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United States v. Kasmir: Taxpayer's Privilege against Self-Incrimination--Accountant's Work Papers in Attorney's Possession with Taxpayer-Client as Conduit

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UNITED STATES v. KASMIR: TAXPAYER'S PRIVILEGE AGAINST SELF-INCRIMINATION—ACCOUNTANT'S WORK PAPERS IN ATTORNEY'S POSSESSION WITH TAXPAYER-CLIENT AS CONDUIT

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INTRODUCTION

Claims to the self-incrimination privilege in tax fraud investigations have generated much litigation. Most of the documentary evidence that the government would use in prosecuting these charges comes from the taxpayer's own books and records, or those of his accountant, usually in the possession of either the accountant, the taxpayer, or his attorney. Therefore, in airing the government's motion to enforce production of the documents, courts must carefully weigh the government's power to collect revenues against the individual's constitutional privilege against self-incrimination. With two such important interests being litigated, the resolution of the conflict has far-reaching significance.

The opposing forces of the taxpayer and the government have been tested in a large variety of factual situations and the results have usually turned on subtle distinctions. In dealing with this problem, the federal district and appeals courts have failed to formulate a consistent and workable rule, and often they have confounded more than clarified the analysis. Amid all this confusion the Supreme Court did not speak until its 1973 opinion in *Couch v. United States*,[1] and then directly only to a very limited set of circumstances.

Recently, the Fifth Circuit had an opportunity to apply the Court's newly announced rule in two cases. The facts of *United States v. Kasmir*,[2] its latest decision, appear below.

1. 409 U.S. 322 (1973).
2. 499 F.2d 444 (5th Cir. 1974), *cert. granted*, 95 S. Ct. 824 (1975). *Editor's*

A taxpayer was visited by special agents of the Internal Revenue Service who informed him that he was under investigation and gave him *Miranda* warnings. During their visit, the agents asked to see his personal books and records which he turned over to them. But upon calling his accountant, who advised him not to show his records, the taxpayer immediately withdrew them from the agents' custody. The next morning, the accountant delivered various documents he had in his possession, pertaining to the taxpayer's prior taxable years, to the taxpayer. Within minutes of receiving the documents, the taxpayer turned them over to Kasmir, his attorney. The following day summonses were served on the accountant and Kasmir, ordering the attorney to give up the documents and the accountant to give testimony concerning them.[3] When they declined to comply, the government sought enforcement.[4] The district court granted the government's motions, but stayed its order pending an appeal by the taxpayer.[5] The Fifth Circuit affirmed in part and reversed in part. The taxpayer, after taking possession of the records from his accountant and delivering them to his attorney prior to service of summons, was permitted to assert the fifth amendment privilege as to such records; furthermore, the taxpayer's attorney was held to have standing to invoke the privilege for the taxpayer. As against the accountant, however, the subpoena to testify was held to be enforceable.[6]

Note: Since this article was written, the Supreme Court granted *certiorari* to *United States v. Kasmir* and the conflicting Third Circuit case of United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), discussed in note 25 *infra*. The *Fisher* opinion by the Third Circuit actually came prior in time, but was not reported until after *Kasmir*; hence, neither court had the benefit of the other's opinion.

3. INT. REV. CODE of 1954, § 7602 provides: "For the purpose of ascertaining the correctness of any return . . . the Secretary or his delegate is authorized—(1) To examine any books, papers, records, or other data which may be relevant to such inquiry . . . ." The government sought retained copies of the taxpayer's income tax returns, copies of reports and other correspondence between the accountant and the taxpayer, and the accountant's work papers pertaining to certain taxable years of the taxpayer. None of the documents examined by the agents on their initial visit were summoned.

4. *Id.* § 7604(a) and (b) provide in pertinent part:

> (a) . . . If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court . . . shall have jurisdiction . . . to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (b) . . . Whenever any person summoned under section . . . 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data . . . the Secretary . . . may apply to the judge of the district court. . . . It shall be the duty of the judge . . . to hear the application . . . and upon such hearing . . . to make such order as he shall deem proper . . . to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

5. United States v. Kasmir, No. CA 3-6973D (N.D. Tex., Mar. 3, 1973).

6. The court quickly disposed of the accountant's claims on the basis of Couch v. United States, 409 U.S. 322 (1973). "[N]o confidential accountant-client privilege ex-

The *Kasmir* case concerned primarily two issues:

> (1) [Whether] the taxpayer's attorney has standing to raise the taxpayer's constitutional right to be free from self-incrimination, [and]
>
> (2) [Whether] enforcement of the summons for the production of records violates the taxpayer's Self-Incrimination Privilege . . . .[7]

The court analyzed these questions in reverse order, reasoning that without a valid claim to the privilege there would be no need to consider the issue of standing to assert it.

THE AVAILABILITY OF THE SELF-INCRIMINATION PRIVILEGE TO THE TAXPAYER

In arriving at its decision, the *Kasmir* court attempted to distinguish an earlier, factually similar, Fifth Circuit case, *United States v. White*,[8] which had held for the government on the issue of the availability of the self-incrimination privilege regarding documents in an attorney's possession. In disposing of this question, both opinions relied heavily on the Supreme Court's language in *Couch*, but the decisions differed in their application of *Couch*.

