INDIVIDUAL RESPONSES TO FEDERAL SUBPOENAS FOR CLIENTS WITH POSSIBLE CRIMINAL EXPOSURE

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INTRODUCTION

Responding to a federal grand jury subpoena or a discovery request by a regulatory agency can implicate numerous constitutional, statutory and common law privileges. Where the client reasonably fears that her responses could possibly be used against her in a criminal case, the Fifth Amendment privilege may be the single most important right the client has.

Assertion of the Fifth Amendment privilege can shield the client from interrogation by the government and others that is relevant to the "possible" criminal charges.[1] It may also shield documents in the client's possession. But assertion of the privilege can raise an "inference of wrongdoing" in a civil case or a prosecutor's mind. Assertion of the Fifth Amendment privilege involves a careful balancing of the costs, benefits and alternatives.[2]

BACKGROUND

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This "Fifth Amendment privilege" applies even when a witness maintains his innocence,[3] and even when no criminal case is pending. A witness asserting the Fifth Amendment privilege does not have to explain how he would be incriminated. Rather, he need only show that, under the circumstances, such an explanation could be an injurious disclosure.[4]

To invoke the privilege against self incrimination, a person must establish (1) *compulsion* to produce (2) a *testimonial* communication[5] that would (3) *incriminate* the person claiming the privilege. These elements dictate the differences in the way the privilege applies to subpoenas for testimony, document subpoenas and subpoenas for corporate records.

The Fifth Amendment and Client Testimony

The privilege obviously applies where the client's statements would directly incriminate him. But questions can also be indirectly incriminating, by "furnish[ing] a link in the chain of evidence needed to prosecute" the witness.[6] For example, a witness's truthful admission of an interest in a business could supply the government with proof it could use at trial if that business was accused of fraud. Further, evidence is incriminating if it could lead to the discovery of additional evidence needed to prosecute the witness.[7]

The Fifth Amendment and Documents

The Fifth Amendment protects against the compelled production of *personal* documents.[8] But voluntarily prepared business records are not protected. The Supreme Court has reasoned that because there is no *compulsion* in the creation of business records, they do not satisfy the basic elements of the privilege.[9]

While business records themselves are not protected, the act of producing business records may be privileged.

> The act of producing [business records] in response to a subpoena . . . has communicative aspect[s] of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the [subpoena recipient]. It also would indicate the [recipient's] belief that the papers are those described in the the subpoena.[10]

Generally, neither corporate records, nor the act of producing corporate records, is protected. The Court has long held that corporations have no Fifth Amendment privilege. In *Braswell v. United States,*[11] the Court reasoned that when a corporate custodian produces records, he is only acting in a representative capacity, so there is no personal compulsion.[12] As the *Braswell* dissent noted, this is a surprising and ironic conclusion where the individual custodian is the target of the

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investigation and the act of producing the documents is clearly incriminating.[13]

The distinction between protected personal records and unprotected corporate records is not always clear. One case held that a desk calendar was a corporate document, but that a pocket calendar was a personal document protected by the Fifth Amendment.[14]

Immunity and the Fifth Amendment

The government can force a witness to testify, over a Fifth Amendment claim, by granting the witness immunity from prosecution. The theory is that once a witness is immunized, she can no longer *incriminate* herself, so the elements of the privilege have not been met.

Two types of immunity are at issue: "transactional" and "use" immunity.[15] Transactional immunity bars prosecution for any offense related to the compelled testimony.[16] Use immunity bars use of the witness's statements and any evidence derived from those statements.[17] The Court has held that use immunity provides the same protection as the Fifth Amendment, because after a grant of use immunity, the prosecutor's case against the witness is in the same condition as if the witness had never testified.[18]

