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## THE USE OF THE FIFTH AMENDMENT IN SEC INVESTIGATIONS

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### INTRODUCTION

The Securities and Exchange Commission (SEC or Commission) is vested with broad power to investigate violations of the federal securities laws.<sup>1</sup> The

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1. See, e.g., *SEC v. Jerry T. O'Brien, Inc.*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 2720, 2725 (1984) (SEC not required to give "target" of its investigation notice of subpoenas issued to third parties); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978) (investigation into possible violations of securities laws, which was predicated on preliminary indication of false or misleading statements in materials filed with SEC, was not unreasonable), *cert. denied*, 439 U.S. 1071 (1979). The main statutory source of the Commission's investigatory authority is found in § 21(a) of the Securities Exchange Act of 1934 (Exchange Act), which provides:

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

15 U.S.C. § 78u(a) (1982). Section 20(a) of the Securities Act of 1933 (Securities Act) similarly

power is analogous to that of grand juries to investigate criminal violations.<sup>2</sup> Like the grand jury, the Commission's Division of Enforcement conducts its investigations in secret.<sup>3</sup> Consequently, during the investigation a target generally cannot discover what, if any, evidence the Commission has accumulated against him.

One of the most important weapons in the Commission's investigatory arsenal is the power to compel testimony of witnesses and production of documents.<sup>4</sup> There are few restrictions on the Commission's subpoena power,<sup>5</sup> which is likewise comparable to that of a federal grand jury.<sup>6</sup> Although an SEC subpoena is not self-enforcing,<sup>7</sup> the Commission may obtain judicial enforcement of a subpoena<sup>8</sup> if it is within the authority of the agency to issue the subpoena, the demand for information is not too indefinite, and the information sought is relevant to the investigation.<sup>9</sup> Once the Commission

provides that the Commission may investigate "[w]henver it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation proscribed under authority thereof, have been or are about to be violated. . . ." 15 U.S.C. § 77t(a) (1982).

2. See SEC v. Arthur Young & Co., 584 F.2d 1018, 1030 (D.C. Cir. 1978) (administrative agency power of inquisition is analogous to grand jury), *cert. denied*, 439 U.S. 1071 (1979); SEC v. Kaplan, 397 F. Supp. 564, 569 (E.D.N.Y. 1975) (SEC as fact-finding institution performs function similar to grand jury); United States v. Kline, 366 F. Supp. 994, 998 (D.D.C. 1973) (SEC has broad investigatory functions analogous to grand jury). See generally United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (inquisitorial function of administrative agencies resembles that of grand jury).

3. Rule 6(e) of the Federal Rules of Criminal Procedure provides that, with certain limited exceptions, grand jury proceedings are to be kept secret. FED. R. CRIM. P. 6(e)(2). Similarly, the *Code of Federal Regulations* provides that "[u]nless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." 17 C.F.R. § 203.5 (1984).

4. Section 21(b) of the Exchange Act provides:

For the purpose of any such investigation, or any other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena[sic] witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

15 U.S.C. § 78u(b) (1982).

5. See SEC v. Jerry T. O'Brien, Inc., \_\_\_ U.S. \_\_\_, 104 S. Ct. 2720, 2726 (1984) ("The provisions vesting the SEC with the power to issue and seek enforcement of subpoenas are expansive.").

6. See *supra* note 2 (cases cited).

7. See, e.g., SEC v. Jerry T. O'Brien, Inc., \_\_\_ U.S. \_\_\_, 104 S. Ct. 2720, 2725 (1984).

8. *Id.* The statutory authority for the Commission to bring a subpoena enforcement action is found in § 21(c) of the Exchange Act, 15 U.S.C. § 78u(c) (1982), and in § 22(b) of the Securities Act, 15 U.S.C. § 77v(b) (1982).

9. See, e.g., SEC v. Arthur Young & Co., 584 F.2d 1018, 1024 (D.C. Cir. 1978) (enforcing subpoena demanding 14 different categories of documents covering six-year period and pertaining to 29 individuals and entities, for all officers and directors of SEC's target and to special engagements, projects or management consulting services performed by Arthur Young for target), *cert. denied*, 439 U.S. 1071 (1979); SEC v. Kaplan, 397 F. Supp. 564, 568 (E.D.N.Y. 1975) (enforcing subpoena demanding eight categories of documents pertaining to witness' investments,

makes this relatively easy showing, the burden shifts to the recipient of the subpoena to show that the subpoena is unreasonable, was issued in bad faith, or the like.<sup>10</sup> The burden on the recipient is a heavy one,<sup>11</sup> and the courts have generally been unwilling to quash subpoenas.<sup>12</sup>

One of the few means that the recipient of a subpoena has to resist the Commission's subpoena power is the self-incrimination clause of the fifth amendment. Because the federal securities laws provide for criminal as well as civil penalties for their violation,<sup>13</sup> a witness who testifies or produces documents in an SEC investigation thereby takes the risk that his testimony or documents may be used against him in a subsequent criminal prosecution. Thus, it is well established that a witness may invoke the fifth amendment

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loans, bank accounts and real estate transactions). Whether a subpoena is relevant to the investigation is determined by reference to the Non-Public Formal Order of Investigation that the Commission issues when it authorizes an investigation. A copy of the formal order can be obtained by anyone who is required to testify in the investigation. See 17 C.F.R. § 203.7(a) (1984) (Rule 7, SEC Rules Relating to Investigations).

10. *Kaplan*, 397 F. Supp. at 571. See *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974); *SEC v. Wheeling-Pittsburgh Steel Corp.*, 482 F. Supp. 555, 563 (W.D. Pa. 1979), *vacated on other grounds*, 648 F.2d 118 (3d Cir. 1981).

11. *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973) ("the burden of showing that an agency subpoena is unreasonable remains with the respondent and where, as here, the agency inquiry is authorized by law and the materials sought are relevant . . . , that burden is not easily met") (allegation that disclosure of financial reports and financier identities would possibly damage business does not sustain burden), *cert. denied*, 415 U.S. 915 (1974).

12. The two leading cases in which the Commission's authority to enforce a subpoena was limited as a result of misconduct are *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981), and *SEC v. ESM Gov't Sec., Inc.*, 645 F.2d 310 (5th Cir. 1981). In *Wheeling-Pittsburgh*, the district court had denied enforcement of an SEC subpoena because of improper interference with the SEC investigation by United States Senator Lowell Weicker on behalf of an acknowledged competitor of Wheeling-Pittsburgh for no legitimate purpose. The Third Circuit, in remanding for further discovery, stated that the district court could refuse to enforce the subpoena if it found that the Commission was acting in bad faith. 648 F.2d at 126. In *ESM Government Securities, Inc.*, the Fifth Circuit reversed and remanded the district court's decision enforcing an SEC subpoena. The Fifth Circuit held that fraud, deceit, or trickery by SEC investigators are grounds for denying enforcement of an administrative subpoena. 645 F.2d at 317. See also *Hunt v. United States Sec. & Exchange Comm'n*, 520 F. Supp. 580, 610 (N.D. Tex. 1981) (defendants granted injunction against SEC from future violations of Right to Financial Privacy Act in connection with SEC's investigation of Hunt brothers).

13. Section 32(a) of the Exchange Act provides:

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this chapter or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$10,000, or imprisoned not more than five years, or both, except that when such person is an

privilege in response to an SEC subpoena for testimony or production of documents.<sup>14</sup>

The protection offered by the privilege is not unlimited, however. The privilege is available only to individuals and sole proprietorships, and not to corporations, partnerships, or other similar entities.<sup>15</sup> Nor does the privilege provide complete protection even for individuals. To assert the privilege successfully, an individual must show that the SEC subpoena in fact compels him to make a self-incriminating, testimonial communication.<sup>16</sup> This burden can be difficult, especially in the case of subpoenas *duces tecum*, because recent Supreme Court decisions have drastically cut back the scope of fifth amendment protection for documents.<sup>17</sup>

If the fifth amendment privilege is available, it unquestionably provides a powerful tool for the witness in an SEC investigation. Not only does it protect the witness from self-incriminating disclosures, but it also prevents the Commission from making its case out of the witness' own mouth. By asserting the privilege during the investigation, the witness gains the advantage of not having to testify at a time when he does not know the nature and extent of the Commission's evidence against him. If, after concluding its investigation, the Commission decides to bring a civil injunctive action against the witness, he can obtain discovery of the Commission's evidence (such as documents produced to the Commission and transcripts of testimony taken from witnesses during the investigation) prior to being deposed. The primary disadvantage of this course of action is the possibility that the Commission will successfully seek to have the trier of fact draw an adverse inference in the civil action from the invocation of the privilege.<sup>18</sup> However, as will be shown, no such adverse inference can be drawn from a witness' assertion of his fifth amendment rights during an SEC investigation.<sup>19</sup>

exchange, a fine not exceeding \$500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

15 U.S.C. § 78ff(a) (1982).

Section 32(c) of the Exchange Act provides for fines of up to one million dollars for corporations that violate the Foreign Corrupt Practices Act and for imprisonment of up to five years and fines of up to ten thousand dollars for officers, directors, or stockholders who violate the Foreign Corrupt Practices Act. 15 U.S.C. § 78ff(c) (1982). Other criminal provisions of the federal securities laws include § 24 of the Securities Act, which provides for imprisonment of not more than five years and fines of not more than ten thousand dollars for any willful violation of the Securities Act or any rule promulgated thereunder. 15 U.S.C. § 77x (1982).

