, 450 F. Supp. 1078 (E.D.N.Y. 1978).

[210]See Eastern R.R. President's Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (continued...)

may ultimately be found to be exempt under Noerr-Pennington will not serve as grounds to quash a subpoena.[211] Moreover, in the Noerr-Pennington context, courts have been unable to identify adverse repercussions of the type that flow from compelled disclosure of membership information, such as those identified in NAACP v. Alabama. Courts have, therefore, refused to limit the scope of the Government's inquiry on the basis of a "chilling effect" on the exercise of Noerr-Pennington rights.[212]

A 1st Amendment religious freedom ground has also been rejected.[213] Similarly, a "scholars' privilege" -- essentially a variant of the newsman's privilege -- was rejected in United States v. Doe, 460 F.2d 328 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973).

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[210](...continued)
(1965).

[211]Cf. Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53 (2d Cir. 1983) (CID upheld despite claim of Noerr-Pennington defense); SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir.) (SEC subpoena upheld, in part to give Government opportunity to determine whether target was "bona fide newspaper" under Act granting exemption from SEC regulation), cert. denied, 398 U.S. 958 (1970).

[212]Cf. Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d at 60.

[213]United States v. Grayson County Bank, 656 F.2d supra.

b. 4th Amendment

1) History of the applicability of the 4th Amendment to grand jury subpoenas. The courts have used the 4th Amendment prohibition against "unreasonable searches and seizures", which is applicable to corporations as well as individuals, to limit the scope of subpoenas duces tecum. Fed. R. Crim. P. 17(c), which provides that a court "on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive," has also been used to limit subpoenas duces tecum in conjunction with the 4th Amendment prohibition. Rule 17, however, does not depend for its authority on the 4th Amendment. The authority of courts to quash or modify subpoenas under Rule 17(c) may be broader in scope than that provided by the 4th Amendment.[214]

On its face, the 4th Amendment does not implicate the power of a grand jury to issue subpoenas duces tecum for books and records. Nevertheless, in Boyd v. United States, 116 U.S. 616, 622 (1886), the Supreme Court extended the reach of the 4th Amendment to "compulsory production of . . . private papers to be used as evidence . . . ." Several subsequent cases have limited and questioned the application of the 4th Amendment to grand jury

[214]See In re Radio Corp. of Am., 13 F.R.D. 167, 171 (S.D.N.Y. 1952).

subpoenas. But while the Supreme Court eventually may abandon its prior view that the 4th Amendment applies to grand jury subpoenas, it probably will continue to apply the reasonableness test that it used in cases subsequent to Boyd.[215]

For example, in Hale v. Henkel, 201 U.S. 43 (1906), the Supreme Court found that a subpoena duces tecum issued by a grand jury investigating a Sherman Act violation was too sweeping to be regarded as reasonable. The Court stated at pages 76-77:

> Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable.
>
> Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the

[215]In United States v. R. Enterprises, Inc., __ U.S. __ (1991), the Supreme Court provides a detailed analysis of Rule 17(c)'s reasonableness requirement, yet does not mention the 4th Amendment.

> production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. . . .

In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), the Supreme Court in upholding a subpoena duces tecum issued by the Office of Price Administration stated at pages 208-209:

> Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, insofar as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that. . . the 4th, [Amendment] if applicable, at the most guards against abuse only by way of too much "indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.
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> . . .

> It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. . . .Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.[216]

2) Limitations on subpoena duces tecum. The limitations on the scope of a subpoena duces tecum may be generally summarized as follows. It must not be too broad and sweeping.[217] The

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[216]See also United States v. Dionisio, 410 U.S. 1, 10-12 (1973) (subpoenas duces tecum are subject only to the 4th Amendment requirement of reasonableness); United States v. Miller, 425 U.S. 435 (1976) (subpoenas duces tecum are subject to no more stringent requirement than are "ordinary" subpoenas); Brown v. United States, 276 U.S. 134 (1928).

[217]United States v. R. Enterprises, Inc., __ U.S. __ (1991); Brown v. United

(continued...)

documents sought must have some relevance to the investigation being conducted.[218] The subpoena must be limited to a reasonable time.[219] The documents requested must be described with sufficient definiteness so that the entity subpoenaed may know what is wanted.[220] The burden of complying with the subpoena must not be too great.[221] The subpoenas may not be used to secure privileged communications, but trade secrets may be obtained.[222]

With the foregoing specific limitations in mind, more general limitations are described below.

