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## THE TAXPAYER'S EXPECTATION OF PRIVACY AS A BAR TO PRODUCTION OF RECORDS HELD BY HIS ATTORNEY

Upon receipt of an administrative summons for tax-related records,<sup>1</sup> a taxpayer or his professional representative, such as an attorney or accountant, may attempt to block production of records in the hands of a representative by asserting the taxpayer's fifth amendment privilege against self-incrimination.<sup>2</sup> Present case law indicates that the success of this defense depends upon which representative possesses the records and upon the means by which that representative acquired possession. In *Couch v. United States*<sup>3</sup> the United States Supreme Court ruled in 1973 that records in the possession of a taxpayer's accountant were not protected since the fifth amendment prohibition against compelling an accused to testify against himself could not be invoked when the accused neither possessed, nor maintained a reasonable expectation of privacy in, the controverted records.<sup>4</sup>

Application of the *Couch* decision in three-party situations, involving taxpayer, accountant, and attorney, has proved more diffi-

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1. Section 7602 of the Internal Revenue Code empowers the Secretary of the Treasury to issue an administrative summons for a taxpayer's records:

For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax . . . , or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . , or any other person . . . to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

INT. REV. CODE OF 1954, § 7602. The summons may be enforced by the federal district courts. *Id.* §§ 7402(b), 7604(a).

2. "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. The privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (footnotes omitted).

3. 409 U.S. 322 (1973).

4. *Id.* at 329-36. The Court emphasized that the privilege only forbids compelled testimony by an accused and that no unconstitutional compulsion was present where the accused taxpayer lacked any possession. *Id.* at 328-29.

cult. In *United States v. White*<sup>5</sup> the Court of Appeals for the Fifth Circuit refused, shortly after the Supreme Court's *Couch* opinion, to allow a taxpayer's attorney to assert his client's fifth amendment rights in order to bar production of records when the attorney had obtained the records directly from the accountant without the taxpayer's knowledge. Although the attorney intended to use these records to prepare the taxpayer's defense to a government inquiry, the court, applying *Couch*, relied upon the absence of any prior actual possession by the taxpayer to preclude any imputation of the attorney's possession to the taxpayer.<sup>6</sup> Thus never having had any possession of the records, the taxpayer was deemed to have no fifth amendment interest in their protection that could be asserted on his behalf by his attorney.

During the following year, that same court and the Court of Appeals for the Third Circuit considered cases in which a taxpayer, prior to the service of a summons, personally removed records from his accountant's possession, delivering them to an attorney who subsequently attempted to raise the taxpayer's fifth amendment right as a bar to producing the records. The Court of Appeals for the Third Circuit ruled in *United States v. Fisher*<sup>7</sup> that no such right attached, while the Court of Appeals for the Fifth Circuit in *United States v. Kasmir*<sup>8</sup> held that the fifth amendment defense was available because the attorney's possession, subsequent to actual possession by the taxpayer, evidenced an expectation of privacy sufficient to give the taxpayer constructive possession of the documents.<sup>9</sup> Although agreeing that a taxpayer's expectation of privacy may be relevant to the invocation of the fifth amendment defense, the

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5. 477 F.2d 757 (5th Cir. 1973), *aff'd on rehearing*, 487 F.2d 1335, *cert. denied*, 95 S. Ct. 132 (1974).

6. *Id.* at 763.

7. 500 F.2d 683 (3d Cir. 1974), *cert. granted*, 95 S. Ct. 824 (1975) (No. 74-18).

8. 499 F.2d 444 (5th Cir. 1974), *cert. granted*, 95 S. Ct. 824 (1975) (No. 74-611). See Note, *United States v. Kasmir: A Clarification of Fifth Amendment Rights Regarding Documents Held by an Attorney?*, 36 U. PITT. L. REV. 728 (1975); 12 HOUSTON L. REV. 504 (1975). The records summoned in *Fisher*, 500 F.2d at 685, and *White*, 477 F.2d at 759, were the accountant's workpapers, while *Kasmir* involved accountant's workpapers, the taxpayer's tax returns, and correspondence between the taxpayer and his accountant, 499 F.2d at 446 n.1. The questioned documents in *Couch* were the taxpayer's bank statements, payroll records, and income and expense accounts. 409 U.S. at 324. These slight factual differences have no legal significance because authorship or ownership should not alone be determinative. See notes 72-82 *infra* & accompanying text.

9. 499 F.2d at 450-52.

*Fisher* and the *Kasmir* opinions both clouded the application of *Couch* unduly.<sup>10</sup> Review of the *Couch* decision, paying close attention to the specific issues addressed by the opinion, indicates that the three-party decisions have erred by failing to perceive that expectations of privacy can exist without any physical possession by the taxpayer and that the appropriate time for gauging the taxpayer's expectations is at the moment the summons is served.

### THE PRE-*Couch* Cases

Prior to the Supreme Court's decision in *Couch*, lower courts considering whether taxpayers' attorneys could raise their clients' fifth amendment privileges as a bar to administrative summonses<sup>11</sup> had developed two clearly opposing viewpoints. One line of decision<sup>12</sup> denied use of the privilege in reliance upon Supreme Court

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10. Although it may be possible to distinguish *Kasmir* and *Fisher* on their facts because the taxpayer in the former case may have delivered his records to his attorney for reasons of security as well as legal advice, *Ord, The IRS's Right of Access to CPA's Workpapers and Client Records*, 4 TAX ADVISER 516, 524 (1973), the possibility of a custodial safekeeping arrangement, see notes 44-46 *infra* & accompanying text, was not considered expressly in *Kasmir*. For a discussion of ethical considerations as another possibly distinguishing factor, see notes 53-56 *infra* & accompanying text.

The tax records involved in these cases also are assumed to be "testimonial or communicative" in nature since the fifth amendment protection may not be applicable otherwise. *Schmerber v. California*, 384 U.S. 757, 763-64 (1966). Moreover, it must be assumed that the summons was not issued solely for purposes of a criminal investigation. See *Donaldson v. United States*, 400 U.S. 517 (1971). The defendant in *Fisher* argued that because only the Internal Revenue Service Intelligence Division, which investigates criminal violations, was assigned to his case, the summons was issued solely for the improper purpose of obtaining evidence for use in a criminal prosecution. 500 F.2d at 686-87. The court dismissed this contention, following the Supreme Court's ruling in *Donaldson* that a section 7602 summons can be issued by the Intelligence Division, 400 U.S. at 533-36, and that the section 7602 summons unquestionably could be used during civil investigations which also might result in criminal prosecution. See, e.g., *Couch v. United States*, 409 U.S. 322, 326 (1973); *Donaldson v. United States*, 400 U.S. 517, 535-36 (1971). *Donaldson* only bars a summons issued solely for the purpose of criminal prosecution; other summonses are sanctioned if issued "in good faith and prior to a recommendation for criminal prosecution." 400 U.S. at 536. One member of the court in *United States v. White*, 477 F.2d 757, 765 (5th Cir. 1973) (Ainsworth, J., dissenting), argued that this good-faith requirement should be construed strictly against the Government. For a general discussion of compelled production of documents in tax cases, see *Tax Symposium*, 2 HOFSTRA L. REV. 129 (1974) [hereinafter cited as *Symposium*].

11. The pre-existing document rule precludes the use of the attorney-client privilege as a defense. See note 77 *infra*.

12. *Bouschor v. United States*, 316 F.2d 451, 458 (8th Cir. 1963); *In re Fahey*, 300 F.2d 383, 385 (6th Cir. 1961); *Falsone v. United States*, 205 F.2d 734, 739 (5th Cir.), cert. denied, 346 U.S. 864 (1953); *In re Brumbaugh*, 62-2 U.S. Tax Cas. ¶ 9521, at 85,183 (S.D. Cal. 1962); *United States v. Boccuto*, 175 F. Supp. 886, 888 (D.N.J. 1959); *United States v. Willis*, 145 F. Supp. 365, 367-69 (M.D. Ga. 1955).

holdings that, in particular situations, the privilege could not be asserted by a representative;<sup>13</sup> other cases<sup>14</sup> sanctioned this usage, often as a matter of policy.

In *United States v. Boccuto*,<sup>15</sup> for example, the taxpayer ordered his accountant to deliver certain records, including the accountant's workpapers, to the taxpayer's attorney. Served with an administrative summons while in possession of these records, the attorney attempted to assert his client's fifth amendment defense. Relying upon three decisions holding the privilege to be solely personal to the witness, *Rogers v. United States*,<sup>16</sup> *United States v. Willis*,<sup>17</sup> and *Application of Daniels*,<sup>18</sup> the court reasoned that because the attorney's possession was representative rather than personal or private, the attorney had no standing to assert the defense. Review of the cases cited for support in *Boccuto*, however, reveals the fragile foundation upon which the decision stands.

The defendant in *Rogers* was a Communist Party member who waived her fifth amendment rights by voluntarily giving self-incriminating testimony, but refused to testify further to incriminate another party member. Ruling that one cannot assert the privilege to protect an unrelated third party, the Supreme Court affirmed her conviction for contempt of court.<sup>19</sup> The use of the Supreme Court's *Rogers* decision by the *Boccuto* court is unpersuasive because the Supreme Court decision did not address the relationship that would exist when an attorney asserted his client's fifth amendment privilege.

Moreover, the *Willis* and *Daniels* decisions cited in the *Boccuto* opinion were predicated upon a series of Supreme Court holdings that the privilege is personal and not to be asserted by a representa-

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13. *Rogers v. United States*, 340 U.S. 367, 371 (1951); *United States v. White*, 322 U.S. 694 (1944); *Grant v. United States*, 227 U.S. 74, 79-80 (1913); *Wilson v. United States*, 221 U.S. 361, 377-79 (1911); *McAlister v. Henkel*, 201 U.S. 90, 91 (1906); *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906).