14. See, e.g., SEC v. Musella, 578 F. Supp. 425, 429 (S.D.N.Y. 1984); SEC v. Scott, 565 F. Supp. 1513, 1533 (S.D.N.Y. 1983), *aff'd per curiam sub nom*, SEC v. Cayman Islands Reins. Corp., 734 F.2d 118 (2d Cir. 1984). See generally Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 94 (1964) (White, J., concurring) ("[t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory").

15. See *infra* notes 26-33 and accompanying text.

16. See *infra* note 25 and accompanying text.

17. See *infra* notes 62-125 and accompanying text.

18. See *infra* notes 182-97 and accompanying text.

19. See *infra* notes 198-214 and accompanying text.

Even if the adverse inference is unavailable to the Commission, counsel must consider other potential disadvantages of invoking the privilege before advising his client to do so. In certain cases, invoking the privilege may have adverse collateral consequences for the witness.<sup>20</sup> Moreover, asserting the privilege will unquestionably lead the staff of the Division of Enforcement to believe that the witness has in fact violated the securities laws. When seeking authority to bring an enforcement action, the staff will undoubtedly rely in part on the witness' assertion of the privilege. As is discussed below, whether these risks outweigh the benefits of invoking the fifth amendment will vary from case to case.

This article analyzes the use of the fifth amendment in SEC investigations. Part I of the article discusses the scope of the fifth amendment in light of recent Supreme Court decisions.<sup>21</sup> Part II of the article discusses the advisability of invoking the fifth amendment in those cases where it is available, with particular emphasis on the question of the potential adverse inference.<sup>22</sup> Part III contains a suggested procedure for asserting the fifth amendment in an SEC investigation.<sup>23</sup>

## I. THE SCOPE OF THE FIFTH AMENDMENT

The fifth amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."<sup>24</sup> The privilege created by the fifth amendment prohibits the government from compelling a person to make a testimonial communication that incriminates him.<sup>25</sup> Although the privilege has existed in this country since the adoption of the Bill of Rights, its boundaries are still not completely clear, and questions as to its scope are frequently litigated. In recent years, the courts have focused on three issues of particular interest to attorneys representing witnesses in SEC investigations: (a) whether documents are held in a personal capacity (and are therefore potentially privileged) or a representative capacity (and are therefore not privileged); (b) whether documents held in a personal capacity are in fact privileged; and (c) whether a particular oral statement or document is incriminating. What follows is a discussion of each of these issues.

### A. *Determining Whether Documents Are Personal*

The fifth amendment privilege is generally available only to natural per-

20. See *infra* notes 180-81 and accompanying text.

21. See *infra* notes 24-177 and accompanying text.

22. See *infra* notes 178-214 and accompanying text.

23. See *infra* notes 215-18 and accompanying text.

24. U.S. CONST. amend. V.

25. See *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) (elements of fifth amendment privilege are "(1) compulsion, (2) testimonial communication, (3) incrimination by such communication"), *cert. denied*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1591 (1984); Note, *On Claiming The Fifth Amendment For Mixed Purpose Documents: The Problem of Categorizing Documents As Personal Or Corporate In A Business Setting*, 17 U.S.F.L. REV. 333, 335 (1983) [hereinafter cited as *Mixed Purpose Documents*].

sons, and not to "collective entit[ies]." <sup>26</sup> Thus, neither a corporation, <sup>27</sup> nor a partnership, <sup>28</sup> nor a labor union <sup>29</sup> may assert the privilege, and a corporate officer, partner, or union official must produce documents he holds for the organization in a representative capacity, even if they incriminate him. <sup>30</sup> On the other hand, a sole proprietorship, which has no legal existence separate from that of the proprietor, is protected by the privilege on the theory that the sole proprietor holds the documents of the proprietorship in a personal capacity. <sup>31</sup> This produces the somewhat anomalous result that a one-person corporation does not possess the privilege, <sup>32</sup> while a sole proprietorship with a hundred employees does. <sup>33</sup>

The distinction between individuals and sole proprietorships on the one hand and "collective entities" on the other, while conceptually simple, can be difficult to apply in practice. <sup>34</sup> For example, a number of decisions have considered whether diaries, calendars, and appointment books maintained by corporate officials are personal documents (and therefore within the privilege) or corporate documents (and therefore unprotected). <sup>35</sup> In one case the assistant treasurer of a corporation was held in contempt for refusing to produce desk calendars and pocket calendars in response to a grand jury subpoena after the district court had determined these items to be corporate rather than personal. <sup>36</sup> The Second Circuit examined the subpoenaed documents, but could not determine whether the entries were corporate or personal in nature. <sup>37</sup> Accordingly, it remanded to the district court for further factual findings. <sup>38</sup> The appellate court suggested that the lower court should examine the nature of the contents of the documents, their purpose, who prepared them, who had custody of them, who had access to them, and whether the corporation required their preparation or needed them to conduct its business. <sup>39</sup>

26. *Bellis v. United States*, 417 U.S. 85, 88 (1974).

27. *Wilson v. United States*, 221 U.S. 361 (1911).

28. *Bellis v. United States*, 417 U.S. 85 (1974).

29. *United States v. White*, 322 U.S. 694 (1944).

30. *See, e.g., Wilson v. United States*, 221 U.S. 361, 385 (1911). The witness cannot, however, be compelled to testify as to the whereabouts of records he has not produced if such testimony would incriminate him. *Curcio v. United States*, 354 U.S. 118, 128 (1957).

31. *Bellis v. United States*, 417 U.S. at 87-88. *See United States v. Doe*, \_\_\_\_ U.S. \_\_\_\_, 104 S. Ct. 1237, 1241 (1984) (upholding assertion of privilege by sole proprietorship).

32. *Grant v. United States*, 227 U.S. 74, 80 (1913).

33. *In re Oswald*, 607 F.2d 645, 647 (5th Cir. 1979).

34. *See In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 522 F. Supp. 977, 980 (S.D.N.Y. 1981); *see also United States v. Malis*, 737 F.2d 1511, 1512-13 (9th Cir. 1984) (district court enforced IRS summons for records of partnership; Ninth Circuit reversed and remanded for evidentiary hearing on taxpayer's claim that records were really those of sole proprietorship since wife was at most nominal partner and partnership form was used only for tax reporting purposes).

35. *See Mixed Purpose Documents*, *supra* note 25, at 345-53 (collection of cases).

36. *See In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 657 F.2d 5, 7 (2d Cir. 1981).

37. *Id.* at 8.

38. *Id.* at 9.

39. *Id.* at 8.

On remand, the district court determined that the desk calendars were corporate documents<sup>40</sup> but that the pocket diaries were not.<sup>41</sup> The district court observed that, although the desk calendars contained some personal notations, most pertained to corporate matters and the calendars were used primarily for corporate business.<sup>42</sup> The corporation supplied the calendars, and they were left open on the witness' desk, where the witness' secretary had access to them.<sup>43</sup> By contrast, the district court found that the pocket diaries contained more personal entries than the desk calendars.<sup>44</sup> Moreover, the witness kept the diaries on his person, and only he had access to them.<sup>45</sup> The witness did not obtain the diaries from the corporation, but rather received them as gifts from third parties or purchased them himself.<sup>46</sup>

In a similar case, the Ninth Circuit upheld a subpoena seeking a desk calendar used by the vice-president of a company but also ordered production of the vice-president's Brooks Brothers diary.<sup>47</sup> The court reasoned that the documents were corporate because the vice-president kept them in his office and used them to record business meetings and corporate transactions.<sup>48</sup> The fact that he also made some personal notations in the documents was deemed insufficient to bring the calendar and diary within the privilege.<sup>49</sup> By contrast, the First Circuit held that a doctor's appointment log was personal, even though the log was maintained in an office at the hospital-corporation, of which the doctor was the Chairman of the Board, by a secretary whose salary was paid by the hospital.<sup>50</sup> In support of its holding, the court pointed to the fact that the log dealt primarily with payments by the doctor's own patients.<sup>51</sup>

Deciding whether a document is the individual corporate officer's or the corporation's is particularly important in an SEC investigation since only the former are even potentially privileged. Therefore, before any decision can be made concerning production, the personal documents must be separated from those that are corporate officers' business records. Making the decision can be difficult since the personal documents of a corporate officer are often kept in the corporate offices. When smaller companies are involved, this distinction is even more difficult to make because officials of such companies frequently fail to differentiate their personal activities from those of the company. Consequently, these officials typically commingle personal and corporate documents. In separating business and personal documents, the criteria listed

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40. *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 522 F. Supp. 977, 982 (S.D.N.Y. 1981).

41. *Id.* at 984.

42. *Id.* at 982-83.

43. *Id.* at 983.

44. *Id.* at 984.

45. *Id.* at 985.

46. *Id.*

47. *United States v. MacKey*, 647 F.2d 898, 901 (9th Cir. 1981).

48. *Id.* at 901.

49. *Id.*

50. *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1053-54 (1st Cir. 1980).

51. *Id.* at 1054.



by the Second Circuit<sup>52</sup> may be of some use, although as that court properly recognized, these criteria are not exhaustive.<sup>53</sup> Whatever criteria counsel ultimately uses, he must apply them consistently and be prepared to defend them in a principled manner.