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[217](...continued)
States, 276 U.S. 134 (1928); United States v. Dionisio, 410 U.S. 1 (1973); United States v. Universal Mfg. Co., 525 F.2d 808 (8th Cir. 1975).

[218]Hale v. Henkel, 201 U.S. 43 (1906), Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956); United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), cert. denied, 403 U.S. 904 (1971).

[219]Brown v. United States, 276 U.S. 134 (1928); In re Grand Jury Subpoena Duces Tecum Issued to S. Motors Carriers Rate Conference, Inc., 405 F. Supp. 1192 (N.D. Ga. 1975); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947).

[220]Brown v. United States, 276 U.S. 134 (1928); In re Eastman Kodak Co., 7 F.R.D. supra; United States v. Medical Society, 26 F. Supp. 55 (D.D.C. 1938).

[221]In re Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949); In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948).

[222]Schwimmer v. United States, 232 F.2d supra; United States v. Medical Society, 26 F. Supp. supra; In re Borden, 75 F. Supp. supra; In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952).

a) Particularity. Subpoenas duces tecum must adequately describe the documents sought so that the subpoena recipient may know what he is being asked to produce. There is no precise formula for determining this particularity. As stated by the Supreme Court in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946), the requirement of particularity:

> comes down to specification of the documents to be produced adequate, but not excessive, for the purpose of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purpose and scope of the inquiry.[223]

The requirement of particularity may be somewhat less stringent in antitrust investigations because of the more complex nature of our inquiries, as stated in In re Eastman Kodak Co., 7 F.R.D. 760, 763-64 (W.D.N.Y. 1947):

[223] See also In re Corrado Bros., 367 F. Supp. 1126 (D. Del. 1973).

> In this particular type of investigation [antitrust] it must be seen that a wider range of inquiry is necessary than in the general run of criminal cases. In this particular instance it is obvious that it normally would be necessary to examine many documents of the Company.

Some courts have recognized that "older" records might need to be specified with greater definiteness than would more recent records. In generally approving a subpoena in a Sherman Act § 2 investigation which requested documents during a multi-year period which itself was several years prior to the date of the subpoena, the court in In re United Shoe Machinery Co., 73 F. Supp. 207, 211 (D. Mass. 1947), said:

> No doubt a subpoena ordering the production of old records or old documents places a far heavier burden on the corporation than does an order requiring the production of recent ones.
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> . . .
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> The documents demanded by a subpoena covering a long period of time in the past should, therefore, set forth the documents demanded with greater particularity, and should not order the production of

documents without some showing that they contain information reasonably relevant to the subject matter of the investigation.

b) Reasonableness. A subpoena for books and records is not subject to the 4th Amendment's probable cause requirement. It is subject only to the general requirement of reasonableness. Reasonableness includes at least two basic elements: (1) that the subpoena is not too broad and sweeping and (2) that the time covered period by the subpoena is reasonable.[224] A grand jury subpoena is presumed to be reasonable, with the burden of showing unreasonableness on the recipient who seeks to avoid compliance.[225]

Factors to be considered in determining reasonableness include the type and extent of the investigation, the materiality of the subject matter to the type of investigation, the particularity of the subpoena, the good faith of the Government and any showing of particular need.[226]

Because of the particular nature of antitrust investigations, courts have generally had a more relaxed standard of reasonableness in connection

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[224]See Brown v. United States, 276 U.S. 134 (1934); In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991 (D.R.I. 1975); In re Grand Jury Investigation (Gen. Motors Corp.), 174 F. Supp. 393 (S.D.N.Y. 1959).

