

APPROACHES TO PROSECUTION AND CONTROL

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OBTAINING AND USING BUSINESS RECORDS

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ACQUISITIONS

Any of you who have tried a financial crime case will agree that technical expertise in obtaining business records and learning how to use them properly is probably the single most important kind of legal knowledge that you must have. Without that expertise, it is difficult, if not impossible, to convict people who are engaged in financial crimes.

First of all, I am going to give you a little bit of law. The law comes in, of course, when you try to obtain records from people who are not willing to give them up. Usually in the financial crime area, the most significant thing that you have to do is exactly that-- get the records of those people who are not really willing to give up. It is those records that are usually going to make or break the case.

You run into a problem with financial crime cases because the traditional approach for obtaining evidence, the search warrant, is not often practical. With financial crimes, unlike street crimes, the issue is not who did it, but whether it was done at all. When you start the investigation of a financial crime case, the traditional method of having that search warrant there so that you can go in and obtain records is simply not available. You do not yet have probable cause.

The alternative method for obtaining records from uncooperative people is the use of the subpoena power. The subpoena power must be viewed in terms of how it relates to an individual's Fifth Amendment privilege against self-incrimination. The traditional Fifth Amendment approach extended the privilege against self-incrimination both to individual testimony and to private papers. Many years ago when we started looking at financial crimes, there was the problem of records being private records and therefore subject to the individual's privilege. But our Supreme Court helped us out a little bit. It didn't help us out at the start because in the early case of Boyd v. United States, 116 U.S. 616 (1886), the Court came up with a convergence theory. The convergence theory basically is that both subpoenas and search warrants supply the necessary element of compulsion to invoke the Fifth Amendment protection. In other words, a subpoena directed at somebody is sufficient to invoke that body's right against self-incrimination if it is required to produce incriminating evidence in the form of private records.

I think the U.S. Supreme Court probably saw a need for law enforcement to obtain records in financial crimes cases because, while the convergence theory of Boyd may have been applicable to shield compulsory production of records because of the Fifth Amendment privilege, the Court has determined

with respect to others than individuals that they may not have a Fifth Amendment privilege at all and, therefore, we can get to their records. Probably the first case in that area was Hale v. Henkel, 201 U.S. 43 (1905), in which the Court held that the privilege was not applicable to corporations. So at that point in time, we could subpoena corporate records and corporations could not come into court and quash the subpoena based upon a Fifth Amendment privilege.

We got some more help in Shapiro v. United States, 335 U.S. 1 (1947), which said that records required to be kept by unincorporated entities were also not subject to the Fifth Amendment privilege. Now we are getting into the area of partnerships and other entities (but not corporate entities) which by law are required to keep certain records and which are no longer subject to a Fifth Amendment claim. Finally, in Bellis v. United States, 417 U.S. 85 (1974), the Supreme Court held that business records of basically all organizations are not subject to the Fifth Amendment privilege. In doing so, the Court stated: "The privilege against compulsory incrimination should be limited to its historic function, protecting only the natural individual from compulsory incrimination through his own testimony or personal records." And it cited United States v. White, 322 U.S. at 701.

At that point, in 1974, we now had the right to subpoena any records maintained by a business so long as that business was not an individual human being. We are still talking about partnerships, associations of any kind, corporations of any kind, and any other entity of that type which are not in fact humans. We were doing well in 1974, and it gets better.

In the case of Fisher v. United States, 425 U.S. 391 (1976), the U.S. Supreme Court held that at least the Internal Revenue Service may, by the use of its summons enforcement technique, enforce a summons requiring an accountant or an attorney to produce records in his possession given to him by a taxpayer. The ruling in Fisher was based on the fact that the taxpayer, in giving up his records and giving them to his accountant or his lawyer, does not have to come to court and be compelled to testify against himself in connection with his records; therefore, his privilege against compulsory self-incrimination was not affected.