Where the corporation and the individuals are separately represented, it is important for counsel, prior to responding to the subpoena, to draw the distinction between corporate and personal documents. Counsel for the individual corporate officer should only be involved with the production of documents which are truly personal and, therefore, potentially privileged. Counsel representing the issuer should be responsible for producing documents from the individual officer's corporate files.

### B. *Determining Whether Personal Documents Are Privileged*

In recent years, courts have struggled with the question of whether production of personal documents in response to a subpoena constitutes a compelled testimonial communication for purposes of the fifth amendment. The Supreme Court has decided two major cases on the issue in recent years,<sup>54</sup> and the lower courts have handed down a host of opinions attempting to amplify and to reconcile the rulings of the Justices.<sup>55</sup>

The traditional view of the scope of fifth amendment protection for documents was set forth by Mr. Justice Bradley, writing for the Supreme Court in *Boyd v. United States*.<sup>56</sup> In *Boyd*, the Court held that compulsory production of an individual's "private books and papers" violated the fifth amendment.<sup>57</sup> In determining whether documents were privileged, *Boyd* focused on their contents.<sup>58</sup> If their contents were "private," the government could not order their production any more than it could force an individual to testify as to his "private" thoughts.<sup>59</sup> The statements contained in a person's private papers constituted testimonial communications within the fifth amendment, and the forced disclosure of those statements pursuant to a subpoena satisfied the requirement of compulsion.

Over the next ninety years, the Supreme Court continued to rely on *Boyd* and to espouse the view that the fifth amendment protects the privacy interests

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52. See *supra* note 39 and accompanying text (Second Circuit's criteria).

53. *In re Grand Jury Subpoena Duces Tecum* Dated April 23, 1981, 657 F.2d 5, 8 (2d Cir. 1981).

54. See *United States v. Doe*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1237 (1984); *Fisher v. United States*, 425 U.S. 391 (1976).

55. See generally Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States*, 95 HARV. L. REV. 683 (1982), and cases cited therein [hereinafter cited as *Aftermath of Fisher*].

56. 116 U.S. 616 (1886).

57. *Id.* at 634-35.

58. *Aftermath of Fisher*, *supra* note 55, at 684 (under *Boyd*, courts "focus[ed] on the nature of the evidence sought, not the process by which it was to be obtained").

59. *Boyd*, 116 U.S. at 623.

of the individual.<sup>60</sup> As late as 1976, Mr. Justice Brennan could observe that *Boyd's* holding had "often been reiterated without question."<sup>61</sup> In that year, however, the Supreme Court decided *Fisher v. United States*,<sup>62</sup> a case that drastically altered analysis of fifth amendment issues<sup>63</sup> and reduced the degree of fifth amendment protection for documents.<sup>64</sup> In *Fisher*, a taxpayer under investigation by the Internal Revenue Service (IRS) obtained from his accountant certain workpapers that the accountant had used in preparing the taxpayer's returns.<sup>65</sup> The taxpayer turned the workpapers over to the attorney who was representing him in the IRS investigation.<sup>66</sup> The IRS issued a summons to the attorney seeking production of the workpapers.<sup>67</sup> The attorney refused to comply with the summons, and the government brought a civil action to enforce it.<sup>68</sup>

The Supreme Court concluded that the workpapers should be produced.<sup>69</sup> Because the summons was directed to the attorney and not the taxpayer, the Court held that the summons did not compel the taxpayer to do anything and, therefore, did not violate the fifth amendment.<sup>70</sup> The Court rejected the contention that the attorney's obligation to preserve the confidences of his client created a reasonable expectation of privacy in the client that was protected by the fifth amendment.<sup>71</sup> The opinion conceded that the protection of privacy was one of several goals served by the fifth amendment.<sup>72</sup> The Court, however, made clear that only invasions of privacy that involved compelled testimonial incrimination of some sort violated the privilege.<sup>73</sup>

The Court went on to state that, if the documents would have been protected by the fifth amendment in the hands of the taxpayer and if the taxpayer transferred them to his attorney for the purpose of seeking legal advice, then the documents would be protected by the attorney-client privilege.<sup>74</sup> Applying this principle, the Court held that a summons directing the taxpayer to produce his accountant's workpapers did not violate the fifth amendment<sup>75</sup>

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60. *Fisher v. United States*, 425 U.S. 391, 419 (1976) (Brennan, J., concurring in the judgment) (citing cases).

61. *Id.*

62. 425 U.S. 391 (1976).

63. See *infra* note 85 and accompanying text.

64. See *In re Grand Jury Subpoena Duces Tecum Served Upon John Doe*, 466 F. Supp. 325, 326 (S.D.N.Y. 1979) (*Fisher* "cut back significantly on the ability of one under subpoena to restrict Government access to documents in one's possession").

65. *Fisher*, 425 U.S. at 394.

66. *Id.*

67. *Id.*

68. *Id.* at 395.

69. *Id.* at 396.

70. *Id.* at 397.

71. *Id.* at 399.

72. *Id.*

73. *Id.*

74. *Id.* at 405.

75. *Id.* at 409.

because such a subpoena did not compel the taxpayer to testify orally or to restate or affirm the contents of the subpoenaed documents.<sup>76</sup> The Court observed that the workpapers were not prepared by the taxpayer and thus contained no testimonial declarations by him.<sup>77</sup> Moreover, because the workpapers had been voluntarily prepared, any testimonial declarations that they contained could not be considered compelled.<sup>78</sup> Thus, even though the documents were incriminating, they were not protected by the fifth amendment.<sup>79</sup>

The Court next considered whether the act of producing the documents, which the Court conceded was compelled, constituted a testimonial communication.<sup>80</sup> The Justices noted that, by producing the documents, the taxpayer tacitly conceded their existence, his possession of them, and his belief that the documents were those described in the subpoena.<sup>81</sup> The Court concluded, however, that the production of the workpapers did not violate the fifth amendment since their existence and location were already known to the government.<sup>82</sup> Nor, in the Court's view, could the taxpayer be deemed to have implicitly authenticated the workpapers by producing them.<sup>83</sup> The Court reasoned that the taxpayer could not authenticate the workpapers since he had not prepared them and could not otherwise vouch for their accuracy.<sup>84</sup>

*Fisher* thus shifted the focus of fifth amendment inquiry away from the contents of the documents to the act of production.<sup>85</sup> Although the Court did not overrule *Boyd*,<sup>86</sup> the Justices cut back on *Boyd* by de-emphasizing the notion that the fifth amendment was designed to protect the privacy of the individual.<sup>87</sup> Indeed, the opinion cast doubt on whether private papers were even within the privilege.<sup>88</sup>

Mr. Justice Brennan concurred in the judgment of the Court in *Fisher*,

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76. *Id.*

77. *Id.*

78. *Id.* at 409-10.

79. *Id.* at 409.

80. *See id.* at 410.

81. *Id.*

82. *Id.* at 411.

83. *Id.* at 412-13.

84. *Id.* at 413.

85. *See In re Grand Jury Subpoena Duces Tecum Served Upon John Doe*, 466 F. Supp. 325, 326 (S.D.N.Y. 1979) ("the Court [in *Fisher*] has directed us to look beyond the contents of the document sought as had always been the inquiry, and toward the testimonial elements of production in determining whether or not the Fifth Amendment privilege exists"); *accord* *United States v. Schlansky*, 709 F.2d 1079, 1082 (6th Cir. 1983), *cert. denied*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1591 (1984); Hafetz, *Document Subpoenas and Fifth Amendment Privilege: Case Law Development* in HAFETZ, *ADVANCED WHITE COLLAR CRIMINAL PRACTICE* 14-15 (1983).

86. *See Fisher*, 425 U.S. at 414 (reserving question of whether fifth amendment would protect taxpayer from producing his own tax records on ground that workpapers sought in *Fisher* were not "private papers").

87. *See id.* at 409.

88. *See id.* ("the prohibition against forcing the production of private papers has long been a rule searching for a rationale").

but refused to join its opinion on the grounds that it denigrated the privacy principle of *Boyd*.<sup>89</sup> Reviewing the history of the privilege and the Court's previous decisions construing it, he concluded that one of the primary purposes of the privilege was to protect personal privacy.<sup>90</sup> In Brennan's view, testimonial communications included not only an individual's immediate declarations, whether oral or written, but also his books and papers,<sup>91</sup> including diaries, letters, and "nonbusiness economic records" such as cancelled checks or tax records.<sup>92</sup> Justice Brennan also took the position, consistent with *Bellis v. United States*,<sup>93</sup> that the business records of a sole proprietorship were within the privilege.<sup>94</sup>

Given the tension between the Justices' opinions in *Fisher* and the fact that the majority opinion criticized *Boyd* without overruling it, it was not surprising that the lower courts differed greatly on the meaning of *Fisher*.<sup>95</sup> The First Circuit, for example, held that *Fisher* had stripped the content of business records of any fifth amendment protection and that such documents were privileged only if the act of production would serve to authenticate them.<sup>96</sup> In *United States v. Beattie*,<sup>97</sup> the Second Circuit likewise adopted the "implicit authentication" rationale of *Fisher*, but did not reach the question of whether the fifth amendment continued to protect the contents of documents.<sup>98</sup> The court went on to hold that a letter written by a taxpayer to his accountant, and subsequently retrieved by the taxpayer, was privileged.<sup>99</sup> Other lower courts, following Justice Brennan's lead, held that even after *Fisher* the privilege barred a subpoena for an individual's private papers.<sup>100</sup> In *In re Grand Jury Proceedings (Johanson)*,<sup>101</sup> for example, the Third Circuit held that personal appointment books that the witness kept on his person and in which only he wrote were private papers under the fifth amendment.<sup>102</sup> Reaffirming the

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89. *Id.* at 414 (Brennan, J., concurring in the judgment).

