



## GRAND JURY MANUAL

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## Introduction

This new edition of the Antitrust Division Grand Jury Practice Manual was prepared to aid all Division personnel in the performance of their grand jury-related responsibilities. It is designed to be a single updated source for general legal, policy and procedural guidance relevant to such responsibilities. Although a certain amount of detail is provided concerning the various criminal laws the Division enforces, this Manual is intended to be a guide to grand jury practice and not a comprehensive primer on criminal law enforcement. This Manual is intended to be as current as possible, however, Division professionals should be alert to changes in substantive law and Division procedures that may not be contained in this Manual.

This version of the Grand Jury Manual is a complete revision of the old Manual which should now be discarded. It should be used in conjunction with the Antitrust Division Manual which also provides valuable guidance in the criminal law enforcement area.

This manual provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

Numerous attorneys, paralegals and secretaries throughout the Antitrust

Division, including all the employees in the FOIA Unit, contributed to this edition of the Manual. Without their effort, performed in addition to their already heavy work-loads, this revision could not have been produced. We all owe a debt of thanks to them.

Several individuals, in addition, deserve special recognition for their contribution to this edition -- Elaine Fidler, proofed (and reproofed) this Manual and managed various other aspects of its production; Jacqueline Jones, who typed (and retyped) the majority of the Manual; Kate Schlech, who offered her sage comments on all the chapters of the Manual; John Powers, who reviewed the legal analysis throughout the Manual and was always there to offer advice and guidance; and especially Leo Neshkes, who took responsibility for this revision when it was faltering and without whom this edition of the Manual would never have been produced.

## I. GETTING STARTED

### A. Functions of the Grand Jury

The function of the grand jury is to investigate possible criminal violations of the federal laws and to return indictments against culpable corporations and individuals where there is probable cause to believe that a violation has occurred. In performing this function, "the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred."<sup>1</sup> The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."<sup>2</sup> The grand jury is rooted in several centuries of Anglo-American history and "has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions."<sup>3</sup>

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<sup>1</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991).

<sup>2</sup>Blair v. United States, 250 U.S. 273 (1919); see also United States v. Calandra, 414 U.S. 338, 343 (1974).

<sup>3</sup>Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972); see also United States v. Sells Eng'g, Inc., 463 U.S. 418, 423 (1983); United States v. Calandra, 414 U.S. at 343.

B. Initial Steps in Starting a Grand Jury Investigation

1. Memo requesting authorization

The Division's grand jury investigations must be approved by the Assistant Attorney General. If a Division attorney believes that a criminal violation of the antitrust laws has occurred, he should prepare a memorandum requesting authority to conduct a grand jury investigation ("the authorization memo"). The authorization memo should set forth all presently available relevant information that indicates that there may have been a violation of any of the criminal provisions of the antitrust laws. (Sherman Act Sections 1, 2, and 3). It should specify, to the extent possible:

- (1) The companies, individuals, industry, and commodity involved;
- (2) The estimated amount of commerce involved on an annual basis;
- (3) The geographic area affected and the district where the investigation is to be conducted;
- (4) The suspected violation and a summary of the supporting evidence;
- (5) The significance of the possible violation from an economic and antitrust enforcement standpoint;
- (6) The estimated amount of time the investigation will take; and
- (7) Any additional relevant information.

The authorization memo should also discuss how the grand jury will be used to gather additional evidence and the expected parameters of the investigation. To the extent possible, the memorandum should identify the individuals and corporations that will be subpoenaed and the individuals or corporations that are potential defendants.

If a preliminary inquiry has not been authorized, the authorization memo should request that clearance for the investigation be obtained from the Federal Trade Commission.

The information supporting a request for grand jury authority may come from a prior preliminary inquiry, a CID investigation or confidential sources. In addition, there are numerous public sources for locating basic information to include in the authorization memo. The Division's library is a rich source of information that should not be overlooked at the start of a grand jury investigation. Useful information about major corporations can be obtained from the 10-K and annual reports located in the Antitrust library.<sup>4</sup> Basic industry information is available in the library's bound volumes and periodicals and from the on-line database accessed through the library. Dun & Bradstreet reports also can be obtained through the Antitrust library. Other valuable sources of information, both in preparing the authorization memo and throughout the ensuing investigation, are the Division's files of past investigations, corporate filings with state government offices, state and federal regulatory agency filings and reports, and national and local trade association reports.<sup>5</sup>

The staff's authorization memo is forwarded to the section or field office chief for review. The chief will write a cover memorandum that contains his views and recommendation, a list of attorneys who will be assigned to the investigation and the district in which the grand jury investigation will be conducted. The chief's memorandum should also set forth an estimate of the time and resources to be used and any specific problems that are likely to be encountered during the investigation.

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<sup>4</sup>10-K's and annual reports for other publicly-held corporations are available in the SEC Reference Room.

<sup>5</sup> See ATD Manual VI for a more detailed discussion of available information sources.

The authorization memo and the chief's cover memo, along with the grand jury letters of authority, are sent to the Office of Operations for review by the Director of Operations. The recommendation of the Director of Operations is made to the Assistant Attorney General through the appropriate Deputy Assistant Attorney General. The following appears on the bottom of the left side of the Operations recommendation memorandum:

Approved: \_\_\_\_\_

Date: \_\_\_\_\_

Disapproved: \_\_\_\_\_

Date: \_\_\_\_\_

Upon approval of the recommendation by the Assistant Attorney General, the staff is notified through its section or field office chief.

Requests to expand the scope of an existing grand jury investigation also require the approval of the Assistant Attorney General. The same procedure as that which is used with new investigations should be followed. When personnel changes are made on the staff of an existing grand jury investigation, the section or field office chief should notify the Office of Operations so that additional letters of authority may be prepared.

## 2. Letters of authority

Whenever a grand jury investigation is requested, the staff will prepare letters of authority for the signature of the Assistant Attorney General, addressed to each attorney who will appear before the grand jury.<sup>6</sup> Upon approval of the grand jury, the signed letters are returned to the appropriate section or field office chief. They should be issued before an Antitrust Division attorney attends any grand jury sessions. Unlike United States Attorneys and their assistants, a Division attorney must be specifically authorized to conduct grand jury proceedings; he does not have general authorization.

The issuance of letters of authority is governed by 28 U.S.C. § 515, which provides, in part:

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

The Attorney General has delegated the authority to direct Department of Justice attorneys to conduct grand jury proceedings to all Assistant and Deputy Assistant Attorneys General.<sup>7</sup>

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<sup>6</sup>See U.S.A.M. 9-11.241.

<sup>7</sup>Order No. 725-77.



Letters of authority may be broadly drafted and need not describe the specific parties or violations that are under investigation.<sup>8</sup> While it is Division policy that all attorneys receive a letter of authority prior to appearing before the grand jury, failure to receive a letter should not invalidate a subsequent indictment.<sup>9</sup> The letter of authority should be filed with the clerk in the district where the grand jury will sit, if possible, before any official action by the Government attorneys affecting the rights of witnesses or possible defendants, such as issuance of subpoenas, is taken.<sup>10</sup> A state attorney participating in the Division's Cross-Designation Program should not attend any grand jury sessions on behalf of the Division before an Oath of Office is executed and a grand jury letter of authority has been filed.

Upon the return of an indictment, experienced defense counsel may check the letters of authority, and failure to file (or to file promptly) may lead to additional motions and unnecessary work on the part of the staff in dealing with the omission. However, failure to file a valid letter prior to appearing before the grand jury should not invalidate a subsequent indictment.<sup>11</sup>

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<sup>8</sup>See United States v. Morrison, 531 F.2d 1089 (1st Cir.), cert. denied, 429 U.S. 837 (1976); In re Subpoena of Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); Infelice v. United States, 528 F.2d 204 (7th Cir. 1975); United States v. Wrigley, 520 F.2d 362 (8th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Prueitt, 540 F.2d 995 (9th Cir.), cert. denied, 429 U.S. 1063 (1976).

<sup>9</sup>See United States v. Balistreri, 779 F.2d 1191, 1209 (7th Cir.) (a letter of authorization is not essential to the validity of an appointment under § 515(a)), cert. denied, 475 U.S. 1095 (1985); see also In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), cert. denied, 484 U.S. 1027 (1988).

<sup>10</sup>If it is necessary to issue subpoenas prior to filing the letters of authority, it may be wise to request the United States Attorney to issue the subpoenas.

<sup>11</sup>See Belt v. United States, 73 F.2d 888, 889 (5th Cir. 1934); May v. United States, 236 F.495, 500 (8th Cir. 1916).

In many jurisdictions, letters of authority are secret; in others, they are a matter of public record.

A sample letter of authority is attached as Appendix I-1.

3. Arranging for the grand jury and preliminary conferences

After the grand jury investigation has been authorized, arrangements for the investigation should be made with the United States Attorney in the district in which the grand jury will sit and, if appropriate, the chief judge or the particular judge who will be in charge of the grand jury. It is also advisable to meet with the clerk of the district court and the local United States Marshal. If practicable, and the procedures in the district are unknown, such arrangements should be made in person. If impracticable, or if the jury is to sit in a district where the staff has already established a personal relationship with the United States Attorney and is acquainted with the local procedures, arrangements may be made by letter or telephone. If the matter is being handled by a Washington staff, the chief of the field office in whose jurisdiction the grand jury will sit should be consulted. Frequently, the chief will have had grand jury experience in the district in which the grand jury will sit and can be quite helpful in procedural matters and as liaison with the court and other officials.

Continued liaison should be maintained with the United States Attorney throughout the entire investigation and, insofar as necessary, with the clerk and marshal. A conference with these individuals should be held prior to the empaneling of a new grand jury, or when the investigation is to be conducted by a grand jury previously empaneled, prior to the first session. Among the procedural matters to be discussed and with which the staff should become familiar are:

1. Filing of letters of authority and secrecy thereof;
2. Challenging and excusing grand jurors;
3. Excusing witnesses;
4. Subpoenas;
  - (a) Where returnable;
  - (b) Whether the service copy is signed and sealed;
  - (c) Where return of service is to be made; and
  - (d) Secrecy;
5. Note taking by grand jurors;
6. Arrangements for court reporting;
7. Obtaining an impounding order;
8. Handling of Witness' Certificates of Attendance and Payment;
9. Immunity applications and orders;
10. Appointment of secretary and keeping of attendance record; and
11. Excusing the grand jury temporarily and recalling it for additional sessions.

The number of hours per day the grand jury should sit and the length of time normally taken for lunch should also be ascertained. Although, within limitations, this is the prerogative of the grand jury, the staff can tactfully suggest the appropriate hours and, normally, they will be followed by the grand jury. In some districts, the hours will be fixed by the court in its charge to the grand jury.

A conference with the judge having supervision over the grand jury ordinarily should be sought prior to the empaneling of a new grand jury, or, if the investigation is to be conducted by a grand jury already empaneled, prior to the initial session. At this conference, the staff should be prepared to explore any anticipated special problems and to explain the general nature of the investigation. Care should be taken that the court understands the anticipated duration of the grand jury and the anticipated frequency of sessions. This is necessary so that the court will not be faced with unexpected complaints of undue hardship or inconvenience by jurors in the case of a grand jury already empaneled, or in the case of a grand jury to be empaneled, so that the court can advise the panel and excuse such persons as may be appropriate. In the latter instance, if the jurors do not know in advance the period they are to serve, they may either not show up or show up angry. In the case of a grand jury already empaneled, the problem of inconvenience or hardship can only be dealt with as tactfully as possible by the staff and, if necessary, jurors excused and additional jurors empaneled.

If not covered in the conference with the United States Attorney, the court's desires should be ascertained as to the procedure to be followed in:

1. Excusing grand jurors;
2. Note taking by grand jurors;
3. Recalling the grand jury from time to time for additional sessions; and
4. Obtaining immunity orders.

The procedure to be followed in challenging grand jurors should also be discussed if such challenges are contemplated. Finally, it may be possible to obtain an appropriate impounding order at this conference.<sup>12</sup>

#### 4. Types of grand juries

Ordinarily, Division investigations are conducted by a regular grand jury. Regular grand juries may be empaneled for up to 18 months. The court may extend this period by six months or less if it determines that such an extension is in the public interest.<sup>13</sup> An antitrust matter may be presented to a grand jury that is already empaneled or one that is specifically empaneled for the antitrust investigation.

The decision as to whether the matter will be presented to a grand jury already empaneled or one to be empaneled is made in conjunction with the U.S. Attorney and depends upon a number of factors, including the following:

1. The practice in the district;
2. The number of sessions and length of time required by the Antitrust Division; and
3. The workload and the term of the grand jury already empaneled.

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<sup>12</sup>An impounding order should only be obtained after a grand jury has been empaneled; otherwise, there is no proceeding before the court in which such an order can be entered. However, an impounding order can be obtained by virtue of the jurisdiction of an already empaneled grand jury and the order by its terms can authorize transfer of the documents to a future grand jury. See Fed. R. Crim. P. 6(e)(3)(c)(iii) and Ch. IV § E. 1., infra.

<sup>13</sup>Fed. R. Crim. P. (6)(g).

For example, in some districts, a grand jury will be empaneled for the full 18 months and the United States Attorney only uses it infrequently. If the time remaining in the term of the grand jury is sufficient for presentation of the antitrust matter, this grand jury may be used. On the other hand, the practice in the district may be to empanel a grand jury solely for antitrust investigations and for the full 18 months.<sup>14</sup> In other districts, a grand jury will be empaneled for only a short period of time, (perhaps two or three months), and it will be necessary to present the antitrust matter to successive grand juries. Numerous other variations exist, but these are examples of the choices that may be faced.

In some districts, the particular grand jury that will conduct the investigation will be determined by the United States Attorney without court approval. In other districts, approval of the court is required. In still other jurisdictions, a decision will be made by the court with the advice and assistance of the United States Attorney and/or the Antitrust Division attorneys. In the absence of exceptional circumstances, it is the policy of the Division to follow the procedures in the district in which the grand jury will sit. It is extremely important that the staff becomes thoroughly familiar with the local procedures. These should be discussed with the United States Attorney and, insofar as necessary, the clerk of the district court and the United States Marshal.

Division attorneys should be aware of the distinction between regular grand juries that are empaneled specifically for antitrust investigations and special grand juries that are empaneled under the authority of 18 U.S.C. § 3331.<sup>15</sup> The former are often referred to as "special grand juries"; however, this is a sometimes confusing misnomer.

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<sup>14</sup>This is the preferred procedure if appropriate arrangements can be made because potential conflicts with the United States Attorney's use of the grand jury are avoided.

<sup>15</sup>See U.S.A.M. 9-11.300, *et seq.*

Special grand juries are limited to major metropolitan areas and areas where the Attorney General, Deputy Attorney General or designated Assistant Attorney General certifies that a special grand jury is necessary because of criminal activity in the district. Special grand juries are designed primarily to meet the special needs of organized crime and public corruption investigations. Special grand juries are virtually never used by the Division.

5. Public comment and contacts with outside counsel

As a general rule, no public comments on the existence or nature of the grand jury investigation are made. In rare instances, some comment may be necessary. In such cases, it should come from the Department's Director of Public Affairs and all inquiries concerning a grand jury investigation should be directed to his office with no comment by the staff.

All substantive contacts with outside counsel throughout the investigation should be recorded. A good practice is to make notes in a stenographic notebook of all contacts with counsel, witnesses or third parties, including the dates and, if appropriate, the substance of the conversation. This notebook should be preserved and a memorandum to files written, describing all significant contacts. In addition, any agreements or special arrangements that are made with outside counsel, such as subpoena modifications, should be memorialized in exchanges of written correspondence.

C. Empaneling the Grand Jury

1. Empaneling provision

District courts are authorized to empanel grand juries under Fed. R. Crim. P. 6(a), which provides:

The court shall order one or more grand juries to be summoned at such time as the public interest requires. . .

.

This provision empowers the court to empanel one or more grand juries in addition to those other grand juries that already may be sitting. The empaneling should be in open court unless extremely unusual circumstances require exclusion of the public.<sup>16</sup>

2. Grand jury qualifications and selection of grand jury

The requirements for grand juror selection are contained in the Jury Selection and Service Act, 28 U.S.C. §§ 1861, et seq. ("JSSA"). Grand jurors must be "selected at random from a fair cross section of the community in the District or Division wherein the court convenes."<sup>17</sup> The JSSA does not require that the resulting grand jury be a

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<sup>16</sup>See In re Impaneling of Grand Jury, 4 F.R.D. 382 (S.D.N.Y. 1945).

<sup>17</sup>17/ 28 U.S.C. § 1861.



statistical mirror of the community but only that the grand jurors are selected from a source that is reasonably representative of the community.<sup>18</sup>

Each judicial district has a written plan for random juror selection that has been reviewed and approved by the chief judge and the judicial counsel for the circuit.<sup>19</sup> Among other things, each district's plan (1) establishes a jury commission or authorizes the clerk of the court to manage the jury selection process, (2) specifies the sources for the names of prospective jurors and identifies those groups of persons or occupational classes that are exempt from service or whose members may be automatically excused upon request<sup>20</sup> and (3) describes the procedures to be followed in randomly selecting jurors from among the qualified candidates. Actual juror qualifications, such as United States citizenship, age, English language proficiency, absence of physical or mental infirmity, and lack of conviction for a felony are detailed in 28 U.S.C. § 1865. The JSSA specifically prohibits any exclusion based on race, color, religion, gender, national origin, or economic status<sup>21</sup>.

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<sup>18</sup>See United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1968), cert. denied, 394 U.S. 934 (1969); United States v. Marcello, 423 F.2d 993 (5th Cir.), cert. denied, 398 U.S. 959 (1970); United States v. Potter, 552 F.2d 901 (9th Cir. 1977); United States v. Test, 550 F.2d 577 (10th Cir. 1976).

<sup>19</sup>28 U.S.C. § 1863.

<sup>20</sup>The JSSA mandates the use of voter registration lists or lists of actual voters as the primary source of juror names. To the extent necessary, these lists may be augmented by supplemental sources. See generally United States v. Young, 822 F.2d 1234 (2d Cir. 1987); United States v. Brummitt, 665 F.2d 521 (5th Cir. Unit B Dec. 1981), cert. denied, 456 U.S. 977 (1982); United States v. Brady, 579 F.2d 1121 (9th Cir. 1978), cert. denied, 439 U.S. 1074 (1979).

<sup>21</sup>28 U.S.C. § 1862; see generally United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974); United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971); United States v. Maskeny, 609 F.2d 183 (5th Cir.), cert. denied, 447 U.S. 921 (1980); United States v. Gometz, 730 F.2d 475 (7th Cir.), cert. denied, 469 U.S. 845 (1984); United States v. Brady, 579 F.2d supra.

Under the usual procedure, the clerk sends out "juror qualification forms" under § 1864. Based on the responses received, a decision is made as to whether the prospective jurors are qualified or automatically excused. The names of qualified jurors are then placed in a master jury wheel from which names are drawn randomly when a grand jury is to be empaneled. The prospective jurors are then summoned for jury duty.<sup>22</sup> Typically, the jurors from which the grand jury will be selected have been summoned and are present when the staff enters the court for empaneling. Possible defects in the summoning process should be discussed with the United States Attorney. If improperly summoned, challenges to the array may be made as discussed below.

When the prospective jurors have been assembled, the judge or the clerk will explain the demands of grand jury service and will inquire of the prospective grand jurors whether there is any reason why service on the grand jury would present an undue hardship, e.g., long-term illness, hearing impairment, acute business problems, etc. The criteria for excusing a prospective juror varies from judge to judge, but generally is extremely strict. The power of the court to excuse prospective grand jurors is set forth in 28 U.S.C. § 1866(c):

... any person summoned for jury service may be (1) excused by the Court, upon a showing of undue hardship or extreme inconvenience, for such period as the Court deems necessary, at the conclusion of which such person shall be summoned again for jury service.<sup>23</sup>

Following this procedure, the 23-person grand jury is picked from the remaining prospective jurors.

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<sup>22</sup>The number to be summoned varies from district to district.

<sup>23</sup>See United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975).

3. Objections to grand jury

a. Form of objection

1) Challenges under Rule 6(b)(1). Government attorneys may challenge the qualifications of individual grand jurors under Fed. R. Crim. P. (6)(b)(1), which provides:

The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

According to the specific wording of the Rule, the challenge shall be made before the jurors are given their oath. If a Division attorney believes that a juror should be excused after the administration of the oath, he should proceed under Fed. R. Crim. P. 6(g) or 28 U.S.C. § 1866(c)(2), (5).

Theoretically, prospective antitrust defendants may challenge the array of grand jurors or a single grand juror under Rule 6(b)(1). However, since antitrust defendants are virtually never "held to answer," this provision has little

application to antitrust grand juries. Further, prospective antitrust defendants are not entitled to notification of grand jury selection.<sup>24</sup>

2) Motion to dismiss under Rule 6(b)(2). Fed. R. Crim. P. 6(b)(2) provides, in pertinent part, that:

A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. . . . An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

This Rule incorporates the JSSA's provisions for moving to dismiss an indictment based on a failure to comply with proper jury selection procedures. Only "substantial failures to comply" with the provisions of the JSSA constitute a violation of the Act; technical violations are insufficient to support a motion to dismiss.<sup>25</sup> "A substantial

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<sup>24</sup>See United States v. Barone, 311 F. Supp. 496 (W.D. Pa. 1970); United States v. Kenner, 36 F.R.D. 391 (S.D.N.Y. 1965).

<sup>25</sup>28 U.S.C. § 1867; see United States v. Savides, 787 F.2d 751, 754 (1st Cir. 1986); United States v. LaChance, 788 F.2d 856, 870 (2d Cir.), cert. denied, 479 U.S. 883 (1986); United States v. Carmichael, 685 F.2d 903, 911-12 (4th Cir. 1982), cert. denied, 459 U.S. 1202 (1983); United States v. Schmidt, 711 F.2d 595, 600 (5th Cir. 1983), cert. denied, 464 U.S. 1041 (1984); United States v. Nelson, 718 F.2d 315, 319 (9th Cir. 1983); United States v. Gregory, 730 F.2d 692, 699 (11th Cir.), cert. denied, 469 U.S. 1208 (1984).

failure is one that contravenes one of the two basic principles of the Act: (1) random selection of jurors, and (2) determination of juror disqualification, excuses, exemptions, and exclusions on the basis of objective criteria.<sup>26</sup> The motion to dismiss must reduce the number of qualified votes for indictment to fewer than 12 to be successful.<sup>27</sup> A defendant must object to the array by pre-trial motion to dismiss the indictment and failure to do so constitutes a waiver.<sup>28</sup> Only defendants have standing under Rule 6(b)(2); grand jury witnesses are not entitled to complain about the composition of the grand jury.<sup>29</sup> A defendant may inspect written questionnaires and other documents relevant to grand jury selection to prepare the motion to dismiss.<sup>30</sup> The district court is not required to hold a hearing on a challenge to the composition of the grand jury.<sup>31</sup>

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<sup>26</sup>United States v. Savides, 787 F.2d at 754; see also United States v. Maskeny, 609 F.2d 183 (5th Cir.), cert. denied, 447 U.S. 921 (1980); United States v. Ross, 468 F.2d 1213 (9th Cir. 1972), cert. denied, 410 U.S. 989 (1973).

<sup>27</sup>See United States v. Johnston, 685 F.2d 934, 938 (5th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); United States v. Okiyama, 521 F.2d 601, 604 n.2 (9th Cir. 1975).

<sup>28</sup>See Davis v. United States, 411 U.S. 233 (1973); United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974); Porcaro v. United States, 784 F.2d 38, 43 (1st Cir.), cert. denied, 479 U.S. 916 (1986); United States v. Zirpolo, 450 F.2d 424, 432 (3d Cir. 1971); Throgmartin v. United States, 424 F.2d 630, 631 (5th Cir. 1970); United States v. Tarnowski, 583 F.2d 903, 904 n.1 (6th Cir. 1978), cert. denied, 440 U.S. 918 (1979); Louie v. United States, 426 F.2d 1398, 1402 (9th Cir.), cert. denied, 400 U.S. 918 (1970); Talk v. United States, 509 F.2d 862, 863 (10th Cir. 1974), cert. denied, 421 U.S. 932 (1975).

<sup>29</sup>See United States v. Fitch, 472 F.2d 548, 549 (9th Cir.), cert. denied, 412 U.S. 954 (1973).

<sup>30</sup>See Test v. United States, 420 U.S. 28, 30 (1975); Mobley v. United States, 379 F.2d 768, 773 (5th Cir. 1967); United States v. Armstrong, 621 F.2d 951, 955 (9th Cir. 1980); United States v. Smaldone, 485 F.2d 1333 (10th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

<sup>31</sup>United States v. Miller, 771 F.2d 1219 (9th Cir. 1985).

b. Grounds for objection

1) Objections to individual jurors. The staff or a defendant may object to a specific grand juror because the juror is not legally qualified to sit on the jury. The JSSA sets out the legal qualifications for grand jurors.<sup>32</sup> In general, all persons are qualified to serve on a grand jury unless:

- (1) they are not citizens of the United States;
- (2) they are under 18 years old;
- (3) they have not resided within the judicial district for a period of at least one year;
- (4) they are unable to read, write and understand the English language sufficiently to satisfactorily fill out the juror qualification form;
- (5) they are unable to speak the English language;
- (6) they have a mental or physical infirmity that would prevent them from rendering satisfactory juror service; or
- (7) they have a charge pending against them or have been convicted of a felony.

Occasionally, the staff may wish to exclude a prospective juror with a potential conflict of interest or a particular bias in regard to the matter to be investigated. For example, a prospective juror may be employed by the company under investigation, may be a direct and substantial victim or may be intimately involved in the industry

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<sup>32</sup>28 U.S.C. § 1865.

under investigation. Those grand jurors who cannot judge the matter fairly should be excused. The court is authorized to exclude a prospective grand juror on the basis of bias or conflict of interest under 28 U.S.C. § 1866(c)(2), (5), which provide, in pertinent part, that:

any person summoned for grand jury service may be . . . (2) excluded by the Court on the ground that such person may be unable to render impartial jury service or that his service as a juror would be likely to disrupt the proceedings, or . . . (5) excluded upon determination by the Court that his service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of the jury deliberations. . .

Even prior to the enactment of 28 U.S.C. § 1866, several courts upheld the right of the empaneling judge to question prospective jurors and to exclude them on conflict of interest grounds.<sup>33</sup>

The presence of an ineligible grand juror will not normally invalidate an indictment. A valid indictment must have the votes of at least 12 qualified grand jurors. Therefore, the number of ineligible grand jurors must be sufficient to reduce the number of qualified votes to fewer than 12 to invalidate an indictment.<sup>34</sup>

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<sup>33</sup>See, e.g., United States v. Hoffa, 349 F.2d 20, 32-33 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966).

<sup>34</sup>See United States v. Johnston, 685 F.2d at 938; United States v. Okiyama, 521 F.2d at 604 n.3.

2) Objections to the grand jury array. The grand jury array may be objected to if it is not representative of the community. The JSSA requires that grand jurors be randomly selected from a fair cross-section of the community. Jury panels must be selected from a source reasonably representative of the community; however, this does not require that the grand jury be a "statistical mirror" of the community, reflecting the proportionate strength of every identifiable group within that population.<sup>35</sup> Generally, the JSSA's requirements are satisfied unless the grand jury's failure to reflect the composition of the community is a result of non-random selection, actual discrimination in the selection process, or failure to select from a fair cross-section of the community.<sup>36</sup> The mere opportunity for non-random jury selection or the fact that the panel ultimately selected is somehow unrepresentative of the community is not a violation.

The Supreme Court, in Duren v. Missouri, 439 U.S. 357 (1979), defined the requirements for a prima facie violation of the fair cross-section requirements of the JSSA. First, the defendant must prove that the relevant community contains a distinct group. Second, the defendant must prove that the venire from which the jury was chosen did not contain a fair representation of the distinct group. Finally, the defendant must prove that the under-representation of the distinct group was due to systematic exclusion of the group in the jury selection process.<sup>37</sup>

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<sup>35</sup>See United States v. D'Alora, 585 F.2d 16 (1st Cir. 1978); United States v. Fernandez, 480 F.2d 726 (2d Cir. 1973); United States v. DiTommaso, 405 F.2d 385, 389 (4th Cir. 1968), cert. denied, 394 U.S. 934 (1969); Simmons v. United States, 406 F.2d 456, 461 (5th Cir.), cert. denied, 395 U.S. 982 (1969); United States v. Miller, 771 F.2d at 1228; United States v. Test, 550 F.2d 577 (10th Cir. 1976).

<sup>36</sup>See generally United States v. Savides, 787 F.2d at 754; United States v. Branscome, 682 F.2d 484, 485 (4th Cir. 1982) (per curium); United States v. Percival, 756 F.2d 600, 615 (7th Cir. 1985).

<sup>37</sup>See also United States v. Hafen, 726 F.2d 21 (1st Cir.), cert. denied, 466 U.S. 962 (1984); Government of the Virgin Islands v. Navarro, 513 F.2d 11, 19 (3d Cir.), cert. denied, 422 U.S. 1045 (1975); United States v. Maskeny, 609 F.2d at 192; United States v. Hoffa, 349 F.2d at 30;



To rebut a defendant's prima facie case, the Government must show that the systematic exclusion was designed to advance a significant state interest that is compatible with the fair cross-section's requirements.<sup>38</sup>

Occasionally, a defendant may seek to have an indictment dismissed because the grand jury as a whole was biased; for example, where the grand jury has already returned indictments in the same industry. Such challenges have been consistently rejected by the courts.<sup>39</sup>

c. Burden of proof

Grand jury proceedings, including the grand jury selection process, are subject to a strong presumption of regularity and the burden of proving an irregularity is on the person alleging it.<sup>40</sup> In general, only substantial failures to comply with the JSSA are a violation; mere technical violations are insufficient to support a challenge to grand jury action.<sup>41</sup>

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United States v. Miller, 771 F.2d supra.

<sup>38</sup>439 U.S. at 367-68; see also Ross v. Kemp, 785 F.2d 1467, 1479 (11th Cir. 1986).

<sup>39</sup>See Estes v. United States, 335 F.2d 609 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965).

<sup>40</sup>See Government of the Virgin Islands v. Navarro, 513 F.2d at 19; Mobley v. United States, 379 F.2d at 771; United States v. Battista, 646 F.2d 237 (6th Cir.), cert. denied, 454 U.S. 1046 (1981); United States v. Turcotte, 558 F.2d 893 (8th Cir. 1977); United States v. Potter, 552 F.2d 901 (9th Cir. 1977).

<sup>41</sup>28 U.S.C. § 1876(a); see footnote 25, supra.

d. Relief

If a defendant successfully attacks the composition of the grand jury prior to conviction, the relief is dismissal of the indictment. However, a defendant's conviction at trial may render harmless any error in the grand jury proceedings. See United States v. Mechanik, 475 U.S. 66 (1986).<sup>42</sup> If an indictment is dismissed because of an improperly constituted grand jury, the matter may be resubmitted to a new, properly constituted grand jury, assuming there are no statute of limitations problems.

e. Waiver

A challenge to the composition of the grand jury is waived if it is not raised in a timely manner.<sup>43</sup> Generally, a challenge to the array of grand jurors or a single grand juror on the grounds that they were legally unqualified or selected improperly must be made by the moving party prior to the administration of the oath to the jurors. When defendants are not "held to answer" prior to empaneling, as is the case with virtually all antitrust matters, objections to the grand jury's composition must be filed before trial commences, or within seven days after the defendant discovers

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<sup>42</sup>See United States v. Mechanik, 475 U.S. 66 (1986).

<sup>43</sup>See Davis v. United States, 411 U.S. 233 (1973); Porcaro v. United States, 784 F.2d at 43; United States v. Young, 822 F.2d 1234 (2d Cir. 1987); United States v. Zirpolo, 450 F.2d at 432; Throgmartin v. United States, 424 F.2d at 631; United States v. Tarnowski, 583 F.2d at 904 n.1; United States v. Hoffa, 367 F.2d 698, 709-10 (7th Cir. 1966), vacated on other grounds, 387 U.S. 231 (1967); Louie v. United States, 426 F.2d at 1402; Talk v. United States, 509 F.2d at 863; United States v. Green, 742 F.2d 609 (11th Cir. 1984).

or, by due diligence, could have discovered grounds for the challenge, whichever is earlier.<sup>44</sup> In some jurisdictions, a waiver may be overcome by a showing of actual prejudice.

#### 4. Voir Dire

If the staff believes that it may want to exclude prospective jurors who may have potential conflicts of interest or particular biases in regard to the matter to be investigated, they may wish to question the prospective jurors to ascertain if any conflicts exist. Such questioning should be discussed with the court prior to the empaneling, to work out the appropriate procedure and to remind the judge of his authority under 28 U.S.C. § 1866(c)(2), (5), to exclude prospective jurors.

In some districts, the staff can discover potential conflicts of interest by examining the summary of the responses to the "juror qualifications forms." However, in other jurisdictions, where the summaries are unavailable or do not contain the desired information, the only practical way to discover a potential conflict of interest is for the judge to conduct a voir dire.

The courts have generally upheld the right of the empaneling judge to question prospective jurors and to exclude them on conflict of interest grounds.<sup>45</sup> The questioning of grand jurors prior to or at the time of empaneling has generally followed one of the following procedures, depending on the court's preference:

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<sup>44</sup>28 U.S.C. § 1867(a), (c); see Davis v. United States, 411 U.S. 233 (1973); United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977 (1974); Porcaro v. United States, 748 F.2d at 43; United States v. Studley, 783 F.2d 934 (9th Cir. 1986).

<sup>45</sup>See United States v. Hoffa, 349 F.2d 20, 32-33 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966); United States v. Gibson, 480 F. Supp. 339 (S.D. Ohio 1979).

(1) The judge has a full grand jury drawn and sworn, but does not dismiss the remaining panel. The selected jurors are sworn so that when the matter under investigation is explained to them (out of the hearing of the rest of the panel), they are under the secrecy oath. After the swearing-in, the staff explains the nature of the investigation and asks the jurors who believe that they may have a conflict of interest to so advise the judge. The jurors are assembled in open court where the court asks those who felt they had a conflict of interest to step forward and explain. If the court agrees, they are excused and replacements are called from the remaining panel and the process is repeated.

