

TEXAS BAR JOURNAL

Volume 53, Number 6, June 1990

AVOIDING CRIMINAL EXPOSURE WHILE SEEKING BANKRUPTCY RELIEF*

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Criminal penalties may flow from bankruptcy requirements. The Bankruptcy Code requires that a debtor submit to examination at meetings of creditors, file a list of creditors, a schedule of assets and liabilities and a statement of affairs,² and surrender to the trustee property of the estate, including any recorded information relating to property of the estate.³ There is potential peril in each of these requirements.

This article discusses whether to file for bankruptcy relief and, if your client does, how to respond to statutory inquiries and at the same time obtain protection from creditors and an ultimate discharge.

A. The Fifth Amendment In Bankruptcy: General Overview

The Fifth Amendment states that "No person shall be . . . compelled in any criminal case to be a witness against himself . . ." ⁴ The privilege extends not only to answers that would in and of themselves support a criminal conviction, but also to answers that would furnish a link in the chain of evidence needed to prosecute.⁵

The Fifth Amendment privilege not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also shield him from answering questions in any proceeding, including as a debtor or witness in bankruptcy,⁶ where the answers might incriminate him in future criminal proceedings or lead to other incriminatory evidence.⁷

1. Scope – Frequently, courts are concerned with whether the debtor

is using the Fifth Amendment merely to avoid inquiry by creditors. The Fifth Amendment privilege only protects the witness against compelled testimonial or communicative self-incrimination.⁸ Being compelled to testify about your finances is not always protected. The disclosures must pose some real and not imaginary threat of incrimination.⁹ The courts reject blanket assertions of the Fifth Amendment privilege.¹⁰ A court's subjective assessment of the likelihood of prosecution, however, is not controlling.¹¹ As long as the debtor can demonstrate some possibility of prosecution beyond imagination and fancy, a Fifth Amendment claim should not be disregarded.

Although protecting your client's constitutional rights may make the road to relief in bankruptcy more arduous, your client does not relinquish those rights by filing for bankruptcy. It may be advisable to avoid bankruptcy court while waiting for the particular criminal statute of limitations to expire.

a. Bankruptcy Schedules – A debtor cannot assert the Fifth Amendment privilege concerning all matters contained in the bankruptcy schedules.¹² On the other hand, the debtor is not required to prove the hazards of incrimination in detail, which, of course, would require him to surrender the very protection the privilege guarantees.¹³ He must, however, be prepared to explain why every facet of his personal and business practices would be incriminatory. For example, if the FBI is

investigating your debtor client for securities violations, be prepared to explain why listing his residence and car would be incriminatory.

On the other hand, avoid disclosing innocent facts, the details of which may be incriminatory. You may unintentionally waive the privilege.¹⁴ For example, listing a bank as a creditor may waive the privilege with regard to the factual circumstances surrounding the obligation, including the fact that the client may have submitted a false statement to obtain a loan. This example may stretch the concept of waiver but always err on the side of the conservative answers.

Do not leave areas blank on the schedule forms. Specifically state that you are asserting the Fifth Amendment privilege. Otherwise, the failure to schedule property may constitute either a false oath or concealment by the debtor.¹⁵

b. Document Production under 11 U.S.C. § 521(4) – 11 U.S.C.

§ 521(4) requires a debtor to:

surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 (of Title 11).

Literally constructed, this provision appears to deny a debtor's right to withhold documents under the Fifth Amendment.

In analyzing the application scope, and constitutionality of this rule, the first step is to determine if the debtor

has Fifth Amendment protection. The Fifth Amendment privilege does not extend to corporations, partnerships, or similar collective entities.¹⁶ Even a custodian of records generally may not invoke the privilege against self incrimination.

The argument that the mere act of production of documents by the custodian constitutes personal testimony conceding the existence or authentication of the documents recently has been foreclosed by the Supreme Court.¹⁷ This protection is reserved for individuals, sole proprietorships,¹⁸ and is potentially viable for corporations where the custodian is the sole employee, officer, and shareholder.¹⁹

In *Doe*²⁰ and *Fischer*,²¹ the Supreme Court left open the question of whether the Fifth Amendment protects the contents of private papers that are not business records. To some extent the First, Second, Fourth, and Sixth circuits protect the contents of private papers. Only the District of Columbia and the Ninth circuits appear to have eviscerated the protection afforded the contents of private papers.²²

