Dear Readers:

On March 18, NYCLA celebrated the 50th anniversary of the U.S. Supreme Court's decision in *Gideon v. Wainwright*, which recognized the constitutional right to counsel in a criminal case. That decision has particular resonance with me since my law firm, Arnold & Porter, represented Clarence Earl Gideon *pro bono* in the U.S. Supreme Court.

The panel discussion that occurred on March 18 during our program illuminated the fact that despite the passage of 50 years, the full promise of *Gideon* remains unfulfilled. Our legal services providers simply do not have the time or resources to provide adequate representation to many criminal defendants.

Stewart D. Aaron
President, New York County Lawyers' Association

Part of NYCLA's mission is to provide "free legal services for the indigent, low-income and other persons in need" and so the Association encourages all of its members to assist in providing legal representation to those who cannot afford to pay for it. We also invite attorneys to participate in our *pro bono* projects — a variety of meaningful opportunities that use volunteer attorney time efficiently to meet pressing community needs. As a profession, we owe it to our citizens and our courts to ensure that constitutional imperatives are being met.

Tweet me @NYCLAPres and share how you are helping to fulfill the promise of *Gideon*.

Stewart D. Aaron
President
New York County Lawyers' Association

NYCLA's Taxation Committee Files Amicus Curiae Brief Urging the United States Supreme Court to Protect the Fifth Amendment Act of Production Privilege

By Megan L. Brackney, Esq.

Almost every day, there is a new headline related to United States taxpayers with unreported offshore bank accounts. In one of its latest enforcement efforts, the United States government has been serving grand jury subpoenas on hundreds of taxpayers who are suspected of having foreign bank accounts, ordering them to produce their own account records, in effect to aid their own prosecutions for tax evasion and other offenses.[1] These subpoenas present a significant constitutional question: is the act of producing foreign account records a testimonial act protected by the Fifth Amendment privilege against self-incrimination?

There has been substantial litigation about this issue over the past two years. Recently, in connection with a petition for *certiorari* filed with the United States Supreme Court in *In re T.W. v. United States*, No. 12-853, NYCLA's Taxation Committee submitted an *amicus curiae* brief, arguing that the Fifth Amendment act of production privilege should apply. NYCLA Taxation Committee member, Caroline Rule of Kostelanetz & Fink, LLP, was the primary author of the *amicus* brief and has represented several individuals in connection with grand jury subpoenas issued in the Southern and Eastern Districts of New York.The NYCLA Taxation Committee submitted the *amicus* brief because it believes that this is an issue of exceptional constitutional importance. Although, as of yet, there is no split between the Courts of Appeals in these cases, the Supreme Court has ordered the Solicitor General to respond to the petition in *T.W.*, which may indicate its interest in this issue.

The petition in *T.W.* seeks review of the Seventh Circuit decision, *In Re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, 691 F.3d 903 (7th Cir. 2012). In that case, the district court initially ruled in favor of the individual who had been subpoenaed, explaining that "the Government must do more work than simply requiring [the target] to incriminate himself by producing his own files if it wishes to find evidence during this grand jury investigation that [he] has an incriminating interest in foreign bank accounts." *In re Special February 2011-1 Grand Jury Subpoena Dated September 12, 2011*, 852 F. Supp. 2d 1020, 1021 (N.D. Ill. 2011). The Seventh Circuit reversed the district court, relying largely on a Ninth Circuit decision in *In re Grand Jury Investigation M.H.,*, 648 F.3d 1067 (9th Cir. 2011). In addition, the Fifth and Eleventh Circuits have compelled subpoenaed parties to turn over their foreign account records. *In re Grand Jury Proceedings, No. 4-10,* — F.3d —, 2013 WL 452768 (11thCir. Feb. 7, 2013); *In re Grand Jury Subpoena,* 696 F.3d 428 (5th Cir. 2012). The issue soon will be argued before the Second Circuit in *In re Grand Jury Subpoena dated February 2, 2012*, No. 13-403, an appeal from the decision in *United States v. John Doe*, 12-MC-553 (JFB) (E.D.N.Y. Jan. 14, 2013).

The act of production privilege is described in the Supreme Court's decision in *United States v. Hubbell*, 530 U.S. 27 (2000),which held that the Fifth Amendment affords the same protection to the testimonial aspects of the act of producing documents as it does to any other compelled testimony. In the recent cases involving grand jury subpoenas of foreign bank account records, the government has argued that the Fifth Amendment privilege against self-incrimination does not apply because these taxpayers were required by regulation to maintain their foreign bank account records. The required records doctrine arises from *Shapiro v. United States*, 335 U.S. 1 (1948), a case decided when the contents of private papers were still considered to be protected by the Fifth Amendment under *Boyd v. United States*, 116 U.S. 616 (1886). *Shapiro* considered whether records that were required to be kept by statute were "public" or "private," which was then the critical question in determining whether the records were privileged. Since *Shapiro*, however, the Supreme Court has abandoned *Boyd*, and concluded that the Fifth Amendment privilege does not protect the *contents of* records, public or private. Instead, it protects individuals against being compelled to produce records when the act of producing them would be testimonial and incriminatory.

Following this reasoning, the Supreme Court held in *Fisher v. United States*, 425 U.S. 391 (1976), and *United States v. Doe*, 465 U.S. 605, 67-68 (1984), that the act of producing documents in response to a subpoena can have a testimonial or communicative aspect of its own, aside from the contents of the documents. In *Grosso v. United States*, 390 U.S. 62 (1968), the Supreme Court developed a three-part test that must be satisfied before the required records doctrine can be applied: (i) "the purposes of the United States' inquiry must be essentially regulatory"; (ii) the information sought must be "of a kind which the regulated party has customarily kept"; and (iii) "the records themselves must have assumed 'public aspects' which render them at least analogous to public documents."