[225]United States v. R. Enterprises, Inc., __ U.S. __, __ (1991)

[226]In re Linen Supply Co., 15 F.R.D. 115, 118-19 (S.D.N.Y. 1953).

with antitrust grand juries. As stated in In re Household Goods Movers Investigation, 184 F. Supp. 689, 690 (D.D.C. 1960):

> Investigations of possible antitrust violations almost invariably involve great amounts of records, etc., either by reason of the size of the corporation, or the industry, or the scope of inquiry. Also, since antitrust conspiracy cases are usually built on circumstantial evidence . . . and because conspiracies "are seldom capable of proof by direct testimony and may be inferred from the things done and from the circumstances" . . . and, because the activity under investigation may only be meaningful if a pattern of activity over a number of years is studied, the breadth and scope of subpoenas issued in antitrust inquiries are perhaps necessarily greater than in other types of cases . . .[227]

Courts have quashed subpoenas duces tecum that resemble "fishing expeditions" into corporate records.[228] A demand in a subpoena duces tecum for

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[227]See also In re Linen Supply Co., 15 F.R.D. at 118-19.

[228]In re Grand Jury Investigation (General Motors Corp.) 174 F. Supp. supra.

all corporate documents usually is unreasonable.[229] However, a demand for particularized records that constitute all or most of the witness' records is not unreasonable.[230]

While materiality is relevant to the question of reasonableness,[231] lack of materiality alone is not sufficient grounds for quashing a subpoena.[232]

The time period covered by a subpoena must have a reasonable relationship to the alleged offense under investigation.[233] Generally, in antitrust investigations, a subpoena duces tecum may extend beyond the applicable statute of limitations because it is recognized that antitrust violations are difficult to prove and because evidence from the period before the statute of limitations, in a continuing conspiracy, can be introduced at trial (assuming, of course, that it can be shown that some conspiratorial acts occurred within the

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[229]United States v. Alewelt, 532 F.2d 1165 (7th Cir.), cert. denied, 429 U.S. 840 (1976); United States v. Gurule, 437 F.2d 239 (10th Cir. 1970), cert. denied, 403 U.S. 904 (1971); In re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575 (S.D.N.Y. 1961).

[230]Civil Aeronautics Bd. v. Hermann, 353 U.S. 322 (1957); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); In re 1980 United States Grand Jury Subpoena Duces Tecum, 502 F. Supp. 576 (E.D. La. 1980).

[231]Hale v. Henkel, 201 U.S. 43 (1906).

[232]United States v. United States Dist. Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

[233]United States v. Alewelt, 532 F.2d supra.

statute of limitations). However, this general rule does not permit unrestricted access to old corporate records.[234]

c) Relevance. A subpoena duces tecum must seek materials relevant to a grand jury inquiry.[235] Relevancy is determined by examining the connection between the requested documents and the subject matter of the investigation.[236] In United States v. R. Enterprises, Inc., __ U.S. __ (1991), The Supreme Court established a very low threshold for satisfying the relevancy requirement. The Court stated at p. __:

> [W]here, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials

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[234]See In re Certain Chinese Family B. & D. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956) (27-year period unreasonable); In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952) (18-year period approved); In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948) (20-year period approved); In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947) (time period reduced from 27 years to 10 years); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947) (26-year period reduced generally to 10 years).

[235]See United States v. R. Enterprises, Inc., __ U.S. __ (1991); Hale v. Henkel, 201 U.S. 43 (1906); see also United States v. Gurule, 437 F.2d at 241.

[236]United States v. Loskocinski, 403 F. Supp. 75, 77 (E.D.N.Y. 1975).

the Government seeks will produce information relevant to the general subject of the grand jury investigation.

Some lower courts have held that the Government need make only a minimal showing of relevance.[237] A standard of "no conceivable relevance" appears to have been adopted in the Second Circuit before a witness can object to a subpoena duces tecum on relevance grounds.[238] The relevancy of the entire subpoena may be questioned[239], as well as particular paragraphs of the subpoena.[240]

c. 5th Amendment

The 5th Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." A person claiming the privilege must establish three elements (1) personal compulsion;

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[237]See In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991, 995, 997 (D.R.I. 1975); see also In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973).

[238]See In re Horowitz, 482 F.2d 72, 79-80 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

[239]In re American Medical Ass'n, 26 F. Supp. 58 (D.D.C. 1938).

[240]In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947).

(2) of a testimonial communication; (3) that would incriminate the person claiming the privilege.[241] As with any claim of privilege, the burden is on the person claiming the privilege to establish that it is properly asserted.[242]

This privilege is often raised in an attempt to resist producing business records or other evidence to the grand jury, but in most instances, the courts have held that the 5th Amendment privilege is not a bar to obtaining almost any type of business record pursuant to a grand jury subpoena. In general, corporations and other artificial entities, such as partnerships, have no 5th Amendment privilege against self-incrimination.[243] Moreover, a corporation must produce its records even though their contents or the act of production itself may incriminate the records custodian or other corporate officials.[244]

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[241]See Ch. V § A. for a more detailed discussion of the 5th Amendment privilege against self-incrimination.

