

A state grand jury investigating a murder learned that the key suspect might have kept a diary. The grand jury issued a subpoena duces tecum requiring the suspect to produce any diary. The subpoena made clear that the grand jury was seeking only the diary and not any testimony from the suspect. The suspect refused to produce the diary, citing his Fifth Amendment privilege against self-incrimination.

Under what circumstances, if any, may the grand jury compel production of the diary over the suspect's assertion of his Fifth Amendment privilege?

- A. It may compel production without granting immunity, because the suspect was not compelled to write a diary.
- B. It may compel production if the suspect is granted use and derivative use immunity from the act of production.
- C. It may compel production only if the suspect is granted transactional immunity.
- D. It may not compel production of a private diary under any circumstances.

Explanation:

The Fifth Amendment **privilege against self-incrimination** protects suspects from being **compelled** to provide self-incriminating evidence that is **testimonial or communicative** in nature (ie, testimonial communications). For example, the compelled **act of producing a document** is privileged if that act would prove that:

the document **exists**

the suspect **possesses** the document *or*

the document is **authentic** (ie, was created or written by the suspect).

However, the **contents** of a document are not protected by this privilege since the suspect was not compelled to create that content **(Choice A)**.

Here, the grand jury compelled the suspect to produce any diary when it issued a **subpoena duces tecum**. The grand jury believed that the suspect *might* have kept a diary, so the suspect's act of production would *prove* that the diary exists, that he possesses it, and that it is authentic (self-incriminating evidence). As a result, the act of production is a privileged testimonial communication.

But the grand jury can still compel production of the diary over the suspect's assertion of this privilege if the suspect is granted either:

use and derivative use immunity – prevents the government from using self-incriminating testimonial communications (and any evidence derived from them) against the suspect in any way that could lead to a criminal prosecution (eg, to obtain a grand jury indictment, at trial) *or*

transactional immunity – protects the suspect from being prosecuted for any crimes associated with self-incriminating testimonial communications.

While testimony can be compelled by granting the suspect full transactional immunity, it is not necessary because the narrower use and derivative use immunity is the minimum grant of immunity required to comply with the Fifth Amendment **(Choice C)**. Therefore, the grand jury can compel production of the diary if the suspect is granted use and derivative use immunity **(Choice D)**.

Educational Objective:

The Fifth Amendment privilege against self-incrimination protects suspects from compelled testimonial communications—eg, the act of producing a document that would prove its existence, possession, and/or authenticity. However, self-incriminating testimony can still be compelled if the government grants use and derivative use immunity.

References

U.S. Const. amend. V (privilege against self-incrimination).

United States v. Hubbell, 530 U.S. 27, 43–44 (2000) (finding that the act of producing documents is a testimonial communication that can only be compelled by a grant of immunity).

Kastigar v. United States, 406 U.S. 441, 452–53 (1972) (holding that use and derivative use immunity is the minimum grant of immunity required to comply with the Fifth Amendment).

Copyright © 2014 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