Couch formulated the basic test for a valid claim to the privilege in cases of this kind:[9] "[N]o Fourth or Fifth Amendment claim can prevail where . . . there exists no *legitimate expectation of privacy* and no semblance of *governmental compulsion against the person of the accused*."[10]

In arriving at this rule *Couch* relied on the historical background of the privilege. Beginning with the proposition that compelled documents fall within the orbit of fifth amendment protection,[11] it proceeded to examine the policies and purposes behind the privilege:

> [O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt;

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ists under federal law, and no state-created privilege has been recognized in federal cases . . . ." *Id.* at 335.

7. United States v. Kasmir, 499 F.2d 444, 447 (5th Cir. 1974). There was a third issue regarding alleged material misrepresentations made by the agents which was never reached by the court and is not discussed herein.

8. 477 F.2d 757 (5th Cir. 1973), *aff'd en banc*, 487 F.2d 1335. For factual differences between *Kasmir* and *White* see text accompanying note 59 *infra*.

9. *Couch* concerned documents in the possession of an independent accountant which were owned by the taxpayer.

10. 409 U.S. at 336 (emphasis added).

11. Boyd v. United States, 116 U.S. 616, 634 (1885); 8 WIGMORE, EVIDENCE § 2264, at 379 (McNaughton rev. ed. 1961) [hereinafter cited as WIGMORE].

> our preference for an accusatorial rather than inquisitional system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load,' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . .[12]

The Court transformed these concepts into a workable rule by dividing its discussions into two parts. First, the fifth amendment, considered independently, is an expression of the principle that "[n]o person . . . shall be compelled . . . to be a witness against himself . . . ."[13] Since incriminating testimony which is either voluntarily elicited[14] or which is obtained from someone other than the suspect[15] does not violate the policies behind the privilege, it follows that only "compulsion directed against the person of the accused" is prohibited.[16]

In the case of documents, it is possession, not ownership, which marks the bounds of the privilege for, as the Court stated:

> [P]ossession bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment. To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line.[17]

Therefore, the first element of the *Couch* test requires that the taxpayer have a possessory interest in the documents to successfully assert a fifth amendment claim.[18]

Secondly, there is an area of fourth and fifth amendment overlap[19] and it is from this that the other aspect of the *Couch* test derives.[20]

12. 409 U.S. at 328, *quoting* Murphy v. Waterfront Commission, 378 U.S. 52, 55 (1964) (citations omitted).

13. U.S. CONST. amend. V. In the case of documents an individual is compelled to testify against himself when he returns a summons because he "produces, identifies, and verifies" that the incriminating records are the ones named in the court order. United States v. Cohen, 388 F.2d 464, 466 (9th Cir. 1967); MCCORMICK, LAW OF EVIDENCE § 126, at 268 (2d ed. 1972) [hereinafter cited as MCCORMICK]; WIGMORE § 2264, at 380.

14. 409 U.S. at 328.

15. *Id.*

16. *Id.* at 336.

17. *Id.* at 331.

18. Although the possession need not be actual; see text accompanying note 50 *infra.*

19. Boyd v. United States, 116 U.S. 616, 630-35 (1885). *Contra,* WIGMORE § 2264, at 381-84.

20. 409 U.S. at 335-36.

Where they "run almost into each other . . . ."[21] they "delineate a 'sphere of privacy' which must be protected against governmental intrusion."[22] Hence, only documents with respect to which the taxpayer has a "legitimate expectation of privacy" can be the proper subject of a claim to this protection.[23]

The majority in *Couch* and dissenting Justices Douglas and Marshall could not agree exactly where the lines should be drawn, but each of their opinions leaves the impression that either a violation of the fifth amendment alone, or an infringement of fourth and fifth amendment rights in conjunction with one another would be a sufficient basis for denying enforcement of a court order to produce documents.[24]

Couch's rejection of ownership as the test for personal compulsion marks a departure from the rule formerly applied by some federal courts which made ownership a chief requirement for the availability of the privilege.[25] This prior line of authority can be traced to the language of *United States v. White*[26] which stated, by way of dictum, that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity."[27]

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21. Boyd v. United States, 116 U.S. 616, 630 (1885).

22. 409 U.S. at 339-40 (Douglas, J., dissenting).

23. *Id.* at 336.

24. The Court handled the two issues separately and there is no suggestion that both must be resolved in favor of the taxpayer before his claim can prevail. Furthermore, they depend on separate grounds, one on the personal compulsion abhorred by the fifth amendment, and the other on the right to privacy mapped out by the fourth and fifth amendments jointly. *Kasmir* confused these criteria by making the "legitimate expectation of privacy" a test for constructive possession. The *White* majority never mentioned "legitimate expectation of privacy" in ruling against the taxpayer; see text accompanying notes 55-56 *infra*.

25. United States v. Widelski, 452 F.2d 1 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); United States v. Zakutansky, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 967 (1965); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); United States v. Fisher, 352 F. Supp. 731 (E.D. Pa. 1972), *aff'd*, 500 F.2d 683 (3d Cir. 1974) (the facts of *Fisher* are identical to those of *Kasmir*, but *Fisher* held for the government, see note 2 *supra*); United States v. Cote, 326 F. Supp. 444 (D. Minn. 1971), *aff'd*, 456 F.2d 142 (8th Cir. 1972); United States v. Pizzo, 260 F. Supp. 216 (S.D.N.Y. 1966); *see* United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959). *Contra*, United States v. Cohen, 388 F.2d 464 (9th Cir. 1967); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956); *In re* Grant, 198 F. 708 (S.D.N.Y. 1912), *aff'd*, 227 U.S. 74 (1913). *See generally* Garbis & Burke, *Fifth Amendment Protection of the Accountant's Workpapers in Tax Fraud Investigations*, 47 TAXES 12, 16-18 (1969); Note, *Accountant's Workpapers in Federal Tax Investigations: The Taxpayer's Privilege Against Self-Incrimination*, 23 Sw. L.J. 728 (1969); Annot., 37 A.L.R.3d 1373 (1971).

