1-1-1993

Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?

Peter J. Henning
Wayne State University

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TESTING THE LIMITS OF INVESTIGATING AND PROSECUTING WHITE COLLAR CRIME: HOW FAR WILL THE COURTS ALLOW PROSECUTORS TO GO?

Peter J. Henning*

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* Trial Attorney, United States Department of Justice. B.A. 1978, Loyola Marymount University; M.A. 1980, Fordham University; J.D. 1985, Georgetown University Law Center. The views expressed in this article are solely those of the author and do not purport to reflect the views of the United States Department of Justice or any other federal agency. I would like to thank J. Anthony Candelmo, Esq., and Karen L. McDonald, Esq. for their valuable assistance.
A question frequently asked by defense lawyers is—why do suspects make admissions? It might seem that it never would be in the interest of any person being investigated to respond to questions.1

I. INTRODUCTION

White collar crime is fundamentally different from the more traditional “street” crimes that are widely portrayed in both fictional and quasi-documentary media presentations. Most people have at least a passing familiarity with basic police investigative tactics, and the Miranda warnings given after an arrest. Yet few could describe how the government mounts a price-fixing, insider trading, or bank fraud investigation, much less the pertinent legal issues involving production of documents and the rights of investigative targets. Street crime generally entails a discrete event that, upon discovery, is immediately identifiable as suspicious, if not obviously criminal. White collar crime, on the other hand, involves a process of events, many of which are common business occurrences that may be otherwise socially desirable.2 The white collar criminal’s goal is to conceal all evidence that a crime has been committed while preserving the patina of legality surrounding the normal conduct of business.3

The differences between street crime and white collar crime are reflected in the nature of the investigations, the role of the prosecutors and defense counsel, and the limits the judiciary has placed on the investigators. Street crime investigations involve classic inquisitorial techniques for witnesses and suspects (e.g., “good cop/bad cop”), using informants to provide incriminating information, and gathering physical evidence of the crime. The prosecutor’s concerns are directed toward forensic issues, proper custody and identification of physical evidence, and accurate depictions of the crime scene. Until the 1980s, the bulk of the Supreme Court’s decisions in the criminal law area similarly dealt with issues raised by the conduct of police investigations into street

2. See William J. Genego, The New Adversary, 54 BROOK. L. REV. 781, 791 (1988) (explaining that the investigation of street crime involves reconstructing an isolated criminal act, while white collar cases “usually involve a series of events, not all of which are necessarily criminal in themselves”).
3. See Henry Solomon, The Economist’s Perspective on Economic Crime, 14 AM. CRIM. L. REV. 641, 643 (1977). A salient feature of economic crime is concealment of all evidence indicating that the crime has been committed. Id. Another important distinction is that white collar crime rarely involves violence directed toward victims or innocent bystanders, which is frequently an object of street crimes. Id. at 641-42.
crimes, and reflected the struggle to correct institutional policies that deprived defendants of their right to defend themselves adequately while protecting the state's power to prosecute them.4

In order to guard the criminal defendant's Sixth Amendment right,6 the Supreme Court adopted a bright-line rule that the right to counsel attaches when judicial proceedings have been initiated, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."8 For persons subject to custodial interrogations, the Court has held that the Fifth Amendment requires police to discontinue questioning outside the presence of counsel when the suspect invokes the right to counsel.7 The right to counsel is a key means to protect persons subject to police questioning: coercive police tactics are prevented through the presence of the subject's attorney. The Court's decisions focus primarily on determining when this right attaches.8

The correlative issue faced by the Court was determining the extent to which the police could pursue other methods of investigation in gathering physical evidence of the crime, even if the defendant invoked the Fifth Amendment privilege to remain silent. The government may compel a person to provide incriminating evidence, except where providing the information entails a testimonial communication by the witness.9 A defendant may be forced to give blood samples,10 handwriting exemplars,11 voice exemplars,12 and even dress in clothing worn by the perpetrator of the crime.13 The Supreme Court's decisions involve a

4. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (recognizing the Fifth Amendment right to counsel for custodial interrogation of suspects); Gideon v. Wainwright, 372 U.S. 335 (1963) (recognizing the Sixth Amendment right to counsel in felony cases); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to state violation of the Fourth Amendment); see also Pamela S. Karlan, Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel, 105 HARV. L. REV. 670, 675 (1992) (noting the Sixth Amendment cases that were shaped by a series of indigent defendants convicted of street crimes).

5. "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.


8. See Karlan, supra note 4, at 698.


delicate, and not always consistent, balance between limiting the ability of the police to entice defendants into providing incriminating admissions, and allowing the government to force a suspect to perform certain nontestimonial acts that can be highly incriminating. Nevertheless, the case law focuses primarily on the rights of defendants accused of street crimes vis-à-vis the police, and the prosecutor remains largely in the background.

Beginning in the mid-1970s, in the aftermath of the Watergate and foreign government bribery scandals, the federal government began targeting white collar crime as a high-priority prosecutorial area. By its very nature, the criminal activity involved is much more complex than street crime, usually consisting of a number of events spread over an extended period of time, with the "real" evidence frequently buried in reams of business and corporate records relating to numerous transactions. The prosecutor is faced with a "cold trail" because the alleged crime has often been completed, meaning the investigation may be years removed from the actual violations. The locus of the investigation has also shifted from the local police force to federal prosecutors and pertinent investigative agencies. Moreover, the constitutional issues raised by white collar investigations do not have a clear starting point similar to those encountered in street crime investigations, such as an investigatory stop, custodial interrogation, or execution of a search.

The investigatory processes in white collar cases raise issues that have little relevance to street crimes. The investigations require access to documents that detail the conduct of the transactions, especially the flow of funds and timing of decisions, and the statements of participants, both innocent and suspect, about the process of events.

14. See Genego, supra note 2, at 789-90 (noting that, until the 1970s, federal prosecutorial resources were primarily directed against crimes against individuals and property); Richard P. Lynch & Frank A. Ray, The National District Attorneys Association Economic Crime Project: A National Experience in Prosecution Confederation, 14 Am. Crim. L. Rev. 781, 782 (1977) (stating that the growth of consumer groups, Watergate, corporate misdeeds, and the emergence of investigative reporting contributed to the growing interest in prosecuting economic crimes).

15. See Howard A. Matz & Stephen V. Wilson, Obtaining Evidence for Federal Economic Crime Prosecutions: An Overview and Analysis of Investigative Methods, 14 Am. Crim. L. Rev. 651, 651 (1977) ("The 'proof' consists not merely of relatively few items of real evidence but of a large roomful of often obscure documents."). This article focuses on the investigation and prosecution of white collar criminals. Much of the discussion, however, applies to investigations of large-scale drug conspiracies, especially those that involve money-laundering and other economic activity related to processing the proceeds of the narcotics sales. See Genego, supra note 2, at 791 (noting that federal drug prosecutions often consist of complex conspiracy charges and investigations that are similar to those of white collar crimes).

16. See Genego, supra note 2, at 791 (noting that investigations involve following paper
collar crimes often involve a group of people acting in concert with various levels of culpability, so investigations usually proceed from the bottom up in a piecemeal fashion, using the less-culpable to supply information against the organizers. As the focal point of the investigation shifts to the prosecutor subpoenaing documents and seeking incriminating statements, there is less direct interaction with the defendant and more with the attorneys retained to represent witnesses and targets of investigations. With the development of a defense bar devoted primarily to white collar cases, the attorneys become involved in the process well before the initiation of criminal proceedings, the traditional trigger of the right to counsel.¹⁷

The principal differences between street crime and white collar investigations are twofold: First, the key players in the white collar investigation are the prosecutor and law enforcement agents assigned to work with the prosecuting body on one side, and counsel for witnesses and targets on the other side; second, the timing of the prosecutor's and defense attorney's involvement is earlier in the investigative process, well before Miranda and Sixth Amendment rights are implicated.¹⁸

The presence of counsel on both sides of the investigation means that defendants are less likely to be subject to direct coercive actions because each step will be scrutinized by lawyers. At the same time, there is a crucial similarity between street crime and white collar investigations: The government still seeks admissions by the defendant that can be used to establish guilt at trial. For defense lawyers counselling witnesses not cooperating with the government, the goal remains the same: They seek to keep the prosecutor and government agents from receiving

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¹⁷. See Genego, supra note 2, at 797 (explaining that defense of white collar and drug conspiracy cases begins before any charges filed); Karlan, supra note 4, at 679-86 (describing the growth of "relational representation" by lawyers of clients on a continuing basis in white collar and drug conspiracy investigations and prosecutions).

¹⁸. Fourth Amendment issues are rarely raised in white collar investigations because the bulk of the evidence is gathered by means of grand jury or administrative subpoenas and summons, with search warrants being used to a lesser extent. Extensive litigation involving exceptions to the warrant requirement, such as automobile searches and searches incident to arrest, generally does not arise in white collar cases because the evidence needed to conduct the investigation is neither on the defendant's person, nor in an automobile or other nearby container. The production of documents is often agreed upon in advance by the prosecutor and an attorney for the producing witness or entity. Moreover, grand jury appearances to produce documents are uncommon.
information, both testimonial and documentary, that may be incriminating.

The expansion of white collar investigations works a subtle change in the issues presented to the courts. The need for access to documents has moved defendants from the police interrogation room to the grand jury, where the threat of unfair coercion is minimal. To gather incriminating admissions that are otherwise not available to the government agent or prosecutor in direct dealings with defense counsel, informants and cooperating witnesses can provide both historical information and a path to reach investigative targets and defendants.\textsuperscript{19} Although the courts were willing to impose institutional restrictions on prosecuting criminals, such as \textit{Miranda} warnings and counsel for indigent defendants, they have been much less willing to dictate categorical limitations to prosecutors and government agents investigating white collar crime. The Supreme Court recognized explicitly in \textit{Braswell v. United States}\textsuperscript{20} that white collar crimes are more complex and harder to prosecute, and therefore refused to impose bright-line restrictions on the prosecution's access to documents and ability to gather information from participants in the process of events under investigation.\textsuperscript{21} This "white collar rationale" allows courts to find that the obstacles inherent in investigating complex economic crimes weigh in favor of avoiding further proscriptions on the government's ability to discover information, because those proscriptions will give defendants additional tools to conceal their criminal activity.

The focal point of much of the sparring between prosecutors and defense attorneys has been over subpoenas for documents and the right to counsel at the pre-indictment stage of investigations. The primary issues raised concern the scope of the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel, including arguments regarding the application of the attorney-client privilege. In the few instances in which the Supreme Court has considered drawing bright-line rules in that context, it has decided in favor of

\textsuperscript{19} Federal Rule of Evidence 410 bars the introduction of statements made in the course of plea discussions which do not result in a guilty plea. \textit{See FED. R. EVID.} 410(4).
\textsuperscript{21} \textit{See id.} at 115-16. The Court recognized that the Fifth Amendment privilege for records custodians of collective entities "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities." \textit{Id}. The Court noted that permitting records custodians to assert a Fifth Amendment privilege over document production would stymie efforts to prosecute both individuals and organizations involved in criminal enterprises. \textit{Id}. 
Moreover, the courts have shown a willingness to limit defendants' ability to use their attorneys as a shield by expanding the reach of the crime-fraud exception to the attorney-client privilege, and by determining that client identity and fee information are not privileged. In response, defendants have turned to the ethics rules that govern law practice to try to create limits on the types of investigatory tactics the government may use. They have also sought assistance from the courts to enact administrative rules that constrain prosecutors and, indirectly, the investigative agents who work under the prosecutor's direction. These efforts have by and large borne little

22. See United States v. Williams, 112 S. Ct. 1735 (1992) (holding that prosecutors need not present exculpatory evidence to a grand jury); Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (upholding constitutionality of asset forfeiture law even though it may limit defendant's right to counsel of choice); Braswell v. United States, 487 U.S. 99 (1988) (holding that custodians of corporate records have no Fifth Amendment privilege in connection with production of corporate documents); Wheat v. United States, 486 U.S. 153 (1988) (finding no Sixth Amendment violation when a court disqualifies an attorney for potential conflict of interest even though the client waived the conflict).

23. See United States v. Zolin, 491 U.S. 554, 572 (1989) (holding that, upon a lesser evidentiary showing, a court may conduct an in camera review to determine whether certain evidence is not privileged under the "crime-fraud" exception); In re Grand Jury Subpoena, 926 F.2d 1423, 1431 (5th Cir. 1991) (stating that fee information and client identity are not privileged unless disclosure would also reveal privileged communication). Defendants have achieved some success in protecting communications through joint defense agreements. The courts accept the joint defense privilege as an extension of the attorney-client privilege, and recognize its value in allowing defendants to put forward a defense while not restricting its application. See United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (setting forth the requirements to establish the joint defense privilege); infra text accompanying notes 192-216 (discussing the joint defense privilege).

24. See, e.g., Baylson v. Disciplinary Bd., 975 F.2d 102 (3d Cir. 1992) (rejecting local Pennsylvania rule that requires prior judicial approval of subpoenas directed to attorneys); United States v. Kublock, 832 F.2d 649 (1st Cir.), aff'd by an equally divided court, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam) (upholding adoption by district court of local Massachusetts rule that requires prior judicial approval of subpoenas directed to attorneys); United States v. Infelise, 773 F. Supp. 93 (N.D. Ill. 1991) (rejecting the application of Disciplinary Rule 7-104 to limit a government agent's pre-indictment contacts with grand jury target represented by counsel); see also infra text accompanying notes 238-60 (discussing judicial rules for attorney subpoenas) and notes 261-76 (discussing application of DR 7-104 to white collar investigations).
fruit, despite support from commentators, with few meaningful restrictions imposed on prosecutors by the courts.

The complexity of white collar crime investigations has also led to fragmentation in the decisions. These cases involve a variety of issues, and courts are still fashioning the rules that apply to prosecutors and agents investigating complex economic crimes. As such, the decisions look at discrete issues and do not focus on the overarching issue of how the court should delineate the relationship between the government and white collar defendants. Courts generally accept the white collar crime rationale, as articulated by the Supreme Court in Braswell, that the rules should not hamper the investigation of complex criminal activity, and consequently do not impose broad standards that restrict prosecutors. Instead, a survey of the development of the law surrounding white collar investigations shows a continuing trend in favor of the government, both through the use of select bright-line rules giving prosecutors broad power, and a case-by-case review that may punish prosecutorial misconduct but avoids imposing categorical limitations on the government’s discretion to pursue investigations.

This article analyzes the trend in white collar cases by reviewing the disparate issues that can arise in an investigation, and the areas that courts are struggling to resolve. Part II reviews the issue of production of documents, and discusses how the Supreme Court’s use of the white collar rationale in Braswell has been extended to other issues related to the production of documents. The article then turns to the related area of witness immunity, and considers the scope of immunity for custodians producing documents. Part III treats the issue of the prosecutor’s contacts with defendants and targets of investigations, and


their attorneys, and examines how the interrelated areas of the Sixth Amendment right to counsel, the attorney-client privilege, and the ethical rules have been analyzed by the courts. Although the decisions are not entirely consistent, the courts have begun to adapt the white collar rationale from the production of documents context to questions related to direct contacts with witnesses and attorneys. The article concludes that so long as the white collar rationale is the predominant theme in reviewing challenges to prosecutors’ and government agents’ conduct of white collar investigations, the courts will avoid adopting bright-line rules proposed by defendants and at best take a case-by-case approach that will only rarely invalidate the particular use of an investigative tactic.

II. REACHING CORPORATE RECORDS AND CUSTODIANS: DOCUMENTS AND THE SCOPE OF IMMUNITY

When a course of business conduct is the subject of a criminal inquiry, the prosecutor must review extensive documentation concerning both the potential violation and numerous other transactions that, while related, are not immediately suspicious. For example, bank fraud often involves loans secured by real estate or receivables that may raise questions concerning the value of the collateral, the propriety of personal or corporate financial statements, and the disposition of funds. A loan file can range from a few pages to dozens of binders; any number of transactions involving different borrowers, lenders and entities may relate to possible criminal activity. Complex investigations involving fraud in health care, housing, government contracts, and securities implicate a wide range of business activities that routinely involve the creation of thousands of pages of documents by numerous legitimate organizations.

The primary tool available to federal prosecutors for gathering documents is the grand jury subpoena. The grand jury is empowered to secure every person’s evidence, which includes documents and tangible items, and it may invoke the court’s power to compel the appearance of witnesses and production of documents. Search warrants may

27. See Matz & Wilson, supra note 15, at 683 (“[F]ederal grand jury subpoenas... may be the most potent investigative tool in the prosecutors’ arsenal.”).
29. United States v. Williams, 112 S. Ct. 1735 (1992). The grand jury is not limited in the matters it can investigate, and may conduct an inquiry “merely on suspicion that the law is being violated, or even because it wants assurance that it has not.” United States v. Morton Salt Co.,
also be issued by the court to secure documents, but they require proof of probable cause that a crime took place, which may not always be possible at an early stage of a white collar investigation. Moreover, the warrant must describe the items to be seized with particularity, requiring detailed knowledge of the documents related to the transactions, thereby putting the investigation at risk if the warrant misses relevant items that may have been removed or about which the prosecutor is unaware. Search warrants are generally a less appealing means to obtain documents because of the greater burden placed on the prosecution, although when there is a threat that documents may be destroyed or tampered with, the warrant is an effective means of seizing evidence before it loses its probative value.

Because the government obtains the bulk of its documents through grand jury subpoenas prior to an indictment, the overriding issue is the applicability of any privileges a witness can assert to resist producing documents. In *Braswell v. United States*, the Supreme Court barred custodians of corporate records from asserting a Fifth Amendment privilege against self-incrimination in the production of documents. This eliminates any possibility that documents designated as corporate records can be withheld from the grand jury. For documents subpoenaed from a business organization, witnesses are left with arguing either that they are not corporate custodians, or that the documents are not corporate records. The witness can also try to establish that the business falls within the narrow range of entities that are sole proprietorships, or so small as to be considered an individual business, thereby making the documents private papers. Courts have generally rejected arguments to resist the production of documents in favor of a broad approach that defines who can qualify as a custodian and what items constitute records of a corporation.

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32. The government may also seek voluntary production of documents, and corporate organizations will frequently cooperate with an investigation by providing access to the documents. A bank, however, generally may not disclose customer records to the federal government without first receiving a grand jury subpoena, an administrative subpoena, or a search warrant. *See Right to Financial Privacy Act of 1978 §§ 1101-1122, 12 U.S.C. §§ 3401-3422 (1988).*

33. *Id.* at 110. "[A] custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government." *Id.*
Braswell also recognized that the custodian's act of production of corporate records cannot be used against the custodian personally, granting a watered-down type of immunity scope of which is unclear.\textsuperscript{34} The testimony of participants in the economic activity under investigation is crucial to explaining what role different persons and entities played in the transactions, and witnesses often appear under a grant of immunity. Courts have, however, apparently been willing to permit the government to make certain nonevidentiary uses of immunized testimony,\textsuperscript{35} and Braswell's protection for corporate custodians is not as extensive as that provided to witnesses compelled to testify under a grant of immunity.\textsuperscript{36}

A. Braswell and the Corporate Custodian

The issue of production of business records has a tortured history. The question of whether the corporate custodian can resist a subpoena for documents remains heavily litigated because the Supreme Court has not been willing to establish clear rules that settle the scope of the Fifth Amendment privilege against self-incrimination. Instead, the Court conditions its decisions by recognizing that certain types of businesses or categories of documents may, or may not, be protected by an assertion of the privilege. The scope of the Fifth Amendment is crucial because the records maintained by businesses can disclose the ownership of illicit proceeds, the participation of various individuals, and even the defendant's knowledge of the illegality of a transaction. The contents of the documents are what is important to a successful prosecution, yet the legal analysis turns on the status of the person subpoenaed and the entity that created them. By focusing on issues that are at best peripheral to the investigation, such as whether a document is "corporate" or "personal," courts have made the analysis unduly complicated.

