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Mitigating Criminal Exposure in the Bankruptcy Court

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Responses to statutory bankruptcy requirements may incriminate your client. The Bankruptcy Code requires that a debtor submit to an examination at meetings of creditors,[1] 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 the property of the estate.[3]

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.

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 a 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 shields 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 whether the debtor is using the Fifth Amendment merely to avoid injury 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 imaginary and fancy, a Fifth Amendment claim should not be disregarded.

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 F.B.I. 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 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, 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 sec. 344 (of Title 11).

Literally construed, this provisions 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 custodians of records generally may not invoke the privilege against self incrimination.

The argument that the mere act of production 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]

The Supreme Court in *Doe*[20] and *Fischer*[21] left open the question of whether the Fifth Amendment protects the contents of private papers that are not business records. The Ninth Circuit recently held that the privilege against self-incrimination may bar compelled disclosure to a grand jury of personal records transferred by a criminal suspect to his attorney.[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 U.S.C. § 521(4)

Several bankruptcy decisions have decided 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. If your client possesses "smoking gun" assets, unknown to the trustee and prosecutor, that may tend to incriminate, assert Fifth Amendment protection.[28]

d. Creditor's Meeting Under 11 U.S.C. § 341; Rule 2004 Examination

A debtor cannot assert the Fifth Amendment on all matters at an examination by creditors or at Rule 2004 examination.[29] A debtor's personal affairs and employment history that are unrelated to a criminal investigation are not protected from inquiry. Always ask: "Will the answer incriminate me, furnish a link in the chain of incriminatory evidence, or lead to any incriminatory evidence?" If the answer is yes, take the Fifth Amendment. Be cautious, but be selective with your answers.

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

There is a heavy burden 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 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. SameProceeding/Revealing Fact/Avoiding Details

When a witness gives incriminating testimony at a proceeding, he generally cannot invoke the privilege as to details of the incriminating subject matter.[34]

b. Different or Subsequent Proceedings

Even if there is a waiver of the privilege and voluntary testimony in response to specific questions or a particular subject matter in one proceeding, it does not constitute a waive of the Fifth Amendment privilege with respect to identical questions or a particular subject matter 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 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 questions

approved by the court, or to testify, after a lawful grant of immunity, or (C) if he refuses to respond to a material questions 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) 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 Act,[38] granted automatic use and derivative use of 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 denial of discharge to compel the debtor to waive his Fifth Amendment privilege.[43]

'[A debtor] must, however, be prepared to explain why every facet of his personal and business practice would be incriminatory.'

b. Dismissal of Bankruptcy

A violation of a court order to testify, to prepare and file schedules and statement of affairs, to turn over documents or property of the estate may be "cause" to dismiss a case.[44] This is a better result for the debtor. If his criminal troubles ever come to fruition and he is acquitted of granted immunity, he would not be barred from refiling and discharging his debts.[45] Any other result would indicate the assessment by the court of a penalty or punishment for assertion of a constitutional privilege.

c. Contempt (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 contemnor 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 9020 (1987) (authority to enter orders in contempt proceedings).[50]

Still other jurisdictions have added to the confusion by stating that amended 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 the 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 states that the rule "recognizes that the bankruptcy judges may not have the power to punish for contempt." Assuming the bankruptcy court has no power to punish, no contemnor 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 and its apparent authority,[55] some courts have not recognized the criminal jurisdiction of bankruptcy courts, [56] and others are undecided .[57]

(c) Appeals

If timely objections are filed, contempt order shall be reviewed de novo by the district court as provided in Bankruptcy Rule 9033. [58] Non-party privilege-holders 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 had applied the same standard to disobedience of orders rendered in connection with pre-trial proceedings.[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 constitutional right, it cannot be enforced by the contempt power."[64]

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, for example, to avoid dismissal of the bankruptcy case, contempt proceedings, denial of a discharge, denial of a discharge ability of a particular debt, or a judgment of 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 statute[66] 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, avoid informal grants of immunity. In *United Sates 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 the 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.

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.

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 mot appropriately entered when civil discovery in a parallel case would threaten to disrupt the restrictions imposed on discovery by the criminal rules.

When weighing the potential prejudice to the debtor vis-a-vis the creditor, implementation of the stay is generally appropriate and warranted.[74] A stay of 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 noncriminal proceeding:

> The noncriminal proceeding, if non deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of limits of Federal Rule of Criminal Procedure 16a(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 of trial, an "adverse influence" 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, and, the resulting prejudice to the debtor obviously would be great.[76] Even if the debtor decides to testify at trial, his Fifth Amendment assertion may be used as impeachment.