26. 322 U.S. 694 (1944).

27. *Id.* at 699. This language has also been used to support the proposition that

Application of House[28] became the first federal case to apply the *White* criterion to a federal tax fraud investigation. The object of the government's subpoena in *House* was the work papers of an accountant used to prepare the taxpayer's tax return. When the taxpayer's attorney learned of the investigation, he arranged an agreement between the taxpayer and the accountant whereby ownership in the documents was transferred from the accountant to the taxpayer. Then the documents were placed directly in the attorney's custody by the accountant. Subsequently, a subpoena was issued to the attorney directing him to produce the documents sought by the Internal Revenue agents. He resisted, asserting his client's self-incrimination privilege as a defense.

The court found that the taxpayer was in constructive possession of the documents by virtue of his attorney's possession and that the taxpayer's possession was "rightful and indefinite."[29] In holding for the taxpayer, however, the court regarded these findings unnecessary since, in any event, ownership of the records was in the taxpayer.[30]

Although the language of *House* emphasizes the possession aspect of the *White* test and casts doubt on the importance of ownership to the availability of the privilege,[31] subsequent cases, dealing with similar factual patterns, have apparently read *White* and *House* together as supporting a requirement of "ownership or rightful, indefinite possession."[32] Other courts, while making no express reference to either *White* or *House,* have applied this criterion nevertheless.[33]

The use of this test results in confusion in situations where, unlike *House,* ownership and possession do not coincide. Since, even before *Couch,* ownership alone was not a sufficient basis for claiming the privilege,[34] a number of courts made both ownership and possession necessary and defeated a claim of privilege where they did not coexist.[35]

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an attorney has no standing to claim the self-incrimination privilege for the benefit of his client. See text accompanying notes 83-86 *infra.*

28. 144 F. Supp. 95 (N.D. Cal. 1956).

29. *Id.* at 101.

30. *Id.*

31. *Id.*

32. *See, e.g.,* United States v. Zakutansky, 401 F.2d 68, 71 (7th Cir. 1968), *cert. denied,* 393 U.S. 1021 (1969).

33. *See, e.g.,* United States v. Fisher, 352 F. Supp. 731, 733 (E.D. Pa. 1972).

34. Burdeau v. McDowell, 256 U.S. 465 (1921); Perlman v. United States, 247 U.S. 7 (1918); Johnson v. United States, 228 U.S. 457 (1913). "A party is privileged from producing the evidence [himself] but not from its production." *Id.* at 458.

35. Note 25 *supra.* In *Kasmir,* the government unsuccessfully argued that both possession and ownership were necessary to claim the privilege. 499 F.2d at 447, 450.

This result was reached in a variety of ways where the taxpayer did not own the documents, usually by finding that he also did not have "rightful and indefinite possession" of them.

One theory advanced by courts for this purpose denies that the taxpayer's possession is "rightful and indefinite" where he, or his attorney, takes possession with the owner's consent, but only after discovering that he is under investigation, in an effort to clothe the documents with fifth amendment protection.[36]

This position was argued by the government in *Kasmir*,[37] but despite its "superficial persuasiveness" was rejected by the court. Since "the rights and obligations of the parties [become] fixed when the summons [is] served . . . ."[38] any attempt by the taxpayer to put the records beyond the reach of a tax investigation is wholly proper provided that the transfer occurs before the summons is served.[39]

The view taken by the *Kasmir* court on this point comports with reason. There must be some time at which the "rights and obligations" of the taxpayer become known and unalterable. Furthermore, the availability of fifth amendment protection cannot be made to turn on the taxpayer's motives, "[f]or every sucessful claim of privilege frustrates to some extent the government's ability to gather evidence."[40]

Courts have also negated a finding of "rightful and indefinite possession" by considering the rights of the owner versus those of the possessor. Since ownership is in someone other than the taxpayer, that person has a superior right to possession. Hence, if the owner of the documents requests their return and the taxpayer, or his attorney, refuses, then his possession is not "rightful" from that moment onward.[41] Or, if the records are taken merely so that the taxpayer's at-

36. United States v. Widelski, 452 F.2d 1, 5 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); United States v. Fisher, 352 F. Supp. 731, 734 (E.D. Pa. 1972). *Accord*, United States v. Zakutansky, 401 F.2d 68, 71-72 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969) (taxpayer's possession was not "rightful and indefinite" where he took possession from his accountant only after defect was discovered in subpoena served on accountant). *Zakutansky* is most often cited for the rule that possession is determined at the time the subpoena is served. *See, e.g.*, United States v. Couch, 409 U.S. 322, 329 n.9 (1973). This reading of *Zakutansky* disregards the fact that the subpoena served on the accountant was procedurally defective.

37. The government characterized the "enterprise by the taxpayer, his accountant, and his attorney [as] 'a frantic last minute effort to put the requested records beyond the reach of a legitimate tax investigation' by 'winning a footrace with the agents of the government.' " 499 F.2d at 450.