[242]In re Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 279 (10th Cir. 1983); In re September 1975 Special Grand Jury, 435 F. Supp. 538, 544 (N.D. Ind. 1977); United States v. Quick, 336 F. Supp. 744, 745-46 (E.D.N.Y. 1972).

[243]Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

[244]Braswell v. United States, 487 U.S. 99 (1988); see United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986); In re Grand Jury, 836 F.2d 150 (3d Cir. 1987); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 479 U.S. 985 (1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Vallance, 793 F.2d 1003, 1005-06 (9th Cir. 1986); In re Grand Jury Proceedings

(continued...)

However, if the records are characterized as being purely personal or the subpoena is directed to a sole proprietor, there may be both 5th and 4th Amendment problems in obtaining such records. Each element of the privilege, and the leading cases dealing with it, are discussed below.

1) Personal compulsion. The Supreme Court has repeatedly held that the 5th Amendment privilege only applies when a person is compelled to make an incriminating statement.[245] Thus, if the preparation of business records is voluntary, no compulsion is present since a subpoena that calls for production of such records does not cause such records to be created. Nor does a subpoena for business records require the person producing them to restate or affirm the truth of their contents. Therefore, the Supreme Court has held that the 5th Amendment privilege does not protect the contents of business records.[246] At least one court has suggested that a similar rule might be

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[244](...continued)
(Vargas), 727 F.2d 941, 946 (10th Cir.), cert. denied, 469 U.S. 819 (1984); In re Grand Jury No. 86-3 (Will Roberts), 816 F.2d 569, 570 (11th Cir. 1987).

[245]See e.g., Andresen v. Maryland, 427 U.S. 463, 477 (1976); Fisher v. United States, 425 U.S. 391, 399 (1976); Olmstead v. United States, 277 U.S. 438, 462 (1928).

[246]United States v. Doe, 465 U.S. 605 (1984).

appropriate for voluntarily created personal papers.[247] Although the contents of business records are not privileged, the act of producing the documents may have certain testimonial aspects that may not be used against the person producing the documents.[248]

2) Incriminating communication. The 5th Amendment provides that no person shall be compelled to incriminate himself in a criminal proceeding. This privilege applies to any testimony that would incriminate the person making the statement. It does not apply to statements that would incriminate someone other than the person making the statement.[249] The privilege is not limited to facially incriminating communications. Courts have uniformly held that the privilege extends to any compelled communications that lead to an incriminating inference.[250]

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[247]See In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988).

[248]Braswell v. United States, 487 U.S. 99 (1988); United States v. Doe, 465 U.S. 605 (1984); In re Custodian of Records of Variety Distributing, 927 F.2d 244 (6th Cir. 1991).

[249]Rogers v. United States, 340 U.S. 367 (1951).

[250]See United States v. Doe, 465 U.S. 605 (1984) (Act of producing sole proprietor's business records found to involve testimonial self-incrimination since production concedes the existence, possession and authenticity of the documents); Andresen v. Maryland, 427 U.S. 463, 473-74 (1976) (act of production of subpoenaed personal records may constitute compulsory authentication of incriminating information).

3) Testimonial communication. The Supreme Court has held in a series of cases culminating in Braswell v. United States, 487 U.S. 99 (1988), that generally the production of business documents pursuant to a subpoena duces tecum is not a "testimonial communication" protected by the 5th Amendment. In certain unique situations, the "act of production" may have testimonial significance. In those cases, the act of production may not be used against the person producing the documents. However, the production of the documents may nonetheless be compelled, even absent a grant of immunity.

In general, the 5th Amendment privilege does not extend to artificial entities whose records are held by a custodian or agent in a representative capacity. This includes corporations,[251] unincorporated associations,[252] and partnerships.[253] According to Bellis v. United States, 417 U.S. 85 (1974), this is true even if the records would incriminate the custodian who is producing them. Thus, in most cases, not only can a corporate document custodian be required to produce documents, he can also be forced to identify and authenticate documents before the grand jury.[254]

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[251]Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911).