Obviously, the government cannot prosecute a witness who was granted transactional immunity, because prosecution for any offense even related to his testimony is barred. It is also difficult for the government to prosecute a witness who has been given use immunity. The government bears a heavy burden to prove the evidence supporting the charge is "derived from a legitimate source wholly independent of the compelled testimony." [19] Once a witness provides the government with incriminating evidence, it is difficult for the government to prove that subsequent charges are based on evidence that is derived from a completely independent source. There is no immunity for perjury and no limit on using false testimony to prove perjury of an immunized witness.[20]

FIRST CONTACT WITH INVESTIGATION

Responding to Grand Jury Subpoenas

In responding to a grand jury subpoena, the most important question is whether the client is a "target" of the grand jury investigation, a "subject" of the investigation, or merely a "witness." Basically, the client's response usually turns on whether the grand jury is likely to charge him with a crime.

The Witness

If the client is only a witness, he may choose to forego assertion of the privilege. The client's interests may be furthered by engendering the government's goodwill and not giving the impression that the witness has more to hide than the government already knows about. The government generally prefers witnesses that it does not have to immunize because it makes them more credible to a jury. Of course, this is a difficult decision that is fact specific and prosecutor dependant.

On the other hand, the client's proposed testimony may so plainly state a criminal offense that assertion of the privilege is advisable. In that case, counsel will want to try and negotiate immunity for the client. This usually occurs through "attorney proffers" to the government of the client's proposed testimony. The attorney proffers may be followed by face-to-face meetings with government agents under grants of limited use immunity, to further explain the client's proposed testimony.[21]

If the client's honest answers before the grand jury would not significantly increase his criminal exposure over what the government previously believed, then the government will likely grant the witness immunity. After all, the government had already described the client as a mere witness.

Conversely, if the client's honest answers would be much more incriminating than the government believes, then the witness should generally claim the privilege and not engage in negotiations for immunity. If the government then

chooses to immunize the witness, the witness has strong protection against future prosecution.

The Target

The "target" of an investigation is "a person to whom the prosecutor or grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."[22] When the client is the target of the investigation, she will usually want to limit the flow of information to the government and claim the Fifth Amendment privilege. Generally, once the government has shown an interest in charging the client, the client should not help the government prove its case by waiving privileges and providing information.

Moreover, the government will not want to immunize the client because it has already evidenced its intent to bring charges. However, if the client, through counsel, can demonstrate to the government that the target's proffered testimony is of paramount importance to the government, then perhaps the government can be convinced to immunize the witness.

Of course, there are exceptions to these general rules. For example, the client may decide to cooperate with the government's investigation in the hope of receiving reduced punishment. In that case, the target may choose to waive her Fifth Amendment privilege. Advising a client to cooperate with the government's investigation requires a thorough understanding of the end game, including the client's likely sentence if she fights the charges versus the likely sentence she will receive if she cooperates.

The Subject

The position of the subject is more nuanced. A subject is "a person whose conduct is within the scope of the grand jury's investigation," but who has not been identified as a target.[23] A key factor in advising the subject-client how to proceed is determining how likely it is that he will be charged.

There are a broad range of subjects: some the government views as potential witnesses and some the government views as potential targets. If the subject-client is on the witness-end of the spectrum, the government may be convinced to immunize the client as discussed. Conversely, if the subject-client is on the target-end of the spectrum, immunity may be unlikely and the subject-witness should be advised to assert his Fifth Amendment privilege.

Another key factor is the accuracy of the government's understanding of the facts and the prosecutor's objectivity. If the subject-client has documents or evidence that support his version of the facts and undermines the government's understanding of the facts, then the government may be convinced to immunize the client. This assumes, of course, that the prosecutor is not so wedded to her version of the facts that she can still be convinced. Obviously, this is a delicate negotiating process with far-reaching consequences for the client.

Other Privileges and Protections Against A Grand Jury Subpoena

There are additional privileges and protections that must be explored in responding to a grand jury subpoena. These protections are particularly important to corporations given their lack of protection by the Fifth Amendment.