The Sixth Circuit in *Butcher v. Bailey*,²³ questioned the constitutionality of 11 U.S.C. § 521, and briefly discussed whether it operated as a legislative nullification of a constitutional privilege. The court, however, found the contents of the documents in issue were not so “intimately personal as to evoke serious concern over privacy interests.”²⁴ On remand, it required the bankruptcy court to determine whether the production of the documents would be incriminating.²⁵

c. Property Production Under 11 U.S.C. § 521(4) – Several bankruptcy decisions have ruled that there is no Fifth Amendment protection for producing property of the estate.²⁶ These decisions ignore the holding in *Fisher v. United States*,²⁷ that suggests that document production and chattel production are accorded the same protection. There-

fore, if your client possesses “smoking gun” assets, unknown to the trustee and prosecutor, that may tend to incriminate, assert the Fifth Amendment protection.²⁸

d. Creditor’s Meeting Under 11 U.S.C. § 341; Bankruptcy Rule 2004 Examination – A debtor cannot assert the Fifth Amendment on all matters at an examination by creditors or at a Bankruptcy Rule 2004 examination.²⁹ For example, a debtors personal affairs and employment history that are unrelated to a criminal investigation are not protected from inquiry. Always ask: “Will the answer incriminate my client, furnish a link in the chain of incriminatory evidence, or lead to any incriminatory evidence?” If the answer is yes, your client should take the Fifth Amendment.

Except in rare cases, it will be very difficult and time consuming for the trustee to get immediate approval from the attorney general to authorize a grant of immunity. If there is a potential or ongoing investigation, the government would not want to risk tainting its work product with indiscriminate grants of immunity.³⁰

2. Waiver – The opposing counsel has a heavy burden indeed to prove that a defendant’s waiver of his privilege against self-incrimination was voluntarily, knowingly, and intelligently made.³¹ The courts indulge every reasonable presumption against a finding of testimonial waiver.³² A court should infer a waiver of the Fifth Amendment privilege from a witness’ prior statements only if:

- (1) the witness’ prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth, and
- (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment’s privilege against self incrimination.³³

a. Same Proceeding/Revealing Facts/Avoiding Details – When a witness gives incriminating testimony at a proceeding, he or she generally cannot invoke the privilege as to details of the incriminating subject matter.³⁴

b. Different or Subsequent Proceedings – Even if there is waiver of the privilege and voluntary testimony in response to specific questions or with respect to a particular subject in one proceeding, it does not constitute a waiver of the Fifth Amendment privilege with respect to identical questions or as to a particular subject in a second proceeding if the witness remains at risk for the same offense.³⁵

The policy behind the majority rule that the privilege is “proceeding specific,” and not waived in a subsequent proceeding by waiver in an earlier one, rests on the premise that during the period between the successive proceedings conditions might have changed creating new grounds for apprehension. For example, a new criminal law may have been passed, the witness might be subject to different interrogation for different purposes at a later proceeding, or repetition of testimony in an independent proceeding might itself be incriminating, even if it merely repeated or acknowledged the witness’ earlier testimony, because it could constitute an independent source of evidence against him based on his current memory of events.³⁶

3. Sanctions

a. Denial of Discharge – A debtor will be denied a discharge:

(A) if he refuses to obey a lawful order of the court, other than an order to respond to a material question or testify,

(B) if he refuses on the grounds of privilege against self-incrimination to respond to a material question approved by the court, or to testify, after a lawful grant of immunity, or

(C) if he refuses to respond to a material question approved by the court, or to testify, on a ground other than a properly invoked privilege against self-incrimination (e.g., he asserts a privilege that has been waived or is inapplicable).³⁷

Section 727(a)(6) of the Bankruptcy Code departs from prior law where a debtor would be denied a discharge, even if he properly asserted a Fifth Amendment privilege. Section 7(a)(10) of the Bankruptcy Act³⁸ granted automatic use and derivative use immunity for testimony, except in hearings on objections to discharge. The immunity was limited to testimony and did not apply to books and records.³⁹ The debtor could be denied a discharge in a discharge hearing for any refusal to answer a material question approved by the court even if he asserted a valid Fifth Amendment right.⁴⁰

The Hobson's choice between a discharge and a constitutional privilege was eliminated by 11 U.S.C. § 727(a)(6). If the debtor claims a valid privilege and the United States Attorney does not request immunity, he may refuse to testify and retain his right to a discharge.⁴¹

