
Assistant U.S. Attorney for the Southern District of California before joining the Counterterrorism Section in 2006. Mr. Sandoval was in private civil practice for ten years before joining the U.S. Attorney's Office in 2004.✉

Obtaining Foreign Evidence Outside of the Mutual Legal Assistance Treaty Process

Corey J. Smith
Antiterrorism Advisory Counsel Regional
Coordinator
Counterterrorism Section
National Security Division

I. Introduction

One of the few truisms in litigation, criminal and otherwise, is that a case is only as good as its (admissible) evidence. As technology shrinks the world, prosecutors increasingly find themselves handling international criminal cases that present new evidentiary challenges. Whether an international tax shelter case, Racketeering Influenced Corrupt Organization (RICO), or terrorist financing prosecution, foreign evidence increasingly comprises a large part of the government's case-in-chief. Obtaining evidence from foreign jurisdictions is only the first of many hurdles that the prosecutor must overcome. In addition, the prosecutor must also authenticate the evidence under Federal Rule of Evidence 901, and often, overcome inherent hearsay.

If the prosecutor is fortunate, the situs of the foreign evidence is a country with which the United States has a Mutual Legal Assistance Treaty (MLAT). If the treaty encompasses the crimes which the prosecutor is contemplating, evidence acquisition may be relatively straightforward; a simple treaty request to the foreign government may suffice. If, however, an MLAT does not exist, or the contemplated

charges are not covered under the treaty, alternative methods must be employed. For instance, the United States Government has MLATs with many Caribbean countries, few of which encompass Title 26 offenses. In these instances, there is a panoply of tools available, each escalating in its intrusiveness.

A formal government-to-government request for assistance, or Letters Rogatory, is the most well-known method of obtaining foreign evidence outside of an MLAT. As an alternative, the prosecutor may inquire if law enforcement has a pre-existing or Simultaneous Criminal Investigation Program arrangement with the law enforcement authorities in the foreign jurisdiction. Alternatively, the prosecutor may seek evidence under the procedures available in the legal system of the foreign country. If the third party possessor of the evidence has a presence in the United States, a Bank of Nova Scotia (BNS) or PATRIOT Act subpoena may be appropriate. Finally, under particular circumstances, the prosecutor may simply move to compel the United States person with signatory authority over the evidence in question to consent to its production. The methodology to employ is dictated by the unique circumstances of each investigation and the legal environment of the foreign country in question. The most efficient way to evaluate the legal climate of the foreign jurisdiction at play is through consultation with the Department of Justice's (Department) Office of International Affairs.

II. The Simultaneous Criminal Investigation Program

The United States does not have a Simultaneous Criminal Investigation Program (SCIP) arrangement with many foreign countries. A SCIP is a formal, nonjudicial arrangement between complimentary law enforcement agencies in two countries to share evidence. The best known SCIP is between the Internal Revenue Service (IRS), Criminal Investigation Division (CID), and its counterpart, the Canadian Department of National Revenue, Canadian Customs and Revenue Agency (CCRA). This agreement was executed by the United States and Canadian Governments on March 31, 1983, and reauthorized on May 3, 2001.

The agreement permits the IRS-CID to share tax return information with CCRA agents under Title 26 U.S.C. § 6103(k)(4), if such sharing will further the development of an ongoing criminal tax investigation in the United States. The SCIP agreement, however, is limited. Paragraph 6 of the SCIP only permits sharing of evidence if such disclosures further the ends of "tax administration." The SCIP process cannot be used to obtain evidence in Title 18 investigations. Moreover, "matters occurring before the Grand Jury" cannot be shared under the SCIP process. Another concern with law enforcement-to-law enforcement evidence sharing is general secrecy. In many instances, security in foreign jurisdictions is not as reliable as in the United States law enforcement community. Occasionally a foreign law enforcement agency may be willing to share evidence with the United States without requesting reciprocity, but more often than not, the one way street of evidence sharing turns out to be a dead end.

