

Responding to Government Subpoenas for Business Records: A STEP-BY-STEP ANALYSIS

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Your client's business has just been served with a Grand Jury subpoena calling for production of a broad array of potentially incriminating documents. Can the client refuse to produce the documents on the grounds they might incriminate him and/or his business in violation of the Fifth Amendment? The answer depends on a series of questions regarding the client, the subpoena and the nature of the documents requested. The following six steps should be taken to answer these questions and help the client respond to the subpoena.

IDENTIFY THE CLIENT AND POTENTIAL CONFLICTS

You should first identify and distinguish between (a) the party being requested to produce documents by the government, and (b) the party seeking advice from you. The two may not be the same. Typically, the government serves its subpoena upon a corporation or other business entity, and one of its shareholders or officers consults a lawyer, seeking advice regarding the company and his or her own personal liability. In this situation, the lawyer is being asked to represent two clients and must follow the Florida Rules of Professional Conduct regarding joint representation and conflicts of interest.

Rule 4-1.7 sets forth the general rule



for conflicts of interest and provides that a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, or if there is a substantial risk that the representation will be materially limited by the lawyer's responsibilities to another client.¹ This conflict can be waived, provided that a series of requirements are satisfied, including: (a) that the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each client despite the conflict, (b) that each client gives informed consent, confirmed in writing or clearly stated

on the record at a hearing, and (c) that the lawyer explains the implications and risks of joint representation to both clients.²

This means you should closely examine the facts surrounding the subpoena for potential conflicts between the corporation and the individual. In the case of closely-held or one-man corporations, the likelihood of conflicts may be small because the interests of the individual owner and the entity are usually the same. In bigger entities, however, the potential for conflicts is much greater. A records custodian can

easily find himself in a position where "discharging his official responsibility to respond to discovery requests on the corporation's behalf may facilitate the construction of a criminal case against him individually."³

Once the interests of the individual and the entity diverge, it will be difficult to advise both clients simultaneously without later being criticized for having given advice that favored one client over the other.⁴ The first step, then, is to identify the clients and conflicts of interest, get written waivers, and bring separate counsel aboard if necessary.

IDENTIFY THE DOCUMENTS BEING REQUESTED

With the players sorted out, you can move to the language of the subpoena itself. If the subpoena has been served on a corporation, you should examine whether any of the documents requested are personal in nature rather than corporate. This is significant because, as we shall see, individuals can oppose the production of personal documents where corporations cannot.

In determining whether a given document is personal or corporate in nature, courts use a multi-factor test designed to answer the basic question: "What is the essential nature of the document?"⁵ The following non-dispositive factors can be considered: (a) who prepared the document; (b) the nature of its contents; (c) its purpose or use; (d) who possessed it; (e) who had access to it; (f) whether the corporation required its preparation; and (g) whether its existence was necessary to or in furtherance of corporate business.⁶

Applying these factors, one court concluded that pocket calendars kept by executives were "personal" in nature because they included records of medical appointments, religious activities and other personal meetings and duties.⁷ Another court found that Day Timers kept by an executive were "corporate" in nature because the overwhelming majority of entries related to work activities.⁸ The result will vary depending on the facts of the case.

REVIEW & UNDERSTAND THE "ACT OF PRODUCTION" DOCTRINE

Next, you can move to the Fifth Amendment's often misunderstood "act of production" doctrine. Simply stated, the Fifth Amendment does not apply to the contents of documents and business records; it applies only to the act of production.⁹ This is because the Fifth Amendment can only be triggered by a communication that is (1) testimonial, (2) incriminating, and (3) compelled by the government.¹⁰ Business records, no

matter how testimonial or incriminating, almost always fail the third prong of the test because they are not created in response to the government subpoena. Instead, they are created voluntarily, years before service of the subpoena, as internal memoranda, tax returns, financial reports, or the like. The subpoena does not "compel" new documents to be created; it only compels existing documents to be produced. As such, the Fifth Amendment "provides absolutely no protection for the contents of private papers of any kind."¹¹