(2) The judge, in open court, questions certain prospective jurors selected by the clerk as to each one's employment and that of his closest relatives. The questioning is based on the juror's answers to the "juror qualification form." Depending on the answers, the judge allows the juror to become a member of the grand jury or orders him to step aside.

Some jurisdictions handle the matter more informally. For example, in some jurisdictions, the judge has, (a) in open court but at side-bar and out of the hearing of the remainder of the prospective jurors, or (b) in his chambers, questioned the prospective juror and, depending upon the answers, excused or allowed the juror to serve.

The Division has no preference on legal grounds between the procedures described above. Method (1) conforms to Rule 6(g) and Method (2) conforms to 28 U.S.C. § 1866. The second method, however, requires much more time, since each prospective juror must be examined individually. The informal procedures have the advantage of simplicity but may jeopardize the secrecy of the proceedings since the prospective juror is not under oath.

If the investigation is to be conducted by a grand jury already empaneled, potential conflicts of interest should also be ascertained and acted upon.

5. Alternate grand jurors

Prior to the empaneling of a new grand jury, the staff should consider requesting the court to empanel four alternate grand jurors. Over an 18-month term, there is an inevitable attrition of grand jurors and the availability of alternates (who need only be called up by the clerk) to replace those permanently excused, will save the laborious process of requesting and having the court, at a later date, empanel additional grand jurors (under Fed. R. Crim. P. 6(g)). The practice of empaneling alternate grand jurors is specifically authorized by Fed. R. Crim. P. 6(a)(2).

Alternate grand jurors are empaneled and sworn with the regular grand jurors. The alternates are advised that, as alternates, the clerk will call them if needed. They are then excused before the grand jury begins to transact business. Until they are called upon to replace excused grand jurors, they do not participate in any of the grand jury sessions. If an alternate grand juror ultimately replaces an original grand juror, the alternate should review all pre-existing grand jury transcripts.

6. The judge's charge

After the members of the grand jury have been selected, the judge will ordinarily administer the oath to the jury as a whole, appoint the foreperson and deputy foreperson, administer the oath to them, and, thereafter, charge or instruct the grand jury. This is done in open court.

The charge is usually in general terms and concerns itself largely with the mechanics of grand jury service. For example, the judge will undoubtedly include a reference to the burden of proof, stating that the grand jury need not find a crime has been committed beyond a reasonable doubt but merely that there is probable cause to believe a violation of the law has occurred. He will ordinarily give instructions that, after concluding that a violation may exist, it is the duty of the grand jury to indict, without fear or bias, and despite any individual belief that the statute involved should not be the law. He will point out that the foreperson will preside over the jurors and administer oaths to witnesses, and that the United States Attorney or other Department of Justice attorneys will be present to assist the jurors in the conduct of their investigation, in bringing evidence before them, and in advising them as to the law. He will generally advise the jurors as to the necessity of a quorum being present at all times and the number of jurors necessary to return an indictment. He will probably discuss possible conflicts of interest if not previously covered. He may comment on the rule of secrecy. He ordinarily will not discuss matters of substantive law.

The staff should be thoroughly conversant with the court's instructions. Frequently, it will be advisable to refer to the instructions during the grand jury proceedings. For example, if grand jurors express views opposing antitrust enforcement, one excellent solution is a reading of the court's instruction as to the duty to indict, notwithstanding personal opinions. If an existing grand jury is used and conflicts of interest were not resolved prior to empaneling, such conflicts may be discovered and resolved with less abrasiveness by utilizing the court's instructions.

In most jurisdictions, the jurors will be given a copy of The Handbook For Federal Grand Jurors, a pamphlet prepared by the Committee on the Operation of the Jury System in compliance with the directions of the Judicial Conference of the United States. This pamphlet sets forth general principles which should be followed by the jurors during their proceedings. To a large extent, it covers the same matters that are normally covered in the judge's charge.

After the judge has charged the grand jury, the jury will normally retire to the room in which it will sit and begin its investigation.

D. Composition and Structure of the Grand Jury

1. General composition

A regular grand jury consists of at least 16 but not more than 23 members. It may be empaneled initially for up to 18 months. This period may be extended by the court for an additional six months. The time period a grand jury sits is computed from the date of empanelment. Each grand jury has a foreperson, a deputy foreperson and often a secretary.

2. Duties of the grand jury foreperson

Fed. R. Crim. P. 6(c) provides:

FOREPERSON AND DEPUTY FOREPERSON. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court.

During the absence of the foreperson, the deputy foreperson shall act as foreperson.

The court-appointed foreperson is the court's administrator of the grand jury sessions, supervising the recording activities of its secretary (if a secretary is appointed and performs such activities), assuring that there is a lawful number of jurors present at each session, and acting as liaison on behalf of the grand jurors with the supervising judge when problems or questions arise requiring consultation with the court. One of the foreperson's most important functions is administering the oath to witnesses. The foreperson is also the spokesman for the grand jury, presenting indictments to the court in open session and causing a secret record to be kept of the number of jurors concurring in the findings of every indictment.

Following the staff examination of a witness, grand jurors should be allowed to question the witness. The grand jury foreperson may also supervise this questioning (recognizing the questions of the grand jurors in an orderly fashion), although this is frequently done by the staff. Rapport with the jury is increased if such supervision is left to the foreperson.

If the foreperson is absent, the deputy foreperson, who is also appointed by the court, assumes all of the duties of the foreperson. If both are absent, the court must appoint another foreperson for such time as is necessary. It is essential to have someone authorized to administer oaths to witnesses.

Although not required by statute or case law, it is a wise precaution to request the foreperson, or in his absence, the deputy foreperson, at the beginning of each session and after each rest period, to examine the persons in the room and state on the record, in substance, that only authorized jurors, the Government attorneys (providing names) and the reporter (providing name) are present in the grand jury room. If the number of jurors present is not recorded by the secretary, the foreperson should state the number for the record.



### 3. Duties of the grand jury secretary

Although there is no specific legislation that creates the position, it is customary in many districts for a secretary of the grand jury to be appointed. Fed. R. Crim. P. 6(c) authorizes the foreperson to designate a juror to perform specific secretarial duties on his behalf. Normally, the jurors select a member to act as secretary to keep a record of the jurors' attendance, the matters presented, the witnesses called, and the number of votes cast on each indictment.<sup>46</sup> This procedure is usually followed with the concurrence of the foreperson. The staff should be prepared to work out mechanical details with the grand jury at the first session.

Usually, the grand jury secretary receives a roster of the grand jurors from the clerk. The secretary takes attendance twice a day (at the beginning of the morning session and after lunch). A true count of the members present is generally taken by the secretary at each break and the noon recess. The secretary's attendance records are given to the clerk of the court to verify the clerk's records.

The secretary will generally keep docket sheets on which are recorded the type of investigation, the court's docket number (if any), the matters being presented, the names of all witnesses appearing before the jury, together with remarks and other data. The secretary will need the staff's help in maintaining the docket sheet. Prior to the appearance of each witness, the staff should supply the secretary with the correctly spelled name of the witness for recording on the docket sheet.<sup>47</sup> The United States Attorney's office will be familiar with the practices in the district and the duties of the

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<sup>46</sup>8 Moore's Federal Practice, ¶ 6.02[2] at 6-11 (2d ed. 1970).

<sup>47</sup>In antitrust investigations, the docket sheet often shows an entry such as United States v. Antitrust Matter. If an indictment is returned, "Antitrust Matter" is stricken, and the names of the defendants are listed where "Antitrust Matter" previously appeared.

secretary necessary to conform to these practices. These duties must be explained to the secretary by either the staff or the United States Attorney's office.

The practice in many districts requires the secretary (or the staff) to pick up the grand jury books (the docket sheets, secretary's notes, etc.) each morning at the United States Attorney's office, return them at noon, pick them up again after lunch, and return them at adjournment. The contents of the grand jury's books are highly confidential and they are usually secured in the United States Attorney's or the clerk's safe when not in use by the jury. The staff should ascertain what the practice is in each particular district.

In some jurisdictions, a secretary is selected but performs no duties; in other jurisdictions, a secretary is not appointed. In these jurisdictions, a deputy clerk (or in some cases, the foreperson or the Government attorney) checks the attendance of the jurors prior to the morning session and sometimes prior to the afternoon session. No further check is made of juror attendance. However, it is recommended that after every break, the foreperson make a statement for the record of how many jurors are present. Insofar as the attendance of witnesses is concerned, the only records will be the Certificate of Attendance and Payment and the grand jury transcripts.

#### 4. Quorum and effect of lack of quorum

Fed. R. Crim. P. 6(a) provides, in part, that the grand jury shall consist of not less than 16 and no more than 23 members. The Handbook for Federal Grand Jurors states (page 10):

Sixteen of the 23 members of the grand jury constitute a quorum for the transaction of business. If fewer than this number are present, even for a moment, the proceedings of the grand jury must stop. This shows

how important it is that each grand juror conscientiously attend the meetings. If a grand juror believes that an emergency prevents his attendance at the meeting, he must promptly advise the grand jury foreperson. If his absence will prevent the grand jury from acting, he should attend the meeting.

In sum, a grand jury must have at least 16 members (a bare quorum) present. In the absence of a quorum, no business may be transacted. At least 12 jurors must concur to return an indictment.<sup>48</sup>

5. Absence of grand jurors

a. Excusing a grand juror

For a variety of reasons, such as illness, vacation or pressing personal or business problems,<sup>49</sup> a grand juror may be absent from some sessions. In many districts, the grand juror must notify the clerk or the United States Attorney to be excused. In other districts, the Government attorneys or the foreperson may excuse a juror on a temporary basis. In still other districts, the request is made to the foreperson who, in turn, communicates with the court.

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<sup>48</sup>Fed. R. Crim. P. 6(f).

<sup>49</sup>In one instance, the court confronted an employer who threatened to fire an employee because of her grand jury work. As a result, the employer withdrew from that position. In another instance, the court advised a juror to inform her employer, who objected to her service, that the court viewed such objections with disfavor. She continued to serve on the jury with no further objections from her employer.

Grand jurors expecting to be absent should be encouraged to give as much advance warning as possible so that any quorum problems can be anticipated. The staff, in close contact with the grand jurors, can expect to encounter many problems, excuses, complaints, etc., about the difficulty of attending certain sessions. Grand jurors, with all due tact, should be discouraged from being absent except in extenuating circumstances. The staff should request that the clerk keep it advised of any excused absences.

b. Effect of absence

Problems arise when, in a lengthy antitrust investigation, jurors are absent from some grand jury sessions. Defense counsel, seizing the issue of the absenteeism, often claim prejudice against their clients if they suspect that any absentee jurors concurred in finding an indictment. Thus, it has been contended that the absentee jurors failed to hear sufficient evidence to qualify to vote. In United States ex rel. McCann v. Thompson, 144 F.2d 604, 607 (2d Cir. 1944), Judge Learned Hand rejected just such a contention, and pointed out that "[s]ince all of the evidence addressed before a grand jury . . . is aimed at proving guilt, the absence of some jurors during some part of the hearings will ordinarily merely weaken the prosecution's case." The court further stated, "If what the absentees actually hear is enough to satisfy them, there would seem to be no reason why they should not vote."<sup>50</sup>

While the absence of a juror or jurors from a few sessions should not invalidate an otherwise valid indictment, it is wise to take precautions to ensure the validity of the indictment. Unless there are strong reasons to the contrary, absent grand jurors should be asked to read the transcripts, with accompanying exhibits, of those sessions that

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<sup>50</sup>See also United States v. Leverage Funding Sys., Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

were missed. In addition, all transcripts and exhibits should be available to the grand jurors when they finally vote on the proposed indictment.

6. Removal of a grand juror: authority to supplement

Fed. R. Crim. P. 6(g) states, in part:

At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

If it is discovered that a grand juror has a serious conflict of interest concerning the matter under investigation, the staff and/or the United States Attorney can move to excuse that grand juror for cause.

In addition, grand jurors may die, become ill, move out of the district, or be excused by the court from further service on a hardship basis. It is a good practice to supplement the grand jury by requesting the court to empanel additional grand jurors when the number of grand jurors gets below twenty.<sup>51</sup> At this point, legitimate absences could threaten a quorum. The procedure for empaneling such jurors is the same as previously described.

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<sup>51</sup>This presupposes that alternate grand jurors were not originally empaneled. If they were empaneled, the clerk, with the approval of the supervising judge, should be requested to call the required number of alternates as may be necessary to keep the jury at full strength.

E. Recordation

Rule 6(e)(1) provides that:

All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device . . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

Prior to the adoption of the rule, colloquy between Government attorneys and the grand jury was not routinely recorded. The rule now requires that all statements made by Government attorneys, as well as the witnesses and grand jurors, before the grand jury be recorded. Attorneys should never go off the record, even to discuss non-investigation related matters, such as lunch schedules. The practice has been, however, to order a complete transcript only of actual witness testimony and opening and closing statements by Division attorneys. Care should be taken, however, to record all proceedings even if transcripts are ordered only for the above-listed matters. The untranscribed notes generally remain in the custody of the court reporter, but care should be taken that all notes are preserved and available on request, i.e., that they are in the "control" of the Government attorney.

The staff should arrange for a reporter to be present in advance of the grand jury session. Generally, the United States Attorney's office or the Division field office will have a list of accredited reporters. Forms should be filled out in advance for payment of the reporter for attendance and transcripts. This will require the identity and address of the reporter and his federal identification number.

The reporter should be sworn before the first session begins and, in some jurisdictions, before each subsequent session begins. In subsequent sessions, any new reporter who has not been sworn before that grand jury should be sworn. Oaths for reporters are generally available from the grand jury clerk.

F. Limitations on Grand Jury Power to Investigate

1. What may a federal grand jury investigate

A federal grand jury may investigate any federal criminal offense committed within the district, i.e., within the jurisdiction of the court.<sup>52</sup> A grand jury that calls a witness without any purpose of obtaining evidence from him of any offense committed, in whole or in part, in the district in which the grand jury is sitting exceeds its powers and any indictment based on that testimony may be dismissed.<sup>53</sup> Nevertheless, since "the eventual scope and direction of [the grand jury's] inquiry is often only hazily perceived and tentatively defined", it must be allowed "to pursue any leads which may be uncovered."<sup>54</sup> For these reasons, the grand jury's jurisdiction is not limited to the probable result of its

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<sup>52</sup>Hubner v. Tucker, 245 F.2d 35, 39 n.6 (9th Cir. 1957).

<sup>53</sup>Brown v. United States, 245 F.2d 549, 554 (8th Cir. 1957).

<sup>54</sup>United States v. Doulin, 538 F.2d 466, 470 (2d Cir.), cert. denied, 429 U.S. 895 (1976); see also United States v. Paxson, 861 F.2d 730, 733 (D.C. Cir. 1988).

inquiry.<sup>55</sup> A witness cannot challenge the right of a grand jury in one district to question him concerning events in another district.<sup>56</sup>

A grand jury may investigate a matter with no defendant or criminal charge specifically in view.<sup>57</sup> The powers of investigation of the grand jury and its powers to obtain information are "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." This, the Supreme Court points out, is normally "developed at the conclusion of the grand jury's labors, not at the beginning."<sup>58</sup> However, it is an abuse of the grand jury process to conduct a grand jury investigation with the sole intent of eliciting evidence for a civil case.<sup>59</sup> At such time as the Government decides to proceed only civilly, the grand jury investigation should be terminated. It is also improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial.<sup>60</sup> However, a prosecutor may use evidence at trial that was incidentally gained from a grand jury primarily investigating other crimes.<sup>61</sup>

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<sup>55</sup>United States v. Paxson, 861 F.2d at 733.

<sup>56</sup>United States v. Girgenti, 197 F.2d 218, 219 (3d Cir. 1952).

<sup>57</sup> United States v. Smyth, 104 F. Supp. 283, 287 n.1 (N.D. Cal. 1952).

<sup>58</sup>Blair v. United States, 250 U.S. 273, 282 (1919).

<sup>59</sup>United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

<sup>60</sup>United States v. Dardi, 330 F.2d 316, 336 (2d Cir.), cert. denied, 379 U.S. 845 (1964).

<sup>61</sup>See In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987); In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980).



A grand jury may investigate matters previously investigated by another grand jury.<sup>62</sup> This is true even if the first grand jury took adverse action. As stated in United States v. Steel, 238 F. Supp. 580, 583 (S.D.N.Y. 1965):

In any event, and assuming the first and second grand juries were in complete disagreement, this would be no ground for dismissal since adverse action by a grand jury does not bar or limit action, including contrary action, by a subsequent grand jury. . . .

A grand jury may indict on hearsay and other evidence that would be inadmissible at trial, or, for that matter, even on the knowledge of the grand jurors themselves.<sup>63</sup> The staff should take care, however, to elicit as much admissible evidence as possible.

Historically, the grand jury could present or indict. Presentment is the process whereby a grand jury initiates an independent investigation and asks that a charge be drawn to cover the facts if they constitute a crime. Since the grand jury may present, it may investigate independently of direction from the United States Attorney.<sup>64</sup> Presentment, however, is now obsolete in federal courts.<sup>65</sup> Further, an indictment is invalid if not signed by the Government attorney.<sup>66</sup>

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<sup>62</sup>United States v. Thompson, 251 U.S. 407 (1920); United States v. Steel, 238 F. Supp. 580, 583 (S.D.N.Y. 1965); In re Borden Co., 75 F. Supp. 857, 863-64 (N.D. Ill. 1948).

<sup>63</sup>Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

<sup>64</sup>United States v. Smyth, 104 F. Supp. at 295.

<sup>65</sup>In re United Elec., Radio and Mach. Workers, 111 F. Supp. 858, 863 n.13 (S.D.N.Y. 1953).

<sup>66</sup>Fed. R. Crim. P. 7(c).

A grand jury may investigate violations of law, although the evidence presented to it is without authority of the Attorney General.<sup>67</sup> However, Antitrust Division attorneys must be authorized by the Assistant Attorney General to appear before the grand jury.<sup>68</sup>

## 2. Limitations on the power to investigate by district court

The court may issue subpoenas for testimony and documents and may exercise its contempt powers to guarantee compliance with such subpoenas. However, the court cannot unduly interfere with the essential activities of the grand jury nor encroach on the grand jury's or the prosecutor's prerogatives. In United States v. United States District Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957), the district court refused to permit the Government attorneys to examine subpoenaed documents or transcripts outside the presence of the grand jury or to summarize and digest the evidence for the grand jury, quashed a subpoena duces tecum on the grounds that the grand jury could not demonstrate "materiality", ordered the grand jury to either indict or return a no bill (the grand jury desired further investigation), held that the Government attorneys could help prepare an indictment, but only in the presence of the grand jury, and adjourned the grand jury and refused the Government's request to call it back into session. On a writ of mandamus, the Fourth Circuit held, inter alia, that the lower court should reconvene the grand jury and permit it to continue the investigation, vacate orders quashing the subpoenas and limiting the right of

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<sup>67</sup>Sullivan v. United States, 348 U.S. 170, 173 (1954).

<sup>68</sup>See § B.2., supra.

Government counsel to receive and use evidence before the grand jury, and permit Government counsel to summarize and digest the evidence for the benefit of the grand jury.

Although the grand jury is a "sovereign body," the courts exercise supervisory jurisdiction and may prevent gross abuses of power. Thus, should the court object to acts of the grand jury, it may discharge the grand jury under the provisions of Fed. R. Crim. P. 6(g). Few cases exist showing the circumstances which would compel a court to discharge a grand jury. As stated in In re Investigation of World Arrangements, 107 F. Supp. 628, 629 (D.D.C. 1952):

This court specifically limits itself to dismissal of a grand jury only where there is good cause. The court feels that grand juries should be consistently advised of their power to act independently in investigations and their duty to diligently inquire into crimes triable in the District of Columbia. Nor should the court, without cause, intervene to discharge a grand jury to prevent an indictment.

An antitrust grand jury, once empaneled, has all the powers of any other grand jury and a district court is without authority to limit those powers by instructions to the grand jurors on their being empaneled or otherwise.<sup>69</sup>

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<sup>69</sup>See In re Borden Co., 75 F. Supp. 857, 859 (N.D. Ill. 1948).

3. Power of grand jury limited by prosecutor

Fed. R. Crim. P. 7(c) provides, in part:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. . . .

[Emphasis supplied.]

The grand jury cannot indict without the signature of the prosecutor. As stated in United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 935 (1965):

The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. . . . It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions. The provision of Rule 7, requiring the signing of the indictment by the attorney for the government, is a recognition of the power of government counsel to permit or not to permit the bringing of an indictment. If the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment. . . .

Although it is common practice for the United States Attorney to sign the indictment, an indictment is equally valid if signed by a Division attorney. A grand jury cannot make accusations of individuals short of indictment; it cannot issue reports to the public or other branches of government.<sup>70</sup> This, of course, is not applicable to special grand juries empaneled under the provision of 18 U.S.C. §§ 331, et seq.

4. What objections can be raised to the grand jury proceeding and by whom

In general, objections can be raised to the activities of a grand jury insofar as the activities exceed or contravene the limitations of the grand jury's jurisdiction as set forth above. However, witnesses appearing before a grand jury generally have no right to raise such objections.<sup>71</sup> Witnesses have the same testimonial privileges they would have in any other criminal proceeding. However, the grand jury's power to investigate is not limited to admissible testimony. As stated in In re Radio Corp. of America, 13 F.R.D. 167, 170-71 (S.D.N.Y. 1952):

The grand jury "is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. . . . [W]itnesses are not entitled to take exception to the jurisdiction of the grand jury or

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<sup>70</sup>See In re United Elec., Radio and Mach. Workers of Am., 111 F. Supp. 858, 864, 869 (S.D.N.Y. 1953).

<sup>71</sup>Witnesses may object to allegedly defective subpoenas on grounds of unreasonableness, burdensomeness, etc. (See Ch. III § F.) and to improper electronic surveillance (See Ch. IV § D.4.).

the court over the particular subject-matter that is under investigation. . . ." [Citing Blair v. United States, 250 U.S. 273 (1919).]<sup>72</sup>

Objections to the scope or propriety of the grand jury proceedings are available only to persons indicted by such grand jury.

G. Who May be Present -- Rule 6(d)

1. Who may be present

Fed. R. Crim. P. 6(d) provides:

Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

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<sup>72</sup>See also United States v. Girgenti, 197 F.2d 218, 219 (3d Cir. 1952) (witness not entitled to challenge the authority of the court or the grand jury, provided the grand jury has de facto existence and organization).

This rule allows attorneys for the Government, the witness, interpreters, and stenographers or operators of recording devices to be present during the grand jury session. Only the grand jurors themselves may be present during deliberation or voting.

Not every attorney working for the federal establishment is a Government attorney within the meaning of Fed. R. Crim. P. 6(d). Generally, only Department of Justice attorneys and attorneys working for the Department under a special appointment qualify.<sup>73</sup>

The witness is not entitled to have counsel present in the grand jury room.<sup>74</sup> However, the Division's general practice is to advise the witness that he may leave the grand jury room to consult with counsel.<sup>75</sup>

Some districts permit the use of grand jury "agents"; however, this practice is fraught with potential problems and is discouraged in the Antitrust Division.

## 2. The effect of presence of unauthorized persons in grand jury room

In the past, the presence of unauthorized persons in the grand jury room was often a sufficient ground for dismissal of an indictment.<sup>76</sup> However, the Supreme Court in Bank of Nova Scotia v. United States, 487 U.S. 250

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<sup>73</sup>See Fed. R. Crim. P. 54(c); Ch. II § C.1.; In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962) (FTC attorney not within Rule).

<sup>74</sup>United States v. Corallo, 413 F.2d 1306 (2d Cir.), cert. denied, 396 U.S. 958 (1969); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973).

<sup>75</sup>Such consultations should not be allowed to unreasonably disrupt the proceedings. See Ch. IV § F.7.

<sup>76</sup>See United States v. Heinze, 177 F. 770 (2d Cir. 1910).

(1988), held that errors in grand jury proceedings should not be grounds for dismissing an indictment unless such errors prejudiced the defendants. As the Court stated at p. 256:

[D]ismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations (citations omitted).

The Supreme Court in Bank of Nova Scotia, among other things, held that a violation of Rule 6(d) by having two agents read prior testimony in tandem was not grounds for dismissal in that case.

An indictment will not be set aside for mere technical violations of the rule. Thus, when an attorney unconnected with the proceedings accidentally entered the grand jury room and remained there for several seconds and where testimony was immediately stopped before the grand jury, the indictment was not quashed.<sup>77</sup> Technical intrusions of unauthorized persons should be noted on the record, together with the fact that no proceedings were conducted while those persons were present, if this is indeed the case.

A violation of Rule 6(d) is remedied by a guilty verdict from a petit jury.<sup>78</sup>

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<sup>77</sup>United States v. Rath, 406 F.2d 757 (6th Cir.), cert. denied, 394 U.S. 920 (1969); see also United States v. Kahan & Lessin Co., 695 F.2d 1122, 1124 (9th Cir. 1982).

<sup>78</sup>United States v. Mechanik, 475 U.S. 66 (1986).



3. Effect of having ineligible or disqualified grand juror present

Fed. R. Crim. P. 6(b)(2) provides:

A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. . . . An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Despite the clear language of this Rule, defendants often attempt to use the presence of one or more ineligible grand jurors in the jury room as grounds for a motion to dismiss an indictment. Such motions are routinely denied by the courts.<sup>79</sup> The courts have examined, in camera, the records required to be kept by the grand jury under Rule 6(c) and denied a 6(b)(2) motion summarily, if the records disclosed that the number of jurors concurring (discounting the jurors challenged) totaled 12 or more.<sup>80</sup>

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<sup>79</sup>See United States v. Johnston, 685 F.2d 934 (5th Cir. 1982), cert. denied, 460 U.S. 1053 (1983).

<sup>80</sup>See, e.g., United States v. Anzelmo, 319 F. Supp. 1106, 1113 (E.D. La. 1970); United States v. Richter Concrete Corp., 328 F. Supp. 1061, 1967 (S.D. Ohio 1971).

## H. FBI and Other Assistance

Historically, Antitrust Division lawyers have done most of the Division's investigative work. From time to time, the FBI was asked to assist staffs. In the last several years, however, the Division has greatly expanded its use of outside investigators due primarily to the growth in criminal enforcement. The Division now uses investigative agents more frequently and from a wider variety of agencies. In the last few years, the Division has worked with agents from the FBI, Department of Agriculture, Department of Defense, Environmental Protection Agency, Department of Housing and Urban Development, Department of Commerce, Farmer's Home Administration, General Services Administration, Department of Interior, U.S. Postal Service, and Department of Transportation.

### 1. Benefits of using outside investigative resources

Use of outside agents has varied substantially from office to office. Use of agents appears to have been most effective where the agents have been made, in effect, a part of the investigative and trial staff. These agents serve grand jury and trial subpoenas, execute search warrants, interview witnesses, review and analyze documents, prepare charts and exhibits, and testify before the grand jury and at trial.<sup>81</sup> Their testimony has ranged from expert testimony on technical questions, such as handwriting analysis, to testimony before the grand jury providing background or statistical data, to grand jury testimony recounting statements by cooperating witnesses.

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<sup>81</sup>Disclosure of grand jury materials to Government agents so that they may assist the Government attorneys in the conduct of criminal investigations is authorized by Rule 6(e)(3)(A)(ii). See Ch. II § D. and United States v. Lartey, 716 F.2d 955 (2d Cir. 1983).

Use of investigative agents has been most beneficial in local or regional price-fixing or bid-rigging investigations where there are more than a few potential witnesses and/or targets, where the offense is relatively straightforward, and where an agent can easily be incorporated into a staff. Perhaps their greatest benefit is simply the availability of additional investigatory resources. Agents can also bring with them special investigatory expertise. While there have been concerns expressed that agents may not be effective interrogators in antitrust conspiracy cases, in fact, antitrust conspiracies are no more complex than other white collar and/or conspiracy crimes. Also, most agents are likely to be more versed in general interrogation techniques than many Division attorneys. The necessary expertise in antitrust law, Division practices and policies, and the facts of a particular investigation can be communicated in training sessions or discussions at the outset of the investigation.

Other benefits include (1) the knowledge of Office of Inspector General (OIG) agents of the federal programs administered by their agencies; (2) technical assistance, e.g., consensual phone monitors, handwriting analysis, (3) analysis of large amounts of data; (4) conduct of a large number of interviews in a short period of time; (5) prompt and accurate service of subpoenas; and (6) local presence for distant attorneys.

Also, agents have proven particularly effective at presenting background or statistical testimony to grand juries and at trial. This can include summaries of interstate commerce evidence, a general description of an industry or bidding practices in that industry, or analysis of statistical data such as pricing or sales patterns. Use of agents to put such evidence before the grand jury, rather than putting it in piecemeal through a number of industry witnesses, can result in a clearer presentation of the evidence and substantial savings of grand jury and trial time.

2. Procedure for obtaining outside investigative help

a. FBI assistance

Procedures for obtaining assistance vary from agency to agency. FBI assistance is still the most widely available and may be obtained in any criminal investigation. Authorization for FBI assistance is obtained by preparing a memo from the Assistant Attorney General to the Director of the FBI, describing the investigation and the nature of the assistance required.<sup>82</sup> Whenever possible, it is preferable to have a specific case agent or agents assigned to the investigation to carry out all necessary duties rather than obtaining assistance only for one or two specific tasks. Having a case agent or agents assigned allows full use to be made of an agent's skills and also creates a better working relationship by permitting the agent to be fully integrated into the staff.

One specific limitation on the assistance provided by FBI agents is that FBI agents generally have a limited geographic area in which they can carry out investigative activities. Thus, for an investigation with a wide geographic scope, the logistics of getting agents involved from numerous jurisdictions and keeping them adequately informed of the nature and progress of the investigation may outweigh the benefits to be obtained from their assistance.

Although approval must be obtained from Washington FBI headquarters prior to an agent becoming involved in the investigation, it is often useful to contact the appropriate local office(s) to introduce oneself and advise that a request for assistance is being made. Then the Washington authorization will not come to the office out of the

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<sup>82</sup>See ATD Manual III-8 for more detailed information regarding the request for assistance.

blue and a good working relationship can be instituted from the outset. Such contact can also result in an earlier initiation of assistance.

b. OIG assistance

Assistance from an Inspector General's office is limited to investigations involving subject matters within the jurisdiction of that agency. There is one very important exception. Agents from the U.S. Postal Service have a relatively broad jurisdiction. They may investigate any violation involving the use of the U.S. mails. Thus, if mail fraud charges may result from an investigation, assistance may be sought from the postal inspectors.

Assistance from an OIG's office generally may be arranged through contact between the section or office chief and the head of the regional OIG office or the OIG Washington headquarters. No higher approvals are required. OIG agents generally have more geographic flexibility than FBI agents. At a minimum, they can travel throughout a several state region and often can travel nationwide.

3. Operational suggestions

When working with an agent, several considerations should be kept in mind. While assigned to your investigation, an agent, in effect, serves two masters – the Antitrust Division and his own supervisors. Allocation of time to the antitrust investigation can become an issue between the two agencies and create real difficulties for the agent. Much of this can be avoided by up-front discussions of the scope of our investigation, the length of time it is expected to take, and the commitment of time needed from the agent. Again, keep in mind that involving the agent

fully in the investigation as a staff member creates a better working relationship, better agent morale, and more productive use of the agent's time.

It is important at the outset of the investigation to inform the agent of Antitrust Division practices and policies that may affect the investigation. The agent must understand that all strategic decisions must ultimately be made by Division attorneys, in consultation, where necessary, with their Washington superiors. Such decisions, including whom to immunize, what representations can be made to witnesses, decisions to prosecute, and plea agreements can and should be discussed with the agent but those decisions must rest with Division attorneys.

One final point to keep in mind in working with agents is that they may not be fully familiar with the requirements of Fed. R. Crim. P. 6(e). Before an agent has any contact with the grand jury or grand jury materials, you should provide him with a complete briefing on grand jury secrecy requirements. The agent must understand that any grand jury materials received must be used only to assist in the criminal investigation. They may not be used for any civil purpose.<sup>83</sup>

#### I. CHECKLIST Before Conducting First Grand Jury Session

1. Approval from Assistant Attorney General.
2. Issuance and filing of letters of authority.
3. Conference with U.S. Attorney, Field Office Chief.
4. Conference with Judge.

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<sup>83</sup>United States v. Sells Eng'g Inc., 463 U.S. 418 (1983); see Ch. II §§ C. and D., infra.

5. Empaneling.
  - a. Check for conflict of interests and disqualify prospective jurors as may be appropriate.
6. Impounding Order.
7. File Rule 6(e) disclosure form.
8. Issuance of subpoenas duces tecum.
9. Scheduling of first session with grand jury clerk.
10. Issuance of testamentary subpoenas where substantive witnesses are to be called.
11. Swearing in of court reporter at first session.
12. Check for quorum at first session.
  - a. Note on the record that there is a quorum and that no unauthorized persons are present.
13. Introduce attorneys and inform grand jurors of basic antitrust law and nature of investigation.

J. CHECKLIST Before Conducting Subsequent Sessions

1. Schedule upcoming session with clerk at least one month in advance - make sure clerk notifies grand jurors; make room arrangements.
2. Arrange for and notify court reporter.
3. Issue testamentary subpoenas and arrange for service.
4. Request immunity, where appropriate, at least two weeks prior to date of session.
  - a. Prepare immunity applications and orders and arrange for submission to judge when approval and clearance are obtained.