1. Development of the Collective Entity Doctrine

In Boyd v. United States,\textsuperscript{37} the Supreme Court held that govern-

\textsuperscript{34} See id. at 117-18; see also John M. Grogan, Jr., Fifth Amendment—The Act of Production Privilege: The Supreme Court's Portrait of a Dualistic Record Custodian, 79 J. Crim. L. & Criminology 701, 732 (1988) (arguing that Braswell confers constructive use immunity in reality if not in name).

\textsuperscript{35} See infra text accompanying notes 165-79.

\textsuperscript{36} See infra text accompanying notes 165-79.

\textsuperscript{37} 116 U.S. 616 (1886).
ment seizures of private property, whether by grand jury subpoena or search warrant, were unconstitutional violations of a person's right to privacy.\textsuperscript{38} The "private" papers at issue were invoices held by a business partnership related to its import of glass for which the proper duties had not been paid. Boyd's celebration of the right to privacy has been noted as a crucial step in the development of civil liberties,\textsuperscript{39} but the holding's application to documents of the type at issue in the case has been completely rejected.\textsuperscript{40} If taken to its logical extreme, Boyd would prevent the government from obtaining any documents that qualified as the property of the person subpoenaed, including a corporation, because of the recognition that their entity has certain property rights under the Constitution.\textsuperscript{41}

The Supreme Court retreated from the extremism of Boyd's protection of business records in \textit{Hale v. Henkel},\textsuperscript{42} where it held that a corporation had no Fifth Amendment privilege to refuse to produce documents pursuant to a subpoena.\textsuperscript{43} \textit{Hale} is the beginning of the "collective entity" rule, under which "corporations and collective entities are treated differently from individuals" for the purpose of application of the privilege against self-incrimination.\textsuperscript{44} Moreover, the Court justified its decision on the basis that a contrary holding would have a deleterious effect on prosecutions of corporate crime.\textsuperscript{46} This justification is

\textsuperscript{38} Id. at 630; see also Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 948-52 (1977) (discussing the formalistic approach to property rights that was exemplified in Boyd).

\textsuperscript{39} Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("[Boyd is] a case that will be remembered as long as civil liberty lives in the United States").

\textsuperscript{40} See Fisher v. United States, 425 U.S. 391, 408-09 (1976) ("[T]he precise claim sustained in Boyd would now be rejected . . . . [T]he prohibition against forcing the production of private papers has long been a rule searching for a rationale . . . .").

\textsuperscript{41} See Robert Heidt, The Fifth Amendment Privilege and Documents—Cutting Fisher's Tangled Line, 49 Mo. L. Rev. 439, 448 (1984) ("Logically, Boyd would suppress property owned by corporations as well as by natural persons.").

\textsuperscript{42} 201 U.S. 43 (1906).

\textsuperscript{43} Id. at 74. The rationale for denying corporations the privilege against self-incrimination is that they are "creature[s] of the state," and the state retains certain visitorial powers over corporations and their records. Id. at 74-75.

\textsuperscript{44} Braswell v. United States, 487 U.S. 99, 104 (1988). The Court noted, one hopes ironically, that the collective entity rule "has a lengthy and distinguished pedigree." Id.

\textsuperscript{45} See Hale, 201 U.S. at 74.

If, whenever an officer or employee of a corporation were summoned before a grand jury as a witness he could refuse to produce the books and documents of such corporation, upon the ground that they would incriminate the corporation itself, it would result in the failure of a large number of cases where the illegal combination was determinable only upon the examination of such papers.

\textit{Id.}
unnecessary to the decision, but it highlights the Court's awareness that the application of the Fifth Amendment should accommodate the needs of effective law enforcement involving economic activity.

In *Wilson v. United States*, the Court extended the reasoning of *Hale* by holding that the custodian of corporate records cannot resist producing documents even if the custodian created them and they would be personally incriminating. *Wilson* also indicated that a corporation cannot have a form of derivative immunity based on the custodian's assertion of the Fifth Amendment. *Wilson* also indicated that a corporation cannot have a form of derivative immunity based on the custodian's assertion of the Fifth Amendment. In *Wheeler v. United States*, the Court held that the dissolution of the corporation does not affect the applicability of the privilege, but rather the character of the documents as corporate records determines whether they must be produced.

While the collective entity rule presents a seemingly simple guide to determine the scope of the Fifth Amendment, it does not address the complexity of modern business organization. Economic activity occurs through a number of entities organized to serve different purposes and to provide various benefits to their owners. Businesses operate through a variety of models, such as partnerships, corporations, sole proprietorships, and trusts, and each form has different permutations applicable to particular circumstances. Moreover, the size of an entity does not require that it adhere to a single organizational model; a corporation may have a single employee-owner while a sole proprietorship can have millions of dollars of revenue.

In *United States v. White*, the Supreme Court recognized that the government's ability to pursue economic crimes could not be limited to transactions by state-chartered corporations. The Court held that a collective entity could not assert a Fifth Amendment privilege and defined it as a "business organization that under all the circumstances . . . has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the

46. 221 U.S. 361 (1911).
47. *Id.* at 384-85; *see also* Dreier v. United States, 221 U.S. 394 (1911) (holding that documents in the custody of a corporate custodian, not the corporation, must be produced).
49. 226 U.S. 478 (1913).
50. *Id.* at 490.
51. 322 U.S. 694 (1944).
purely private or personal interests of its constituents, but rather to em-
body their common or group interests only."\textsuperscript{52}

The Court again invoked the rationale of combatting corporate
crime to justify the decision, noting that if "the cloak of the privilege
[were] thrown around these impersonal records and documents, effec-
tive enforcement of many federal and state laws would be impossi-
ble."\textsuperscript{53} Although \textit{White} sought to delineate the scope of the privilege,
the Court's definition is vague because there are no clear means of dis-
tinguishing between personal and group interests. While the Court does
not want to hamper prosecution of economic crimes unduly, the vague-
ness in \textit{White} exemplifies the Court's hesitancy in making its rule too
broad, because then even the smallest economic unit would be subject
to producing documents without any constitutional protection.

The Court found that \textit{White}'s vague definition needed further refi-
nement in \textit{Bellis v. United States},\textsuperscript{54} which involved a subpoena for
records from a defunct three-person law firm. In exploring the "outer
limits" of \textit{White}, the Court expanded the definition, stating that a col-
lective entity exists when the entity is

an organization . . . recognized as an independent entity apart from its individual
members. The group must be relatively well organized and structured, and not
merely a loose, informal association of individuals. It must maintain a distinct set
of organizational records, and recognize rights in its members of control and
access to them. And the records subpoenaed must in fact be organizational
records held in a representative capacity.\textsuperscript{55}

\textit{Bellis} provided a test as malleable as a court could wish, listing
factors that defy easy categorization as determinative of the proper de-
sicion in a case. While the Court adopted a position that may deny the
Fifth Amendment privilege to any business entity, it continued to limit
the scope of its decision by stating that the case might be decided dif-
ferently if the organization "involved a small family partnership . . . or
. . . if there were some other pre-existing relationship of confidentiality
among the partners."\textsuperscript{56}

\textsuperscript{52.} \textit{Id.} at 701. The organization at issue was a labor union. A subpoena required the union
to provide copies of its constitution, by-laws, and certain records showing collections of fees from
employers. \textit{Id.} at 695.

\textsuperscript{53.} \textit{Id.} at 700.

\textsuperscript{54.} 417 U.S. 85 (1974).

\textsuperscript{55.} \textit{Id.} at 92-93. The Court found that the \textit{White} formulation could not be "reduced to a
simple proposition based solely upon the size of the organization." \textit{Id.} at 100.

\textsuperscript{56.} \textit{Id.} at 101.
Bellis signaled the trend in the Supreme Court's decisions concerning application of the privilege against self-incrimination to business entities, in which the Court refused to delineate the scope of its rules by reserving certain areas from the rule announced in the case. In White and Bellis, the Court refused to acknowledge that its decisions mean that any business organization, whether large or small, sole proprietorship or public stock corporation, cannot assert the privilege against self-incrimination. Instead, the Court sought to adhere to the privacy rationale first announced in Boyd by paying lip-service to the need to protect certain areas from governmental scrutiny, although it could not define those areas beyond a general description of them as possibly falling outside the decision in the case. 57

2. Fisher v. United States: Creation of the Act of Production Privilege to Subpoenas for Documents

Rather than continue down the road of trying to define what types of business entities could not refuse to produce records, the Supreme Court adopted an entirely new form of analysis for determining the application of the Fifth Amendment privilege to subpoenas for documents in Fisher v. United States. 58 The Court reoriented the Fifth Amendment analysis to focus on the communicative aspect of the production of records, holding that the witness subpoenaed to produce records may assert a privilege only if the witness "is compelled to make a testimonial communication that is incriminating." 59 The Court found that the very act of production may have communicative aspects, wholly apart from the incriminating content of the documents, that permit the witness to invoke the privilege against self-incrimination. 60

The Fisher approach is complex because a court must determine a number of issues before concluding that the privilege applies. First, the production of the documents must be testimonial, which itself entails a three-part analysis, and second, the communication must be incriminat-

57. See id. at 95 (stating that its decisions reflect the policy of protecting individual's right to privacy). For an extensive analysis of the shifting rationales of the decisions applying the Fifth Amendment privilege against self-incrimination to collective entities, see Robert P. Mosteller, Simplifying Subpoena Law: Taking the Fifth Amendment Seriously, 73 Va. L. Rev. 1, 51-59 (1987); Scott D. Price, Note, Braswell v. United States: An Examination of a Custodian's Fifth Amendment Right to Avoid Personal Production of Corporate Records, 34 Vill. L. Rev. 353, 357-62 (1989).


59. Id. at 408.

60. Id. at 410.
The testimonial prong of the *Fisher* test requires a determination of whether the production of documents communicates (1) existence; (2) possession or control by the witness; or (3) authenticity. Even if the act of production is testimonial; that communication may not be incriminating if the government can prove that the information conveyed by producing documents was a "foregone conclusion." 62

The first prong of *Fisher* can best be understood as representing links in a chain: If there is a question about the very existence of the subpoenaed documents, then their production is testimonial. If the government can prove independent knowledge of their existence, then the issue is whether production of the documents will demonstrate the witness's possession of the items beyond the information the government already has about their control. If possession or control is already known or otherwise irrelevant, then the question is whether production will authenticate the records for introduction at trial. A document can be authenticated by a number of methods. The custodian producing the records is not necessarily required to testify about the authenticity of the documents because other witnesses may provide the necessary evidence to authenticate them. 63 As each link in the chain is established, the testimonial aspect of the act of production diminishes. 64

While *Fisher* adopted a new form of analysis for the Fifth Amendment, the Supreme Court did not shed its reticence about adopting clear rules, if the act of production privilege can even be described as such. After savaging the rationale of *Boyd*, the Court stated that the documents at issue were not "private papers" and refused to determine whether production of that type of document could be compelled under its analysis. 65 The Court could neither bring itself to abandon completely the private property approach of *Boyd*, nor address how the act

61. *Id.*

62. *Id.* at 411. *Fisher* involved a subpoena for tax workpapers served on the attorney representing the targets of a grand jury investigation. After first holding that the attorney can challenge the subpoena if the there is a valid attorney-client privilege, the Court held that there was no valid privilege claim because the existence and possession of the papers were a foregone conclusion, and the act of production would not authenticate the documents. *Id.* at 411-12.

63. See Fed. R. Evid. 901(b)(1) (testimony of witness with knowledge).

64. For an extensive consideration of the *Fisher* act of production analysis, see Samuel A. Alito, Jr., *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 42-51 (1986); Heidt, supra note 41, at 473-82; Mosteller, supra note 57, at 11-40.

65. 425 U.S. at 414 ("Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers' . . . ") (citing United States v. Boyd, 116 U.S. 616 (1886)).
of production analysis could be reconciled with the collective entity doctrine. Much like the broad definition in Bellis, Fisher's new approach was sufficiently vague to continue the indeterminacy in the application of the Fifth Amendment.

More importantly, Fisher's analysis is unnecessarily complicated and focuses on one aspect of the subpoena process, the act of production, which is largely irrelevant to the real issues of the grand jury investigation. One commentator aptly noted that "[b]oth prosecutors and witnesses served with document subpoenas are invariably interested in the documents' contents, not the testimonial component of the act of production." The majority of subpoenas in white collar investigations are directed to third parties, such as banks, brokerage houses, and customers of the targets with no direct interest in the investigation. For those few subpoenas to targets of investigations, the government will probably know the types of documents it wants, because they will have been created in the normal course of business. The grand jury subpoena will usually be directed to the corporation's custodian, and the issue of possession and authenticity will probably be of minor importance. If the government does not know that the documents exist, or where they are located, the subpoena probably will be unproductive because it is doubtful that a guilty party will voluntarily turn over incriminatory records.

Nevertheless, Fisher elevates the act of production to the linchpin of the Fifth Amendment analysis, requiring courts to jump through a number of hoops to reach a decision that masks the real issue underlying the assertion of the privilege: Can the witness protect the doc-

66. Alito, supra note 64, at 46. Judge Alito reviews the history of the act of production doctrine, noting that it was originally proposed by Professor Wigmore as a counterposition to Boyd. Id. at 45. He argues that the doctrine "was an academic creation and found judicial acceptance more as an excuse than a reason. The theory did not develop because any real witnesses balked at surrendering documents for fear that the act of production would really be incriminating." Id. at 46.

67. See id. at 47 ("Where possession cannot be independently shown, common sense and experience suggest that incriminating evidence frequently will not be produced."); see also Gregory I. Massing, Note, The Fifth Amendment, the Attorney-Client Privilege, and the Prosecution of White-Collar Crime, 75 Va. L. Rev. 1179, 1202 (1989) (stating that a broad document subpoena "virtually invites noncompliance . . . because it gives the custodian an opportunity to sort out those documents that are incriminating and retain them."). Judge Alito notes the analogous situation of subpoenaing poison from a defendant charged with poisoning his wife: "Mr. X would have to be exceptionally honest or exceptionally stupid to turn it over." Alito, supra note 64, at 47 n.104.
ments, which are presumably incriminating, from discovery by the government?

Despite these problems, the Court affirmed the act of production doctrine eight years later in *United States v. Doe*. It held that the custodian of records for a sole proprietorship can invoke the privilege to resist a subpoena for records of the business. *Doe* is part of the line of cases that reaches back to the collective entity decisions which hinted that certain types of organizations may be able to assert the Fifth Amendment privilege to prevent the production of documents even though a corporate custodian could not block production of the same items. Rather than review the scope of the collective entity doctrine for sole proprietorships, however, *Doe* applied the new act of production analysis to determine that the custodian's production of the records of a business he owns may be incriminating, apart from the content of the records.

*Doe* is important not so much for what it says about subpoenas directed to sole proprietorships, but more for how far the *Fisher* approach can swing the scope of the Fifth Amendment privilege away from requiring production of business records and toward restricting the enforcement of subpoenas. Although *Doe* addresses a particular type of organization—the sole proprietorship—its application of the act of production doctrine is not limited to a particular form of business entity. Instead, *Doe* signals that any custodian has a chance of convincing a court that the production of documents will be personally incriminating, and thus protects the documents from disclosure. The incentive to litigate privilege issues is dramatically increased if *Fisher* applies to all custodians of records because *Doe* calls into question the collective entity doctrine.

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69. See supra text accompanying notes 51-57 (reviewing *White* and *Bellis*).
70. The Court concluded that the contents of the records were not privileged. *Doe*, 465 U.S. at 612. The Court, however, adopted the lower court findings that a sole proprietor acts in a personal capacity in producing documents and the act of production involved testimonial self-incrimination. *Id.* at 608, 613. The decision's net effect was to protect the content of the records, unless the government granted the witness act of production immunity.
71. One court interpreted *Fisher* as subsuming the collective entity doctrine. See *In re Grand Jury Matter*, 768 F.2d 525, 528-29 (3d Cir. 1985) (en banc) (indicating that the type of entity is not relevant and that the only significant factor is whether act of production is communicative). Some commentators have also argued that the collective entity rule should be replaced by the act of production doctrine. See Mosteller, supra note 57, at 71 (stating that the collective entity doctrine appears to lack a solid foundation); Nancy J. King, Note, *Fifth Amendment Privilege for Producing Corporate Documents*, 84 MICH. L. REV. 1544, 1562 (1986) (arguing that the

*Fisher* and *Doe* do not discuss the line of cases creating the collective entity doctrine because the subpoenas at issue were not directed to custodians of corporate records, but dealt with documents relating to individuals (*Fisher*) and a sole proprietorship (*Doe*). The unresolved issue was whether the act of production analysis of the Fifth Amendment superseded the decisions requiring the production of corporate records. The question was crucial because neither *Fisher* nor *Doe* made any reference to the white collar rationale supporting earlier holdings that compelled custodians to produce the records of business organizations. If the act of production doctrine made the cases beginning with *Hale v. Henkel* irrelevant, then the Court would have to consider whether the need to combat economic crimes could be reconciled with the assertion of a privilege that might effectively block the production of business records once thought so crucial to effective law enforcement.

Rather than grapple with the hard issue of reconciling the competing rationales, the Supreme Court elevated the collective entity doctrine above the act of production privilege for the records of most business entities. In *Braswell v. United States*, the Court held that "without regard to whether the subpoena is addressed to the corporation, or as here, to the individual in his capacity as custodian, ... a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds." *Braswell* was the sole shareholder of two Mississippi corporations, with his wife and mother as nominal directors and officers of the companies. The subpoenas were addressed to Braswell as president of the corporations and sought a broad variety of standard business records. After reviewing the "distinguished pedigree" of the collective entity doctrine, the Court rejected the argument that *Fisher* and *Doe* made the doctrine "obso-

principles behind collective entity doctrine do not justify withholding privilege for testimony implicit in producing documents). *But see Alito,* supra note 64, at 71 (arguing that *Fisher* and *Doe* should necessitate only small changes in traditional rules regarding subpoenas to entities).

73. *Id.* at 108-09.
74. *Id.* at 101. The subpoena sought virtually all records that a business could produce, and was not specific as to particular types of documents or transactions. *Id.* at 101 & n.1. Under the act of production analysis, the government probably had a difficult time demonstrating that the production of the documents did not communicate the existence of particular records if they were in fact incriminating.
lete." Instead, the Court applied an agency theory to determine the status of the corporate custodian, finding that the person producing the records merely acts on the entity's behalf as its agent and not in any personal capacity.

*Braswell* reaffirmed the white collar rationale recognized in earlier cases, noting that if corporate custodians could assert any Fifth Amendment privilege it "would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities." Barring assertion of the Fifth Amendment by custodians created a problem of how to treat the testimonial aspect of the production of records recognized in *Fisher*. Rather than giving the prosecution the unfettered right to use the act of production in any way it wished, *Braswell* held that "certain consequences flow from the fact that the custodian's act of production is one in his representative capacity rather than personal capacity . . . . [The prosecution] may make no evidentiary use of the 'individual act' against the individual." The prohibition on evidentiary use is not a requirement that the court grant a witness constructive use immunity, because *Doe* explicitly rejected such a proposal in connection with the production of documents. While the Court denied that its holding granted a form of immunity, it failed to explain either the constitutional basis for the evidentiary prohibition or what use the government could make of the act of production.