[252]United States v. White, 322 U.S. 694 (1944).

[253]Bellis v. United States, 417 U.S. 85 (1974).

[254]United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 318 (2d Cir.
(continued...)

A corporation cannot invoke the 5th Amendment privilege even where it is a mere alter ego of its owner.[255] This also applies to doctors, lawyers, and other professionals doing business as "professional corporations."[256] The rationale for this limitation of the 5th Amendment privilege to natural persons was succinctly stated by the Supreme Court in United States v. White, 322 U.S. 694, 700 (1944):

> The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be

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[254](...continued)
1979).

[255]Braswell v. United States, 487 U.S. 99 (1988); Hair Indus. Ltd. v. United States, 340 F.2d 510, 511 (2d Cir.), cert. denied, 381 U.S. 950 (1965); see United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972).

[256]United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67 (2d Cir. 1986); Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975).

thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

In addition, courts have refused to look behind the particular organizational form chosen in deciding whether to allow a 5th Amendment privilege claim. If a person chooses to organize as a corporation even if he is the sole shareholder, he can not assert a 5th Amendment privilege to shield his business records from production.[257]

A number of factors are relevant in determining whether a partnership is a collective entity independent of its members or the individual business of a single partner, including number of partners, type of partnership, whether it has held itself out to the public as a collective entity, whether it holds property in the partnership name, and whether more than one partner has access to the books and records.[258] Although small family partnerships have been held to have no 5th Amendment privilege,[259] in one case, In re Special Grand Jury No.1, 465 F. Supp. 800 (D. Md. 1978), a member of a family law partnership was allowed to withhold documents based on the court's finding that the actual

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[257]In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52, 59 (2d Cir. 1985).

[258]Bellis v. United States, 417 U.S. at 86-88.

[259]United States v. Mahady & Mahady, 512 F.2d 521 (3d Cir. 1975).

structure more closely resembled private businesses operated by each brother than a partnership.

Other collective entities have been denied the use of the privilege against self-incrimination. The ultimate determination is whether, based on all the circumstances, the particular organization "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interest only."[260]

The treatment of business records of a sole proprietorship was determined in United States v. Doe, 465 U.S. 605 (1984). In Doe, the Supreme Court held that the contents of voluntarily prepared business records were not privileged since their creation was not compelled. However, the act of producing the records of a sole proprietorship could amount to a compelled incriminating testimonial communication. The Court noted that the District Court had made a specific finding that "enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his

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[260]United States v. White, 322 U.S. 694, 701 (1944) (denying the 5th Amendment privilege to an unincorporated labor union); see also Rogers v. United States, 340 U.S. 367 (1951) (treasurer of Communist Party could not assert privilege as to books and records of party); In re Grand Jury Proceedings, 633 F.2d 754 (9th Cir. 1980) (trust records are not personal records of trustee); In re Witness Before the Grand Jury, 546 F.2d 825 (9th Cir. 1976) (no expectation of privacy as to the records of investment-limited partnerships or joint ventures).

possession, and that they are authentic."[261] Therefore, although the records themselves are not privileged, the Government may have to grant use immunity for the "act of production" to obtain the business records of a sole proprietorship.[262]

The "act of production" doctrine is limited to sole proprietorships and does not extend to other artificial collective entities such as corporations. In Braswell v. United States, 487 U.S. 99 (1988), the Supreme Court distinguished Doe and held that the president and sole shareholder of a corporation could not interpose a 5th Amendment objection to the compelled production of corporate records, even if the act of production might prove to be personally incriminating.[263] The Court did note, however, that the Government could make

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[261]465 U.S. at 613 n.11.

[262]See U.S.A.M. 9-23.215; see also Fisher v. United States, 425 U.S. 391, 411 (1976) (production of accountant's papers in the possession of a taxpayer would not be testimonial self-incrimination, as the existence and location of the records was a "forgone conclusion").