5. Select documents to be used as grand jury exhibits.
6. Prepare questions.



## II. THE REQUIREMENT OF SECRECY – RULE 6(e)

### A. Rule 6(e)

The general secrecy requirements of Rule 6(e) are contained in Section 6(e)(2). It provides that:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

#### 1. Purpose of Rule 6(e)

Rule 6(e) codifies the traditional rule of grand jury secrecy by prohibiting members of the grand jury, Government attorneys and their authorized assistants, and other grand jury personnel from disclosing matters occurring before the grand jury, except as otherwise authorized by the rule. Grand jury secrecy is vital to the investigative function of the grand jury. It serves several distinct interests, primarily: (1) to encourage witnesses to come forward and testify freely and honestly; (2) to minimize the risks that prospective defendants will flee or use corrupt means to thwart investigations; (3) to safeguard the grand jurors themselves and the proceedings from

extraneous pressures and influences; and (4) to protect accused persons who are ultimately exonerated from unfavorable publicity.<sup>1</sup>

In addition, the secrecy requirements of Rule 6(e) and the limited exceptions promote three other policy concerns: (1) the Government's need to know what transpires before the grand jury to prosecute cases effectively and to assist the grand jury in its deliberations; (2) the need to protect the grand jury process from prosecutorial abuse; and (3) the need for Government attorneys to adhere to established procedures that limit the Government's powers of discovery and investigation.<sup>2</sup>

The reasons for grand jury secrecy are particularly compelling while an investigation is pending. While these reasons may lose some of their force after the proceedings have been concluded, grand jury secrecy may never be breached, except as provided for by the rule, no matter how compelling the circumstances.<sup>3</sup>

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<sup>1</sup>See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); Executive Sec. Corp. v. Doe, 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954); United States v. Jones, 766 F.2d 994 (6th Cir.), cert. denied, 474 U.S. 1006 (1985); In re Special March 1981 Grand Jury, 753 F.2d 575 (7th Cir. 1985); United States v. Fischbach and Moore, Inc., 776 F.2d 839, 843 (9th Cir. 1985); United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983).

<sup>2</sup>See United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

<sup>3</sup>See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); In re Bonanno, 344 F.2d 830 (2d Cir. 1965); In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501 (5th Cir. 1980); United States v. Fischbach and Moore, Inc., 776 F.2d at 844; In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571 (11th Cir. 1983). But see In re Biaggi, 478 F.2d 489 (2d Cir. 1973) (court may disclose grand jury information if there is a sufficient public interest).

## 2. Obligation on grand jurors

Grand jurors are subject to the secrecy requirement of Rule 6(e). The court generally provides each grand juror with a copy of the Federal Grand Jury Handbook that includes an explanation of Rule 6(e)'s obligation of secrecy. In addition, each grand juror's obligation of secrecy usually is emphasized in the oath each juror takes and in the charge given to the grand jury by the judge. A frequently used practice of Division attorneys is to reiterate the requirements of Rule 6(e) in the opening statement to the grand jury and at appropriate times during subsequent grand jury sessions.

The grand jurors may disclose matters occurring before them, except for their deliberations, to the attorneys representing the Government for use in the performance of their duties or to others when ordered to do so by the court. A grand juror obviously may discuss matters occurring before the grand jury with other grand jurors, but should do so only in the grand jury room.

## 3. Obligation on reporter

The reporter who takes and transcribes the evidence is permitted to be present during grand jury sessions, except when the grand jury is deliberating or voting. Rule 6(e) specifically imposes an obligation of secrecy on the reporter. Further, the rule explicitly recognizes that the reporter may utilize other persons as typists to transcribe the recorded testimony by including such typists among those who are prohibited from making disclosures.

Transcription of grand jury evidence should be performed entirely on the premises of the grand jury reporter.

Independent transcription centers should not be used because of the potential for a breach of grand jury secrecy.<sup>4</sup>

4. Obligation on Government attorneys and support staff

Government attorneys and support staff are prohibited from disclosing matters occurring before a grand jury, subject to several important exceptions that are discussed in detail elsewhere in this chapter.

5. No obligation on witness

Rule 6(e) specifically prohibits any obligation of secrecy from being "imposed on any person except in accordance with this rule." Therefore, witnesses cannot be put under any obligation of secrecy and attempts to impose such an obligation generally have been struck down by the courts.<sup>5</sup> One circuit permits the imposition of a reasonable obligation of secrecy on a witness if there is a compelling necessity that is shown with particularity.<sup>6</sup> The grand jury foreman or a Government attorney may request a witness not to make unnecessary disclosures when

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<sup>4</sup>See Memorandum from Stephen S. Trott, Assistant Attorney General, Criminal Division, to all United States Attorneys, Jan. 10, 1984.

<sup>5</sup>See In re Investigation Before April 1975 Grand Jury (Rosen), 531 F.2d 600 (D.C. Cir. 1976); In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987); Bast v. United States, 542 F.2d 893 (4th Cir. 1976); In re Eisenberg, 654 F.2d 1107, 1113 n.9 (5th Cir. Unit B Sept. 1981); United States v. Radetsky, 535 F.2d 556 (10th Cir. 1976), cert. denied, 429 U.S. 820 (1977).

<sup>6</sup>In re Grand Jury Subpoena Duces Tecum, 797 F.2d 676 (8th Cir.), cert. dismissed, 479 U.S. 1013 (1986); see also In re Swearingen Aviation Corp., 486 F. Supp. 9 (D. Md. 1979).

those disclosures or the attendant publicity might hinder an investigation.<sup>7</sup> When making such a request, it should be absolutely clear that it is a request only and that no expressed or implied coercion is used.

B. What Is Covered By Rule 6(e)

Rule 6(e) prohibits the disclosure of any information that would reveal "matters occurring before the grand jury." Rule 6(e) does not cover all information developed during the course of a grand jury investigation; only information that would reveal the strategy or direction of the investigation, the nature of the evidence produced before the grand jury, the views expressed by members of the grand jury, or anything else that actually occurred before the grand jury.<sup>8</sup> Rule 6(e) does not apply to material obtained or created independently of the grand jury as long as the disclosure of such material does not reveal what transpired before or at the direction of the grand jury.<sup>9</sup> Rule 6(e) also does not apply to information that has become a matter of public record, for example, by its introduction at trial.<sup>10</sup>

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<sup>7</sup>See In re Grand Jury Proceedings, 814 F.2d at 70; In re Castiglione, 587 F. Supp. 1210 (E.D. Cal. 1984); In re Grand Jury Proceedings, 558 F. Supp. 532 (W.D. Va. 1983).

<sup>8</sup>See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); In re Grand Jury Investigation, 630 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980); United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); Anaya v. United States, 815 F.2d 1373 (10th Cir. 1987).

<sup>9</sup>See In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982).

<sup>10</sup>See United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 (continued...)

Attorneys should consult the case law in the jurisdiction where the grand jury is sitting to determine what materials constitute "matters occurring before the grand jury." The following sections provide general guidelines on how certain categories of information have been treated under Rule 6(e).

1. Grand jury testimony/transcripts/colloquy

Transcripts of witness testimony, statements made by Government attorneys, and any other statements made by or before the grand jury, while in session, clearly constitute "matters occurring before the grand jury" and may not be disclosed, except in conformity with one of the exceptions to Rule 6(e).<sup>11</sup> Some courts have held that the court's charge to the grand jurors is not covered by Rule 6(e) because the ground rules by which the grand jury operates do not reflect matters occurring before the grand jury.<sup>12</sup>

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<sup>10</sup>(...continued)  
U.S. 1030 (1987); Sisk v. C.I.R., 791 F.2d 58 (6th Cir. 1986).

<sup>11</sup>See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856 (D.C. Cir. 1981). But see In re Biaggi, 478 F.2d 489, 494 (2d Cir. 1973) (court may permit disclosure of grand jury testimony if disclosure is in public interest).

<sup>12</sup>United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973). But see United States v. Hart, 513 F. Supp. 657 (E.D. Pa. 1981).

## 2. Documents

The courts differ widely as to the extent that documents are considered "matters occurring before the grand jury." Therefore, the local rules and the case law in the jurisdiction where the grand jury is sitting should be carefully consulted before any documents are disclosed.

Rule 6(e) usually does not govern the disclosure of documents obtained by means independent of the grand jury.<sup>13</sup> This is true even when such documents have later been examined by the grand jury or made grand jury exhibits so long as disclosure of the documents does not reveal that they were exhibits.<sup>14</sup>

Most courts do not consider individual documents subpoenaed by the grand jury to be "matters occurring before the grand jury." The rule that has evolved is that Rule 6(e) does not apply to subpoenaed documents that are sought for the information they contain, rather than to reveal the direction or strategy of the grand jury investigation.<sup>15</sup> As explained in United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979), at 291:

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<sup>13</sup>See In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982); In re Grand Jury Subpoena, 920 F.2d 235 (4th Cir. 1990); In re Grand Jury Investigation (Lance), 610 F.2d 202 (5th Cir. 1980).

<sup>14</sup>See Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d 574 (D.C. Cir. 1987); United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); In re Grand Jury Investigation, 630 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1081 (1980).

<sup>15</sup>See SEC v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960); In re Grand Jury Investigation, 630 F.2d at 1000-01; United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979). But see In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988); In re Grand Jury Disclosure, 550 F. Supp. 1171 (E.D. Va. 1982).

Unlike testimony, documents are created for purposes other than the grand jury investigation; they are, therefore, more likely to be useful for purposes other than revealing what occurred before the grand jury.

The Division's general policy is to treat individual documents subpoenaed by the grand jury as not covered by Rule 6(e) unless disclosure of the documents would reveal the scope, direction, or other secret aspect of the investigation or would implicate one of the secrecy concerns of the rule. Collections of documents, as opposed to individual documents, are more likely to be treated as covered by Rule 6(e). Division attorneys should be particularly careful in those jurisdictions that are beginning to take a broader view of the coverage of Rule 6(e) in light of the suggestion in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), and United States v. Baggot, 463 U.S. 476 (1983), that subpoenaed documents should be treated the same as testimony.<sup>16</sup> The Sixth Circuit in In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988), established a broad presumption that subpoenaed documents are covered by Rule 6(e). In deviating from the rule in most other circuits, the court held at p. 866:

The general rule, however, must be that confidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be 'matters occurring before the grand jury' just as much as testimony before the grand jury.

A court is more likely to treat subpoenaed documents as covered by Rule 6(e) if the request is framed in terms of the grand jury investigation, for example, a request that calls for the disclosure of all documents

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<sup>16</sup>See United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 479 U.S. 1030 (1987).



subpoenaed by a particular grand jury or a list or inventory of all such documents, because such a request is more likely to reveal the scope or direction of the investigation.<sup>17</sup> In general, the greater the number of documents sought, the more likely that disclosure is prohibited by Rule 6(e).<sup>18</sup>

Different considerations may also apply to documents such as affidavits, narratives and summaries that are prepared specifically by the subpoena recipient for the grand jury and frequently submitted in lieu of an actual grand jury appearance or underlying documents. The policy reasons for grand jury secrecy apply more strongly to such documents because they resemble testimony and are more likely than ordinary business records to reveal the nature and scope of the grand jury's investigation.<sup>19</sup>

While Rule 6(e) may not apply to the disclosure of subpoenaed documents, a court order may, nevertheless, be required for their public disclosure. Subpoenaed documents remain the property of the person from whom they were subpoenaed, the grand jury having only temporary custody.<sup>20</sup> Where the owner of the documents does not consent to their release, disclosure must be authorized by the court. The standard for such

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<sup>17</sup>See Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 868-70 (D.C. Cir. 1981); see also United States v. Stanford, 589 F.2d at 291 n.6; In re Doe, 537 F. Supp. 1038 (D.R.I. 1982). But see United States v. Saks & Co., 426 F. Supp. 812 (S.D.N.Y. 1976).

<sup>18</sup>See In re Grand Jury Disclosure, 550 F. Supp. *supra*. But see Senate of Puerto Rico v. United States Dep't of Justice, 823 F.2d *supra*.

<sup>19</sup>See In re Special February, 1975 Grand Jury, 662 F.2d 1232 (7th Cir. 1981), *aff'd sub nom. United States v. Baggot*, 463 U.S. 476 (1983).

<sup>20</sup>See United States v. Interstate Dress Carriers, Inc., 280 F.2d at 54; In re Grand Jury Proceedings, 486 F.2d 85 (3d Cir. 1973); United States v. Penrod, 609 F.2d 1092 (4th Cir.), *cert. denied*, 446 U.S. 917 (1979); In re Special March 1981 Grand Jury, 753 F.2d 575 (7th Cir. 1985).

authorization is not Rule 6(e), but whether the party seeking the documents is lawfully entitled to have access to them.<sup>21</sup>

Before disclosing any documents subpoenaed by the grand jury, attorneys should be certain that disclosure is not restricted by another statute. For example, the Right to Financial Privacy Act of 1978, (12 U.S.C. § 3420) requires that protected financial records subpoenaed by a grand jury be accorded the same protections as Rule 6(e) material. Similarly, the Tax Reform Act of 1976, (26 U.S.C. § 6103) restricts disclosure of tax information obtained from the Internal Revenue Service, irrespective of whether it has been presented to a grand jury.

As a matter of Department policy, an attorney should not initiate the disclosure of subpoenaed documents to another attorney working solely on civil matters without an appropriate court order.<sup>22</sup> This policy does not apply to materials that were created for a purpose independent of the grand jury.<sup>23</sup>

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<sup>21</sup>See United States v. Interstate Dress Carriers, Inc., 280 F.2d at 54; Capitol Indem. Corp. v. First Minnesota Constr. Co., 405 F. Supp. 929 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972).

<sup>22</sup>See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 15-16.

<sup>23</sup>See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 53, 79.

3. Government memoranda summarizing or referring to testimony or documents

Government memoranda, or portions thereof, that summarize or refer to grand jury testimony or documents are covered by Rule 6(e) to the extent that their disclosure would reveal "matters occurring before a grand jury." Documents prepared by an attorney or his authorized assistants that reflect grand jury information cannot be disclosed.<sup>24</sup>

Government memoranda, or portions thereof, that excerpt, refer to, or discuss grand jury testimony are covered by Rule 6(e) and may not be disclosed except as provided by Rule 6(e).<sup>25</sup> Government memoranda that reflect information provided by witnesses outside of the grand jury room usually are not covered by Rule 6(e).<sup>26</sup>

Government memoranda that analyze documents subpoenaed by the grand jury have at least the same protection under Rule 6(e) as the subpoenaed documents. In some instances, the disclosure of an analysis of subpoenaed documents may reveal more about the strategy and direction of an investigation than would disclosure of the documents alone. In these instances, the analysis should not be disclosed.<sup>27</sup> Memoranda reflecting

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<sup>24</sup>See In re Special February 1975 Grand Jury, 662 F.2d 1232, 1238 (7th Cir. 1981), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983); U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 17.

<sup>25</sup>See In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501, 505 (5th Cir. 1980); U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), cert. denied, 382 U.S. 814 (1965); United States v. Armco Steel Corp., 458 F. Supp. 784 (W.D. Mo. 1978).

<sup>26</sup>See In re Grand Jury Matter (Catania), 682 F.2d 61, 64 (3d Cir. 1982). But see In re Special February 1975 Grand Jury, 662 F.2d at 1238; In re Grand Jury Proceedings (Daewoo), 613 F. Supp. 672 (D. Or. 1985) (Memorandum of a post-grand jury appearance interview treated as covered by Rule 6(e)).

<sup>27</sup>See In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982); In re Special February, 1975  
(continued...)

information obtained independent of the grand jury, such as summaries of bidding information prepared by other agencies, ordinarily should be treated as outside of the coverage of Rule 6(e), even if the document is later submitted to the grand jury.<sup>28</sup> However, one circuit court has held that an analysis of information obtained independently of the grand jury that was prepared specifically for the grand jury is covered by Rule 6(e).<sup>29</sup> Also, at least one district court has held that Government memoranda requesting authority for conducting a grand jury are covered by Rule 6(e) because such memoranda provide a blueprint for the Government's investigation.<sup>30</sup>

#### 4. Nature of investigation or identity of targets

Generally, it is necessary to disclose at least some information describing the nature of a grand jury inquiry during the course of an investigation. In most circumstances, such information should be very general. For example, a Government attorney could say, "We are investigating a possible price-fixing conspiracy in the road building industry." In some situations, such as during plea negotiations or witness interviews, it may be appropriate to summarize the evidence in somewhat greater detail. This should be done only when necessary for the effective conduct of the investigation. Attorneys should be careful not to disclose the identities of specific witnesses, actual

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<sup>27</sup>(...continued)  
Grand Jury, 662 F.2d at 1238.

<sup>28</sup>See In re Grand Jury Matter (Catania), 682 F.2d at 64; Sisk v. C.I.R., 791 F.2d 58 (6th Cir. 1986).

<sup>29</sup>In re Grand Jury Matter, 697 F.2d at 513.

<sup>30</sup>In re Disclosure of Grand Jury Matters (Miller Brewing Co.), 518 F. Supp. 163 (D. Wis.), modified on other grounds, 687 F.2d 1079 (7th Cir. 1981).

verbatim testimony or other information that would reveal the strategy or precise direction of the investigation or anything that has actually occurred before the grand jury.<sup>31</sup>

The identities of the targets of the investigation should not be disclosed since one of the specific interests that Rule 6(e) serves is to protect individuals who ultimately are not indicted from unfavorable publicity.<sup>32</sup> The exception to this is disclosure to the targets of their status as targets.<sup>33</sup> An attorney may also, as appropriate, tell opposing counsel whether his client is a target, subject or just an informational witness.

#### 5. Local rules may provide for additional secrecy

The local rules in a particular jurisdiction may provide for additional secrecy. For example, the local rules of the South Dakota District Court contain particularly strict secrecy requirements for subpoenaed documents. Consequently, the local rules regarding the disclosure of information concerning the grand jury should be carefully reviewed before making any disclosures.

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<sup>31</sup>See United States v. Bazzano, 570 F.2d 1120, 1125 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978).

<sup>32</sup>See United States v. Procter & Gamble Co., 356 U.S. 677, 681-82 (1958); United States v. Eisenberg, 711 F.2d 959 (11th Cir. 1983).

<sup>33</sup>See U.S.A.M. 9-11.153.

6. Access to ministerial grand jury records

Ministerial records that relate to the procedural aspects of the grand jury usually fall within the scope of Rule 6(e). Such records may not be disclosed if the legitimate interests protected by Rule 6(e) would be threatened.<sup>34</sup>

Rule 6(e)(6) provides that: "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." Records, orders, and subpoenas relating to the grand jury should not be disclosed so long as they remain under seal.

The scope of Rule 6(e)(6) is not entirely clear, as the term "records" is not defined. The notes of the Advisory Committee on the Federal Rules of Criminal Procedure include the Department of Justice authorization to a U.S. Attorney to apply to the court for a grant of immunity for a witness as included within the scope of the rule. In re Grand Jury Impanelled March 8, 1983, 579 F. Supp. 189 (E.D. Tenn. 1984), one of the few cases to interpret Rule 6(e)(6), states, without discussion, that motions to quash subpoenas are not covered by Rule 6(e)(6). However, the court also held that motions, briefs and the like that tend to reveal the substance of grand jury records, orders and subpoenas, nonetheless, should be sealed to protect the information contained in them. The court in In re Donovan, 801 F.2d 409 (D.C. Cir. 1986), suggests that motions for disclosure of grand jury information are subject to Rule 6(e)(6), but only to the extent that the motion contains information that is subject to the general rule of secrecy.

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<sup>34</sup>In re Special Grand Jury (for Anchorage, Alaska), 674 F.2d 778 (9th Cir. 1982); see also United States v. Alter, 482 F.2d 1016, 1029 n.21 (9th Cir. 1973) (the court's charge to the grand jury is not covered by Rule 6(e)).

Until there is further interpretation of Rule 6(e)(6), Division attorneys should file preindictment motions, subpoenas, letters of authorization, immunity orders and the like under seal, unless there are compelling reasons to the contrary.<sup>35</sup> Similarly, efforts to discover other ministerial records, such as docket sheets and attendance and impaneling records, should be resisted if any of the policy reasons behind Rule 6(e) are implicated.<sup>36</sup>

7. Names of witnesses

Rule 6(e) prohibits the disclosure of the identities of witnesses subpoenaed by or appearing before the grand jury.<sup>37</sup>

8. Interview memoranda

According to the majority view and the general policy to be followed by Division attorneys, Rule 6(e) does not apply to witness interview memoranda, even if the statements contained therein are later reported to the

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<sup>35</sup>A time-saving procedure is to have the Impounding Order that is filed at the beginning of the investigation contain language that provides for the automatic sealing of motions, subpoenas, etc.

<sup>36</sup>See In re Special Grand Jury (For Anchorage, Alaska), 674 F.2d supra.

<sup>37</sup>See Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869 (D.C. Cir. 1981); United States v. White Ready-Mix Concrete Co., 509 F. Supp. 747, 750 (N.D. Ohio 1981).

grand jury by the investigation staff or repeated to the grand jury by the witness.<sup>38</sup> The local case law should be carefully reviewed before disclosing any interview memoranda, as several courts have treated interview memoranda that were later presented to the grand jury similarly to transcripts of grand jury testimony.<sup>39</sup>

#### 9. Proffer memoranda

Proffer memoranda should be treated similarly to interview memoranda. As a general rule, proffers should not be treated as covered by the secrecy requirements of Rule 6(e), because they reflect information that is obtained independently of the grand jury.<sup>40</sup> This is particularly true when the witness providing the proffer is not later called before the grand jury. Attorneys should carefully consult the local case law as a few jurisdictions treat documents that reveal what will happen before the grand jury in the future, such as proffers, as covered by the rule.<sup>41</sup>

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<sup>38</sup>See Cullen v. Margiotta, 811 F.2d 698 (2d Cir.), cert. denied, 483 U.S. 1021 (1987); In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982); Anaya v. United States, 815 F.2d 1373 (10th Cir. 1987); In re Grand Jury Proceedings (Bath Iron Works), 505 F. Supp. 978, 980 (D. Me. 1981); In re Search Warrant for Second Floor Bedroom, 489 F. Supp. 207, 211 (D.R.I. 1980).

<sup>39</sup>In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982) (interview memoranda should be treated the same as grand jury transcripts); In re Special February, 1975 Grand Jury, 662 F.2d 1232, 1237-38 (7th Cir. 1981) (in certain very limited circumstances, a report of an interview given in lieu of a grand jury appearance is covered by Rule 6(e)), aff'd sub nom. United States v. Baggot, 463 U.S. 476 (1983); In re Grand Jury Proceedings (Daewoo), 613 F. Supp. 672 (D. Or. 1985) (post-appearance statements by witness of what transpired before grand jury covered by Rule 6(e)).

<sup>40</sup>Disclosure of interview and proffer memoranda may be resisted on other grounds; e.g., the attorney work-product and informants' privileges.

<sup>41</sup>See In re Grand Jury Investigation (Lance), 610 F.2d 202, 216-17 (5th Cir. 1980); United  
(continued...)



C. Disclosure to Attorneys for the Government, Rule 6(e)(3)(A)(i)

Rule 6(e)(3)(A)(i) permits the disclosure of information covered by Rule 6(e) without a court order to "an attorney for the government for use in the performance of such attorney's duty."<sup>42</sup>

1. Definition of "attorney for the government"

Rule 54(c) of the Federal Rules of Criminal Procedure defines "attorney for the government" as "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney." The definition includes not only those attorneys who actually appear before the grand jury but also supervisory attorneys who are working on the matter.<sup>43</sup> It also includes attorneys who are operating under a special appointment.<sup>44</sup>

Those Division attorneys who actually appear before the grand jury receive letters signed by the Assistant Attorney General for the Antitrust Division authorizing them to appear before the grand jury as "an authorized

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<sup>41</sup>(...continued)  
States v. Armco Steel, 458 F. Supp. 784 (W.D. Mo. 1978).

<sup>42</sup>See generally U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984.

<sup>43</sup>United States v. Sells Eng'g, Inc., 463 U.S. 418, 429 n.11 (1983).

<sup>44</sup>See In re Subpoena of Persico, 522 F.2d 41 (2d Cir. 1975); In re Perlin, 589 F.2d 260, 266 (7th Cir. 1978); United States v. Zuber, 528 F.2d 981 (9th Cir. 1976); United States v. Mitchell, 397 F. Supp. 166 (D.D.C.), aff'd, 559 F.2d 31 (D.C. Cir. 1974), cert. denied, 431 U.S. 933 (1977).

assistant of the Attorney General." A letter of authorization is not necessary prior to appearing before the grand jury and failure to obtain one will not invalidate a subsequent indictment.<sup>45</sup>

Disclosure is not permitted to attorneys for federal administrative agencies,<sup>46</sup> Parole Commission hearing officers,<sup>47</sup> or state governments.<sup>48</sup> However, a non-Department of Justice attorney (including a state prosecutor or federal agency attorney), appointed under 28 U.S.C. § 515, as a Special Assistant United States Attorney or Special Assistant to the Attorney General, is an "attorney for the government" for purposes of the rule.<sup>49</sup> While the definition would appear to include attorneys working on civil and criminal matters, the Supreme Court held in United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), that Rule 6(e)(3)(A)(i) permits disclosure only to attorneys working on criminal matters.

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<sup>45</sup>United States v. Balistreri, 779 F.2d 1191 (7th Cir.), cert. denied, 475 U.S. 1095 (1985).

<sup>46</sup>See United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

<sup>47</sup>See Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

<sup>48</sup>See Illinois v. Abbott & Assocs., Inc., 460 U.S. 557 (1983); In re Grand Jury Proceedings, 580 F.2d 13 (1st Cir. 1978); United States v. Colonial Chevrolet Corp., 629 F.2d 943 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981); Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973).

<sup>49</sup>See In re Perlin, 589 F.2d at 265-67. Great care should be taken with the use of cross-designated state attorneys since it is unclear how courts will apply existing disclosure law to all aspects of the cross-designation program. See ATD Manual VII-10 for additional information on this program.

## 2. Policy after Sells

Prior to Sells, the Department interpreted Rule 6(e)(3)(A)(i) to permit an attorney conducting a civil investigation to utilize, without obtaining prior judicial approval, Rule 6(e) material from a prior or concurrent criminal investigation conducted by other Department attorneys. This interpretation was rejected by the Supreme Court in Sells. The Supreme Court held that Government attorneys may not automatically obtain grand jury materials for use in a civil matter under Rule 6(e)(3)(A)(i), but must obtain a court order to secure such materials under Rule 6(e)(3)(C)(i).<sup>50</sup>

Sells should not retroactively affect final judgments, pending litigation or ongoing civil investigations in which grand jury materials have already been disclosed under either Rule 6(e)(3)(A)(i) or a pre-Sells Rule 6(e)(3)(C)(i) order.<sup>51</sup> Chevron Oil Co. v. Huson, 404 U.S. 97, 105-09 (1971), should govern the retroactivity of Sells.

Although Sells should not affect the past use of grand jury materials, it may restrict the continued use of such materials. United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987), permitted continued use in the context of that case; however, most courts have not permitted such use.<sup>52</sup> Attorneys

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<sup>50</sup>The Court declined to address the issue of "continued use of grand jury materials, in the civil phase of a dispute, by an attorney who himself conducted the criminal proceedings." 463 U.S. at 430 n.15. See § 3., infra.

<sup>51</sup>See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984, at 33-40; United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987).

<sup>52</sup>See In re Grand Jury Proceedings (Kluger), 631 F. Supp. 1542 (E.D.N.Y. 1986), modified, 827 F.2d 868 (2d Cir. 1987).

working on civil matters who want to continue to use previously disclosed grand jury materials should file (C)(i) motions to preclude later motions for sanctions.<sup>53</sup>

### 3. Use of grand jury materials for civil cases in the Antitrust Division

As a general rule, grand jury information may not be used for civil investigations or cases. However, much of the material developed during the course of a criminal investigation is not covered by Rule 6(e) and, consequently, may be disclosed to civil investigation staffs. It is imperative that attorneys carefully distinguish between Rule 6(e) and non-Rule 6(e) materials. If an attorney is uncertain whether the material to be disclosed is subject to Rule 6(e), he should file a notice of use with the court. This will provide the court with an opportunity to respond to the notice with an order to file a motion under Rule 6(e)(3)(C)(i), should one be necessary. In the alternative, attorneys may file a motion for use, attaching a proposed order.

An attorney who was involved in a grand jury proceeding as a member of the prosecution team (including supervisory attorneys) may, without prior authorization of the court, continue to use materials subject to Rule 6(e) in a companion or related civil proceeding as long as such use does not contravene Rule 6(e)'s purposes.<sup>54</sup> An attorney who so uses Rule 6(e) material should be careful not to disclose the material to other members of the civil staff who were not members of the prior criminal staff or to disclose the Rule 6(e) material in civil pleadings and the like.

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<sup>53</sup>See U.S. Department of Justice Guide on Rule 6(e) After Sells and Baggot, Jan. 1984 at 65.

<sup>54</sup>United States v. John Doe, Inc., I, 481 U.S. 102 (1987).

Use of grand jury materials for civil matters by attorneys who were not members of the grand jury staff after the close of the grand jury without indictment or concurrently with a criminal matter involving the same party or parties is not permitted unless an appropriate order under Rule 6(e)(3)(C)(i) is obtained from the court. However, there is no requirement to use separate staffs to investigate or litigate similar matters or matters that may involve use of the staff attorney's unrefreshed recollection of grand jury information.<sup>55</sup> Extreme caution should be exercised by such staffs not to improperly disclose information subject to Rule 6(e).

Attorneys working on criminal matters may not use Civil Investigative Demands (CIDs) to obtain information for criminal investigations.<sup>56</sup> However, a CID investigation may be converted to a criminal investigation and information lawfully obtained during a legitimate civil investigation may later be used for a criminal investigation.<sup>57</sup> Nonetheless, a common practice within the Division is to issue a grand jury subpoena for documents or information previously obtained by a CID.

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<sup>55</sup>See United States v. Archer-Daniels-Midland Co., 785 F.2d 206 (8th Cir. 1986), cert. denied, 481 U.S. 1028 (1987).

<sup>56</sup>15 U.S.C. § 1312(a).

<sup>57</sup>15 U.S.C. § 1313(d)(1).

D. Disclosure to Other Government Personnel; Rules 6(e)(3)(A)(ii) and 6(e)(3)(B)

1. Definition of Government personnel

Under Rule 6(e)(3)(A)(ii), grand jury information may be disclosed without a court order to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." "Government personnel" includes all federal Government employees who are assisting attorneys in the investigation and prosecution of criminal violations.<sup>58</sup> Government "personnel" includes not only members of the prosecution support staff, such as economists, secretaries, paralegals and law clerks, and federal criminal investigators such as the FBI, but also employees of any federal agency who are assisting the Government prosecutor.<sup>59</sup> At least one court includes temporary Government personnel and independent contractors employed by the agency within the rule.<sup>60</sup> However, individuals who are cooperating with the

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<sup>58</sup>See United States v. Lartey, 716 F.2d 955, 964 (2d Cir. 1983); United States v. Bazzano, 570 F.2d 1120 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978); United States v. Penrod, 609 F.2d 1092 (4th Cir.), cert. denied, 446 U.S. 917 (1979); In re Grand Jury, 583 F.2d 128 (5th Cir. 1978); In re Perlin, 589 F.2d 260 (7th Cir. 1978).

<sup>59</sup>See United States v. Jones, 766 F.2d 994 (6th Cir.), cert. denied, 474 U.S. 1006 (1985); United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); United States v. Block, 497 F. Supp. 629 (N.D. Ga. 1980), aff'd, 660 F.2d 1086 (5th Cir. Unit B Nov. 1981).

<sup>60</sup>United States v. Lartey, 716 F.2d at 963-64; see also United States v. Anderson, 778 F.2d 602 (10th Cir. 1985). See § J. below for the Division's policy regarding disclosure to independent contractors.

Government in connection with a particular investigation without reimbursement for their services, such as informants, are not permitted access to grand jury materials.<sup>61</sup>

Prior to the 1985 amendment to Rule 6(e)(A)(ii), the law was unclear as to whether state and local government personnel were included within the "government personnel" exception to Rule 6(e). Most courts that had addressed the issue held that "government personnel" includes only Federal Government employees.<sup>62</sup> The 1985 amendment to Rule 6(e)(3)(A)(ii) has resolved the split by expressly including "personnel of a state or subdivision of a state" within the scope of the rule. Because of the peculiar nature of the District of Columbia, its employees are included within the Government personnel exception to Rule 6(e) as federal personnel.<sup>63</sup>

Strict precautions should be taken when disclosing information to Government employees who have civil law enforcement functions, such as IRS agents, to ensure that grand jury materials are not used improperly for civil purposes. Personnel assisting the grand jury investigation ordinarily should not work on a related civil matter and should receive precautionary instructions, preferably in writing, regarding the use and disclosure of grand jury materials.<sup>64</sup>

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<sup>61</sup>See United States v. Tager, 638 F.2d 167 (10th Cir. 1980).

<sup>62</sup>See In re Grand Jury Proceedings, 580 F.2d 13 (1st Cir. 1978). But see In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979).

<sup>63</sup>United States v. McRae, 580 F. Supp. 1560 (D.D.C. 1984).

<sup>64</sup>See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976); see also Fed. R. Crim. P. 6(e)(3)(B).

2. When necessary to assist in enforcing federal criminal laws

Disclosure to Government personnel under Rule 6(e)(3)(A)(ii) is permitted only when necessary to assist in enforcing federal criminal laws. This rule does not permit disclosure for civil law enforcement purposes.<sup>65</sup> Further, this rule requires that the disclosure be enforcement-related and does not permit the disclosure of grand jury materials after the completion of prosecution. One court has gone so far as to hold that probation officers who prepare presentence investigation reports are not permitted access to grand jury materials because they do not assist in either the investigation or the prosecution of the case.<sup>66</sup> The Division disagrees with this holding and believes that attorneys may include grand jury information in presentence reports, because partaking in the sentencing process is part of the Government attorneys' "duty to enforce federal criminal law." In addition, disclosure to the District Court via its probation service as part of the sentencing process embodied by Rule 32 should not be considered a disclosure as contemplated by Rule 6(e).<sup>67</sup> Attorneys should consult the local U.S. Attorney's office to determine the local practice as to whether Rule 6(e) information may be contained in presentence reports.

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<sup>65</sup>See In re Perlin, 589 F.2d 260, 268-69 (7th Cir. 1978); In re Grand Jury Investigation No. 78-184, 642 F.2d 1184 (9th Cir. 1981), aff'd sub nom. United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

<sup>66</sup>United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980); see also Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

<sup>67</sup>It may be appropriate to file sentencing memoranda that contain grand jury information under seal unless there is a specific need for public disclosure. See United States v. Alexander, 860 F.2d 508 (2d Cir. 1988).