38. *Id.*

39. *Id.* at 451.

40. *Id.*

41. Deck v. United States, 339 F.2d 739, 740 (D.C. Cir. 1964), *cert. denied*, 379

torney may examine them, then the taxpayer's possession is "temporary", not "indefinite", and the possession is terminated with a request for their return from the owner.[42]

Usually, in these cases, the owner of the documents in question is the accountant[43] and he is indifferent about regaining possession of them but makes the request in an effort to comply with the court order which has been served upon him. However, courts which have adopted the foregoing analysis have been unfettered by this consideration.

United States v. Cohen[44] took a different perspective. By way of dictum, the court reasoned that even possession wrongfully acquired or retained in disregard of the owner's rights should be sufficient to support the privilege.[45] This stand, taken by the Ninth Circuit, has been criticized by other federal courts,[46] but that was prior to the Supreme Court's decision in *Couch* which cites *Cohen* with approval.[47]

The practical effect of *Couch* should be to shift the emphasis of inquiry from a question of ownership versus possession to a determination of the quality of possession. While the Court devoted discussion primarily to situations of actual possession,[48] it expressly disclaimed the notion that a "per se" rule was being adopted.[49] It acknowledged that

U.S. 967 (1965); United States v. Pizzo, 260 F. Supp. 216, 221 (S.D.N.Y. 1966); MODEL CODE OF EVIDENCE rule 206 (1942).

42. *In Re* Fahey, 300 F.2d 383, 385 (6th Cir. 1961).

43. Often, the government seeks the accountant's work papers, as was the case in *Kasmir*. Absent some agreement to the contrary, the ownership of these is usually presumed to be in the accountant, not the taxpayer. *See generally* Annot., 90 A.L.R.2d 784 (1963).

44. 388 F.2d 464 (9th Cir. 1967). The facts of *Cohen* are substantially the same as those of *Deck* and *Pizzo*. See note 41 *supra* and corresponding text.

45. *Id.* at 469. The logic of this view was expressed by Judge Learned Hand in *In re* Grant, 198 F. 708, 709 (S.D.N.Y. 1912), *aff'd*, 227 U.S. 74 (1913):

> [S]uppose that A., knowing that B. has papers which would incriminate him, gets wrongful possession of them from B., whom they do not incriminate. If B. is content, and leaves A. in possession, I do not understand that it would be any answer whatever to A, to say: "You cannot keep these back, because you came by them wrongfully, or at least you have no right to them now." All the law considers is whether A. has got possession in fact, and whether the documents actually will tend to incriminate him. To get them in evidence the law would have to force him to bring them out of possession which is good enough against any one but B. Certainly, I can find nothing in the books which suggests such a distinction, and it contradicts the whole history of the matter.

46. *See, e.g.*, United States v. Widelski, 452 F.2d 1, 5 (6th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

47. 409 U.S. at 330 n.12.

48. *Id.* at 330-35.

49. *Id.* at 336 n.20. But, Justice Brennan apparently felt that there was sufficient doubt regarding the majority's approach to prompt him to write a concurring opinion in an effort to clarify the quality of possession necessary. *Id.* at 337 (Brennan, J., con-

the claim of privilege would also be available in clear cases of constructive possession or where "the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact."[50] But the Court declined "to conjecture broadly on the significance of possession in cases and circumstances not before [it]."[51] The reluctance of the Supreme Court to articulate a standard for constructive possession which is the proper subject of a fifth amendment claim places the burden of this inquiry squarely on the lower federal courts.[52]

The emphasis of the *Couch* majority on personal compulsion creates conceptual difficulties.[53] To test constructive possession in this way might lead to conflicting results because it is usually difficult to identify an element of personal compulsion against the accused when the taxpayer is not in actual possession.[54]

Kasmir cleverly sidestepped the issue of constructive possession by moving directly to the second element of the *Couch* test. The court reasoned that where the taxpayer was not the actual possessor, his "legitimate expectation of privacy" with regard to the evidence would control.[55]

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curring). And Justice Marshall, in his dissenting opinion, accused the majority of announcing a "bright-line" rule. *Id.* at 344 (Marshall, J., dissenting).

50. *Id.* at 333 (citation omitted).

51. *Id.* at 336 n.20. The Court gave two illustrations, both involving documents that had been temporarily stored in office safes. *Id.* at 333-34 n.16.

52. The *Kasmir* court noted in passing, "the Supreme Court in [*Couch*] has now spoken on the subject before us in a manner that guides our journey far down the road to judgment, but not to the very end." 499 F.2d at 448.

53. 409 U.S. at 344 (Marshall, J., dissenting).

54. The courts cannot even agree that an attorney's possession places his client in constructive possession of the documents. *Compare, e.g.*, Application of House, 144 F. Supp. 95, 101 (N.D. Cal. 1956) *with, e.g.*, United States v. Cote, 326 F. Supp. 444, 451 (D. Minn. 1971), *aff'd*, 456 F.2d 142 (8th Cir. 1972).

55. The *Kasmir* court remarked:

> Thus the method adopted by the Court [in *Couch*] focuses the inquiry on two factors: (1) the party in possession of the evidence and (2) *where the actual possessor is not the taxpayer, the taxpayer's legitimate expectation of privacy with regard to the evidence.* By considering not only the question of physical, personal compulsion upon the accused, but also any expectation of privacy which might reasonably attach to the summoned materials, the Court was weighing the extent to which any of the variety of policies enumerated in *Murphy* [note 12 *supra*] would be furthered by application of the privilege.