14. *United States v. Judson*, 322 F.2d 460, 465-68 (9th Cir. 1963); *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962) (dictum), cert. denied, 371 U.S. 951 (1963); *United States v. Pritchard*, 70-1 U.S. Tax Cas. ¶ 9434, at 83,548 (N.D. Ala. 1970); *United States v. Foster*, Lewis, Langley & Onion, 65-1 U.S. Tax Cas. ¶ 9418, at 95,515 (W.D. Tex. 1965); *Application of House*, 144 F. Supp. 95 (N.D. Cal. 1956).

15. 175 F. Supp. 886 (D.N.J. 1959).

16. 340 U.S. 367 (1951).

17. 145 F. Supp. 365 (M.D. Ga. 1955).

18. 140 F. Supp. 322 (S.D.N.Y. 1956).

19. 340 U.S. at 371.

tive.<sup>20</sup> In each of the cases, however, the Supreme Court used the word "personal" only to distinguish natural persons from collective entities.<sup>21</sup> These decisions therefore should be read as stating only that the privilege is unavailable to a collective entity, such as a corporation, and may not be asserted on its behalf by its representative.<sup>22</sup> Despite this narrow holding of the "collective entity" line of cases and the resulting doubt that should be cast upon *Willis* and *Daniels*, the court in *Bocutto* deemed the latter two decisions sufficiently persuasive to preclude the attorney from asserting his client's privilege.<sup>23</sup>

The opposing view was exemplified by *Application of House*<sup>24</sup> in which a federal district court confronted a factual situation similar to that in *Bocutto*. Because the records sought were the property of the taxpayer's accountant, the Government argued in *House* that the privilege was unavailable to the taxpayer. Citing a statement by the Supreme Court that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege or at least in his possession in a purely personal

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20. See *United States v. White*, 322 U.S. 694 (1944); *Grant v. United States*, 227 U.S. 74 (1913); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

21. The Court declared in *Hale v. Henkel*, 201 U.S. 43, 74 (1906): "[W]e are of the opinion that there is a clear distinction in this particular between an individual and a corporation . . . ." This language was cited with approval in *Wilson v. United States*, 221 U.S. 361, 364 (1911). There is dictum in *Hale* to the effect that an agent may not assert his principal's privilege whether the principal is a corporation or an individual. 201 U.S. at 70. This issue was not presented in *Hale* nor is it controlling in the other cases in this series. All deal with the records of collective entities of some sort: active corporations (*Hale*, *Wilson*), defunct corporations (*Grant*), or labor unions (*White*). For comment on the use of these "collective entity" cases in suits to compel attorneys to produce the records of individual clients, see *United States v. Judson*, 322 F.2d 460, 464 (9th Cir. 1963); Lay, *Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations*, 21 U. MIAMI L. REV. 854, 855 (1967); *Symposium*, *supra* note 10, at 203-05.

22. The "collective entity" interpretation is buttressed by the Supreme Court's recent decision in *Bellis v. United States*, 94 S. Ct. 2179 (1974), in which the Court stated: "These decisions [*Wilson*, *Grant*, and *White*] reflect the Court's consistent view that the privilege against compulsory self-incrimination should be 'limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.'" *Id.* at 2184, quoting *United States v. White*, 322 U.S. 694, 701 (1944).

23. In determining that the privilege was unavailable, the *Bocutto* court also placed great emphasis upon the fact that the accountant, rather than the taxpayer, owned the controverted documents. 175 F. Supp. at 889-90. This rationale is not convincing in light of the holding in *Couch* that possession rather than ownership is decisive. See note 42 *infra* & accompanying text.

24. 144 F. Supp. 95 (N. D. Cal. 1956).

capacity,"<sup>25</sup> the court ruled that the defense was available because rightful and indefinite possession short of ownership was deemed sufficient for assertion of the privilege.<sup>26</sup>

Also addressed by the *House* opinion was an issue that became pivotal in the *Kasmir-Fisher* conflict, namely, whether possession by an attorney is equivalent to possession by his client. In response to the Government's assertion that it was not, the court in *House*, endorsing a New York state case,<sup>27</sup> ruled that an attorney's possession is the equivalent of the client's possession by finding that the taxpayer met the requirement of "possession in a purely personal capacity."<sup>28</sup> Moreover, it reasoned that as a matter of policy an attorney should be allowed to assert his client's privilege for him; otherwise, during a protracted series of administrative hearings the taxpayer's fifth amendment rights could be preserved only by compliance with a "novel" and unduly burdensome requirement of the taxpayer's physical presence.<sup>29</sup>

*House* apparently remains sound since it utilized a possession-oriented analysis in conformity with that espoused by the Supreme Court in *Couch*. Conversely, the *Boccuto* line of cases appears questionable because, in addition to its dubious use of the "collective entity" cases, *Boccuto* has been undermined further by the Supreme Court's statement in *United States v. Donaldson*<sup>30</sup> that a party may intervene in a suit where records are sought in which he

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25. *Id.* at 101, quoting *United States v. White*, 322 U.S. 694, 699 (1944) (emphasis supplied by the *House* court).

26. 144 F. Supp. at 101. This reasoning was particularly cogent in light of the later statement in *Couch* that possession rather than ownership determines the availability of the defense. See note 42 *infra* & accompanying text. See also notes 64, 65 *infra* & accompanying text.

27. *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917). In *Minkowitz* the Court of Appeals held that when a defendant rightfully in possession of documents transferred them to his attorney, the attorney's possession could be equated with that of his client.

In *House*, the Government cited three cases to support its argument that an attorney's possession may not be equated with that of his client: *Remmer v. United States*, 205 F.2d 277 (9th Cir. 1953); *Ziegler v. United States*, 174 F.2d 439 (9th Cir. 1949); *United States v. Shibley*, 112 F. Supp. 1234 (S.D. Cal. 1952). The court distinguished the latter two on the ground that they were cases in which the privilege had become unavailable through waiver. 144 F. Supp. at 99-100. *Remmer* was considered irrelevant because the party claiming the privilege had acquired the summoned records from the Government by promising to return them. See *id.* at 100.

28. *United States v. White*, 322 U.S. 694, 699 (1944). The interpretation of *White* found in *House* is reasonable even when compared to the argument advanced in *Boccuto* that the privilege cannot be asserted by a representative. See notes 15-23 *supra* & accompanying text.

29. 144 F. Supp. at 100.

30. 400 U.S. 517 (1971).

has "a significantly protectable interest."<sup>31</sup> In *Boccuto* the district court had ruled that an attorney had no standing to assert his client's privilege.<sup>32</sup> Inasmuch as the controverted records in *Boccuto* were the taxpayer's own records, the *Donaldson* holding would allow the taxpayer to intervene in an enforcement proceeding directed against his attorney.<sup>33</sup> Thus the standing hurdle interposed by *Boccuto* no longer presents any practical problem since the taxpayer's rights can be protected by his intervention into the proceeding. The issue now determinative is one not directly addressed by the *Boccuto* opinion: Does the taxpayer retain his fifth amendment privilege even though his records are in his attorney's possession? This question was answered affirmatively in the *House* decision and was paralleled by the question presented to the Supreme Court in *Couch*.

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31. *Id.* at 531. Unable to find such an interest present, the Court in *Donaldson* refused intervention by an employee subject to a tax investigation in a proceeding to compel production of his employer's records after discerning that the employee did not own the records and could not claim that they were the work product of his attorney or accountant. *Id.* at 530. To a certain degree, *Donaldson* limits *United States v. Powell*, 379 U.S. 48 (1964), and *Reisman v. Caplin*, 375 U.S. 440 (1964), which had been utilized by lower courts to justify intervention on a broad scale. See, e.g., *United States v. Benford*, 406 F.2d 1192, 1194 (7th Cir. 1969) (party whose tax liability at issue allowed to intervene with facts similar to *Donaldson*); *United States v. Bank of Commerce*, 405 F.2d 931, 932-33 (3d Cir. 1969) (depositor-taxpayer allowed to intervene on fourth amendment ground in a proceeding to require bank to produce records of depositor's transactions). For an analysis of *Donaldson*'s effect on intervention, see Comment, *Is the Odd Man Out: The Taxpayer's Right to Intervene in Judicial Enforcement of a Summons Directed Against a Third Party—Donaldson v. United States*, 1971 UTAH L. REV. 561.

32. 175 F. Supp. at 890.

33. 40 BROOKLYN L. REV. 211, 217-18 n.40 (1973). See *Couch v. United States*, 409 U.S. 322, 336-37 (1973); 42 FORDHAM L. REV. 197, 203-04 (1973); 5 ST. MARY'S L. REV. 337, 339-40 (1973). Intervention also will be allowed when records are the work product of the taxpayer's accountant or attorney. See note 31 *supra*. In its petition to the Supreme Court for certiorari in *Kasmir*, see note 8 *supra*, the Government argued that an attorney should not be allowed to invoke his client's privilege when the client could have intervened and claimed the privilege himself, as is the case in *Kasmir*. It was the Government's position that intervention should be required as the trial court may find it necessary to examine the taxpayer. Petitioner's Brief for Certiorari at 11, *United States v. Kasmir* (U.S., filed Nov. 18, 1974). It would seem, however, that if the trial court wished to examine the taxpayer it could simply exercise its subpoena power and require his attendance. A similar argument was made by the taxpayer in *Kasmir*. See Respondent's Brief Opposing Certiorari at 19, *United States v. Kasmir*, No. 74-611 (U.S., filed Jan. 6, 1975) (Government also has subpoena power).