Although there is no constitutional right to a discharge,⁴² a court cannot threaten to impose the drastic sanction of the denial of a discharge to compel the debtor to waive his Fifth Amendment privilege.⁴³

b. Dismissal of Bankruptcy – A violation of a court order to testify, to prepare and file schedules and statements of affairs, or to turn over documents or property of the estate may be “cause” to dismiss a bankruptcy case.⁴⁴ This is a better result for the debtor. If his criminal troubles ever come to fruition and he is acquitted or granted immunity, he would not be barred from refile and discharging his debts.⁴⁵ Any other result would be tantamount to

the assessment by the court of a penalty or punishment for assertion of a constitutional privilege.

c. Contempt

(1) Jurisdiction of the Bankruptcy Court

(a) History – Under the Bankruptcy Reform Act of 1978, Congress expressly granted bankruptcy courts civil and criminal contempt powers, subject to the restrictions of 28 U.S.C. §§ 1481 and 1826. After the Supreme Court ruling in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,⁴⁶ and subsequent congressional amendments, the authority of bankruptcy courts became uncertain, especially in the area of civil contempt. Rule 9020 of the Bankruptcy Rules originally promulgated in 1983, only established procedures for criminal contempt. In 1987, Bankruptcy Rule 9020 was amended and sets forth the procedures for civil and criminal contempt.

(b) Present Application

1. Civil Contempt – A court order compelling a debtor to testify or turn over records to a trustee may subject the debtor to civil contempt proceedings. Civil contempt is predicated on a refusal to do a commanded act, as distinguished from commission of a prohibited act.⁴⁷ An order of civil contempt is conditional and may be purged; that is, the sanction imposed is remedial and compensatory rather than punitive, and ends when the contemtor complies with the underlying order.⁴⁸

The authority of the bankruptcy court to impose civil contempt sanctions, however, is still unresolved.⁴⁹ Recent decisions

tend to find jurisdiction based on a reading and interpretation of 11 U.S.C. § 105(a) (authority to issue orders to carry out the provisions of Title 11); Title 28 U.S.C. § 157(b)(1) and (2) (authority to enter orders in core proceedings); and amended Bankruptcy Rule of Procedure 9020 (1987) (authority to enter orders in contempt proceedings).⁵⁰

Still other jurisdictions have added to the confusion by stating that amended Bankruptcy Rule 9020 makes little sense.⁵¹ The court's confusion is definitely understandable. The amendment requires that all contested contempt orders be treated as though they were beyond bankruptcy judge's jurisdiction. In other words, they are non-core matters. Thus, if contested, the bankruptcy court would not have the power to enter final dispositive orders in core proceedings where there is noncompliance.⁵²

Furthermore, the Advisory Committee Note to Bankruptcy Rule 9020 states that the rule “recognizes that bankruptcy judges may not have had the power to punish for contempt.” Assuming the bankruptcy court has no power to punish, no contemtor would ever risk filing an objection that could result in some form of punishment by the district court.

2. Criminal Contempt – Criminal contempt is punitive, and imposes a fixed, unconditional punishment.⁵³ Its purpose is to vindicate the authority of the court.⁵⁴ In spite of amended Rule 9020 courts and its apparent authority,⁵⁵ some have not recognized the criminal jurisdiction of bankruptcy courts,⁵⁶ and others are undecided.⁵⁷

(c) Appeals – If timely objections are filed, a contempt order shall be reviewed de novo by the district court as provided in Bankruptcy Rule 9033.⁵⁸ Non-party privilegeholders may seek immediate review of disclosure orders because they do not have the authority to compel a person with custody of the materials to risk a contempt citation for refusal to comply with a court order.⁵⁹

(d) Avoiding Waiver – Any possible appeal may be mooted by compliance with an order, and preclude the court from fashioning any relief.⁶⁰ Once the information has been released, appellate courts cannot always “unring the bell.”⁶¹

A person to whom such an order is directed may resist the order, and yet not be guilty of contempt, if the order is declared invalid on appeal. Although the Supreme Court in *Maness v. Meyers*,⁶² referred to its consistent application of this rule in the context of orders made “during trial,” the court previously has applied the same standard to disobedience of orders rendered in connection with pre-trial proceeding.⁶³ The Fifth Circuit has recognized that the rationale of these cases suggests the following rule: If an order “requires an irrevocable and permanent surrender of a constitutional right, it cannot be enforced by the contempt of power.”⁶⁴

B. Immunity (11 U.S.C. § 344; 18 U.S.C. § 6001 et seq.)

You may want to seek immunity from prosecution if the client absolutely must testify.⁶⁵ This may be necessary when you are unable to obtain a stay of proceedings and the failure to testify may result in the dismissal of the bankruptcy case, contempt proceedings, denial of discharge, denial of a dischargeability of a particular debt, or a judge-

ment or finding of fraudulent or preferential transfers.