90. *Id.* at 416.

91. *Id.* at 418.

92. *Id.* at 427.

93. 417 U.S. 85 (1974).

94. *Fisher*, 425 U.S. at 425-27 (Brennan, J., concurring in the judgment); see *Bellis*, 417 U.S. at 87-88.

95. See *Aftermath of Fisher*, *supra* note 55, at 685 (uncertainty generated by *Fisher* has confused lower courts).

96. *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1055 (1st Cir. 1980). Applying this standard, the court held that the records at issue, logs prepared by the doctor-witness' secretary reflecting appointments with patients and payments, were within the privilege. *Id.* at 1055-56.

97. 541 F.2d 329 (2d Cir. 1976) (per curiam).

98. See *id.* at 331.

99. *Id.*

100. See, e.g., *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 333 (3d Cir. 1982), *rev'd sub nom.*, *United States v. Doe*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1237 (1984); *In re Grand Jury Proceedings*, 601 F.2d 162, 168 (5th Cir. 1979); *In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981*, 522 F. Supp. 977, 979 (S.D.N.Y. 1981).

101. 632 F.2d 1033 (3d Cir. 1980).

102. *Id.* at 1042, 1044.

vitality of *Boyd*, the court reasoned that the fifth amendment created an inviolable "zone of privacy" around the citizen.<sup>103</sup> A contrary result, the court believed, might well lead citizens to refrain from reducing their thoughts to writing, out of a fear that their writings could subsequently be used to incriminate them.<sup>104</sup>

Consistent with Justice Brennan's position that the fifth amendment protected the business records of sole proprietorships, the Fifth Circuit, in *In re Grand Jury Proceedings (McCoy and Sussman)*,<sup>105</sup> refused to enforce a subpoena to a sole proprietor seeking, among other things, financial statements and workpapers used to prepare them, ledgers, check requests, records of receipts and disbursements, vouchers, bills, invoices, and payroll records.<sup>106</sup> The court reasoned that the subpoenaed documents were "personal financial records" and, therefore, did not have to be produced.<sup>107</sup> Similarly, the Third Circuit held in *In re Grand Jury Empanelled March 19, 1980*,<sup>108</sup> that the fifth amendment still protected private papers and that this protection extended not only to an individual's personal records, but also to the business papers of an individual or a sole proprietorship.<sup>109</sup> Applying this principle, the court then quashed five subpoenas directing the witness to produce numerous documents relating to his sole proprietorships, including correspondence, bank statements, checks, deposit tickets, telephone toll records, ledgers, vouchers, invoices, contracts, purchase orders, bids, financial statements, and income tax returns.<sup>110</sup> The court went on to hold that, even if the subpoenaed documents were not private papers, they were nevertheless privileged under *Fisher*, since the very act of producing them would constitute an admission of their existence and their possession by the taxpayer.<sup>111</sup> The court observed that the record contained no indication that the government actually knew that the subpoenaed documents existed or were in the possession of the witness.<sup>112</sup> To compel their production under such circumstances, the court reasoned, would violate the fifth amendment by making the witness "the primary informant against himself."<sup>113</sup>

In *United States v. Doe*, the Supreme Court affirmed in part, reversed

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103. *Id.* at 1043.

104. *Id.*

105. 601 F.2d 162 (5th Cir. 1979).

106. *See id.* at 166-67.

107. *Id.* at 170.

108. 680 F.2d 327 (3d Cir. 1982), *rev'd sub nom.*, *United States v. Doe*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1237 (1984).

109. *Id.* at 333-34.

110. *Id.* at 328-29 & n.2.

111. *Id.* at 334-35.

112. *Id.* at 335.

113. *Id.* The Third Circuit also stated that, by producing the subpoenaed documents, the witness would be forced to authenticate them. *Id.* The court noted that many of the subpoenaed documents, including ledgers, contracts, correspondence, and memoranda, were most likely prepared by the witness and that the government had failed to offer any explanation as to how such documents could be authenticated except by the witness. *Id.*

in part, and remanded.<sup>114</sup> Relying heavily on the reasoning of *Fisher*, the Court overturned the Third Circuit's holding that the documents at issue were private papers and, therefore, within the fifth amendment privilege.<sup>115</sup> The Court emphasized that, because the documents had been voluntarily prepared, the statements they contained were not compelled for purposes of the fifth amendment.<sup>116</sup> In the Court's view, the fact that the documents were in the possession of the witness (rather than his attorney, as had been the case in *Fisher*) was irrelevant to determining whether the creation of the documents was compelled.<sup>117</sup> Accordingly, the Court concluded that there was no fifth amendment protection for the contents of the documents.<sup>118</sup>

However, the Supreme Court did affirm the Third Circuit's holding that the act of producing the documents at issue violated the privilege.<sup>119</sup> Again relying on *Fisher*, the Court opined that a subpoena for documents compels the witness to perform an act, *i.e.*, turning the documents over to the government, that may have testimonial aspects and an incriminating effect.<sup>120</sup> The Court placed great weight on the findings of the district court (which had been affirmed by the Third Circuit) that producing the documents would admit their existence and authenticity, as well as the witness' possession of them.<sup>121</sup> Having determined the limits of the privilege, the Court turned to the question of use immunity. It rejected the government's proposed doctrine of constructive use immunity, whereby the district court would order the witness to produce the subpoenaed documents and, at the same time, order the government not to use the act of production against the witness in any way.<sup>122</sup> The Supreme Court stated that, in the absence of a formal request for immunity under 18 U.S.C. § 6003, courts lacked jurisdiction to grant prospective use immunity.<sup>123</sup> The Court did state, however, that if the Department of Justice did obtain immunity pursuant to the statute, it extended only to the act of producing the documents subpoenaed, and not to their contents.<sup>124</sup> The Court reasoned that the immunity statute was coextensive with the fifth amendment

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114. *United States v. Doe*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1237, 1245 (1984).

115. *See id.* at 1241-42.

116. *Id.* at 1241.

117. *Id.* at 1242.

118. *Id.*

119. *Id.* at 1242-43.

120. *Id.* at 1242.

121. *See id.* at 1242-43 & nn.11, 12. The Court rejected the government's argument that the incriminating effect of the act of production would be so trivial as to avoid impinging upon the privilege. *Id.* at 1243 n.13. The Court stated that the witness' allegations that producing the documents would admit their existence, their authenticity, and his possession of them were sufficient to establish a substantial and real risk of incrimination. *Id.* According to the Justices, the government could theoretically prevent this showing by introducing evidence that possession, existence, and authentication were foregone conclusions but the government had failed to make such a showing in the present case. *Id.*

122. *See id.* at 1244.

123. *Id.*

124. *Id.* at 1244 n.17.

and that, since the fifth amendment provided no protection for the contents of documents, the immunity statute did not either.<sup>125</sup>

Even though *Fisher* and *Doe* have substantially narrowed the scope of fifth amendment protection for documents, these decisions may nonetheless permit a witness in an SEC investigation to withhold documents if the act of production would be tantamount to testimony regarding their existence and the witness' possession of them. Particularly in the early stages of an SEC investigation, the subpoenas issued by the Commission are very broadly worded. Typically, the subpoenas seek all bank statements, checks, and deposit slips or all documents reflecting brokerage accounts for a particular period. Subpoenas also frequently request all diaries, calendars, and appointment books and all telephone logs. Such broadly worded requests suggest that the Commission is not aware of the existence of any particular documents requested by the subpoena, but rather is merely engaged in a fishing expedition for documents of the type commonly kept by corporate officers or by individuals who trade in the stock market. Under *Fisher* and *Doe*, the act of producing documents in response to such a subpoena would clearly have testimonial aspects and, therefore, would be within the privilege against self-incrimination.<sup>126</sup>

Furthermore, an SEC subpoena may be resisted under the implicit authentication theory of *Fisher* if the act of production would require the witness to admit the genuineness of the documents sought.<sup>127</sup> The implicit authentication theory protects documents written by the witness<sup>128</sup> and any documents created by third parties if their production would constitute an admission that

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125. See *id.*

126. See, e.g., *United States v. Fox*, 721 F.2d 32, 38 (2d Cir. 1983) (IRS summons quashed; "the mere fact that a tax return reveals on its face that a taxpayer had 'at least one bank account' or 'brokerage account' does not give the IRS any information about whether the taxpayer has records of other bank accounts showing income that was never reported in his return"); *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 335 (3d Cir. 1982) (quashing subpoena for all books and records, including *inter alia*, ledgers, journals, vouchers, bank statements, checks, and contracts; "The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist . . . is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself"), *aff'd on this point sub nom.*, *United States v. Doe*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 1237, 1243 (1984); *In re Grand Jury Subpoena Duces Tecum Served Upon John Doe*, 466 F. Supp. 325, 327 (S.D.N.Y. 1979) (quashing subpoena directed to target suspected of illegal payments to union officials seeking all records of any kind received from certain individuals; "the existence of the documents in question is not, as in *Fisher*, a 'foregone conclusion'"); *cf.* *United States v. Schlansky*, 709 F.2d 1079, 1083 (6th Cir. 1983) (enforcing IRS summons for ring binder containing 8" x 12" sheets to which were attached checks, bank statements, invoices, receipts, and workpapers for 1976 and 1977), *cert. denied*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 428 (1984).