There must be a need for assistance before disclosure may be made under Rule 6(e)(3)(A)(ii). The determination of the need for assistance is within the discretion of the prosecutor and need not be justified.<sup>68</sup> Nonetheless, Government prosecutors should be wary of abusing this discretion and should limit the disclosure of grand jury materials as much as practicable.

Disclosure under Rule 6(e)(3)(A)(ii) to Government personnel for use in a separate investigation is not permitted. Government personnel who are seeking discovery of grand jury material for use in a different investigation must proceed under Rule 6(e)(3)(A)(i) or Rule 6(e)(3)(C)(i).

### 3. No need for court authorization

There is no need for court authorization to disclose grand jury materials under Rule 6(e)(3)(A)(ii).<sup>69</sup> When in doubt as to the applicability of Rule 6(e)(3)(A)(ii), an attorney should consider seeking a court order authorizing release under Rule 6(e)(3)(C)(i).

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<sup>68</sup>See In re Perlin, 589 F.2d at 268.

<sup>69</sup>See United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

4. Notice—Rule 6(e)(3)(B)

Rule 6(e)(3)(B) provides that:

Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

Under this rule, a list of all Government personnel to whom disclosure has been made must be promptly provided to the supervising judge. While not required by the rule, whenever possible, the list of names should be furnished to the court before the information is disclosed.<sup>70</sup> Such prior notice is what Congress contemplated when it amended Rule 6(e) in 1977.<sup>71</sup> If prior notice is not possible, then the court should be notified of disclosure as soon thereafter as possible. The 1985 amendments to Rule 6(e)(3)(A)(ii) also require certification that all persons to

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<sup>70</sup>See United States v. Hogan, 489 F. Supp. 1035 (W.D. Wash. 1980).

<sup>71</sup>S. Rep. No. 354, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 530.

whom grand jury material have been disclosed under this rule have been advised of their obligation of secrecy under Rule 6(e).<sup>72</sup>

Standard Division policy is to list Division economists, contractors and agents of other Government agencies in the disclosure notice. Secretaries, paralegals and clerical staffs need not be listed as they may be considered the alter egos of the attorneys, economists, agents and others whom they assist.

5. Record of disclosure/advice of secrecy

Attorneys conducting criminal investigations and prosecutions should keep detailed records of disclosures made under Rule 6(e)(3)(A)(ii) and should advise all recipients of grand jury materials of the secrecy requirements of Rule 6(e). Written precautionary instructions are preferable as they can be used in any hearing challenging the grand jury procedures.<sup>73</sup>

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<sup>72</sup>A sample letter containing precautionary instructions is attached as Appendix II-1.

<sup>73</sup>See Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976).

E. Disclosure To Witness

1. Access to own transcript

The large majority of courts have held that neither the Federal Rules of Criminal Procedure<sup>74</sup> nor the Freedom of Information Act<sup>75</sup> gives a grand jury witness a general right to a transcript of his own testimony. The same standards governing disclosure of matters occurring before the grand jury in general are applicable to a witness' access to a transcript of his testimony.

Under Rule 6(e)(3)(D), a witness who wishes to obtain a transcript of his grand jury testimony must file a motion in the district where the grand jury was convened. Disclosure is permitted only when ordered by a court "preliminarily to or in connection with a judicial proceeding" upon a finding that a "particularized need" exists for the desired disclosure that outweighs the need for maintaining the secrecy of the transcript.<sup>76</sup> As discussed in § H infra, particularized need is not a standard easily met.

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<sup>74</sup>See In re Bianchi, 542 F.2d 98 (1st Cir. 1976); Executive Sec. Corp. v. Doe, 702 F.2d 406 (2d Cir.), cert. denied, 464 U.S. 818 (1983); Bast v. United States, 542 F.2d 893 (4th Cir. 1976); United States v. Fitch, 472 F.2d 548 (9th Cir.), cert. denied, 412 U.S. 954 (1973). But see In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989); In re Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975); United States v. Scott Paper Co., 254 F. Supp. 759 (W.D. Mich. 1966).

<sup>75</sup>Thomas v. United States, 597 F.2d 656 (8th Cir. 1979); Valenti v. United States Dep't of Justice, 503 F. Supp. 230 (E.D. La. 1980).

<sup>76</sup>See Fed. R. Crim. P. 6(e)(3)(C)(i); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Dennis v. United States, 384 U.S. 855 (1966); United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

A few courts have granted witnesses pretrial access to grand jury transcripts absent a showing of particularized need, reasoning that Rule 6(e) does not prohibit disclosure to a witness who already has knowledge of his testimony.<sup>77</sup>

2. Antitrust Division policy regarding disclosure of grand jury transcript to a witness

Given the case law noted above, a witness is not entitled to automatic access to a transcript of his grand jury testimony. However, as part of an attorney's preparation for trial, he may allow a witness to review his prior grand jury testimony.<sup>78</sup>

In some jurisdictions, an attorney for the Government may need to obtain an order under Rule 6(e)(3)(C)(i) before disclosing the witness' transcript to the witness. The Government's motion for disclosure should state that disclosure to a prospective witness of his grand jury testimony is necessary to assist the witness in preparing for trial or an upcoming grand jury session and involves minimal secrecy concerns.

Attorneys should consult the case law in their jurisdiction and discuss the local practice with the United States Attorney's office before disclosing to a witness a transcript of his grand jury testimony.

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<sup>77</sup>In re Sealed Motion, 880 F.2d 1367 (D.C. Cir. 1989); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); United States v. Heinze, 361 F. Supp. 46, 57 (D. Del. 1973).

<sup>78</sup>See United States v. Garcia, 420 F.2d 309 (2d Cir. 1970); United States v. Heinze, 361 F. Supp. 46 (D. Del. 1973).

3. Disclosure to a witness of another's grand jury transcript or testimony

It is improper to disclose the grand jury testimony of one witness to another witness. In United States v. Bazzano, 570 F.2d 1120, 1124-26 (3d Cir. 1977), cert. denied, 436 U.S. 917 (1978), the court held that Rule 6(e) is violated whenever a Government attorney or agent discloses the grand jury testimony of one witness to another in order to shape either or both witnesses' trial testimony. The court, however, distinguished such improper disclosure from the acceptable practice of a prosecutor who, in a pretrial interview (or in the grand jury room), restates in general terms the evidence which other witnesses have given.

4. Disclosure to a witness of documents subpoenaed from another party

It may be necessary for the staff to disclose to a witness documents subpoenaed from another party in order to impeach the witness, refresh the witness' recollection, authenticate a document, identify handwriting or encourage truthful testimony. Before a witness is shown a document subpoenaed from another party, attorneys should be thoroughly familiar with the case law and the local rules governing the disclosure of subpoenaed documents in the jurisdiction in which they are practicing.<sup>79</sup>

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<sup>79</sup>Staff should also be aware of any legal restrictions other than Rule 6(e) imposed on the disclosure and use of subpoenaed documents, such as bank records. See Right to Financial Privacy Act, 12 U.S.C. § 3420.

The case law on whether subpoenaed documents constitute matters occurring before a grand jury is not settled.<sup>80</sup> Many courts have reasoned that when a particular subpoenaed document is sought or disclosed for a lawful and independent purpose "for its own sake - for its intrinsic value in the furtherance of a lawful investigation," it does not necessarily constitute a matter occurring before the grand jury.<sup>81</sup>

The approach adopted by the Third, Seventh, and District of Columbia Circuits requires the court to conduct a factual inquiry into whether disclosure of subpoenaed documents will reveal the inner workings of the grand jury.<sup>82</sup> Several district courts have also used this approach to various degrees.<sup>83</sup> Under this approach, only those subpoenaed documents revealing some secret aspect of a grand jury's investigation would be governed by Rule 6(e) and would require a showing of "particularized need" before disclosure would be permitted. Accordingly, a court order allowing disclosure to a witness might not be necessary in these jurisdictions.

Other courts have held that subpoenaed documents and transcripts of grand jury testimony are subject to the same degree of secrecy and that the court must balance the need of the party seeking disclosure against the effect

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<sup>80</sup>See § B.2., supra for a full discussion of the treatment of subpoenaed documents under Rule 6(e).

<sup>81</sup>SEC v. Dresser Indus., 628 F.2d 1368, 1382-83 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980); United States v. Interstate Dress Carriers, Inc., 280 F.2d 52, 54 (2d Cir. 1960).

<sup>82</sup>Fund for Constitutional Gov't v. National Archives & Records Serv., 656 F.2d 856, 869-70 (D.C. Cir. 1981); In re Grand Jury Investigation, 630 F.2d 996, 1001 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re Grand Jury Proceedings (Miller Brewing Co.), 687 F.2d 1079, 1090 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

<sup>83</sup>E.g., In re Doe, 537 F. Supp. 1038 (D.R.I. 1982) (thorough review of case law on the applicability of Rule 6(e) to grand jury documents).

such disclosure would have on the policies underlying grand jury secrecy.<sup>84</sup> In these jurisdictions, a court order would be necessary before showing a witness documents subpoenaed from another party.

F. Disclosure to Defendant - Bases for Pre-Trial Discovery of Grand Jury Material

There are four commonly encountered bases for disclosure of grand jury material to a criminal defendant. Three of these are covered by specific provisions of the Federal Rules of Criminal Procedure; the fourth (Brady material) has its origin in due process analysis.

1. Disclosure to defendant of his own testimony

Rule 16(a)(1)(A) provides that, upon request, an individual defendant shall be permitted to inspect and copy or photograph:

- (1) written or recorded statements by him;
- (2) oral statements made by the defendant to a person then known to the defendant to be a Government agent; and

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<sup>84</sup>In re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988); Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1008-09 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Investigation of Cuisinarts, Inc., 516 F. Supp. 1008, 1022 n.17 (D. Conn.), aff'd on other grounds, 665 F.2d 24 (2d Cir. 1981), cert. denied, 460 U.S. 1068 (1982); In re Grand Jury Disclosure, 550 F. Supp. 1171, 1177 (E.D. Va. 1982).



(3) testimony of a defendant before a grand jury which relates to the events charged.

Grand jury testimony is producible to a defendant only if "relevant" to the case in which production is requested.<sup>85</sup> With respect to corporate defendants, Rule 16(a)(1)(A) provides that, upon request, the corporation may obtain transcripts of relevant grand jury testimony of its officers or employees who had the authority to bind the corporation legally for the alleged offense, either at the time of their testimony or when the alleged offense was committed.<sup>86</sup> Division policy is to require a written representation from defendants' counsel that the employees were in a position to bind the corporation before disclosing their statements.<sup>87</sup> The grand jury witness whose testimony is to be produced should be notified of the Rule 16 motion since the witness has standing to object to disclosure.<sup>88</sup>

The Government is not required by Rule 16 to disclose the transcript of a non-defendant witness who reiterates what was said by a defendant.<sup>89</sup> Such a transcript, however, may have to be disclosed under the Jencks Act and Rule 26.2, as discussed below.

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<sup>85</sup>United States v. Disston, 612 F.2d 1035, 1037 (7th Cir. 1980).

<sup>86</sup>At least one court has held that a corporate defendant is entitled to non-grand jury statements to the same extent as an individual defendant. In re United States, 918 F.2d 138 (11th Cir. 1990).

<sup>87</sup>Normally, an order is entered that restricts any further disclosure of such testimony by the corporate defendant.

<sup>88</sup>See United States v. RMI Co., 599 F.2d 1183 (3d Cir. 1979); United States v. White Ready-Mix Concrete Co., 449 F. Supp. 808 (N.D. Ohio 1978).

<sup>89</sup>See United States v. Callahan, 534 F.2d 763 (7th Cir.), cert. denied, 429 U.S. 830 (1976); United States v. Walk, 533 F.2d 417 (9th Cir. 1975).

2. Disclosure of grand jury transcripts of Government witnesses pursuant to the Jencks Act and Rule 26.2

Both the Jencks Act, 18 U.S.C. § 3500, and Fed. R. Crim. P. 26.2,<sup>90</sup> provide that, upon motion, a criminal defendant is entitled to the production of the prior statements of the prosecution witnesses on relevant matters after such witnesses have testified on direct examination. Under Rule 26.2(f)(3), which carries forward a provision that was added to the Jencks Act in 1970, "a statement, however taken or recorded, or a transcription thereof, made by the witness to a grand jury" is included in the definition of "statement." The Jencks Act applies only to criminal trials, not to pretrial proceedings, such as suppression or preliminary hearings.<sup>91</sup>

The Government is required to produce only those transcripts that relate to the subject matter of the witness' testimony.<sup>92</sup> When there is a dispute as to whether the transcript relates to the subject matter, the court determines whether the transcript ought to be produced in whole or in part. If, after reviewing the challenged transcript in camera, the court concludes that only part of a witness' grand jury transcript relates to the subject matter

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<sup>90</sup>Rule 26.2, which became effective on December 1, 1980, transfers the substance of the Jencks Act from Title 18 to the Federal Rules of Criminal Procedure and makes production of "statements" of a witness to the opposing side an obligation of the defendant as well as the prosecution.

<sup>91</sup>United States v. Sebastian, 497 F.2d 1267, 1268-70 (2d Cir. 1974); United States v. Montos, 421 F.2d 215, 220-21 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); Robbins v. United States, 476 F.2d 26, 32 (10th Cir. 1973).

<sup>92</sup>United States v. Ferreira, 625 F.2d 1030, 1034 (1st Cir. 1980); United States v. Keller, 512 F.2d 182, 186 (3d Cir. 1975); United States v. Smaldone, 544 F.2d 456, 460 (10th Cir.), cert. denied, 430 U.S. 967 (1976).

concerning which the witness has testified, the court will excise the unrelated portions and order the remainder of the transcript to be produced to the moving party. This procedure is required by Rule 26.2(c) which provides:

If the other party claims that the statement contains matter that does not relate to the subject matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness has testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over his objection shall be preserved by the attorney for the government, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

The Jencks Act and Rule 26.2 require that the court-ordered production of a witness' grand jury transcript be made after the witness has completed his direct testimony,<sup>93</sup> however, if appropriate concessions are made by defendants, arrangements may sometimes be made to provide Jencks Act materials to the defendant in advance of trial. The trial court is without power to order the early disclosure of Jencks Act materials.<sup>94</sup>

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<sup>93</sup>United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979); United States v. Callahan, 534 F.2d 763 (7th Cir.), cert. denied, 429 U.S. 830 (1976); United States v. Eisenberg, 469 F.2d 156 (8th Cir. 1972), cert. denied, 410 U.S. 992 (1973); see United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987); United States v. Liuzzo, 739 F.2d 541 (11th Cir. 1984). But see United States v. Short, 671 F.2d 178 (6th Cir.), cert. denied, 457 U.S. 1119 (1982).

<sup>94</sup>See, e.g., United States v. Sebastian, 497 F.2d 1267 (2d Cir. 1974); United States v.  
(continued...)

3. Disclosure of grand jury transcripts upon a showing of grand jury abuse - Rule 6(e)(3)(C)(ii)

Under Rule 6(e)(3)(C)(ii), a court may allow the disclosure of matters occurring before a grand jury at the request of a defendant "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." A presumption of regularity attaches to grand jury proceedings,<sup>95</sup> and the party charging an abuse of the grand jury process carries a heavy burden even to get a hearing on the allegations.<sup>96</sup> In response to such motions to dismiss, courts are generally receptive to the Government's ex parte submission of the grand jury matters at issue for in camera review.

A defendant seeking the production of grand jury transcripts must do more than make general unsubstantiated or speculative allegations of impropriety concerning a grand jury's proceedings to prevail under Rule 6(e)(3)(C)(ii).<sup>97</sup> The defendant's motion must establish that grounds truly may exist and that the requested

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<sup>94</sup>(...continued)

Peterson, 524 F.2d 167, 175 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976). But see United States v. Evans & Assoc. Constr. Co., 857 F.2d 720 (10th Cir. 1988).

<sup>95</sup>See United States v. DeVincent, 632 F.2d 147, 154 (1st Cir. 1980); In re Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980); United States v. West, 549 F.2d 545, 554 (8th Cir.), cert. denied, 430 U.S. 956 (1977).

<sup>96</sup>See In re Special April 1977 Grand Jury, 587 F.2d 889, 892 (7th Cir. 1978); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983). See generally Ch. IV § I., infra for a discussion of grand jury abuse.

<sup>97</sup>See United States v. Budzanoski, 462 F.2d 443 (3d Cir.), cert. denied, 409 U.S. 949 (1972); United States v. Edelson, 581 F.2d 1290, 1291 (7th Cir.), cert. denied, 440 U.S. 908 (1979); United States v. Harbin, 585 F.2d 904, 907 (8th Cir. 1978); United States v. Ferreboeuf, 632 F.2d 832, 835 (9th Cir. 1980), cert. denied, 450 U.S. 934 (1981).

grand jury materials are necessary for a court to determine the allegations of abuse. Defense counsel usually fail to make the requisite showing.<sup>98</sup>

#### 4. Disclosure of Brady material

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held that suppression by the prosecution of evidence favorable to a defendant who has requested it violates due process if the evidence is material either to guilt or punishment, regardless of the good or bad faith of the Government attorneys in not producing it. Brady did not create an absolute right of access to grand jury testimony of possible defense witnesses.<sup>99</sup>

To the extent that the Brady material is contained in grand jury materials other than transcripts of witnesses who will testify, it should be produced. The Government satisfies its Brady obligation so long as it discloses Brady material in sufficient time for the defendant to make effective use of it.<sup>100</sup> When Brady material,

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<sup>98</sup>See United States v. Williams, 644 F.2d 950 (2d Cir. 1981); United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Fife, 573 F.2d 369 (6th Cir. 1976), cert. denied, 430 U.S. 933 (1977); United States v. Edelson, 581 F.2d at 1291; United States v. Harbin, 585 F.2d at 907; United States v. Ferreboeuf, 632 F.2d at 835; United States v. Cole, 755 F.2d 748 (11th Cir. 1985).

<sup>99</sup>See Weatherford v. Bursey, 429 U.S. 545, 559 (1977); United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); United States v. Presser, 844 F.2d 1275, 1284 (6th Cir. 1988); Gollaher v. United States, 419 F.2d 520 (9th Cir.), cert. denied, 396 U.S. 960 (1969).

<sup>100</sup>United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir.), cert. denied, 474 U.S. 1005 (1985); United States v. Presser, 844 F.2d at 1283-84.

either exculpatory or impeaching, is contained in Jencks Act material, disclosure is timely if the Government complies with the Jencks Act.<sup>101</sup>

G. Disclosure to Another Grand Jury—Rule 6(e)(3)(C)(iii)

Rule 6(e)(3)(C)(iii) permits the disclosure of grand jury material "when the disclosure is made by an attorney for the government to another federal grand jury." This exception to Rule 6(e), adopted in 1983, codified the existing case law that permitted, in some circumstances, the disclosure of grand jury material from one grand jury to another.<sup>102</sup> No court order is required prior to disclosure nor must the court be notified of the disclosure.<sup>103</sup> The rule applies to transfers between grand juries in the same district and to transfers between grand juries in different districts.

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<sup>101</sup>United States v. Martino, 648 F.2d 367, 384 (5th Cir. Unit B June 1981), cert. denied, 456 U.S. 943 (1982); see also United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979) (court invalidated discovery order requiring pretrial disclosure of exculpatory Brady material contained in Jencks Act statements).

<sup>102</sup>See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Garcia, 420 F.2d 309 (2d Cir. 1970); United States v. Penrod, 609 F.2d 1092 (4th Cir.), cert. denied, 446 U.S. 917 (1979).

<sup>103</sup>See United States v. Claiborne, 765 F.2d 784 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

H. Disclosure Under Court Order-Rule 6(e)(3)(C)(i)

Rule 6(e)(3)(C)(i) provides that:

Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made

- (i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

1. Must be "preliminarily to or in connection with a judicial proceeding"

a. Definition of "judicial proceeding"

The leading definition of judicial proceeding was provided by Judge Learned Hand in Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958):

[T]he term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.

Under this definition, courts have held that the following qualify as judicial proceedings: the grand jury's own proceedings,<sup>104</sup> other grand juries,<sup>105</sup> attorney and judicial disciplinary proceedings,<sup>106</sup> police officer disciplinary proceedings,<sup>107</sup> Internal Revenue Service and Tax Court proceedings,<sup>108</sup> impeachment hearings,<sup>109</sup> state grand jury proceedings<sup>110</sup> and state criminal trials.<sup>111</sup> The critical factor common to these proceedings is that any post-investigation use of the information would necessarily involve resort to the judicial system. Judicial proceedings that are instituted solely to obtain grand jury materials, while technically meeting the definition of "judicial proceeding", do not fall within the scope of Rule 6(e)(3)(C)(i).<sup>112</sup>

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<sup>104</sup>See In re 1979 Grand Jury Proceedings, 479 F. Supp. 93 (E.D.N.Y. 1979).

<sup>105</sup>See United States v. Stanford, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979); United States v. Mayes, 670 F.2d 126 (9th Cir. 1982). Contra United States v. Tager, 638 F.2d 167 (10th Cir. 1980). New Rule 6(e)(3)(C)(iii) eliminates this conflict.

<sup>106</sup>In re Federal Grand Jury Proceedings, 760 F.2d 436 (2d Cir. 1985); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978); In re Barker, 741 F.2d 250 (9th Cir. 1984). But see In re Grand Jury 89-4-72, 932 F.2d 481 (6th Cir. 1991).

<sup>107</sup>See Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), In re Grand Jury Transcripts, 309 F. Supp. 1050 (S.D. Ohio 1970).

<sup>108</sup>See Patton v. C.I.R., 799 F.2d 166 (5th Cir. 1986); Patrick v. United States, 524 F.2d 1109 (7th Cir. 1975).

<sup>109</sup>See Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974).

<sup>110</sup>See In re Disclosure of Evidence, 650 F.2d 599 (5th Cir. Unit B July 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B Nov. 1981).

<sup>111</sup>See In re Grand Jury Proceedings, 654 F.2d 268, 271-72 (3d Cir.), cert. denied, 454 U.S. 1098 (1981); In re Grand Jury Proceedings, 483 F. Supp. 422 (E.D. Pa. 1979).

<sup>112</sup>See American Friends Serv. Comm. v. Webster, 720 F.2d 29 (D.C. Cir. 1983).



When a Government agency seeks disclosure for use in an administrative proceeding for which no judicial action is planned, the majority of courts will not permit disclosure. For example, the courts have held that the following ordinary administrative proceedings do not qualify as judicial proceedings: parole revocation hearings,<sup>113</sup> Federal Energy Regulatory Commission preliminary investigations,<sup>114</sup> Federal Maritime Commission adjudicatory hearings,<sup>115</sup> state medical board investigations,<sup>116</sup> and Federal Trade Commission investigations.<sup>117</sup> The essential difference between judicial proceedings and ordinary administrative proceedings is that in the former, judicial review is clearly intended to be part of the decision-making process while in the latter, judicial review remains speculative.

b. Definition of "preliminarily to"

The Supreme Court in United States v. Baggot, 463 U.S. 476 (1983), held that a civil tax audit is not preliminary to a judicial proceeding within the meaning of Rule 6(e)(3)(C)(i). In reaching this conclusion, the Court enunciated a two-pronged definition of "preliminarily to." First, Rule 6(e)(3)(C)(i) "contemplates only uses related

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<sup>113</sup>See Bradley v. Fairfax, 634 F.2d 1126 (8th Cir. 1980).

<sup>114</sup>See In re J. Ray McDermott and Co., 622 F.2d 166 (5th Cir. 1980).

<sup>115</sup>See United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980).

<sup>116</sup>See United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980).

<sup>117</sup>See In re Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962).

fairly directly to some identifiable litigation, pending or anticipated."<sup>118</sup> 118/ Disclosure is not "preliminarily to" a judicial proceeding "if the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding."<sup>119</sup> Second, litigation must be more than a remote contingency. The Court left open the question of just "how firm an agency's decision to litigate must be before its investigation can be characterized as "preliminar[y] to a judicial proceeding!"<sup>120</sup>

## 2. Must show particularized need

A court may permit disclosure of grand jury materials under Rule 6(e)(3)(C)(i) only when the requesting party has demonstrated a "particularized need" for the material. The particularized need standard was refined in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Under the standard, the movant must demonstrate that the material is "needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed. . . . [Moreover], in considering the effects of disclosure of grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of

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<sup>118</sup>463 U.S. at 480.

<sup>119</sup>Id.

<sup>120</sup>Id. at 482 n.6.

future grand juries."<sup>121</sup> Both private litigants and the Government must show particularized need.<sup>122</sup> If the court concludes that disclosure is warranted, it must be limited to only that material for which particularized need has been shown.<sup>123</sup> Further, any disclosure "may include protective limitations on the use of the disclosed material."<sup>124</sup> The party seeking disclosure has the burden of proof with regard to establishing particularized need.<sup>125</sup> The district court that determines whether there is "particularized need" is vested with substantial discretion in resolving the matter that should not be disturbed absent a showing of an abuse of that discretion.<sup>126</sup>

The Supreme Court has not provided a precise definition of particularized need. In general, courts have focused on how the sought-after materials will be used. For example, disclosure may be permitted when it is sought for use in refreshing the recollection, impeaching, or testing the credibility of witnesses at trial.<sup>127</sup> Disclosure also has

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<sup>121</sup>441 U.S. at 222-23; see also United States v. Procter & Gamble, Co., 356 U.S. 677 (1958).

<sup>122</sup>United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

<sup>123</sup>Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 222; see also United States v. Sobotka, 623 F.2d 764, 768 (2d Cir. 1980); Allis-Chalmers Mfg. Co. v. City of Fort Pierce, Fla., 323 F.2d 233, 242 (5th Cir. 1963); United States v. Fischbach and Moore, Inc., 776 F.2d 839, 845-46 (9th Cir. 1985); United States v. Liuzzo, 739 F.2d 541 (11th Cir. 1984).

<sup>124</sup>Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. at 223.

<sup>125</sup>Id.

<sup>126</sup>See In re Sealed Case, 801 F.2d 1379 (D.C. Cir. 1986); In re Federal Grand Jury Proceedings, 760 F.2d 436, 439 (2d Cir. 1985); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293, 1299 (4th Cir. 1986); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986); United States v. Peters, 791 F.2d 1270 (7th Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Benson, 760 F.2d 862 (8th Cir.), cert. denied, 474 U.S. 858 (1985); United States v. Murray, 751 F.2d 1528 (9th Cir.), cert. denied, 474 U.S. 979 (1985).

<sup>127</sup>See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982); United States v. McGowan, 423 F.2d 413 (4th Cir. 1970);  
(continued...)

been permitted for the same purposes in deposition settings.<sup>128</sup> However, there is no absolute right to the grand jury testimony of a witness who later testifies in a different judicial proceeding.<sup>129</sup> Further, a request for disclosure for refreshing the recollection of a witness may be premature if it is not yet known whether the witness' recollection will, in fact, need to be refreshed.<sup>130</sup>

Several courts have examined the need for disclosure in terms of the ability of the party seeking disclosure to obtain the requested material from some other source or by some other means.<sup>131</sup> Courts have also found particularized need where one party has access to grand jury material and the party seeking disclosure does

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<sup>127</sup>(...continued)

Texas v. United States Steel Corp., 546 F.2d 626, 631 (5th Cir.), cert. denied, 434 U.S. 889 (1977); Illinois v. Sarbaugh, 552 F.2d 768, 776 (7th Cir.), cert. denied, 434 U.S. 889 (1977); United States v. Harbin, 585 F.2d 904 (8th Cir. 1978); Petrol Stops Northwest v. United States, 571 F.2d 1127, 1131 (9th Cir. 1978), rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Parker, 469 F.2d 884 (10th Cir. 1972).

<sup>128</sup>See Atlantic City Elec. Co. v. A.B. Chance Co., 313 F.2d 431 (2d Cir. 1963); United States v. Fischbach and Moore Inc., 776 F.2d at 845; see also Illinois v. Sarbaugh, 552 F.2d at 776.

<sup>129</sup>See In re Federal Grand Jury Proceedings, 760 F.2d at 439.

<sup>130</sup>See In re Grand Jury Testimony, 832 F.2d 60 (5th Cir. 1987); Illinois v. F.E. Moran, Inc., 740 F.2d 533 (7th Cir. 1984).

<sup>131</sup>See United States v. Moten, 582 F.2d 654 (2d Cir. 1978); In re Disclosure of Evidence, 650 F.2d 599, 601-02 (5th Cir. Unit B July 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B Nov. 1981); In re Grand Jury Proceeding (Miller Brewing Co.), 717 F.2d 1136 (7th Cir. 1983).

not, because it would be inequitable not to allow disclosure to the other party.<sup>132</sup> This last factor is rarely decisive but should be given some weight in determining particularized need.

On the other hand, disclosure will not be allowed upon a mere showing of relevance nor for general discovery.<sup>133</sup> Convenience, avoidance of delay, the complexity of the case, the passage of time, and expense also are insufficient reasons to justify disclosure.<sup>134</sup> While these factors are insufficient in and of themselves, they may, nonetheless, when coupled with other factors, be used to demonstrate the requisite particularized need.

### 3. Particularized need must be balanced against need for maintaining grand jury secrecy

In determining whether disclosure is permitted under Rule 6(e)(3)(C)(i), the court must balance the particularized need of the party seeking disclosure against the continuing need for secrecy. As the need for secrecy

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<sup>132</sup>See Dennis v. United States, 384 U.S. 855, 873 (1966); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d at 1302-03; Illinois v. Sarbaugh, 552 F.2d *supra*; U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656 (10th Cir.), *aff'd on rehearing*, 857 F.2d 720 (10th Cir. 1988). But see Texas v. United States Steel Corp., 546 F.2d at 630-31.

<sup>133</sup>See United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Hernly v. United States, 832 F.2d 980 (7th Cir. 1987); Thomas v. United States, 597 F.2d 656 (8th Cir. 1979); Petrol Stops Northwest v. United States, 571 F.2d at 1129.

<sup>134</sup>See Smith v. United States, 423 U.S. 1303 (1975); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); United States v. Sobotka, 623 F.2d *supra*; In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982); In re Disclosure of Evidence, 650 F.2d at 602; In re Holovachka, 317 F.2d 834 (7th Cir. 1963); In re Sells, 719 F.2d 985 (9th Cir. 1983); United States v. Liuzzo, 739 F.2d at 545.

declines, the burden of demonstrating need for the materials in question is reduced.<sup>135</sup> The burden of demonstrating that the need for disclosure outweighs the need for secrecy rests with the person seeking disclosure.<sup>136</sup>

By far the most important factor to be considered in weighing the need for continued secrecy is whether the grand jury investigation has been completed. While the grand jury investigation is pending, all of the reasons for secrecy are in full force and effect. Under these circumstances, it is virtually impossible to demonstrate sufficient need to outweigh the secrecy concerns and disclosure is virtually precluded.<sup>137</sup> Once the investigation is terminated and the grand jury is discharged, many of the reasons for maintaining secrecy are no longer valid and disclosure is

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<sup>135</sup>See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980); In re Grand Jury Investigation, 630 F.2d 996 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); United States v. Colonial Chevrolet Corp., 629 F.2d 943, 949 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981); United States v. Tucker, 526 F.2d 279, 282 (5th Cir.), cert. denied, 425 U.S. 958 (1976); Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977); In re Disclosure of Testimony, 580 F.2d 281 (8th Cir. 1978); United States v. Warren, 747 F.2d 1339 (10th Cir. 1984).

<sup>136</sup>See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); United States v. Moten, 582 F.2d 654, 662 (2d Cir. 1978).

<sup>137</sup>See United States v. Moten, 582 F.2d at 662-63; United States v. Colonial Chevrolet Corp., 629 F.2d at 949; In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d 501 (5th Cir. 1980); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986); United States v. Clavey, 565 F.2d 111 (7th Cir. 1977), cert. denied, 439 U.S. 954 (1978); In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571 (11th Cir. 1983).

more likely to be ordered.<sup>138</sup> Although the importance of secrecy may be reduced when the grand jury investigation is concluded, it is far from eliminated.<sup>139</sup>

Generally, the most significant consideration that survives the termination of the grand jury investigation is that secrecy encourages witnesses to testify fully and honestly without fear of retribution. This consideration should be given significant weight regardless of the status of the investigation.<sup>140</sup> This consideration may be limited, though not eliminated, by a showing that the requested information already has been disclosed to a witness' corporate employer, as will often be the case during discovery in a criminal proceeding. This is particularly true when the disclosed information has been shared with the employer's co-defendants.<sup>141</sup> This consideration may also be limited by a witness' consent to disclosure; however, this factor alone may not be dispositive.<sup>142</sup>

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<sup>138</sup>See United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Sobotka, 623 F.2d at 767; United States v. Rose, 215 F.2d 617 (3d Cir. 1954); United States v. Colonial Chevrolet Corp., 629 F.2d at 950; In re Grand Jury Proceedings Northside Realty Assocs., 613 F.2d *supra*; Wisconsin v. Schaffer, 565 F.2d 961 (7th Cir. 1977); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978); Petrol Stops Northwest v. United States, 571 F.2d *supra*.

<sup>139</sup>See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979); Baker v. United States Steel Corp., 492 F.2d 1074 (2d Cir. 1974); In re Grand Jury Testimony, 832 F.2d 60 (5th Cir. 1987); United States v. Fischbach and Moore Inc., 776 F.2d 839, 844 (9th Cir. 1985).

<sup>140</sup>See United States v. Sobotka, 623 F.2d at 767; Illinois v. Sarbaugh, 552 F.2d at 775; Petrol Stops Northwest v. United States, 571 F.2d 1127, 1128-29 (9th Cir. 1978), *rev'd on other grounds sub nom. Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979).

<sup>141</sup>See Illinois v. Sarbaugh, 552 F.2d at 775; U.S. Indus., Inc. v. United States Dist. Court, 345 F.2d 18 (9th Cir.), *cert. denied*, 382 U.S. 814 (1965).

<sup>142</sup>See Executive Sec. Corp. v. Doe, 702 F.2d 406 (2d Cir.), *cert. denied*, 464 U.S. 818 (1983); Illinois v. F.E. Moran, Inc., 740 F.2d 533 (7th Cir. 1984).