In *Kasmir* the court did not rely upon *Donaldson* to find that the taxpayer's attorney had standing, but rather ruled that as a matter of policy an attorney and his client should be regarded as one, 499 F.2d at 454; in *Fisher* the finding that the privilege was unavailable to the taxpayer apparently made consideration of the attorney's standing to assert the taxpayer's privilege unnecessary.



THE *Couch* DECISION

In *Couch v. United States*<sup>34</sup> the question presented was whether a taxpayer could assert the fifth amendment to prevent production of personal records in her accountant's possession. Taxpayer Couch's income tax returns had been prepared by the same accountant for approximately fifteen years prior to the Government's attempt to require production of her tax records. The accountant retained these records at his office although it was understood that they were the taxpayer's property. After a summons was served upon the accountant, taxpayer Couch was allowed to intervene in the subsequent enforcement proceeding. The Supreme Court's analysis focused upon the taxpayer's ability to assert her fifth amendment privilege on the basis of her ownership of the documents despite her lack of actual possession.

Prefacing its discussion with a consideration of the various policies underlying the fifth amendment privilege,<sup>35</sup> the Court attached particular significance to Justice Holmes' earlier statement that "a party is privileged from producing the evidence, but not from its production,"<sup>36</sup> and concluded that only compelled testimony by an accused was prohibited by the fifth amendment. Information provided by a third party, although incriminating the accused, was not regarded as privileged.<sup>37</sup> The taxpayer argued to no avail that an early Supreme Court case, *Boyd v. United States*,<sup>38</sup> established that an owner of papers is protected from their compelled production. The Court distinguished *Boyd* on the ground that the defendant in that case had both owned and possessed the controverted papers. Justice Powell, writing for the majority, noted that courts following the *Boyd* rule<sup>39</sup> usually have been faced with circumstances in which possession and ownership were "conjoined."<sup>40</sup> After noting with ap-

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34. 409 U.S. 322 (1973).

35. Among the policies considered were the need to avoid forcing defendants to choose between self-incrimination and perjury, the need to avoid coerced confessions, the protection of individual privacy, and the desirability of requiring the Government to "shoulder the entire load" in developing its evidence. 409 U.S. at 328. For a discussion of the applicability of the right to privacy to the privilege against self-incrimination, see note 48 *infra*.

36. 409 U.S. at 328, quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913).

37. 409 U.S. at 328.

38. 116 U.S. 616 (1886).

39. See *Hill v. Philpott*, 445 F.2d 144 (7th Cir.), cert. denied, 404 U.S. 991 (1971); *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963).

40. 409 U.S. at 330.

proval the circuit court opinion in *Cohen v. United States*,<sup>41</sup> Justice Powell, stated that possession, not ownership, "bears the closest relationship to the personal compulsion forbidden by the fifth amendment."<sup>42</sup> Although possession was deemed determinative in *Couch*, the Court refused to establish a per se rule that the fifth amendment may be asserted only by those in possession of summoned documents, instead carefully limiting its holding to the facts presented.<sup>43</sup>

One situation excepted from the *Couch* rule was that of "constructive possession." The Court adduced two cases, *Schwimmer v. United States*<sup>44</sup> and *United States v. Guterma*,<sup>45</sup> as examples of constructive possession that could support assertion of fifth amendment protection. In each of these cases a taxpayer who had stored personal records on the premises of a corporation was permitted to assert his fifth amendment privilege to protect the records from a grand jury subpoena directed to the corporation.<sup>46</sup> Indicating that a determination of the limits of constructive possession was not necessary for its decision,<sup>47</sup> the Court declined to specify the different

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41. 388 F.2d 464 (9th Cir. 1967). Justice Powell made the following reference to *Cohen*:

See also *United States v. Cohen* . . . where the court, in upholding the right of a possessor, nonowner, to assert the privilege, noted that "it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit." Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate.

We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege.

409 U.S. at 330 n.12. Justice Powell's qualifying statement regarding "rightful possession" has prompted some commentators to suggest that the *Cohen* citation may not indicate a general approval of that court's decision. See, e.g., Ord, *The IRS's Right of Access to the CPA's Workpapers and Client Records*, 4 TAX ADVISER 516, 523 (1973). An examination of *Cohen* indicates that this disagreement is limited to the dictum in *Cohen* that possession of papers allows the assertion of the privilege even when the owner-accountant has requested their return.

42. 409 U.S. at 331.

43. *Id.* at 336 n.20.

44. 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

45. 272 F.2d 344 (2d Cir. 1959).

46. 409 U.S. at 333 n.16. The Government attempted to distinguish those cases as "involving mere custodial safekeeping." *Id.*

47. *Id.* The Court ruled that the accountant's status as an independent contractor and the fact that the records had been accumulating in his possession for approximately fifteen years eliminated any possibility of constructive possession on the part of the taxpayer. *Id.* at 619. A different situation could be presented if the records were held by an attorney, rather than an accountant, and they were held for a shorter period of time.

types of constructive possession that might satisfy the possession-oriented analysis reflected in the opinion.

The Court also addressed the taxpayer's expectations of privacy.<sup>48</sup> When preparing taxpayer Couch's income tax returns, the accountant had been required to disclose to the IRS much of the data contained in the summoned records. Finding that a taxpayer's transfer of these documents to an accountant under such circumstances negates any expectation of confidentiality,<sup>49</sup> Justice Powell concluded that the fifth amendment defense must fail where there "exists no legitimate expectation of privacy *and* no semblance of governmental compulsion against the accused."<sup>50</sup> The Court therefore ruled that the fifth amendment privilege against self-

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48. It is not clear whether this privacy discussion represents an independent ground for the *Couch* decision or merely elaborates the preceding discussion of "constructive possession." It is difficult to imagine situations in which one in "constructive possession" of documents would not also have a reasonable expectation of privacy. Certainly the examples of "constructive possession" cited in *Couch* also would involve an expectation of privacy. That "constructive possession" may be equated with the expectation of privacy is implied by the Court's apparent ruling that the presence of either allows assertion of the fifth amendment privilege. See note 50 *infra* & accompanying text. The equivalence of "constructive possession" and the expectation of privacy is suggested in a somewhat different fashion in *Symposium, supra* note 10, at 183, wherein it is said that "the real governmental compulsion on the individual in constructive possession of the evidence sought is the forced disclosure of information which the individual legitimately expected to remain private."

Although a privacy analysis is commonly associated with the fourth amendment prohibition of "unreasonable searches and seizures," it also has been used often in discussions of fifth amendment rights. See, e.g., *Bellis v. United States*, 94 S. Ct. 2179, 2184 (1974); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The Supreme Court in *Couch*, quoting *Murphy v. Waterfront Comm. of New York Harbor*, 378 U.S. 52, 55 (1964), stated that the fifth amendment respects "the right of each individual to a private enclave where he may lead a private life . . ." 409 U.S. at 328. The opinions subsequently rendered in *United States v. Fisher*, 500 F.2d 683, 690-91 (3d Cir. 1974), and *United States v. Kasmir*, 499 F.2d 444, 449 (5th Cir. 1974), agreed that *Couch* requires consideration of the taxpayer's expectation of privacy. Even though the majority opinion in *Couch* stated that the fifth amendment privilege encompasses the right to privacy, one court of appeals judge in *Fisher* opined that the *Couch* examination of a taxpayer's expectation of privacy was made in a fourth amendment context. 500 F.2d at 701 (Hunter, J., dissenting). Judge Hunter agreed, however, that a taxpayer's expectation of privacy must be examined to determine if the taxpayer has retained "constructive possession." *Id.*

49. 409 U.S. at 335. But see Comment, *The Protection of Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?*, 59 IOWA L. REV. 1336 (1974).

50. 409 U.S. at 336 (emphasis supplied). The Court's use of the word "and" apparently indicates that the presence of either of these elements is sufficient to allow the assertion of the fifth amendment defense. Justice Powell's words imply that in order to compel production, the Government must show that the taxpayer has neither a reasonable expectation of privacy nor actual possession since actual possession "bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." *Id.* at 331.

incrimination could not be raised by a taxpayer to prevent production of tax records held by an accountant. The Court's refusal to consider situations beyond the bare facts before it, coupled with its reluctance to define sharply "constructive possession," left undefined the rights of a taxpayer when an administrative summons is served upon his attorney for production of the taxpayer's records in the possession of the attorney.

### ATTEMPTS TO APPLY *Couch*

Both the *Kasmir*<sup>51</sup> and *Fisher*<sup>52</sup> courts emphasized the individual's expectations of privacy when considering the taxpayer's rights, but strayed in their attempts to determine those expectations. Each court faced a fact pattern in which a taxpayer acquired documents from his accountant, held them briefly, then delivered them to his attorney who had actual possession when the summons arrived. In each case the questioned records included the accountant's work papers. Legal comparisons of these decisions, however, are difficult, in part because analysis of the *Fisher* opinion is complicated by that court's failure to state explicitly the grounds upon which its decision rests and by its vague allusions to several matters which could have influenced the decision.