But, immunity is a perilous venture. The unwary client may find himself losing both his money and his liberty. The use immunity statute⁶⁶ permits a prosecutor to compel the testimony of a witness, despite a Fifth Amendment claim of privilege. While use immunity generally exempts the witness from prosecution,⁶⁷ the witness may nonetheless be prosecuted if the government proves that adverse evidence is derived from a legitimate source wholly independent of the compelled testimony.⁶⁸ The use immunity statute applies only to past offenses – it does not include prosecution for perjury.⁶⁹ Also, immunized testimony may be used against your client in a civil proceeding, as substantive evidence and for impeachment.⁷⁰

Finally, you should avoid informal grants of immunity. In *United States v. Doe*,⁷¹ the Supreme Court declined to adopt a “doctrine of constructive immunity” urged by the government. Said the Court: “We decline to extend jurisdiction of courts to include prospective grants of immunity in the absence of the formal request that the statute requires.”

This so-called pocket immunity, like all attempts to circumvent the procedures set forth in 18 U.S.C. § 6002 and 6003, is potentially unenforceable.⁷² The evil of informal immunity is simple: if the prosecutor is unhappy with your testimony for whatever reason he may summarily withdraw the grant of immunity.

C. Parallel Criminal and Bankruptcy Proceedings

1. Stay of Adversary Litigation – A bankruptcy court may stay a civil proceeding during the pendency of a parallel criminal proceeding.⁷³ Indeed, the Fifth Circuit recognizes that a stay is most appropriately entered when civil discovery in a parallel case would threaten to dis-

rupt the restrictions imposed on discovery by the criminal rules.

When weighing the potential prejudice to the debtor visa-vis the creditor, implementation of a stay is generally appropriate and warranted.⁷⁴ A stay of a bankruptcy proceeding will generally cause no serious damage to the public interest. The court can also fashion some protection for the creditor if a stay will adversely affect his ability to protect his interests in the main bankruptcy case.

Furthermore, as stated in *United States v. Armada*,⁷⁵ a decision of the Temporary Emergency Court of Appeals affirming a district court’s stay of a noncriminal proceeding:

The noncriminal proceeding, if not deferred, might undermine the party’s Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Court Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

2. Adverse Inference Instruction

– If a stay is denied, and the debtor is compelled to assert his Fifth Amendment rights during discovery or trial, an “adverse inference” instruction may be requested by the creditor. If the court permits such an instruction, the trier of fact may draw an inference of guilt from the debtor’s failure to testify; the resulting prejudice to the debtor obviously would be great.⁷⁶ Adverse inferences may even be drawn from a non-party’s invocation of the Fifth Amendment.⁷⁷ Hence, the assertion of the Fifth Amendment by a former or current employee, agent, or co-conspirator may be used to the debtor’s detriment.

3. Appeals – Bankruptcy courts are not always receptive to Fifth Amendment assertions. If the stay is denied, you should appeal to the district court pursuant to 28 U.S.C. § 158⁷⁸ and the collateral order doctrine originally set forth in *Cohen v. Beneficial Industrial Loan Corp.*⁷⁹ and recently adopted in *United States v. Armada*.⁸⁰ Anticipate, however, that your appeal will be challenged both on jurisdictional⁸¹ and substantive grounds.⁸²

4. Special Problems – During the criminal investigation, the debtor, or several of his corporate officers, may be subpoenaed to the grand jury on matters parallel to an adversary proceeding pending in bankruptcy court. If a stay of the adversary proceeding is denied, you may attempt to enter into a protective order pursuant to Fed. R. Civ. P. 26(c). The order should provide that the fruits of the depositions, including transcripts of testimony and documents produced, be protected from grand jury subpoena or other government investigatory tools.⁸³

This is a perilous path as some courts have held that it is against public policy to impede grand jury investigations.⁸⁴ If you venture into this area, obtain a tightly worded protective order. Merely obtaining an oral “understanding of confidentiality” will not be sufficient.⁸⁵ Be sure that the order states that you are agreeing to testify solely in reliance on the order. If appropriate, you may want to get the Department of Justice or another government agency to agree to its terms.⁸⁶