499 F.2d 449 (emphasis added).

It is true that if the taxpayer has neither actual nor constructive possession, then his "legitimate expectation of privacy" is controlling. And even if there is a finding of constructive possession, his "legitimate expectation of privacy" may provide an alternative basis for ruling in his favor. But the two facets of the test should be regarded as distinct grounds for disposition of a case, in the spirit of the *Couch* decision; see note 24 *supra.*

Unlike *Kasmir*, the majority opinion in *White*,[56] the earlier decision by the Fifth Circuit, makes no reference to the words "legitimate expectation of privacy." *White* summarily disposed of the constructive possession issue with a mechanical application. Since the taxpayer had never been in actual possession, it was not possible for his attorney to hold the documents constructively for him.[57] "In these circumstances the necessary ingredient of personal compulsion . . . [was] totally lacking . . . ."[58]

Facing *White* as "a formidable wall to scale," *Kasmir* proceeded to distinguish it on the basis of the only factual differences between the cases:

> The taxpayers had never been in actual possession of the papers . . . . The attorney had obtained the documents directly from the accountant without record evidence that he had done so upon the taxpayers' instructions or that they were even aware that he had secured them. The parties to the transfer, [the attorney] and the accountant, had agreed that [the attorney]—not the taxpayers—could keep the papers indefinitely, but that they would be returned to the the accountant upon completion of [the attorney's] work. Thus, the taxpayers retained no right to immediate possession . . . . *Their actions could not be said to have evinced any legitimate expectation of privacy.*[59]

Whether these differences are regarded as determinative of constructive possession, of legitimate expectation of privacy, or of both, they do not present a satisfactory basis for distinguishing *White*. First, the taxpayer's "fleeting" possession in *Kasmir* cannot be conclusive. This would be "exalting form over substance."[60] The availability of the privilege should not be made to turn on such subtle factual variations.

Secondly, why should the absence of the taxpayer's instructions or knowledge respecting the attorney's acquisition of the documents be important?[61] The attorney had obtained them in connection with his clients' case and this should be sufficient.[62] Furthermore, to require

56. United States v. White, 477 F.2d 757 (5th Cir. 1973), *aff'd en banc*, 487 F.2d 1335. See text accompanying note 7 *supra*.

57. *Id.* at 763.

58. *Id.* at 764.

59. 499 F.2d at 450 (emphasis added).

60. *Id.* at 456 (Bell, J., dissenting).

61. The majority opinion in *White* commented that this was not a factor of "controlling importance." 477 F.2d at 763.

62. See text accompanying notes 69-75 *infra*.

a client's participation in the exchange would produce the anomalous result of giving a taxpayer who was intentionally frustrating the government's efforts to obtain the evidence greater protection than the taxpayer whose attorney unexpectedly had the documents in his possession at the time the summons was served.[63]

Finally, giving significance to the fact that there was an agreement to return the documents to the accountant sounds like a reincarnation of the "ownership or rightful, indefinite possession" test.[64] The clear and unmistakable language of *Couch* should have had the effect of abrogating this rule.[65] While the *Kasmir* majority pays lip service to this vivid intent,[66] it would revive the rule in a different form.[67]

Taken together, *White* and *Kasmir* determine the availability of the privilege on no more substantial grounds than the slight factual differences between them. Yet *Kasmir*, aware of the prior inconsistent ruling in *White*, was not willing to ignore the probable adverse effect on the sixth amendment right to counsel merely to follow precedent.[68] However, in its efforts to distinguish rather than overrule *White*, the *Kasmir* court has generated an atmosphere of confusion which can produce equally undesirable consequences.

Perhaps an attorney who practices in the Fifth Circuit can safely rely on these decisions and have his client participate in every transfer

63. The fifth amendment privilege has been characterized as a "fighting clause" requiring a "beligerent claim" to its protection. United States v. Johnson, 76 F. Supp. 538, 540 (M.D. Pa. 1947). But this should not be taken to mean that the attorney and his client have to contrive the only situations where it can be successfully asserted. And the fact that "every successful claim of privilege frustrates to some extent the government's ability to gather evidence" (note 40 *supra*) does not mean that those who go out of their way to put the documents beyond the government's reach should receive special rewards.

64. See text accompanying note 32 *supra.*

65. See text accompanying note 17 *supra.*

66. The *Kasmir* court rejected the government's argument that both ownership and possession were required. 499 F.2d at 450. But the situation in *Kasmir* involved neither an agreement to return the documents to their owner nor a demand for their return from the owner. See text accompanying notes 1-3 *supra.*

67. The *Kasmir* majority admits that ownership is a factor to be considered. *Id.* at 450 n.2.

68. In discussing this point the court reflected:

> If we hold that no Fifth Amendment privilege is now available, then the taxpayer's rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney to study the records than with him. Indeed, we make it almost appear as though the taxpayer must now closet himself with his myriad tax data drawn up around him and permit the attorney to study or possess the records only when the taxpayer is in a position to grab them physically, lest some furtive and surreptitious agent may [sic] swoop down with a summons while the attorney is fingering the treasure.

