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LITIGATION

Defense attorney happily changes his mind before circuit

By John Roemer
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SAN FRANCISCO – A defense attorney trying to shield his client’s financial documents from the Internal Revenue Service was happy to cite a case he lost more than a decade ago as precedent during oral argument Thursday before a 9th U.S. Circuit Court of Appeals panel.

In 2001, Jay R. Weill was chief of the tax division for the U.S. attorney in San Francisco. Today, Weill is in private practice as a defense lawyer at Sideman & Bancroft LLP, where he is holding tax records for client Mary A. Nolan, a San Ramon divorce lawyer who is the target of a IRS criminal investigation. *U.S. v. Sideman & Bancroft*, 11-15930.

As a government tax collector 11 years ago, Weill sought to enforce a grand jury subpoena for Sideman to produce tax documents it held for another client. Then-Chief U.S. District Judge Marilyn Hall Patel of San Francisco ruled against him, finding that the production of the records could be a link in the chain of evidence needed to prosecute the client for a crime.

The Fifth Amendment protects against

such compelled acts of production, Patel held. *In re Grand Jury Subpoena to Richard Sideman*, CR-01-219 (N. Dist. of Cal., 2001).

On Thursday Weill cited the earlier case in trying to persuade three circuit judges that they should reverse U.S. District Judge William H. Alsup of San Francisco who, unlike Patel, did order Sideman to turn over the records it is holding for Nolan.

“The identical issue was decided by Chief Judge Patel,” Weill asserted in court papers.

At the oral argument session, Circuit Judge Marsha S. Berzon asked Assistant U.S. Attorney Michael J. Haungs of the Department of Justice’s tax division why he had not responded to that claim in his answering brief.

Haungs said there were different issues involved because some of the documents in the 2001 case could not be authenticated, while in the Nolan matter the IRS knows what Weill is holding. “There was different fact-finding by the district court,” he said.

Outside the courtroom, Weill laughed at the way his old loss might now work as a winning argument. “It was my case. I was the prosecutor. Sideman filed a petition to

quash and Judge Patel ruled against me,” he said. “Now I think she was right on the money.”

In the Nolan case, prosecutors contend that the so-called foregone conclusion exception to the Fifth Amendment applies to the documents and warrants their compelled production because an accountant who held the papers before they ended up at Sideman’s offices can identify and authenticate them.

Weill countered that the accountant spent at most two or three hours with the files, which comprise more than five linear feet of paperwork in several banker’s boxes, and would be highly unlikely to be able to spot and confirm the identity of any single piece of evidence contained within them.

Questioned by Circuit Judge Susan P. Graber, Weill conceded that for the panel to reverse the district court, he must convince them that Alsup clearly committed judicial error, no easy task. But pointing to the conflict over who can authenticate the documents and Patel’s prior ruling, Weill was adamant. “The judge is wrong,” he said.

The third panelist is Senior Circuit Judge J. Clifford Wallace. The panel gave no indication when it will rule.