Attorney-Client Privilege

An attorney should control any investigation in order to protect the confidentiality of the results.⁸⁷ Although the attorney-client privilege may be shared with a third person who has a common defense,⁸⁸ it is not an eternal protection. In *Commodity Future's Trading Commission v. Weintraub*,⁸⁹ the Supreme

Court held that the trustee of a corporation in bankruptcy had the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications.⁹⁰

Conclusion

Although protecting your client's constitutional rights may make the road to relief in bankruptcy more arduous, your client does not relinquish these rights by filing for bankruptcy. Before filing, you and your client must decide whether it is in your client's best interests to announce to the federal judiciary and his creditors that he fears incrimination. It may be advisable to avoid bankruptcy court while waiting for the particular criminal statute of limitations to expire.

* This article updates Androphy, *Mitigating Criminal Exposure in the Bankruptcy Court*, 27 Houston Lawyer No. 2 at 42 (Sept. 1989).

1. 11 U.S.C. § 343.
2. 11 U.S.C. § 521 (1).
3. 11 U.S.C. § 521(4).
4. U.S. Const. Amend. V.
5. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951). See also *Maness v. Meyers*, 419 U.S. 449, 462, 95 S. Ct. 584, 593, 42 L.Ed.2d 574 (1975); *Kastigar v. United States*, 406 U.S. 441, 444-45 92 S. Ct. 1653, 1656, 32 L.Ed.2d 212 (1972); *Doe v. United States*, 487 U.S. 201, 108 S. Ct., 2341, 2346 n.6 (1988).
6. *Johnson v. United States*, 228 U.S. 457, 459 (1913); *McCarthy v. Arndstein*, 266 U.S. 34 (1924); *Butcher v. Bailey*, 753 F.2d 465, 467 (6th Cir.), cert. dismissed, 473 U.S. 925, 106 S. Ct. 17 (1985); *In re Martin-Trigona*, 732 F.2d 170, 175 (2nd Cir.), cert. denied, 469 U.S. 859, 105 S. Ct. 191 (1984).
7. *Lefkowitz v. Turley*, 414 U.S. 70, 94 S. Ct. 316, 38 L.Ed.2d 274 (1973). See also *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S.Ct. 2132, 2135, 53 L.Ed 2d 1 (1977); *Coppola v. Powell*, 878 F.2d 1562, 1565-66 (1st Cir. 1989), U.S. App. Pndg.
8. *Fisher v. United States*, 425 U.S. 391, 397-99 (1976); *Schmerber v. California*, 384 U.S. 757, 761 (1966).
9. *In Re Morgenroth*, 718 F.2d 161, 167 (6th Cir. 1983); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).
10. *United States v. Goodwin*, 625 F.2d 693, 700-01 (5th Cir. 1980). *United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 1986); *United States v. Hatchett*, 862 F.2d 1249, 1251 (6th Cir. 1988).
11. *In Re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1150 (7th Cir. 1981), *aff'd*, 459 U.S. 248 (1983).
12. *In Re John Lakis, Inc.*, 228 F. Supp. 918, 920 (S.D.N.Y. 1964).
13. *Hoffman v. United States*, 341 U.S. at 486; *New York State Nat'l Org. For Women v. Terry*, 886 F.2d 1339, 1356-57 (2nd Cir. 1989).
14. *In Re Corrugated Container Antitrust Litigation*, 661 F.2d at ____ (1951).
15. 18 U.S.C. § 152 (concealment of assets, false oaths); 18 U.S.C. § 3284 (limitations period).
16. *Braswell v. United States*, 108 S. Ct. 2284 (1988).
17. *Id.*
18. *United States v. Doe*, 104 S.Ct. 1237, 1241-42 (1984).
19. *Braswell v. United States*, 108 S.Ct. 2295 n. 11.
20. *United States v. Doe*, 104 S.Ct. at 1241 n.7, 1245 (Concurring and dissenting opinions).
21. *Fischer v. United States*, 425 U.S. 391, 413-414 (1976); *In Re Proceedings Before the Aug. 6, 1984 Grand Jury*, 767 F.2d 39, 41 (2nd Cir. 1985).