In the recent cases involving grand jury subpoenas for foreign bank account records, the government and the courts have relied on the required records doctrine to compel compliance. Specifically, 31 C.F.R. § 1010.420, promulgated under the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* (the "BSA"), requires anyone having "a financial interest in or signatory authority over" a foreign bank account to maintain for five years, and keep available for inspection, records containing the "name," "number or other designation," and "type" of account; the "name and address of the foreign bank or other person with whom such account is maintained"; and "the maximum value of each such account during [each year]." *Id.* This regulation operates in conjunction with 31 C.F.R. § 1010.350, under which any financial interest or other authority over a foreign financial account must be reported annually to Treasury on Form TD F 90-22.1, "Report of Foreign Bank and Financial Accounts,"commonly-known as an "FBAR."

In its *amicus* brief, the NYCLA Taxation Committee argued that the Seventh Circuit improperly collapsed the entire Grosso test into just its first prong by holding that because it believes that the government's inquiry is essentially regulatory, the records required by the regulation must be customarily kept by those

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regulate and that the records thus assume public aspects by virtue of the requirement that they be maintained. The NYCLA Taxation Committee argued that if the Supreme Court were to separately analyze each prong of the *Grosso test*, it would be required to conclude that the required records doctrine does not apply to the grand jury subpoenas for foreign account records.

First, an inquiry under the BSA is not "essentially regulatory," but seeks to advance the Government's "criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311. In this context, "essentially regulatory" applies to a "valid civil regulatory regime" that serves nonprosecutorial ends. *Rajah v. Mukasey*, 544 F.3d 427, 442 (2d Cir.2008). There is no civil regulatory purpose for the BSA regulations; rather, their aim, as expressed in the BSA itself and its legislative history, is law enforcement. Second, the records are not of a type that the regulated party would ordinarily maintain. Foreign banks, especially in the "secrecy" jurisdictions that the BSA targets, are notorious for failing to provide customers with records; as a practical matter, individuals regulated by 31 C.F.R. § 1010.420 are unlikely to possess, much less maintain, the records required by the BSA regulation. Third, foreign bank account records do not have "public aspects," such as is contemplated in *Grosso* and *Shapiro*, where the petitioners were engaged in commerce with the public, and were able to do so solely because of licenses requiring them to maintain certain records, which then assumed the character of public records. There is nothing public about the unlicensed activity of owning a private foreign bank account. Rather, the relationship between the government and a taxpayer with a foreign bank account is no different than that of a taxpayer with a domestic bank account, and the Seventh Circuit has twice held that the act of production privilege protects domestic financial records, even though they are required to be maintained by statute. *See Smith v. Richert*, 35 F.3d 300 (7th Cir. 1994) and *United States v. Porter*, 711 F.2d 1397 (7th Cir. 1983).

In holding that a wagering statute's record-keeping provisions did not cloak the records with "public aspects," the Supreme Court previously stated:

> The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

The NYCLA Taxation Committee argued that in the cases compelling production of foreign bank account records, the government's desire to obtain information regarding United States taxpayers' foreign bank accounts cannot overcome these taxpayers' Fifth Amendment rights. This is especially true, where, as in the case of the grand jury subpoenas for foreign bank account records, there is no Act of Congress, but merely a regulation requiring the records to be maintained. The NYCLA Taxation Committee thus emphasized that the courts should be careful and rigorous in applying the *Grosso* test to ensure that the constitutional Fifth Amendment act of production privilege cannot be eliminated by regulation. Because the government has issued hundreds of these subpoenas with no end in sight, the NYCLA Taxation Committee is hopeful that the Supreme Court will step in and protect the bedrock Fifth Amendment privilege against self-incrimination before it is entirely eroded by the lower courts.

Megan L. Brackney, Esq. is the Chair of NYCLA's Taxation Committee and a partner at Kostelanetz & Fink, LLP in New York.

References:

[1] Although exact statistics are not available, at this time last year, it was estimated that more than 150 grand jury subpoenas had been issued. *See* M. Sapirie, *International Tax Enforcement 3.0*, 134 Tax Notes 1359 (Mar. 12, 2012).

Ethics Hotline

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Questions to the Hotline are limited to an inquiring attorney's prospective conduct. The Hotline does not answer questions regarding past conduct, the conduct of other attorneys, questions that are being litigated or before a disciplinary committee or ethics committee, or questions of law. This notation shall not be construed to contain all Hotline guidelines. For a full discussion of Ethics Hotline guidelines, please see the article below, "Guidelines on NYCLA's Ethics Hotline," published in the September 2006 issue of *New York County Lawyer*.

NYCLA Comments on and Supports Issues

NYCLA frequently reports, comments on, and supports issues affecting the New York City legal community and has recently commented on or supported the following issues:

- Supreme Court Committee Submits Comments to OCA on 22 NYCRR 202.12 and 22 NYCRR 202.70, which would require parties to confer with respect to potential electronic discovery matters prior to the preliminary conference, and expand the Commercial Division Rule's list of e-discovery issues for the parties to address.
- Matrimonial Law Section Submits Comments to OCA Regarding Access to Forensic Evaluation Reports in Child Custody Matters
- Civil Court Practice Section and Supreme Court Committee Submit Joint Comments to OCA opposing 22 NYCRR Section 202.5-c, which related to proof of service by mail through attorney's affirmation
- Taxation Committee Files Amicus Brief in Support of Petitioner in *T. W. v. the United States of America*

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