Another factor to be considered in balancing the need for secrecy against the need for disclosure is the type of information that is at issue. For example, there are fewer secrecy concerns raised by the disclosure of subpoenaed documents than by the disclosure of grand jury transcripts.<sup>143</sup>

Other factors that decrease the need for secrecy include a public airing of the information at trial and the passage of time.<sup>144</sup> Factors that increase the need for secrecy include the acquittal of certain defendants and the possibility of further criminal trials.<sup>145</sup>

Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977), is illustrative of the balancing approach used to determine particularized need. The court held that the State of Illinois' need for the grand jury transcripts in a private treble damage antitrust action outweighed the need for secrecy and permitted disclosure of the transcripts. The secrecy concerns had been dissipated by the termination of the grand jury investigation and the disclosure of the transcripts to defendants during criminal discovery. The diminished secrecy concerns were outweighed by the State of Illinois' need for the documents to refresh the recollection and to impeach the credibility of witnesses at trial. In addition, fairness favored disclosure since the defendants in the private action already had copies of the transcripts from the prior criminal case discovery.

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<sup>143</sup>See In re Grand Jury Proceeding (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983); In re Barker, 741 F.2d 250 (9th Cir. 1984).

<sup>144</sup>See In re Grand Jury Proceeding GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986).

<sup>145</sup>See United States v. Fischbach and Moore Inc., 776 F.2d at 844.



#### 4. Disclosure to Government agencies

Courts have recognized that the need for secrecy is less where disclosure is sought by a public body for a public purpose; however, this reduced secrecy does not create a per se particularized need.<sup>146</sup> In United States v. Sells Engineering, Inc., 463 U.S. 418 (1983), the Court held not only that Rule 6(e)(3)(C)(i) governs disclosure of materials to Government attorneys for civil purposes but, further, that the Government must show particularized need. However, the Court acknowledged that the particularized need standard "accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case".<sup>147</sup> Such considerations include: 1) the public interest served by disclosure to the Government; 2) the reduced risk of further disclosure or improper use posed by disclosure to Government attorneys as opposed to private parties or the general public; 3) the burden and cost of duplicating an extensive grand jury investigation; and 4) any independent legitimate rights that the Government may have to the materials.<sup>148</sup>

A case that is illustrative of the balancing approach used to determine particularized need when the Government is the party seeking disclosure is In re Grand Jury Proceeding GJ-76-4 & GJ-75-3, 800 F.2d 1239 (4th Cir. 1986). In that case, the Civil Division of the Department of Justice was seeking access to grand jury material

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<sup>146</sup>See United States v. Sobotka, 623 F.2d 764 (2d Cir. 1980); In re Grand Jury Matter, 697 F.2d 511 (3d Cir. 1982); In re Disclosure of Evidence, 650 F.2d 599 (5th Cir. Unit B July 1981) (per curiam), modified on other grounds, 662 F.2d 362 (5th Cir. Unit B Nov. 1981); In re Disclosure of Testimony Before the Grand Jury (Troia), 580 F.2d 281 (8th Cir. 1978).

<sup>147</sup>463 U.S. at 445.

<sup>148</sup>Id. at 445-46; see also United States v. John Doe, Inc. I, 481 U.S. 102 (1987); In re Sealed Case, 801 F.2d 1379 (D.C. Cir. 1986); In re Grand Jury Proceedings GJ-76-4 & GJ-75-3, 800 F.2d 1293 (4th Cir. 1986); In re Grand Jury Proceeding (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982), aff'd on rehearing, 717 F.2d 1136 (7th Cir. 1983).

concerning a Government contractor for use in a civil proceeding against the contractor. The court found that the need for secrecy had been greatly reduced because the grand jury had been terminated for four years, the resulting criminal proceeding had been concluded by a jury verdict following a full airing of the entire controversy, the defendant in both the criminal and civil proceedings had had unlimited possession of the grand jury material for about eight years, no witness had come forward to protest disclosure and there was less risk of further improper disclosure or improper use by disclosure to the Government. Balanced against the minimal need for secrecy was the Government's need for the grand jury materials to put it on equal terms with the civil defendant which had had access to the materials for eight years and the lapse of a substantial amount of time which had necessarily dimmed the memories of potential witnesses. Under these circumstances, the court held that disclosure to the Civil Division was entirely appropriate.

5. Disclosure to State Attorneys General

a. For civil enforcement purposes

State Attorneys General seeking access to grand jury material under section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b), are not relieved of the burden of demonstrating particularized need. In Illinois v. Abbott & Associates, Inc., 460 U.S. 557 (1983), the Supreme Court held that the state must show particularized need despite the language of section 4F(b). The Court's decision was based primarily on the legislative history of section 4F(b) and the importance and deep-rooted tradition of grand jury secrecy. The Court required an affirmative expression from Congress before adopting any exception to Rule 6(e). However, the Court did emphasize that the

particularized need standard had sufficient flexibility to take into account any public interest served by disclosure to a governmental body.

b. For criminal enforcement purposes

Subdivision 6(e)(3)(C)(iv), effective August 1, 1985, now permits disclosure otherwise prohibited by Rule 6(e):

When permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

It is the intent of the amended rule and the policy of the Department to share grand jury information to assist states in the enforcement of state criminal law whenever it is appropriate to do so. While there is no requirement for a state to demonstrate a particularized need for the grand jury information, there should be a substantial need. The Assistant Attorney General of the Division having jurisdiction over the matter that was before the grand jury, has decisional authority for applying to the court for a disclosure order. Requests from Division staff attorneys should be directed to the Assistant Attorney General through the Director of Operations. A copy of this request should be sent to each investigative agency involved in the grand jury investigation. The Department has

suggested the information that should be included in a request for authorization and the factors that should be considered by the Assistant Attorney General in making a decision to seek disclosure.<sup>149</sup>

The Division usually will oppose disclosure of grand jury material to a state attorney general while an investigation is pending but usually will request disclosure once an investigation has closed. If authorization to seek a disclosure order is granted, the proposed order must include a provision that further disclosures be limited to those required in the enforcement of state criminal laws. If the motion for disclosure is denied, a copy of the order denying the motion must be sent to the Assistant Attorney General who authorized the filing of the motion.<sup>150</sup>

#### 6. Mechanics of obtaining disclosure orders

Rule 6(e)(3)(D) and 6(e)(3)(E) govern the mechanics of seeking and obtaining disclosure orders under Rule 6(e)(3)(C)(i). These rules provide that:

- (D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such

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<sup>149</sup>See December 9, 1985 memorandum from Stephen S. Trott, then Assistant Attorney General, Criminal Division.

<sup>150</sup>For a more complete discussion of Division policies and procedures in this area, see ATD Manual, Ch. VII-18.

a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

- (E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

These rules adopt the procedure suggested by the Supreme Court in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), for resolving venue where disclosure is sought for use in a judicial proceeding instituted in a different district from that in which the grand jury sat.<sup>151</sup> The procedure requires the party seeking disclosure to file a motion for disclosure in the district where the grand jury sat (the grand jury court). Next, the grand jury court must determine the need for continued secrecy. Where the need for continued secrecy remains high, for example, when the grand jury investigation is still active, the grand jury court may decide that disclosure is inappropriate, regardless of need, and deny the motion. If the grand jury court decides that disclosure may be

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<sup>151</sup>See also Bast v. United States, 542 F.2d 893 (4th Cir. 1976); In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d 1293 (5th Cir.), cert. denied, 437 U.S. 905 (1978); Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977).

appropriate, the grand jury court should transfer the requested materials with a statement evaluating the need for continued secrecy to the court where the civil proceeding is located (the civil court). Finally, the civil court should determine particularized need and balance it against the need for continued secrecy as stated by the grand jury court.

Where the person seeking disclosure is not the Government, Rules 6(e)(3)(D) and (E) also require notice to and the opportunity to be heard for the attorney for the Government, the parties to the judicial proceeding and such other parties as the court may direct. The Notes of the Advisory Committee for the Federal Rules of Criminal Procedure indicate that the last clause should include all persons who might suffer substantial injury from disclosure.<sup>152</sup> If the party seeking disclosure is the Government, then the proceeding may be ex parte, although the courts have the discretion to conduct adversary hearings.<sup>153</sup> Division attorneys should ordinarily file Rule 6(e)(3)(C)(i) motions ex parte whenever a public filing would result in a breach of grand jury secrecy.

Under Rule 6(e)(5), hearings on motions for disclosure should be closed to the public. This is necessary to prevent the disclosure of any grand jury information that may be discussed at the hearing.

The law on whether disclosure orders are appealable is unclear. Generally, while the grand jury is sitting, an order denying disclosure is not appealable because of the potential disruptions that would occur.<sup>154</sup> A writ of mandamus may be available to review an order denying disclosure in certain extraordinary circumstances, but such

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<sup>152</sup>See also Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

<sup>153</sup>See In re Grand Jury Investigation, 774 F.2d 34 (2d Cir. 1985), rev'd on other grounds sub nom. United States v. John Doe, Inc., 481 U.S. 102 (1987); In re Grand Jury Matter (Catania), 682 F.2d 61 (3d Cir. 1982).

<sup>154</sup>See In re Grand Jury Proceedings, 580 F.2d 13, 15 (1st Cir. 1978).

review is rare.<sup>155</sup> The grant or denial of a disclosure order also may be appealable if the disclosure motion is the only matter pending before the federal court and appellate review otherwise might be lost,<sup>156</sup> or if the controversy over disclosure arose in an independent, plenary proceeding.<sup>157</sup> Finally, most courts have held that orders transferring grand jury materials from the court where the grand jury sat to a court that is conducting subsequent proceedings are not appealable.<sup>158</sup> Courts differ, however, on whether an order by a court conducting a subsequent civil proceeding permitting disclosure is appealable.<sup>159</sup>

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<sup>155</sup>See United States v. Weinstein, 511 F.2d 622, 624 (2d Cir.), cert. denied, 422 U.S. 1042 (1975); In re Grand Jury Subpoenas, April 1978, 581 F.2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979); In re Moore, 776 F.2d 136 (7th Cir. 1985).

<sup>156</sup>See United States v. Sobotka, 623 F.2d 764, 766 (2d Cir. 1980).

<sup>157</sup>See Baker v. United States Steel Corp., 492 F.2d 1074, 1077-78 (2d Cir. 1974) (dictum); In re Grand Jury Investigation, 630 F.2d 996, 999 (3d Cir.), cert. denied, 449 U.S. 1081 (1980); In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d at 1300 (dictum); Illinois v. Sarbaugh, 552 F.2d at 773.

<sup>158</sup>See Baker v. United States Steel Corp., 492 F.2d at 1077-78; In re 1975-2 Grand Jury Investigation of Associated Milk Producers, Inc., 566 F.2d at 1300. But see In re Grand Jury Proceedings (Alpha Portland Indus. Inc.), 649 F.2d 387, 388 (6th Cir.), cert. dismissed, 453 U.S. 946 (1981).

<sup>159</sup>See Baker v. United Steel Corp., 492 F.2d at 1077-78 (order for disclosure was nonappealable); Illinois v. F.E. Moran, Inc., 740 F.2d 533 (7th Cir. 1984) (disclosure order in subsequent civil case is appealable if appeal will not delay criminal proceeding); United States v. Fischbach and Moore, Inc., 776 F.2d 839 (9th Cir. 1985) (order for disclosure is appealable).

I. Use of Materials in Investigation

1. Quotation of transcripts in motions and briefs

It is often necessary to quote from transcripts in motions and briefs. Although staff attorneys should keep this to a minimum, it may be unavoidable, for example, when defending against a claim of prosecutorial abuse.

Precautions should be taken when filing motions and briefs that contain Rule 6(e) material. Attorneys should consider filing a motion requesting the court to place the document – or, at a minimum, the portion with not previously disclosed Rule 6(e) material – under seal. A frequently followed practice is to place all of the Rule 6(e) material in a separate memorandum for the court only, advising defense counsel of the filing but not providing them with a copy of the memorandum.

The most commonly applied rule regarding the appropriateness of an in camera submission is contained in In re Taylor, 567 F.2d 1183 (2d Cir. 1977), at 1188:

In order to determine, therefore, whether the in camera proceeding conducted by the district court afforded appellant all of the process to which he was entitled, the nature of the Government interest must be balanced against the private interests that are affected by the court's action.<sup>160</sup>

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<sup>160</sup>See also In re John Doe Corp., 675 F.2d 482 (2d Cir. 1982); In re Antitrust Grand Jury, 805 F.2d 155, 161-62 (6th Cir. 1986); In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980).



If the party objecting to the in camera submission is the target of an ongoing investigation, then the balance should always be weighed in favor of the Government.<sup>161</sup>

## 2. Using subpoenaed documents to refresh recollection

The documents subpoenaed by the grand jury can be very useful in refreshing a witness' recollection. Documents such as telephone records, pricing sheets, correspondence and memoranda can help a cooperative witness recall specific details and place events in a proper time sequence. Similarly, confronting a recalcitrant witness with hard documentary evidence may prod the witness to remember, or at least admit to, things he might otherwise not recall or deny.

The disclosure of subpoenaed documents raises concerns involving the secrecy requirements of Rule 6(e) and, to a lesser extent, the proprietary nature of some company documents. As a threshold matter, staff should consult the local rules, the case law, and the U.S. Attorney's office in the jurisdiction where the grand jury is sitting to determine whether subpoenaed documents are considered "matters occurring before the grand jury". As previously noted, this is an area in which the courts differ widely.<sup>162</sup>

As a practical matter, most jurisdictions will neither explicitly allow nor prohibit the disclosure of subpoenaed documents to witnesses. While the general rule is that individual documents subpoenaed by the grand

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<sup>161</sup>In re Antitrust Grand Jury, 805 F.2d at 162.

<sup>162</sup>See § B.2., supra for a discussion of the treatment of subpoenaed documents under Rule 6(e).

jury do not constitute "matters occurring before the grand jury," disclosure of a large number of documents could reveal the scope or direction of the grand jury and, thus, implicate one of the secrecy concerns of the rule.

a. Inside grand jury room

Attorneys often disclose subpoenaed documents to grand jury witnesses during the course of their appearances to refresh recollection and elicit more detailed and accurate testimony. Documents can pin down the dates and times of contacts, the attendance at meetings, the movement of prices over time and – in the case of some correspondence and memoranda – the substance of conversations. Disclosure of documents for these purposes is consistent with the grand jury's obligation to elicit information and examine "every clue" to determine if a crime has been committed.<sup>163</sup>

In the course of a witness' grand jury testimony, many attorneys take the opportunity to authenticate and lay a foundation for a subpoenaed document if it is considered likely to become a trial exhibit. This has been found helpful in: (1) obtaining stipulations to the document's authenticity at trial; (2) identifying at an early stage a problem in establishing the document's authenticity; and (3) locking a witness into a line of testimony concerning the exhibit for trial. Particular care should be taken if the witness might not be available, because of identification with a target, for interviews in a post-indictment context. However, because document authentication may be time-consuming, it should be done only with important documents and care must be taken not to waste precious grand jury time or unnecessarily bore grand jurors.

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<sup>163</sup>Blair v. United States, 250 U.S. 273, 282 (1919); Carroll v. United States, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763 (1927).

One issue arising in this context is whether documents subpoenaed from a company other than the witness' employer may be shown to a witness.<sup>164</sup> As an initial matter, local practice and the law in the district where the grand jury is sitting must be checked. Assuming that the practice is not prohibited, it may be very helpful to disclose such documents on occasion to prod a witness' memory and help elicit a more detailed account of pertinent events. As with the disclosure of other documents, this disclosure is consistent with and, indeed, necessary for the grand jury to discharge its obligation to investigate fully and ferret out all pertinent facts. Care must be taken not to disclose needlessly the proprietary information from one company to the representative of another and to be aware of any other legal restrictions that may govern disclosure.<sup>165</sup>

It is important that an accurate record be made whenever subpoenaed documents are disclosed to a witness in the grand jury room. The document should be clearly identified and, when appropriate, marked as a grand jury exhibit. This will help produce a clearer transcript and may protect against charges of impropriety and unauthorized disclosure in the future.

b. Outside the grand jury room

There is often not enough grand jury time to show a witness all pertinent documents in the grand jury room. Sometimes, with a cooperating witness, staff would like the witness to examine the documents at his leisure so that he has ample time to fully supplement his memory and piece together a detailed and chronological account

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<sup>164</sup>See § E.4., *supra*, for a discussion of disclosure to a witness of documents subpoenaed from another party.

<sup>165</sup>See, e.g., Right to Financial Privacy Act, 12 U.S.C. § 3420.

of what occurred. This ensures maximum accuracy and orderly testimony. In these instances, showing the witness documents during an interview outside the grand jury room is most helpful and appropriate.

There is little problem in showing a witness his own company's documents outside the grand jury room. The question becomes more difficult in the case of a former employee who, for example, authored the documents, or a third-party witness. In these situations, great care must be taken to safeguard the proprietary nature of the documents.

Various safeguards have been adopted in connection with the disclosure of documents to a third-party witness. For example, some attorneys do not reveal the source of the document (*i.e.*, which company produced it to the grand jury), showing the witness a copy with all identifying codes removed. Other attorneys have entered into confidentiality agreements pertaining to the Government's use of the documents with subpoenaed parties. Such agreements contain language to the effect that the Government would reveal the company's documents during interviews only as necessary to conduct the investigation. The company thus implicitly approves reasonable disclosure of their documents to third parties.

Finally, some courts and the U.S. Attorneys' offices have approved the practice of using an agent to review subpoenaed documents outside the presence of the grand jury. The agent then presents a summary, analysis or explanation of the documents to the grand jury.<sup>166</sup> This procedure usually involves expert witnesses, such as Treasury or FBI agents or economists.

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<sup>166</sup>See In re April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1957).

3. Using grand jury testimony to refresh recollection

Disclosing an individual's own prior testimony to a grand jury witness may be useful when he is testifying before the grand jury for a second time (either to recant and correct prior testimony or to provide additional information) or in the course of preparing him as a witness for trial. Occasionally, an attorney may consider revealing the substance of one witness' testimony to another in the hope of eliciting truthful testimony. However, the attorney should be careful not to reveal any information that would identify the prior witness.

a. During grand jury session

It is often necessary for a witness to appear a second time before the grand jury. The witness may have been untruthful during his first appearance and wish to recant or it may be useful to expand on his initial testimony. In both cases, it is common for the witness (or his counsel) to seek access to the transcript of the witness' testimony. In most jurisdictions, the witness is not entitled to automatic access to his transcript.<sup>167</sup> In these jurisdictions, a Rule 6(e) order must be obtained to allow disclosure of the transcript to the witness and his counsel.<sup>168</sup>

Sometimes, in seeking to refresh recollection or confront a witness with contradictory information, staff may consider revealing the statements of or information provided by one witness to another. Opinions differ as to

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<sup>167</sup>See §§ E.1. and E.2., supra concerning the witness' right of access to his own transcript and the Division's policy regarding such disclosure.

<sup>168</sup>See § H., supra. Attorneys should consult the case law in their jurisdiction and discuss the local practice with the United States Attorney's Office as to whether a 6(e) order is necessary if the transcript is disclosed to the witness alone.

the efficacy of such disclosure in eliciting a witness' truthful testimony. Some attorneys do not find it useful and, instead, focus upon making as detailed a record as possible to preserve a possible perjury charge. Others think that some disclosure could prod a witness to change his testimony or remember something he might otherwise "not recall." In these circumstances, most agree that little of the other evidence should be revealed, for tactical reasons as well as Rule 6(e) concerns. Most attorneys reveal only that the grand jury has heard contradictory evidence. Again, care should be taken not to reveal any information that would disclose the identities of prior witnesses.

b. Preparation for trial

Most attorneys find it very helpful to allow a prospective trial witness to see his grand jury testimony when preparing for trial. This often requires a Rule 6(e) disclosure order that should be obtained early in the pretrial stage. The order typically provides that the witness may be provided a copy of his transcript which he may show his counsel, but that no copies or other disclosure may be made. The copy of the transcript must be returned at the conclusion of the trial. In some jurisdictions, a witness may read the transcript of his grand jury testimony without a Rule 6(e) order.<sup>169</sup> In any case, the transcript provided to the witness should contain only his testimony, with all colloquy between Government attorneys and grand jurors removed.

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<sup>169</sup>See United States v. Garcia, 420 F.2d 309 (2d Cir. 1970).

## J. Disclosure to Computer Specialists

Lengthy criminal investigations that involve large volumes of testimony and documents often require the assistance of computer specialists (e.g., computer programmers, document coders and transcript keyers) to organize the accumulated information. When disclosing grand jury information to computer specialists, attorneys should be sure to file the requisite notices or to seek the appropriate orders.

If the computer specialist is a Federal Government employee, then no court order is necessary because disclosure falls within Rule 6(e)(3)(A)(ii).<sup>170</sup> A notice of disclosure should be filed with the court under Rule 6(e)(3)(B).

The computer specialists used by the Division usually are employed by private contractors. There is some authority for treating private contractors the same as permanently employed Government personnel under Rule 6(e)(3)(A)(ii).<sup>171</sup> Nonetheless, attorneys should check with the U.S. Attorneys Office for the district in which the grand jury is sitting and follow the practice used by that office. The practice followed by most U.S. Attorneys Offices is to seek a court order under Rule 6(e)(3)(C)(i).<sup>172</sup> Samples of the necessary pleadings, including affidavits, memoranda in support of motions, and proposed orders, may be obtained from the Division's Information System Support Group. Also included in this package is the confidentiality agreement entered into between the Division and the private contractor. This agreement should be included in the papers filed with the court to demonstrate that the secrecy of the grand jury will not be breached significantly by disclosure.

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<sup>170</sup>See § D., *supra*.

<sup>171</sup>See *United States v. Lartey*, 716 F.2d 955 (2d Cir. 1983).

<sup>172</sup>See § H., *supra*.

## K. Non-Disclosure Orders

### 1. Restrictions on witnesses

Witnesses may not be put under any obligation of secrecy because Rule 6(e) specifically prohibits any obligation of secrecy from being "imposed on any person except in accordance with this rule."<sup>173</sup> Consequently, witnesses are free to discuss their testimony with their own counsel, counsel for potential targets or anyone else they so choose. In appropriate circumstances, the grand jury foreman or the Government attorney may request that a witness not make any unnecessary disclosures because of possible interference with the investigation. However, when making such a request, it should be extremely clear that it is a request only and not a command and that the person making the request uses no express or implied coercion.

### 2. Protective orders

The court may regulate the disclosure of materials turned over under court order to limit to the maximum extent possible the invasion of grand jury secrecy.<sup>174</sup> The nature and scope of the protective order will vary depending upon the circumstances of a given case. Generally, the greater the need for secrecy and the greater the risks of subsequent disclosure, the more stringent the protective order.

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<sup>173</sup>See § A. 5., *supra*.

<sup>174</sup>See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).



Illinois v. Sarbaugh, 552 F.2d 768 (7th Cir.), cert. denied, 434 U.S. 889 (1977), illustrates a particularly comprehensive protective order. The court permitted the disclosure of grand jury transcripts to the State of Illinois but required the deletion of all transcript portions that were irrelevant to the State's case. Secondly, the court permitted use of the transcripts in the pending litigation only and then only for impeaching the credibility of witnesses, refreshing their recollection, or discrediting them. Finally, the court permitted disclosure to a single attorney, required that attorney to keep a log of all subsequent disclosures, prohibited the copying of the transcripts and required the return of the transcripts once they were no longer needed.

#### L. Sanctions

Rule 6(e)(2) provides that a "knowing violation of Rule 6 may be punished as a contempt of court." Thus, the court with appropriate jurisdiction may issue a contempt citation against a Government attorney who knowingly discloses or uses information in violation of Rule 6(e).<sup>175</sup> However, contempt is a severe sanction and Division attorneys should argue that lesser sanctions, if any, would be appropriate to remedy improper disclosures. For example, attorneys who have improperly used Rule 6(e) materials for civil law enforcement purposes may argue that the appropriate remedy is a prohibition against continued disclosure or use<sup>176</sup> or an order permitting disclosure of the Rule 6(e) materials to the opposing party.

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<sup>175</sup>In re Grand Jury Investigation (Lance), 610 F.2d 202, 219 (5th Cir. 1980). One court has held that a Rule 6(e) violation is punishable only as a criminal contempt and may be enforced only by the court or United States Attorney, a defendant having no private right of action. In re Grand Jury Investigation, 784 F. Supp. 1188 (E.D. Mich. 1990).

<sup>176</sup>See In re Special March 1981 Grand Jury, 753 F.2d 575 (7th Cir. 1985).

Defendants may argue more onerous sanctions such as exclusion of the improperly obtained evidence in the civil suit for which it was used, substitution of attorneys, quashing outstanding subpoenas that are based on the improperly obtained evidence or dismissal of the criminal indictment, civil case, or both.<sup>177</sup> Courts are unlikely to order such drastic remedies.

There should be no suppression of evidence if a Government employee acted in good-faith reliance on a facially valid Rule 6(e) order.<sup>178</sup> Further, a subpoena should be quashed only when there is a flagrant abuse of Rule 6(e).<sup>179</sup>

A remedy as drastic as dismissal of an indictment is clearly unwarranted, particularly when the violation of Rule 6(e) is inadvertent. As stated in United States v. Rosenfield, 780 F.2d 10, 11 (3d Cir. 1985), cert. denied, 478 U.S. 1004 (1986):

An abuse of the grand jury by the prosecution merits dismissal of an indictment only where the defendant is actually prejudiced, or "(t)here is evidence that the challenged activity was something other than an isolated incident, unmotivated by sinister ends or that the type of misconduct has become 'entrenched and flagrant' in the circuit." (citations omitted)<sup>180</sup>

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<sup>177</sup>See Barry v. United States, 865 F.2d 1317 (D.C. Cir. 1989).

<sup>178</sup>See Graham v. C.I.R., 770 F.2d 381 (3d Cir. 1985); United States v. (Under Seal), 783 F.2d 450 (4th Cir. 1986), cert. denied, 481 U.S. 1032 (1987).

<sup>179</sup>See Gluck v. United States, 771 F.2d 750 (3d Cir. 1985).

<sup>180</sup>See also In re Grand Jury Investigation (Lance), 610 F.2d *supra*; United States v. Stone, 633 F.2d 1272 (9th Cir. 1979); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656 (10th Cir.), aff'd on rehearing, 857 F.2d 720 (10th Cir. 1988); United States v. Kabbaby, 672 F.2d 857, (continued...)

M. Security of Grand Jury Information

Antitrust Division employees should be aware of the requirements for handling grand jury information contained in DOJ Order 2600.4 (Safeguarding Grand Jury Information) and Security Awareness Memorandum No.4 (October 26, 1981).<sup>181</sup> Employees working with grand jury information must exercise special precautions when using, storing, transferring and/or destroying such material.

1. Safeguards during use

When grand jury information is being used by Antitrust Division employees, it should be kept under constant observation by an authorized person who is in a position to exercise direct physical control over it. The material should be covered, turned face down, placed in storage containers, or otherwise protected when persons who should not have access are present. As soon as practical after use, the material should be returned to storage containers.

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<sup>180</sup>(...continued)  
863 (11th Cir. 1982).

<sup>181</sup>Failure to follow these internal regulations should not result in any sanctions against the Government.

2. Storage requirements

Grand jury information should be stored in a lockbar file cabinet, secured with a GSA approved combination lock or its equivalent. Documents subpoenaed by the grand jury do not need to be stored in lockbar file cabinets, but should be stored in rooms with secure door locks. Entrances and exits to rooms where grand jury information or subpoenaed grand jury documents are stored must be locked during nonworking hours, or when no authorized individual is present, to insure security of the material.

3. Safeguards during transfer

When grand jury information cannot be personally transmitted by an authorized Department of Justice employee, it should be transferred by U.S. Postal Service certified mail with return receipt. Documents subpoenaed by the grand jury can be transferred by mail or by a private courier service or mover hired by the General Services Unit of the Antitrust Division's Executive Office.

4. Return and destruction procedures

When grand jury information is no longer needed, it shall be treated in accordance with the requirements of ATR Directive 2710.1 (Procedures For Handling Division Documents). Documents subpoenaed by the grand jury should be returned to their owner when no longer needed. If the owner does not wish them returned, they should be destroyed by burning, shredding, or pulping. Other material that may contain grand jury information that

is inappropriate for permanent retention, such as copies, working papers or typewriter ribbons, should be destroyed in the same manner as grand jury information. Magnetic tapes containing grand jury information (such as computer or dictation tapes) must be erased electromagnetically before they are reused or destroyed.

5. Safeguards for word processing equipment

To protect against unauthorized access, all documents containing grand jury information that are stored in a word processing system should be password protected.

### III. SUBPOENAS

#### A. Scope of Subpoena Power

A grand jury's subpoena power is coextensive with its broad power to investigate. Accordingly, it may subpoena all witnesses, nonprivileged documents and other physical evidence relevant to its investigation, provided that the subpoenas are not unreasonably burdensome. Probable cause is not a prerequisite to the issuance of a subpoena.<sup>1</sup> There is a strong presumption of regularity that accompanies a grand jury subpoena.<sup>2</sup>

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<sup>1</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991); United States v. Sahley, 526 F.2d 913 (5th Cir. 1976); In re Womack, 333 F. Supp. 479 (N.D. Ill. 1971), aff'd, 466 F.2d 555 (7th Cir. 1972).

<sup>2</sup>United States v. R. Enterprises, Inc., \_\_ U.S. at \_\_; In re Grand Jury Subpoena, 920 F.2d 235, 244 (4th Cir. 1990); In re Grand Jury Proceedings, 896 F.2d 1267, 1278 (11th Cir. 1990).

1. Subpoenas must seek relevant evidence

- a. Subpoenas may not constitute a "fishing expedition"

The Government may not use a subpoena to conduct a "fishing expedition";<sup>3</sup> however, a subpoena is rarely invalidated because of a finding that it sought information irrelevant to the grand jury's investigation. In the face of general allegations that a subpoena seeks irrelevant information, the standard of "relevance" is easy to meet.

In United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991), the Supreme Court held that a grand jury subpoena is valid "unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury investigation."

Earlier circuit court opinions have articulated a variety of different standards to be used in determining whether a subpoena is valid. In the Fourth Circuit, a subpoena is valid if it might aid the grand jury in its investigation, despite a possibility that the prosecutor may use the subpoena for some purpose other than obtaining evidence for the grand jury.<sup>4</sup> In the Third Circuit, the Government must establish by affidavit that the subpoena seeks relevant information

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<sup>3</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991); FTC v. American Tobacco Co., 264 U.S. 298, 305-06 (1924).

<sup>4</sup>United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978 (1983).

by stating that: 1) the item that a subpoena seeks is relevant to a grand jury's investigation; 2) the investigation is properly within the grand jury's jurisdiction; and 3) the Government does not seek the item primarily for a purpose other than to contribute to the grand jury's investigation.<sup>5</sup>

In this circuit, once established by affidavit, a subpoena recipient may not challenge the relevance of a subpoena. The Eleventh Circuit does not require the Government to make any preliminary showing that a subpoena seeks relevant evidence; a validly-issued subpoena is presumed to seek such evidence.<sup>6</sup> Likewise, the Second, Seventh, and Ninth Circuits do not require an affidavit to establish relevance.<sup>7</sup>

The Third Circuit's affidavit requirement is highly suspect in light of the Supreme Court's determination that an initial burden should not be placed on the Government and that the Government should only be required to "reveal the general subject of the grand jury's investigation."<sup>8</sup>

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<sup>5</sup>In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

<sup>6</sup>In re Slaughter, 694 F.2d 1258 (11th Cir. 1982).

<sup>7</sup>See In re Grand Jury Proceeding, 721 F.2d 1221 (9th Cir. 1983); In re Grand Jury Subpoena Duces Tecum to John Doe Corp., 570 F. Supp. 1476 (S.D.N.Y. 1983); In re Grand Jury Proceedings of June 6, 1981, 519 F. Supp. 791 (E.D. Wis. 1981).

<sup>8</sup>United States v. R. Enterprises, Inc., \_\_ U.S. at \_\_.



b. Subpoenas may not be used for trial discovery

The Government may not use the grand jury and its subpoena power after indictment of a defendant for the gathering of evidence, or, otherwise, for pretrial discovery or trial preparation for a trial against that defendant.<sup>9</sup> A prosecutor may, however, use the grand jury to gather evidence at any time prior to indictment, though the prosecutor may believe that the grand jury has already received evidence that will support an indictment.<sup>10</sup>

Following indictment, the Government may use grand jury subpoenas that might have some relationship to a trial, if the Government's ongoing investigation is related to a possible later indictment of additional defendants,<sup>11</sup> or to additional crimes for which the grand jury has not issued indictments.<sup>12</sup> This is true even if such an inquiry might uncover further evidence against a person whom the grand jury has already indicted.<sup>13</sup> Witnesses before the grand jury may include prospective witnesses in a pending trial, provided that their testimony is directed at

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<sup>9</sup>In re Grand Jury Proceedings, 814 F.2d 61 (1st Cir. 1987); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 429 U.S. 1062 (1977); United States v. Star, 470 F.2d 1214 (9th Cir. 1972).

<sup>10</sup>United States v. Picketts, 655 F.2d 837 (7th Cir.), cert. denied, 454 U.S. 1056 (1981).

<sup>11</sup>See United States v. Gibbons, 607 F.2d 1320, 1323 (10th Cir. 1979).

<sup>12</sup>United States v. Dyer, 722 F.2d 174 (5th Cir. 1983); In re Grand Jury Proceedings (Pressman), 586 F.2d 724 (9th Cir. 1978); In re Grand Jury Proceedings, 896 F.2d 1267, 1279 (11th Cir. 1990).

<sup>13</sup>In re Grand Jury Proceedings, 814 F.2d supra; In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980).

offenses other than those upon which indictments have already been brought. Further, the Government may utilize any collateral fruits of such testimony.<sup>14</sup> A former grand jury witness may be recalled before the grand jury -- regardless of whether his testimony may relate to an existing indictment -- for the purpose of having him recount his prior grand jury testimony.<sup>15</sup> In any event, the return of an indictment, alone, does not provide a subpoena recipient with a legal basis for refusing to comply with a subpoena.<sup>16</sup>

c. Grand jury may not be used to conduct a civil investigation

The Government may not use a grand jury to conduct a civil investigation.<sup>17</sup> Some courts have held that a complainant may raise the question of improper use for a civil investigation only 1) if a civil suit develops, and 2) in the context of an appropriate motion.<sup>18</sup>

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<sup>14</sup>Haldeman v. Sirica, 501 F.2d 714 (D.C. Cir. 1974); United States v. Sellaro, 514 F.2d 114 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975).