22. *In Re Steinberg*, 837 F.2d 527 (1st Cir. 1988); *In Re Proceedings Before the Aug. 6, 1984 Grand Jury*, 767 F.2d 39, 41 (2nd Cir. 1985); *United States v. (Under Seal)*, 745 F.2d 834, 839-40 (4th Cir. 1984), *vacated as moot*, 471 U.S. 1001 (1985); *Butcher v. Bailey*, 753 F.2d at 469; *In Re Sealed Case*, 877 F.2d 83, 84 (D.C. Cir. 1989); *In Re Grand Jury Proceedings (U.S. v. Terry)* 759 F.2d 1418, 1419 (9th Cir. 1985).
23. 753 F.2d at 467.
24. *Id.* at 469.
25. *Id.* at 470; *See In Re Connelly*, 59 Bankr. 421, 443 (Bankr. N.D. Ill. 1986).
26. *In Re Crabtree*, 39 Bankr. 726, 731 (Bankr. E.D. Tenn. 194); *In Re Devereaux*, 48 Bankr. 644 (Bankr. S.D. Cal. 1985).
27. 425 U.S. at 410 n.11, 412 n.12.
28. *In Re Connelly*, 59 Bankr. at 444.
29. *In Re Candor Diamond Corp.*, 21 Bankr. 147, 152 (Bankr. S.D.N.Y. 1982).
30. *See Kastigar v. United States*, 406 U.S. 441 (1972).
31. *United States v. Sonderup*, 639 F.2d 294, 297 (5th Cir. Unit A 1981); *United States v. Perez-Franco*, 873 F.2d 455, 462-63 (1st Cir. 1989).
32. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).
33. *Id.* at 287.
34. *United States v. James*, 609 F.2d 36, 45 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980); *Klein v. Harris*, 667 F.2d at 287-88; *United States v. Rogers*, 340 U.S. 367, 374-75 (1951).
35. *United States v. Licavoli*, 604 F.2d 613 (9th Cir. 1979), *cert. denied*, 446 U.S. 935, 100 S. Ct. 2151, 64 L.Ed.2d 787 (1980); *United States v. Cain*, 544 F.2d 1113 (1st Cir. 1976); *United States v. Lawrenson*, 315 F.2d 312 (4th Cir. 1963); *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) (a witness who testifies with immunity at the grand jury does not waive the privilege in a subsequent civil case; however, the previously compelled testimony can be used in a subsequent civil proceeding); *Ryan v. Commissioner*, 568 F.2d 531, 541-42 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).
36. *In Re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *In Re Corrugated Container Antitrust Litigation, Conboy*, 661 F.2d 1145, 1155 (7th Cir. 1981), *aff'd*, *Pillsbury Company v. Conboy*, 459 U.S. 248, 103 S. Ct. 608, 74 L.Ed.2d 430 (1983) (“Questions do not incriminate; answers do.” *Id.* at 603. The court reasoned that “answers to such questions ‘are derived from the deponent’s current, independent memory of events’ and thus ‘necessarily create a new source of evidence’ that could incriminate a witness and could be used in a subsequent criminal prosecution against him.” *Id.*); *In Re Mudd*, 95 Bankr. 426 (Bankr. N.D. Tex. 1989) (Debtor waives privilege by testifying in prior 2004 examinations and 341 meetings, unless revealing details at subsequent proceeding would further to incriminate him or subject him to new areas of incrimination); *Klein v. Harris*, 667 F.2d at 288 (A waiver might be inferred only if the prior statements were testimonial, meaning that they were voluntarily made under oath in the context of the same judicial proceeding); *In Re Oxford Royal Mushroom Products*, 46 Bankr. 77, 79-80 (Bankr. E.D. Pa. 1985). (The debtor’s president testified at a Rule 2004 examination and then invoked the privilege when the hearing was continued to another date. The court held that the privilege was waived as to the details of the president’s knowledge after he voluntarily admitted his involvement during prior testimony).
37. 11 U.S.C. § 727(a)(6)(A), (B), (C).
38. 11 U.S.C. § 25(a)(10) (Repealed 1979).
39. *United States v. Seiffert*, 501 F.2d 974, 981-982 (5th Cir. 1974).
40. § 14(c)(6) of the Act, 11 U.S.C. § 32(c)(6) (repealed 1979).