*Braswell* resolves the primary Fifth Amendment issue concerning subpoenas for documents by circumscribing the act of production doctrine to the rather narrow area of subpoenas to individuals for personal

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75. See id. at 109.

76. See id. at 110 ("[A] custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation."). One commentator argues that the use of the agency theory creates a "dualistic" custodian by viewing *Braswell* as a corporate entity while the prosecutors sought to convict him as an individual. See Grogan, *supra* note 34, at 726.

77. *Braswell*, 487 U.S. at 115 (footnote omitted). In his dissent, Justice Kennedy attacked the reliance on the white collar rationale, arguing that "the text of the Fifth Amendment does not authorize exceptions premised on such rationales." Id. at 129 (Kennedy, J., dissenting). Justice Kennedy further stated that "even if it were proper to invent such exceptions, the dangers prophesied by the majority are overstated." Id.

78. Id. at 117-18.

79. See United States v. Doe, 465 U.S. 605, 616 ("We decline to extend the jurisdiction of courts to include prospective grants of immunity in the absence of the formal request that the statute requires.") (footnote omitted). The *Braswell* dissent argued that "[i]n *Doe I* we declined expressly to do what the Court does today." *Braswell*, 487 U.S. at 128 (Kennedy, J., dissenting).
records, and to sole proprietorships and small professional practices. Although the decision brings a greater degree of doctrinal clarity to the area, its result leads to arbitrary distinctions based once again on the type of entity receiving the subpoena, an issue of only limited relevance to the criminal investigation. The Court in Braswell limits the holding of Doe to permitting the assertion of the act of production privilege only to sole proprietorships; the collective entity doctrine requires that the person producing the records act in a representative capacity, not personally.

After Braswell, the production of the exact same types of records, such as invoices or ledgers, depends on whether the owner of the enterprise chose to incorporate the business, or maintain a sole proprietorship or small partnership arrangement. That decision can have momentous consequences, because if the business is not incorporated, the owner may be able to shield the records through the assertion of the Fifth Amendment privilege. It is even possible under Braswell for a person to own two businesses, one a corporation and the other a sole proprietorship, and be able to assert the privilege to resist production of one set of records yet be forced to produce the records for the other business. It is odd that the seemingly inconsequential choice of what organizational form to use for a business, which may have little if any effect on its operations, can determine the applicability of a constitutional right.

Nevertheless, Braswell adopts the more simple bright-line rule of requiring all custodians of corporate records to produce the documents without any resort to a claim of Fifth Amendment privilege. The agency theory allows courts to ignore any concerns about the testimonial aspect of the act of production by creating a type of immunity for custodians that bars evidentiary use against the custodian as an individual. The Braswell Court dispensed with the problem of reconciling the Fifth Amendment protections with the need to prosecute economic crimes by eliminating all possible Fifth Amendment claims for custodians that raised the white collar rationale to a level comparable to the rights of the subpoenaed witness.80

The complex analysis proposed in Fisher has been replaced, for most document subpoenas, by two narrow issues left open by Braswell: (1) Is the document a corporate record? (2) Is the person challenging

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80. One commentator notes that a possible explanation for the Court's approach to the privilege against self-incrimination in Braswell is its "unease with the [F]ifth [A]mendment itself . . . ." Massing, supra note 67, at 1191.
the subpoena a custodian? There may even be a way around the minimal analysis required by Braswell, by resorting to another doctrine, the required records exception, that bypasses the Fifth Amendment completely. The next section analyzes the development of the collective entity doctrine after Braswell, and the effort by prosecutors to limit assertions of the Fifth Amendment privilege to shield documents further.

4. Extending the Reach of Braswell

Witnesses subpoenaed to produce records before a grand jury have only narrow grounds to challenge the subpoena as violative of their Fifth Amendment rights after Braswell. Witnesses can argue that the records are personal, rather than corporate records, and are therefore protected under Boyd. The Supreme Court has paid homage to the Boyd doctrine of protecting the privacy of personal papers, and the lower courts differ as to whether Boyd remains good law.81 If the documents are determined to be corporate, however, the issue is whether the witness qualifies as the custodian of the records. The trend since Braswell is to construe the terms "corporate records" and "custodian" broadly, giving witnesses very little chance to escape the collective entity rule.82 The other approach to resist complying with the subpoena focuses on the organizational form of the entity, trying to fit under the Doe rule that records custodians of individual proprietorships can assert the act of production privilege.83 The government may even try to overcome that basis for the privilege by demonstrating that the subpoenaed documents are "required records," and not subject to Fifth Amendment protection. After Braswell, the courts have been receptive to arguments that documents fall within the required records exception and order the witness to produce the documents.84

a. What Are "Corporate Records"?

It is hard to imagine any court today refusing to require production of the types of invoices at issue in Boyd. Permitting a corporation to shield its normal paper flow relating to commercial transactions would give it a virtual license to commit acts ranging from the highly questionable to the clearly criminal. Secret accounts maintained in off-

81. See infra note 89.
82. See infra text accompanying notes 85-142.
83. See supra text accompanying notes 68-70.
84. See infra text accompanying notes 143-51.
shore banks designed to evade reporting requirements exemplify the problem of allowing otherwise regular business activity to be completely protected from government investigation. While it is easy to assail the decision in *Boyd* to protect documents relating to the normal course of business, the harder question is how to determine what documents maintained by corporate officers and employees qualify as corporate records.

In *In re Grand Jury Subpoenas*, the Court of Appeals for the Second Circuit considered the status of records for the personal telephone of a corporation's president and sole shareholder. The corporation paid the bills for several telephone lines listed under the president's name in his homes and car. Although the bills were addressed to the president personally, they came to the corporation's offices, were paid with corporate funds, and the records were stored at the corporation. The government attempted unsuccessfully to subpoena the records from the corporation, and then sought copies of the records maintained by the president, who argued that they were personal documents.

The court upheld the finding that the documents were corporate records on the basis of the corporation's treatment of them: The company paid the bills; the president did not reimburse it for the expenses; the company deducted the costs on its taxes; and the company maintained the records in its files. The president argued, however, that his copies of the records were for his personal use. The court of appeals held that

> copies of corporate records do not become the personal property of an individual merely because he has caused copies to be made... Allowing a corporate officer to obtain copies of corporate records and secure for them greater protection than could be enjoyed for the originals would create a rule ripe for abuse.

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85. 959 F.2d 1158 (2d Cir. 1992).
86. *Id.* at 1161-62.
87. *Id.* The subpoena was addressed to the president's counsel as the custodian of records for the corporation, a situation similar to that in *Fisher*. See *id.* at 1161. Counsel's control of the documents is irrelevant to the Fifth Amendment analysis. See *id.* at 1163. The court, however, stated,

> Where... preexisting documents have been transferred to the attorney for the purpose of obtaining legal advice and the client claims attorney-client privilege, the attorney may refuse to produce the documents if the client, had he retained possession of them, would have had a Fifth Amendment privilege to refuse production.

*Id.* (citing *Fisher* v. United States, 425 U.S. 391, 404-05 (1976)).
88. *Id.* at 1165. The court decided that, even if the documents were personal and not corporate, compelling their production would not violate the president's Fifth Amendment rights because they were not prepared by him and the act of production would not be incriminating. *Id.*
The court never mentioned Boyd, but the opinion exemplifies the continuing power of the century-old holding that the government cannot compel production of “private” papers because the court continued to focus on whether the documents were personal or corporate. Braswell leaves open the question of whether any writing prepared prior to the criminal investigation (specifically, documents that are not in themselves compelled confessions) can be reached by the government. The issue of whether a document is “corporate” or “personal” requires an assessment of whether the content and purpose of the document relates to business activity or an individual’s private affairs. Needless to say, making those distinctions requires much hair-splitting by courts.

Courts describe the prospect of government seizures of private diaries and letters as clearly violative of the Fifth Amendment privilege. The likelihood, however, that investigators would have the slightest interest in such documents in a white collar case is minimal. Even if such documents exist and contain inculpatory admissions, the government is more likely to seize them pursuant to a search warrant than to send a subpoena demanding that the author produce them, simply because most people will not voluntarily surrender incriminating evidence.

The government’s subpoena was so carefully drafted to reach specific telephone numbers that the court’s Fisher analysis was correct, although the court probably should have explicitly applied the foregone conclusion analysis. The case illustrates that Braswell has relegated Fisher’s act of production analysis to a secondary position that courts may address in dicta.

89. Prior to Braswell, in United States v. Doe, 465 U.S. 605 (1984), Justice O’Connor stated in a concurrence that “the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind,” and argued that Fisher “sounded the death knell for Boyd.” Id. at 618 (O’Connor, J., concurring). Braswell, however, did not specifically overrule Boyd, and its analysis of the collective entity doctrine as a means to avoid the breadth of Boyd supports the conclusion that the protection for “private papers” (however narrowly that term might be defined) remains viable. See Braswell v. United States, 487 U.S 99, 105 (1988) (“Hale carved an exception out of Boyd . . . .”); see also United States v. Freidus, 135 F.R.D. 52, 59 (S.D.N.Y. 1991) (stating that Boyd remains good law despite Fisher); In re Grand Jury Subpoena Duces Tecum, 741 F. Supp. 1059, 1067 (S.D.N.Y. 1990) (stating that the Boyd holding should be preserved because “a mechanical application of the Fisher-Doe analysis to bar the invocation of the Fifth Amendment for private papers is inappropriate.”). The Court of Appeals for the D.C. Circuit, however, implied that Boyd is no longer good law when it stated that “[e]ven for records of an individual, the privilege applies in only a limited fashion. It does not cover the contents of any voluntarily prepared records, including personal ones.” In re Sealed Case, 877 F.2d 83, 84 (D.C. Cir. 1989), cert. denied, 493 U.S. 1044 (1990); see also In re Grand Jury 89-4 Subpoena Duces Tecum, 727 F. Supp. 265, 268 n.4 (E.D. Va. 1989) (stating that Boyd “is no longer authoritative.”). The Court of Appeals for the Eleventh Circuit refused to decide whether Boyd had any “remaining vitality,” reserving the question for another day. See In re Grand Jury Investigation, 921 F.2d 1184, 1187 n.6 (11th Cir. 1991).


91. See Alito, supra note 64, at 47 (“Where possession cannot be independently shown,
The possibility that one can be forced to incriminate oneself by delivering intimate personal papers is a convenient illustration for courts to cite, but otherwise is not realistic in the context of white collar investigations.

The subpoenas for documents that typically raise the issue of personal versus corporate records involve the pocket diaries and calendars of corporate officers and employees. These items will frequently include both business and personal entries, and can be crucial evidence in economic crimes to show the timing and content of business meetings. In United States v. Wujkowski, the government subpoenaed, among other things, the pocket calendars and planner schedules of two executives as part of an investigation of corruption of public officials and contractors. The Court of Appeals for the Fourth Circuit rejected the government's argument that a corporate employee's appointment books and schedules are presumptively business records and instead listed a series of factors a court must consider in determining whether the items are corporate or personal. The court also considered certain records pertaining to a beach house owned by one of the executives, holding that the documents could be transformed from personal to corporate records if there was a financial link between the use of the beach house and the corporation. The court of appeals focused not on the content of the documents, but rather on the relationship of the person to the underlying business activity being investigated.

The Court of Appeals for the D.C. Circuit in In re Sealed Case explicitly adopted an agency analysis to determine whether documents constitute corporate records. The witness made an intriguing argument that falsified corporate documents used to create an unauthorized bank account in the corporation's name, but controlled by the witness, could not be corporate records but instead were personal records. The court rejected that position, holding that there was an agency relationship between the witness, who was an employee of the company, and the

common sense and experience suggest that incriminating evidence frequently will not be produced.

92. 929 F.2d 981 (4th Cir. 1991).
93. Id. at 984. The factors are "who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to or in furtherance of the conduct of the corporation's business." Id.
94. Id. at 985. The court also noted that "[e]vidence of corporate hospitality or of the conduct of corporate business at the dwelling would also be relevant." Id.
corporation; the fact that documents were used to defraud the corporation did not change their status as records of the corporation and therefore they were not subject to any Fifth Amendment privilege. 96 Whether the documents are used for personal purposes does not control the determination of whether they are corporate. Rather, the issue is whether a business relationship exists between the person claiming the privilege and the entity subpoenaed. If there is some evidence of that link, the courts will usually determine that the documents are business records and subject to production without any Fifth Amendment protection under Braswell.97

While a personal document can become a corporate record, courts have not addressed whether a document can ever change its status from a corporate to a personal record subject to a Fifth Amendment privilege claim. In In re Grand Jury Subpoenas,98 the Court of Appeals for the Second Circuit concluded the telephone bills held by the corporation were corporate records. The court then, however, leapt to the conclusion that copies of those records that are held by an individual away from the corporation remain ipso facto corporate records.99 In effect, the court held that once a document is designated a corporate record, it retains that status regardless of how the item is subsequently handled. Although it is hard to dispute that mere photocopying of a document cannot automatically change its status, the court did not consider how the witness handled the document or the purpose of maintaining a copy outside of the corporate office.

Boyd's vestige after Braswell is to hold out the faint hope that a witness can demonstrate that the subpoenaed documents are personal, and therefore protected by the Fifth Amendment. The approach

96. Id. at 88-89. The court stated, "Apart from appellant's alleged use of the account for larceny or for other illegal purposes, the records are corporate. The account is in the corporation's name, is run by the corporation's president and chief executive officer, and is funded with corporate property." Id. at 89; see also In re Trader Roe, 720 F. Supp. 645 (N.D. Ill. 1989) (holding that a subpoena for a commodities trader's records, which showed transactions under investigation and which would likely show illegal trades, must be produced).

97. See, e.g., In re Sealed Case, 950 F.2d 736 (D.C. Cir. 1991) (requiring an in camera review of records held by a witness in connection with federal employment); In re Steinberg, 837 F.2d 527 (1st Cir. 1988) (enforcing a subpoena for notebooks related to security operations of a political organization); In re Grand Jury 89-4 Subpoena Duces Tecum, 727 F. Supp. 265, 269 (E.D. Va. 1989) (enforcing a subpoena for documents of a defunct corporation and finding that changes in corporate form do "not miraculously operate to metamorphose the corporation's documents into personal documents."); In re Trader Roe, 720 F. Supp. 645 (N.D. Ill. 1989) (ordering production of trading cards and other records maintained by commodities trader).

98. 959 F.2d 1158, 1163 (2d Cir. 1992).

99. Id. at 1165.
adopted by the courts is to give a broad meaning to the term "corporate records," and to compel the witness to turn over the documents for an *in camera* review to determine whether there is any business aspect to the documents.\(^{100}\) To the extent that the documents contain incriminating information related to an investigation of economic crimes, the court is likely to err on the side of finding that the records are corporate; the more innocuous the item, the more likely it will be considered personal. Although *Braswell* did not overrule *Boyd*, the courts have made it virtually impossible to find the contents of any documents protected by the Fifth Amendment privilege against self-incrimination.

b. Who Is a "Custodian"?

By only prohibiting the prosecution from using the corporate act of production privilege against the individual producing the documents, *Braswell* gives the custodian of corporate records cold comfort because the jury may still draw an inference that the defendant was the person who produced the records.\(^{101}\) If the witness can avoid the label of custodian, the subpoena will have to be reissued to the person in an individual capacity; this would permit invocation of the act of production privilege to protect the documents, or designation of a different custodian who will produce the records on behalf of the entity. When the government merely seeks the records themselves and has little interest in who actually produces them, which is usually the case, the designation as a custodian is immaterial.\(^{102}\)

When the prosecutor, however, is interested in discovering the documents that a particular witness possesses, especially where the person is a target of the investigation, the label of custodian has important

\(^{100}\) See, e.g., *Sealed Case*, 950 F.2d at 738-39 (holding that the district court must review every document despite large volume of records to determine whether witness can assert privilege); United States v. Wujkowski, 929 F.2d 981 (4th Cir. 1991) (requiring *in camera* review of pocket calendars and planner schedules to determine whether they are related to corporate transactions); *In re Grand Jury Subpoena Dues Tecum*, 741 F. Supp. 1059 (S.D.N.Y. 1990) (ordering *in camera* review of daily diaries, appointment books, and address books to determine whether the documents are personal or corporate), *aff'd* *without* *published* *op.*, 956 F.2d 1160 (2d Cir. 1992).

\(^{101}\) See *Braswell* v. United States, 487 U.S. 99, 118 (1988) ("If the defendant held a prominent position within the corporation that produced the records, the jury may, just as it would had someone else produced the documents, reasonably infer that he had possession of the documents or knowledge of their contents."); see also Marvin G. Pickholz & Paul N. Murphy, *Corporate Officers and Employees After Braswell: Is No Document Sacred?*, 18 Sec. Reg. L.J. 359, 367 (1991) (asserting that *Braswell* leaves corporate custodians with scant protection).

\(^{102}\) In that instance, the witness will rarely be called before the grand jury and instead will supply the documents directly to the prosecutor or investigative agency.
implications for building a criminal case against the individual. The possession or control of the documents, and the implicit meaning that can be inferred from a person’s choice to maintain specific records, can be crucial evidence for determining both the person’s culpability and the likely scope of the investigation.

In *In re Grand Jury Subpoena (Paul)*, 103 the Court of Appeals for the Eleventh Circuit considered a challenge to a grand jury subpoena seeking bank records copied and maintained by the financial institution’s former chief executive officer, David A. Paul. 104 Paul argued that although the documents were corporate records, he was not a custodian of the records because he was no longer employed by the bank. The court rejected that position, holding that a custodian possesses the documents in a representative capacity even after leaving the business entity, and “‘[i]t is the immutable character of the records as corporate which requires their production and which dictates that they are held in a representative capacity.’” 105

*Paul* is an interesting case more for what is taking place below the surface than for the court’s holding, which is otherwise straightforward and unremarkable. First, Paul was incarcerated for contempt, which is rare in cases challenging grand jury subpoenas. Because a contempt citation is a prerequisite to appellate review, 106 courts generally allow the contemnor to remain free while pursuing the appeal. If jail were a real possibility, fewer witnesses, or counsel, would take the steps necessary to litigate the scope of the Fifth Amendment privilege. Second, the reason why the government subpoenaed Paul is unclear. If Paul had taken the only copies of the bank’s records, then it was a very easy case because Paul was the only possible custodian of the corporation’s records. If, however, the prosecutor already had the records, or access to them, then the subpoena to Paul was probably designed to learn what records he considered important enough to copy and remove from the bank. The latter reason means that while the subpoena is ostensibly for corporate documents, the pertinent information is the witness’

103. 957 F.2d 807 (11th Cir. 1992).
104.  Id. at 808.
105.  Id. at 812. Paul also argued that he was holding the documents for “personal reasons” and therefore could assert the Fifth Amendment to bar production. The court rejected that position as “specious” in light of *Braswell*.  Id.
106.  See United States v. Ryan, 402 U.S. 530, 533 (1971) (stating that immediate appealability of contempt citation allows for appellate review of grand jury subpoena); Cobbledick v. United States, 309 U.S. 323, 328 (1940) (holding that the denial of a motion to quash a grand jury subpoena is not an appealable final order).
thought process in selecting certain items. If the chief executive officer considers some transactions important enough to have the relevant documents copied to assist in defending himself, then those are probably the transactions that a prosecutor would be most interested in, too. Requiring Paul to produce the records as the custodian of the corporation means that he may supply the government with a roadmap to suspicious transactions. The Eleventh Circuit’s holding in Paul focuses on the “immutable character” of the documents, and it is that determination that overrides any underlying question of whether the witness’s production may also be testimonial and incriminating, further highlighting Braswell’s limitation on the Fisher act of production analysis.