[263]See also In re Kave, 760 F.2d 343 (1st Cir. 1985); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984); In re Grand Jury Proceedings (Vargas), 727 F.2d 941 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

no evidentiary use of the act of production in any prosecution against that individual.[264]

There are two other areas where, in general, the 5th Amendment privilege is not available. First, there is generally no 5th Amendment protection available for records required to be kept by law.[265] For a particular class of documents to be deemed a "required record", they must be kept pursuant to a law or regulation whose purpose is essentially regulatory; they must be of the type customarily kept by the business and they must have a "public aspect."[266] Second, there is no 5th Amendment protection for demonstrative or physical evidence, since the privilege applies only to testimony. This includes handwriting samples,[267] fingerprints and photographs,[268] voice exemplars,[269] and blood samples.[270]

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[264]See also In re Custodian of Records of Variety Distributing, 927 F.2d 244 (6th Cir. 1991).

[265]Grosso v. United States, 390 U.S. 62 (1968); Shapiro v. United States, 335 U.S. 1 (1948); United States v. Rosenberg, 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031 (1975).

[266]Grosso v. United States, 390 U.S. at 67-68.

[267]United States v. Mara, 410 U.S. 19 (1973).

[268]Schmerber v. California, 384 U.S. 757, 764 (1966).

[269]United States v. Dionisio, 410 U.S. 1 (1973).

[270]Schmerber v. California, 384 U.S. 757 (1966).

The nature of the documents themselves may also be an issue. In Grand Jury Subpoena Duces Tecum v. United States, 657 F.2d 5 (2d Cir. 1981), the Second Circuit examined a personal 5th Amendment claim asserted by a corporate executive concerning pocket and desk calendars used to record business appointments. The Second Circuit remanded the case to the district court for clarification of the nature of each item. It proposed a "non-exhaustive list of criteria" to be used in deciding whether production of the calendars would amount to self-incrimination. These criteria included: "who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to the conduct of the corporation's business."[271] The district court held that the desk calendar was a corporate document but that the pocket calendar was more a personal paper and therefore within the scope of the 5th Amendment privilege. Other circuits have applied a similar case-by-case analysis for the determination of the issue.[272]

The few courts that have considered specifically whether documents are personal or corporate find that mixed documents are corporate and outside

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[271]657 F.2d at 8.

[272]See e.g., In re Grand Jury Proceedings United States, 626 F.2d 1051 (1st Cir. 1980); In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980); United States v. MacKey, 647 F.2d 898 (9th Cir. 1981).

the privilege. For example, the Ninth Circuit in United States v. MacKey, 647 F.2d 898 (9th Cir. 1981), held that a diary and desk calendar used to record business meetings and transactions, kept in the office, and used in the daily management of the corporation were properly discoverable corporate papers despite personal non-business notations and lack of corporate possession or ownership.[273]

4) Disclosure of records held by third parties. On occasion, it may be necessary to compel a target or subject of an investigation to execute a form consenting to the disclosure of documents held by a third party, for example, in avoiding the application of a foreign blocking statute. The Supreme Court in Doe v. United States, 487 U.S. 201 (1988), held that a court order compelling a target of a grand jury investigation to authorize the disclosure of bank records without specifically identifying those documents or acknowledging their existence does not violate the target's 5th Amendment privilege against self-incrimination.[274] The Court reasoned that execution of the consent form was not testimonial and, therefore, not within the privilege. The holding in Doe should also apply to other third parties in addition to banks.

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[273]See also In re Steinberg, 837 F.2d 527 (1st Cir. 1988).

[274]See also United States v. Ghidoni, 732 F.2d 814 (11th Cir.), cert. denied, 465 U.S. 932 (1984).

Personal documents protected by the 5th Amendment do not lose their privileged status when turned over to an attorney if the production meets all the requirements of the attorney-client privilege. The documents are protected by the attorney-client privilege, not the 5th Amendment.[275] However, if possession goes to a person other than an attorney, the Government may serve a subpoena on the third party, and thus avoid compulsion on the person incriminated by the documents.[276] In addition, a person who is incriminated by documents prepared by a third party may not validly claim a 5th Amendment privilege as to the documents by taking possession of them or by transferring them to his attorney.[277]

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[275]Fisher v. United States, 425 U.S. 391 (1976).

[276]Couch v. United States, 409 U.S. 322 (1973); In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987 (Doe), 834 F.2d 1128 (2d Cir. 1987); In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851 (3d Cir. 1979).

[277]Fisher v. United States, 425 U.S. 391 (1976).