41. *In Re Connelly*, 59 Bankr. at 428, 29; *In Re Martin-Trigona*, 732 F.2d 170, 173-74 (2nd Cir. 1984).
42. *United States v. Kras*, 409 U.S. 434, 446 (1973).
43. *Lefkowitz v. Turley*, 414 U.S. 70, 82-84 (1973); *National Acceptance Co. of America v. Bathsater*, 705 F.2d 924, 928-32 (7th Cir. 1983).
44. 11 U.S.C. § 707(a), 1112(b), 1307(c).
45. 11 U.S.C. § 349(a).
46. 458 U.S. 50 (1982).
47. *Skinner v. White*, 505 F.2d 685, 688 (5th Cir. 1974).
48. *Kellog v. Chester*, 71 Bankr. 36, 38 (N.D. Tex. 1987); *In Re Timmons*, 607 F.2d 120, 124 (5th Cir. 1979).
49. The Ninth Circuit declined to find the authority in *In Re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987). In *Sequoia*, a contempt proceeding arose from an individual's assertion of the Fifth Amendment privilege and failure to file a corporate statement of affairs, schedules, and a master mailing list. The case was decided based on an interpretation of the law prior to the 1987 amendments to Rule 9020. Furthermore, Judge Bue, former United States District Judge for the Southern District of Texas, has declined to find the power of the bankruptcy judges to issue final orders of contempt. *In Re Continental Airlines*, 61 Bankr. 758 (S.D. Fla. 1988).
50. *In Re Skinner*, 90 Bankr. 470, 475-77 (Bankr. D. Utah 1988); *In Re Hamilton Allied Corp.*, 87 Bankr. 43, 45-46 (Bankr. S.D. Ohio. 1988); *Dubin v. Jakobowski* (In Re Grosse), 84 Bankr. 377 (Bankr. E.D. Pa. 1988); *Yaquinto v. Greer*, 81 Bankr. 870, 880 (N.D. Tex. 1988); *Kellogg v. Chester*, 71 Bankr. 36, 37 (N.D. Tex. 1987); *In Re Stephen W. Grosse, P.C.*, 84 Bankr. 377, 385-387 (Bankr. E.D. Pa. 1988); *In Re Miller*, 81 Bankr. 669, 676-79 (Bankr. M.D. Fla. 1988).
51. *In Re Kennedy*, 80 B.R. 673 (D.Del. 1987).
52. Bankruptcy Rule 9020(c).
53. *In Re Timmons*, 607 F.2d 124; *United States v. Rizzo*, 539 F.2d 458, 462-63 (5th Cir. 1976).
54. *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Hubbard v. Fleet Mortg. Co.*, 810 F.2d 778, 781-782 (8th Cir. 1987); see *Hicks v. Friock*, 43 Cr. L. 3005 (1988) (difference between civil and criminal contempt).
55. *Yaquinto v. Greer*, 81 Bankr. at 881; see *In Re Sasson Jeans, Inc.*, 80 Bankr. S.D.N.Y. 1987).
56. *In Re Kennedy*, 80 Bankr. at 674. *Griffith v. Oles*, No. 88-1663, slip op. (5th Cir. March 16, 1990).
57. *Kellogg v. Chester*, 71 Bankr. at 39; *In Re Skinner*, 90 Bankr. at 478-479.
58. Also see *Butcher v. Bailey*, 753 F.2d 465 (6th Cir. 1985); 28 U.S.C. § 158; *Maness v. Meyers*, 419 U.S. 449, 461 (1975); *In Re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d at 1283.
59. *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 878 n.3 (5th Cir. Unit A 1981).
60. *Id.* at 471; but see *In Re Grand Jury Investigation*, 642 F.2d 1184 (9th Cir. 1981).
61. *Maness v. Meyers*, 419 U.S. 449, 460, 95 S. Ct. 574, 592 (1975); *In Re Grand Jury Proceedings*, 601 F.2d 162, 169 (5th Cir. 1979).
62. *Id.*