Id. at 451.

of records, but counsel in other jurisdictions must proceed at their own risk. Given the lack of substance for the *Kasmir-White* distinction and the usual absence of agreement among the courts in taxpayer fraud litigation, it is likely that at least one other circuit will not adhere to these rulings. But even if there is unanimous judicial consent on this limited set of facts, *Kasmir* opens the door to the application of other rules in slightly different factual settings. The net effect of this uncertainty could be to inhibit the free exercise of the right to counsel.

A better rule would satisfy the "personal compulsion" test by recognizing that an attorney's actual possession is also his client's constructive possession regardless of the form of the transfer.[69] Under this view

> *when the client himself would be privileged* from production of the document, . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. . . . On the other hand, if the *client would be compellable* to produce . . . then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure.[70]

69. "The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry." United States v. Judson, 322 F.2d 460, 467 (9th Cir. 1963); *see* United States v. White, 477 F.2d 757, 765 (5th Cir. 1973), *aff'd en banc*, 487 F.2d 1335 (Ainsworth, J., dissenting).

The suggestion made here that an attorney's actual possession ought to be considered his client's constructive possession regardless of the client's participation in the transfer of possession to the attorney does not overlook the traditional property requirements for possession. While it can be argued that possession by an attorney gives his client some degree of physical control over the documents, it would admittedly be quite difficult to manufacture an intent to control by the client where he did not even have knowledge of his attorney's possession. Nevertheless, the dual test of possession can be interpreted flexibly by the courts here, as it has been elsewhere, to avoid defeating an important purpose or policy when a finding of possession or no possession is crucial. (E.g., possession of property is also possession of its contents; PERKINS, CRIMINAL LAW 257-258 (2d ed. 1969): "an employee who obtains property from his employer has custody only, but an employee who obtains property from a third person for his employer has possession of the property;" *Id.* at 240-43.)

In the area of criminal law, the usual scienter requirements coupled with the canon that penal statutes are to be strictly construed favor a finding of no possession if the statute allegedly violated requires possession for conviction. Conversely, the self-incrimination provision is raised as a defense in a criminal proceeding and "must be accorded liberal construction in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). In this circumstance a court should not rigidly apply the test for possession and thereby undermine an important constitutional objective.

70. WIGMORE § 2307, at 592 (emphasis in the original). In certain circumstances documents are not eligible for fifth amendment protection even though the client has possession of them. These include situations where the privilege has been waived (Ziegler v. United States, 174 F.2d 439, 446-47 (9th Cir.), *cert. denied*, 338 U.S. 822 (1949);

In addition, where the party in possession is an attorney, the taxpayer's "legitimate expectation of privacy" should provide an alternative ground for ruling in his favor. When the taxpayer is not in actual possession, the resolution of this issue depends on the normal functions of the possessor[71] and not on any non-possessory interest the taxpayer might have in the documents.[72] And it should not be made to turn on the taxpayer's knowledge of, or participation in, the transfer of possession.[73] Therefore, given the promise of confidentiality implicit in the attorney-client relationship,[74] any documents which are eligible for fifth amendment protection, when used or possessed by an attorney on his client's behalf, should give rise to a "legitimate expectation of privacy."[75]

MCCORMICK § 132, at 278-79); cases involving the documents of incorporated and unincorporated associations (see note 89 and accompanying text); and applications of the "required documents exception" (United States v. Willis, 145 F. Supp. 365, 368-69 (M.D. Ga. 1955)).

71. *See* Couch v. United States, 409 U.S. 322, 335-36 (1973).

72. The *Couch* majority made no reference to ownership in its discussion of this issue notwithstanding that the taxpayer in that case was the owner of the documents in question. *Id.* But the Court's express rejection of ownership as a criterion for applying the fifth amendment when it discussed the personal compulsion question was unequivocal, see text accompanying note 17 *supra.*

73. See text accompanying notes 61-63 *supra.*

74. In analyzing this issue the *Kasmir* court stressed the unique nature of the attorney-client relationship. It distinguished *Couch,* which had involved an accountant-client relationship, on the grounds that an independent accountant has a legal duty to disclose whereas an attorney has a ". . . strict, ethical obligation to prevent disclosure . . . . broader than and independent of the attorney-client privilege . . . ." 499 F.2d at 453 (citation omitted). *Kasmir* acknowledged that the attorney-client *relationship,* as distinguished from the attorney-client *privilege* (which was "admittedly not available here"), could not, in itself, justify the refusal to turn over the documents. But the attorney-client *relationship* could form a reasonable basis for a "legitimate expectation of privacy" regarding documents in an attorney's possession, and thus support a claim for fifth amendment protection. *Id.* (The attorney-client *privilege* was not available because of the pre-existing documents rule. *See* MCCORMICK § 89, at 185; WIGMORE § 2307, at 591. Note: Some courts have held that documents produced by an accountant for the purpose of assisting an attorney in advising or defending a taxpayer are within the attorney-client *privilege.* United States v. Cote, 456 F.2d 142 (8th Cir. 1972); United States v. Judson, 322 F.2d 460 (9th Cir. 1963). But this is not true where the documents were prepared under the direction of the taxpayer and before the attorney entered the case. United States v. Cote, 456 F.2d 142 (8th Cir. 1972); Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963). *See generally* Annot., 15 A.L.R. FED. 771, 793-98 (1973). An alternative formulation has been suggested which would avoid the constitutional issues in a self-incrimination claim by allowing the attorney-client *privilege* to cover documents in an attorney's possession which would be protected by the fifth amendment if held by the client. Note, *The Attorney and His Client's Privileges,* 74 YALE L.J. 539 (1965). See note 78 *infra.* This position was cited with approval in United States v. Schmidt, 360 F. Supp. 339, 345 (M.D. Pa. 1973)).