<sup>15</sup>United States v. Beasley, 550 F.2d 261 (5th Cir.), cert. denied, 434 U.S. 863 (1977).

<sup>16</sup>In re Grand Jury Proceedings, 632 F.2d supra.

<sup>17</sup>United States v. Sells Eng'g Inc., 463 U.S. 418, 431-33 (1983).

<sup>18</sup>See In re Grand Jury Subpoena Duces Tecum, 520 F. Supp. 253 (S.D. Tex. 1981).

Some courts have accepted an affidavit from prosecutors to satisfy questions of misuse of grand jury process for a civil investigation.<sup>19</sup>

d. Subpoenas may not be used to harass or intimidate

Courts will refuse to enforce subpoenas used to harass or intimidate any person.<sup>20</sup>

Prohibited harassment includes the use of a grand jury subpoena to coerce a plea bargain, when such use has no relation to a proper purpose of the grand jury.<sup>21</sup> To succeed in opposing a subpoena on the grounds of alleged prosecutorial harassment, a complainant must show that the grand jury has lost its independence.<sup>22</sup> This is a difficult burden to meet.<sup>23</sup>

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<sup>19</sup>In re Grand Jury Subpoenas, April 1978, 581 F.2d 1103 (4th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

<sup>20</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

<sup>21</sup>United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978 (1983).

<sup>22</sup>United States v. Doe, 541 F.2d 490 (5th Cir. 1976).

<sup>23</sup>See, e.g., In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948) (subpoena not harassing, despite delivery of many files under prior subpoenas and fact that all previous investigations of petitioner indicated innocence).

2. Scope of subpoenas duces tecum

a. "Reasonableness"; overview

Provided that it is relevant to the grand jury's investigation, a subpoena duces tecum may seek all nonprivileged documents and physical evidence,<sup>24</sup> including documents or information which another party may have already produced,<sup>25</sup> or information which may readily be available other than from the subpoenaed party.<sup>26</sup> Moreover, a subpoena duces tecum may require the production of original documents.<sup>27</sup> This may be especially important; for example, where it is important to capture notations, erasures, or colored markings on documents that may not show up on copies. Physical evidence sought by a subpoena duces tecum may include handwriting exemplars, photographs, and fingerprints.<sup>28</sup>

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<sup>24</sup>See In re Corrado Bros. Inc., 367 F. Supp. 1126 (D. Del. 1973).

<sup>25</sup>United States v. Davis, 636 F.2d 1028 (5th Cir. Unit A Feb. 1981), cert. denied, 454 U.S. 862 (1981).

<sup>26</sup>See In re Grand Jury Subpoena Duces Tecum Issued to S. Motors Carriers Rate Conference, Inc., 405 F. Supp. 1192 (N.D. Ga. 1975).

<sup>27</sup>See In re Certain Chinese Family B. & D. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956).

<sup>28</sup>United States v. Santucci, 674 F.2d 624 (7th Cir. 1982), cert. denied, 459 (continued...)

The subpoena duces tecum, however, must be "reasonable" in scope.<sup>29</sup> Moreover, subpoenas may not seek documents or other physical evidence from some classes of persons (such as foreign governments), and may only seek evidence from others (such as Congress and telephone companies) if certain procedures are followed. The paragraphs that follow discuss the obligations that a subpoena duces tecum places on its recipient and the persons and entities upon which a subpoena duces tecum may be served.

b. Continuing obligation to provide documents

The recipient of a subpoena has a continuing obligation to produce all documents and other evidence that fall within the time frame of the subpoena, including those which it discovers after its response to the subpoena.<sup>30</sup>

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<sup>28</sup>(...continued)  
U.S. 1109 (1983).

<sup>29</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991).

<sup>30</sup>United States v. Barth, 745 F.2d 184, 189 (2d Cir. 1984), cert. denied, 470 U.S. 1004 (1985).

- c. Subpoenas duces tecum may be served on any natural person, legal entity or corporation

Subpoenas duces tecum may be served on any natural person, legal entity, or corporation. A grand jury's jurisdiction is coextensive with the court to which the grand jury is appended.<sup>31</sup> Thus, any person within the court's jurisdiction may be served with a grand jury subpoena.

Documents or other tangible items may be obtained by subpoena duces tecum from any person who is either in physical or constructive possession or control of them.<sup>32</sup> Once a subpoena duces tecum is served on a person, another cannot claim to re-take possession of required evidence to prevent the person served from complying with the subpoena.<sup>33</sup>

Service on a corporation may be secured by serving an officer or managing or general agent of the corporation,<sup>34</sup> or, where state law permits, by

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<sup>31</sup>Hale v. Henkel, 201 U.S. 43, 55 (1906); In re May 1972 San Antonio Grand Jury, 366 F. Supp. 522, 530 (W.D. Tex. 1973).

<sup>32</sup>Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

<sup>33</sup>In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851 (3d Cir. 1979).

<sup>34</sup>In re Electric & Musical Indus. Ltd., Middlesex, England, 155 F. Supp. 892 (S.D.N.Y. 1957).

serving the Secretary of the state in which the corporation is located or transacts business.<sup>35</sup>

- d. Foreign persons; persons in the U.S. related to foreign persons; U.S. corporate entities located abroad

Subpoenas duces tecum may be served on 1) foreign corporations over which the supervising court has jurisdiction, 2) all corporate presences within the United States (which have either foreign or U.S. parents) to secure documents located in the United States or abroad, or 3) foreign-located U.S. corporate affiliates. Separate considerations apply to each of these categories; however, in all cases where a foreign entity is involved, the appropriate foreign government must be notified prior to issuing the subpoena.

- 1) Documents located within the U.S. Documents of foreign corporations located within the United States have the same general status as documents of United States corporations.

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<sup>35</sup>In re Canadian Int'l Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1947).

2) Foreign persons holding foreign-located

documents. Documents in the possession of foreign persons over whom a supervising court has jurisdiction, but which are located abroad, raise difficult questions of comity and sovereignty. For example, courts may decline to require production of documents on comity grounds.<sup>36</sup> Further, foreign blocking statutes, such as those of Germany, Australia, France and Great Britain, may prohibit production of documents. There is little that can be done if a foreign corporation, especially one with tenuous contacts with the United States, declines to produce documents.

3) U.S. affiliates holding foreign-located documents.

Subpoenas calling for documents from the overseas offices or affiliates of U.S. corporations that are located abroad also present problems involving comity and foreign blocking statutes. However, such subpoenas do not involve enforcement problems since the U.S. corporation is within U.S. jurisdiction. Further, it may be possible to avoid the application of foreign blocking statutes

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<sup>36</sup>See Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378 (9th Cir.), cert. denied, 472 U.S. 1032 (1984).



by obtaining the consent of the U.S. corporation to the disclosure of the foreign-located documents.<sup>37</sup>

4) Notifications. A number of international agreements require signatory governments to notify any other party to the agreement, which has jurisdiction over the party to be served with judicial process, (including grand jury subpoenas), that the subpoena will be served. These agreements include the following: 1) 1979 OECD Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade (among OECD member countries; the U.S., United Kingdom, France, Belgium, Denmark, The Netherlands, Luxembourg, Federal Republic of Germany, Italy, Norway, and Japan); 2) The Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices; 3) other Bilateral Agreements between the United States and Australia and the United States and Canada; and 4) the November 1, 1977 Pliattsky/Shenefield Understanding.

Before a grand jury subpoena is served on any foreign corporation or United States subsidiary of a foreign corporation, attorneys must notify the

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<sup>37</sup>See Doe v. United States, 487 U.S. 201 (1988).

Chief of the Division's Foreign Commerce Section. This Section will arrange for notification of the member governments under the various agreements. No subpoena may be issued until proper notification has been made, and the Foreign Commerce Section has so notified the attorneys involved. Moreover, the Foreign Commerce Section can provide Division staffs with information concerning foreign blocking statutes and other bilateral agreements.

e. Congressional documents

Congressional documents may only be subpoenaed with the consent of the Chamber subpoenaed.<sup>38</sup> This is consistent with the Speech and Debate Clause of the United States Constitution, that protects certain activities within the Congress.<sup>39</sup> The documents of individual congressmen or senators that do not come within their speech and debate privileges may be subpoenaed without prior permission.<sup>40</sup> However, Division and Department directives require that the Attorney General be notified of investigations involving public officials.<sup>41</sup>

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<sup>38</sup>Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971).

<sup>39</sup>See Paisley v. CIA, 712 F.2d 686, 696 (D.C. Cir. 1983), modified, 724 F.2d 201 (D.C. Cir. 1984).

<sup>40</sup>See Gravel v. United States, 408 U.S. 606, 626 (1972).

<sup>41</sup>See ATD Manual III-81 and Division Directive ATR 3300.1.

f. Federal Government agencies

A grand jury may seek documents from Federal Government agencies.<sup>42</sup>

g. Foreign governments may not be subpoenaed

Under the doctrine of sovereign immunity, as embodied in the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, foreign governments may not be subpoenaed unless the subpoena is directed at activities which are purely of a commercial nature.<sup>43</sup>

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<sup>42</sup>In re Grand Jury Subpoenas Issued to United States Postal Serv., 535 F. Supp. 31 (E.D. Tenn. 1981).

<sup>43</sup>Gadaby & Hannah v. Socialist Republic of Romania, 698 F. Supp. 483 (S.D.N.Y. 1988).

- h. May subpoena state and local government documents

Grand jury subpoena power extends to state and local government documents, because of the supremacy of federal law.<sup>44</sup> A state statute that limits disclosure of information, therefore, does not exempt that information from production under a federal subpoena duces tecum.<sup>45</sup> However, the Office of Operations should be notified before issuing a subpoena for state and local government documents.

- i. Telephone companies

It is common to subpoena records from telephone companies. Under 18 U.S.C. § 2703(c)(1)(B) and (c)(2), the subscriber need not be notified of a grand jury subpoena. However, most telephone companies require a certification that the subpoena is issued in connection with a criminal

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<sup>44</sup>See In re Special 1977 Grand Jury, 581 F.2d 589 (7th Cir.), cert. denied, 439 U.S. 1046 (1978).

<sup>45</sup>United States v. Blasi, 462 F. Supp. 373 (M.D. Ala. 1979); United States v. Grand Jury Investigation, 417 F. Supp. 389 (E.D. Pa. 1976). Contra In re Grand Jury Subpoena for N.Y. State Income Tax Records, 468 F. Supp. 575 (N.D.N.Y.), appeal dismissed, 607 F.2d 566 (2d Cir. 1979).

investigation. A grand jury subpoena for toll records of members of the news media may be sought only with the express approval of the Attorney General unless there are exigent circumstances.<sup>46</sup>

j. Financial institutions: Right to Financial Privacy  
Act of 1978

Subpoenas duces tecum may seek a customer's financial records directly from his bank.<sup>47</sup> The Right to Financial Privacy Act of 1978 ("Act"), 12 U.S.C. 1301, et seq. (1983) requires that all such subpoenas be "returned and actually presented to the grand jury". The return may be made by a representative of the financial institution or, with the financial institution's permission, by a Division attorney.<sup>48</sup> When records of financial institutions are involved, Division attorneys must assure that the records are presented to the grand jury on the return date or as soon as possible thereafter. The Act does

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<sup>46</sup>See § C.2.a. and 28 C.F.R. § 50.10; see also ATD Manual III-82 and U.S.A.M. 9-2.161.

<sup>47</sup>In re Seiffert, 446 F. Supp. 1153 (N.D.N.Y. 1978); United States v. Nelson, 486 F. Supp. 464 (W.D. Mich. 1980). The prescribed form for such subpoenas is found at Appendix III-1.

<sup>48</sup>United States v. Kington, 801 F.2d 733 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987); United States v. A Residence Located at 218 3rd St., 805 F.2d 256 (7th Cir. 1986).

not entitle financial institutions to reimbursement for compliance with a subpoena duces tecum.<sup>49</sup>

The Act also requires that after completion of the grand jury's investigation, all documents must be destroyed or returned to the financial institution if not used in connection with an indictment or disclosed under Fed. R. Crim. P. 6(e). During the grand jury's investigation, the financial records must be maintained separately, sealed and marked as grand jury exhibits.

k. Consumer credit reporting agency: Fair Credit Report Act

The Fair Credit Reporting Act, 15 U.S.C. § 1681, et seq., authorizes a consumer reporting agency, such as a credit agency, to furnish consumer reports only in response to "an order of the court." There is a split among the courts as to whether a grand jury subpoena is "an order of the court" under the Fair Credit Reporting Act.<sup>50</sup> If information is to be subpoenaed from a

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<sup>49</sup>In re Grand Jury Proceedings, 636 F.2d 81 (5th Cir. Unit B Jan. 1981).

<sup>50</sup>See In re Gren, 633 F.2d 825 (9th Cir. 1980) (grand jury subpoena is not an order); United States v. Retail Credit Men's Ass'n of Jacksonville, 501 F. Supp. 21 (M.D. Fla. 1980) (grand jury subpoena is an order).

consumer reporting agency, it may be advisable to seek a special court order under 15 U.S.C. § 1681 (b)(1) to obtain the information.<sup>51</sup>

#### 1. Subpoenas to the media

The Attorney General has prescribed specific procedures for subpoenas to the media that are set forth at 28 C.F.R. § 50.10. The requirements of 28 C.F.R. § 50.10 only apply to subpoenas regarding news gathering functions and do not apply if the subpoena seeks only business documents.<sup>52</sup> Nonetheless, Division policy provides that "no form of compulsory process should be addressed to a news organization by the Antitrust Division . . . unless the Assistant Attorney General in charge personally approves, following his determination that the request relates to purely commercial or financial information."<sup>53</sup>

If the investigation involves media news gathering functions, the staff should first attempt to obtain the necessary information from non-media

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<sup>51</sup>See U.S.A.M. 9-11.141.

<sup>52</sup>28 C.F.R. § 50.10(m).

<sup>53</sup>See Memorandum to Sanford M. Litvack, Assistant Attorney General, Antitrust Division, from Benjamin R. Civiletti, Attorney General, "Subpoenas For Commercial Information Addressed To The News Media." April 28, 1980.

sources before considering subpoenaing members of the news media. If these attempts are unsuccessful and news media sources are the only reasonable sources of the relevant information, the staff should attempt to negotiate with the news media member or organization to obtain the information voluntarily. If such negotiations fail, the staff must seek the express approval of the Attorney General before issuing a subpoena. The standards applicable in seeking the approval of the Attorney General are set forth at 28 C.F.R. § 50.10.<sup>54</sup>

To obtain the Attorney General's approval, the staff should prepare a memorandum explaining the circumstances of the subpoena request and forward it to the Office of Operations, together with a memorandum to the Attorney General from the Assistant Attorney General, Antitrust Division, setting forth the factual situation and the reasons for the request, in accordance with the principles in 28 C.F.R. § 50.10. Upon approval by the Assistant Attorney General, Antitrust Division, the memorandum will be forwarded to the Attorney General for his consideration.

During the time the Assistant Attorney General and the Attorney General are reviewing the request, the staff should not take any steps to begin

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<sup>54</sup>See also U.S.A.M. 9-2.161 and § C.2.a., *infra*.



the process of subpoenaing or otherwise interrogating the member of the news media. Staff should allow substantial review time for such a request.

If the staff, or a section or field office Chief, have any questions as to the applicability of this procedure, the matter should be discussed with the Office of Operations.

m. Subpoenas to attorneys

Because of the potential effect upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the representation of a client, the Department has determined that all litigating divisions must obtain the authorization of their respective Assistant Attorneys General before issuing such subpoenas in any matter, criminal or civil.<sup>55</sup> The Assistant Attorney General must be satisfied that the following conditions are met before approving the issuance of a grand jury subpoena:

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<sup>55</sup>In general, there is no special judicially imposed requirement that need or relevance be shown before a lawyer can be compelled to appear before a grand jury. See In re Grand Jury Proceedings 88-9 (Mia.), 899 F.2d 1039 (11th Cir. 1990).

- 1) that the information is reasonably necessary to investigate or prosecute a crime that is being or has been committed by any person;
- 2) all reasonable attempts to secure the information from alternative sources have failed;
- 3) the need for the information outweighs the adverse impact on the attorney-client relationship; and
- 4) the information is not protected by a valid claim of privilege.<sup>56</sup>

To obtain the approval of the Assistant Attorney General, the staff should submit a memorandum to the Office of Operations setting forth the factual circumstances, reasons for the request, and any information bearing on the standards the Assistant Attorney General must apply. The Office of Operations will review the memorandum, and if appropriate, forward it to the Assistant Attorney General for his approval.

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<sup>56</sup>See U.S.A.M. 9-2.161(a) and § C.1.a., *infra*.

3. Scope of subpoenas ad testificandum

- a. May subpoena any witness with potentially relevant testimony

The grand jury "has the right to everyone's testimony".<sup>57</sup>

Accordingly, with only rare exceptions, the grand jury may subpoena any witness who has testimony that is potentially relevant to the grand jury's investigation.<sup>58</sup>

- b. Subpoenas may not be used to compel interviews

An attorney may not use a subpoena to compel a witness interview with no intention of having the witness appear before the grand jury.<sup>59</sup> Nothing prohibits voluntary interviews with a witness who has appeared before the

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<sup>57</sup>Garner v. United States, 424 U.S. 648, 658 n.11 (1976).

<sup>58</sup>See In re Wood, 430 F. Supp. 41 (S.D.N.Y. 1977).

<sup>59</sup>See Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954); ABA Project on Standards for Criminal Justice Standards Relating to the Administration of Criminal Justice 71-98, § 3.1(d).

grand jury.<sup>60</sup> Also, with the grand jury's authorization, attorneys may use a subpoena to take a sworn statement of a witness who is unable to appear physically before the grand jury.

An attorney often will interview a subpoenaed witness prior to his scheduled grand jury appearance and, as a result of that interview, determine either that the witness could not offer testimony of value to the grand jury, or that the witness' testimony would not best be heard by the grand jury at that particular time. In such instances, attorneys may decide to excuse the witness or to postpone his grand jury appearance. To establish that excusing or postponing a witness appearance has been done properly, attorneys should generally advise the grand jury of the reason for not calling a witness. This will give the grand jury the opportunity to request the witness' appearance and there will be no question that the attorneys have withheld evidence from the grand jury.

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<sup>60</sup>In re Possible Violations of 18 U.S.C. §§ 201, 371, 491 F. Supp. 211 (D. D.C. 1980); United States v. Mandel, 415 F. Supp. 1033, 1039-40 (D. Md. 1976), vacated, 591 F.2d 1347 (4th Cir.), aff'd on rehearing, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980).

c. Subpoenas to investigation targets

Subpoenas may be issued to investigation targets.<sup>61</sup> The Department's policy, however, is to subpoena targets to testify only if it is essential to the investigation to do so. A target should be excused from testifying if his attorney advises, in a notarized letter, that the target intends to assert the 5th Amendment privilege before the grand jury. Subjects or targets of an investigation should be permitted to appear voluntarily before the grand jury if they wish, but they must agree to answer all questions posed by the attorneys and the grand jury.<sup>62</sup> They may not merely read a prepared statement and then leave the room.

It is also Division policy to inform someone who has been served with a subpoena that he is or is not a target of a grand jury's investigation. This policy is not required by case law except in the Second Circuit.<sup>63</sup>

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<sup>61</sup>United States v. Mandujano, 425 U.S. 564, 572-75 (1976); see generally J. Holderman, Pre-Indictment Prosecutorial Conduct in the Federal System, 71 J. Criminal Law and Criminology 1, 21-23 (1980).

<sup>62</sup>See U.S.A.M. 9-11.151.

<sup>63</sup>United States v. Jacobs, 547 F.2d 772 (2d Cir. 1977), cert. dismissed, 436 U.S. 31 (1978).

4. Court has power to enforce subpoena

Failure to appear or testify before the grand jury can lead to either criminal contempt charges under 18 U.S.C. § 401 or Fed. R. Crim. P. 42, or civil contempt charges under 28 U.S.C. § 1826. Failure to comply fully with a subpoena duces tecum, moreover, may amount to obstruction of justice.<sup>64</sup>

Power to enforce a subpoena is vested in the United States district court, and not with the prosecutor or with the grand jury.<sup>65</sup> A district court must be satisfied with the propriety of a subpoena before it enforces the subpoena.<sup>66</sup>

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<sup>64</sup>United States v. Weiss, 491 F.2d 460, 466 (2d Cir.), cert. denied, 419 U.S. 833 (1974).

<sup>65</sup>See United States v. Ryan, 455 F.2d 728 (9th Cir. 1972); In re Grand Jury Subpoena Duces Tecum (Dorokee Co.), 697 F.2d 277 (10th Cir. 1983).

<sup>66</sup>In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975).

## 5. Service of subpoenas

Grand jury subpoenas may be served anywhere within the United States, its commonwealths and its possessions. Subpoenas may also be served on U.S. installations abroad.<sup>67</sup> Subpoenas may also be served abroad on a United States national or resident.<sup>68</sup>

To subpoena aliens outside the United States, letters rogatory must be issued from the United States District Court to the relevant court in which the alien witness is located. The Division's policy is that if aliens appear before the grand jury, the grand jury gains jurisdiction over them, and their appearance can be extended or the grand jury can require the aliens to appear again.

If a subpoena is to be issued to a foreign national residing outside the United States, INS may be requested to institute a border watch. If the foreign national thereafter enters the United States, INS will notify the Division so that the subpoena may be served. The Foreign Commerce Section should be contacted to assist in instituting the border watch.<sup>69</sup>

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<sup>67</sup>Fed. R. Crim. P. 17(e)(2).

<sup>68</sup>Fed R. Crim. P. 17(e)(2); 28 U.S.C. § 1783; see U.S.A.M. 9-11.140.

<sup>69</sup>See ATD Manual I-14 and VII-18 for additional information regarding border watches.

B. Mechanics of Issuing and Serving Subpoenas

Fed. R. Crim. P. 17 sets forth the basic rules for the use of subpoenas, including grand jury subpoenas. Attorneys should also consult local court rules and determine the usual procedures of the appropriate United States Attorney's Office with respect to the issuance of grand jury subpoenas.

1. Issuance of the subpoena

a. Obtaining the subpoena

Rule 17(a) specifies that subpoenas are issued to counsel by the clerk of the court, signed and imprinted with the seal of the court, but otherwise in blank. Counsel then completes the subpoenas and causes them to be served, without requesting leave of the court.<sup>70</sup> Clerks in some districts, however, issue only blank, unsigned subpoenas because the local practice is that only a completed subpoena ready for service may be signed. In other districts, the staff obtains signed subpoenas by executing a praecipe. Praecipes for subpoenas for witnesses are not required by Fed. R. Crim. P. 17(a) and

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<sup>70</sup>See United States v. Gel Spice Co., 601 F. Supp. 1214, 1224 (E.D.N.Y.), aff'd, 773 F.2d 427 (2d Cir. 1985), cert. denied, 474 U.S. 1060 (1986).



should not be prepared unless local rules or practice makes their use mandatory.<sup>71</sup>

To avoid administrative delays, attorneys should obtain a supply of subpoenas for use throughout the term of the grand jury. This practice requires the cooperation of the clerk in the district in which the grand jury is sitting. It is particularly important to obtain such a supply when the grand jury is sitting in a district distant from the office or section conducting the investigation. Most field offices maintain supplies of signed blank subpoenas for those districts in which grand juries are frequently held, particularly the district in which the field office is located.

b. Authority to issue subpoenas

Counsel may determine which persons and/or entities will be served with grand jury subpoenas. Counsel need not obtain the grand jury's authorization for the issuance of subpoenas.<sup>72</sup> However, some jurisdictions require that the grand jury be notified of subpoenas issued on their behalf. Other jurisdictions require the foreman to initial a copy of each subpoena,

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<sup>71</sup>See U.S.A.M. 1-14.112.

<sup>72</sup>See United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519 (E.D.N.Y. 1974).

signifying that he has been notified of its issuance. Attorneys have no authority to issue subpoenas for other than grand jury purposes.<sup>73</sup> For example, "request subpoenas", directing a witness to appear before the United States Attorney or his assistants, are not permissible and are an abuse of the subpoena power.<sup>74</sup>

c. Time for issuing the subpoena

Practice varies within the Division as to the issuance of subpoenas before a grand jury is actually empanelled. Generally, the wiser rule is not to issue them beforehand. However, if a grand jury is sitting to which the documents can be returned, or if a grand jury is to be empanelled on a date certain and the subpoenas are made returnable on that or a later date, then motions attacking the subpoena should be easily defeated. This practice is sometimes useful because conserving grand jury time is often necessary for the efficient investigation of crime.<sup>75</sup>

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<sup>73</sup>See United States v. O'Connor, 118 F. Supp. 248 (D. Mass. 1953); In re Pacific Tel. & Telegraph Co., 38 F.2d 833 (N.D. Cal. 1930).

<sup>74</sup>See Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954).

<sup>75</sup>United States v. Miller, 508 F.2d 588, 593 (5th Cir. 1975); see also United States v. Culver, 224 F. Supp. 419 (D. Md. 1963).

Documents subpoenaed by one grand jury may be transferred to a subsequent grand jury without a court order.<sup>76</sup> Frequently, this procedure expedites the investigation and may be critical in those jurisdictions where the grand jury is empanelled for a comparatively short time.

Under certain circumstances, a forthwith subpoena may call for compliance within a particularly short period of time. The following factors should be considered in determining whether a forthwith subpoena is appropriate: 1) risk of flight; 2) the risk of destruction or fabrication of evidence; 3) the need for the orderly presentation of evidence; and 4) the degree of inconvenience to the witness.<sup>77</sup>

2. Service of the subpoena and return by marshal

a. The mechanics

Fed. R. Crim. P. 17(d), provides:

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<sup>76</sup>Fed. R. Crim. P. 6(e)(3)(C)(iii); In re Grand Jury Proceeding (Sutton), 658 F.2d 782 (10th Cir. 1981).

<sup>77</sup>See § H., infra and U.S.A.M. § 9-11.140.

A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. . . .

Subpoenas are generally served by the U.S. Marshal, his deputies, or by FBI or other case agents. The prohibition against service by a party applies in practice only to the defendant. "There is no prohibition on service by a government attorney or other government employee, or by the defense attorney."<sup>78</sup> The better practice is for Government attorneys not to serve subpoenas, since some courts have frowned on this practice. The local practice should be checked with the clerk because the district court may by local rule require that service be made only by the marshal or his deputy.

Completed subpoenas, which are ready for service, generally are delivered in duplicate to the marshal responsible for service. If they are mailed, they should be sent certified, return receipt requested, so the staff can be sure they have been received. A follow-up phone call several days after the subpoenas are mailed is suggested whether the subpoenas were sent certified mail or otherwise. A letter of instruction should accompany the subpoenas. If time is of the essence or if special problems are anticipated, this should be

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<sup>78</sup>8 Moore's Federal Practice, at ¶ 17.04.

stated in the instruction letter. The staff may also wish to call the marshal and alert him to the subpoena and any problems that may exist.

Practice varies from district to district as to the procedure to be followed when subpoenas are to be served on witnesses residing outside the district in which the grand jury is sitting. In some districts, the marshal in the district in which the grand jury is sitting will request that all subpoenas be sent to him. He will then forward the subpoenas for service to the marshal in the appropriate district. In other districts, the marshal will request that the subpoenas be sent directly to the marshal in the district in which the witness resides. The latter is the preferred procedure and the one generally followed within the Division. It expedites service of the subpoenas, gives the staff greater control and assurance that the letters are being sent to the proper parties in the proper fashion, and conserves time and work on the part of the marshal in the district in which the grand jury sits. Generally, the marshal in the district where the grand jury is sitting will request that he be kept informed in some manner of the issuance of subpoenas to out-of-district witnesses since he is ultimately responsible for the payment of their fees, travel allowances, etc.

Frequently, a deputy marshal will have his office closer to the witness than will the marshal. Notwithstanding this fact, the subpoena should be sent to the marshal unless different arrangements have been made with him.

Otherwise, the records which the marshal must keep may be inaccurate or incomplete.

b. Who can be served

Fed. R. Crim. P. 17(d) states:

Service of the subpoena shall be made by delivering a copy thereof to the person named . . . .

This rule is strictly construed. For example, service of the subpoena on a former employer has been held ineffective.<sup>79</sup> Similarly, service on counsel for a party, as opposed to the party himself, is ineffective. Should the witness fail to appear, it is doubtful that the court would impose penalties for contempt.<sup>80</sup> However, service of the subpoena may be made upon the witness' attorney, subject to an agreement to that effect between the Government attorney and counsel. A written record should be made of the alternate arrangements and the actual method employed.

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<sup>79</sup>Ferrari v. United States, 244 F.2d 132, 141 (9th Cir. 1957).

<sup>80</sup>See Harrison v. Prather, 404 F.2d 267, 269 (5th Cir. 1968).

Occasionally, the attorney for a party will pick up the subpoena at the marshal's office. In still other instances, the subpoena is mailed directly to the witness or his counsel. Where such informal service is made, prior arrangements should be made, and a record kept of both the arrangement and the method used.

A subpoena duces tecum directed to a corporation (or to a partnership or other unincorporated association which is subject to suit under a common name) may be served on an officer, director, or general manager of the business entity.<sup>81</sup> The officer or agent accepting the subpoena on behalf of the business entity need not be explicitly authorized to accept service as prescribed in Fed. R. Civ. P. 4(d)(3); an implicit authorization will suffice.<sup>82</sup>

c. Filing the served subpoena

In some districts, the clerk's office maintains files of grand jury subpoenas that have been served. In these districts, if the marshal returns the executed subpoena to the staff's office, the subpoena file copy should be

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<sup>81</sup>In re Electric & Musical Indus. Ltd., Middlesex, England, 155 F. Supp. 892 (S.D.N.Y. 1957); In re Vankoughnet, 184 F. Supp. 819 (E.D. Mich. 1960).

<sup>82</sup>See In re Grand Jury Subpoenas Issued to Thirteen Corps., 775 F.2d 43, 46 (2d Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

conformed and the executed subpoena (with the service noted) promptly filed with the clerk. Where the marshal does not return the subpoena to the staff's office, the staff should check with the office of either the marshal or the clerk to be certain that service has been made within a reasonable time and that the return is on file with the clerk.

In some districts, the clerk does not maintain files of grand jury subpoenas. In such instances, the served subpoenas, with the marshal's return noted thereon, are kept on file in the United States Attorney's office, or the Field or Section Office of the Antitrust Division.

### 3. Time necessary for compliance

Subpoenas ad testificandum should be mailed to the marshal approximately three weeks prior to the time the witness is to appear, unless special circumstances require a different period of time. Subpoenas duces tecum should generally be mailed one to two months prior to the submission date. With either type of subpoena, consideration should be given to the workload of the marshal's office and to the fact that the subpoena may have to be sent by the marshal to a deputy in another office. In some districts, the workload is such that it will take the marshal two or three weeks or longer to effectuate service.



If a corporation cannot comply with a subpoena duces tecum in the time specified, it may move for an appropriate order of the court extending the time for compliance.<sup>83</sup> Generally, appropriate extensions are granted on an informal basis by Government counsel after compliance difficulties have been pointed out by counsel for the subpoenaed corporation.

#### 4. Place of return of subpoena

Subpoenas are sometimes made returnable in the office of the United States Attorney. The recommended practice, however, is that the subpoena be made returnable in either the office of the clerk or the grand jury room. The Eastern District of Pennsylvania has specifically disapproved of the practice of making subpoenas returnable in the United States Attorney's office.<sup>84</sup> The court in that district pointed out in a 1962 informal and unwritten opinion that the subpoena was the process of the court -- not the Government -- and should be made returnable on premises under the control of the court and not the prosecuting attorney. Accordingly, in that district, the practice has been

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<sup>83</sup>See, e.g., United States v. Morton Salt Co., 216 F. Supp. 250, 253 (D. Minn. 1962).

<sup>84</sup>Cf. United States v. Johns-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962).

adopted of having the witness report directly to the grand jury room. After testifying, the witness is directed to the United States Attorney's office where the necessary data is obtained by a clerk who has no connection with the matter under investigation.

Documents demanded by a grand jury subpoena duces tecum are returnable before the grand jury. However, alternative arrangements can be made with the subpoena recipient to deliver the documents directly to Division attorneys.<sup>85</sup>

For all practical purposes, the life of a grand jury subpoena is measured by the life of the grand jury under which it was issued. If the investigation is continued before a succeeding grand jury, it is recommended that a new subpoena be issued for any incomplete compliance under the old subpoena. The documents received under the old subpoena would be resubpoenaed or held under the authority of an impounding order.<sup>86</sup>

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<sup>85</sup>See § E.1., infra.

<sup>86</sup>See Ch. IV, § E.1. for a discussion of impounding orders.

## 5. Scheduling of witnesses

Recipients of a grand jury subpoena are under a continuing duty to comply until they have been excused by the court, the foreman of the grand jury or the Government attorney.<sup>87</sup> This duty reflects each citizen's obligation to support the administration of justice by appearing in court and giving testimony when properly summoned.<sup>88</sup>

As a practical matter, without issuing a second subpoena, there is no way to compel a witness to appear prior to the date specified in the subpoena. If arrangements are made with counsel, however, a witness may appear earlier than required. If the witness does not appear on the agreed-upon earlier date, he remains under compulsion to appear on the later date specified in the subpoena. However, an informal agreement to appear on a date earlier than the one specified cannot be relied upon if the jury's term is about to expire or if more sessions cannot be scheduled.

The time for compliance with the grand jury subpoena may be extended by the Government in view of the witness' obligation to comply until

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<sup>87</sup>United States v. Snyder, 413 F.2d 288, 289 (9th Cir.), cert. denied, 396 U.S. 907 (1969).

