

Court Denies Self-Incrimination Privilege To Lawyer In Law Firm

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May the individual partners of a law firm (especially, a small law firm) invoke the privilege against compelled self incrimination in response to a grand jury subpoena duces tecum served upon the firm's custodian of records seeking production of the firm's financial records, copies of retainer and closing statements, and various other records. That was the issue before the Court of Appeals in *Matter of Nassau County Grand Jury Subpoena Duces Tecum v. Doe Law Firm*, (#60, May 3, 2005).

The Court agreed with the Appellate Division and the motion court that the three individual partners in the appellant law firm ("Doe Law Firm") could not invoke either the state or the Federal privilege against self incrimination. The Court's opinion, in which all concurred, was written by Judge George B. Smith.

Although the record did not disclose the purpose of the grand jury proceeding, information about the purpose was provided in the brief of respondent, Attorney General Eliot Spitzer:

Because of concerns that dramatic increases in the cost of motor vehicle insurance were attributable to fraud, in 2001, Governor Pataki appointed New York State Attorney General Eliot Spitzer special prosecutor for auto insurance fraud [see Executive Order No. 109, 9 NYCRR § 5.109 (2001)]. Pursuant to this authority, on June 17, 2003, [respondent] filed criminal court complaints in Queens County and Nassau County charging 19 defendants with Conspiracy in the Fourth Degree in violation of Penal Law § 105.10. ... [T]he cases charged conspiracies among lawyers, medical providers, insurance brokers and middlemen known as 'steerers' to defraud insurance companies providing no fault insurance.

Doe Law Firm was served by a subpoena duces tecum issued by the Attorney General requiring its custodian of records to appear before the Nassau County grand jury and produce all the firm's records relating to personal injury cases handled by the firm from January 1, 2001 to June 24, 2003.

Specifically, the firm was required to produce all the following: general ledgers and journals; cash disbursement and receipt books; cancelled checks and bank statements; records of IOLA and escrow accounts; tax returns; copies of retainer statements; copies of closing statements filed with the Office of Court Administration; records of payments to providers of services relating to specific retainer or closing statements; records of payments to medical practitioners or medical facilities, or to marketing firms representing them; copies of contracts or agreements with medical practitioners or facilities, including leases; records of all cash payments and cash books and entries; records of all debts to or from providers of services and medical practitioners and marketing firms; payroll books and 941 tax forms; and the names of all past and present associate attorneys and partners.

Doe Law Firm moved to quash the subpoena or modify its scope. The firm made three basic arguments:

1. the subpoena violated the individual partner's state and Federal rights against selfincrimination;
2. the subpoena violated the right of the law firm and of the individual partners against unreasonable searches and seizures; and
3. the subpoena violated the attorney client privilege.

The firm also argued that the subpoena was burdensome and overbroad, and that statements filed with the Office of Court Administration were confidential under 22 NYCRR 691.20(c). The firm offered to submit a privilege log, or if compelled, to file a privilege log and the required documents for in camera inspection by the court, to enable it to rule on the claimed privileges.

The Nassau County court denied the motion in its entirety. The Appellate Division affirmed unanimously. The law firm appealed as of right under CPLR 5601(b)(1).

Federal Privilege Against Self Incrimination

Judge Bundy responded to the law firm's self incrimination argument by pointing out that the Federal courts have interpreted the Federal constitutional privilege against self incrimination as a personal privilege. "It cannot be utilized by or on behalf of any organization, such as a corporation." *United States v. White*, 322 US 694 (1944).

"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." *Bellis v. United States*. 417 US 85, 90 (1974), quoting *White*, at 699.

The *Bellis* case established the basic principle that a partner in a law firm, even a small law firm, cannot invoke the Federal Fifth Amendment privilege against compelled self incrimination "to avoid producing records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally." *Bellis*, at 88. *Bellis* involved a grand jury subpoena on a former partner in a three man law firm which had been dissolved.

The rationale behind denying the Fifth Amendment privilege to an individual who acts in a representative capacity is that because an organization such as a law firm or a corporation can produce its records only through an officer, member or agent, it would frustrate legitimate governmental regulation of such organizations to extend the privilege to its representatives individually.

The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many Federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available

to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations" (*Bellis*, at 9091, quoting *White, supra*, at 700).

As prescribed by the *Bellis* court, in deciding whether a law firm is an "organization" so as to preclude the claim of privilege by its individual lawyers, the court should ask whether the law firm: 1) existed as an independent entity apart from its members; 2) was well structured "and not merely a loose, informal association of individuals"; and 3) maintained "a distinct set of organizational records and recogniz(ed) rights in its members of control and access to them." The records subpoenaed must be the organization records held in a representative capacity, not the records of an individual held in a personal capacity.

Court Adopts Ruling in *Bellis*

Judge Smith acknowledged that the Court of Appeals had never determined whether the privilege against compelled self incrimination in the New York Constitution applies to partnerships. The Federal privilege is contained in Article V of the Federal Constitution; the New York State privilege is contained in Article I, § 6 of the State Constitution.