The Court in Fisher also replied in the negative to the question of whether the Fifth Amendment privilege was a privilege that the lawyer could invoke on behalf of the client because of the attorney-client relationship. The reason that the Court gave there, and I think it is dicta, was that at this point the taxpayer could not have invoked his privilege. The reason given was that even if the taxpayer were required to produce his records, they would only be a tacit acknowledgement, in terms of his physical testimony, of the existence of the records and of the fact that they may be his. The Supreme Court said that that was not enough for the taxpayer to invoke his Fifth Amendment privilege. The Fisher case did not really direct itself to this exact question; it dealt generally with the situation where an attorney has possession of a private taxpayer's records. And the Court said the Fifth Amendment does not apply. The next interesting issue will arise when the Court is confronted directly with the situation where a subpoena is directed at the private records of an individual.

In regard to the area of search warrants, the Court in Boyd v. United States, in drawing on its convergence theory, said also that search warrants were sufficient to raise the specter of compulsion so that the Fifth Amendment privilege would apply to records. Fisher took care of the subpoena problem and basically reversed Boyd in that respect. Right after Fisher came Andresen v. Maryland, 427 U.S. 463 (1976), which reversed Boyd basically on the other half of the convergence theory, that is, the search warrant.

Andresen involved a case where investigators from the state of Maryland obtained a search warrant to search a lawyer's office for records involving a real estate fraud case. They were fortunate in that they had probable cause. They found a sufficient number of private records, of a private lawyer, which tended to incriminate him. The lawyer appealed basically on the issue of the Boyd convergence theory. The U.S. Supreme Court held that in conducting a search, agents may take incriminating business records of the lawyer, even though the lawyer is a private individual. They can do this because, first, the lawyer prepared the records voluntarily and not under compulsion; secondly, the lawyer at trial was not required to authenticate the documents that the investigators picked up; and thirdly, the lawyer was not required to assist the investigators in finding the records since they found them themselves. The Court said, under these three circumstances, the necessary compulsion sufficient to invoke the Fifth Amendment privilege was absent and the documents could be used in evidence against the lawyer.

Andresen may clearly have helped in the search warrant area to the extent that we want to use search warrants, but it certainly confused us in the area of subpoenas. Although we might have been able to draw some inferences from the Fisher case that subpoenas to an individual to produce incriminating documents may be used, it seems that Andresen itself casts some shadows on that question. I don't know what the answer is at this point; it will probably take another Supreme Court case directly on issue. In Andresen the Court quoted a Justice Holmes opinion and said that a person is privileged from producing the records but not from their production. Now that principle may apply to a search warrant when you have someone going in there and getting them, but it does not apply in a subpoena situation. In Andresen, with regard to the suggestion that there was no compulsion in a search warrant situation, there was the element that the person being searched was not required to assist in the production of the records. Look at the subpoena situation, however. You serve a person with a subpoena and he is going to have to assist in the production of those records because he has to bring them in. I don't think anyone really knows right now where the Supreme Court is going in the area of requiring a person to produce incriminating documents.

This looks like a good situation, but there have been other decisions which indicate potential problems in regard to obtaining records. In Burrows v. Superior Court, 13 Cal.3d 238, 118 Cal. Rptr. 166 (1974), the California Supreme Court held that a bank depositor has a reasonable expectation of privacy in his bank records which is protected under the California constitution. Interestingly, the Burrows decision was followed by the case of United States v. Miller, 425 U.S. 435 (1976), in which the U.S.

Supreme Court faced the same issue and held that the U.S. Constitution should be construed not to suggest that depositors have a Fourth Amendment privilege in their bank records. The Court held that a bank's production of a depositor's records, pursuant to a subpoena duces tecum, did not intrude upon any protected zone of privacy of the depositor.

We have a very recent case in Wisconsin, State v. Starkey, 81 Wisc.2d 399 (1978), dealing with bank records subpoenaed by a state agency. In a concurring opinion, one of our justices adopted the same philosophy as that of the California Supreme Court in the case of Burrows v. Superior Court. This justice said that individual bank depositors have a right of expectation of privacy in their bank records. If this view becomes popular among the states, you can imagine the extreme problems that you are going to have. We cannot conduct financial crimes investigations without the use of the subpoena power. If more states adopt the restricted view that California did, it may mean that search warrants will be the only way in which you will be able to obtain bank records. They may extend the right of privacy to the individual's records located in his own house or in any area where he expects a zone of privacy. So maybe we are winning on one side and on the other side we are beginning to lose a little bit.