For instance, it is possible that the Court of Appeals for the Third Circuit decided *Fisher* on the basis of an issue not presented in *Kasmir*, the issue of rightful possession. At the hearing the taxpayer's accountant testified that he had requested the return of his workpapers from the attorney.<sup>53</sup> After noting both this fact and the failure of the *Couch* opinion to determine the elements of rightful possession,<sup>54</sup> the court, though not finding specifically that the taxpayer's possession was wrongful, rendered a cryptic holding that could reflect such a determination:

Thus, if the taxpayers are to succeed in their effort, they must prove that their brief experience of actual possession for a lim-

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51. *United States v. Kasmir*, 499 F.2d 444, 448-49 (5th Cir. 1974), cert. granted, 95 S. Ct. 824 (1975) (No. 74-611).

52. *United States v. Fisher*, 500 F.2d 683, 689 (3d Cir. 1974), cert. granted, 95 S. Ct. 824 (1975) (No. 74-18).

53. 500 F.2d at 685. For discussion of the notion that such conduct by an accountant implies an unethical attempt to curry the favor of the Internal Revenue Service, see *Symposium*, *supra* note 10, at 255 n.573.

54. 500 F.2d at 689.

ited purpose coupled with turning their accountant's records over to their attorney has the legal capacity to generate a subsequent right of constructive possession of sufficient intensity to elevate those records into the required category of their "private books and papers." We are unwilling to attribute a Fifth Amendment protection to the accountant's work product based on such a limited possession by his client.<sup>55</sup>

The court's reference to "possession of sufficient intensity" may indicate a determination that possession against the owner's will is not adequate for assertion of the fifth amendment privilege.<sup>56</sup> While the "sufficient intensity" language most likely refers to some concept other than this type of rightful possession, the possibility cannot be discounted due to the imprecise nature of the *Fisher* opinion.<sup>57</sup>

A review of *United States v. Egenberg*,<sup>58</sup> a case deemed persuasive by the *Fisher* court,<sup>59</sup> may indicate more precisely the intended meaning of the "sufficient intensity" language. The *Egenberg* court

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55. *Id.* at 692. Evidence exists, however, that the taxpayer had possession with his accountant's permission. *See id.* at 685 n.2.

56. A determination that a taxpayer's possession was wrongful, based upon facts similar to those in *Fisher*, has proved decisive in cases decided both before and after *Couch*. *See, e.g.,* *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964); *United States v. Riland*, 364 F. Supp. 120, 122 (S.D.N.Y. 1973). The court in *United States v. Cohen*, 388 F.2d 464, 469 (9th Cir. 1967), suggested, however, that wrongful possession might be sufficient to allow assertion of the fifth amendment privilege. While *Couch* cited *Cohen* favorably, the Supreme Court expressly limited its approval to the *Cohen* statement that possession, not ownership, determines the availability of the fifth amendment privilege, refusing to endorse dictum in *Cohen* to the effect that even possession against the owner's will was sufficient for assertion of the fifth amendment privilege. *See* note 41 *supra*. The problem of possession against the owner's will is not presented by *Kasmir*, 499 F.2d at 446, but the Government nonetheless argued that the taxpayer's acquisition of possession was wrongful because it was motivated by a desire to avoid compelled production. Two independent definitions of "rightful possession" thus can be formulated: The one to which *Couch* and *Fisher* alluded is possession with the owner's permission; the definition urged by the Government in *Kasmir* is possession not acquired to avoid compelled production. Since the *Couch* opinion seemingly refers only to the former type of rightful possession, it provides no support for the Government's position in *Kasmir*. *See* notes 125-134 *infra* & accompanying text.

57. In his dissenting opinion, Judge Hunter stated that he was unable to discern the rationale upon which the majority premised its decision. 500 F.2d at 699. Judge Hunter also referred to the majority's "possession of sufficient intensity" language as being "vague and obscure." *Id.* at 700.

58. 443 F.2d 512 (3d Cir. 1971).

59. 500 F.2d at 691. The district court in *Fisher*, which rendered its decision prior to the Supreme Court's *Couch* ruling, also emphasized *Egenberg*. *See* note 61 *infra* & accompanying text.

held that when a third party has a superior possessory interest in the controverted records, the taxpayer may not assert the fifth amendment as a bar to production.<sup>60</sup> Adhering to *Egenberg*, the trial court in *Fisher* ruled that the taxpayer was precluded from raising the fifth amendment when the accountant, rather than the taxpayer, owned the records.<sup>61</sup> Thus the requirement of "constructive possession of sufficient intensity" by the Court of Appeals for the Third Circuit could refer to ownership or a superior right to possession.

Such a ruling, however, hardly remains viable after the ruling in *Couch* that possession rather than ownership is the most significant factor in determining the availability of the fifth amendment defense. This contradiction is illustrated by the statement in *Egenberg* that *Cohen* was "unpersuasive."<sup>62</sup> *Cohen* permitted a taxpayer to raise the defense while in possession of documents owned by another.<sup>63</sup> Although the Government urged the application of the superior possessory interest test, the *Cohen* court indicated a belief that such a rule would be the equivalent of requiring ownership and instead required only possession for assertion of the fifth amendment privilege.<sup>64</sup> While not rejecting specifically the superior possessory interest test, the Supreme Court in *Couch* cited with approval the *Cohen* conclusion that ownership is not required.<sup>65</sup> The statement in *Fisher* that "*Couch* does not undercut *Egenberg*,"<sup>66</sup> indicates a fundamental misunderstanding of *Couch* and suggests that the court's determination that the taxpayer's possession was not of "sufficient intensity" may really be a finding of a superior possessory interest in the taxpayer's accountant. Such a finding also may explain the reference in *Fisher* to the taxpayer's "limited possession."<sup>67</sup> In view of the Supreme Court's holding in *Couch*, such a finding should not be determinative. To the extent that *Fisher* is premised upon *Egenberg*, it is not convincing.

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60. The court stated: "Where, as here, a third party has a superior right to possession of the papers, the witness cannot withhold them." 443 F.2d at 517.

61. 352 F. Supp. at 734-35.

62. 443 F.2d at 518.

63. 388 F.2d at 467.

64. *Id.* at 468.

65. The *Cohen* language quoted by the *Couch* court was part of the *Cohen* rationale for rejecting the superior possessory interest test. *United States v. Cohen*, 388 F.2d 464, 468 (9th Cir. 1967). See note 41 *supra* & accompanying text.

66. 500 F.2d at 691.

67. See note 55 *supra* & accompanying text.

A further possible misinterpretation of *Couch* is indicated by a reference in *Fisher* to the taxpayer's "brief experience of actual possession" as a sign that the taxpayer did not have possession of "sufficient intensity."<sup>68</sup> In *Couch* the Supreme Court discussed the duration of the accountant's possession<sup>69</sup> and described circumstances in which a taxpayer's loss of possession might be so "temporary and insignificant" that he clearly would retain control of the documents.<sup>70</sup> The latter expression in *Couch* merely illustrated the Court's belief that a brief loss of possession might be insignificant.<sup>71</sup> At no time did the Court attach significance to the length of time that the records were in the taxpayer's possession, and nowhere did it suggest that any particular duration of possession was required in order to allow assertion of the fifth amendment privilege.

Another ambiguity in *Fisher* concerns the court's apparent reliance upon *Boyd* for the statement that the taxpayer must prove possession adequate to make the records his "private books and papers" in order to assert the fifth amendment.<sup>72</sup> The court apparently contended that, although the records related to the taxpayer's taxes, the fact that they were prepared and owned by the accountant precluded a finding that they were the taxpayer's private papers. In a cogent dissent, Judge Hunter noted that the Supreme Court in *Boyd* had refused to compel production of documents prepared by a third party.<sup>73</sup> Moreover, the Court stated long ago in *Wilson v. United States*<sup>74</sup> that authorship of documents is not significant to assertions of fifth amendment privileges.

Viewed from another perspective, however, the statement in *Fisher* that the records were not "private papers" may evidence an underlying attempt to discover whether the taxpayer had a reasonable expectation of privacy. After noting the relevance of the tax-

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68. See note 55 *supra* & accompanying text.

69. 409 U.S. at 324.

70. *Id.* at 333.

71. *Id.*

72. 500 F.2d at 692, quoting *Boyd v. United States*, 116 U.S. 616, 633 (1886). See note 38 *supra* & accompanying text.

73. 500 F.2d at 700. Alternatively, the *Fisher* reliance upon the word "private" could represent a misapplication of the "collective entity" line of cases. These cases contrasted the individual's private, personal papers with those held by the individual as the representative of a collective entity. See, e.g., *United States v. White*, 322 U.S. 694, 699 (1944). See notes 20-23 *supra* & accompanying text. Since the *Fisher* records relate to the taxpayer's own taxes, the "collective entity" cases are inapplicable.

74. 221 U.S. 361, 378 (1911) (dictum).

payer's expectation,<sup>75</sup> the court observed that the accountant's papers were prepared to enable him to complete the defendant's tax returns rather than for confidential use by the defendant's attorney.<sup>76</sup> The court's comment in *Fisher* concerning the accountant's preparation and ownership of the documents implied a belief that a taxpayer's expectation of privacy could not be changed by his acquisition of the documents because the nature of the documents remained unaltered.<sup>77</sup> Judge Gibbons made a similar statement in his concurring opinion in cautioning that the majority opinion should not be interpreted as ruling that the privilege would be available if the papers were in the taxpayer's possession.<sup>78</sup> This is a somewhat startling caveat for if the taxpayer were in possession, the

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75. 500 F.2d at 689.

76. *Id.* at 692.

77. The court had stated previously that in order to prevail a taxpayer must demonstrate that he could have asserted the fifth amendment privilege while in actual possession of the records. 500 F.2d at 689. The discussion of the accountant's preparation of the records seems designed to expose the taxpayer's inability to assert the privilege.