The analysis of what constitutes a corporate record is formalistic, looking at the attributes of the document and its relationship to the business activity at issue. The determination of who may be a custodian rejects any formalism, and courts will not confine the designation of a custodian to the person selected by the entity subpoenaed. In In re Sealed Case, the Court of Appeals for the D.C. Circuit rejected a witness’s claim that he need not produce the documents himself because the corporation designated another person as the custodian. The court held that an entity can have more than one person represent it, citing the white collar rationale that any other rule could permit a corporate officer to designate a custodian with no knowledge of the existence or location of documents necessary to prosecute economic crimes. Therefore, according to the court, any person who is an agent of the corporation has custody or control of the corporate docu-

107. Possession of the documents may in itself be illegal, and therefore the subpoena seeks an admission of culpability through production of the records. In In re Grand Jury Subpoena Duces Tecum (Saxon Indus.), 722 F.2d 981 (2d Cir. 1983), the Court of Appeals for the Second Circuit held that once an officer leaves a corporation’s employment, she no longer acts as a corporate representative but only in a personal capacity with regard to corporate documents. Id. at 986-87. In Saxon, the documents sought were duplicates of records already obtained by the government, and the court was apparently troubled by the government’s need for the documents when possession of them might be wrongful. No other court has followed Saxon’s holding that a former officer does not hold the documents in a representative capacity, and Braswell probably overrules the approach of Saxon that allowed the witness to assert an act of production privilege because the documents at issue are admittedly corporate and not personal. See In re Grand Jury Subpoena (Paul), 957 F.2d 807, 811 (11th Cir. 1992).

108. See Paul, 957 F.2d at 811. After the government subpoenaed the records, Paul was indicted for various alleged crimes relating to his activities at the financial institution. Id. at 809 n.2.


110. Id. at 86.
ments. Correspondingly, the United States District Court for the Southern District of Florida held that "any person with custody over corporate records is a records custodian." The fact of access or control of documents, or an agency relationship, determines whether one can be a corporate records custodian, regardless of the continuing existence of the corporation, or one's current association with the entity.

The one instance in which a witness will argue in favor of being designated a custodian is when the business organization is a sole proprietorship or similarly small partnership such that the act of production doctrine can be asserted under the holding in *Doe*. A subpoena to the owner or partner of such an entity as the custodian of records is considered to compel testimony from the person in an individual capacity, not as the representative of a collective entity as defined by *Bellis*, and is therefore subject to a Fifth Amendment claim. For certain types of organizations that exhibit qualities of both sole proprietorships and corporations, the government can avoid the *Doe* limitation by arguing that the entity meets the requirements of *Bellis* to qualify as a collective entity. Even if it is not a collective entity, the owner or partner need not be subpoenaed personally, and someone else, such as an employee, can qualify as the custodian. The owner or partner will argue, however, that they retained "constructive possession" of the documents and they are the only proper custodian of the records.

In *In re Grand Jury Investigation*, the Court of Appeals for the Eleventh Circuit reviewed a subpoena for financial records to the secretary of a lawyer who operated his practice as a sole proprietorship. The court found that the secretary "was intimately involved in the preparation and maintenance of the records," and therefore was a valid substitute custodian. Similarly, in *Doe v. United States*, the Court

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112. *See In re Grand Jury Subpoena*, 973 F.2d 45, 50 (1st Cir. 1992) (holding that Massachusetts nominee trusts are collective entities because they possess a formal status, trustees are authorized to act on behalf of the trust, and trusts are "held out to the world as being separate and apart from beneficiaries").

113. In *United States v. White*, 477 F.2d 757, 763 (5th Cir.), aff'd on reh'g en banc, 487 F.2d 1335 (5th Cir. 1973), cert. denied, 419 U.S. 872 (1974), the Court of Appeals for the Fifth Circuit stated that a person may retain the Fifth Amendment privilege when the documents are placed with another person or entity "for custodial safekeeping" only.

114. 921 F.2d 1184 (11th Cir. 1991).

115. *Id.* at 1184-85.

116. *Id.* at 1189.

117. 834 F.2d 1128 (2d Cir. 1987).
of Appeals for the Second Circuit reviewed a subpoena to the administrative assistant to a married couple for their personal financial records in connection with an investigation of diversion of corporate funds and tax evasion.\textsuperscript{118} The court focused on "the degree of control ceded to the party the subpoena compels to act rather than the degree of control retained by the owner."\textsuperscript{119} The administrative assistant had "virtually exclusive responsibility" for the records, while the couple had only minimal contact with them, and the assistant was therefore qualified to produce the documents as a custodian.\textsuperscript{120}

Neither the Eleventh Circuit nor the Second Circuit allowed the form of the entity or the personal status of the documents to inhibit the analysis of the relationship between the person subpoenaed and the records sought. In much the same way that a corporation's designation of a custodian is not binding on whether an agent or former employee may be compelled to produce records,\textsuperscript{121} the intent of the owner of the records was irrelevant to the determination of whether a third-party could qualify as the custodian.

Once one is designated a custodian of records, the issue then arises as to what duties the custodian has. As an initial matter, the entity, through its custodian, must provide the documents to the grand jury or administrative agency that subpoenaed the records. Frequently that will be all that is required at that point because neither the grand jury nor administrative investigations are bound by the rules of evidence concerning hearsay.\textsuperscript{122} The custodian may, however, be called at trial

\begin{footnotesize}
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  \item \textsuperscript{118} Id. at 1129-30.
  \item \textsuperscript{119} Id. at 1133. The case was decided a few months before Braswell, and therefore the court of appeals was primarily concerned with the act of production issue. After Braswell, the court would have been able to find that the documents were corporate records because (1) the administrative assistant was an employee of the corporation; (2) the files were maintained in the assistant's office in the corporate suite; and (3) he created and maintained the records within the scope of his employment. Moreover, the documents may have reflected corporate transactions, albeit illegal ones, that may have made at least part of the records corporate rather than personal.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} The only decision to uphold a claim of constructive possession is In re Grand Jury Subpoena (Kent), 646 F.2d 963, 970 (5th Cir. Unit B June 1981), when the court found that the owner "never delivered possession, custody, or control of his records" to the employee subpoenaed as custodian. Id. at 970 (emphasis added). Kent supports the proposition that it is the relationship of the purported custodian to the subpoenaed records and not the intent of the owner or partner that controls the determination of who can qualify as a custodian.
  \item \textsuperscript{122} See Administrative Procedure Act, 5 U.S.C. § 556(d) (1988) (providing that, in administrative agency hearings, "[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" (emphasis added)); Costello v. United States, 350 U.S. 359, 363-64 (upholding validity of indictment even though only hearsay evidence was presented to grand jury); United
\end{itemize}
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to testify as to the authenticity of the documents provided. The question then arises as to how much questioning the custodian must respond to before a valid assertion of the Fifth Amendment can be made.

In *Curcio v. United States*, the witness, a local labor union's secretary-treasurer, refused to answer questions before a grand jury concerning the location or possession of the local's books and records and was found guilty of criminal contempt. Although the Supreme Court found that the rightful custodian of the union's records could not refuse to produce them, "he cannot lawfully be compelled, in the absence of a grant of immunity from prosecution, to condemn himself by his own oral testimony." The Court held that there is a distinction for determining the applicability of the Fifth Amendment between requiring the corporate custodian to produce records, and compelling answers to questions about the location or possession of the documents.

In *Braswell*, the Court read *Curcio* narrowly, finding that *Curcio* barred the custodian's oral testimony, but not the incriminating testimony that was part of the act of production.

In *In re Custodian of Records of Variety Distributing, Inc.*, the Court of Appeals for the Sixth Circuit took *Braswell* one step further by holding that a corporate custodian can be required to provide oral testimony about the creation and maintenance of the documents to establish the foundation for admission of the documents under the business records exception to the hearsay rule. The underlying criminal

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124. Id. at 119-21.
125. Id. at 124.
126. Id. at 127-28. The Court rejected the government's argument that the white collar rationale supports requiring the custodian to provide oral testimony, stating that to allow such questioning "requires him to disclose the contents of his own mind. . . . That is contrary to the spirit and letter of the Fifth Amendment." Id.
127. See *Braswell v. United States*, 487 U.S. 99, 114 (1988). In *Braswell*, the Court stated: "The *Curcio* Court made clear that with respect to a custodian of a collective entity's records, the line drawn was between oral testimony and other forms of incrimination. . . . In distinguishing those cases in which a corporate officer was required to produce corporate records and merely identify them by oral testimony, the Court showed that it understood the testimonial nature of the act of production . . . ."
128. 927 F.2d 244 (6th Cir. 1991).
129. See id. at 245; see also FED. R. EVID. 803(6) (setting forth the business records exception to the hearsay rule). Rule 803(6) states that the hearsay rule does not exclude the following
case involved the prosecution of a theater and its owners for selling obscene videos. The prosecution subpoenaed the records of two corporations that allegedly supplied the videos for trial showing the interstate shipment of the items to the defendants. The records custodian of one corporation provided the documents but invoked his privilege and refused to testify that they were records of the corporation maintained in the normal course of business, which was necessary to establish the business records exception for the admission of the documents into evidence.  

The Court of Appeals for the Sixth Circuit rejected the custodian's Fifth Amendment claim, holding that Braswell's narrow reading of Curcio eliminates a custodian's privilege to refuse to testify as to matters "auxiliary" to producing corporate records because the testimony "is different from the type of explicitly incriminating oral testimony sought [in Curcio]." The court found that the collective entity analysis in Braswell requires the custodian "to identify and authenticate the documents produced for admission into evidence." The only additional testimony required of the corporate custodian was to provide the information necessary to permit admission into evidence of the business records. Concurrent with Braswell, the Court of Appeals for the Sixth Circuit held that the government could not use the custodian's testimony about the business records against him personally in a subsequent prosecution.

Variety Distributing's analysis of the scope of oral testimony a custodian can be compelled to provide without infringing upon the Fifth Amendment rights of the custodian is flawed, because the court of appeals failed to distinguish between authentication of documents and establishing admissibility under the business records exception. The court treats them as being related parts of a custodian's testimony,

documents:
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Id.

131. Id. at 248.
132. Id. at 249.
133. Id. at 250-51.
stating that the "authentication" required of the witness is to testify "that shipping videos is a regular business activity and the corporation regularly keeps records of its shipments." Authentication and the business records exception, however, address distinct evidentiary issues and are treated by the Federal Rules of Evidence separately. Federal Rule of Evidence 901(a) states that "authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The authenticity of evidence is generally not presumed, except for certain items, and the party offering the item must provide some evidence, either direct or circumstantial, that the item is what it purports to be. Once the court determines there is sufficient evidence of authenticity, then the item may be admitted into evidence and it is up to the jury to decide any remaining question concerning authenticity.

The hearsay rule is designed to exclude otherwise relevant evidence that does not meet the basic requirements of the adversary system that testimony be made under oath, at trial, and subject to cross-examination. Although business records are clearly hearsay, they are admissible if there is sufficient testimony to show their reliability, based on the fact that regularly maintained records have a high degree of accuracy. The testimony required for authentication of business records relates to the location of the records and their correspondence to the specifications of the subpoena. The business records exception, on the other hand, concerns the conduct of the enterprise at the time the record was created or transcribed. The foundation for admission as an exception to the hearsay rule requires the witness to have personal knowledge of the type of business conducted and its routine practices.

A document may be authentic even though it does not meet the business records exception. Variety Distributing, however, ignores that distinction. Instead, the court in Variety Distributing expands the scope

134. Id. at 251.
136. See Edward J. Imwinkelried, Evidentiary Foundations 35 (2d ed. 1989) (stating that the test is whether there is sufficient evidence to support a rational jury finding that the item is genuine or accurate, and that the court looks only to the proponent's evidence).
138. Id. § 286.
139. See Fed. R. Evid. 803(6).
140. See id.
of Braswell to include testimony that will permit the admission of sub-
oponaed documents as substantive evidence. That testimony may be
crucial to implicating the witness in criminal activity by the organiza-
tion, which conflicts with Curcio's prohibition against using oral testi-
mony against the custodian. Moreover, as the court noted but did not
decide, the witness may try to assert the Fifth Amendment on cross-
examination. That would require resolution of the confrontation
clause problem and the scope of the privilege, if the questioning went
into any detail concerning the witness's foundation testimony.

c. The Required Records Exception: Avoiding the Limitations of
the Privilege Against Self-Incrimination

Variety Distributing demonstrates the degree to which a court will
go to ensure the admission of corporate records. The designation as
custodian can permit the prosecution to use a target of the investiga-
tion as the vehicle to obtain important records and provide the necessary
foundation to secure the admission of the documents as evidence. The
scope of the Fifth Amendment, however, is subject to even further limi-
tation if the documents meet the "required records" exception, which
overcomes any assertion of the Fifth Amendment by the person in pos-
session of the documents.

The exception "overrides the privilege against self-incrimination in
situations in which the privilege would otherwise apply" even if the act
of production is incriminating. The prosecution may obtain any doc-
ument, regardless of whether it is "personal," or the business entity is a
sole proprietorship or small partnership, if the following three condi-
tions can be shown to establish the required records exception: (1) the

141. For example, substantial criminal penalties can be imposed against persons engaging in
criminal enterprises" as operations that involve certain illegal drug transactions with more than
five persons acting in concert and from which the defendant obtains a substantial income. See id.
§ 848(c). The testimony related to establishing the business records exception can also encompass
the size of the business and its method of disbursing proceeds, which is evidence that can also
prove a continuing criminal enterprise. The Court of Appeals for the Sixth Circuit indicated that
the Braswell limitation on using the testimony against the custodian in an individual capacity
applies to the testimony on the business records exception. See In re Custodian of Records of
Variety Distrib., 927 F.2d 244, 251 (6th Cir. 1991). The mere admission of the documents, how-
ever, may establish the criminal violation through evidence that may not have otherwise been
admissible. Stating that the testimony cannot be used does not eliminate the problem that the
evidence before the jury is introduced through the custodian's oral testimony.

142. Variety Distrib., 927 F.2d at 250 n.5.

143. In re Grand Jury Subpoena Duces Tecum, 793 F.2d 69, 73 (2d Cir. 1986).
statutory scheme is essentially regulatory and not criminal; (2) the recordkeeping requirements apply to records a business normally maintains; and (3) the records themselves have a "public aspect" making them analogous to public documents. The limited vitality of Fisher and Doe is further undermined by the required records exception because the doctrine is premised on the need to allow the government to reach records that are incriminating and whose production will be used against the person maintaining them individually.

The third prong of the required records exception is the hardest part to apply because the Supreme Court has never defined what the "public aspect" is that allows the documents to be transformed from records potentially protected by the Fifth Amendment to completely available to the government for use against their creator or custodian. In United States v. Lehman, the Court of Appeals for the Seventh Circuit examined the relationship between the party creating the record and the administrative agency regulating the business to determine whether the government had a strong enough interest in the maintenance of the records to demonstrate the need for regular public access to the documents. The court ordered the production of certain financial records because of important health and safety interests and because the proprietor could not show that the documents were "inherently private."

It is not entirely clear why courts have continued to apply the required records exception in light of Braswell's broad holding requiring production of corporate records. The rationale for the doctrine is that those who choose to conduct business subject to the government's regulatory scheme effectively waive their Fifth Amendment privilege, and

144. Grosso v. United States, 390 U.S. 62, 68 (1968); see also Shapiro v. United States, 335 U.S. 1, 32-35 (1948) (holding that records, which are required by law to be kept, have "public aspects" and may be used as evidence when lawfully obtained by subpoena).

145. See In re Grand Jury Subpoena Duces Tecum, 781 F.2d 64 (6th Cir.), cert. denied, 479 U.S. 813 (1986). "Supreme Court has directed that where the narrow parameters of the doctrine are met, and the balance weighs in favor of disclosure, the information must be forthcoming even in the face of potential incrimination." Id. at 70.

146. 887 F.2d 1328 (7th Cir. 1989).

147. Id. at 1333. The court noted that the third prong "does not lend itself to analytical precision . . . ." Id. The problematic aspect of the third prong is that the government's desire for the information cannot alone render the information public. See Grosso, 390 U.S. at 68 (explaining that, although the information is desired, "this alone does not render information 'public,' and thus does not deprive it of constitutional protection"); see also Marchetti v. United States, 390 U.S. 39, 57 (1968) (stating that the Fifth Amendment is not overridden because the government has "formalized its demands in the attire of a statute").

148. Lehman, 887 F.2d at 1333.
because of the public aspect of the records that businesses would otherwise maintain, there is only a slight risk of incrimination in producing the document. The weakness of this approach is that it adopts the basic Fisher act of production analysis to support an exception to even allowing an assertion of the privilege against self-incrimination. Moreover, it assumes that business owners have chosen to waive their constitutional rights without any clear warning that they have done so, and uses a three-part test with at least one factor whose application is vague, at best.

In some instances, the documents sought by subpoenas for required records may otherwise qualify as corporate records under Braswell. The value to prosecutors of the required records exception is that it avoids both the Doe stricture on compelling production of documents from sole proprietorships and small partnerships, and the Braswell constraint on using the custodian's testimony against the person in an individual capacity. By preventing any assertion of the Fifth Amendment privilege, the required records doctrine gives prosecutors a potentially powerful argument to compel the production of documents without any real constraint on the use of the documents and related testimony by the custodian. In conjunction with Variety Distributing, the custodian of the required records may be required to testify concerning the relevant course of business to enable the documents to be admitted under the business records exception. There would not be any limitation on the use of that testimony against the custodian in an individual capacity because there is no privilege with regard to required records and the exception does not implicate the Braswell limitation on the use of a custodian's testimony.