The Supreme Court recognizes, however, that the "act of production" qualifies for its own level of Fifth Amendment protection, so long as the act is also testimonial and incriminating.¹² The act of production can be "testimonial" when it reveals crucial information to the government, such as (1) the existence of the documents, (2) their possession by the custodian, and (3) the custodian's belief that the documents are responsive to the subpoena.¹³ The act of production can be "incriminating" when it helps the government link criminal conduct to the producing party.¹⁴

If your client qualifies for act-of-production privilege, he or she can withhold documents in response to the subpoena. Be wary of exceptions to the doctrine however. These include the "foregone conclusion" exception, which provides that an act of production is not "testimonial" when the existence and authenticity of the documents are already known to the government and the subpoena merely seeks the production itself.¹⁵ Also, the "required records" exception will defeat act-of-production privilege for documents that are required to be maintained by law, rule or government regulation.¹⁶

DETERMINE WHETHER THE CLIENT HAS FIFTH AMENDMENT STANDING

Not every client has standing to assert the act-of-production privilege. In the next step, you should determine whether your client falls into one of

the protected categories. The answer depends on the client's legal status, as follows.

Natural Persons—Yes

The Fifth Amendment applies to individual or "natural" persons. Accordingly, individual persons cannot be compelled to produce documents when the act of production is both testimonial and incriminating.¹⁷ In *United States v. Hubbell*, for example, the former governor of Arkansas successfully opposed government subpoenas issued against him in his individual capacity for his private papers.¹⁸ The Supreme Court recognized that he was entitled to act-of-production privilege under the Fifth Amendment.¹⁹ Your individual clients will be afforded the same privilege.

Corporations—No

The Fifth Amendment does not apply to corporations, partnerships, LLC's or other business organizations.²⁰ This principle, known as the "collective entity" rule, goes all the way back to the early 1900s and is premised on the notion that corporations exist as entities separate and apart from their owners and members. The framers of the constitution were not interested in the rights of collective entities and instead "were interested primarily in protecting individual civil liberties."²¹ Thus, even though a corporation can be prosecuted as an entity separate and apart from its shareholders, the entity itself cannot invoke a privilege against self-incrimination.²² This rule applies regardless of the size of the corporation.²³ Corporations must produce their documents no matter how incriminating.

Sole Proprietorships—Yes

The rule is different for sole proprietorships, that is, unincorporated businesses owned by only one person. For Fifth Amendment purposes, a sole proprietorship is equivalent to its owner and does not exist as a separate entity.²⁴ Therefore, the owner of a sole proprietorship can invoke his or her personal Fifth Amendment rights to oppose a

subpoena issued to the business. If the government has served a subpoena on your client's business, you should determine whether the client is operating as a sole proprietorship. If so, the client may be able to oppose the subpoena.

Corporate Records Custodians—No

Frequently, a government subpoena calls for production of documents that will incriminate individual corporate officers or employees, including the records custodian called upon to produce the documents. Unfortunately for records custodian in this position, individuals cannot invoke their personal act-of-production privilege when responding to a corporate subpoena.²⁵ In *Braswell v. United States*, the Supreme Court, relying on principles of agency law, held that a custodian's act of production "is not deemed a personal act, but rather an act of the corporation," and thus "any claim of privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege."²⁶

As an agent of the corporation, the custodian is bound by the same obligation to produce records as the corporation itself. Thus, a records custodian must produce documents, even when those documents will incriminate him or her on an individual basis.²⁷

One-Man Corporations—Maybe

In a footnote, the *Braswell* Court acknowledged a possible exception to the records custodian rule for "one-man corporations," that is, corporations with only one shareholder, officer, director and employee.²⁸ In this situation, the agency rationale breaks down because there is no practical distinction between the entity and its sole shareholder. Such companies function like sole proprietorships, in that any act of production by the corporation would inevitably incriminate the "one man" of the one-man corporation. The *Braswell* Court expressly left open the question of act-of-production privilege in that context.²⁹

To date, however, no subsequent case has recognized act-of-production



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privilege for the records custodian of a one-man corporation.³⁰ Nevertheless, in the right case, you may be able to argue that the sole shareholder in this situation should enjoy the protection left open by the *Braswell* footnote.