75. There are situations where documents are not eligible for fifth amendment protection regardless of who possesses them; see note 70 *supra.*

THE ATTORNEY'S STANDING TO ASSERT THE CLIENT-TAXPAYER'S FIFTH AMENDMENT PRIVILEGE ON HIS CLIENT'S BEHALF

Having resolved the issue of availability of the privilege in the taxpayer's favor, the question remains whether the attorney may assert this claim on his client's behalf where the taxpayer is not a party to the action.[76] The disposition of this issue posed little difficulty for the *Kasmir* court which is remarkable in light of the lack of consensus among the courts in this area. On the basis of "reason" and one line of authority, *Kasmir* held that the attorney had standing.[77]

The alternative view, by no means in disfavor,[78] derives from the language of two early Supreme Court decisions, neither of which involved the issue in point. *Hale v. Henkel*[79] dealt with a case where an agent of a corporation sought to plead the fifth amendment as a bar to his testimony concerning his principal. The Court denied this plea, stating that the privilege is a purely personal one and cannot be raised to avoid incriminating some third person even though the witness is the agent of that person.[80]

76. For the taxpayer's right to intervene in the proceeding under FED. R. CIV. P. 24(a)(2), see Donaldson v. United States, 400 U.S. 517 (1971).

77. 499 F.2d at 454. The following authorities have stated that an attorney has standing to raise the taxpayer's self-incrimination privilege on the taxpayer's behalf: United States v. Kasmir, 499 F.2d 444, 454 (5th Cir. 1974); United States v. Judson, 322 F.2d 460, 463-65 (9th Cir. 1963); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962) (dictum), *cert. denied*, 371 U.S. 951 (1963); Brody v. United States, 243 F.2d 378, 387 n.5 (1st Cir.), *cert. denied*, 354 U.S. 923 (1957); Application of House, 144 F. Supp. 95, 99-100 (N.D. Cal. 1956); MCCORMICK § 120, at 254; WIGMORE § 2270, at 416; *see* Grant v. United States, 227 U.S. 74, 80 (1913); WIGMORE § 2307, at 592. The Fifth Circuit in United States v. White, 477 F.2d 757 (5th Cir. 1973), *aff'd en banc*, 487 F.2d 1335, "assumed without deciding" that the attorney had standing and then proceeded to dispose of the case on other grounds. *Id.* at 762.

78. The following authorities have indicated that an attorney lacks standing: United States v. Goldfarb, 328 F.2d 280 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964); Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963); United States v. Judson, 322 F.2d 460 (9th Cir. 1963) (Foley, J., dissenting); *In re* Fahey, 300 F.2d 383 (6th Cir. 1961); Schwimmer v. United States, 232 F.2d 866 (8th Cir. 1956); Remmer v. United States, 205 F.2d 277 (9th Cir. 1953), *vacated on other grounds*, 347 U.S. 227 (1954), *re-aff'd*, 222 F.2d 720 (1955), *vacated on other grounds*, 350 U.S. 377 (1956); Ziegler v. United States, 174 F.2d 439 (9th Cir.), *cert. denied*, 338 U.S. 822 (1949); London v. Everett H. Dunbar Corp., 179 F. 506 (1st Cir. 1910); *In re* Brumbaugh, 62-2 U.S. TAX CAS. ¶ 9521 (S.D. Cal. 1962); *In re* Blumenberg, 191 F. Supp. 904 (S.D.N.Y. 1960); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334 (E.D. Wis. 1956); United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955). Note, *The Attorney and His Client's Privileges*, 74 YALE L.J. 539 (1965) agrees with this position, but would mitigate its harshness by abrogating the pre-existing documents rule in certain cases thereby allowing a claim to attorney-client privilege in place of a self-incrimination claim. See note 74 *supra*.

79. 201 U.S. 43 (1906).

80. *Id.* at 69-70.

By way of dictum, it was added that "so strict is the rule that the privilege is a personal one that it has been held in *some cases* that counsel will not be allowed to make the objection.[81]

Two observations are noteworthy. First, the Court in *Hale* was concerned with the enforcement of the Sherman Act, and other similar federal legislation and what mischief might result if combinations or conspiracies could gain protection by an extension of the fifth amendment in the agency context.[82] The individual taxpayer and his attorney could hardly be said to pose such a threat. Second, the above language of the Court admits that to refuse counsel standing is not the universal rule.

In *United States v. White*,[83] a union president was arraigned on contempt charges for failure to obey a subpoena commanding him to produce union records. In refusing to grant fifth amendment protection, the Court emphasized the personal nature of the privilege and the fact that it could not be used in a "representative capacity."[84]

Some courts have seized upon this language and, giving it entirely literal interpretation, have denied an attorney's standing. Since an attorney is an agent for his client and since all agents act in a "representative capacity," an attorney lacks standing to claim the privilege on his client's behalf.[85] Other courts, while not doing so expressly, appear to be applying the same analysis.[86]

While this logic might be criticized as being unimaginative, it is also incorrect because it overlooks the meaning *White* attached to the word "representative."[87] The Court echoed the concerns of *Hale* in extending protection to non-natural individuals whose economic activi-