149. See Subpoena Duces Tecum, 781 F.2d at 70.
150. See, e.g., In re Grand Jury Subpoenas, 772 F. Supp. 326 (N.D. Tex. 1991) (upholding subpoena to former employees for records taken from savings and loan institution); In re FDIC, 640 F. Supp. 1178 (S.D.N.Y. 1986) (upholding subpoena to former bank employee for records taken from institution). In In re FDIC, decided before Braswell, the administrative subpoena duces tecum was addressed to the former officer in her personal capacity. Id. at 1179. The law is now settled that the subpoena should be addressed to the individual as the custodian because the witness's current employment status is immaterial to determining whether the documents must be produced.
151. See United States v. Lehman, 887 F.2d 1328 (7th Cir. 1989) (allowing an administrative subpoena to a livestock dealer who was apparently operating a sole proprietorship); In re Grand Jury Proceedings, 801 F.2d 1164 (9th Cir. 1986) (per curiam) (upholding a subpoena for drug prescription records of medical practice operated by one doctor); In re Two Grand Jury Subpoenas Duces Tecum, 793 F.2d 69 (2d Cir. 1986) (upholding two subpoenas for bank records); In re Grand Jury Subpoena Duces Tecum, 781 F.2d 64 (6th Cir. 1986) (allowing subpoena to sole proprietorships for automobile odometer records).
B. The Scope of Immunity Under Kastigar and Braswell for Witnesses and Custodians

The primary effect of Braswell on white collar criminal investigations is to limit the ability of witnesses to shield documents from the purview of the grand jury or an investigative agency through the assertion of the right against self-incrimination. Although the courts have made the application of the law clearer, ambiguity remains in determining how Braswell's limitation on the use of the act of production privilege by the custodian should be reconciled with the more traditional analysis of the scope of immunity under the Fifth Amendment. The Supreme Court in Doe asserted that the judiciary has no right to impose immunity on a witness without a request for it from the prosecutor, and Braswell rejected the argument that the limitation on evidentiary use was the equivalent of a constructive use immunity. While the Court in Braswell vigorously shunned the label "immunity," it left open the question of what use can be made of the act of production.152 It would be incongruous to give more protection to the Braswell prohibition against evidentiary use, which is a "necessary concomitant" to the collective entity doctrine but not a constitutional prerequisite, than to a grant of immunity that reaches the limits of the Fifth Amendment's protection against self-incrimination. The question, therefore, is to determine how Braswell's protection fits into the hierarchy of potential uses of immunized statements by defendants created in Kastigar v. United States.153

In Kastigar, the Supreme Court upheld a statute granting use immunity as coextensive with the protections of the Fifth Amendment privilege, rather than requiring the government to grant complete transactional immunity. In describing the outlines of the protection for immunized statements, the Court stated that use immunity "prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."154 Use immunity does not bar a subsequent prosecution of the witness, but the government

154. Id. at 453. The immunity statute provides that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (1988).
bears a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." The *Kastigar* hearing requires that the government prove that its evidence is not tainted by the defendant's prior immunized statements, and therefore a grant of immunity can, as the Court noted in *Braswell*, entail significant drawbacks in the attempt to prosecute the immunized witness.

*Kastigar* bars any direct or indirect evidentiary use of the immunized testimony against the defendant at trial. At the pre-indictment stage of white collar investigations where the prosecutor seeks production of documents, the issue can arise whether to grant act of production immunity to a custodian who can avoid the limitations on the assertion of the Fifth Amendment privilege imposed by *Braswell* and its progeny. The question for the government is whether the limited grant of use immunity for production of records will taint the documents such that a subsequent prosecution of the custodian will be prohibited by *Kastigar*. That issue cannot be resolved at the investigative stage because the only time a witness can challenge the scope of the immunity and the potential use of tainted evidence is at a suppression hearing after indictment. To the extent that witnesses are granted immunity to produce documents at an early stage of the investigation, the prosecution runs a substantial risk that it will have to forego using important evidence related to the act of production to prove criminal charges against the custodian.

The effect of finding a violation of the defendant's Fifth Amendment privilege through improper use of the immunized testimony is dismissal of the indictment. *Kastigar* violations typically involve indirect use of the immunized statements as an investigative tool, using the so-called "fruits" of the compelled statements against the witness through the introduction of tainted evidence. In *United States v. Hampton* the federal government sought to prosecute a witness who had testified

157. See *In re J.W.O.*, 940 F.2d 1165, 1167-68 (8th Cir. 1991) (stating that the appropriate time and place for challenging use of tainted evidence is after the witness has been indicted); *In re Grand Jury Proceeding*, 890 F.2d 1, 4 (7th Cir. 1989) (stating that danger of improperly using immunized testimony is only after witness is indicted, which may then be challenged at suppression hearing); *In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir.) (stating that the scope of immunity is a question for a subsequent suppression hearing), *cert. denied*, 479 U.S. 924 (1986).
158. The government must demonstrate by a preponderance of the evidence that all of its evidence is based on an independent source and not on the immunized testimony. *United States v. Seiffert*, 501 F.2d 974, 982 (5th Cir. 1974).
159. 775 F.2d 1479 (11th Cir. 1985).
before a state grand jury. State law provided transactional immunity to grand jury witnesses, and the state investigators extensively briefed federal agents before their investigation. The Court of Appeals for the Eleventh Circuit "disabused" the government of the "faulty notion" that it could meet its Kastigar burden through proof of an independent source of some of its evidence and conclusory denials that it used the fruits of the immunized statement "to fill in the numerous evidentiary holes that remain." In \textit{United States v. Tormos-Vega}, a defendant gave widely viewed testimony under a grant of immunity before a legislative committee and was indicted on charges relating to specific transactions about which he had testified. The investigative agent immersed himself in the testimony, which led the district court to state that it "cannot give serious consideration to the government's contention that its agent did not use the important information revealed by Serrano's testimony in the manner prohibited by Kastigar." The Justice Department has sought to minimize the possibility of violating an immunized witness's rights by requiring express approval of prosecutions of witnesses based on information first disclosed in, or closely related to, their immunized statements.

\textit{Id.} at 1489. The government used the immunized information to build a case against a co-conspirator, who agreed to plead guilty and to testify against the immunized witness. The court of appeals held that "the testimony of the co-conspirator must be deemed to have been indirectly derived from the testimony of the immunized witness in violation of Kastigar." \textit{Id.} at 1488.

\textit{Id.} at 1534. The court also noted that the agent brought the immunized testimony to the attention of the grand jury. \textit{Id.} at 1535. The courts are split as to whether the grand jury hearing the immunized testimony may properly indict the witness for crimes related to the subject of the testimony. \textit{Compare United States v. Garrett}, 797 F.2d 656, 663-65 (8th Cir. 1986) (holding that indictment by same grand jury that hears immunized testimony is not an automatic Fifth Amendment violation, but requiring an evidentiary hearing to determine whether indictment rests directly or indirectly on the immunized testimony) and \textit{United States v. Zielezinski}, 740 F.2d 727 (9th Cir. 1984) (same) \textit{with United States v. Hinton}, 543 F.2d 1002 (2d Cir.) (mandating automatic dismissal if same grand jury hearing the immunized testimony indicted witness), \textit{cert. denied}, 429 U.S. 980 (1976).

\textit{United States v. North}, 910 F.2d 843 (D.C. Cir.), \textit{modified per curiam}, 920 F.2d 940 (D.C. Cir. 1990), \textit{cert. denied}, 111 S. Ct. 2235 (1991), a similar though more notorious case than \textit{Tormos-Vega}, the court of appeals vacated the conviction of Lieutenant Colonel Oliver North because of the effect his widely viewed congressional testimony may have had on the testimony of other witnesses. \textit{North} and \textit{Tormos-Vega} may stand for the proposition that witnesses testifying under legislative grants of immunity cannot be prosecuted when, as is usually the case, their statements are widely publicized in the press.

\textit{DEP'T OF JUSTICE. UNITED STATES ATTORNEYS' MANUAL} § 9-23.400 (1988) [hereinafter U.S. ATT'YS MANUAL]. Among other things, Justice Department approval requires the prosecutor to state
The courts have not considered the question of what remedies are available for a violation of Braswell's protection of the custodian's act of production because the scope of that protection has not been considered. The Supreme Court specifically rejected the notion of constructive immunity for the custodian's act of production, so it would be anomalous to adopt wholesale the Kastigar remedy of dismissal of the indictment if a court found a violation of Braswell's protection. Moreover, Braswell only prohibits "evidentiary use" of the act of production, barring the prosecution from introducing evidence at trial "that the subpoena was served upon and the corporation's documents were delivered by one particular individual, the custodian."\footnote{164} The opinion does not discuss indirect use of the act of production, which is the key protection afforded by Kastigar to immunized witnesses. If the Court intended to provide the same protection to custodians as it furnishes to witnesses granted immunity, then it would have referred to Kastigar's prohibition on "any use," direct or indirect, of the information. Instead, Braswell limits its protection to the more specific "evidentiary use," which at a minimum implies that the custodian's protection for the act of production is short of that provided by the Fifth Amendment.

Courts have faced the related issue of whether the prosecution can make any nonevidentiary use of immunized statements and information derived from the testimony. In United States v. McDaniel,\footnote{165} the Court of Appeals for the Eighth Circuit held that Kastigar's restriction on "any use" of immunized information forbids "all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury."\footnote{166} Among the possible nonevidentiary uses outlined by the appeals court are "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning the method by which he/she will affirmatively establish either that all evidence necessary for a conviction was in the hands of the government prior to the date of the defendant's compelled testimony or that it came from sources independent of the witness's testimony and was not the result of focusing an investigation on the witness because of compelled disclosures . . . .

\textit{Id.}

\footnote{164}{Braswell v. United States, 487 U.S. 99, 118 (1988).}
\footnote{165}{482 F.2d 305 (8th Cir. 1973).}
\footnote{166}{\textit{Id.} at 311. In McDaniel, the federal prosecutor read three volumes of the defendant's testimony that was given before a state grand jury under an automatic grant of immunity. The prosecutor was unaware of the immunity, and the federal grand jury indicted the defendant on charges relating to the testimony. \textit{Id.} at 307-08.}
trial strategy." More recently, courts have moved away from McDaniel's broad reading of Kastigar to find that the government need not face the consequences of dismissal for any possible use of the information. In United States v. Byrd, the Court of Appeals for the Eleventh Circuit rejected McDaniel's categorical prohibition on nonevidentiary use as leading to transactional immunity, holding that Kastigar does not create an impenetrable barrier between the immunized information and the prosecutor. If any possible use of immunized testimony were prohibited, no matter how speculative, then witnesses would have complete transactional immunity, broader than the more limited use-immunity upheld in Kastigar. Similarly, in United States v. Mariani, the Court of Appeals for the Second Circuit rejected McDaniel in holding that if courts were to prohibit any nonevidentiary use then it would be impossible to ever prosecute an immunized witness.

Commentators are split as to whether Kastigar bars nonevidentiary use of information gained from immunized statements. Compare Gary S. Humble, Nonevidentiary Use of Compelled Testimony: Beyond the Fifth Amendment, 66 Tex. L. Rev. 351, 355-56 (1987) (arguing that neither the immunity statute nor the Fifth Amendment requires the government to prove it made no nonevidentiary use of defendant's compelled testimony) with Kristine Strachan, Self-Incrimination, Immunity, and Watergate, 56 Tex. L. Rev. 791, 831 (1978) (arguing that preclusion of nonevidentiary use of immunized testimony should be broader than exclusion of coerced confessions) and Jefferson Keenan, Note, Nonevidentiary Use of Compelled Testimony and the Increased Likelihood of Conviction, 32 Ariz. L. Rev. 173, 188 (1990) (stating that a requirement for independent sources of evidence to be used at trial is not sufficient to protect the defendant from increased likelihood of conviction if prejudicial nonevidentiary uses are allowed).
The problem with determining the scope of Kastigar’s prohibition on use of immunized testimony is that there is no clear line between nonevidentiary and indirect evidentiary use. In United States v. North, involving the Iran-Contra prosecution of Lieutenant-Colonel Oliver North, the Court of Appeals for the D.C. Circuit considered whether the use by witnesses of North’s immunized congressional testimony to refresh their recollection constituted a violation of Kastigar. Although the court criticized Byrd and other cases for accepting nonevidentiary use of immunized testimony, calling those decisions “troubling,” it avoided the issue by designating the use against North as indirect evidentiary use. Given its finding of indirect evidentiary use, it is not clear why the court of appeals even addressed the issue of nonevidentiary use. North is not really different from Hampton, where the prosecutors sought to use immunized testimony indirectly against the defendant through another witness.

North highlights the problem of determining the permissible limits of prosecutorial use of immunized testimony. While access to immunized testimony may have some effect on the decision to prosecute and the conduct of the trial, defendants need to prove some direct link between their immunized testimony and the evidence used against them at trial. For example, if the purpose in seeking to compel testimony is to discover the defendant’s testimony or determine the types of charges to be filed, then such use would probably be prohibited because there is an obvious connection to the evidence that is introduced at trial. If the relationship is only speculative, for example the immunized testimony confirmed evidence the prosecution already possessed, then a court is more likely to find any link between the compelled testimony and the evidence at trial to be so attenuated that any use is nonevidentiary, and permissible. The label applied to the use of the evidence determines the outcome of the decision under Kastigar.

173. Id. at 860. The court stated, “In our view, the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes indirect evidentiary not nonevidentiary use.” Id. The court noted that even if nonevidentiary use of the information were prohibited by Kastigar, the special prosecutor had made no such use of the information. Id.
174. See United States v. Hampton, 775 F.2d 1479, 1482-83 (11th Cir. 1985).
175. See United States v. Rivieccio, 919 F.2d 812, 815 (2d Cir. 1990) (finding that nonevidentiary use that influenced government thought process or questioning of witnesses was “merely tangential” and not a prohibited use).
176. Courts have shown their discomfort with even nonevidentiary use of immunized testi-
If Kastigar does not prohibit nonevidentiary use of immunized information, then Braswell's protection for the custodian cannot reach any further. In In re Grand Jury Subpoena (Paul), the subpoena for records removed by the bank's former president may have been designed to learn what loans and transactions were important to him, and his act of production provided information to the prosecution. Although that information itself cannot be introduced at trial, Braswell does not prohibit the use of the information in a nonevidentiary fashion. The protection afforded custodians by Braswell is quite narrow because neither indirect nor nonevidentiary uses violate the requirement that the act of production not be introduced against the defendant at trial. The Supreme Court even acknowledged the narrowness of the protection by noting in Braswell that it is permissible for the jury to draw an inference that the defendant produced the corporate documents introduced at trial.

In short, the interplay of determining when a person can be compelled to produce documents and what effect a grant of immunity has on the subsequent prosecution of the witness has been greatly affected by the Supreme Court's restrictive interpretation of the scope of the Fifth Amendment for corporate records. The witness in possession of documents has very few means to resist a subpoena, and the courts have favored the government by expansively interpreting what constitutes a corporate record and who can fill the role of custodian of the records. Moreover, there is even a means to overcome the Fifth Amendment, through the required records exception. The protection afforded to custodians in Braswell is not as extensive as that provided

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mony by admonishing prosecutors to erect barriers between the attorney taking the immunized testimony and the attorney assigned to conduct the trial, in order to limit any taint from compelling the witness to testify. See United States v. Schwimmer, 882 F.2d 22, 26 (2d Cir. 1989) (suggesting that the government should create “chinese wall” procedures to protect against tainting any subsequent trial), cert. denied, 493 U.S. 1071 (1990); United States v. Serrano, 870 F.2d 1, 18 n.18 (1st Cir. 1989) (criticizing the government for not following Justice Department procedures for keeping the attorney who prosecutes the case from immunized testimony); United States v. Byrd, 765 F.2d 1524, 1532 n.11 (11th Cir. 1985) (suggesting that it is unwise to permit a prosecutor familiar with immunized testimony to participate in trial). The Justice Department requires prosecutors to show that they will not make nonevidentiary use of immunized testimony against the witness, and recommends having an attorney unfamiliar with the compelled testimony conduct the trial. See U.S. ATT'YS MANUAL, supra note 163, § 9-23.400.

177. 957 F.2d 807 (11th Cir. 1992).
178. See supra text accompanying notes 106-08 (discussing the reasons for the government's subpoena in In re Grand Jury Subpoena (Paul), 957 F.2d 807 (11th Cir. 1992)).
to witnesses granted use immunity, and the courts do not automatically bar nonevidentiary use of immunized information.

The strength of the prosecution's position in the conduct of white collar investigations is underscored by the fact that witnesses have few protections at the pre-indictment stage under the Sixth Amendment right to counsel. Kastigar places substantial obstacles in the path of prosecutors seeking to convict immunized witnesses, yet statements from the participants in economic crimes can be crucial to explaining the documents related to a suspicious transaction. The government routinely seeks incriminating information from witnesses outside of the grand jury without any grant of immunity or the consent of the witness's counsel. Similar to the trend in requiring production of documents, courts have generally favored the government in deciding the scope of protection to be afforded to defendants and investigative targets who are represented by counsel. The next section analyzes the various arguments propounded against the tactics used by prosecutors to secure incriminating admissions in white collar investigations.

III. PROTECTING CLIENTS FROM THEMSELVES: INCriminating Statements, ATTORNEY-CLIENT PRIVILEGE AND THE ETHICAL RULES

Documents are the foundation of any white collar investigation because they are the objective material showing the process of the transactions at issue. Much like a weapon or drug sample, corporate records have an immutable character that furnishes the basis for an initial conclusion that a criminal violation occurred. Nevertheless, a successful prosecution cannot be made on the documents alone, just as a murder cannot be proven with just the corpus delicti. While the documents establish the foundation for the crime, participants flesh out the bare facts in the records with testimony as to intent, knowledge and motive. Often the best witness is the defendant herself, if she made incriminating statements to investigators or co-conspirators; information from co-conspirators can also be crucial in sorting out the paper trail and explaining the thought processes of the defendants in pursuing a series of transactions.

The prosecutor's best chance at gathering information directly from targets is at the pre-indictment stage of the investigation. Once a
person is indicted, the Sixth Amendment right to counsel bars all contacts with the represented defendant outside the presence of counsel.\textsuperscript{181} The indictment is the critical point for the government's investigation because the defendant's constitutional and statutory rights attach and the prosecutor's latitude to continue the investigation is substantially limited.\textsuperscript{182} The prosecution may use a co-conspirator who has agreed to cooperate to learn information about the crimes charged, but the government puts its indictment at risk if it seeks to learn information about the defendant's case through a secret informer in violation of the defendant's Sixth Amendment rights.

The Supreme Court has begun to take a more restrictive view of the scope of the Sixth Amendment right to counsel at the post-indictment stage of criminal proceedings. In \textit{Caplin & Drysdale v. United States},\textsuperscript{183} the Court held that an asset forfeiture statute that may deprive a defendant of the funds necessary to retain counsel is constitutional.\textsuperscript{184} The Court rejected the argument that defendants have a right to the counsel of their choice, finding instead that the Sixth Amendment does not infringe Congress's power to enact a statute that deprives a person of the "economic power to retain private counsel."\textsuperscript{185}

In \textit{Wheat v. United States},\textsuperscript{186} the Court considered whether the Sixth Amendment protected a defendant's choice to be represented by an attorney with a potential conflict of interest arising from his repre-


\textsuperscript{182} See, e.g., \textit{In re Grand Jury Proceedings}, 814 F.2d 61, 70 (1st Cir. 1987) ("It is well established that a grand jury may not conduct an investigation for the primary purpose of helping the prosecution prepare indictments for trial. The prosecutor at a trial, however, may use evidence incidentally gained from a grand jury primarily investigating other crimes.") (citations omitted).

\textsuperscript{183} 491 U.S. 617 (1989).

\textsuperscript{184} Id. at 635; see also 21 U.S.C. § 853(e)(1)(A) (1988) (permitting a court to issue a restraining order forbidding the transfer of potentially forfeitable property). In \textit{Caplin & Drysdale}, 491 U.S. at 619-21, the defendant was charged with conducting a large drug importation and distribution scheme that constituted a "continuing criminal enterprise" for purposes of asset forfeiture. After imposition of the restraining order, the defendant sought to transfer $25,000 to his attorney to pay for legal counsel. \textit{Id}.

\textsuperscript{185} \textit{Caplin & Drysdale}, 491 U.S. at 630. The Court rejected the defendant's argument that the complex nature of the offenses charged should permit the defendant to use assets that may have been generated by the criminal activity to retain skilled counsel of choice. The effect of this argument as seen by the Court was that every indigent defendant charged with participating in complex criminal activity could assert an ineffectiveness of counsel claim for having to rely on appointed counsel. \textit{Id}. at 630 n.7.

In a companion case, \textit{United States v. Monsanto}, 491 U.S. 600 (1989), the Supreme Court rejected the argument that the asset forfeiture statute implicitly exempts attorneys fees from the forfeiture provisions. \textit{Id}. at 611.