III. The Letters Rogatory

A Letters Rogatory, in contrast to a SCIP or MLAT, is a judicial animal that issues from the court. It is a formal request from a United States District Court to the judiciary of a foreign nation, requesting the assistance of the latter in obtaining evidence. The execution of a request for judicial assistance is based on comity between nations at peace. See *United States v. Zabady*, 546 F. Supp 35, 39 n.9 (M.D. Pa. 1982). The power of United States federal courts to issue Letters Rogatory derives from Title 28 U.S.C. § 1781 and from the courts' inherent authority. *United States v. Reagan*, 453 F.2d 165, 171-73 (6th Cir. 1971);

United States v. Staples, 256 F.2d 290 (9th Cir. 1958); *United States v. Strong*, 608 F. Supp. 188, 192-94 (E.D. Pa. 1985); *B & L Drilling Electric v. Totco*, 87 F.R.D. 543, 545 (W.D. Okla. 1978). Federal courts also possess the power to execute Letters Rogatory at the request of foreign tribunals. 28 U.S.C. § 1782; *In Re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 648 F. Supp 464 (S.D. Fla. 1986).

Evidence, including documents and the testimony of witnesses, may properly be sought by means of a request for foreign judicial assistance before or after formal charges have been brought. *United States v. Reagan*, 453 F.2d at 173 n.4; *In Re Grand Jury 81-2*, 550 F.Supp 24, 29 (W.D. Mich. 1982); *United States v. Strong*, 608 F.Supp at 194. The request for assistance may also include the execution of a search warrant. Such a search will be upheld if executed in accordance with the laws of the country in which the search took place, as long as the country has reasonable procedural protections and safeguards consistent with United States law. *United States v. Barona*, 56 F.3d 1087 (9th Cir. 1995).

A prosecutor wishing to employ the use of a Letters Rogatory must first obtain the approval of the Office of International Affairs (OIA). The OIA will have an attorney assigned to the country from which evidence is sought, and he or she will be able to inform the prosecutor of the particular legal landscape of that country. Once OIA approval is obtained, the prosecutor must prepare a motion for the court and the actual Letters Rogatory, which must include the charges being investigated, the elements of those charges, the criminal conduct being investigated, and a precise description of the evidence sought. If any specific evidence gathering techniques, such as witness questioning, are also being sought, that technique must also be described. Most importantly, the prosecutor must describe how the evidence sought will assist in proving the criminality of the targeted suspect. The affiant in this case is not the special agent, but the prosecutor.

The Federal Rules of Criminal Procedure are silent as to the procedure for the issuance of Letters Rogatory, but case law suggests that applications may be made *ex parte*. If the evidence being sought is for investigative purposes only, authentication of the evidence under Federal Rule of Evidence 901 is not a concern. If, however, the evidence is sought for

preservation and use at trial, such as bank records or statements of witnesses, the domestic evidentiary rules must be observed. For instance, if a request for foreign judicial assistance seeks testimony for use at trial, the requirements of Rule 15 of the Federal Rules of Criminal Procedure must be followed. *See United States v. Strong*, 608 F. Supp at 192-94 (approving post-indictment request for judicial assistance to obtain deposition of foreign witness). If foreign bank records are being sought, the requirements of 18 U.S.C. § 3505, including notice, must be followed.

Even if a foreign court accepts a United States Letters Rogatory, and issues an order compelling the production of the requested evidence, it is by no means certain that the United States prosecutor will receive the evidence in question, or will receive it in a form admissible at trial. Depending on the country, the foreign prosecutors charged with enforcing the Letters Rogatory Order may be unwilling to enforce the foreign Order, or the third party possessor of the evidence may simply refuse to comply. Systemic corruption in foreign jurisdictions is only one reason why compliance with a Letters Rogatory may be problematic. There are many less nefarious reasons why requested foreign evidence may never be produced through a Letters Rogatory.