SELECT A RECORDS CUSTODIAN

If your client cannot claim act-of-production privilege, the documents must be produced. Typically, this can be done without a formal Grand Jury appearance by signing a records custodian affidavit and mailing the records to the government. Occasionally, the government will insist on a Grand Jury appearance.

In either case, the government has no right to choose the exact person who will serve as records custodian. A business can appoint an alternative custodian at any time, so long as the custodian is qualified to identify and authenticate the documents.³¹ Thus, when the act of production might incriminate the president, a corporation can designate the vice-president, and so on. In an

extreme case, the corporation can hire a new employee to become a records custodian, so long as he or she becomes qualified to identify and authenticate the documents.³²

The custodian enjoys a limited form of protection for his or her efforts. In particular, if the custodian is later charged in a criminal case, the government will not be able to introduce the fact that the custodian personally produced the documents on behalf of the corporation.³³

PREPARE THE RECORDS CUSTODIAN TO TESTIFY

Finally, when the custodian must actually appear before the Grand Jury in conjunction with an act of production, you should prepare him or her as to the limits of government questioning. By agreeing to serve as a corporate records custodian, a person does not thereby waive their constitutional right not to incriminate themselves through oral testimony.³⁴

Nevertheless, the government can ask the custodian to identify and authen-

ricate the documents being produced, without invading the Fifth Amendment privilege.³⁵ Such "auxiliary" testimony merely makes explicit what is already implicit in complying with the subpoena.³⁶

The government cannot go much further. In a case arising from the Southern District of Florida, for example, a records custodian appeared before the Grand Jury and testified that she did not have possession of the records sought by the subpoena.³⁷ When asked their location, the custodian invoked the Fifth Amendment and refused to answer. The district court found her in contempt, reasoning that the location of the documents fell within the ambit of her role as records custodian and was not privileged. On appeal, the Eleventh Circuit disagreed. The court reasoned that, while the documents themselves "belonged" to the corporation and could be compelled, the custodian's thoughts (presumably as to the location of the missing documents) could not be said to "belong" to the corporation. "The government has no right to compel a person to speak the contents of her mind when doing so would incriminate that person."³⁸ Accordingly, you can advise your client to invoke the Fifth Amendment as to any questions beyond the auxiliary testimony of identifying and authenticating the documents.

CONCLUSION

In summary, with the document subpoena a favorite tool of law enforcement and prosecutors alike, every criminal practitioner will sooner or later be called upon to respond to one. Doing so requires a fact-intensive inquiry and application of business, ethical and constitutional law issues. The six steps outlined here will assist you in this analysis.

¹ See Fla. R. Prof. Conduct 4-1.7.

² *Id.*; see also Fla. R. Prof. Conduct 4-1.13 (regarding the obligations of representing a corporate entity).

³ *Federated Institute for Patent & Trademark Registry v. State*, 979 So.2d 1162, 1165 (Fla. 1st DCA 2008) (describing the position faced by a

records custodian as "tenuous").

⁴ The longer one lawyer continues to represent both clients, the more likely he or she will become disqualified from representing either client, and/or causing Sixth Amendment problems due to the right to conflict-free counsel. See *Lynd v. Terry*, 470 F.3d 1308, 1318 (11th Cir. 2006) (noting that the Sixth Amendment right to effective assistance of counsel encompasses the right to counsel untainted by conflicts of interest).

⁵ In re Grand Jury Proceedings, 55 F.3d 1012, 1014 (5th Cir. 1995).

⁶ *Id.*

⁷ See In re Grand Jury Subpoena Duces Tecum Dated April 23, 1981, 522 F.Supp. 977, 982-84 (S.D. N.Y. 1981).

⁸ See In re Grand Jury Proceedings, 55 F.3d at 1014-15.