\textsuperscript{186} 486 U.S. 154 (1988).
sentation of other parties to a conspiracy. The Court held that even when the defendant knowingly waives the conflict, district courts have broad discretion to disqualify attorneys with potential conflicts based on the "institutional interest in the rendition of just verdicts in criminal cases [that] may be jeopardized by unregulated multiple representation."\textsuperscript{187} As Professor Karlan's analysis of the change in the Supreme Court's attitude toward the scope of the Sixth Amendment points out, the shift relates to the different types of cases before the Court: Instances of discrete representation of indigent defendants accused of street crimes has given way to relational representation on a continuing basis by attorneys for criminal enterprises and defendants.\textsuperscript{188} The Court appears to be more willing to rule against defendants where counsel may in fact aid the commission of crimes by protecting those who control the enterprise from being indicted and convicted through the provision of ongoing legal services.

\textit{Caplin \& Drysdale} and \textit{Wheat} are concerned with the post-indictment stage of the criminal case. At the pre-indictment phase of the white collar investigation, the issues center more on the scope of the attorney-client privilege and any restrictions that may be placed on the conduct of government attorneys in participating in investigations through the ethical rules of the legal profession. The prosecutor generally cannot use the criminal asset forfeiture provisions apart from an indictment or other criminal charge, and the question of multiple representation is not yet ripe for review because even the potential conflicts may not have arisen when no one has been indicted. The benefits from having one attorney represent multiple targets in an investigation is that the attorney can control the flow of information from the defense, present a united front to the government, and be aware of each step the government takes with regard to any target. For example, an offer of immunity and any subsequent cooperation will become known to each target because of the single legal representative.

Although the targets of an investigation may have some power to impede or control an investigation, the trend in the Sixth Amendment area highlights the shift in favor of the prosecution in investigations of white collar crimes. Courts have been unwilling to restrict the use of undercover tactics to elicit statements from represented targets outside the presence of their counsel. Moreover, prosecutors have become more

\textsuperscript{187} \textit{Id.} at 160.

\textsuperscript{188} Karlan, \textit{supra} note 4, at 679-86.
aggressive in seeking information from attorneys about their clients through the crime-fraud exception to the attorney-client privilege and subpoenas for client identity and fee arrangements. Issues related to the attorney-client privilege have largely superseded the earlier emphasis on the right to counsel under the Fifth and Sixth Amendments in police interrogations. The resulting shift in favor of prosecutors is not surprising given the Supreme Court's hostility to the use of the Fifth Amendment to shield business records from being produced, and the Sixth Amendment to permit defendants to use the proceeds of alleged illegal activity to retain high-priced legal counsel.

A. Joint Defense Agreements and the Attorney-Client Privilege

The attorney-client privilege is the oldest and probably most widely known privilege under the common law. The Supreme Court summarized the rationale of the privilege this way:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

To invoke the privilege, the proponent must demonstrate that the communication was made to an attorney or an agent of the attorney in the course of seeking legal advice, and that the party intended the communication to be confidential. The privilege protects only commu-
cations and not the underlying facts discussed with counsel or any documents prepared by or on behalf of the client apart from the attorney-client relationship.

The benefit of the attorney-client privilege in fostering complete communication with one's counsel is especially applicable in the multi-party context because counsel can gather all the information necessary to investigate the matter without fear that the government can force disclosure of the communications. At the pre-indictment stage, however, targets of the investigation will often seek separate legal counsel; corporations whose officers are also involved in investigations will frequently provide separate counsel at the company's expense. The value of having separate counsel to represent one personally may be undermined if the attorneys for the targets cannot gather information in a manner that protects communications with other targets under the attorney-client privilege. Moreover, while the ethical rules prohibit an attorney from representing clients that may have a conflict of interest, it can be argued that it is incongruous to penalize clients if the conflict of interest rules that are designed to protect them result in less adequate representation because the attorneys cannot communicate with one another. The courts have addressed this issue by recognizing the "joint defense" privilege as derivative of the attorney-client privilege. 192

To qualify for protection under the joint defense privilege, the communications must meet the basic requirements of the attorney-client privilege and demonstrate that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed

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1502-09 (1985) (analyzing the benefits and burdens of the attorney-client privilege on the judicial system).

192. Although courts have used the term "joint defense privilege," that misstates its scope because it is neither limited to defendants nor is it necessary for actual litigation to commence for the privilege to be applicable. See, e.g., United States v. Bay State Ambulance and Hosp. Rental Serv., 874 F.2d 20, 28 (1st Cir. 1989) (using the term "joint defense privilege"); see also Daniel J. Capra, The Attorney-Client Privilege in Common Representations, 20 TRIAL LAW. Q. 20 (1989) (stating that the term is a misnomer). One commentator has argued that the joint defense privilege should be recognized as separate from the attorney-client privilege and not as deriving from that privilege. See Susan K. Rushing, Note, Separating the Joint-Defense Doctrine from the Attorney-Client Privilege, 68 TEX. L. REV. 1273 (1990). It is unclear, however, how the privilege can be severed from its roots in the attorney-client privilege without allowing the doctrine to protect any discussion between parties that share a common interest, which would include communications between parties outside the presence of either of their counsel. The effect of protecting these communications would be to undermine the use of cooperating witnesses to elicit incriminating statements from targets of the investigation at the pre-indictment stage. It is doubtful that the courts will permit the joint defense privilege to eliminate one of the cornerstones of white collar investigations through the creation of a new privilege.
to further the effort, and (3) the privilege has not been waived.\textsuperscript{193} The parties need not share identical interests, nor are they precluded from having certain conflicting positions among themselves, but there must be a degree of congruity between them such that a court can determine that they have agreed to act cooperatively. The joint defense privilege may attach before litigation even commences, and it applies in both the criminal and civil contexts.\textsuperscript{194} The key facet of the joint defense privilege is that the privilege can only be waived by all members of the common group, and a single member cannot reveal the communications made in the course of the common action.\textsuperscript{195} In the criminal context, the scope of the privilege is important because the communications need not be made to one's own attorney, but include all statements within the scope of the joint defense to any other counsel.\textsuperscript{196}

To protect communications under the joint defense privilege, the court must first determine whether in fact there is an agreement to conduct a joint defense. In United States v. Bay State Ambulance and Hospital Rental Service,\textsuperscript{197} the court found that a written outline of certain conduct provided by the defendant to counsel for the corporation was not protected because there was no evidence of an agreement. The court noted that the defendant never consulted his own attorney about the outline, which made it difficult to see how the document was

\textsuperscript{193} In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986).

\textsuperscript{194} See In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990) ("Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged . . . "). The joint defense privilege arose in the criminal context, when Court of Appeals for the Ninth Circuit recognized the value of extending the attorney-client privilege to protect communications between co-defendants and their counsel. See Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964). It has since been extended to cooperative action in response to an SEC investigation. See In re LTV Securities Litig., 89 F.R.D. 595 (N.D. Tex. 1981). It has also been extended to the exchange of documents between class action attorneys pursuing similar albeit separate actions, and to legal advice given to a parent corporation and its subsidiary regarding the sale of the subsidiary. See Medcom Holding Co. v. Baxter Travenol Lab., 689 F. Supp. 841 (N.D. Ill. 1988) (subsidary sale case); Schachar v. American Academy of Opthamology, 106 F.R.D. 187 (N.D. Ill. 1985) (class action case).

\textsuperscript{195} See Medcom Holding Co., 689 F. Supp. at 845.

\textsuperscript{196} The proponent of the joint defense privilege bears the burden of establishing its existence. Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d at 126. If the proponent asserts the Fifth Amendment privilege against self-incrimination in response to questions, then the witness cannot also assert the joint defense privilege because there is no basis for concluding that it exists based on the proponent's silence. Id.

\textsuperscript{197} 874 F.2d 20 (1st Cir. 1989).
part of a joint defense. In *United States v. Melvin*, counsel for a defendant asked a cooperating defendant, who stated that he did not have counsel, to attend meetings to discuss the case. The Court of Appeals for the Fifth Circuit held that the communications were not intended to be confidential because the informant had not become a member of the defense team. To establish the existence of the joint defense privilege, parties who are involved in governmental investigations often enter into written agreements that reflect their common interests in the investigation and lay the basic framework of the relationship, such as sharing work product among counsel and apportioning certain tasks to different law firms.

The courts have generally been protective of joint defense agreements by recognizing that they are not limited to the post-indictment phase of the prosecution but also protect communications between targets of investigations and their counsel. Unlike other areas relating to the conduct of white collar investigations, the trend is not in favor of limiting the scope of the agreements because that would necessarily infringe on the attorney-client privilege. Joint defense agreements may nevertheless be problematic if they are used as a means to control the defense of lower-level members of a conspiracy to protect the organizers, as highlighted in *United States v. Allen*. In *Allen*, the

198. Id. at 27.
199. 650 F.2d 641 (5th Cir. Unit B July 1981).
200. Id. at 646. The court determined that the defendant's Sixth Amendment rights were not violated because there was no breach of the joint defense privilege. See also United States v. Bell, 776 F.2d 965, 971-72 (11th Cir. 1985) (holding no expectation of confidentiality existed when the defendant approached two government informants to attend a meeting with his own counsel and the informants stated that they had retained other counsel), cert. denied, 447 U.S. 904 (1986).
202. See, e.g., Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964).
203. The joint defense may raise conflict-of-interest questions if the attorney learns confidential information in the course of representation and one member of the joint defense cooperates with the government. The recipient of communications protected by the privilege cannot reveal them. Therefore, cross-examination of the cooperating witness may be limited to avoid revealing any protected communications. Nevertheless, the defense of the other members could be adversely affected. In United States v. Bicoastal Corp., No. 92-CR-261, slip op. at 13 (N.D.N.Y. Sept. 28, 1992), the court permitted the defendants to waive any potential conflict arising from a joint defense in which some members were granted immunity, and would be called as government witnesses. See also Arthur F. Mathews, *Assessing a New Ruling on Joint Defense*, NAT'L L.J., Nov. 23, 1992, at 16 (discussing the Bicoastal opinion).
204. 831 F.2d 1487 (9th Cir. 1987), cert. denied, 487 U.S. 1237 (1988).
defendant was part of a massive drug-importation conspiracy in which all of the defendants ultimately had separate counsel. One firm, however, acting on behalf of the leaders of the conspiracy, coordinated the defense and served as a conduit for all legal fees. The lead attorneys counseled the defendants to present a "united front" and may have presented a misleading picture of Allen's actual culpability in negotiating a plea bargain to protect other organizers.\textsuperscript{206} Although the Court of Appeals for the Ninth Circuit found that the defendant had not been adequately informed "of the gross conflicts underlying this joint representation," Allen subsequently withdrew his plea and was convicted after a trial in which he had independent counsel.\textsuperscript{206} The only remedy for a violation of the defendant's right to conflict-free counsel is a new trial, which Allen received. That remedy, however, is ineffective where the pre-indictment stage is the crucial period in which targets can seek to make favorable arrangements with the prosecutor in exchange for immunity or lighter punishment.

The joint defense privilege does not protect communications among the defendants or investigative targets outside the presence of their counsel, where those communications would not otherwise be covered by the attorney-client privilege. Statements that are not made in the presence of an attorney are not in connection with seeking legal advice, a condition for invoking the privilege.\textsuperscript{207} The government may seek to learn the content of discussions among joint defendants or targets and an attorney by arguing that there was no agreement, or that there was no intention to keep the communications confidential, but that is a doubtful proposition because experienced defense counsel will reach an agreement before permitting such a meeting. A joint defense agreement does not preclude the prosecution from using a cooperating defendant or target to contact others seeking incriminating statements. The problem arises where a cooperating witness who is also a member of the joint defense becomes privy to the defense strategy.

The prosecutor may not intentionally "invade the defense camp" for information, but the Supreme Court recognized in \textit{Weatherford v.}
Bursey\textsuperscript{208} that the government can authorize a cooperating witness to attend a meeting with counsel for other defendants to maintain the witness's cover. \textit{Weatherford} requires that a defendant show prejudice arising from the government having an informant attend a meeting with the defense attorney to constitute a violation of the Sixth Amendment right to counsel.\textsuperscript{209} In \textit{United States v. Mastroianni},\textsuperscript{210} an unindicted informant attended a meeting with counsel for a defendant out of fear that revealing his cooperation would endanger his safety. The Court of Appeals for the First Circuit held that the government bears the burden of proving the necessity of the informant's attendance at the meeting to avoid a finding of a Sixth Amendment violation. Even if the informant may attend the meeting, the government cannot use that opportunity to learn about the issues discussed and the direction of the defense.\textsuperscript{211}

Courts are split on determining the quantum of prejudice the defendant must show from a government informant's attendance at meetings with defense counsel to constitute a violation of the Sixth Amendment. In \textit{United States v. Hernandez},\textsuperscript{212} the Court of Appeals for the Ninth Circuit found that a cooperating defendant's participation throughout the planning stages of a joint defense did not rise to the level of a Sixth Amendment violation because the informant did not learn anything of import about the defense and therefore any information passed to the government could not have prejudiced the other defendants.\textsuperscript{213} Despite the court of appeals' conclusion, the timing of the frequent contacts between the informant and government agents, and the denials that they ever discussed the pending case, appear curious.\textsuperscript{214}

\begin{enumerate}
\item[208.] 429 U.S. 545 (1977).
\item[209.] \textit{Id.} at 558 (stating that, unless there is "at least a realistic possibility of injury to [the defendant] or benefit to the state, there can be no Sixth Amendment violation").
\item[210.] 749 F.2d 900 (1st Cir. 1984).
\item[211.] \textit{Id.} at 906-07. The court criticized the government for debriefing the informant after the meetings as an unjustified intrusion into the attorney-client privilege. \textit{Id.} at 907. The Justice Department's proposed rule on communications with represented persons would prohibit any communication of information about the defense to the prosecutors or investigative agents. \textit{See} 57 Fed. Reg. 54737, 54743 (1992) (to be codified at 28 C.F.R. \textsection 77.8(b)) (proposed Nov. 20, 1992).
\item[212.] 937 F.2d 1490 (9th Cir. 1991).
\item[213.] \textit{Id.} at 1494; \textit{see also} United States v. Posner, 637 F. Supp. 456, 459 (S.D. Fla. 1986) (holding that meetings with a co-defendant and his attorney, who were parties to a joint defense agreement, were not an "egregious or shocking intrusion by the government into [the] attorney-client relationship" when the information gained was innocuous and repetitive).
\item[214.] The court of appeals noted that the cooperating defendant "was in frequent contact with" government agents throughout the time the defendant or his counsel participated in joint strategy sessions. \textit{Hernandez}, 937 F.2d at 1492.
\end{enumerate}
That illustrates the problem defendants face in proving prejudice because there is rarely any direct evidence that the government purposefully sought information about the defense or the effect at a trial in which the defendants have been convicted.

The Court of Appeals for the D.C. Circuit, on the other hand, held that "[m]ere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is . . . sufficient to establish detriment to the criminal defendant."215 The weakness of using a per se approach is that defendants or targets who suspect that a confederate might cooperate with the government will hold frequent meetings to discuss some aspect of the joint defense strategy in order to insulate themselves from the effect of an informer. If a confederate does not attend a meeting, that may signal the person has begun to cooperate; if everyone attends, then the defendants can be secure in the knowledge that the presence of an informer will establish a Sixth Amendment violation through a breach of the attorney-client privilege. As an intermediate position, the Court of Appeals for the First Circuit shifts the burden of proving the absence of prejudice to the government where the defendant can show that the confidential information was "conveyed as a result of the presence of a government informant at a defense meeting."216

Perhaps the easiest solution to the problem posed by having an informant attend a defense meeting is to isolate the information from the prosecutors assigned to the investigation by having another prosecutor debrief the informant and instruct her not to communicate information learned at the meeting to anyone else.217 Although burdensome, this procedure demonstrates the prosecution's good faith in trying to avoid any purposeful invasion of the defense camp. The joint defense privilege is an important shield, but it should not also be a sword by which the ringleaders of criminal enterprises can forestall the effective


217. See 57 Fed. Reg. 54737, 54743 (1992) (to be codified at 28 C.F.R. § 77.8(b)) (proposed Nov. 20, 1992) (stating that any information regarding defense strategy or trial preparation "shall not be communicated to attorneys for the government or to law enforcement agents who are participating in the prosecution of the pending criminal charges . . . ").
use of cooperating witnesses who can provide crucial evidence against them.

B. The Crime-Fraud Exception to the Attorney-Client Privilege

Although co-conspirators are a prime source of statements by participants in the illegal activity, communications by defendants and targets to their attorneys are also fertile ground for incriminating statements. The attorney-client privilege protects communications except where the client seeks advice in furtherance of a crime or fraud. With the advent of continuing relationships between lawyers and clients in providing advice to business enterprises, the potential for using an attorney as an unwitting, or even witting, participant in criminal activity increases. The shift in federal criminal prosecutions toward the pursuit of white collar crime creates a need to seek information from any source that can provide the details of how the transactions were structured and what the purpose of the activity was. The crime-fraud exception to the attorney-client privilege has become more important as attorneys play an increasing role in advising clients in business activities that may be the subject of a criminal investigation.218

The crime-fraud exception has roots as deep in the common law as the attorney-client privilege.219 It provides that "[c]ommunications otherwise protected by the attorney-client privilege are not protected if the communications are made in furtherance of a crime, fraud, or other misconduct."220 The exception only applies to pending or contemplated crimes or fraud and not to communications about completed acts for which a client seeks legal advice.221 The communication must be re-

218. See Earl J. Silbert, The Crime-Fraud Exception to the Attorney-Client Privilege and Work-Product Doctrine, the Lawyer's Obligations of Disclosure, and the Lawyer's Response to Accusation of Wrongful Conduct, 23 AM. CRIM. L. REV. 351 (1986) [hereinafter Crime-Fraud Exception] ("The government invokes [the crime-fraud exception] because lawyers have a prominent role in complex transactions in areas which are the subject of increasing criminal investigations, such as tax, banking, and securities.").


220. In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985). The exception also applies to attorney work-product that is related to the crime or fraud. See In re Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983); In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979).

221. Communications after the crime has been completed do not qualify for the exception even if they only memorialize communications with an attorney who participated in the crime. In In re Federal Grand Jury Proceedings, 938 F.2d 1578 (11th Cir. 1991), the Court of Appeals for the Eleventh Circuit held that "although communications otherwise covered by the attorney-client privilege lose their privileged status when used to further a crime or fraud, post-crime repetition or
lated to the illegal or fraudulent acts under consideration, although the
attorney need not be aware that the advice is in furtherance of an im-
proper scheme. The "in furtherance" requirement is liberally con-
strued by courts because the prosecution will not know the content of
the attorney-client communications and therefore cannot show conclu-
sively the connection between the legal advice and the alleged illegal
act. Nevertheless, the mere proximity in time between the communi-
cation with an attorney and the crime or fraud does not conclusively
establish the requisite connection to overcome the privilege.

The crime-fraud exception has expanded considerably due to the
growth of government regulation of business activity that results in
greater reporting requirements incorporating criminal penalties for fail-
ing to comply with the proper procedures or for supplying false infor-
mation. Not only can more acts be labelled "criminal" or "fraudulent,"
but lawyers play such a pervasive role in advising clients on complying
with or avoiding regulatory schemes that the opportunity to use legal
advice to commit an illegal act has increased correspondingly. Moreover,
the improper act does not have to be a violation of a specific crim-

discussion of such earlier communications . . . may still be privileged even though those earlier
communications were not privileged because of the crime-fraud exception.” Id. at 1582.