127. See 5 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 901(a)[01] (1983) (authentication is process by which evidence is shown to be genuine, *i.e.*, what its proponent claims it to be).

128. See *United States v. Beattie*, 541 F.2d 329, 331 (2d Cir. 1976) (per curiam) ("By producing his own letters to the accountant, the taxpayer would be authenticating them . . . [T]he Fifth Amendment protects against compulsory production of a paper written by an accused with respect to his own affairs").

they are in fact the witness' records and that they pertain to him.<sup>129</sup> Under this theory, a witness in an SEC investigation can refuse to produce not only correspondence and other documents created by him, but also his bank statements, checks, and brokerage account records.<sup>130</sup>

### C. Standard for Witnesses Seeking to Invoke the Privilege

In *Hoffman v. United States*,<sup>131</sup> the Supreme Court laid down the standard for determining whether a witness' response to a subpoena for testimony or documents will incriminate him. Under this test, a witness is entitled to the privilege's protection when there is "reasonable cause to apprehend danger from a direct answer."<sup>132</sup> A witness may invoke the fifth amendment privilege and refuse to answer questions that would either independently support a conviction or "furnish a link in the chain of evidence" needed to prosecute him.<sup>133</sup> In *Hoffman*, the petitioner appeared before the grand jury, but refused to answer questions regarding the whereabouts of one Weisberg, a fugitive witness,<sup>134</sup> on the ground that his answers might tend to incriminate him.<sup>135</sup> The district court found that Hoffman did not face a real threat of self-incrimination and held him in criminal contempt.<sup>136</sup> Hoffman's conviction was affirmed by the Third Circuit.<sup>137</sup> Reversing the conviction,<sup>138</sup> the Supreme Court held that Hoffman had a reasonable basis for believing that his answers would tend to incriminate him.<sup>139</sup> The Court pointed out that, if Hoffman had answered the questions, he might have linked himself to Weisberg and even admitted to hiding Weisberg.<sup>140</sup> Thus, the Court concluded, Hoffman "could reasonably have sensed the peril of prosecution. . . ."<sup>141</sup>

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129. See *United States v. Fox*, 721 F.2d 32, 39 (2d Cir. 1983) ("compelled production of records in a taxpayer's possession—even records prepared by a third party—implicitly authenticates the records as the taxpayer's own and thus violates the Fifth Amendment").

130. See *supra* notes 128-29.

131. 341 U.S. 479 (1951).

132. *Id.* at 486.

133. *Id.*

134. *Id.* at 481.

135. *Id.* at 482.

136. *Id.*

137. *Id.* at 484.

138. *Id.* at 490.

139. *Id.* at 488.

140. *Id.* at 487-88. The Supreme Court noted that if Hoffman answered the questions he would have faced the prospect of providing information that may have incriminated him in the offenses of obstruction of justice as well as the offenses that the grand jury was actively investigating. *Id.* at 488-89.

141. *Id.* at 488. In *United States v. Apfelbaum*, 445 U.S. 115 (1980), the Court stated the standard in somewhat different language. "The central standard for the privilege's application has been whether the claimant is confronted by substantial and "real," and not merely trifling or imaginary, hazards of incrimination." 445 U.S. at 128, quoting *Marchetti v. United States*, 390 U.S. 39, 53 (1968). Notwithstanding the difference in language between the two opinions, *Apfelbaum* has not had any substantive impact on *Hoffman*. See *United States v. Zappola*, 646



Under the *Hoffman* standard the trial court judge is responsible for determining whether the apprehension is reasonable.<sup>142</sup> In making this determination, the test is not whether the witness will be prosecuted, but whether he could be prosecuted.<sup>143</sup> As the Seventh Circuit has held, "when a witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster."<sup>144</sup> Applying this standard, the court vacated and remanded a contempt citation against a corporate officer who invoked the fifth amendment in a private antitrust action after having pleaded *nolo contendere* to an indictment charging a price-fixing conspiracy in the folding carton industry from 1960 through 1974.<sup>145</sup> Plaintiffs in the private antitrust suit assured the court that they would restrict their deposition questions to the period alleged in the indictment. On this basis they argued that any answers the witness might give could not possibly form the basis for subsequent criminal charges, since the witness had already been prosecuted.<sup>146</sup> The court rejected this argument, stating that the witness' answers could be used against him in a state prosecution or as "other crimes" evidence in a federal prosecution covering post-1974 events.<sup>147</sup> In another private antitrust action, the Seventh Circuit held that a witness who testified before a grand jury under a grant of use immunity may nonetheless invoke the fifth amendment at a subsequent civil deposition in response to questions that tracked those asked in the grand jury.<sup>148</sup> The court reasoned that the witness' answers to the deposition questions constituted a new source of evidence not derived from the previously immunized testimony and that such answers could be used against the witness in a subsequent criminal prosecution.<sup>149</sup> On appeal, the Supreme Court affirmed, without reaching the issue of whether a mere possibility of prosecution sufficed to meet the *Hoffman* standard.<sup>150</sup> The Court's affirmance of the Seventh Circuit, however, suggests at least tacit approval for a broad reading of *Hoffman*.

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F.2d 48, 52-53 (2d Cir. 1981) (combining the two standards into one). Likewise in *Doe*, the Court cited both *Apfelbaum* and *Marchetti* in determining whether the documents in question were incriminating. *Doe*, \_\_\_ U.S. at \_\_\_ n.13, 104 S. Ct. at 1243 n.13.

142. *Hoffman*, 341 U.S. at 486 ("It is for the court to say whether his silence is justified . . . and to require him to answer if 'it clearly appears to the court that he is mistaken.' *Temple v. Commonwealth*, 75 Va. 892, 899 (1881)").

143. See *infra* note 144 and accompanying text.

144. *In re Folding Carton Antitrust Litigation* (Appeal of Brown), 609 F.2d 867, 871 (7th Cir. 1979); accord *In re Corrugated Container Antitrust Litigation* (Appeal of Conboy), 661 F.2d 1145, 1151 (7th Cir. 1981), *aff'd sub nom.*, *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983); *In re Corrugated Container Antitrust Litigation* (Appeal of Franey), 620 F.2d 1086, 1092 (5th Cir. 1980).

145. *In re Folding Carton Antitrust Litigation* (Appeal of Brown), 609 F.2d 867, 873 (7th Cir. 1979).

146. *Id.* at 871.

147. *Id.*

148. *In re Corrugated Container Antitrust Litigation* (Appeal of Conboy), 661 F.2d 1145, 1159 (7th Cir. 1981).

149. *Id.* at 1155.

150. See *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983).

Nonetheless, some courts have taken an exceedingly narrow view of what constitutes an incriminating question.<sup>151</sup> Although Judge Learned Hand criticized this view even before *Hoffman* was decided,<sup>152</sup> it has persisted in some courts.<sup>153</sup> These courts put the witness in a conundrum. In order to prove the incriminating nature of the questions, the witness may very well have to disclose the very information that the privilege permits him to withhold. On the other hand, if the witness refuses to make such a proffer, or makes only a limited proffer, he risks being held in contempt on the grounds that he has refused to answer non-incriminating questions.

*In re Grand Jury Proceedings (Galante)*<sup>154</sup> illustrates this dilemma. In that case, the grand jury sought to question Galante, a reputed leader of organized crime, about whether he had presided at an underworld arbitration to resolve conflicting claims to certain stolen property.<sup>155</sup> The prosecutors did not offer Galante immunity, and he refused to answer questions before the grand jury.<sup>156</sup> The prosecutors sought a court order compelling Galante's testimony.<sup>157</sup> They informed the court that they had no intention of prosecuting Galante for his actions and disavowed any belief that he had violated any criminal laws.<sup>158</sup> Galante nonetheless failed to make a showing to the judge of the specific reasons why he feared his testimony would be incriminating.<sup>159</sup> The district court judge held Galante in civil contempt, finding that his invocation of the fifth amendment was capricious.<sup>160</sup>

The Fifth Circuit reversed.<sup>161</sup> The court stated that it could not conclude that Galante was clearly mistaken in believing he had reasonable cause to fear incrimination.<sup>162</sup> The court reasoned that answering questions about the underworld arbitration might lead to evidence that Galante had received a share of the stolen property as a "fee" or that he had otherwise violated federal law.<sup>163</sup> Under such circumstances, the court stated, an *in camera* proffer was

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151. See, e.g., *In re Grand Jury Proceedings (Galante)*, 562 F.2d 334 (5th Cir. 1977) (per curiam) (reversing a district court that had taken this position).

152. *United States v. Weisman*, 111 F.2d 260, 262 (2d Cir. 1940) (Hand, J.) ("Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects."). Judge Walter R. Mansfield of the Second Circuit has recalled arguing this case as a young prosecutor before Judge Hand. During his argument, in which he took the position that a witness could be held in contempt for refusing to answer a non-incriminating question, Mansfield heard Judge Hand mutter to himself, "Rubbish." Mansfield, *The Lesson of Learned Hand*, 68 A.B.A. J. 172, 172 (1982).