<sup>88</sup>Blackmer v. United States, 284 U.S. 421 (1932).

excused by the court.<sup>89</sup> Rescheduling a witness to appear after the date specified on the subpoena may be arranged subject to an informal agreement with the witness or with counsel. Courts treat such agreements as binding and punish as contempt the failure to appear at the agreed-upon time.<sup>90</sup> A written record of an agreement to reschedule a witness should always be made. The written record may be either a letter of acknowledgement signed by the witness or his counsel, or a letter from the Government confirming the new date, sent by certified mail, return receipt requested.

If the witness refuses to change the date of appearance to a later time, a notification to appear at the later date may be sufficient.<sup>91</sup> Two safer alternatives are to resubpoena the witness or bring him before the grand jury on the originally-designated date and then request the foreman to instruct him to return at the later date.<sup>92</sup>

A witness may be excused at the end of an appearance, required to return for further examination or excused subject to recall under his initial

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<sup>89</sup>Id. at 443.

<sup>90</sup>United States v. Snyder, 413 F.2d at 289-90.

<sup>91</sup>Blackmer v. United States, 284 U.S. 421 (1932).

<sup>92</sup>See United States v. Germann, 370 F.2d 1019 (2d Cir.), vacated on other grounds, 389 U.S. 329 (1967).

subpoena. As stated in United States v. Germann, 370 F.2d 1019, 1021-22 (2d Cir.), vacated on other grounds, 389 U.S. 329 (1967):

Once the witness has appeared before the grand jury, whether pursuant to subpoena or of his own volition, the witness is subject to the orders of the grand jury. The grand jury acts through its foreman or deputy foreman; they have the power to direct the witness to return at a stated time just as they have the power to administer an oath . . . .

If there is any possibility that it may be necessary to recall a witness, he should be excused temporarily (through the foreman) so that he need not be resubpoenaed. A standard direction in this regard is:

The Foreman: There being no further questions, you are excused for the present. However, I inform you that you are subject to recall in the future under the same subpoena, pursuant to which you appeared today, if and when this Grand Jury requires further testimony from you.

Note that the power of the foreman to direct a witness to return at a stated time is not dependent on the convenience or consent of the witness.

After the grand jury has expired, a witness cannot be compelled to give testimony or produce documents,<sup>93</sup> since there is no grand jury before which to present such evidence.<sup>94</sup> Further, coercive imprisonment (where a witness is confined until compliance) cannot extend beyond the term of the grand jury.<sup>95</sup>

## 6. Witness fees

### a. Certificate of attendance

Form OBD-3-Revised (Witness Attendance Fees, Travel and Miscellaneous Expense Claim) should be executed for each grand jury witness. A representative of the United States Attorney's office, or the Department of Justice attorney who actually conducts the investigation, should initial the witness' attendance daily in the appropriate block on the face of the form.

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<sup>93</sup>Cf. In re Grand Jury Investigation (Gen. Motors Corp.), 1960 Trade Cas. (CCH) ¶ 69,796, at 77,133 (S.D.N.Y.).

<sup>94</sup>It is not clear whether some other grand jury sitting in the district would be sufficient.

<sup>95</sup>Shillitani v. United States, 384 U.S. 364, 371 (1966).

After discharge of the witness, the certificate should be signed by the attorney conducting the investigation, the United States Attorney or an Assistant United States Attorney, depending upon the practice in the district.<sup>96</sup>

Practice differs from district to district as to who completes the remainder of the certificate which is signed by the witness. In some districts, it is done by a clerk in the U.S. Attorney's office; in other districts, it is done by a clerk in the marshal's office; and, in still other districts, it is completed, in part, by the Government attorney. In the last mentioned instance, the number of miles travelled is usually completed by a representative of the United States Attorney's office or the marshal's office.

The original should be forwarded to the marshal promptly or given to the witness for presentation to the marshal as his claim for allowances.<sup>97</sup>

b. Fees and allowances

28 U.S.C. § 1821 provides for a witness attendance fee of \$30.00 per day for each day's attendance and for the time necessarily occupied in going to and returning from the place of giving testimony. In addition, a witness is

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<sup>96</sup>See 28 C.F.R. 21.7.

<sup>97</sup>A sample witness certificate is appended as Appendix III-2.

entitled to parking fees, airfare or mileage and subsistence allowances (when the distance or other circumstances require an overnight stay) equal to those to which Government employees would be entitled for official travel in the area of attendance.

c. Advances to witnesses

Under Fed. R. Crim. P. 17(d), fees and mileage need not be tendered to a witness upon service of a subpoena issued on behalf of the United States. This, of course, applies to grand jury witnesses. However, if it becomes apparent that an important witness who is regularly subpoenaed, or otherwise retained, on behalf of the United States and absolutely essential to the proper presentation of the case, is unable to attend a grand jury session for want of sufficient funds with which to defray expenses of travel and subsistence, counsel for the Government may request the marshal for the district in which the witness resides to supply sufficient funds to enable the witness to attend.<sup>98</sup> The marshal usually will only advance sufficient funds for one-way transportation and lodging. The remaining expenditures will be covered when the witness submits his attendance certificate. The subpoena itself should be

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<sup>98</sup>See U.S.A.M., 1-14.122.



transmitted through the marshal in the issuing district. Counsel should also notify the marshal in the witness' district that the request for an advance has been made, stating where the witness is to testify. Advances to witnesses should not be requested as a matter of course.

C. Privileges

1. Common law privileges

a. Attorney-client

1) Definition of privilege. The attorney-client privilege protects confidential communications by a client to an attorney for the purpose of obtaining legal advice. The primary policy justification for the privilege is to encourage clients to be completely truthful with their attorneys, so that attorneys can give effective and reliable advice. In addition, by promoting open communication between the attorney and client, the privilege is said to foster voluntary compliance with laws.

The privilege applies only to the factual content of a communication by a client; it does not protect the underlying facts if they can be learned from some other source. Thus, pre-existing documents that would otherwise be

discoverable do not become privileged simply because they are delivered to an attorney for review or safe-keeping.<sup>99</sup>

The mere fact that the attorney-client relationship exists is not privileged; the general nature of the legal services the attorney was to perform and the terms of the engagement are not protected. Thus, courts have ordered disclosure of the identity of the client,<sup>100</sup> the time period in which the representation occurred,<sup>101</sup> the whereabouts of the client,<sup>102</sup> the nature of the legal services rendered,<sup>103</sup> the details of financial transactions between the attorney and client, including the identity of the party paying the attorney's

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<sup>99</sup>Fisher v. United States, 425 U.S. 391 (1976); Colton v. United States, 306 F.2d 633, 639 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

<sup>100</sup>In re Shargel, 742 F.2d 61, 62 (2d Cir. 1984); In re Grand Jury Investigation No. 83-2-35, 723 F.2d 447 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984); In re Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986), modified, 817 F.2d 64 (9th Cir. 1987); In re Grand Jury Subpoenas, 906 F.2d 1485, 1488 (10th Cir. 1990); In re Grand Jury Proceedings 88-9 (Mia.), 899 F.2d 1039, 1042 (11th Cir. 1990).

<sup>101</sup>Colton v. United States, 306 F.2d at 637.

<sup>102</sup>Burden v. Church of Scientology, 526 F. Supp. 44 (M.D. Fla. 1981).

<sup>103</sup>Colton v. United States, 306 F.2d at 638.

fees,<sup>104</sup> and the demeanor or activities of the client about which the attorney has personal knowledge.<sup>105</sup>

An exception to the rule that the identity of the client is not privileged is where disclosure of the identity itself would necessarily reveal other privileged information that would implicate the client in the very matter for which legal advice was sought. Under these circumstances, a few courts have held that the identity of the client need not be disclosed.<sup>106</sup>

The burden of establishing entitlement to the attorney-client privilege is on the party claiming the privilege. The mere existence of an attorney-client relationship is not sufficient; the applicability of the privilege must be demonstrated with respect to particular documents and inquiries.<sup>107</sup>

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<sup>104</sup>In re Grand Jury Matter (Doe I), 926 F.2d 348 (4th Cir. 1991); In re Grand Jury Subpoena for Reyes-Requena, 913 F.2d 1118 (5th Cir. 1990); In re Grand Jury Proceedings, 803 F.2d at 498; In re Grand Jury Subpoenas, 906 F.2d at 1488.

<sup>105</sup>In re Sealed Case, 737 F.2d 94, 99-100 (D.C. Cir. 1984) (overheard discussion between client and competitor); In re Walsh, 623 F.2d 489, 494 (7th Cir.), cert. denied, 449 U.S. 994 (1980); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663, 665 (8th Cir. 1986) (authenticity of client's signature).

<sup>106</sup>See In re Grand Jury Proceedings (Jones), 517 F.2d at 1027; In re Grand Jury Proceedings, Cherney, 898 F.2d 565, 569 (7th Cir. 1990); In re Grand Jury Subpoenas, 803 F.2d supra; In re Grand Jury Proceedings, 896 F.2d 1267 (11th Cir. 1990).

<sup>107</sup>In re Grand Jury Proceeding, 721 F.2d 1221, 1223 (9th Cir. 1983).

2) Limitations. Not all communications between an attorney and client are privileged. There are five essential elements that must be established for the privilege to apply: (a) the holder of the privilege must be a client or have sought to be a client; (b) the person to whom the communication was made must be an attorney or subordinate of an attorney; (c) the communication must be made for the purpose of obtaining legal advice or assistance; (d) the communication sought to be protected must be confidential; and (e) the privilege must not have been waived.

Communications by a client: The privilege protects only communications by a client or someone seeking to become a client. Communications between an attorney and third parties are not protected by the privilege.<sup>108</sup> Communications by the attorney to the client, however, are protected if their disclosure would reveal the substance of the client's communication.<sup>109</sup> A few courts have gone further, holding that virtually all communications by an attorney to a client in the course of giving legal advice are privileged.<sup>110</sup>

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<sup>108</sup>Hickman v. Taylor, 329 U.S. 495, 508 (1947); Brinton v. Department of State, 636 F.2d 600, 604 (D.C. Cir. 1980), cert. denied, 452 U.S. 905 (1981).

<sup>109</sup>In re Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984); In re Fischel, 557 F.2d 209, 212 (9th Cir. 1977); In re Ampicillin Antitrust Litig., 81 F.R.D. 395 (D.D.C. 1978).

<sup>110</sup>In re LTV Sec. Litig., 89 F.R.D. 595, 602-03 (N.D. Tex. 1981).

The attorney-client privilege may be asserted by a corporation. In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court adopted a "subject matter" test to determine whether the communications of corporate employees are privileged.<sup>111</sup> Applying that test, courts will consider the following factors in determining whether employees' communications are privileged: whether the communications were made to the corporation's counsel, acting as such; whether they were made at the direction of corporate superiors for the purpose of obtaining legal advice; whether the communication concerned matters within the scope of the employees' duties; and whether the employees were aware that the communications were intended to enable the corporation to obtain legal advice.<sup>112</sup>

Communications to an attorney: The communication must be made to a licensed member of a bar who is acting as an attorney at the time the communication is made. Communications to the agents or subordinates of an attorney, including law clerks, junior attorneys, office clerks, and secretaries, may also be protected, provided the services performed by the agent or

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<sup>111</sup>The Court rejected the "control group" test that was first applied in City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

<sup>112</sup>See Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 678 (S.D.N.Y. 1983); In re Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1253-54 (E.D.N.Y. 1982).

subordinate are directly related to assisting the attorney in providing legal services to the client.<sup>113</sup>

Communication for the purpose of obtaining legal advice:

Communications to an attorney acting in a capacity other than as a legal advisor are not privileged. This is particularly important in cases involving in-house counsel, who may serve multiple functions within the company. Attorneys are often involved in negotiating contracts or giving business advice; communications to attorneys that concern largely business matters are not protected.<sup>114</sup> Where an attorney's role in a particular matter involves both legal and business matters, courts will generally look to the role that predominates to determine whether the privilege applies.<sup>115</sup>

Confidentiality: Communications are privileged only if they are made in confidence and are intended to remain confidential. Thus, information

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<sup>113</sup>See United States v. Brown, 478 F.2d 1038 (7th Cir. 1973) (communications between attorney, client, and accountant not privileged when purpose was to seek accounting services rather than legal advice); United States v. Cote, 456 F.2d 142 (8th Cir. 1972) (privilege applied to accountant hired to assist attorney in giving tax advice).

<sup>114</sup>SEC v. Gulf & Western Indus., Inc., 518 F. Supp. 675, 683 (D.D.C. 1981).

<sup>115</sup>United States v. International Business Machs. Corp., 66 F.R.D. 206, 212 (S.D.N.Y. 1974); see also FTC v. TRW, Inc., 479 F. Supp. 160, 163 (D.D.C. 1979) (document prepared for simultaneous review by legal and nonlegal personnel, but not prepared primarily to obtain legal advice, is not privileged), aff'd, 628 F.2d 207 (D.C. Cir. 1980).

given to an attorney with the intent that the attorney distribute it to others is not privileged.<sup>116</sup> The presence of third parties at the time the communication is made may defeat the privilege. When two or more parties have a common interest, however, such as joint defendants or targets of a grand jury investigation, communications by one party to his attorney in the presence of another party may nevertheless be considered confidential and, therefore, privileged.<sup>117</sup>

When the client is a corporation, it must establish that its internal security practices would support a finding of confidentiality; privileged documents must have been made available only to those employees who needed to know their contents.<sup>118</sup>

Waiver: The attorney-client privilege belongs to, and can only be waived by, the client, or by the attorney acting with the client's express or implied consent.<sup>119</sup> As a practical matter, if the attorney has control over the client's litigation, the attorney has an implied authority to waive the privilege

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<sup>116</sup>Colton v. United States, 306 F.2d 633, 637-38 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); In re Ampicillin Antitrust Litig., 81 F.R.D. 395 (D.D.C. 1978).

<sup>117</sup>Continental Oil Co. v. United States, 330 F.2d 347, 350 (9th Cir. 1964) (the "joint defendant" exception applied even prior to indictment).

<sup>118</sup>SEC v. Gulf & Western Indus., Inc., 518 F. Supp. at 681.

<sup>119</sup>In re Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979).

on behalf of his client.<sup>120</sup> Thus, the client usually will be bound by the attorney's failure to assert the privilege.<sup>121</sup>

Any voluntary disclosure of a communication by the holder of the privilege is inconsistent with the confidentiality requirement and waives the privilege.<sup>122</sup> Inadvertent disclosure of privileged communications may also constitute waiver of the privilege.<sup>123</sup> Some courts have held that inadvertent disclosure does not destroy the privilege, provided reasonable precautions against disclosure had been taken.<sup>124</sup> The court in In re Grand Jury Investigation of Ocean Transport, 604 F.2d 672 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979), refused to allow the attorney-client privilege to be successfully asserted after it was explicitly, knowingly, albeit mistakenly, waived. The court further found that the risk of an error by the attorney in producing privileged documents is the burden of the client and that practical

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<sup>120</sup>Drimmer v. Appleton, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986).

<sup>121</sup>In re Grand Jury Investigation of Ocean Transp., 604 F.2d at 675; United States v. Mierzwicki, 500 F. Supp. 1331, 1334 (D. Md. 1980).

<sup>122</sup>United States v. American Tel. and Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

<sup>123</sup>In re Grand Jury Investigation of Ocean Transp., 604 F.2d at 675; In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984).

<sup>124</sup>Lois Sportswear, USA, Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985); Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982).



realities govern; if Government attorneys have studied the materials, the mistaken waiver of the privilege cannot be remedied and the privilege will be considered permanently destroyed. However, the inadvertent disclosure of documents under an accelerated discovery schedule has been held to be "compelled," so that the privilege could be claimed with respect to the same documents in subsequent litigation.<sup>125</sup>

Once privileged communications concerning a particular issue have been disclosed, the privilege is usually deemed waived for all communications concerning the same issue or subject matter.<sup>126</sup> A limited number of courts have created an exception to this rule for disclosures made in the course of settlement negotiations,<sup>127</sup> or when disclosure was inadvertent and there would be no unfairness to the other party by the refusal to disclose other communications.<sup>128</sup> In these cases, the privilege was deemed waived only with respect to the communications that had been disclosed.

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<sup>125</sup>International Business Machs. Corp. v. United States, 471 F.2d 507, 511 (2d Cir. 1972), rev'd en banc, 480 F.2d 293 (2d Cir. 1973), cert. denied, 416 U.S. 980 (1974).

<sup>126</sup>In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989); Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977).

<sup>127</sup>Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 46 (D. Md. 1974).

<sup>128</sup>Hercules Inc. v. Exxon Corp., 434 F. Supp. at 156; but see In re Sealed Case, 877 F.2d at 980-81.

3) Exceptions

a) Ongoing or future crimes or frauds. The attorney-client privilege does not protect communications that relate to ongoing or contemplated but not-yet-committed crimes or frauds.<sup>129</sup> This is true even if the attorney was unaware that the services he performed were not for a legitimate purpose.<sup>130</sup> One court has even suggested that if co-conspirators agreed to provide an attorney's services if a member of the conspiracy was arrested, the attorney's services would be in furtherance of the conspiracy and the privilege would not apply.<sup>131</sup> The party challenging the applicability of the privilege on this ground must make out a prima facie case of illegality.<sup>132</sup>

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<sup>129</sup>United States v. Zolin, 491 U.S. 554 (1989); Clark v. United States, 289 U.S. 1, 14 (1933); In re Sealed Case, 754 F.2d 395, 399-402 (D.C. Cir. 1985); In re Grand Jury Subpoena, 884 F.2d 124 (4th Cir. 1989).

<sup>130</sup>In re Sealed Case, 676 F.2d 793, 812-13 (D.C. Cir. 1982); United States v. Calvert, 523 F.2d 895, 909 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

<sup>131</sup>In re Witness-Attorney Before Grand Jury No. 83-1, 613 F. Supp. 394, 397 (S.D. Fla. 1984).

<sup>132</sup>Clark v. United States, 289 U.S. 1, 14 (1933); In re Sealed Case, 676 F.2d at 812; In re Grand Jury Subpoena, 884 F.2d at 127; In re International Sys. and Control Corp., 693 F.2d 1235 (5th Cir. 1982); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986). But see In re John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982) (applying probable cause standard).

The court may review the allegedly privileged communications in camera to determine whether the crime-fraud exception applies; however, the party opposing the privilege must first "present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exceptions applicability."<sup>133</sup>

b) Making privileged communications an issue.

When a client puts communications with its attorney at issue in a case, the privilege does not apply.<sup>134</sup> Thus, the client may not disclose some communications with counsel in its own case without losing the privilege as to other communications involving the same subject matter.<sup>135</sup> Similarly, if the client asserts advice of counsel as a defense in a proceeding, the privilege is lost.<sup>136</sup>

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<sup>133</sup>United States v. Zolin, 491 U.S. 554 (1989); see also In re John Doe Corp., 675 F.2d *supra*; In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In re Grand Jury Proceedings, 857 F.2d 710 (10th Cir. 1988), *cert. denied*, 489 U.S. 1074 (1989); In re Grand Jury Investigation, 842 F.2d 1223 (11th Cir. 1987).

<sup>134</sup>United States v. Aronoff, 466 F. Supp. 855, 861-62 (S.D.N.Y. 1979).

<sup>135</sup>United States v. Miller, 600 F.2d 498, 501-02 (5th Cir.), *cert. denied*, 444 U.S. 955 (1979).

<sup>136</sup>Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248, 249 (1965); United States v. Miller, 600 F.2d at 501-02; United States v. Exxon Corp., 94 F.R.D. 246 (D.D.C. 1981)

4) Subpoenas to attorneys. Because of the potential effects on an attorney-client relationship that may result from the issuance of a subpoena to an attorney to obtain information concerning his client, the Department has established guidelines governing the issuance of such subpoenas. No attorney may be subpoenaed in any matter, criminal or civil, concerning the representation of a client without the approval of the Assistant Attorney General in charge of the Criminal Division. In a grand jury proceeding, no such subpoena will be approved unless the following conditions are met:

- 1) The information sought is reasonably necessary to prosecute a crime that is being or has been committed by any person;
- 2) all attempts to secure the information from alternate sources have failed;
- 3) the need for the information outweighs the adverse impact on the attorney-client relationship; and

- 4) the information is not protected by a valid claim of privilege.<sup>137</sup>

Attorneys should also be aware that the Massachusetts Supreme Judicial Court has adopted an ethical rule that states that it is unprofessional conduct for a prosecutor to subpoena an attorney to appear before a grand jury without prior judicial approval.<sup>138</sup> Similar rules have been proposed in other states.

- b. Attorney work-product

- 1) Definition of privilege. The attorney work-product privilege, although often confused and muddled with the attorney-client privilege, is separate, distinct and broader than the attorney-client privilege.<sup>139</sup> It protects information assembled or created by an attorney in preparation for litigation. The privilege was first recognized in

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<sup>137</sup>See U.S.A.M., 9-2.161(a) and § A.2.m., supra.

<sup>138</sup>Rule 3:08, prosecution function 15. This rule was recently held applicable to federal prosecutors in Massachusetts. United States v. Klubock, 639 F. Supp. 117 (D. Mass. 1986), aff'd, 832 F.2d 664 (1st Cir. 1987).

<sup>139</sup>United States v. Nobles, 422 U.S. 225, 238 (1975); In re Antitrust Grand Jury, 805 F.2d 155, 162-63 (6th Cir. 1986).

Hickman v. Taylor, 329 U.S. 495 (1947), and was subsequently codified for application in civil and criminal trials. Its application to grand jury proceedings, however, is based solely on common law.<sup>140</sup> The purpose of the privilege is to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.<sup>141</sup>

The work-product privilege covers materials prepared or collected by an attorney "in the course of preparation for possible litigation."<sup>142</sup> The interpretations of the phrase "possible litigation" range from "a real and imminent threat of litigation"<sup>143</sup> to the "motivating purpose behind creation or collection of the documents was to aid in possible future litigation."<sup>144</sup> The privilege will not apply if the prospect of future litigation is remote.<sup>145</sup>

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<sup>140</sup>See United States v. Nobles, 422 U.S. 225 (1975); In re Grand Jury Proceedings, 473 F.2d 840, 845 (8th Cir. 1973).

<sup>141</sup>Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

<sup>142</sup>Id. at 505.

<sup>143</sup>Diversified Indus. Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977); In re Grand Jury Investigation, 412 F. Supp. 943 (E.D. Pa. 1976).

<sup>144</sup>United States v. Davis, 636 F.2d 1028 (5th Cir. Unit A Feb. 1981), cert. denied, 454 U.S. 862 (1981); In re Grand Jury Proceedings (Sutton), 658 F.2d 782 (10th Cir. 1981); see also In re Natta, 48 F.R.D. 319 (D. Del.) (privilege extends to materials prepared in anticipation of proceedings before the Patent and Trademark Office and the Board of Patent Interferences), aff'd, 410 F.2d 187 (3d Cir.), cert. denied, 396 U.S. 836 (1969).

<sup>145</sup>In re Special September 1978 Grand Jury, 640 F.2d 49 (7th Cir. 1980); In  
(continued...)

Similarly, the privilege will not apply if the materials were created predominantly for business or economic purposes.<sup>146</sup> For example, business records created to prepare tax returns<sup>147</sup> and routine business records which are subsequently used in connection with litigation<sup>148</sup> are not within the privilege.

The materials covered by the privilege include tangible documents such as memoranda, correspondence, and briefs, as well as intangible information such as personal recollection and mental impressions.<sup>149</sup> The term "materials" has been interpreted broadly to encompass all information collected or created by an attorney's investigative and strategic efforts on behalf of a client in litigation.<sup>150</sup> This includes the attorney's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy and recording of mental impressions.<sup>151</sup>

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<sup>145</sup>(...continued)  
re Grand Jury Investigation, 412 F. Supp. at 948.

<sup>146</sup>Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980).

<sup>147</sup>United States v. Davis, 636 F.2d supra.

<sup>148</sup>In re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979).

<sup>149</sup>Hickman v. Taylor, 329 U.S. 495, 511 (1947).

<sup>150</sup>In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976); see also Larkin, Federal Testimonial Privileges § 11.02 n.47 (1983).

<sup>151</sup>In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).

Nevertheless, non-privileged portions of an otherwise protected document must be disclosed.<sup>152</sup>

2) Limitations

a) Qualified vs. absolute privilege. The materials covered by the work-product privilege fall into two categories: fact work-product and opinion work-product.<sup>153</sup> Fact work-product are materials collected or prepared by the attorney which do not reflect his mental processes, conclusions, opinions or legal theories. The protection for fact work-product is qualified and may be overcome by a showing of need and hardship.<sup>154</sup>

The protection afforded opinion work-product has been disputed by the courts. Some courts have held the protection for opinion work-product is absolute.<sup>155</sup> They base their holdings on the sanctity of the attorney's thought processes, the unreliability of the evidence and the fear of turning the advocate

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<sup>152</sup>Hickman v. Taylor, 329 U.S. 495, 511 (1947).

<sup>153</sup>Id. at 512-13; In re Antitrust Grand Jury, 805 F.2d 155, 163-64 (6th Cir. 1986).

<sup>154</sup>See Larkin, Federal Testimonial Privileges § 11.04 nn.88 & 89 (1983); In re Thompson, 624 F.2d 17, 19 (5th Cir. 1980) (insufficient showing).

<sup>155</sup>In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 949 (E.D. Pa. 1976).



into a witness.<sup>156</sup> Other courts have held opinion work-product to be disclosable in rare situations.<sup>157</sup>

b) Corporate attorneys - employee interviews.

Materials collected and prepared by a corporate attorney in connection with employee interviews are usually covered by the corporation's attorney-client privilege.<sup>158</sup> Those materials that are not within the attorney-client privilege may still be covered by the attorney work-product privilege. The test is "not whether a particular employee comes within the ambit of the attorney-client privilege, but whether the communication to the corporate attorney by the employee is in furtherance of the attorney's duty to investigate the facts in order to advise the corporate client in anticipation of litigation."<sup>159</sup>

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<sup>156</sup>In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979).

<sup>157</sup>In re Grand Jury Subpoena, 599 F.2d 504, 511-12 (2d Cir. 1979); In re Natta, 410 F.2d 187, 192 (3d Cir.), cert. denied, 396 U.S. 836 (1969); In re Antitrust Grand Jury, 805 F.2d at 164; In re Grand Jury Subpoena, 524 F. Supp. 357, 363 (D. Md.), aff'd sub nom. In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

<sup>158</sup>See Upjohn Co. v. United States, 449 U.S. 383 (1981).

<sup>159</sup>In re Grand Jury Subpoena, 599 F.2d 504, 510 (2d Cir. 1979).

c) Disclosure of work-product material. Unlike the attorney-client privilege which is based on the need for confidentiality and is waived immediately upon disclosure of the privileged material, the attorney work-product privilege is based on the need to protect material from an opposing party in litigation and is not automatically waived upon disclosure. The test for waiver focuses on whether the transferor has "common interests" with the transferee.<sup>160</sup> Early cases construed "common interests" narrowly to allow disclosure only to persons on the same side of litigation.<sup>161</sup> Recent cases, however, have construed the phrase more broadly to allow disclosure to any person unless such disclosure would substantially increase the possibility of an opposing party obtaining the information.<sup>162</sup> For example, in GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46 (S.D.N.Y. 1979), the court held that the work-product privilege was not waived by disclosure of trial preparation documents by a private antitrust plaintiff to the Government. A middle ground was arrived at in United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980), in which the court held that "common interests" should be construed to allow disclosure "so long as transferor and transferee anticipate litigation against a

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<sup>160</sup>United States v. AT&T, 642 F.2d 1285, 1298 (D.C. Cir. 1980).

<sup>161</sup>See Stix Prods., Inc. v. United Merchants & Mfg., 47 F.R.D. 334, 338 (S.D.N.Y. 1969).

<sup>162</sup>In re Grand Jury Subpoenas Dated Dec. 18, 1981 and Jan. 4, 1982, 561 F. Supp. 1247, 1257 (E.D.N.Y. 1982).

common adversary on the same issue or issues." This interpretation was adopted and elaborated on in In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). In that case, the court held that release of otherwise protected material without an intent to limit its future disposition might forfeit work-product protection, regardless of the relationship between the attorney and the recipient of the material. The court found that the attorney had waived the privilege by unconditionally turning over the material to his client.<sup>163</sup>

d) Waiver by misconduct. Misconduct by the attorney or his client may waive the work-product privilege. This is often referred to as the crime-fraud exception. "Misconduct", in this context, has been defined by one court to be "fraud on the judicial processes perpetrated by a client or his attorney which could be something less than criminal activity, but certainly encompasses criminal activity subverting or attempting to subvert the judicial process."<sup>164</sup> To overcome an attorney's invocation of his work-product privilege based on his client's misconduct, a showing must be made that the evidence is

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<sup>163</sup>In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); see also In re Subpoenas Duces Tecum to Fulbright & Jaworski, 99 F.R.D. 582 (D.D.C. 1983), aff'd, 738 F.2d 1367 (D.C. Cir. 1984).

<sup>164</sup>In re Doe, 662 F.2d at 1079 n.4.

relevant to the grand jury's investigation, there is prima facie evidence of misconduct, and there is a connection between the documents and the alleged misconduct.<sup>165</sup> If such a showing is made, then the court, in camera, must find a valid relationship between the work-product subpoenaed and the prima facie misconduct.<sup>166</sup> Courts have had little difficulty disclosing information which was either written or orally communicated to the attorney.<sup>167</sup> But, the courts have refused to overcome the work-product privilege for an attorney's mental impressions, conclusions, opinions, and legal theories because of his client's misconduct.<sup>168</sup>

When the attorney is suspected of misconduct, the courts have been more willing to compel disclosure of not only fact work-product, but opinion work-product as well. In In re Doe, 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982), the attorney was suspected of advising his client to

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<sup>165</sup>In re Sealed Case, 676 F.2d 793, 814-15 (D.C. Cir. 1982); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 803 (3d Cir. 1979); In re Antitrust Grand Jury, 805 F.2d 155 (6th Cir. 1986); In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

<sup>166</sup>In re Sealed Case, 676 F.2d at 814-15; In re International Sys. & Controls Corp., 693 F.2d 1235, 1242 (5th Cir. 1982).

<sup>167</sup>In re Special September 1978 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1980); cf. In re Grand Jury Proceedings, 604 F.2d 798, 802, 803 n.5 (3d Cir. 1979) (if client's crime had been completed before retaining attorney, then attorney privilege remains intact).

<sup>168</sup>In re Special September 1978 Grand Jury, 640 F.2d at 63.

testify falsely, alter or destroy documents, and bribe witnesses. The court rationalized disclosure of his opinion work-product by saying that the work-product privilege was "not designed as a fringe benefit for protecting lawyers who would, for their personal advantage, abuse it."<sup>169</sup> The court went on to say that the party seeking disclosure of opinion work-product must show not only undue hardship and prima facie misconduct, but also "a greater need" for the opinion work-product material than was necessary to obtain the fact work-product.<sup>170</sup>

c. Spousal privilege

The marital privilege, as recognized by the federal courts, is in actuality two separate privileges based on the marital relationship: the confidential communications privilege and the adverse testimony privilege. The former privilege bars testimony of one spouse as to confidential communications between the two; the latter provides that a witness can be neither compelled to testify nor foreclosed from testifying against his spouse.<sup>171</sup>

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<sup>169</sup>662 F.2d at 1080.

<sup>170</sup>Id. See In re Grand Jury Subpoena, 524 F. Supp. 357 (D. Md. 1981).

<sup>171</sup>Trammel v. United States, 445 U.S. 40 (1980).

Based in common law, the marital privilege was codified in Rule 501 of the Federal Rules of Evidence. The marital privilege is applicable before the grand jury as well as at trial.<sup>172</sup>

Both the adverse spousal testimony privilege and the confidential communications privilege require the existence of a valid marriage. Although the issue of whether the privilege exists in a particular case is a matter decided under federal law, the determination as to the validity of the marriage depends upon state law.<sup>173</sup> Thus, in a state which does not recognize common-law marriages, living together does not permit one to invoke the marital privilege.<sup>174</sup> The privilege is not conditioned on a judicial determination that the marriage is happy or successful, but only that it is valid.<sup>175</sup> The court will, however, reject the privilege if based upon a fraudulent, spurious marriage, not entered into in good faith.<sup>176</sup>

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<sup>172</sup>In re Snoonian, 502 F.2d 110 (1st Cir. 1974); In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir. Unit B Nov. 1981), cert. denied, 455 U.S. 1000 (1982); Fed. R. Evid. 1101(d).

<sup>173</sup>United States v. White, 545 F.2d 1129 (8th Cir. 1976); United States v. Lustig, 555 F.2d 737 (9th Cir.), cert. denied, 434 U.S. 926 (1977).

<sup>174</sup>United States v. Snyder, 707 F.2d 139 (5th Cir. 1983).

<sup>175</sup>United States v. Lilley, 581 F.2d 182 (8th Cir. 1978). But see United States v. Cameron, 556 F.2d 752, 756 (5th Cir. 1977).

<sup>176</sup>United States v. Mathis, 559 F.2d 294 (5th Cir. 1977); United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975).

Since the modern justification for the adverse testimony privilege (fostering the harmony and sanctity of the marriage relationship) differs from that of the confidential communications privilege (encouraging full and frank communications between spouses), courts treat the two privileges differently.

Under the adverse testimony privilege, the test is whether a valid marriage exists at the time the testimony is sought. If met, the privilege then exists as to any testimony adverse to the other spouse, even as to acts predating the marriage. Under the confidential communications privilege, the test is whether a valid marriage existed at the time the communication was made. The confidential communications privilege survives the termination of the marriage. The adverse testimony privilege does not.<sup>177</sup> The ramification of what a legal separation would be upon the adverse testimony privilege is unclear.

Under the confidential communication privilege, either spouse has the right to interpose the privilege and preclude the testimony. Under the adverse testimony privilege, the witness spouse alone has the privilege to refuse to testify adversely. The witness spouse may neither be compelled to testify nor foreclosed from testifying.<sup>178</sup> Neither marital privilege encompasses

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<sup>177</sup>United States v. Lilley, 581 F.2d *supra*; United States v. Bolzer, 556 F.2d 948 (9th Cir. 1977).