222. See In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co.), 731 F.2d 1032, 1038 (2d Cir. 1984) (stating that communications are excluded from the privilege "even if the
attorney is unaware that his advice is sought in furtherance of such an improper purpose"). The
person seeking legal advice need not even be a knowing participant in the crime or fraud if there
is a nexus between the communications and the illegal act. See Duttle v. Bandler & Kass, 127
F.R.D. 46, 53 (S.D.N.Y. 1989) (stating that crime-fraud exception applies to communications by
corporate personnel seeking legal advice on behalf of officers in connection with fraudulent scheme
by officers). The ethical problems that confront an attorney who discovers that a client is engaged
in an ongoing crime or fraud and is using the attorney to further an illegal act are analyzed in
Fried, supra note 219, at 490-98, and Crime-Fraud Exception, supra note 218, at 371-76.

223. See In re Grand Jury Investigation, 842 F.2d 1223, 1227 (11th Cir. 1987) (determining
whether communications relate to matters under investigation "must take into account that the
government does not know precisely what the material will reveal or how useful it will be").
The courts will accept a good faith statement by the prosecutor summarizing the grand jury evi-

dence that would demonstrate the connection between the attorney-client communications and the
alleged crime or fraud. See, e.g., id. at 1226; In re Vargas, 723 F.2d 1461 (10th Cir. 1983).

224. See In re Grand Jury Subpoena Duces Tecum, 798 F.2d 32, 34 (2d Cir. 1986) (stating
that the crime-fraud exception cannot be applied "merely upon a showing that the client commu-
nicated with counsel while the client was engaged in criminal activity"); In re Grand Jury Pro-
ceedings, 641 F.2d 199, 201 (5th Cir. Unit A Mar. 1981) (stating that, although proximity in
time may support strong suspicion of criminal activity, it is not enough to establish a prima facie
case of crime or fraud related to legal advice).

225. See Fried, supra note 219, at 470 (noting that the crime-fraud exception has expanded
because of the increased use of criminal penalties as sanctions and because of the increasing num-
ber of statutes that impose reporting requirements).
inal provision, and the act only has to be one objective of seeking the legal advice for the exception to apply. Therefore, the question of whether an alleged course of conduct qualifies as a crime or fraud is rarely at issue because the breadth of white collar criminal law encompasses most acts which are of questionable legality.

As prosecutors have more opportunities to raise the crime-fraud issue, the doctrine has evolved from determining whether the contemplated acts are crimes or fraud, to what measure of proof the party asserting the exception must proffer to establish that the communications are not privileged. The crime-fraud exception poses analytical problems because the communication itself is the best proof of whether the advice was in furtherance of a crime or fraud, yet the privilege must protect communications from being revealed or its value is severely diminished. The circularity in asserting that the communication is dispositive of whether the privilege applies to it is compounded by the fact that prosecutors arguing for the crime-fraud exception will necessarily have only a limited amount of information about the content of the discussions on which to move for disclosure. Without detailed knowledge of the communication, the issue arises as to how much specificity a court can require from the government to even entertain the question of whether the exception applies. The traditional rule is that the prosecution must make a prima facie showing of a crime or fraud and need not prove an illegal act beyond a reasonable doubt; but even that standard begs the question of what evidence the court can consider in determining whether there is a prima facie case.

In United States v. Zolin, the Supreme Court considered the propriety of in camera review of an attorney-client communication to determine whether the crime-fraud exception applied. The Court of Appeals for the Ninth Circuit in Zolin had followed its rule that the prosecution must adduce “independent evidence” of the alleged crime.

226. Marc Rich & Co., 731 F.2d at 1039; see also Finley Assocs. v. Sea & Pines Consol. Corp., 714 F. Supp. 110, 117-18 (D. Del. 1989) (stating that courts do not examine whether the elements of a particular crime are established, but whether instead there is a prima facie case “to believe any criminal or fraudulent activity occurred in the attorney-client relationship.”).


228. See In re Sealed Case, 754 F.2d at 399 (“[T]he government must first make a prima facie showing of a violation sufficiently serious to defeat the privilege . . . .”).

or fraud without reference to the communications at issue;\textsuperscript{230} the Supreme Court rejected that as too stringent. Instead, \textit{Zolin} provides that a district court may conduct an \textit{in camera} review of the questioned communication and consider it in determining whether the crime-fraud exception applies.\textsuperscript{231} The Court accepted the circularity inherent in the crime-fraud exception’s use of the communication to determine the applicability of the privilege to it. The Court then had to determine the requisite showing the prosecution must make to have a district court conduct an \textit{in camera} review.\textsuperscript{232}

\textit{Zolin} rejects a blanket rule permitting \textit{in camera} review upon request by the party opposing the privilege, finding that such a position would permit parties “to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents.”\textsuperscript{233} Instead, the Court requires that the prosecution provide a factual basis “‘adequate to support a good faith belief by a reasonable person’” that the \textit{in camera} review “may reveal evidence to establish the claim that the crime-fraud exception applies.”\textsuperscript{234} The Court noted that this preliminary standard is lower than the evidence necessary for the ultimate determination of whether the attorney-client privilege is overcome because of a crime or fraud.\textsuperscript{235} While \textit{Zolin} thus rejects the proposition that it is addressing the issue of what quantum of proof is necessary to vitiate a claim of privilege, the Court’s analysis of how much evidence must be introduced to have a district court conduct an \textit{in camera} review effectively resolves the issue of what proof is sufficient to establish the application of the crime-fraud exception.

Once the government provides enough of a factual basis to meet the good faith belief threshold,\textsuperscript{236} then the \textit{in camera} review itself will

\begin{itemize}
\item \textsuperscript{230} \textit{Id.} at 560-61.
\item \textsuperscript{231} \textit{Id.} at 574-75. The Court rejected the rule enunciated by the Ninth Circuit in United States v. Shewfelt, 455 F.2d 836 (9th Cir.), \textit{cert. denied}, 406 U.S. 944 (1972), as inconsistent with the policies underlying the attorney-client privilege because an absolute bar against \textit{in camera} review without independent evidence imposed costs that were “intolerably high.” \textit{Zolin}, 491 U.S. at 569.
\item \textsuperscript{232} The Court specifically avoided deciding the question of what quantum of proof is necessary to establish the crime-fraud exception. \textit{Zolin}, 491 U.S. at 563.
\item \textsuperscript{233} \textit{Id.} at 571.
\item \textsuperscript{234} \textit{Id.} at 572 (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)).
\item \textsuperscript{235} \textit{Id.}
\item \textsuperscript{236} The Court of Appeals for the Ninth Circuit has held that a district court considering whether the government has met the minimal threshold should engage in “some speculation” to determine whether the crime-fraud exception exists. \textit{See In re Grand Jury Investigation}, 974 F.2d 1068, 1073 (9th Cir. 1992).
\end{itemize}
frequently provide the evidence formerly unavailable to satisfy the burden of finding the crime-fraud exception. If the communication is not incriminating, then there is no prima facie case of a crime or fraud, but the government is not hurt because the statement would not provide any additional information for the investigation or aid in prosecuting the client or attorney. If the communication is incriminating, then there is a prima facie showing of a crime or fraud. Under these circumstances, a court will, in all likelihood, be more willing to find that the "in furtherance" requirement has been satisfied than it would have been without seeing the communication. By lowering the threshold for permitting in camera review, Zolin makes it more likely that the prosecution will be able to bring attorney-client communications before the district court, and increases the possibility of overriding the attorney-client privilege.

Zolin does not, however, invite wholesale attacks on client consultations with counsel. At the pre-indictment stage, seeking to compel testimony by an attorney, and the resultant litigation, imposes a burden on scarce prosecutorial resources that diverts attention from the investigation and may cause an extensive delay without any reasonable assurance of a commensurate benefit. Moreover, the time-consuming nature of the litigation involved in deciding the issue may cause the government to run the risk of losing prosecutable transactions under the statute of limitations since white collar investigations often take place well after the completion of the transaction. Prosecutors are more likely to pursue efforts to overcome the attorney-client privilege where they have a sound basis for concluding that the communications revealed will substantially advance the case, rather than engage in fishing expeditions.

Although the lower threshold may increase the likelihood that prosecutors will seek to learn the content of client contacts with lawyers, that does not in and of itself demonstrate that there will be abuses. As the Court noted in a similar context in Caplin & Drysdale, the fact that a prosecutor could abuse the power to seek to have an attorney testify about client communications under the crime-fraud exception does not undermine the rationale of the rule. Zolin only establishes the evidentiary threshold for the district court to conduct an in camera review, but does not invest a new power in the government to seek information from attorneys.237

The increased availability of the crime-fraud exception may have a strong effect on the use of joint defense agreements. If the government can make the requisite showing that the conduct of the joint defense was designed to obstruct an investigation, which is a criminal act, then the communications among the attorneys and with the clients could be open to examination insofar as they relate to the alleged obstruction. If one of the parties to the joint defense agrees to cooperate with the government’s investigation, then that person can provide information to meet the initial good faith belief requirement to have the district court consider an in camera submission of the communications relating the existence of a crime or fraud. Although an individual member of a joint defense may not reveal in court confidences that arise from the common effort, the crime-fraud exception can vitiate any claim of privilege for all members of the joint defense. The benefit of the joint defense agreement in holding the participants together is undermined to the extent that a goal of the common effort is to obstruct a governmental investigation.

C. Nonprivileged Information: Subpoenas to Attorneys for Client Identity and Fee Information

Not all information related to the attorney-client relationship qualifies as privileged and protected from disclosure in the absence of a waiver. Courts recognize a general rule that the identity of a client and fee arrangements are not protected as privileged, although the rationale for that conclusion is not entirely clear. The client’s identity and fee information may not involve any communication with the lawyer, failing a requirement of the attorney-client privilege, although that is certainly not always the case. For example, the attorney’s fee may be paid by a wire transfer that identifies the party sending the funds, but there is no possible client communication relating to the transfer of funds between financial institutions. The client also may not intend that communication on those topics be accorded any confidentiality, but there are certainly plausible instances where maintaining confidentiality is of the utmost importance. The very fact that one has retained counsel, and even the practice specialty of that attorney, may be highly suspi-

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note 219, at 473 (stating that recent emphasis on white collar crime “presents prosecutors with new temptations to make the examination of attorneys an integral part of their investigations”). Given the degree to which lawyers are involved in business transactions that may be the subject of white collar investigations, it would be surprising if prosecutors ignored them as a source of information.
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ocious; therefore, any transaction could entail a significant communication that a client wants to be considered confidential. Although the issue of client identity and fee information has a degree of simplicity surrounding it, it has in fact been the subject of increased scrutiny to determine the scope of the rule and whether there are instances where a court can prohibit disclosure to the prosecution.

Information about client identity and fee arrangements may be of particular interest to a prosecutor where an undisclosed third party is paying the fees for one or more defendants or targets of an investigation, a situation arising quite frequently in large scale drug distribution schemes. Similarly, the source and amount of an attorney's fee can be important in white collar investigations where the target may be trying to hide assets or launder proceeds of illegal activity. The usual means to learn the client's identity and any fee arrangements is to subpoena the attorney to the grand jury investigating the matter for questioning limited to areas outside the scope of the attorney-client privilege. Unlike the crime-fraud exception, the government need not meet any evidentiary threshold to compel disclosure of the information. The use of grand jury subpoenas to attorneys has grown in use, and has been decried by commentators as placing an unfair burden on the attorney-client relationship by turning lawyers into informants about their clients.²³⁸

²³⁸ See Attorney-Client Relationship, supra note 25, at 237 (arguing that the disclosure of information deters formation of the attorney-client relationship, imposes ethical dilemmas on attorneys, and "skews the adversary system through ad hoc disqualification" that outweighs any gain from the disclosure); Stern & Hoffman, supra note 25, at 1830 ("[A] regime that grants prosecutors the virtually uninhibited power to destabilize or destroy the legal representation of an adversary, by the simple means of a well-aimed subpoena, is inconsistent with the fundamental tenets of our legal system.").

The U.S. Department of Justice has promulgated policy guidelines for issuing subpoenas to attorneys for information relating to the representation of a client. The policy requires inter alia that the prosecutor (1) attempt to obtain the information from other sources, (2) seek to obtain the information voluntarily, and (3) receive approval from the assistant attorney general of the Criminal Division before issuance of the subpoena. U.S. Atty's Manual, supra note 163, § 9-2.161(a). Although the policy does not create an enforceable right for attorneys or their clients, it does limit federal prosecutors' ability to seek information from attorneys through the use of subpoenas, and recognizes the potential adverse effects a subpoena may have on the attorney-client relationship. See id.; see also In re Grand Jury Matter, 789 F. Supp. 693, 696 (D. Md. 1992) (stating that the Justice Department guidelines adequately protect against the abuse of subpoena power directed against attorneys). Stern and Hoffman criticize the policy for, among other things, distinguishing between subpoenas for privileged and nonprivileged information, such as client identity and fee arrangements. Stern & Hoffman, supra note 25, at 1820. The Justice Department policy does not distinguish between the types of information, but instead covers all subpoenas to attorneys for "information relating to the representation of a client," regardless of whether that
Courts have struggled to find an analytically clear means to place some limits on the prosecution's right to learn the identity of clients and fee arrangements without substantially altering the rule that such information is not privileged. The initial focus was on the incriminatory nature of the information, that revealing the client's identity would effectively incriminate the person.\textsuperscript{239} The weakness of the incrimination approach is that the inculpatory nature of the information is irrelevant to the applicability of the attorney-client privilege. The privilege assumes that certain communications between a lawyer and client may implicate the person in a crime, yet the communication is privileged \textit{because} the benefit of seeking legal counsel outweighs the burden of shielding incriminating information.\textsuperscript{240}

The Court of Appeals for the Fifth Circuit sought to refine the incrimination analysis by proposing the "last link" exception to the general rule that client identity and fee information was not privileged: The attorney need not reveal the information "when the disclosure of [his] client's identity . . . would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment."\textsuperscript{241} The last link rule confined the incrimination analysis by requiring that the information lead directly to an indictment of the client rather than leaving the degree of incrimination open. Focusing on the "links" in an evidentiary chain, however, only confuses the analysis because it encourages the government to seek the information earlier in an investigation, so that it is not the final connection leading to an indictment. Moreover, the rule makes no reference to the requirements for protecting communications under the attorney-client privilege. Whatever its initial appeal, courts have rejected the incrimination rationale as a basis for protecting client identity and fee information from disclosure.\textsuperscript{242}

\textsuperscript{239} See United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977) ("A client's identity and the nature of that client's fee arrangements may be privileged where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought.").


\textsuperscript{241} In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. Unit A 1982).

\textsuperscript{242} See In re Grand Jury Subpoena, 913 F.2d 1118 (5th Cir. 1990) [hereinafter Reyes-Requena I] (stating that Pavlick did not create a last link analysis independent of the privileged communications with attorney), cert. denied, 111 S. Ct. 1581 (1991); In re Grand Jury Proceeding, 898 F.2d 565, 567 (7th Cir. 1990) (stating that "incrimination has been rejected as a sufficient basis for invoking the privilege."); Torney v. United States, 840 F.2d 1424, 1427 (9th Cir. 1988) (stating that incrimination rule adopted in Hodge & Zweig is dictum and is thus given no
The analysis for compelling disclosure of client identity and fee arrangements has shifted recently to a renewed focus on the principles of the attorney-client relationship, that the privilege "shields the identity of a client or fee information only where revelation of such information would disclose other privileged communications such as the confidential motive for retention." To protect the client's identity and fee arrangements, the client must first meet the basic requirement of the privilege: that one has entered into an attorney-client relationship with a lawyer. In *In re Grand Jury Subpoena (Reyes-Requena)*, the Court of Appeals for the Fifth Circuit found that an undisclosed benefactor who paid the legal fees of an attorney's client had a prior attorney-client relationship with the lawyer, and the client had sought the legal advice for the purpose of paying the legal fees. The confidentiality of the client's identity was "inextricably" related to the purpose of seeking legal advice, and therefore compelling disclosure of the identity would reveal the confidential communications. In *In re Grand Jury Proceedings*, the Court of Appeals for the Eleventh Circuit found that compelling disclosure of client identity and fee information would not reveal confidential communications where the client had retained the attorney in a separate matter, and the payment of attorney fees for

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243. *Reyes-Requena I*, 913 F.2d at 1125; *see also In re Grand Jury Subpoena*, 926 F.2d 1423, 1431 (5th Cir. 1991) ("We protect the client's identity and fee arrangements in such circumstances not because they might be incriminating but because they are connected inextricably with a privileged communication—the confidential purpose for which he sought legal advice."); *Grand Jury Proceeding*, 898 F.2d at 568 (7th Cir. 1990) (holding that incriminating information may be shielded by privilege when it is an integral part of a confidential communication); *In re Grand Jury Proceedings*, 896 F.2d 1267, 1283 (11th Cir.) (stating that the last link doctrine protects identity when disclosure would reveal other privileged communications such as motive or strategy), vacated as moot as stated in 904 F.2d 1498 (11th Cir. 1990) (en banc). *But see In re Shargel*, 742 F.2d 61, 64 (2d Cir. 1984) ("[I]dentification of . . . clients . . . neither discloses nor implies a confidential communication.").

244. 926 F.2d 1423 (5th Cir. 1991) [hereinafter *Reyes-Requena II*].

245. *Id.* at 1431. The court of appeals rejected the government's argument that it only sought the client's identity and not confidential communications because the reason for sending the subpoena to the lawyer was to broaden the investigation of the drug conspiracy for which the defendant had been charged. *Id.* at 1432; *see also In re Grand Jury Proceedings*, 946 F.2d 746, 748 (11th Cir. 1991) (protecting client identity where client sought legal advice on own culpability and to pay fee of another client indicted in drug conspiracy); *Grand Jury Proceeding*, 898 F.2d 565, 567 (7th Cir. 1990) (protecting client identity where fee payer sought advice from lawyer in advance of representation of defendant for whom fee paid).

246. 899 F.2d 1039 (11th Cir. 1990).
the client by a third party did not of itself reveal any other communication, motive or strategy of the client.\textsuperscript{247} 

The typical situation in which an anonymous third party pays a defendant's legal fees involves drug distribution schemes in which the government believes that the organizers are paying the defense costs of lower-level participants as a type of "fringe benefit" to protect themselves from being implicated.\textsuperscript{248} Learning the anonymous benefactor's identity will permit the prosecution to expand its investigation and argue to the defendants that they should cooperate against the ringleaders because the government already knows who they are. To prevent the court from compelling disclosure of her identity the benefactor must prove that she has an attorney-client relationship that involves communications about the criminal activity with the attorney who also represents a defendant or investigative target. Under \textit{Wheat}, the prosecution could seek the attorney's removal from the case because of a conflict of interest in representing two participants in a crime who may have adverse positions, especially where it may be in the defendant's interest to cooperate with the government by revealing the identity of the scheme's organizers in exchange for a reduced punishment. If the court finds a conflict and orders the attorney to cease representing the defendant or target, then the anonymous benefactor no longer controls the defense and runs the risk of having the defendant cooperate with the government by supplying information about the organizers.\textsuperscript{249} The requirement that the undisclosed benefactor demonstrate a pre-existing attorney-client relationship may ultimately work to her detriment if the goal is to maintain control of the defense, because the exception from disclosure of client identity virtually requires that an attorney represent two clients with potentially conflicting interests.