⁹ See *Fisher v. United States*, 425 U.S. 391 (1976); *United States v. Doe*, 465 U.S. 605 (1984); In re Grand Jury Subpoena, 87 F.3d 1198 (11th Cir. 1996)

¹⁰ See *Fisher*, 425 U.S. at 408.

¹¹ *Doe*, 465 U.S. at 618 (1984) (O'Connor, J., concurring).

¹² See *Fisher*, 425 U.S. at 391; *Doe*, 465 U.S. at 612-13.

¹³ See *Fisher*, 425 U.S. at 410.

¹⁴ See *Braswell v. United States*, 487 U.S. 99, 124 (1987) ("the potential for self incrimination inheres in the act [of production] demanded of the individual").

¹⁵ *Fisher*, 425 U.S. at 411 (Supreme Court concluded that production of accountant's work papers for tax returns was not "testimonial" because the existence of those work papers was already a "foregone conclusion." The Court reasoned that "[t]he issue is not testimony but surrender.")

¹⁶ See *Shapiro v. United States*, 335 U.S. 1, 16-19 (1948); In re Grand Jury Proceedings, 601 F.2d 162, 168 (5th Cir. 1979).

¹⁷ See *United States v. Hubbell*, 530 U.S. 27 (2000).

¹⁸ *Id.* at 45.

¹⁹ *Id.*

²⁰ See *Bellis v. United States*, 417 U.S. 85 (1974); *Hale v. Hinkel*, 201 U.S. 43 (1906); *State v. Dawson*, 290 So.2d 79 (Fla. 1st DCA 1974).

²¹ See *United States v. White*, 322 U.S. 694, 700 (1944).

²² State ex rel *Losey v. Willard*, 54 So.2d 183 (Fla. 1951).

²³ See *Braswell*, 487 U.S. at 99.

²⁴ See *Doe*, 465 U.S. at 617 (sole proprietor could oppose subpoena on Fifth Amendment grounds).

²⁵ See *Braswell*, 487 U.S. at 99; In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807, 809-10 (11th Cir. 1992); *State v. Wellington Precious Metals, Inc.*, 510 So.2d 902 (Fla. 1987).

²⁶ *Braswell*, 487 U.S. at 109-10; see also In re Grand Jury Subpoena Dated April 9, 1996, 87 F.3d 1198, 1200-01 (11th Cir. 1996).

²⁷ *Braswell*, 487 U.S. at 109-10; *Wellington Precious Metals, Inc.*, 510 So.2d at 905-06.

²⁸ Footnote 11 provided that "We leave open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records." *Braswell*, 487 U.S. at 118 n. 11.

²⁹ *Id.*

³⁰ See *Freedom Medical, Inc. v. Gillespie*, 2006 WL 3924101 * 2 (E.D. Penn. Jan. 16, 2006) (reviewing the case law on this point and noting that, as of 2006, no case had answered the question left open by footnote 11 in favor of records custodians of one-man corporations being able to assert the act-of-production privilege). In 1987, the Florida Supreme Court also decided *State v. Wellington Precious Metals, Inc.*, 510 So.2d 902 (Fla. 1987), a pre-*Braswell* case finding that the sole owner/records custodian of a small corporation could not claim act-of-production privilege.

³¹ See *Braswell*, 487 U.S. at 116; In re Grand Jury No. 86-3 (Will Roberts Corp.), 816 F.2d 569, 573 (11th Cir. 1987); *Wellington Precious Metals*, 510 So.2d at 905.

³² See In re Grand Jury Proceedings, 473 F.Supp.2d 201 (D. Mass. 2007).

³³ See *Braswell*, 487 U.S. at 118; *United States v. Medlin*, 986 F.2d 463, 467-68 (11th Cir. 1993).

³⁴ See *Curcio v. United States*, 354 U.S. 118 (1957).

³⁵ See *Braswell*, 487 U.S. at 114-15.

³⁶ *Id.*

³⁷ See In re Grand Jury Subpoena, 87 F.3d at 1201.

³⁸ *Id.*

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