Recognizing that the Court of Appeals has occasionally "afforded greater fundamental rights than the Federal Constitution and the United States Supreme Court," Judge Smith asked whether *Bellis* should be adopted in New York.

The Court of Appeals has adopted a two pronged analysis to determine whether a provision of the State Constitution should be interpreted more broadly than "its Federal analog." The first prong (the "interpretative" prong) is: is the State's language different from the Federal language? If the answer is yes, there is a basis for a different interpretation by the State. Here, however, there is no material textual difference between the State and Federal provisions concerning the privilege against selfincrimination.

In these circumstances, the Court of Appeals proceeds to the second prong of its analysis (the "noninterpretive" prong), which "proceeds from a judicial perception of sound policy, justice and fundamental fairness" and inquires into "any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of that individual right; any identification of the right in the State Constitution as being one of peculiar State and local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right."

Analysis of the "noninterpretive" prong can persuade the Court of Appeals that the State may properly adopt a broader reading of its constitutional provision than the Supreme Court has given to the corresponding Federal provision. In this case, however, there is no basis for a broader interpretation of the State provision.

Judge Smith rejected the argument by the Doe law firm that a partnership is not a legal entity separate from its members. Although in some instances, a partnership may be regarded as an entity separate from its members, that is not the case when the privilege against self incrimination is the issue.

Referring to *Friedman v. HiLi Manor Home for Adults*, 42 NY2d 408 (1977), Judge Smith said: ... "the constitutional guarantee against compulsory self incrimination is concerned mostly with protecting individual civil liberties, and should not be interpreted to 'insulate economic or other interests of

organizations, incorporated and unincorporated, when to do so would be to frustrate appropriate governmental regulation.”

Judge Smith concluded:

Based on the foregoing, we hereby adopt *Bellis* and hold that an individual partner of a law firm, whose firm was served with a subpoena duces tecum seeking the production of firm records, cannot rely on the constitutional privilege against compelled self incrimination ‘to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally’ (*Bellis*, 417 US at 88). Applying this rule to the present case, appellant law firm is a collective entity under *Bellis*. It is not a family partnership or association; exists as an independent entity apart from its individual members; is a well structured, not informal, organization set up for conducting an ongoing legal practice; and maintains a distinct set of organizational records. Additionally, the records subpoenaed were organization records held in a representative capacity rather than records of an individual held in a personal capacity — i.e., the subpoena was directed to appellant law firm’s custodian of records.

Court Rejects Unreasonable Search and Seizure Claim

Judge Smith considered the Doe Law Firm’s argument that the grand jury’s subpoena duces tecum violated its right against unreasonable search and seizure. A subpoena duces tecum does not have to be supported by probable cause. It need only satisfy the standard of reasonableness.

The standard of reasonableness rather than probable cause is appropriate because of the substantial differences between a search warrant and a subpoena duces tecum. A search and seizure is conducted abruptly, without advance notice, often with force or the threat of force. A subpoena, in contrast, remains at all times under the control and supervision of a judicial officer and may be challenged before compliance through a motion to quash. Moreover, the unannounced search and seizure of documents often results in serious social stigma. A subpoena is served in the same manner as any summons or other legal process and typically no stigma whatsoever attaches if it is enforced. *Matter of Grand Jury Subpoenas for Locals 17, 135, 257 and 608 of the United Brotherhood of Carpenters and Joiners of America, AFLCIO*, 72 NY2d 307, 315 (1988).

So long as the materials sought are relevant to the investigation being conducted and the subpoena is not overbroad or unduly burdensome, the subpoena does not violate an individual’s right to be free from unreasonable search and seizure. “A Grand Jury subpoena, unlike an office subpoena, enjoys a presumption of validity that requires the party challenging the subpoena to demonstrate, by concrete evidence, that the materials sought have no relation to the matter under investigation...given the ranging, exploratory nature and operation of a Grand Jury, the witness served with a subpoena must show that the documents are so unrelated to the subject of inquiry as to make it obvious that their production would be futile as an aid to the Grand Jury’s investigation.”

The Doe Law Firm failed to rebut the presumption of validity. It also failed to show the subpoena was overbroad or that the subpoenaed documents were irrelevant to the grand jury’s investigation.

Finally, Judge Smith rejected the Doe Law Firm's argument that the documents subpoenaed were protected by the attorney client privilege. The attorney client privilege protects confidential communications between a lawyer and his client relating to legal advice requested by the client. The burden of proof is on the person asserting the privilege. Communications relating to the identity of the client and the fees paid by the client or a third person are not generally protected under the privilege.

Judge Bundy refused to disturb the lower courts' decision that the documents covered by the subpoena were not protected by the attorney client privilege. He noted, however, that nothing prevented the firm from compiling a privilege log and asserting the privilege as to particular documents.