The disclosure of fee arrangements can also be attacked by the government under the crime-fraud exception. If the payment is more than $10,000 in cash, then the attorney must report the payment to the

\textsuperscript{247} Id. at 1044.

\textsuperscript{248} See, e.g., United States v. Allen, 831 F.2d 1487, 1490 (9th Cir. 1987) (stating that the defendants were instructed to contact a law firm if arrested and the fees were paid by unidentified person in cash), \textit{cert. denied}, 487 U.S. 1237 (1988); United States v. Hodge & Zweig, 548 F.2d 1347, 1354 (9th Cir. 1977) (explaining that co-conspirators would provide bail and legal expenses for those who might be arrested).

\textsuperscript{249} If the client has any contact with the new attorney, that communication cannot be privileged unless the client forms an attorney-client relationship with the new attorney, forcing the government to again argue that the new attorney has a conflict of interest.
Internal Revenue Service. Failure to properly report cash payments could be argued to constitute a crime or fraud, undermining any claim that the communication inherent in the payment is confidential. Similarly, if the proceeds used to pay the lawyer are from the illegal activity, then the prosecution may argue that the funds are being hidden as part of an ongoing conspiracy and the payment is a facet of the crime. In \textit{In re Grand Jury Proceedings}, Chief Judge Tjoflat of the Court of Appeals for the Eleventh Circuit argued in a concurrence that the exception from disclosure of client identity and fee arrangements is inherently inconsistent with the crime-fraud exception and "wholly indefensible." Because the crime-fraud exception covers a multitude of reporting statutes, many of which relate to reporting the proceeds of business transactions and maintaining proper records, he concluded that "when the client has been charged with misconduct involving pecuniary gain and the client obviously has paid his attorney's fees in cash, the two-prong showing required to invoke the crime/fraud exception should be satisfied."

Although Chief Judge Tjoflat is correct that in many instances a prima facie case for a crime can be shown in connection with large cash payments, that does not automatically undermine the attorney-client privilege inherent in the analysis of whether disclosure will also reveal confidential communications. The better understanding is that the exception created by the courts for protecting client identity and

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250. See 26 U.S.C. § 6050I (1988). The IRS requires persons to file Form 8300, which contains the cash payor's name and other identifying information, when they receive more than $10,000 in cash in the course of a trade or business. \textit{Id.; see also United States v. Leventhal}, 961 F.2d 936, 940-41 (11th Cir. 1992) (enforcing IRS summons for information identifying clients related to cash payments, and rejecting argument that providing information would violate the attorney-client privilege); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 504-07 (2d Cir. 1991) (enforcing IRS summonses to identify clients who paid over $10,000 in cash, and rejecting arguments that disclosure would violate the defendant's Sixth Amendment right to counsel and the attorney-client privilege).

251. It is interesting to note that the money laundering statute specifically exempts "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" from the monetary transactions greater than $10,000 involving proceeds of unlawful activity that can be prosecuted. 18 U.S.C. § 1957(f)(1) (1988). The provision's meaning is unclear because the Sixth Amendment right to counsel has been limited under \textit{Caplin & Drysdale} and \textit{Wheat}, and a prosecutor could argue that a payment to an attorney that exceeds $10,000, and which is made with illicit funds, is illegal because "preserving" the right to counsel does not necessarily permit the client to have the counsel of choice.

252. 896 F.2d 1267 (11th Cir.), \textit{vacated as moot as stated in} 904 F.2d 1498 (11th Cir. 1990) (en banc).

253. \textit{Id.} at 1279 (Tjoflat, C.J., concurring).

254. \textit{Id.} at 1281 (Tjoflat, C.J., concurring).
fee arrangements is only a narrow extension of the attorney-client privilege that remains subject to the broad applicability of the crime-fraud exception. The client identity and fee arrangements analysis is in fact not an exception, but an \textit{interpretation} of the privilege that does not rest on the incriminating nature of the underlying communications.\textsuperscript{285}

The courts have been unwilling to extend the protection of the Sixth Amendment right to counsel to prohibit prosecutors from subpoeanining lawyers for information about their present or former clients. In \textit{In re Grand Jury Matter},\textsuperscript{286} the Court of Appeals for the Third Circuit rejected, as improperly impairing the grand jury's investigatory function, an attorney's argument that the court impose a requirement on prosecutors to demonstrate that the attorney is the only practical source of the information before the subpoena can issue. The court noted that "[s]uch a requirement would bring investigators to intermittent standstills as the government set out to prove the necessity of each piece of information it sought to obtain."\textsuperscript{287} All other courts of appeals have similarly rejected calls from attorneys and their clients to use their supervisory powers to require prosecutors to seek judicial approval of subpoenas for lawyers for information related to their clients.\textsuperscript{288} Massachusetts, however, has enacted a local rule that is applicable to federal prosecutors requiring that they seek prior judicial approval of subpoenas to attorneys; the Court of Appeals for the First Circuit, sitting \textit{en banc}, affirmed the local rule by an equally divided court.\textsuperscript{289}

\begin{footnotesize}

\textsuperscript{285} See \textit{In re Grand Jury Matter} No. 91-01386, 969 F.2d 995, 998 (11th Cir. 1992) (requiring attorney to identify client who paid fee with counterfeit currency, and rejecting last link argument because payment was not related to any confidential communications).

\textsuperscript{286} 906 F.2d 78 (3d Cir.), cert. denied, 111 S. Ct. 509 (1990).

\textsuperscript{287} Id. at 431-32 (citing \textit{In re Grand Jury Proceedings}, 862 F.2d 430, 431-32 (2d Cir. 1988)).

\textsuperscript{288} \textit{In re Grand Jury Matter}, 926 F.2d 348, 350 (4th Cir. 1991); United States v. Anderson, 906 F.2d 1485, 1496 (10th Cir. 1990); \textit{In re Grand Jury Proceedings}, 862 F.2d 430, 432 (2d Cir. 1988); United States v. Perry, 857 F.2d 1346, 1348-49 (9th Cir. 1988); \textit{In re Grand Jury Proceedings}, 791 F.2d 663, 666 (8th Cir. 1986); \textit{In re Klein}, 776 F.2d 628, 635-36 (7th Cir. 1985); \textit{In re Grand Jury Proceedings}, 754 F.2d 154, 156 (6th Cir. 1985); \textit{In re Grand Jury Proceedings}, 708 F.2d 1571, 1575 (11th Cir. 1983).

\textsuperscript{289} Mass. Sup. Jud. Cr. R. 3:08; United States v. Klubock, 832 F.2d 649 (1st Cir. 1987), \textit{aff'd by an equally divided ct.}, 832 F.2d 664 (1st Cir. 1987) (en banc) (per curiam). The Massachusetts rule was enacted by the state's highest court and incorporated by the U.S. District Court for the District of Massachusetts into its local rules. Klubock, 832 F.2d at 650 & n.3. The supreme courts of Tennessee and Virginia also adopted rules similar to the Massachusetts provision, but the United States district courts in those states have not incorporated them into their local rules. See Stern & Hoffman, \textit{supra} note 25, at 1821.

\end{footnotesize}
cuit by rejecting a similar rule for federal prosecutors in Pennsylvania, holding that the local rule is beyond the district court's rulemaking power, and that enforcement of the state law requirement would violate the Supremacy Clause.\footnote{260}

\section*{D. Informants and Represented Witnesses: The Limits of the Ethical Rules}

The Sixth Amendment has been interpreted by the Supreme Court to attach only at the commencement of legal proceedings against a defendant, and courts have resisted attempts to extend the protection of the right to counsel to the pre-indictment stage of an investigation. The fact that a witness is represented by counsel, even if known by the prosecutor, does not mean that the government is constitutionally required to have the attorney present at all contacts with the person. DR 7-104(A)(1) of the Model Code of Professional Responsibility provides that a lawyer may not contact a party known to be represented by counsel without the prior consent of counsel, or unless authorized by law to contact the party.\footnote{261} Defense attorneys have argued that the ethical rules prohibit contact with represented witnesses and targets by prosecutors, including indirect contact through investigatory agents and cooperating witnesses, even if the Sixth Amendment does not have a coextensive reach. What the Constitution may permit can arguably be...

\footnote{260. Baylson v. Disciplinary Bd., 975 F.2d 102, 104 (3d Cir. 1992) (adopting the rationale of the dissenting opinion of Chief Judge Campbell in \textit{Kluckock}). The District Court for the Eastern District of Pennsylvania had also rejected the rule, and criticized the First Circuit's decision as "an orphan in the federal system, and it will not find a relative here." Baylson v. Disciplinary Bd., 764 F. Supp. 328, 343 (E.D. Pa. 1991).

261. DR 7-104(A)(1) of the American Bar Association (ABA) Model Code of Professional Responsibility provides:

\begin{quote}
During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.
\end{quote}

The ABA's Model Rules of Professional Conduct, which have been adopted by approximately one-half of the states, has a similar provision, Model Rule 4.2, which provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." There is no substantive difference between DR 7-104 and Model Rule 4.2, and the cases raising the question of the ethical rules' scope in criminal investigations invariably focus on DR 7-104. \textit{See} Bruce A. Green, \textit{A Prosecutor's Communications with Defendants: What Are the Limits?}, 24 CRIM. L. BULL. 283, 284 n.5 (1988) (stating that there is no reason to expect that language of Model Rule 4.2 will result in different analysis from DR 7-104).}
restricted by the guidelines of the profession to limit the investigative tactics available to the prosecution.

The ethical rules apply to all prosecutors, but it is questionable whether DR 7-104(A)(1) reaches pre-indictment contacts with a represented person because the rule specifically restricts contact with a "party." The Supreme Court's Sixth Amendment analysis limits the right to counsel to the initiation of criminal charges or an arrest, at which time a person becomes a party in an action. A number of court of appeals have held that pre-indictment, non-custodial contacts with represented persons do not violate the ethical rules because they do not apply.262 Prosecutors may be prohibited from contacts with represented persons where the meeting involves a custodial situation without the presence or consent of retained counsel.263 The Court of Appeals for the Second Circuit, however, held in United States v. Hammad264 that the Constitution ensures only minimal safeguards, not the limit of what the law provides to protect defendants, and that DR 7-104's applicability was not limited to the moment of an indictment, because the rule is not simply coextensive with the Sixth Amendment.265

In Hammad, the prosecutor had issued a "sham" subpoena to an informant to use as a cover in initiating discussions with the defendant that were taped. DR 7-104(A)(1) permits contacts with parties when

262. See United States v. Ryans, 903 F.2d 731, 740 (10th Cir.) (holding that DR 7-104(A)(1) does not apply "during the investigative process before the initiation of criminal proceedings."); cert. denied, 111 S. Ct. 152 (1990); United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986) ("Rule 7-104 was never meant to apply" to pre-indictment, non-custodial taping of defendant); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.) (holding that the pre-indictment use of an informant to contact a represented person was not a rule violation); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.) (stating that investigative techniques at pre-indictment stage do not implicate problems addressed by the ethical rules); cert. denied, 452 U.S. 920 (1981); United States v. Lemonakis, 485 F.2d 941, 955 (D.C. Cir. 1973) (holding that the ABA Model Code does not apply to taping by informant before indictment of defendant), cert. denied, 415 U.S. 989 (1974); see also Marc A. Schwartz, Note, Prosecutorial Investigations and DR 7-104(A)(1), 89 COLUM. L. REV. 940, 952 (1989) (arguing that best approach is to acknowledge that DR 7-104(A)(1) "simply should not apply at all to prosecutorial investigations, thus freeing prosecutors from the threat that the fruits of their work will be suppressed because of undefined but nevertheless 'unethical' conduct").


265. Id. at 838-39. The court noted that prosecutors substantially control the timing of indictment, and therefore to limit the rule to the handing up of an indictment could allow the government to "manipulate grand jury proceedings to avoid its encumbrances." Id. at 839.
the attorney is "authorized by law," and the court found that "the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization." Nevertheless, the court found that the use of a false subpoena designed to "create a pretense that might help the informant elicit admissions from a represented suspect" constituted misconduct that is not authorized by law and violated the prosecutor's ethical duty.

Whatever the merits of its analysis of the applicability of DR 7-104(A)(1) to pre-indictment non-custodial contacts with represented persons, 

Hammad has been rendered essentially meaningless by subsequent decisions. In United States v. Infelise, the United States District Court for the Northern District of Illinois found no violation of DR 7-104(A)(1) where the prosecutor issued a valid but unnecessary subpoena to an informant to permit him to discuss the investigation with the defendant. The subpoena in Infelise is virtually identical to the one issued in Hammad, except that the Court of Appeals for the Second Circuit chose to treat it as a "sham" while the district court found that it was only "unnecessary." In United States v. Ryans, the Court of Appeals for the Tenth Circuit held that issuance of a subpoena to an informant was an acceptable investigative technique, even if the subpoena was unnecessary to compel the informant's appearance before the grand jury. The Ryans court noted that permitting contacts with represented persons may result in some interference with the attorney-client privilege, but it found that the white collar rationale of preserving effective law enforcement outweighed that interest. Two decisions by district courts in the Second Circuit limited Hammad by permitting the government to record conversations with investigative targets even though counsel had requested that all contacts be made through the attorney.

The approach taken by the courts after Hammad is similar to that

266. Id.
267. Id. at 840.
270. Id. at 740; see also Green, supra note 261, at 319 ("To the extent that DR 7-104(A)(1) cuts back on prosecutorial and police questioning of represented suspects and defendants, it substantially undermines the important societal interest in the enforcement of criminal laws.").
taken by the Supreme Court in the Sixth Amendment right to counsel cases where the Court exhibited its mistrust of using lawyers as a shield for ongoing criminal activities. Extending the ethical rules to create an absolute bar on contacts with any represented person will permit criminal enterprises to use attorneys as a layer of protection against an effective law enforcement tactic, the undercover informant, without advancing the interests of preserving the adversarial process. Indeed, the pre-indictment stage is outside the adversarial process, making any expansion of the right to counsel questionable.272 Even if the contact were to violate DR 7-104(A)(1), there is no obvious remedy available to cure the violation. Defendants have argued for excluding the evidence resulting from the contact, but that result is extreme in comparison to the type of violation that occurred. In United States v. Morrison,273 the Supreme Court held that the remedy for Sixth Amendment violations must be tailored to cure the prejudice, if any, that results from the violation, rejecting an exclusionary rule.274 Violations of the ethical rules certainly do not rise to the level of breaches of a defendant's constitutional rights, yet adoption of an exclusionary rule would invest defendants with greater rights than they have under the Sixth Amendment, through a set of rules that have not been adopted by Congress and which may arguably not even apply to criminal investigations. It is anomalous that defendants can attempt to use a set of rules designed to govern the conduct of the legal profession to create rights that the Supreme Court has refused to accord them.275

272. See L. Eric Johnson, The Impact of Disciplinary Rule 7-104 on Law Enforcement Contact with Represented Persons, 40 Kan. L. Rev. 63, 69-70 (Criminal Procedure Ed. 1992) (arguing that the liberal application of DR 7-104 threatens to render irrelevant a large portion of the Fifth and Sixth Amendment case law concerning right to counsel).


274. Id. at 365-66.

275. See Schwartz, supra note 262, at 954 (stating that, if suppression is the appropriate remedy, DR 7-104(A)(1) provides defendants with a broader right to counsel than the Constitution because the rule cannot be waived). Professor Green argues that courts should not interpret the ethical rules as if they are statutes to determine the drafters' intent, but should identify the interests that the rule is designed to protect in determining its application to criminal investigations. See Green, supra note 261, at 314-19. But see United States v. Lopez, 765 F. Supp. 1433, 1463-64 (N.D. Cal. 1991) (using supervisory powers to order dismissal of indictment for violation involving post-indictment contact with defendant without informing counsel). The court in Lopez found that the prosecutor misled a magistrate in seeking permission to meet with the defendant without informing his counsel. Id. at 1442. That may explain why the court found the violation sufficiently egregious to order dismissal. Lopez demonstrates that courts should directly address the prosecutorial misconduct issue without using the ethical rules as a type of statutory basis to order a remedy.
Arguments concerning the application of DR 7-104(A)(1) to the prosecutor's conduct of criminal investigations are misleading because the real issue is one of prosecutorial misconduct. *Hammad* even uses the phrase "egregious misconduct" in describing the types of acts that are not authorized by law. The ethical rules provide a convenient facade to argue that prosecutors have overstepped the proper bounds for investigating criminal activity. The need to gather incriminating statements from targets in white collar investigations has heightened the tension between defense counsel and prosecutors because the government seeks direct contact with the targets outside the presence of counsel. The proper focus should be on whether the government's conduct has breached the standard of fundamental fairness, constituting a violation of the defendant's due process rights, and not whether a rule created by the legal profession can be stretched to prevent prosecutors from adapting traditional investigative techniques to the developing realm of white collar criminal investigations.276

IV. CONCLUSION

Although courts have avoided bright-line rules in considering the array of investigatory tactics prosecutors and investigative agents apply to white collar investigations, they are clearly sympathetic to arguments that extending the constitutional rights of investigative targets and defendants to the pre-indictment stage will hamper the successful prosecution of complex economic crimes. The acceptance of the white collar rationale as a basis to permit the government to seek incriminating statements from participants, and to limit the privilege against self-incrimination, means that the cases will continue to be decided generally in favor of the government. For example, while *Hammad* appears to grant a degree of protection to represented targets, the decision is a dead-letter. If *Hammad* were taken to its logical extreme, it would prevent informants from using virtually any ruse to provide cover and entice an investigatory target into making potentially incriminating statements. If the courts change their emphasis away from considering the

276. The Justice Department's proposed rules concerning prosecutorial contacts with represented persons generally permit contacts at the pre-indictment stage and strongly limit them after the initiation of criminal proceedings. "The proposed rules, therefore, are intended to strike an appropriate balance between the need to protect the attorney-client relationship from unnecessary intrusion and the need to preserve the ability of government attorneys to conduct legitimate law enforcement activities." 57 Fed. Reg. 54,737, 54,740, 54,742 (1992) (to be codified at 28 C.F.R. pt. 77) (proposed Nov. 20, 1992).
need for effective enforcement of economic criminal laws, then defendants will have a better chance of arguing in favor of extending the protections of the Fifth and Sixth Amendments.

A more subtle issue that the cases raise is whether the courts are more solicitous of lawyers than police officers when questions are raised about investigatory tactics. The shift from street crime cases to white collar and drug distribution cases means that prosecutors are often the principal players for the government, and the defendants and witnesses tend to be more sophisticated business people represented by highly skilled private attorneys. Arguments that the government has treated a client unfairly may be less readily acceptable given the large role attorneys play on both sides. The appeal to equity does not have the same resonance, so the courts may be less willing to expand the scope of constitutional protections that appear to hamper the government while shielding a group that has little real need of an added layer of protection. The courts may also believe that the presence of lawyers on both sides means there are fewer opportunities for outrageous conduct, therefore limiting the pressure to create institutional changes in the conduct of white collar investigations. Defendants would likely argue that the conduct is only subtler, but no less outrageous. Nevertheless, the trend continues in favor of the government in conducting investigations because the white collar rationale retains its appeal. Production of business records and the ability to seek incriminating statements from investigative targets and defendants will not become less important in the conduct of white collar investigations, so the need to permit effective law enforcement will continue as an overriding concern in considering claims that the government has transgressed the rights of those who participated in the series of events under investigation.