If you are going to be conducting financial investigations, you need to understand the Bank Secrecy Act. Be aware of its contents and what it can do for you before you conduct any investigations. It is a super tool because it requires financial institutions all over this country to maintain certain kinds of records of financial transactions. You should know what kinds of financial transactions that institutions are required to keep records of so that you know what kinds of records are available to you when you conduct an investigation and when you prosecute. 12 U.S.C. §§ 1951 et seq. and 12 U.S.C. § 1829(d) contain the enabling legislation for the Bank Secrecy Act. 31 C.F.R. §§ 103.11 et seq. are the Treasury rules and regulations that were adopted as a result of the enabling legislation.

I would like to make a few comments about obtaining records from cooperative people. In my experience, I have found that in instances where your investigators are obtaining records from cooperative people, unless those records are primary documents (that is, documents which by their very nature exemplify the existence of the crime), original documents of all kinds should be retained by the custodian of the records and copies should be obtained by your investigators. Your investigators should record the date and time of the acquisition of the records and record the exact duplicate nature of the records. The investigators should make copies and have the custodian acknowledge the true nature of the copies. Get the name of the person from whom the copies were obtained, require the custodian to date and initial the copies, obtain a statement from the custodian indicating the fact of the duplication of the documents, and obtain a statement from the custodian regarding the nature of any entries appearing which were made not in the ordinary course of business. If you do all of this at the beginning, when you are preparing a large financial crime case which may involve thousands of documents, you will be much better prepared.

The reason I like people to keep their own records is because we all have a tendency to lose records, not only the investigating agency but also

the custodian of the records. Given the two options of having the investigators or the custodian lose the records, I would much prefer the custodian to do it because when you get to court and you have your copies, then you look prepared. If you take the originals and then you lose them, the custodian is prepared and you are not. If you have hundreds and hundreds of documents, you are going to lose some and they are going to lose some, but you are going to be better off if you lose the copies and not the originals.

In regard to using records at trial, as soon as you get something that you think you are going to use, ask yourself one question: for what purpose are you going to use that record? It sounds simple but when you really look at the record in terms of what you will use it for, everything comes easier. Business records are not always introduced into evidence under the business records exception to the hearsay rule. Business records, or any records, can be introduced into evidence for any number of reasons. Many times you are not going to need a hearsay exception to get that record, if you understand for what purpose it is being used. If it is being used to prove the truth of the matter asserted, you will have to find a hearsay exception. Do not just look to the business records exception because there may be other exceptions available.

Are you trying to introduce that record to establish that matters were asserted regardless of their truth? You will be surprised, if you look at your records, to find that there are many occasions when the only reason that you want that record in evidence is to prove the existence of it rather than whether what it says is true or false. Under those circumstances, you do not have to deal with the hearsay rules and you don't have to find exceptions. Is the record used to refresh recollection? If so, you don't have to worry about getting it into evidence at all. So understand why you are using your records.

One of the major objections to the introduction of any record is its authenticity-- is it what it purports to be? Is it the best evidence--are you using originals, duplicates, copies? Are they the best evidence? The hearsay rule is going to be raised almost every time by the defense counsel. You must know what the exceptions are and, more importantly, whether you are using it to prove the truth of the matters asserted therein. Last, but not least, consider relevancy. Is the record relevant to what you are trying to do? Those are the objections that you are going to hear and, in almost all cases, those are the only objections that are going to be available. If you have your records intact, you have testimony about what they are about, you can establish their authenticity, and you know where the copies and the originals are, then you are in good shape.

The ultimate answer to the use of records is to stipulate. When you have hundreds of documents and you want to introduce them all in evidence, the easiest thing to do is to hand them to the defense lawyer and ask him to stipulate. He will want to avoid extra days in trial because of the documents and he will likely agree to stipulate. Be sure you put the most important ones in the middle!



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