The accountant's preparation of the records may be relevant to the availability of an attorney-client privilege because of the "pre-existing document" rule of evidence. This rule states that documents prepared prior to the creation of the attorney-client relationship are not protected by that relationship. See, e.g., *United States v. Fisher*, 500 F.2d 683, 697 n.11 (3d Cir. 1974); *United States v. White*, 477 F.2d 757, 762 n.9 (5th Cir. 1973); *Bouschor v. United States*, 316 F.2d 451, 457 (8th Cir. 1963); *Application of House*, 144 F. Supp. 95, 97 (N.D. Cal. 1956); 8 J. WIGMORE, EVIDENCE § 2307, at 594 (J. McNaughton rev. ed. 1961).

The attorney-client privilege relates to the outcome of the case only if the significant assumption is made that the taxpayer's expectation of privacy could not change when the documents were acquired from his accountant. Assuming that the expectation of privacy could not change, the only possible protection for the records would rest in the use of the attorney-client privilege, a privilege not attaching to the records in cases such as *Fisher* or *Kasimir* because of the "pre-existing document" rule. Thus, if the taxpayer's expectation of privacy could not change, the absence of an attorney-client privilege would be decisive, and fifth amendment protections could never attach to taxpayers' documents prepared by accountants.

For a novel approach to the relationship of the attorney-client and fifth amendment privileges, see Petersen, *Attorney Client Privilege in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67, 85-86 (1969), in which the author contended that the attorney-client privilege should be extended to include all documents in the attorney's possession that would be privileged in the client's hands. This approach was cited with approval in *United States v. Schmidt*, 360 F. Supp. 339, 345 (M.D. Pa. 1973). Other authorities believe that the attorney-client privilege should not be expanded. See *In re Horowitz*, 482 F.2d 72, 81-82 (2d Cir. 1973) (Friendly, J.).

78. 500 F.2d at 693. Judge Gibbons cited *Wilson v. United States*, 221 U.S. 361 (1911), and *United States v. White*, 322 U.S. 694 (1944), to support his statement that even if the taxpayer were in actual possession of the records he would be unable to assert the privilege. However, these cases merely state that the fifth amendment defense may not be asserted in regard to the records of collective entities. See notes 20-23 *supra* & accompanying text.



situation would duplicate the facts of *Cohen*: a taxpayer in actual possession of workpapers prepared and owned by the taxpayer's accountant. The *Cohen* rationale, which allowed a taxpayer to assert his fifth amendment privilege because possession was deemed more significant than ownership, was approved by the Supreme Court in *Couch*.<sup>79</sup> Thus the mere preparation and ownership of tax records by an accountant should not preclude a taxpayer's subsequent assertion of his fifth amendment privilege.

More fundamentally, the relevant time for determining the availability of the fifth amendment defense is the moment that the summons is served, not the time period during which the accountant prepared the documents. As the Supreme Court stated in *Couch*: "The rights and obligations of the parties became fixed when the summons was served . . . ."<sup>80</sup> The critical issue therefore becomes whether the taxpayer had possession of the documents or a reasonable expectation of privacy at the time the summons was served, not

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79. See note 41 *supra* & accompanying text. By implying that the taxpayer in *Couch* would have been able to assert the fifth amendment defense despite the fact that the accountant had prepared the documents, see note 65 *supra* & accompanying text, the Supreme Court would appear to have rejected the imputation of an unalterable status to such documents. The proposition that a taxpayer in rightful possession of documents cannot be compelled to produce them has been accepted generally. See *United States v. Fisher*, 500 F.2d 683, 695-96 (3d Cir. 1974) (dissenting opinion); *United States v. Kasmir*, 499 F.2d 444, 451 (5th Cir. 1974); *Stuart v. United States*, 416 F.2d 459, 462 (5th Cir. 1969); *United States v. Zakutansky*, 401 F.2d 68, 71 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969); *United States v. Cohen*, 388 F.2d 464, 468 (9th Cir. 1967); *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963); *United States v. Kleckner*, 273 F. Supp. 251, 252 (S.D. Ohio 1967); *United States v. Foster*, Lewis, Langley, & Onion. 65-1 U.S. Tax Cas. ¶ 9418 (W.D. Tex. 1965); *Stafford & Jackson, The Privilege Against Self-Incrimination in Federal Tax Investigations*, 34 LA. L. REV. 703, 715-16, 725 (1974); Note, *Fifth Amendment Rights of a Client Regarding Documents Held by His Attorney: United States v. White*, 1973 DUKE L.J. 1080, 1091-92; 5 ST. MARY'S L.J. 337, 342 (1973). See also *Couch v. United States*, 409 U.S. 322, 330 n.12 (1973); *Application of House*, 144 F. Supp. 94, 101 (N.D. Cal. 1956); note 80 *infra* & accompanying text. Indeed the Government implicitly conceded this point in *Couch* by stating that it normally allowed taxpayers in possession to plead the fifth amendment privilege. See 409 U.S. at 334 n.18. Nevertheless, the Government contended in *Fisher* that the taxpayer could not have asserted the privilege if the documents had been in his actual possession. 500 F.2d at 689.

80. 409 U.S. at 329 n.9. The Court's remarks were designed to show that *Couch*'s accountant could not have enlarged the taxpayer's rights by use of a post-summons transfer of the documents to the taxpayer. The Court's statement that the rights "of the parties became fixed when the summons was served," coupled with its approval of *Cohen*, suggests that a pre-summons transfer would allow the taxpayer to assert his fifth amendment privilege. See also Note, *Fifth Amendment Rights of a Client Regarding Documents Held by His Attorney: United States v. White*, 1973 DUKE L.J. 1080, 1096 n.89 (transfer before issuance should be allowed on basis of logic; *Couch* not considered).

whether the taxpayer or someone else created the documents. The *Couch* decision emphasized that the accountant, in preparing his client's tax returns, had been required to reveal much of the information contained in his workpapers.<sup>81</sup> In light of this fact, the inevitable conclusion is reached that the taxpayer in *Couch* could have had no reasonable expectation of privacy because the papers were in the accountant's possession at the time the summons was served.<sup>82</sup> Although in *Fisher* the court considered the general question of the taxpayer's expectation of privacy, its analysis was clouded by the emphasis placed upon the accountant's ownership and preparation of the papers prior to the time the summons was served.

The Court of Appeals for the Fifth Circuit has developed a test for application of the fifth amendment privilege in three-party situations which heavily emphasizes possession of tax records by the taxpayer in the course of determining the taxpayer's expectation of privacy. In *United States v. White*<sup>83</sup> the taxpayer, realizing that a tax investigation was in progress, retained counsel who contacted the taxpayer's accountant and obtained possession of all relevant documents. The taxpayer never had actual possession of the records, nor was he aware of the transfer until after its occurrence. When a summons was served on the attorney, he attempted to plead the taxpayer's fifth amendment privilege. Reading the "constructive possession" exception in *Couch*<sup>84</sup> as indicating that the documents might have been privileged if the taxpayer personally had transferred the papers to his attorney while retaining the right to immediate possession,<sup>85</sup> the court found the attorney's defense to be precluded by the absence of even brief actual possession by the taxpayer and by the lack of any right to immediate possession in the taxpayer.<sup>86</sup> The court also noted that the taxpayer was unaware of

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81. 409 U.S. at 335.

82. Conversely, if taxpayer Couch had been in possession of the documents at the time the summons was served, her reasonable expectations would have differed. The fact that the accountant's prior preparation of tax returns required disclosure of some information contained in the records would have been irrelevant. As a corollary, if the taxpayer in *Couch* had delivered the accountant's workpapers to her attorney before the summons was served, the issue then raised would have been her expectation of privacy while the attorney maintained them in his possession, irrespective of the accountant's preparation of the papers.

83. 477 F.2d 757 (5th Cir. 1973).

84. See notes 44-47 *supra* & accompanying text.

85. 477 F.2d at 763.

86. *Id.*

his attorney's possession, although this factor was not deemed to be of "controlling importance."<sup>87</sup>

This requirement of either an instant of actual possession or a right to immediate possession, however, is an unsound interpretation of *Couch*. Taxpayer Couch apparently had a right to immediate possession since she owned the documents in her accountant's possession and he later delivered them to her upon request.<sup>88</sup> Nevertheless the Supreme Court found her ownership interest constitutionally insignificant. Nor did the requirement of an instant of actual possession arise from *Couch* since the taxpayer would have met this requirement because she had actual possession before the documents were given to her accountant.<sup>89</sup> What taxpayer Couch did not have at the time the summons was served was actual possession or a reasonable expectation of privacy. As Justice Powell observed,<sup>90</sup> her records were in the hands of a third party who was required by law to disclose much of their content during the preparation of her tax returns.<sup>91</sup> The taxpayer in *White* did not have actual possession, and at the time the summons was served he was not aware that his attorney controlled the documents. Therefore, a more appropriate application of *Couch* in *White* would result in a finding that, since to the best of the taxpayer's knowledge, the records were still in his accountant's possession, his expectations of privacy were the same as those of taxpayer Couch. Although a proper conclusion was reached in *White*, the absence of even an instant of actual possession by the taxpayer should not dictate the outcome of a situation such as that presented in *White*; rather, the determinant should be recognized as the taxpayer's ignorance of his attorney's possession as indicated by the fact that the taxpayer did not transfer the records to his attorney. Although the expectation of privacy analysis was not articulated fully in *White*, the decision nonetheless focuses attention upon the lack of knowledge of the taxpayer and the concomitant absence of an expectation of privacy.

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87. *Id.*

88. 409 U.S. at 324-25.

89. *Id.* at 324.