153. See *supra* note 151 and accompanying text.

154. 562 F.2d 334 (5th Cir. 1977) (per curiam).

155. *Id.* at 335.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

unnecessary.<sup>164</sup> The court also noted that the prosecutors' assurance that they would not use Galante's testimony against him provided no guarantee whatsoever that the testimony would not be used against him by other federal prosecutors.<sup>165</sup>

The Fifth Circuit's decision in *Galante* clearly represents the proper way of resolving the witness' dilemma. Particularly when a witness has been warned of his fifth amendment rights (as is the case in an SEC investigation), he has every reason to believe that his testimony will be used against him. Even seemingly innocuous questions may provide links in a chain of evidence against a witness.<sup>166</sup> Even if the witness' answers are not incriminating at the time they are given, they may turn out to be incriminating when considered in light of subsequently obtained evidence or when evaluated by a different prosecutor.<sup>167</sup>

A federal judge is generally ill-equipped to make a determination whether a particular question calls for an incriminating answer. The judge is generally unfamiliar with the investigation and does not know either the evidence the prosecutor has accumulated or the prosecutor's theories. Likewise, the judge does not know what would be the substance of the witness' testimony. To remedy this lack of information, judges sometimes hold an *in camera* hearing at which the witness must explain to the judge his reasons for asserting the privilege. This procedure was used in *Feig v. Computer Microfilm Corp.*<sup>168</sup> In that case, the plaintiff, who asserted a cause of action under rule 10b-5, sought to depose one of the defendants, who refused to answer, claiming the privilege against self-incrimination.<sup>169</sup> The court held an *in camera* hearing and found that the defendant had a right to assert the privilege regarding all questions concerning the events charged in the complaint because of the possibility of future criminal prosecution.<sup>170</sup> The court noted that the defendant had previously settled with the SEC in a case involving the same issues as the plaintiff's case and that the SEC consent decree did not prohibit the Commission from referring the matter for criminal prosecution.<sup>171</sup>

Although the *in camera* hearing provides one means of permitting the judge to decide whether the witness has properly invoked the privilege, this procedure is still flawed in that it forces the witness to disclose at least partially the very information that the privilege is designed to protect. This runs contrary to the teaching of *Hoffman*.<sup>172</sup> The better practice is for the court to

164. *Id.*

165. *Id.* at 335-36.

166. *See supra* note 133 and accompanying text.

167. *See supra* note 165 and accompanying text.

168. [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 99,218 (E.D.N.Y. 1983).

169. *Id.* at 95,890.

170. *Id.* at 95,891.

171. *Id.*

172. *See Hoffman*, 341 U.S. at 486 ("if the witness . . . were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee").

presume that the invocation of the privilege is proper and to permit the witness' counsel to explain the risks of incrimination faced by the witness.<sup>173</sup> The court should require no more than a minimal showing from counsel. Evidence that the witness has been called before a grand jury or the SEC and warned of his rights should be considered sufficient to justify invocation of the privilege.

Although this standard may well permit witnesses to frustrate discovery by plaintiffs in civil cases,<sup>174</sup> it is nonetheless the only way to protect adequately the fifth amendment rights of a witness who has not been granted immunity.<sup>175</sup> If the Commission desires to obtain the testimony of a witness who has announced his intention to assert the privilege, it should seek immunity for the witness,<sup>176</sup> as the Justice Department routinely does in civil antitrust cases.<sup>177</sup>

## II. THE ADVISABILITY OF ASSERTING THE FIFTH AMENDMENT IN AN SEC INVESTIGATION

### A. *Strategic Considerations*

Assuming that the privilege against self-incrimination is available, counsel must then consider, as a tactical matter, whether to advise his client to assert the privilege. The most obvious advantage of refusing to testify on constitutional grounds is that the witness thereby avoids incriminating himself.<sup>178</sup>

The tactical effectiveness of asserting the privilege will vary from case to case. In certain types of cases, where there is generally a lack of documentary evidence or witnesses other than the targets (such as insider trading cases), it is possible that, if the witness invokes the fifth amendment, the staff will not have sufficient evidence to bring a public enforcement proceeding. In these types of cases, the negative ramifications of invoking the privilege are minimal. By contrast, in cases involving false or misleading disclosure by an issuer or seller, the implications of asserting the privilege are more worrisome, because it likely results in the staff placing a more sinister interpretation on the documents and testimony it obtains from other sources.

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173. See Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 *YALE L.J.* 1062, 1073 (1982).

174. *Id.* at 1071-75.

175. *Id.* at 1074-75 ("responses providing clues need to be protected to keep the privilege meaningful. Putting greater burdens on the invoker may undermine the purpose of the privilege").

176. See 18 U.S.C. § 6004 (1982) (administrative agencies may, with approval of Attorney General, immunize witnesses who have asserted their privilege against self-incrimination and whose testimony is necessary to public interest).

177. The Justice Department provides such immunity even though witnesses in antitrust investigations are more frequently motivated in their refusal to testify by a desire to avoid providing harmful testimony against other witnesses than by a desire to avoid self-incrimination.

178. Invoking the privilege not only reduces the witness' exposure to substantive criminal charges but also enables the witness to avoid being trapped into committing perjury. *Cf.* SEC v. Geotek, 426 F. Supp. 715, 724 (N.D. Cal. 1976) (defendant pleaded guilty to one count of violating 18 U.S.C. § 1001 in connection with filing of false affidavit with SEC); *United States v. Kline*, 366 F. Supp. 994, 998 (D.D.C. 1973) (refusing to dismiss perjury indictment predicated on false statements to SEC).

By invoking the fifth amendment, the witness avoids having to testify at a time when he does not know the dimensions of the Commission's case against him. To be sure, the staff of the Commission's Division of Enforcement will undoubtedly construe the invocation as an admission of guilt. At the conclusion of the investigation, when the staff submits its enforcement memorandum seeking authorization from the Commission to commence a public enforcement proceeding, the staff will likely point to the invocation of the fifth amendment as support for its recommendation that a public proceeding be commenced.<sup>179</sup> On balance, however, the strategic advantage of not testifying during the investigation substantially outweighs the disadvantages in a case where it is likely that some enforcement proceeding would ultimately be commenced in any event. Once the Commission brings an enforcement action, the defendant can obtain discovery of the Commission's evidence prior to being deposed. On the other hand, if an enforcement action is unlikely, then a witness may well want to testify, since asserting the privilege in such circumstances increases the chance he will be sued.

When the witness is a broker-dealer, counsel must also consider the collateral consequences of invoking the privilege. Although the SEC, as a government instrumentality, cannot punish an individual solely for invoking the fifth amendment,<sup>180</sup> the stock exchange to which the broker-dealer belongs may conduct a parallel investigation and terminate his membership if he refuses to cooperate.<sup>181</sup>

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179. Once the staff has decided to seek authority to bring enforcement proceedings, the staff generally invites possible targets of a public enforcement proceeding to submit a statement, commonly referred to as a Wells Submission, setting forth the reasons why an enforcement action is inappropriate. Securities Exchange Act Release No. 5310, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,010 (Sept. 27, 1972). The staff has incorrectly suggested that an individual who has asserted his privilege against self-incrimination during the investigation is not entitled to make a Wells Submission. The staff has also incorrectly suggested that it would construe the receipt of the Wells Submission as a waiver of the privilege. There is no support for either of these positions in any rule or regulation of the Commission. Furthermore, as a practical matter, the Commission would review any submission received even if the staff felt that it had been submitted inappropriately.

180. *See, e.g.,* Lefkowitz v. Cunningham, 431 U.S. 801, 807-08 (1977) (state cannot divest political party officer from state party position for asserting fifth amendment); Lefkowitz v. Turley, 414 U.S. 70, 82-83 (1973) (state cannot use threat of state contract cancellation to compel contractor to waive fifth amendment); Garrity v. New Jersey, 385 U.S. 493, 497-98 (1967) (state cannot compel waiver by threatening police officer with forfeiture of office); Spevack v. Klein, 385 U.S. 511, 516 (1966) (plurality opinion) (attorney may not be threatened with disbarment as penalty for asserting privilege).

181. *See, e.g.,* Richard Neuberger, Securities Exchange Act Release No. 18428, [1981-1982 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,091 (Jan. 19, 1982) (as self-regulatory agency, the Exchange may impose sanctions government agency may not); *In re* Lawrence H. Abercrombie, Securities Exchange Act Release No. 15285, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,342 (Oct. 18, 1979) (as self-regulatory organization, the National Association of Security Dealers is not bound by same considerations that restrict government agencies). *See also* United States v. Solomon, 509 F.2d 863, 867-71 (2d Cir. 1975) (because New York Stock Exchange (NYSE) is not agent of government, interrogation by NYSE of broker-dealer does not implicate fifth amendment).