IV. Bank secrecy laws suspension

Bank secrecy laws are the obstacle most frequently encountered by United States prosecutors when seeking foreign financial records. Many jurisdictions have made it a crime for financial institutions to provide customer bank records to law enforcement, or to foreign law enforcement. Many of these countries, however, have exceptions to these laws. For instance, the Turks and Caicos Islands can provide bank records if the investigation does not involve tax charges. Some jurisdictions provide a procedure through which law enforcement, including foreign law enforcement, can apply for a suspension of the bank secrecy laws. For example, in Lebanon, Law 318 of the Lebanese Republic, Article 6, creates a *Special Investigation Commission* which is empowered to lift Lebanese bank secrecy laws in particular money laundering investigations. Law 318, Article 1, enumerates the types of investigations in which the bank secrecy laws can be suspended. Under Law 318, the Lebanese bank secrecy laws can be suspended only in cases involving the following.

- The growing, manufacture, or trading of narcotics.
- Organized crime investigations.
- Terrorist acts.
- Illegal arms trade.
- Stealing or embezzling public or private funds, or their appropriation by fraud.
- Counterfeiting money or official documents.

Of course, the prosecutor must be mindful of the political environment of the requested country. A procedure like that codified in Law 318 is only as good as the will to enforce it.

The best way for a prosecutor to ascertain if a procedure like Law 318 is available in a particular jurisdiction is to contact counsel for the financial institution from which records are sought. Typically, counsel will work with the United States prosecutor to achieve a mutually advantageous resolution to obtaining foreign evidence. Counsel's objective is not to thwart law enforcement, but to satisfy it. If the financial institution's counsel has any experience in the area of criminal law and foreign evidence gathering, he or she will be motivated to prevent their client from being on the receiving end of a more intrusive request for evidence, such as a BNS or PATRIOT Act Subpoena.

A. Bank of Nova Scotia subpoena

If an evaluation of the facts and circumstances of a particular case cause a prosecutor, in consultation with OIA, to conclude that a Letters Rogatory or Bank Secrecy Act (BSA) exception request are not likely to succeed, and if the financial institution in question has a presence in the United States, a BNS or PATRIOT Act subpoena may be appropriate. Institutions that maintain branches or affiliates in the United States are subject to legal process. *In Re Grand jury Proceeding (Bank of Nova Scotia)*, 722 F.2d 657 (11th Cir. 1983), *appeal following remand*, 740 F.2d 817 (1984); *In Re Grand jury Proceeding (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982). If the financial institution does not maintain a branch or affiliate in the United States, but has a correspondent relationship with a United States bank, a PATRIOT Act Subpoena may be appropriate. 31 U.S.C. § 5318(k)(3).

OIA approval is required for the issuance, and if necessary, the enforcement, of all BNS subpoenas. *See* USAM 9-13.525; Criminal

Resource Manual, § 279. Approval of a BNS subpoena is dependent on a number of factors.

- The availability of alternative methods for obtaining the records in a timely manner.
- The indispensability of the records to the success of the investigation or prosecution.
- The need to protect against the destruction of records located abroad and to protect the United States' ability to prosecute for contempt or obstruction of justice for such destruction.

If enforcement is necessary, the prosecutor will need to plead a so-called comity analysis, and the Court will be required to balance international comity against law enforcement needs to determine if an enforcement order should issue. Comity analysis derives from § 442(1)(c) of the Restatement (Third) of the Foreign Relations Law of the United States (1987). *See Richmark Corp v. Timber Falling Consultants*, 959 F.2d 1468, 1474-79 (9th Cir. 1992). Typically, enforcement takes the form of daily fines until compliance is obtained. Service of a BNS subpoena is upon a financial institution's United States branch or U.S. registered agent. If the foreign bank does not have a branch or affiliate in the United States, and other means of obtaining the records are not viable, the only remaining alternative may be a PATRIOT Act subpoena.

B. The PATRIOT Act subpoena

The Patriot Act subpoena derives its name, obviously, from the recently enacted PATRIOT Act, but is codified at 32 U.S.C. § 5318(k)(3), which states:

The Attorney General may issue ... a subpoena to any foreign bank that maintains a correspondent account in the United States and requests records related to such correspondent account, including records maintained outside of the United State relating to the deposit of funds in the foreign bank

Much like a BNS subpoena, a prosecutor must obtain OIA approval prior to issuing and/or enforcing a PATRIOT Act subpoena. To obtain approval, the prosecutor must establish an extraordinary need for the subject evidence, and show that no other method is likely to result in compliance. In counterterrorism or counterespionage cases, a classified supplement can be submitted as part of the approval package.