90. *Id.* at 335.

91. A privacy analysis also can be used to explain the examples given in *Couch* of "constructive possession." All of the examples involved taxpayers who stored their records on the premises of a corporation. See notes 44-47 *supra* & accompanying text. From the taxpayers' viewpoint it was not their immediate right to possession that was significant, but their expectation of privacy.

In *United States v. Kashmir*<sup>92</sup> the Court of Appeals for the Fifth Circuit again addressed a three-party situation. In *Kashmir*, however, the tax records were transferred physically by the taxpayer from the accountant to the attorney before the summons arrived. Reasoning that the taxpayer could have asserted the fifth amendment to block production when the documents were in his own hands, the court determined that the issue was whether the taxpayer had "a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession."<sup>93</sup> Because the taxpayer sent the records to his attorney pursuant to their attorney-client relationship, the court concluded that the taxpayer "retained a legitimate expectation of privacy with regard to the materials he placed in his attorney's custody, that he retained constructive possession of the evidence, and thus that he retained Fifth Amendment protection."<sup>94</sup>

Because of their differing results, it is necessary to attempt to reconcile the *Kashmir* and *White* decisions. In *Kashmir* the issue was whether the taxpayer's fifth amendment privilege which existed while the taxpayer physically possessed the records *continued* after the taxpayer transferred the records to his attorney. In *White* the issue was whether the privilege was *created* by the transfer from the accountant to the attorney when the taxpayer had neither knowledge of the transfer nor any prior physical possession. These issues, however, should be legally indistinguishable and should be judged by the same standard. Absent taxpayer possession, that standard should be "whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records . . . ."<sup>95</sup> Moreover, the expectation should be determined at the time the summons is served.<sup>96</sup>

The Court of Appeals for the Fifth Circuit would not agree fully with this standard because that court would require at least an instant of physical possession by the taxpayer before permitting the fifth amendment to be raised as a bar to production.<sup>97</sup> It distin-

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92. 499 F.2d 444 (4th Cir. 1974), cert. granted, 95 S. Ct. 824 (1975) (No. 74-611).

93. *Id.* at 452, citing *Couch v. United States*, 409 U.S. 332, 334-38 (1973).

94. 499 F.2d at 453.

95. *Id.* at 452, citing *Couch v. United States*, 409 U.S. 332, 334-38 (1973).

96. See *Couch v. United States*, 409 U.S. 322, 329 n.9 (1973); note 80 *supra* & accompanying text.

97. See 499 F.2d at 452-53. Following *Couch* the court in *Kashmir* would not find that the taxpayer had any fifth amendment rights in the records while they were in the possession of the accountant. When the records were returned to the taxpayer for him to transfer them to

guished its differing holdings in *Kasmir* and *White* specifically on the basis that the taxpayer in *Kasmir* had physical possession of the records at least for a brief period of time whereas the taxpayer in *White* never possessed the controverted documents.<sup>98</sup> The availability of the fifth amendment defense, however, should not be determined by a brief instant of possession by the taxpayer because, as Judge Ainsworth stated in his dissent in *White*: "No policy would be served by requiring the client first to touch the documents before turning them over to his lawyer."<sup>99</sup> Once the requirement of a moment's physical possession is perceived as extraneous, the availability of the fifth amendment defense can be determined by a straightforward examination of the taxpayer's expectations when the controverted records are in the possession of his attorney.

#### ATTORNEY'S POSSESSION AND A TAXPAYER'S EXPECTATIONS

Guidance in identifying factors constituting a reasonable expectation of privacy can be found in the Supreme Court's decision in *Couch*. One factor stressed by Justice Powell as an indication of taxpayer Couch's lack of "constructive possession" was the length of the accountant's possession.<sup>100</sup> Because the records had been accumulating in the accountant's office for approximately fifteen years, and the taxpayer displayed no interest in the records at the time the summons was served, the taxpayer should have had no expectation of privacy regarding the records.<sup>101</sup> In contrast, the attorney in *Kasmir* obtained possession one day before being served,<sup>102</sup>

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his attorney, the *Kasmir* court would acknowledge that the period of actual possession by the taxpayer would be sufficient to create fifth amendment rights that could continue in the taxpayer when the documents were transferred by him to the attorney. However, for the taxpayer to obtain rights in the records when they were transferred without the taxpayer's participation or even knowledge, as in *White*, the fifth amendment rights would have to be created in some fashion merely by the fact of the transfer. This distinction was dispositive for the *Kasmir* court, which stated: "We reject the notion, as we did in *White*, that a Fifth Amendment privilege in the taxpayer can somehow be created when evidence finds its way into his attorney's hands." *Id.* at 452.

98. *Id.* at 453. The court in *Kasmir* recognized the possibility that its decision would appear to stress form over substance, *id.* at 451, but attempted to avoid such a result by its interpretation of reasonable expectations of privacy in relation to the facts presented in that case, *id.* at 452.

99. 477 F.2d at 766 n.7.

100. 409 U.S. at 324.

101. *Id.* at 324-25. The rights of the parties are determined at the time the summons is served. See note 80 *supra* & accompanying text.

102. 499 F.2d at 446.

while the attorney in *Fisher* had prior possession of the documents for only four months.<sup>103</sup> In each of these latter cases, the taxpayers had demonstrated a strong concern for the protection of their records before the summons was issued by transferring the documents from accountant to attorney.

A further indication of the taxpayer's expectations is the relationship that exists between the taxpayer and the attorney. Justice Powell found in *Couch* that the accountant's status as an independent contractor was significant in ruling against the taxpayer.<sup>104</sup> It cannot be denied that in *Kasmir* and *Fisher* the attorneys also were independent contractors; nevertheless an attorney's obligation to his client is materially different from that of an accountant. As noted in *Couch*,<sup>105</sup> an accountant must divulge much of the information contained in his client's records during the preparation of income tax returns. As noted in *Kasmir*,<sup>106</sup> however, an attorney in possession of his client's records for the purpose of providing legal advice is not so obligated; indeed, he may be compelled to do the opposite. Although the attorney-client privilege does not protect pre-existing documents,<sup>107</sup> the American Bar Association Code of Professional Responsibility requires that an attorney not reveal any information acquired through a "professional relationship" that would be "detrimental" to his client.<sup>108</sup> A client's tax records fall within these guidelines even though not protected by the attorney-client privilege. Since information need only have been acquired through the "professional relationship" to be protected,<sup>109</sup> the Code

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103. 500 F.2d at 685-86.

104. 409 U.S. at 334. *Couch* has been criticized on policy grounds because this rationale favors those taxpayers wealthy enough to hire a full-time accountant. *Id.* at 342 n.4 (Douglas, J., dissenting). Indeed, the *Couch* decision as a whole protects those taxpayers able to afford "house calls" by their accountants, thereby allowing the taxpayer to retain actual possession at all times. Several commentators have recommended this tactic for taxpayers anxious to avoid a potential summons. Coffee, *Supreme Court's Couch Decision Signals New Directions in Guarding Client's Records*, 38 J. TAXATION 258, 260 (1973); *Symposium, supra* note 10, at 256.

105. 409 U.S. at 335.

106. 499 F.2d at 453.

107. See note 77 *supra*.

108. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101. The rule states: "(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. (B) . . . [A] lawyer shall not knowingly reveal a confidence or secret of his client . . ."

109. *Id.* EC 4-4. The Ethical Consideration provides: "[T]he ethical obligation of a lawyer

of Professional Responsibility creates an attorney-client relationship which protects information that is beyond the scope of the attorney-client privilege. Unlike the attorney-client privilege, the more generalized attorney-client relationship may not be used to resist a summons;<sup>110</sup> it does provide a significant indication of the client's expectation of privacy in relation to the client's fifth amendment privilege against self-incrimination, however, because the attorney is bound to remain silent in all other instances.<sup>111</sup>

The *Couch* view of a client's expectation of privacy also is reflected by Justice Powell's reference to *United States v. Judson*<sup>112</sup> and *Hill v. Philpott*<sup>113</sup> as cases in which ownership and possession were "conjoined."<sup>114</sup> An examination of *Judson* reveals that the documents at issue were owned by the taxpayer but in his attorney's possession.<sup>115</sup> The taxpayer in *Hill* both owned and possessed the controverted records.<sup>116</sup> By equating these situations, Justice Powell implied that an attorney's possession is the equivalent of his client's,<sup>117</sup> a rationale which also pervades *Judson*.<sup>118</sup> Substantial authority exists in support of this contention.<sup>119</sup> Professor Wigmore,

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to guard the confidences and secrets of his client ? . . . exists without regard to the nature or source of information or the fact that others share the knowledge."

110. *Id.* DR 4-101(c)(2). If an attorney takes possession of records to prepare a client's tax returns rather than to provide legal defense or advice, a closer case would be presented, this situation paralleling the facts in *Couch*. For a discussion of the preparer of a tax return who happens to be an attorney, see *Symposium*, *supra* note 10, at 241-45.

111. See Justice Marshall's comment in note 117 *infra*. There are a few narrow exceptions to the general rule of Disciplinary Rule 4-101 which are not relevant to the present discussion. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(C).

112. 322 F.2d 460 (9th Cir. 1963).

113. 445 F.2d 144 (7th Cir. 1971).

114. 409 U.S. at 330.

115. 322 F.2d at 462, 469.

116. 445 F.2d at 145.

117. Justice Marshall was more direct, stating: "A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given." *United States v. Couch*, 409 U.S. 322, 350 (1973) (dissenting opinion). The implication of Justice Powell's statement is also noted in *Symposium*, *supra* note 10, at 183-84.