Other Privileges

Under Rule 501 of the Federal Rules of Evidence, common law privileges apply to federal court investigations.[24] Accordingly, the attorney-client, attorney work product and spousal privileges apply. The physician/patient, accountant/client and intra-family privileges do not.[25] There is a limited priest-penitent privilege.[26]

Additional non-common-law privileges may also apply. The Supreme Court has held that there is no general constitutional "right to privacy" before the grand jury, so witnesses cannot refuse to answer questions on the grounds that the answers are embarrassing or disclose personal affairs.[27] However, courts have quashed grand jury subpoenas that violate statutorily created privacy rights.[28] Accordingly, grand jury subpoenas should be carefully analyzed to determine if they seek evidence protected by federal or state statutes.

Federal Rule of Criminal Procedure 17

Rule 17(c) permits the quashing of "unreasonable or oppressive" subpoenas. The

rule requires a case-by-case analysis to determine whether a grand jury subpoena is unreasonable or oppressive. No single factor controls. For example, the Ninth Circuit upheld an order quashing a grand jury subpoena seeking a lawyer's testimony against his client. But the court noted that this was not a bright line rule, and that subpoenas seeking such testimony must be addressed on a case by case basis.[29] At a minimum, Rule 17(c) requires that the subpoena: (1) seek evidence that is relevant to the grand jury's investigation; (2) describe the requested documents with reasonable particularity; and (3) request documents spanning a reasonable length of time.[30]

Other Constitutional Protections

Historically, the Fourth Amendment has been applied to grand jury subpoenas. The Fourth Amendment requires that such seizures be "reasonable," and a reasonableness inquiry focuses on the breadth of the subpoena and the time period the request covers.[31]

Subpoenas to news organizations are subject to challenge on First Amendment grounds if they involve harassment, bad faith or grand jury abuse.[32] Under Justice Department Guidelines, the Attorney General must approve all subpoenas directed to news organizations.[33]

Assertion of the Privilege in Civil Investigations

The Fifth Amendment Privilege also can be asserted in civil proceedings. "It is the incriminating tendency of the disclosure, and not the pendency of the prosecution against the witness, upon which the [privilege against compelled self incrimination] depends."[34] In fact, civil investigations often precede a criminal case.[35]

For example, the Federal Trade Commission ("FTC") investigates "unfair or deceptive business practices" in commerce. The FTC has broad authority to investigate and stop business practices that are likely to mislead a reasonable consumer, whether or not the party engaged in commerce knew of the deception. Likewise, the Securities and Exchange Commission ("SEC") has broad authority to investigate "all facts and circumstances" surrounding possible violations of securities laws and rules. There are numerous other regulatory agencies with broad investigative power.

But invoking the Fifth Amendment privilege may cost the client the case. Assertion of the Fifth Amendment in a civil action can raise an "inference of wrongdoing" in the action.[36] Under certain circumstances, assertion of the Fifth Amendment privilege during civil discovery, can preclude use of the shielded evidence at trial.[37]

When faced with the choice of self incrimination or losing a lawsuit, the best choice is often to try and stay the civil case pending resolution of the criminal proceedings. While a court can stay all or part of civil proceedings pending the outcome of a criminal investigation,[38] there is no guarantee.

> A defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. Not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even if that necessitates invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.[39]

Alternatively, the client may seek a protective order precluding use of her civil discovery responses in the criminal case. Unfortunately, such a protective order is useless if a court refuses to enforce it.[40]

Accordingly, deciding whether and when to invoke the Fifth Amendment is a delicate balance. For most clients, avoiding a criminal accusation is the top priority. On the other hand, losing civil fraud charges against the SEC, FTC and other regulatory agencies can exact a heavy toll. Obviously, if there is another privilege that can be legitimately invoked, it should be. If not, assertion of the Fifth Amendment may be required, despite the cost. Resolution of this issue depends on a thorough understanding of the facts and the client's potential criminal exposure.