63. See *Gelbard v. United States*, 408 U.S. 41, 92 S. Ct. 2357, 33 L.Ed.2d 179 (1972) (witness ordered to testify before grand jury); *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L.Ed.2d 653 (1964) (witness ordered to testify before referee investigating gambling and other criminal activities); *Silverhorne Lumber Company v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L.Ed.319 (1920) (company ordered to produce books and records to grand jury pursuant to subpoenas).
64. *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972), *on remand*, 349 F. Supp. 227 (M.D.La. 1972), *aff'd*, 476 F.2d 373 (5th Cir.), *cert. denied*, 414 U.S. 979, 94 S. Ct. 370, 38 L.Ed.2d 223 (1973).
65. *In Re Minton Group, Inc.*, 43 Bankr. 705, 708-709 (Bankr. S.D.N.Y. 1984).
66. 18 U.S.C. §§ 6002, 6003.
67. *Kastigar v. United States*, 406 U.S. 441, 448-49 (1972); *United States v. Boruff*, 870 F.2d 316, 319 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 160 (1989).
68. *Id.* at 460-462.
69. 18 U.S.C. § 6002.
70. *Ryan v. Commissioner*, 568 F.2d 531, 541-42 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).
71. 104 S. Ct. 1237, 1244 (1984).
- 72.
73. *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Accord ACF Industries v. Guinn*, 384 F.2d 15, 19 (5th Cir. 1967), *cert. denied*, 390 U.S. 949 (1968); *Mobil Oil Corp. v. W.R. Grace & Co.*, 334 F.Supp. 117 (S.D. Tex. 1971). *Campbell v. Eastland*, 307 F.2d 478, 480 (5th Cir. 1962) (footnote omitted), *cert. denied*, 371 U.S. 955 (1963); *SEC v. First Financial Group of Texas, Inc.*, 659 F.1d 660, 668 (5th Cir. 1981); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979).
74. *Brock v. Tolkow*, 109 F.R.D. 116 (E.D.N.Y. 1985).
75. 700 F.2d 706, 708 (Temp. Emer. Ct. App. 1983).
76. *Baxter v. Palmigiano*, 425 U.S. 308, 316-21 (1976); *Brink's Inc. v. City of New York*, 717 F.2d 700, 707-710 (2d Cir. 1983).
77. *Brink's Inc. v. City of New York*, 717 F.2d 700, 707-710 (2d Cir. 1983), *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984).
78. Under 28 U.S.C. § 158(a), an appellant must have leave of court in order to appeal for an interlocutory order of the bankruptcy court. While there are no established guidelines for determining the propriety of interlocutory appeals in bankruptcy cases, courts have relied through analogy on 28 U.S.C. § 1292(b) which governs appeals of interlocutory orders from district courts to courts to appeal. *In re Charter Company*, 788 F.2d 617, 620 n.5 (11th Cir. 1985).
79. 337 U.S. 541 (1949).
80. 700 F.2d at 708.
81. See *In re Chandler*, 66 Bankr. 334, 337 (N.D. Ga. 1986); *Smith v. Seaside Lanes (In re Moody)*, 825 F.2d 81, 88 (5th Cir. 1987).
82. See cases cited in n.73.

83. *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295-296 (2d Cir. 1979); *Waldbaum v. Worldvision Enterprises*, 84 F.R.D. 95 (S.D.N.Y. 1979); *Securities & Exchange Commission v. Gilbert*, 79 F.R.D. 683, 685-86 (S.D.N.Y. 1978).

84. *In Re Grand Jury Subpoena Duces Tecum Special Grand Jury*, 41 Cr. L. 2117 (D.Md. April 21, 1987); *United States v. Foley*, 598 F.2d 1323 (4th Cir. 1979) (implying that letter covered by civil protective order was inaccessible to government but available to grand jury); *United States v. GAF Corp.*, 596 F.2d 10 (10th Cir. 1979); *United States v. Dionisio*, 410 U.S. 1, 16-18 (1973) (the court should not intervene in the grand jury process absent some compelling reason); *Branzburg v. Hayes*, 408 U.S. 665, 668 (1972) (investigatory powers of grand jury are broad).

85. *United States v. Davis*, 702 F.2d 418, 422-423 (2d Cir. 1983), *cert. denied*, 463 U.S. 1215 (1983).

86. *Valentin by Valentin v. Richardson*, 110 F.2d 861 (2d Cir. 1985).

87. *Hodges, Grant & Kaufmann v. United States Government*, 768 F.2d 719, 720-721 (5th Cir. 1985); *Upjohn Company v. United States*, 101 S. Ct. 677, 685-686 (1981).

88. *Wilson P. Abraham Construction Corp. v. Armco*, 559 F.2d 250, 253 (5th Cir. 1977); *United States v. McPartlin*, 595 F.2d 1321, 1336-1337 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

89. 105 S. Ct. 1986 (1985).

90. *Id.* at 1996; The waiver of a corporate debtor's attorney-client privilege by a co-trustee does not affect an individual debtor's personal attorney-client privilege. *Id.* at 1995; *In re Carter*, 62 Bankr. 1007, 1015 (C.D. Cal. 1986).