118. 322 F.2d at 466-68.

119. See, e.g., *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963); *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *United States v. Riland*, 364 F. Supp. 120, 122 (S.D.N.Y. 1973); *United States v. Pritchard*, 70-1 U.S. Tax Cas. ¶ 9434 (N.D. Ala. 1970); *United States v. Foster, Lewis, Langley & Onion*, 65-1 U.S. Tax Cas. ¶ 9418 (W.D. Tex. 1965); *Application of House*, 144 F. Supp. 95, 101 (N.D. Cal. 1956); 8 J. WIGMORE, EVIDENCE § 2307, at 592 (J. McNaughton rev. ed. 1961); Note, *Fifth Amendment Rights of a Client Regarding Documents Held by His Attorney: United States*

for example, has written that if the client could avoid compelled production of a document by interposing his fifth amendment privilege, the attorney actually possessing the document cannot be compelled to produce.<sup>120</sup> The court in *Judson* made a particularly forceful statement concerning this rule:

No other "third party" nor "agent" nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.<sup>121</sup>

This language, coupled with Justice Powell's equation in *Couch* of an attorney's possession to that of his client, indicates that a taxpayer should be regarded as having a reasonable expectation of privacy when his records are in his attorney's possession.

Constitutional grounds also exist for upholding such expectations because a failure to do so will have a chilling effect upon the client's exercise of his sixth amendment right to counsel.<sup>122</sup> An attorney would be hampered severely in defending a client in a criminal tax fraud prosecution without free access to the client's records, yet a client would not be likely to deliver sensitive records to him if the client realized that by so doing he would open the door to compelled production.<sup>123</sup> Thus a decision such as *Fisher* that a taxpayer's fifth

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*v. White*, 1973 DUKE L.J. 1080, 1086-87; 42 FORDHAM L. REV. 197, 210 (1973). See McCORMICK ON EVIDENCE § 120 (E. Cleary rev. ed. 1972); 3 W. BLACKSTONE, COMMENTARIES \*26. In the United States the equation of an attorney's possession with that of his client was made as early as 1917. *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917). The *Boccuto* group of courts often reached the opposite conclusion, but their persuasiveness is undermined by their misapplication of the relevant cases. See notes 15-23 *supra* & accompanying text.

120. 8 J. WIGMORE, EVIDENCE § 2307, at 592 (J. McNaughton rev. ed. 1961).

121. 322 F.2d at 467.

122. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

123. Since there is no constitutional right to consult an accountant, it may be constitutionally permissible for the Supreme Court to rule that an accountant may view his client's records only at the client's home or office if the client's fifth amendment privilege is to be preserved. Whether the sixth amendment right to counsel can or should be so limited is questionable. It has been said that the Government's attempts to discourage taxpayers from giving tax records to their attorneys may be prompted by the belief that a taxpayer might be persuaded to waive his fifth amendment privilege if he is without the advice of counsel. *Lay*,



amendment privilege may not be asserted by his attorney limits the effectiveness of the right to counsel, a right that has been the subject of expansion, not contraction, over the last forty years.<sup>124</sup>

Notwithstanding the constitutional and practical reasons why a taxpayer should be regarded as having a reasonable expectation of privacy in records personally placed in his attorney's possession, two avenues of attack upon such a determination remain for the Government. On appeal of the *Kasmir* decision to the Supreme Court, the Government may contend that the fifth amendment defense should not be allowed because the taxpayer did not have "rightful possession."<sup>125</sup> Under this theory the taxpayer who transferred his records

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*Attorney's Assertion of His Client's Privilege Against Self-Incrimination in Criminal Tax Investigations*, 21 U. MIAMI L. REV. 854, 862-63 (1967).

124. The trend is demonstrated by the following cases, cited in chronological order: *Powell v. Alabama*, 287 U.S. 45 (1932) (state must appoint counsel in capital cases for indigent defendants unable to conduct own defense due to illiteracy or ignorance); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (appointed counsel required when indigent defendant charged with felony); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (confession inadmissible when police refused defendant's request for assistance of counsel); *Miranda v. Arizona*, 384 U.S. 436 (1966) (prior to any custodial interrogation, defendant must be advised of his right to counsel); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (no person may be imprisoned unless represented by counsel, even in misdemeanor cases). The sixth amendment privilege has not been expanded to encompass all situations, however. See *Harris v. New York*, 401 U.S. 222 (1971) (confession made without counsel may be admitted to show lack of credibility although not admissible to prove guilt); *Douglas v. California*, 372 U.S. 353 (1963) (state must only provide counsel for first appeal as of right).

One element of this expansion has been the requirement that law enforcement officials advise suspects of their right to counsel before any custodial interrogation commences. *Miranda v. Arizona*, 384 U.S. 436 (1966). Technically, the Government was not required to give a *Miranda* warning to the taxpayer in *Kasmir* because he was not in custody at the time of the interrogation. See *Mathis v. United States*, 391 U.S. 1 (1968). Nevertheless, the taxpayer in *Kasmir* received such a warning during his first encounter with Internal Revenue agents, and within 24 hours thereafter delivered his records to an attorney. 499 F.2d at 446. The Government then attempted to compel production by the attorney, creating an anomalous situation whereby it first reminded the taxpayer of his right to counsel, then sought to penalize him for exercising it. The irony of the Government's action emphasizes the tenuous nature of its position in relation to the taxpayer's sixth amendment right to counsel.

It is not suggested that the Government intentionally deceived or defrauded the taxpayer, although such an argument has been made in opposition to the Government's request for certiorari in *Kasmir*. Respondent's Brief Opposing Certiorari at 2, *United States v. Kasmir*, No. 74-611 (U.S., filed Jan. 6, 1975). The *Couch* opinion noted that the individual's constitutional rights must be balanced against society's interest in the collection of taxes. 409 U.S. at 336. If, however, the Government is allowed to manipulate the taxpayer in the anomalous manner described above, that balance will be weighted heavily towards the Government, which would be given the power to make a taxpayer choose between ineffective representation and self-incrimination.

125. The rightful possession argument was one of the Government's primary arguments before the Court of Appeals for the Fifth Circuit. There the court noted: "The government's

from his accountant to his attorney for an improper reason, perhaps to avoid compelled production after discovering that an investigation was in progress, would be precluded from having his attorney assert his fifth amendment privilege. Strict adherence to this theory, however, could void any transfer occurring after an investigation is discovered, even if no summons has been served. As the court correctly noted in *Kasmir*,<sup>128</sup> the result of this theory is that the taxpayer's rights become fixed when he discovers an investigation, even before a summons is served. A statement by Justice Powell in the *Couch* opinion clearly indicates that such an early determination of the taxpayer's rights would be premature: "The rights and obligations of the parties became fixed when the summons was served . . . ."<sup>127</sup>

Justice Powell cited two appellate court cases in support of his statement, *United States v. Zakutansky*<sup>128</sup> and *United States v. Lyons*,<sup>129</sup> each holding that an accountant's post-summons transfer to his client cannot alter the rights of the parties. In *Zakutansky* the Court of Appeals for the Seventh Circuit determined that a client did not have rightful possession because the transfer in issue occurred after service.<sup>130</sup> While reaching the same conclusion in *Lyons*, the Court of Appeals for the First Circuit distinguished *Cohen* and *House* on the ground that they concerned transfers occurring before service,<sup>131</sup> implying that transfer before service would have altered the parties' rights. In neither *Zakutansky* nor *Lyons* was the taxpayer's motivation held determinative;<sup>132</sup> rather, it was the time of transfer in relation to the arrival of the summons.

Moreover, there is little in the *Couch* opinion to suggest that a

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most appealing argument is that the taxpayer had no 'rightful possession' here because this enterprise by the taxpayer, his accountant, and his attorney was a 'frantic last minute effort to put the requested records beyond the reach of a legitimate tax investigation' by 'winning a footrace with agents of the government.' In spite of the argument's great superficial persuasiveness, we reject it." 499 F.2d at 450.

126. *Id.* at 450.

127. 409 U.S. at 329 n.9.

128. 401 F.2d 68 (7th Cir. 1968), cert. denied, 383 U.S. 1021 (1969).

129. 442 F.2d 1144 (1st Cir. 1971).

130. 401 F.2d at 72.

131. 442 F.2d at 1146.

132. The court did consider motivation in *Zakutansky* when determining ownership of the records, but this factor is largely irrelevant in view of the emphasis which the *Couch* decision placed upon possession as opposed to ownership. In *Zakutansky* the issue of the taxpayer's possession was decided on the basis of the time of transfer. 401 F.2d at 72.

taxpayer's motivation in obtaining possession is to be considered determinative. Justice Powell's approval of *Cohen* was qualified by his statement that the Court did not determine the requirements for a "rightful possession" which would allow the assertion of the fifth amendment privilege.<sup>133</sup> *Cohen* contained dictum to the effect that even possession against the owner's will would permit assertion of the privilege,<sup>134</sup> and this language appears to be the position that Justice Powell hesitated to endorse. Because the legitimacy of a transfer motivated by a desire to avoid compelled production was not considered in *Cohen*, there would appear to be no reason to infer that Justice Powell's use of the phrase "rightful possession" and his caveat concerning *Cohen* support a test of the taxpayer's motivation for the transfer of records.