[1] *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974).
[2] While this article is intended to identify some key principles in responding to investigatory subpoenas, it is not intended as legal advice or a guidebook. The issues discussed herein are fact and prosecutor dependant. A complete discussion is well beyond the scope of this article. There is no substitute for an experienced criminal practitioner to guide a client through the crucial and complex issues addressed in this article.
[3] *Ohio v. Reiner*, 532 U.S. 17 (2001).
[4] *Hoffman v. United States*, 341 U.S. 479, 486-87 (1950).
[5] *Anderson v. Maryland*, 427 U.S. 463, 477 (1976); *Fisher v. United States*, 425 U.S. 391, 399 (1976).
[6] *Hoffman*, 341 U.S. at 479.
[7] *Id.* at 486-87.
[8] *Bellis v. United States*, 417 U.S. 85, 87-88 (1974).
[9] *United States v. Doe*, 465 U.S. 605, 610-12 (1984).
[10] *Fisher v. United States*, 425 U.S. 391, 410 (1976).
[11] 487 U.S. 99 (1988).
[12] *Id.* at 110-11.
[13] *Id.* at 119.
[14] *Grand Jury Subpoena Duces Tecum v. United States*, 657 F.2d 5 (2d Cir. 1991).
[15] "Use" immunity is sometimes called "use and derivative use immunity."
[16] *Kastigar v. United States*, 406 U.S. 441, 453 (1972).
[17] 18 U.S.C. § 6002.
[18] *Kastigar*, 406 U.S. at 457.
[19] *Id.* at 460.
[20] *United States v. Mandujano*, 425 U.S. 564, 577 (1976).
[21] Limited use immunity under 18 U.S.C. § 2002 offers substantially less protection than the use immunity discussed above. Limited use immunity is usually granted in so-called "Queen for a Day" letters. These letters from the Assistant United States Attorney promise the witness that their statements will not be used against them by the government in its "case in chief." But the letters typically say that the witness's statements can be used to impeach the witness, evidence derived from the statements can be used against the witness and false statements can be used against the witness (and not just in a perjury prosecution).
[22] U.S. Department of Justice, United States Attorneys' Manual § 9-11.151.
[23] *Id.*
[24] Fed. R. Evid. 501.
[25] United States Justice Department Grand Jury Manual, Antitrust Division (Grand Jury Manual) § III.C.1.
[26] *Id.*
[27] *United States v. Calandria*, 414 U.S. 338, 353 (1974).
[28] *In re Grand Jury*, 111 F.3d 1066, 1071 (3d Cir. 1997) (witness could suppress grand jury subpoena seeking recordings created in violation of wire tap statute).
[29] *United States v. Bergeson*, 425 F.3d 1221, 1225-26 (9th Cir. 2005) (subpoena of lawyer to testify in investigation of client properly quashed; but, courts must still address issue on case by case basis).
[30] *In re Grand Jury Proceedings*, 707 F. Supp. 1207, 1216 (D. HI 1989).
[31] *See Hales v. Henkel*, 201 U.S. 43, 76-77 (1906).
[32] *See Branzburg v. Hayes*, 408 U.S. 665 (1971).
[33] 28 C.F.R. § 50.10.
[34] *Wilson v. United States*, 221 U.S. 361, 379 (1911).
[35] Civil investigations cannot be used as a stalking horse to gather evidence for a criminal case. *See, e.g., United States v. Stucky*, 646 F.2d 1369, 1384 (9th Cir. 1984) (use of civil IRS subpoena to aid criminal investigation improperly broadens government's right to discovery in criminal case and infringes on grand jury).
[36] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).
[37] *See United States v. Certain Real Property*, 55 F.3d 78, 84-86 (2d Cir. 1995).
[38] *See Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1985).
[39] *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995).
[40] *See, e.g., In re Grand Jury*, 659 F. Supp. 628 (D. Md. 1987) (district court refused to quash grand jury subpoena seeking civil discovery covered by protective order where movants claimed they would have asserted Fifth Amendment but for protective order).

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