### B. *The Possibility of an Adverse Inference*

Assuming the witness is not subject to sanctions by a stock exchange for claiming the privilege against self-incrimination, the primary risk the witness takes in asserting the privilege during the investigation is that the Commission will seek to have an adverse inference drawn in any subsequent enforcement action. In support of its position that such an inference is justified, the Commission relies on *Baxter v. Palmigiano*,<sup>182</sup> which held that the fifth amendment "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them. . . ."<sup>183</sup> In *Baxter*, an inmate accused of inciting a prison disturbance was informed that if he exercised his right to remain silent at a prison disciplinary hearing, his silence could be used against him.<sup>184</sup> The inmate did not testify at the hearing, and prison officials introduced several reports containing the evidence against him.<sup>185</sup> After the hearing, the prison disciplinary board placed the inmate in punitive segregation for thirty days.<sup>186</sup> In upholding the decision of the disciplinary board, the Court reasoned that unlike a criminal case, "where the stakes are higher and the State's sole interest is to convict," disciplinary hearings "involve the correctional process and important state interests other than conviction for crime."<sup>187</sup> The Court also relied on the fact that the assertion of the privilege was not the sole evidence supporting the sanctions against the inmate.<sup>188</sup>

Relying on *Baxter*, the court in *SEC v. Musella*<sup>189</sup> drew an adverse inference against two defendants accused of insider trading who had invoked the fifth amendment at their depositions and refused to produce documents.<sup>190</sup> The court granted the Commission's motion for a preliminary injunction and a freeze on assets, based in part on the adverse inference.<sup>191</sup> The court began its analysis with the observation that the defendants' ability to invoke the fifth amendment put the Commission at a "potentially overwhelming disadvantage" in establishing its case.<sup>192</sup> Because of the nature of insider trading, the

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182. 425 U.S. 308 (1976).

183. *Id.* at 318. See generally 8 J. WIGMORE, EVIDENCE § 2272 at 439 (McNaughton rev. ed. 1961).

184. 425 U.S. at 312.

185. *Id.* at 320 n.4.

186. *Id.* at 313.

187. *Id.* at 318-19.

188. *Id.* at 317-18.

189. 578 F. Supp. 425 (S.D.N.Y. 1984).

190. *Id.* at 429; see *SEC v. Netelkos*, [Current] FED. SEC. L. REP. (CCH) ¶ 91,607 (S.D.N.Y. 1984) ("the adverse inferences I draw from Netelkos' and Gamarekian's invocation of the Fifth Amendment add credence" to the conclusion that they violated the securities laws); *SEC v. Scott*, 565 F. Supp. 1513, 1534 (S.D.N.Y. 1983) ("the negative inference which flows from Dirks' decision to remain silent, while not necessary to the Court's findings, provides further support for the conclusion that he violated the securities laws"), *aff'd per curiam sub nom.*, *SEC v. Cayman Islands Reins. Corp.*, 734 F.2d 118 (2d Cir. 1984).

191. See *Musella*, 578 F. Supp. at 445.

192. *Id.* at 429.

court believed that assertion of the privilege could lead to a complete failure of proof.<sup>193</sup> The court also expressed concern about the delays caused by the assertion of the privilege,<sup>194</sup> apparently fearing that such delays would enable the defendants to dissipate assets.<sup>195</sup> The court stated that, if an indictment had been returned, an adverse inference would be far less appropriate, because of the possibility of prosecutorial abuse.<sup>196</sup> But the court was willing to allow the inference when the defendants were only targets of an ongoing grand jury investigation.<sup>197</sup>

Neither *Baxter* nor *Musella* holds that a witness who invokes the fifth amendment during an SEC investigation is thereby subject to an adverse inference. Nor is such an inference justified. An SEC investigation is not an adversarial proceeding like the civil action in *Musella* or the prison disciplinary hearing in *Baxter*. In this regard it more closely resembles the secret, *ex parte*, non-adversarial investigation conducted by a grand jury.<sup>198</sup> This distinction is significant, because the propriety of drawing an adverse inference depends on the existence of an adversary hearing. As one commentator has explained,

It is not the defendant's claim of the privilege, but his silence in the face of other uncontradicted, adverse evidence which is damaging. That is, as a party to the action, the defendant would be expected to refute evidence contrary to his position, and if he fails to controvert the plaintiff's testimony with facts within his control, such evidence will be given conclusive weight.<sup>199</sup>

Thus, adverse inferences should be permitted only when parties "refuse to testify *in response to probative evidence offered against them*."<sup>200</sup> Because an investigative proceeding is non-adversarial, no evidence is "offered against" a witness in such a proceeding; therefore, there is no need for a witness to offer any evidence in response.

Moreover, it is important to remember that the SEC (like the grand jury) gives *Miranda*-type warnings as a matter of practice to witnesses that appear before it.<sup>201</sup> Having warned the witness of his fifth amendment rights, the Commission cannot then fairly sanction him for asserting those very rights.

193. *Id.*

194. *Id.* The court did not identify these delays, but presumably they included the time spent litigating the privilege issues and gathering evidence from sources other than the defendants.

195. *See id.* ("The objective [of the asset freeze], of course, is to ensure that defendants' assets will remain available to satisfy any future court order to disgorge illegal profits.")

196. *Id.* at 430-31.

197. *Id.* at 431. *Musella's* distinction between a civil defendant who also faces a criminal trial and one who is "only" a target of a grand jury investigation is unpersuasive. In both cases the dangers of self-incrimination from testifying in the civil matter are particularly great. Both situations give rise to the potential that prosecutors will engage in abusive practices.

198. *See* United States v. Calandra, 414 U.S. 338, 343-44 (1974) (grand jury investigations are *ex parte*, non-adversarial investigations).

199. Comment, *The Privilege Against Self-Incrimination In Civil Litigation*, 1968 U. ILL. L.F. 75, 79 (notes omitted).

200. *Baxter*, 425 U.S. at 318 (emphasis added).

201. The policy of the U.S. Department of Justice to give *Miranda* warnings to grand jury

As the Supreme Court repeatedly has observed in recent years, *Miranda* warnings assure the witness, at least implicitly, that his exercise of the right to remain silent cannot be used against him.<sup>202</sup> Consequently, a defendant who remains silent after receiving *Miranda* warnings may not be impeached at trial with this fact.<sup>203</sup> Nor may a defendant be impeached with the fact that he invoked his fifth amendment rights when testifying before the grand jury.<sup>204</sup> Given the close resemblance between an SEC investigation and a grand jury investigation, courts likewise should refuse to draw an adverse inference from the invocation of the privilege in an SEC investigation.<sup>205</sup>

Further support for prohibiting an adverse inference in such circumstances can be found in the law of evidence. The adverse inference rests on three premises: (1) that invoking the privilege is equivalent to an admission of guilt; (2) that such an admission is inconsistent with any subsequent exculpatory testimony by the witness; and (3) that the exculpatory testimony may be impeached with the prior inconsistent "statement" that the witness is asserting the privilege. None of these premises is correct in the context of an SEC investigation. As the Supreme Court has emphasized, "one of the basic func-

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witnesses is set forth in 9 UNITED STATES ATTORNEYS' MANUAL § 11.250. There is no manual or rule memorializing the SEC's comparable practice.

202. *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

203. *See Doyle v. Ohio*, 426 U.S. 610, 618 (1976) (due process clause of fourteenth amendment is violated when state prosecutor impeaches defendant with fact that he remained silent after being arrested and given *Miranda* warnings); *United States v. Hale*, 422 U.S. 171, 181 (1975) ("it was prejudicial error for the trial court to permit cross-examination of respondent concerning his silence during police interrogation" after having been warned of his rights). It may be argued that *Hale* and *Doyle*, being criminal cases, are inapplicable in the civil context. And it is true that in *Baxter*, the Court permitted an adverse inference even though the prisoner had been warned of his right to remain silent. 425 U.S. at 317. However, in *Baxter*, the prisoner also was told that his silence could be used against him. *Id.* This statement is not part of the standard *Miranda* warnings. *See Hale*, 422 U.S. at 183 (White, J., concurring in judgment) ("Hale was not informed here that his silence . . . could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case.") Even if the SEC were to begin warning witnesses that their silence could be used against them, or to discontinue *Miranda* warnings altogether, an adverse inference would still be improper because an SEC investigation is not an adversarial proceeding. *See supra* notes 198-200 and accompanying text.

204. *Grunewald v. United States*, 353 U.S. 391, 417, 424 (1957). In *Grunewald*, the petitioner, Halperin, was called before a grand jury investigating corruption in the Bureau of Internal Revenue. *Id.* at 416. Petitioner was asked, among other things, whether he knew certain employees of the Bureau and whether he had delivered money to Grunewald as part of a tax-fixing scheme. *Id.* In response, petitioner asserted the privilege. *Id.* At trial, he was asked many of the same questions and answered them in a manner consistent with innocence. *Id.* at 416-17. On cross-examination, the court allowed the prosecutor to elicit from petitioner the fact that he had invoked the privilege in the grand jury. *Id.* at 417. Petitioner was convicted of obstructing justice, but the Supreme Court reversed. *Id.* at 424.

205. Indeed, an adverse inference is arguably even less appropriate in the context of an SEC investigation than in the context of a grand jury investigation. In a criminal case, the prosecutor has only two opportunities to take the witness' testimony, once in the grand jury and once at trial. In an SEC case, by contrast, the Commission has three chances to obtain a witness' testimony, once during the investigation, once at the deposition, and once at trial. Thus, the Commission has less need for the adverse inference than the prosecutor.



tions of the privilege is to protect *innocent* men.”<sup>206</sup> Innocent men as well as guilty ones invoke the privilege, and it is therefore improper to equate its assertion with an admission of guilt.<sup>207</sup> Thus, for example, one who purchases stock in a company shortly before a tender offer is announced may well be reluctant to testify, even if he did not make his purchase on the basis of inside information. In short, the invocation of the privilege has no probative value.<sup>208</sup> Because this is so, there is no inconsistency between asserting the privilege in an SEC investigation and later testifying that one is innocent.