3. Appeals

Bankruptcy Courts are not always receptive to Fifth Amendment assertions. If the stay is denied, appeal to the district court pursuant to 28 U.S.C. § 158[77] and the collateral order doctrine originally set forth in *Cohen v. Beneficial Industrial Loan Corp.*[78] and recently adopted in *United*

States v. Armada.[79] Anticipate, however, that your appeal will be challenged both on jurisdictional[80] and substantive grounds.[81]

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 a pending adversary. If a stay of the adversary is denied, you may attempt to enter into a protective order pursuant to Fed. R. Civ. P. 26(c), providing that the fruits of the depositions, including transcripts of testimony and documents produced, be protected from grand jury subpoena or other government investigatory tools.[82]

This is a perilous path as some courts have held that it is against public policy to impede grand jury investigations.[83]

If you venture into this area, obtain a tightly worded protective order. Merely obtaining an oral "understanding of confidentiality" will not be sufficient.[84] 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 other government agency to agree to its terms.[85]

ATTORNEY-CLIENT PRIVILEGE

An attorney should control any investigation in order to protect the confidentiality of the results.[86] Although the privilege may be shared with a third person who has a common defense,[87] it is not an eternal protection. In *Commodity Future's Trading Commission v. Weintraub*,[88] the Supreme Court held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications.[89]

CONCLUSION

Although the road to relief may be more arduous, you do not relinquish your constitutional rights when you file for bankruptcy. On the other hand, before you file, you 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 515 Rusk, while waiting for the statute of limitations to expire.

ENDNOTES

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, 444-445 92 S. Ct. 1653, 1656, 32 L.Ed.2d 212 (1972).
6. *Johnson v. United States*, 229 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 (2d 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).
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 Cr. 1980).
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.
14. *In re Corrugated Container Antitrust Litigation*, 661 F.2d at 1158, *quoting Rogers v. United States*, 340 U.S. 367, 373 (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 August 6, 1984 Grand Jury*, 767 F. 2d 39, 41 (2d Cir. 1985).
22. *In re Grand Jury Proceedings*, (U.S. v. Terry) 759 F.2d 1418, 1420-1421 (9th Cir. 1985); *United States v. Lang* 792 F.2d 1235, 1237 (4th Cir. 1986), *cert. denied*, 479 U.S. 985, 107 S. Ct. 574 (1986)(Subpoena for personal records quashed by trial court); but *see In re Steinberg*, 837 F.2d 527 (1st Cir. 1988).
23. 753 F.2d at 467.
24. Id. at 469.
25. *Id.* at 470; *In re Connelly,* 159 Bankr. at 443.
26. *In re Crabtree*, 39 Bankr, at 726, 731 (Bankr. E.D. Tenn 1984); *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).
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 612 (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 hat "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 341meetings, unless revealing details at subsequent proceeding would further 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)(repealed1979).

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 (2d. Cir. 1984).

42. *United States v. Kras*, 409 U.S. 434, 446 (1973).

43. *Lefkowitz v. Turley*, 414 U.S. 70, 82-82 (1973); *National Acceptance Co. of America v. Bathlsater*, 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. *Kellogg 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. Tex. 1986).

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. 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. MD. Fla. 1988).

51. *In re Kennedy*, 80 Bankr. 673 (D. Del 1987).

52. 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. *Gompersd v. Buck Stove & Range Co*., 221 U.S. 418, 441 (1911); *Hubbard v. Fleet Mortgage Co*., 810 F.2d 778, 781-782 (8th Cir. 1987); *see Hicks v. Feiock*, 43 Cr. L. 3005 (1988)(difference between civil and criminal contempt).

55. *Yaquinto v. Greer*, 81 Bankr. at 881; see *In re Season Jeans, Inc*. 80 Bankr. 289, 295 (Bankr. S.D.N.Y. 1987).

56. *In re Kennedy*, 80 Bankr. at 674.

57. *Kellog 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. 584, 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); *Silverthorne 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. 270, 38 L.Ed2d223 (1973).

65. *In re Minton Group, Inc*. 43 Bankr. 705, 708-709 (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).

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. *United States v. D'Apice*, 664 F.2d 75, 77-78 (5th Cir. Unit B 1981).

73. *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). *Landis v. North American Co.* 299 U.S. 248, 254 (193 6); 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.2d 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. Under 28 U.S.C. § 158(a), an appellant must have leave of court in order to appeal from an interlocutory order in the bankruptcy court. While there are no established guidelines for determining the propriety of interlocutory appeals in bankruptcy cases, courts have relied though analogy on 28 U.S.C. § 1292(b) which governs appeals of interlocutory orders from district court to courts of appeals. *In re Charter Company*, 778 F.2d 617, 620 n. 5 (11th Cir. 1985).

78. 337 U.S. 541 (1949).

79. 700 F.2d. at. 708.

80. *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).

81. See cases cited in fn 73.

82. *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).

83. *In re Grand Jury Subpoena Duces Tecum Special Grand Jury*, 41 Cr.L. 2117 (ID. 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. Gionisio*, 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).

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

85. *Valentin by Valentin v. Richarardson*, 110 F.R.D., 622, 625 (D. Mass 1986); *Palmieri v. State of New York*, 779 F.2d Cir. 1985).

86. *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).

87. *Wilson P. Abraham Construction Company vs. 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. l 833 (1979).

88. 105 S. Ct. 1986 (1985).

89. *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).