Another potential objection to finding an expectation of privacy in the attorney's possession of taxpayer records concerns the required-records doctrine of *Shapiro v. United States*.<sup>135</sup> As was the case in *Couch*, the defendant in *Shapiro* was the sole proprietor of a business. Pursuant to wartime price control legislation,<sup>136</sup> the defendant was required to maintain records of his business transactions. In order to facilitate examinations of such required records, Congress eliminated the fifth amendment privilege as a defense to a subpoena duces tecum seeking such records and instead granted immunity from prosecution to those for whom the fifth amendment privilege otherwise would have been available. By a 5-4 margin, the Supreme Court subsequently negated the Act's immunity provisions by ruling that the fifth amendment privilege would not otherwise have been available to the defendant because required records cannot be privileged.<sup>137</sup> This construction of the Act seems implausible: everyone who could have claimed the fifth amendment privilege would have been granted immunity, but no one could have claimed

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133. 409 U.S. at 331 n.12.

134. See notes 41, 56 *supra*. It is undisputed that in *Kasimir* the taxpayer held the documents with his accountant's permission, see 499 F.2d at 446; in *Fisher* the taxpayer probably had his accountant's permission, see 500 F.2d at 685 n.2. But see notes 53-56 *supra* & accompanying text. Precedent exists for the proposition that the fifth amendment privilege is unavailable if the accountant-owner demands the return of the records. *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964), cert. denied, 379 U.S. 967 (1965); *United States v. Riland*, 364 F. Supp. 120 (S.D.N.Y. 1973); *United States v. Levy*, 270 F. Supp. 601 (D. Conn. 1967); *United States v. Pizzo*, 260 F. Supp. 216 (S.D.N.Y. 1966).

135. 335 U.S. 1 (1948).

136. Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23.

137. 335 U.S. at 19-20.

it because required records could not be privileged. Justice Frankfurter in dissent, argued that the fifth amendment is essentially a dead letter if Congress can make public documents of records normally kept by individuals by the simple expedient of requiring that those records be kept.<sup>138</sup> Perhaps because of the criticisms that can be brought to bear upon the majority decision, the Supreme Court has not applied the *Shapiro* doctrine to tax records, although several lower courts have.<sup>139</sup>

Nevertheless some courts<sup>140</sup> and commentators<sup>141</sup> see the required-records doctrine as a tacit premise of the *Couch* decision, a view seemingly supported by Justice Powell's statement that the "mandatory disclosure" provisions of the Internal Revenue Code undercut the taxpayer's claimed expectation of privacy.<sup>142</sup> Upon closer examination this apparent support evaporates, however, because Justice Powell's statement was addressed to the taxpayer's expectations of privacy while the records were in the accountant's possession, not the attorney's possession. Since a taxpayer's rights should become fixed when the summons is served<sup>143</sup> and it is apparent that taxpayer *Couch* could have avoided compelled production if she had been in possession of the records when the summons was served,<sup>144</sup> the "mandatory disclosure" provisions are significant only while the accountant has possession of the documents. Required records, on

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138. *Id.* at 70. Justice Jackson was concerned that the majority rule might be expanded in later cases, noting that the enforcement of the criminal laws undoubtedly would be advanced if each person were required to keep a record of his daily misdeeds. *Id.* at 71.

139. *Falsone v. United States*, 205 F.2d 734, 739 (5th Cir.), cert. denied, 346 U.S. 864 (1953); *Stern v. Robinson*, 262 F. Supp. 13, 15-16 (W.D. Tenn. 1966), appeal dismissed, 391 F.2d 601 (6th Cir. 1967), cert. denied, 390 U.S. 1027 (1968); *United States v. Willis*, 145 F. Supp. 365, 369 (M.D. Ga. 1955).

140. *In re Grand Jury Subpoena to Custodian of Records, Mid-City Realty Co.*, 497 F.2d 218 (6th Cir. 1974) (tax records not an issue).

141. 15 B.C. IND. & COM. L. REV. 185, 199 (1973); 40 BROOKLYN L. REV. 211, 224 (1973). A theory of the fifth amendment privilege somewhat similar to the *Shapiro* doctrine could, in a very general way, be the basis for the recent series of decisions progressively narrowing the scope of the fifth amendment's applicability in cases involving documents. See *Donaldson v. United States*, 400 U.S. 517 (1971) (intervention limited); *Couch v. United States*, 409 U.S. 322 (1973) (taxpayer's documents in accountant's possession not protected); *Bellis v. United States*, 94 S. Ct. 2179 (1974) (records of small partnership not protected); *United States v. Bisceglia*, 95 S. Ct. 915 (1975) ("John Doe" summons may be used to determine taxpayer's identity through his bank records).

142. 409 U.S. at 335.

143. *Id.* at 329 n.9.

144. See note 79 *supra* & accompanying text.

the other hand, retain their status in any event, as evidenced by the inability of the defendant in *Shapiro* to plead the fifth amendment privilege even though the documents were in his possession. That *Couch* does not extend the required-records doctrine to tax cases is further indicated by the Court's failure to mention *Shapiro* despite the fact that the Government's brief noted the case.<sup>145</sup>

It appears that the *Couch* reference to "mandatory disclosure" was prompted only by the happenstance of the accountant's possession and was directed to the nature of the possessor rather than the nature of the records. The comment was made in the context of a discussion of the taxpayer's expectations, not during a consideration of the type of records involved. Indeed, the Court's lengthy explication of its possession theory would have been unnecessary if *Shapiro* were controlling authority. The Court's careful discussion of a different theory indicates that a possession analysis, coupled with an examination of the taxpayer's expectation of privacy, is to be determinative.

#### APPLICATION OF THE EXPECTATION ANALYSIS

The various judicial attempts to determine when attorneys holding summoned documents may assert their clients' fifth amendment privilege have not produced an all-encompassing test. A synthesis of these opinions, however, suggests that, absent actual possession by the taxpayer, the fifth amendment defense yet may be available to him if he has a reasonable expectation of privacy in the documents at the time the summons is served. This method of analysis has its origin in the expectation of privacy language found in *Couch*.<sup>146</sup>

By eliminating any requirement for an instant of prior possession by the taxpayer, the proposed test differs from the analysis used in the opinions by the Court of Appeals for the Fifth Circuit. Pursuant to the expectation of privacy approach taken in *Kasimir*, a court must observe the relationship existing between the taxpayer and the summoned documents at the moment of service of summons to determine whether a pre-summons transfer of the records indicates that the taxpayer had a reasonable expectation that they would be kept private. The feature distinguishing the *Kasimir* approach from

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145. Case Note, *Couch v. United States—Protection of Taxpayers' Records*, 23 DEPAUL L. REV. 811, 819-20 (1974).

146. See notes 48-50 *supra* & accompanying text.

the proposed test is the continued emphasis which that court placed upon a moment's pre-summons possession by the taxpayer, no matter how fleeting. This brief actual possession was the fact by which the Court of Appeals distinguished *Kasimir* from its prior holding in *White*.<sup>147</sup> Whether the taxpayer physically touched records during their transfer from accountant to attorney should not alter the legal consequences of the transfer, however. The taxpayer should be able to assert his privilege in either situation if the existence of a "legitimate expectation of privacy"<sup>148</sup> can be demonstrated; the absence or presence of prior possession should be only one indicium of the taxpayer's expectations. Moreover, the evaluation of the taxpayer's expectations should focus upon the moment the summons is served since that time is an administratively feasible termination point prior to which a taxpayer should be free to maneuver.

Applying this test to the facts presented in *Couch* and *White* would not produce an outcome different from that reached by the respective courts. The taxpayer in *Couch* would be prevented from raising the fifth amendment defense because she had relinquished control of her records for many years to her accountant to have the information contained therein made public in her income tax returns;<sup>149</sup> thus no protectable expectations of privacy ever arose. The outcome of the *White* decision also would remain unaltered, primarily because the taxpayer's attorney obtained the documents from the accountant without the taxpayer's knowledge or express permission. Since the taxpayer believed the records still to be in the accountant's possession, he had no protectable expectations of privacy. If the taxpayer had known of and approved the transfer, application of the expectation of privacy analysis would alter the outcome of the decision.

Application of the analysis proposed in this Note might produce a different outcome in *Fisher*. After improperly emphasizing an accountant's prior preparation and ownership of summoned records, the Court of Appeals for the Third Circuit in *Fisher* apparently concluded that thereafter a taxpayer never could develop expectations of privacy concerning the documents regardless of whether he obtained personal possession and subsequently delivered them to an

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147. 499 F.2d at 453-54. See note 97 *supra* & accompanying text. See also 12 HOUSTON L. REV. 504, 506 (1975).

148. 499 F.2d at 452.

149. See notes 48-50 *supra* & accompanying text.

attorney. A superior analysis would view the particular attorney-client relationship existing when the records were summoned from the attorney, rather than any previous accountant-client relationship, to determine whether expectations of privacy existed. Adherence to the stance assumed in *Fisher* would create a per se possession requirement subject only to a narrow custodial safekeeping exception.<sup>150</sup>

Material differences between the accountant-client and attorney-client relationships, coupled with strong policy considerations surrounding the sixth amendment right to counsel, militate against adoption of the *Fisher* analysis. Furthermore, while authorship or ownership of documents may give some indication of the taxpayer's expectations of privacy, the primary factor should be the presence or absence of some act reasonably calculated to protect the privacy of records at the time the summons is served. The taxpayer might evidence this desire by requiring his accountant to return the documents, by placing them in custodial safekeeping, by transferring them to an attorney, or by reacquiring personal possession. Thus the expectation of privacy analysis suggested by *Couch* and *Kasimir*, but modified to eliminate any absolute requirement of an instant of physical possession, presents a less mechanical, more satisfactory approach for determining the availability of the fifth amendment as a bar to the production of a taxpayer's records held by his attorney.

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150. See notes 44-47 *supra* & accompanying text.