81. *Id.* at 70 (emphasis added).
82. *Id.*
83. 322 U.S. 694 (1944).
84. *Id.* at 699. The language used by the court appears in the text corresponding to note 27 *supra.*
85. *See, e.g.*, United States v. Boccuto, 175 F. Supp. 886, 889 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).
86. *See, e.g.*, Bouschor v. United States, 316 F.2d 451, 458-59 (8th Cir. 1963).
87. The *White* court said, "[t]he test . . . is whether . . . a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked . . . ." 322 U.S. at 701. This implies that a "personal capacity" involves cases of natural individuals and a "representative capacity" concerns representatives of non-privileged organizations (i.e., those that may not claim the self-incrimination privilege directly). United States v. Judson, 322 F.2d 460, 464 (9th Cir. 1963); 19 VILL. L. REV. 186, 188 n.15 (1973); *See In re* Grand Jury Subpoena Duces Tecum, 358 F. Supp. 661, 665-67 (D. Md. 1973); WIGMORE § 2259a.

ties have such a broad scope by allowing their agents to claim the privilege.[88] Reading *Hale* and *White* together, neither incorporated nor unincorporated organizations can receive fifth amendment protection through their agents.[89] This says nothing about the situation of the attorney and his individual client.

Many of the decisions which have said that an attorney lacked standing stated it in dictum,[90] and in others that issue became confused with an alternative ground for disposition of the case.[91] The number of cases in which the resolution of the standing issue was the sole ground for ruling against the taxpayer are quite few.[92] Although these considerations might seem to weaken the argument that an attorney lacks standing, in those cases where the lack has been asserted, by dictum or otherwise, the courts have done so with unmistakable clarity.[93]

The chief concern of these holdings has been the frustration and obstruction of justice by allowing some "third person" to plead the privilege of another.[94] But this reasoning neglects the fundamentally unique nature of the attorney-client relationship. In a sense the attorney is not a "third person" but is, for all intents and purposes, the taxpayer himself.[95] By denying an attorney standing,

> the government could thus put any taxpayer to the choice of attending hearings or investigations, sometimes carried on over considerable periods of time, or waiving his privilege against self-incrimination. Such a rule would accomplish nothing except to impose a heavy penalty in terms of time

88. 322 U.S. at 700.

89. And, of course, they may not claim it directly. *Id.* at 698, 700-01.

90. *See* Remmer v. United States, 205 F.2d 277, 285 (9th Cir. 1953), *vacated on other grounds*, 347 U.S. 227 (1954), *re-affirmed*, 222 F.2d 720 (1955), *vacated on other grounds*, 350 U.S. 377 (1956); Ziegler v. United States, 174 F.2d 439, 447 (9th Cir.), *cert. denied*, 338 U.S. 822 (1949); *In re* Blumenberg, 191 F. Supp. 904-05 (S.D.N.Y. 1960); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 340-41 (E.D. Wis. 1956); United States v. Willis, 145 F. Supp. 365, 368 (M.D. Ga. 1955).

91. *See In re* Fahey, 300 F.2d 383, 385 (6th Cir. 1961); Schwimmer v. United States, 232 F.2d 866, 868-69 (8th Cir. 1956); London v. Everett H. Dunbar Corp., 179 F. 506, 510 (1st Cir. 1910); United States v. Boccuto, 175 F. Supp. 886, 888-90 (D.N.J.), *appeal dismissed*, 274 F.2d 860 (3d Cir. 1959).

92. *See* United States v. Goldfarb, 328 F.2d 280, 282 (6th Cir.), *cert. denied*, 377 U.S. 976 (1964); Bouschor v. United States, 316 F.2d 451, 458-59 (8th Cir. 1963); *In Re* Brumbaugh, 62-2 U.S. TAX CAS. ¶ 9521 (S.D. Cal. 1962).

93. *See, e.g.*, Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949). "[A]ppellant's privilege was personal to him and could not be claimed by someone else for him, not even by his counsel." *Id.* at 447.

94. United States v. Judson, 322 F.2d 460, 469 (9th Cir. 1963) (Foley, J., dissenting).

95. Note 69 *supra.*

and money on those taxpayers who chose to assert their right against self-incrimination . . . .[96]

CONCLUSIONS

According to the newly announced Supreme Court criteria "governmental compulsion against the person of the accused" and the accused's "legitimate expectation of privacy" will control the availability of the taxpayer's self-incrimination privilege with respect to documents sought be the government in tax fraud investigations.

Applying this test in two recent decisions, the Fifth Circuit has arrived at inconsistent results. Despite indications in those cases to the contrary, either aspect of the test should be sufficient to support a taxpayer's claim to fifth amendment protection when the documents are eligible for this protection and are in an attorney's possession, regardless of how the transfer of possession took place.

Possession, and not ownership, of documents subjects an individual to the compulsions abhorred by fifth amendment. When the taxpayer is not in actual or constructive possession, the normal functions of the party who has possession determine the taxpayer's "legitimate expectation of privacy" with regard to documents.

There is widespread disagreement on the issue of an attorney's standing to assert his client's fifth amendment protection on the client's behalf. The view which refuses standing lacks merit because it relies exclusively on the broad dictum of two early Supreme Court decisions. Hence, given the unique nature of the attorney-client relationship and the unnecessary hardships to the taxpayer attending a contrary result, the attorney should be permitted to plead the self-incrimination privilege for his client.

96. Application of House, 144 F. Supp. 95, 100 (N.D. Cal. 1956).