Moreover, permitting the finder of fact to draw an adverse inference from the witness' invocation of the privilege on a previous occasion arguably constitutes an impermissible burden on the witness' constitutional rights. As Justice Black stated, “The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them.”<sup>209</sup> In Black's view, it was “incongruous and indefensible” for courts to infer lack of honesty from the invocation of the privilege.<sup>210</sup> Similarly, in *Frierson v. McIntyre*,<sup>211</sup> the court refused to allow the plaintiff to introduce in evidence a deposition in which the defendant had asserted her fifth amendment privilege, reasoning that admission of the deposition would, in effect, deny the defendant her constitutional privilege.<sup>212</sup> There is also ample authority from state courts supporting this theory.<sup>213</sup> Although *Baxter* found no undue burden from permitting the

206. *Grunewald*, 353 U.S. at 421 (emphasis original); see *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964) (“the privilege, while sometimes ‘a shelter to the guilty,’ is often ‘a protection to the innocent.’”).

207. *Grunewald*, 353 U.S. at 421.

208. *Bowles v. United States*, 439 F.2d 536, 542 (D.C. Cir. 1970) (en banc); see *Doyle*, 426 U.S. at 617 (silence is “insolubly ambiguous”); *Hale*, 422 U.S. at 177 (“failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication”); *United States v. Marquez*, 319 F. Supp. 1016, 1022 (S.D.N.Y. 1970) (Weinfeld, J.) (“The invocation of the fifth amendment . . . is without probative value on the issue of the defendant's guilt or innocence, and neither the prosecution nor the defense should be permitted to comment thereon.”).

209. *Grunewald*, 353 U.S. at 425 (Black, J., concurring). Justices Brennan and Douglas and Chief Justice Warren joined Justice Black's opinion.

210. *Id.* at 426.

211. 151 F. Supp. 5 (W.D. Va. 1953).

212. *Id.* at 7.

213. See *Walton v. Robert E. Haas Construction Corp.*, 259 So.2d 731, 734 (Fla. Ct. App. 1972) (“The admission of the prior exercise of the self-incrimination privilege would tend to destroy or chill the exercise of such a right.”), *cert. denied*, 265 So.2d 48 (Fla. 1972); *Hall Motor Freight v. Montgomery*, 212 S.W. 2d 748, 751 (Mo. 1948) (defendant in wrongful death action arising out of automobile collision could not be cross-examined at trial concerning his refusal to testify in earlier criminal case concerning same collision; permitting cross-examination “would be a gross impairment of the constitutional right, because it would burden it with a dangerous consequence”); *accord Muir v. Grier*, 325 P.2d 664, 669 (Cal. Ct. App. 1958) (same); *Barnhart v. Martin*, 64 N.E.2d 743 (Ill. App. 1945) (same). See also *Loewenherz v. Merchants' & Mechanics' Bank*, 87 S.E. 778, 780 (Ga. 1916) (in suit to determine ownership of property, “a party should not be subjected to injury for availing himself of the privilege of refusing to answer questions which might have a tendency . . . to [in]criminate him”); *In re Woll*, 194 N.W.2d 835, 840 (Mich. 1972) (in bar disciplinary proceeding, counsel for state bar could not comment on fact that defen-

inference in civil cases, this ruling should not govern in the specialized context of an SEC investigation.

Accordingly, in a situation where a defendant invokes the privilege during the SEC's investigation, and then fully testifies in a subsequent civil deposition, no adverse inference should be permitted from the assertion of the privilege. The civil deposition will occur only after the defendant has had an opportunity to obtain discovery from the SEC. In a situation where the defendant attempts to testify at trial after having invoked his fifth amendment right during the SEC investigation *and* in the civil deposition, the court appears to have two alternative courses of action. First, the court can allow the defendant to testify, but permit an adverse inference based upon the earlier invocation of the privilege in the civil deposition. However, the better practice would be to adjourn the trial and permit the taking of the defendant's deposition and any additional discovery.<sup>214</sup>

### III. PROCEDURE FOR INVOKING THE FIFTH AMENDMENT IN AN SEC INVESTIGATION

Given the impropriety of drawing an adverse inference from the assertion of the privilege during the SEC investigation, the Commission should follow the practice adhered to by United States Attorneys in conducting grand juries. Under this practice, a target will be excused from appearing before the grand jury if he and his counsel inform the government that he intends to assert the privilege.<sup>215</sup> Such a practice saves the government the time and expense of making a fruitless effort to obtain the witness' testimony, and saves the witness travel expenses and the humiliation of having to assert his constitutional right before the grand jury.<sup>216</sup> The factors favoring this policy apply with equal force in the context of an SEC investigation.

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dant asserted fifth amendment privilege and then subsequently changed his mind and answered question).

214. See Rakoff, *Taking the 5th in Civil Cases—Perils and Palliatives*, N.Y.L.J., Dec. 8, 1983, at 4 (“if [the witness] invokes his fifth amendment [rights] during his deposition and thereafter offers to testify at trial, he may find either that he is precluded from so testifying or that the trial is adjourned until after his deposition can be taken”). Cf. *Meyer v. Second Judicial District Court*, 591 P.2d 259, 261, 263 (Nev. 1979) (upholding order that witness not be permitted to testify at child custody hearing unless she first answered questions as to which she had asserted privilege during her deposition). In an SEC enforcement proceeding, there is no right to a jury trial. As a practical matter, it is very difficult to screen the court completely from the fact that the defendant invoked the privilege during the administrative investigation.

215. See 9 UNITED STATES ATTORNEYS' MANUAL § 11.254 (“if a ‘target’ of the investigation . . . and his attorney state in a writing signed by both that the ‘target’ will refuse to testify on fifth amendment grounds, the witness ordinarily should be excused from testifying. . . .”). Similarly, the courts have recognized that a witness who has stated his intention to invoke the privilege may not be subpoenaed by the grand jury for the sole purpose of forcing him to take the fifth amendment before the grand jury. *United States v. Horowitz*, 452 F. Supp. 415, 418 (S.D.N.Y. 1978). See *In re Possible Grand Jury Investigation*, 17 CRIM. L. REP. (BNA) 2398 (D.D.C. June 25, 1975) (quashing subpoena). See also *Jones v. United States*, 342 F.2d 863 (D.C. Cir. 1964) (en banc) (questioning propriety of summoning a target).

216. The practice of calling a witness whom the examiner knows will probably assert the privilege is also inappropriate because it raises serious ethical questions. The ABA Criminal Justice

However, because the Commission continues to take the position that an adverse inference may be drawn, it insists that even those witnesses who have announced their intention to rely on the privilege appear and testify. Under such circumstances, the following alternative procedure, which the staff has been agreeable to, is recommended. Prior to the witness' appearance, counsel should inform the Commission of his client's intention to assert the privilege. Counsel should then request that the Commission limit its questioning to avoid wasting the time and financial resources of all parties. The Commission has in the past been willing to limit itself to asking a question or two about each of the subject areas of its investigation. The witness, for his part, should answer the first few questions, which usually pertain to such matters as his name and address, and should then assert the privilege for all other questions.<sup>217</sup> In asserting the privilege, the witness need not say that he is refusing to answer because an answer would tend to incriminate him. All he should say is that he is relying on his constitutional privilege and that he cannot be obliged to be a witness against himself.<sup>218</sup> Counsel should not permit questioning as to whether the witness is relying on his privilege because a truthful answer would tend to incriminate him. Nor should counsel permit the questioning to go on for too long a time.

#### CONCLUSION

The self-incrimination clause of the Constitution provides an important protection which can be used effectively by the subject of an SEC investigation. By invoking the fifth amendment privilege during an SEC investigation without the threat that at a later time an adverse inference will be drawn, the defendant and counsel can decide the best course for defense of the SEC case at a later time when more information is available.

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Standards Relating to the Prosecution Function § 3.6(e) state that a prosecutor "should not compel the appearance of a witness whose activities are the subject of the inquiry if the witness states in advance that if called he will exercise his privilege not to testify. . . ." The District of Columbia Bar Committee on Legal Ethics has stated that summoning a witness who has made clear that he will invoke the privilege against self-incrimination violates DR7-106(C)(2) of the Code of Professional Responsibility, which prohibits an attorney from asking "any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness. . . ." D.C. Bar Committee on Legal Ethics, Op. No. 31. In the view of the Committee on Legal Ethics, forcing a witness to assert his privilege against self-incrimination "degrades" him. *Id.* at 4. Moreover, the question is irrelevant since the examiner knows in advance that it will not be answered. *Id.* at 4-5. Significantly, the Committee on Legal Ethics reached this conclusion outside the context of a criminal case. The Committee applied its ruling to an attorney for a congressional committee that had sought to compel a witness who had stated his intention to assert the privilege to do so at a television hearing. *Id.* at 1.

217. See Heidt, *supra* note 173, at 1074 n.50 ("a stringent waiver rule holding that one who provides facts waives the privilege as to details encourages invoking at the earliest opportunity").

218. See *Quinn v. United States*, 349 U.S. 155, 162 (1955) ("a claim of the privilege does not require any special combination of words").