In most cases, by the time the prosecutor is contemplating the use of a BNS or PATRIOT Act subpoena, he or she has had discussions with bank counsel. It is often likely that the prospect of a PATRIOT Act subpoena will encourage a foreign financial institution to agree to some alternative method of providing the requested records, short of a subpoena, that will not violate the subject jurisdiction's bank secrecy laws. Voluntary consent is one such alternative procedure.

V. Compelled consent order

If the party controlling a foreign bank account is subject to United States' jurisdiction or process, prosecutors can seek a court order compelling an account holder to sign a consent form obliging the foreign institution to provide the records in question. *Doe v. United States*, 487 U.S. 201 (1988); *United States v. Ghidoni*, 732 F.2d 814 (11th Cir. 1984); *United States v. Lehder-Rivas*, 827 F.2d 682 (11th Cir. 1987). The Supreme Court has ruled that such an order, if the consent form is properly worded in the hypothetical, does not violate a signatory's Fifth Amendment privilege against self-incrimination. *Doe v. United States*, 487 U.S. at 206-18. The consent form must clearly state that the signatory is not affirming the existence or control over records that may be located at a particular institution, but that inasmuch as the institution requires his consent for the release of any records in its possession, such consent is given. If a nominal custodian, or signatory, refuses to voluntarily sign such a consent form, the prosecutor can move the applicable court for an order compelling consent. *See id.* The Supreme Court held in *Doe* that, since a properly worded hypothetical consent form does not implicate the signatory's Fifth Amendment rights, the signatory can be compelled to provide said consent. The underpinning for this result is the precept that, in the interest of the public welfare, the government is entitled to everyone's evidence. Why should access to the sought-after financial records be denied simply because of the unfortunate happenstance that they are located outside the United States? This argument is especially poignant when the person, under whose name these records are being held, is subject to U.S. jurisdiction.

Foreign courts have had mixed reactions to these directives. A court in the Cayman Islands, a dependency of the United Kingdom, held that such compelled disclosure directives do not constitute voluntary and freely given consent for

disclosure, as required under the secrecy laws of that jurisdiction. *In re ABC Ltd.*, 1984 CILR 130, 134-45 (Grand Court of the Cayman Islands, 1984). For other countries that do not have such stringent secrecy statutes, and that follow British common law, there is authority that such disclosures do constitute valid consent under the common law duty of a banker to keep the financial affairs of clients private. *Tournier v. National Provincial & Union Bank of England*, 1 K.B. 461 (1924).

The use of compelled consent orders has been widely successful in obtaining foreign bank records. Even when the account holder is located outside the United States, the prospect of a subpoena or compelled consent order may lead a General Counsel for a foreign financial institution to assist in obtaining voluntary consent under these procedures. Also, there is no reason why a compelled consent order cannot be used to obtain other types of records that are subject to the secrecy provisions of foreign jurisdictions, for example, accounting records.

It is important for prosecutors to remember one of the foundational dictates of the noble profession, regardless of the methodology employed in obtaining foreign evidence. "Everything is negotiable." Before a prosecutor uses a PATRIOT Act subpoena, it is not only required, but wise, to explore less intrusive, and more informal, methods of obtaining the requested evidence. More often than not, bank's counsel will be a willing and capable ally in this endeavor. If compulsory process is required, approval will be easier to obtain if it is preceded by a record of informal request and negotiation. ❖

ABOUT THE AUTHOR

□ **Corey Smith** is an Antiterrorism Advisory Counsel Regional Coordinator with the National Security Division, Counterterrorism Section. He previously served as Assistant Chief with the Tax Division, Southern Criminal Enforcement Section.

Material contained within this article derived, in part, from material authored by James Springer, Senior Litigation Counsel, Tax Division, retired.