<sup>178</sup>Trammel v. United States, 445 U.S. 40 (1980); United States v. Chapman, 866 F.2d 1326, 1332 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989).

out-of-court statements made by a spouse and validly testified to by a third party.<sup>179</sup>

For the confidential communication privilege to exist, there must be a communication. The taking of fingerprints, handwriting samples and records have been held not to be testimonial communicative evidence in the context of the confidential communications privilege.<sup>180</sup> Likewise, acts or observations made in confidence have not been included in this privilege.<sup>181</sup> The privilege extends only to statements intended by one spouse to convey a message to the other and does not reach evidence concerning "objective facts having no per se effect" on the other spouse.<sup>182</sup> Similarly, the adverse testimony privilege does not extend to the production of voluntarily produced records that would not amount to "testimony" under a 5th Amendment analysis.<sup>183</sup>

The privilege also requires that the communication be made in confidence. Marital communications are presumptively confidential. The

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<sup>179</sup>United States v. Chapman, 866 F.2d at 1332-33.

<sup>180</sup>United States v. Thomann, 609 F.2d 560 (1st Cir. 1979); United States v. Cotton, 567 F.2d 958 (10th Cir. 1977), cert. denied, 436 U.S. 959 (1978).

<sup>181</sup>United States v. Smith, 533 F.2d 1077 (8th Cir. 1976); United States v. Lustig, 555 F.2d supra.

<sup>182</sup>United States v. Klayer, 707 F.2d 892, 894 (6th Cir. 1983), cert. denied, 464 U.S. 858 (1984); United States v. Brown, 605 F.2d 389, 396 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

<sup>183</sup>See In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988).



burden is upon the party seeking to avoid the privilege to overcome the presumption.<sup>184</sup> A confidential communication can lose this status and thus the privilege if the communication is later disclosed by the spouse claiming the privilege.<sup>185</sup>

The adverse testimony privilege requires that the testimony be adverse to the interest of the other spouse in the case under consideration. The issue is whether the answers to the questions posed would tend to incriminate the spouse.<sup>186</sup> Where the spouse is a target of an investigation, the incrimination justifying invocation of the privilege may be indirect or direct.<sup>187</sup>

Certain exceptions exist to the general rule that confidential communications between spouses are privileged. One exception is where both spouses are co-conspirators in the matter under inquiry. For example, conversations between a husband and a wife about crimes in which they are presently jointly participating are not within the protection of the privilege.<sup>188</sup>

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<sup>184</sup>In re Grand Jury Investigation, 603 F.2d 786, 788 (9th Cir. 1979).

<sup>185</sup>United States v. Lilley, 581 F.2d at 189.

<sup>186</sup>See In re Grand Jury Proceedings, 664 F.2d supra.

<sup>187</sup>In re Grand Jury Matter, 673 F.2d 688 (3d Cir.), cert. denied, 459 U.S. 1015 (1982). But see United States v. Armstrong, 476 F.2d 313 (5th Cir. 1973).

<sup>188</sup>United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976); United States v. Ammar, 714 F.2d 238 (3d Cir.), cert. denied,  
(continued...)

The adverse testimony privilege also has certain exceptions. Where husband and wife are co-conspirators, some courts have held that acts made in furtherance of the conspiracy are outside the privilege.<sup>189</sup> Other courts have not recognized this exception.<sup>190</sup> If an offense has been committed by a party against his spouse, the victim spouse's testimony as to that activity is also outside the privilege.<sup>191</sup> This "offense against the spouse" exception includes an offense against the child of either spouse.<sup>192</sup>

A properly invoked adverse testimony privilege may be overcome under certain circumstances. In In re Snoonian, 502 F.2d 110 (1st Cir. 1974), the prosecutor stated to the grand jury that the wife of the witness was not a target of this grand jury investigation and the Government had no intent to prosecute the wife on the basis of the husband's testimony. The First Circuit held:

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<sup>188</sup>(...continued)  
464 U.S. 936 (1983); United States v. Mendoza, 574 F.2d 1373 (5th Cir.), cert. denied, 439 U.S. 988 (1978); United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974); United States v. Price, 577 F.2d 1356 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979).

<sup>189</sup>United States v. Clark, 712 F.2d 299 (7th Cir. 1983); United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), aff'd, 455 U.S. 40 (1980).

<sup>190</sup>In re Malfitano, 633 F.2d 276 (3d Cir. 1980).

<sup>191</sup>United States v. Smith, 533 F.2d supra.

<sup>192</sup>United States v. Cameron, 556 F.2d supra; United States v. Allery, 526 F.2d 1362 (8th Cir. 1975).

In the present case the speculative nature of the threat to the wife, coupled with the Government's unequivocal and convincing promises not to use any of the testimony against her, nullifies any claim of privilege as grounds for (the witness') refusal to testify.<sup>193</sup>

Lesser promises by the Government have been held inadequate to overcome the privilege. In In re Malfitano, 633 F.2d 276 (3d Cir. 1980), the Government had promised not to use the wife's testimony in future proceedings against her husband. The husband had previously been sent a target letter. The court stated that the Government's promise was inadequate since the grand jury was free to consider the testimony in deciding whether to indict the spouse.<sup>194</sup> At least one court has specifically chosen not to extend the holding in Snoonian to the confidential communication privilege.<sup>195</sup>

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<sup>193</sup>502 F.2d at 113; see also In re Grand Jury Proceedings, 443 F. Supp. 1273 (D.S.D. 1978).

<sup>194</sup>See also In re Grand Jury Matter, 673 F.2d supra, (promise not to bring an indictment was inadequate because the Government was free to use the fruits of the testimony before a subsequent grand jury).

<sup>195</sup>In re Grand Jury Investigation, 603 F.2d supra. Given the language of this opinion, there is some doubt that the Ninth Circuit would adopt Snoonian even for the adverse testimony privilege.

Granting immunity to both spouses would appear to overcome both marital privileges.<sup>196</sup>

d. Physician/patient

A physician-patient privilege has not been recognized by common law. Federal courts have uniformly agreed that the physician-patient privilege is a statutory creation.<sup>197</sup>

e. Priest/penitent

Federal courts have recognized a priest-penitent privilege in very limited applications. The privilege covers communications by a penitent, seeking spiritual rehabilitation, to a clergyman. The communication must have been made in confidence to the clergyman in his capacity as a religious counselor, with the expectation of receiving religious consolation and

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<sup>196</sup>United States v. Doe, 478 F.2d 194 (1st Cir. 1973); see also In re Lochiatto, 497 F.2d 803, 805 n.3 (1st Cir. 1974) (the marital privilege cannot be asserted where both spouses have immunity and the sole claim is that inconsistent spousal testimony may result in a perjury prosecution).

<sup>197</sup>See Whalen v. Roe, 429 U.S. 589, 602 n.28 (1977).

guidance.<sup>198</sup> Conversations between penitent and priest that relate to a business rather than a spiritual relationship are not privileged.<sup>199</sup> Similarly, communications about a third party or made with the intent of passing information to a third party are not privileged.<sup>200</sup>

f. Accountant/client

Federal courts have refused to recognize an accountant-client privilege.<sup>201</sup> One court, however, has held a client's confidential communication to his attorney's accountant, made for the purpose of obtaining legal advice from his attorney, to be privileged. The court viewed the accountant as the attorney's agent and found the communication to be within the attorney-client privilege.<sup>202</sup>

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<sup>198</sup>See Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958); United States v. Wells, 446 F.2d 2, 4 (2d Cir. 1971); In re Grand Jury Investigation, 918 F.2d 374 (3d Cir. 1990); United States v. Webb, 615 F.2d 828 (9th Cir. 1980).

<sup>199</sup>United States v. Gordon, 655 F.2d 478, 486 (2d Cir. 1981).

<sup>200</sup>See 3 Wharton's Criminal Evidence § 527 (14th ed. 1987).

<sup>201</sup>United States v. Arthur Young & Co., 465 U.S. 805 (1984); Couch v. United States, 409 U.S. 322, 335 (1973).

<sup>202</sup>United States v. Kovel, 296 F.2d 918, 921-22 (2d Cir. 1961).

g. Intra-family

The majority of federal courts have refused to recognize a testimonial privilege between family members.<sup>203</sup> In re Agosto, 553 F. Supp. 1298 (D. Nev. 1983), is the only federal court which has recognized a family privilege. Nonetheless, Department and Division policy usually is not to seek close family confidential communications unless they consist of business communications among close family members.<sup>204</sup>

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<sup>203</sup>See In re Grand Jury Subpoena of Santarelli, 740 F.2d 816 (11th Cir. 1984); see also In re Matthews, 714 F.2d 223, 224 (2d Cir. 1983) (antitrust case -- no privilege against testifying about in-laws); United States v. Jones, 683 F.2d 817, 819 (4th Cir. 1982) (no privilege for son testifying about father); In re Grand Jury Proceedings (Starr), 647 F.2d 511, 512-13 (5th Cir. Unit A May 1981) (no privilege for daughter testifying about mother and step-father); United States v. Penn, 647 F.2d 876, 885 (9th Cir.), cert. denied, 449 U.S. 903 (1980) (no privilege for children testifying about mother).

<sup>204</sup>See U.S.A.M. 9-23.211 and Ch. V § L.

## 2. Constitutional privileges

### a. 1st Amendment

The 1st Amendment provides little support for a refusal to honor a grand jury subpoena. Important limitations are imposed on subpoenas, however, by Departmental regulations concerning the issuance of compulsory process to members of the news media.

Procedures and standards regarding the issuance of subpoenas to members of the news media, and subpoenas for the telephone toll record of members of the news media are set forth in 28 C.F.R. § 50.10.<sup>205</sup> Subject to limited exceptions, this section requires the express approval of the Attorney General before a subpoena may be issued. 28 C.F.R. § 50.10 does not apply to CIDs or subpoenas directed to news media organizations for purely commercial or financial information related to an antitrust investigation.

Several litigants have raised 1st Amendment objections to a subpoena. In general, the courts have refused to recognize a 1st Amendment testimonial privilege. A so-called "newsman's testimonial privilege" was rejected in the case of Branzburg v. Hayes, 408 U.S. 665 (1972). The Supreme

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<sup>205</sup>See § A.2.1., supra for a more detailed discussion of these procedures; see also U.S.A.M. 9-2.161 and ATD Manual III-82 to 83.

Court, in a plurality opinion by Justice White, noted that "the administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."<sup>206</sup> The Court reasoned that a reporter was also a citizen and subject to the duty of citizens generally to respond and testify, and that this, as well as the public interest in law enforcement, was sufficient to override the consequential effect on the gathering of news.

Nonetheless, the plurality opinion in Branzburg did suggest that several factors might support the quashing of a subpoena to a newsman on 1st Amendment grounds. These included harassment, bad faith or grand jury abuse. Further, Justice Powell's concurrence in Branzburg suggests that even absent such grounds, a limited 1st Amendment newsman's privilege exists, a view which has received some support in the lower courts.<sup>207</sup>

Outside of the newsgathering area, the courts have recognized very limited 1st Amendment privileges against subpoenas; in particular, those that may infringe on rights of free association. In the antitrust context, challenges based on a possible "chilling effect" on the right of free association may arise in response to subpoenas for documents showing communications or attendance at

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<sup>206</sup>408 U.S. at 703-04.

<sup>207</sup>See In re Possible Violations of 18 U.S.C. 371, 641, 1503, 564 F.2d 567 (D.C. Cir. 1977) (Robinson, J., concurring); United States v. Criden, 633 F.2d 346 (3d Cir. 1980), cert. denied, 449 U.S. 1113 (1981).



meetings. The cases suggest, however, that unless such challenges are grounded on allegations of serious potential or actual harassment of political or religious groups, or grand jury abuse, they are unlikely to succeed.<sup>208</sup>

In cases not involving serious potential or actual harassment of political or religious groups, the likelihood of quashing a subpoena on freedom of association grounds appears to be diminished. Moreover, the cases suggest that under the balancing approach of NAACP v. Alabama, 357 U.S. 449 (1958), possible chilling effects or even substantial interference with the right of free association will be tolerated if there is a significant Government interest implicated in compelling disclosure.<sup>209</sup>

Similarly, attempts to invoke Noerr-Pennington as grounds for a motion to quash have also been unsuccessful.<sup>210</sup> The mere fact that activities

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<sup>208</sup>Compare NAACP v. Alabama, 357 U.S. 449 (1958) (disclosure by the NAACP of its membership rolls); United States v. Citizens State Bank, 612 F.2d 1091 (8th Cir. 1980) (focus of inquiry on membership information for taxpayer protest groups); Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) (inquiry on Black Panther party membership information); In re 1st Nat'l Bank, Englewood, Colo., 701 F.2d 115 (10th Cir. 1983) with United States v. Grayson County State Bank, 656 F.2d 1070 (5th Cir. Unit A Sept. 1981) (I.R.S. subpoena to determine tax liability of church minister is unlike subpoena to tax protest group in that it would not affect church's ability to solicit members or support), cert. denied, 455 U.S. 920 (1982).

<sup>209</sup>See Buckley v. Valeo, 424 U.S. 1 (1976); In re Rabbinical Seminary, 450 F. Supp. 1078 (E.D.N.Y. 1978).

<sup>210</sup>See Eastern R.R. President's Conference v. Noerr Motor Freight Inc., 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657

(continued...)

may ultimately be found to be exempt under Noerr-Pennington will not serve as grounds to quash a subpoena.<sup>211</sup> Moreover, in the Noerr-Pennington context, courts have been unable to identify adverse repercussions of the type that flow from compelled disclosure of membership information, such as those identified in NAACP v. Alabama. Courts have, therefore, refused to limit the scope of the Government's inquiry on the basis of a "chilling effect" on the exercise of Noerr-Pennington rights.<sup>212</sup>

A 1st Amendment religious freedom ground has also been rejected.<sup>213</sup> Similarly, a "scholars' privilege" -- essentially a variant of the newsman's privilege -- was rejected in United States v. Doe, 460 F.2d 328 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973).

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<sup>210</sup>(...continued)  
(1965).

<sup>211</sup>Cf. Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53 (2d Cir. 1983) (CID upheld despite claim of Noerr-Pennington defense); SEC v. Wall St. Transcript Corp., 422 F.2d 1371 (2d Cir.) (SEC subpoena upheld, in part to give Government opportunity to determine whether target was "bona fide newspaper" under Act granting exemption from SEC regulation), cert. denied, 398 U.S. 958 (1970).

<sup>212</sup>Cf. Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d at 60.

<sup>213</sup>United States v. Grayson County Bank, 656 F.2d supra.

b. 4th Amendment

1) History of the applicability of the 4th Amendment to grand jury subpoenas. The courts have used the 4th Amendment prohibition against "unreasonable searches and seizures", which is applicable to corporations as well as individuals, to limit the scope of subpoenas duces tecum. Fed. R. Crim. P. 17(c), which provides that a court "on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive," has also been used to limit subpoenas duces tecum in conjunction with the 4th Amendment prohibition. Rule 17, however, does not depend for its authority on the 4th Amendment. The authority of courts to quash or modify subpoenas under Rule 17(c) may be broader in scope than that provided by the 4th Amendment.<sup>214</sup>

On its face, the 4th Amendment does not implicate the power of a grand jury to issue subpoenas duces tecum for books and records. Nevertheless, in Boyd v. United States, 116 U.S. 616, 622 (1886), the Supreme Court extended the reach of the 4th Amendment to "compulsory production of . . . private papers to be used as evidence . . . ." Several subsequent cases have limited and questioned the application of the 4th Amendment to grand jury

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<sup>214</sup>See In re Radio Corp. of Am., 13 F.R.D. 167, 171 (S.D.N.Y. 1952).

subpoenas. But while the Supreme Court eventually may abandon its prior view that the 4th Amendment applies to grand jury subpoenas, it probably will continue to apply the reasonableness test that it used in cases subsequent to Boyd.<sup>215</sup>

For example, in Hale v. Henkel, 201 U.S. 43 (1906), the Supreme Court found that a subpoena duces tecum issued by a grand jury investigating a Sherman Act violation was too sweeping to be regarded as reasonable. The Court stated at pages 76-77:

Applying the test of reasonableness to the present case, we think the subpoena duces tecum is far too sweeping in its terms to be regarded as reasonable.

Doubtless many, if not all, of these documents may ultimately be required, but some necessity should be shown, either from an examination of the witnesses orally, or from the known transactions of these companies with the other companies implicated, or some evidence of their materiality produced, to justify an order for the

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<sup>215</sup>In United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991), the Supreme Court provides a detailed analysis of Rule 17(c)'s reasonableness requirement, yet does not mention the 4th Amendment.

production of such a mass of papers. A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. . . .

In Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), the Supreme Court in upholding a subpoena duces tecum issued by the Office of Price Administration stated at pages 208-209:

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, insofar as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that. . . the 4th, [Amendment] if applicable, at the most guards against abuse only by way of too much "indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

. . .

It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command.

. . . Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.<sup>216</sup>

2) Limitations on subpoena duces tecum. The limitations on the scope of a subpoena duces tecum may be generally summarized as follows. It must not be too broad and sweeping.<sup>217</sup> The

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<sup>216</sup>See also United States v. Dionisio, 410 U.S. 1, 10-12 (1973) (subpoenas duces tecum are subject only to the 4th Amendment requirement of reasonableness); United States v. Miller, 425 U.S. 435 (1976) (subpoenas duces tecum are subject to no more stringent requirement than are "ordinary" subpoenas); Brown v. United States, 276 U.S. 134 (1928).

<sup>217</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991); Brown v. United  
(continued...)

documents sought must have some relevance to the investigation being conducted.<sup>218</sup> The subpoena must be limited to a reasonable time.<sup>219</sup> The documents requested must be described with sufficient definiteness so that the entity subpoenaed may know what is wanted.<sup>220</sup> The burden of complying with the subpoena must not be too great.<sup>221</sup> The subpoenas may not be used to secure privileged communications, but trade secrets may be obtained.<sup>222</sup>

With the foregoing specific limitations in mind, more general limitations are described below.

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<sup>217</sup>(...continued)

States, 276 U.S. 134 (1928); United States v. Dionisio, 410 U.S. 1 (1973); United States v. Universal Mfg. Co., 525 F.2d 808 (8th Cir. 1975).

<sup>218</sup>Hale v. Henkel, 201 U.S. 43 (1906), Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956); United States v. Gurule, 437 F.2d 239, 241 (10th Cir. 1970), cert. denied, 403 U.S. 904 (1971).

<sup>219</sup>Brown v. United States, 276 U.S. 134 (1928); In re Grand Jury Subpoena Duces Tecum Issued to S. Motors Carriers Rate Conference, Inc., 405 F. Supp. 1192 (N.D. Ga. 1975); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947).

<sup>220</sup>Brown v. United States, 276 U.S. 134 (1928); In re Eastman Kodak Co., 7 F.R.D. supra; United States v. Medical Society, 26 F. Supp. 55 (D.D.C. 1938).

<sup>221</sup>In re Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949); In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948).

<sup>222</sup>Schwimmer v. United States, 232 F.2d supra; United States v. Medical Society, 26 F. Supp. supra; In re Borden, 75 F. Supp. supra; In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952).

a) Particularity. Subpoenas duces tecum must adequately describe the documents sought so that the subpoena recipient may know what he is being asked to produce. There is no precise formula for determining this particularity. As stated by the Supreme Court in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 209 (1946), the requirement of particularity:

comes down to specification of the documents to be produced adequate, but not excessive, for the purpose of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purpose and scope of the inquiry.<sup>223</sup>

The requirement of particularity may be somewhat less stringent in antitrust investigations because of the more complex nature of our inquiries, as stated in In re Eastman Kodak Co., 7 F.R.D. 760, 763-64 (W.D.N.Y. 1947):

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<sup>223</sup>See also In re Corrado Bros., 367 F. Supp. 1126 (D. Del. 1973).



In this particular type of investigation [antitrust] it must be seen that a wider range of inquiry is necessary than in the general run of criminal cases. In this particular instance it is obvious that it normally would be necessary to examine many documents of the Company.

Some courts have recognized that "older" records might need to be specified with greater definiteness than would more recent records. In generally approving a subpoena in a Sherman Act § 2 investigation which requested documents during a multi-year period which itself was several years prior to the date of the subpoena, the court in In re United Shoe Machinery Co., 73 F. Supp. 207, 211 (D. Mass. 1947), said:

No doubt a subpoena ordering the production of old records or old documents places a far heavier burden on the corporation than does an order requiring the production of recent ones.

. . . .

The documents demanded by a subpoena covering a long period of time in the past should, therefore, set forth the documents demanded with greater particularity, and should not order the production of

documents without some showing that they contain information reasonably relevant to the subject matter of the investigation.

b) Reasonableness. A subpoena for books and records is not subject to the 4th Amendment's probable cause requirement. It is subject only to the general requirement of reasonableness. Reasonableness includes at least two basic elements: (1) that the subpoena is not too broad and sweeping and (2) that the time covered period by the subpoena is reasonable.<sup>224</sup> A grand jury subpoena is presumed to be reasonable, with the burden of showing unreasonableness on the recipient who seeks to avoid compliance.<sup>225</sup>

Factors to be considered in determining reasonableness include the type and extent of the investigation, the materiality of the subject matter to the type of investigation, the particularity of the subpoena, the good faith of the Government and any showing of particular need.<sup>226</sup>

Because of the particular nature of antitrust investigations, courts have generally had a more relaxed standard of reasonableness in connection

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<sup>224</sup>See Brown v. United States, 276 U.S. 134 (1934); In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991 (D.R.I. 1975); In re Grand Jury Investigation (Gen. Motors Corp.), 174 F. Supp. 393 (S.D.N.Y. 1959).

<sup>225</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991)

<sup>226</sup>In re Linen Supply Co., 15 F.R.D. 115, 118-19 (S.D.N.Y. 1953).

with antitrust grand juries. As stated in In re Household Goods Movers Investigation, 184 F. Supp. 689, 690 (D.D.C. 1960):

Investigations of possible antitrust violations almost invariably involve great amounts of records, etc., either by reason of the size of the corporation, or the industry, or the scope of inquiry. Also, since antitrust conspiracy cases are usually built on circumstantial evidence . . . and because conspiracies "are seldom capable of proof by direct testimony and may be inferred from the things done and from the circumstances" . . . and, because the activity under investigation may only be meaningful if a pattern of activity over a number of years is studied, the breadth and scope of subpoenas issued in antitrust inquiries are perhaps necessarily greater than in other types of cases . . .<sup>227</sup>

Courts have quashed subpoenas duces tecum that resemble "fishing expeditions" into corporate records.<sup>228</sup> A demand in a subpoena duces tecum for

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<sup>227</sup>See also In re Linen Supply Co., 15 F.R.D. at 118-19.

<sup>228</sup>In re Grand Jury Investigation (General Motors Corp.) 174 F. Supp. supra.

all corporate documents usually is unreasonable.<sup>229</sup> However, a demand for particularized records that constitute all or most of the witness' records is not unreasonable.<sup>230</sup>

While materiality is relevant to the question of reasonableness,<sup>231</sup> lack of materiality alone is not sufficient grounds for quashing a subpoena.<sup>232</sup>

The time period covered by a subpoena must have a reasonable relationship to the alleged offense under investigation.<sup>233</sup> Generally, in antitrust investigations, a subpoena duces tecum may extend beyond the applicable statute of limitations because it is recognized that antitrust violations are difficult to prove and because evidence from the period before the statute of limitations, in a continuing conspiracy, can be introduced at trial (assuming, of course, that it can be shown that some conspiratorial acts occurred within the

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<sup>229</sup>United States v. Alewelt, 532 F.2d 1165 (7th Cir.), cert. denied, 429 U.S. 840 (1976); United States v. Gurule, 437 F.2d 239 (10th Cir. 1970), cert. denied, 403 U.S. 904 (1971); In re Grand Jury Subpoena Duces Tecum, 203 F. Supp. 575 (S.D.N.Y. 1961).

<sup>230</sup>Civil Aeronautics Bd. v. Hermann, 353 U.S. 322 (1957); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); In re 1980 United States Grand Jury Subpoena Duces Tecum, 502 F. Supp. 576 (E.D. La. 1980).

<sup>231</sup>Hale v. Henkel, 201 U.S. 43 (1906).

<sup>232</sup>United States v. United States Dist. Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

<sup>233</sup>United States v. Alewelt, 532 F.2d supra.

statute of limitations). However, this general rule does not permit unrestricted access to old corporate records.<sup>234</sup>

c) Relevance. A subpoena duces tecum must seek materials relevant to a grand jury inquiry.<sup>235</sup> Relevancy is determined by examining the connection between the requested documents and the subject matter of the investigation.<sup>236</sup> In United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991), The Supreme Court established a very low threshold for satisfying the relevancy requirement. The Court stated at p. \_\_:

[W]here, as here, a subpoena is challenged on relevancy grounds, the motion to quash must be denied unless the district court determines that there is no reasonable possibility that the category of materials

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<sup>234</sup>See In re Certain Chinese Family B. & D. Ass'ns, 19 F.R.D. 97 (N.D. Cal. 1956) (27-year period unreasonable); In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952) (18-year period approved); In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948) (20-year period approved); In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947) (time period reduced from 27 years to 10 years); In re Eastman Kodak Co., 7 F.R.D. 760 (W.D.N.Y. 1947) (26-year period reduced generally to 10 years).

<sup>235</sup>See United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991); Hale v. Henkel, 201 U.S. 43 (1906); see also United States v. Gurule, 437 F.2d at 241.

<sup>236</sup>United States v. Loskocinski, 403 F. Supp. 75, 77 (E.D.N.Y. 1975).

the Government seeks will produce information relevant to the general subject of the grand jury investigation.

Some lower courts have held that the Government need make only a minimal showing of relevance.<sup>237</sup> A standard of "no conceivable relevance" appears to have been adopted in the Second Circuit before a witness can object to a subpoena duces tecum on relevance grounds.<sup>238</sup> The relevancy of the entire subpoena may be questioned<sup>239</sup>, as well as particular paragraphs of the subpoena.<sup>240</sup>

c. 5th Amendment

The 5th Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." A person claiming the privilege must establish three elements (1) personal compulsion;

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<sup>237</sup>See In re Grand Jury Subpoenas Duces Tecum, 391 F. Supp. 991, 995, 997 (D.R.I. 1975); see also In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973).

<sup>238</sup>See In re Horowitz, 482 F.2d 72, 79-80 (2d Cir.), cert. denied, 414 U.S. 867 (1973).

<sup>239</sup>In re American Medical Ass'n, 26 F. Supp. 58 (D.D.C. 1938).

<sup>240</sup>In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947).

(2) of a testimonial communication; (3) that would incriminate the person claiming the privilege.<sup>241</sup> As with any claim of privilege, the burden is on the person claiming the privilege to establish that it is properly asserted.<sup>242</sup>

This privilege is often raised in an attempt to resist producing business records or other evidence to the grand jury, but in most instances, the courts have held that the 5th Amendment privilege is not a bar to obtaining almost any type of business record pursuant to a grand jury subpoena. In general, corporations and other artificial entities, such as partnerships, have no 5th Amendment privilege against self-incrimination.<sup>243</sup> Moreover, a corporation must produce its records even though their contents or the act of production itself may incriminate the records custodian or other corporate officials.<sup>244</sup>

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<sup>241</sup>See Ch. V § A. for a more detailed discussion of the 5th Amendment privilege against self-incrimination.

<sup>242</sup>In re Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 279 (10th Cir. 1983); In re September 1975 Special Grand Jury, 435 F. Supp. 538, 544 (N.D. Ind. 1977); United States v. Quick, 336 F. Supp. 744, 745-46 (E.D.N.Y. 1972).

<sup>243</sup>Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Hale v. Henkel, 201 U.S. 43 (1906).

<sup>244</sup>Braswell v. United States, 487 U.S. 99 (1988); see United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986); In re Grand Jury, 836 F.2d 150 (3d Cir. 1987); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 479 U.S. 985 (1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Vallance, 793 F.2d 1003, 1005-06 (9th Cir. 1986); In re Grand Jury Proceedings

(continued...)

However, if the records are characterized as being purely personal or the subpoena is directed to a sole proprietor, there may be both 5th and 4th Amendment problems in obtaining such records. Each element of the privilege, and the leading cases dealing with it, are discussed below.

1) Personal compulsion. The Supreme Court has repeatedly held that the 5th Amendment privilege only applies when a person is compelled to make an incriminating statement.<sup>245</sup> Thus, if the preparation of business records is voluntary, no compulsion is present since a subpoena that calls for production of such records does not cause such records to be created. Nor does a subpoena for business records require the person producing them to restate or affirm the truth of their contents. Therefore, the Supreme Court has held that the 5th Amendment privilege does not protect the contents of business records.<sup>246</sup> At least one court has suggested that a similar rule might be

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<sup>244</sup>(...continued)  
(Vargas), 727 F.2d 941, 946 (10th Cir.), cert. denied, 469 U.S. 819 (1984); In re Grand Jury No. 86-3 (Will Roberts), 816 F.2d 569, 570 (11th Cir. 1987).

<sup>245</sup>See e.g., Andresen v. Maryland, 427 U.S. 463, 477 (1976); Fisher v. United States, 425 U.S. 391, 399 (1976); Olmstead v. United States, 277 U.S. 438, 462 (1928).

<sup>246</sup>United States v. Doe, 465 U.S. 605 (1984).



appropriate for voluntarily created personal papers.<sup>247</sup> Although the contents of business records are not privileged, the act of producing the documents may have certain testimonial aspects that may not be used against the person producing the documents.<sup>248</sup>

2) Incriminating communication. The 5th

Amendment provides that no person shall be compelled to incriminate himself in a criminal proceeding. This privilege applies to any testimony that would incriminate the person making the statement. It does not apply to statements that would incriminate someone other than the person making the statement.<sup>249</sup> The privilege is not limited to facially incriminating communications. Courts have uniformly held that the privilege extends to any compelled communications that lead to an incriminating inference.<sup>250</sup>

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<sup>247</sup>See In re Steinberg, 837 F.2d 527, 530 (1st Cir. 1988).

<sup>248</sup>Braswell v. United States, 487 U.S. 99 (1988); United States v. Doe, 465 U.S. 605 (1984); In re Custodian of Records of Variety Distributing, 927 F.2d 244 (6th Cir. 1991).

<sup>249</sup>Rogers v. United States, 340 U.S. 367 (1951).

<sup>250</sup>See United States v. Doe, 465 U.S. 605 (1984) (Act of producing sole proprietor's business records found to involve testimonial self-incrimination since production concedes the existence, possession and authenticity of the documents); Andresen v. Maryland, 427 U.S. 463, 473-74 (1976) (act of production of subpoenaed personal records may constitute compulsory authentication of incriminating information).

3) Testimonial communication. The Supreme Court has held in a series of cases culminating in Braswell v. United States, 487 U.S. 99 (1988), that generally the production of business documents pursuant to a subpoena duces tecum is not a "testimonial communication" protected by the 5th Amendment. In certain unique situations, the "act of production" may have testimonial significance. In those cases, the act of production may not be used against the person producing the documents. However, the production of the documents may nonetheless be compelled, even absent a grant of immunity.

In general, the 5th Amendment privilege does not extend to artificial entities whose records are held by a custodian or agent in a representative capacity. This includes corporations,<sup>251</sup> unincorporated associations,<sup>252</sup> and partnerships.<sup>253</sup> According to Bellis v. United States, 417 U.S. 85 (1974), this is true even if the records would incriminate the custodian who is producing them. Thus, in most cases, not only can a corporate document custodian be required to produce documents, he can also be forced to identify and authenticate documents before the grand jury.<sup>254</sup>

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<sup>251</sup>Wheeler v. United States, 226 U.S. 478 (1913); Wilson v. United States, 221 U.S. 361 (1911).

<sup>252</sup>United States v. White, 322 U.S. 694 (1944).

<sup>253</sup>Bellis v. United States, 417 U.S. 85 (1974).

<sup>254</sup>United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 318 (2d Cir.

(continued...)

A corporation cannot invoke the 5th Amendment privilege even where it is a mere alter ego of its owner.<sup>255</sup> This also applies to doctors, lawyers, and other professionals doing business as "professional corporations."<sup>256</sup> The rationale for this limitation of the 5th Amendment privilege to natural persons was succinctly stated by the Supreme Court in United States v. White, 322 U.S. 694, 700 (1944):

The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be

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<sup>254</sup>(...continued)  
1979).

<sup>255</sup>Braswell v. United States, 487 U.S. 99 (1988); Hair Indus. Ltd. v. United States, 340 F.2d 510, 511 (2d Cir.), cert. denied, 381 U.S. 950 (1965); see United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972).

<sup>256</sup>United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67 (2d Cir. 1986); Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975).

thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible.

In addition, courts have refused to look behind the particular organizational form chosen in deciding whether to allow a 5th Amendment privilege claim. If a person chooses to organize as a corporation even if he is the sole shareholder, he can not assert a 5th Amendment privilege to shield his business records from production.<sup>257</sup>

A number of factors are relevant in determining whether a partnership is a collective entity independent of its members or the individual business of a single partner, including number of partners, type of partnership, whether it has held itself out to the public as a collective entity, whether it holds property in the partnership name, and whether more than one partner has access to the books and records.<sup>258</sup> Although small family partnerships have been held to have no 5th Amendment privilege,<sup>259</sup> in one case, In re Special Grand Jury No.1, 465 F. Supp. 800 (D. Md. 1978), a member of a family law partnership was allowed to withhold documents based on the court's finding that the actual

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<sup>257</sup>In re Two Grand Jury Subpoenae Duces Tecum, 769 F.2d 52, 59 (2d Cir. 1985).

<sup>258</sup>Bellis v. United States, 417 U.S. at 86-88.

<sup>259</sup>United States v. Mahady & Mahady, 512 F.2d 521 (3d Cir. 1975).

structure more closely resembled private businesses operated by each brother than a partnership.

Other collective entities have been denied the use of the privilege against self-incrimination. The ultimate determination is whether, based on all the circumstances, the particular organization "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interest only."<sup>260</sup>

The treatment of business records of a sole proprietorship was determined in United States v. Doe, 465 U.S. 605 (1984). In Doe, the Supreme Court held that the contents of voluntarily prepared business records were not privileged since their creation was not compelled. However, the act of producing the records of a sole proprietorship could amount to a compelled incriminating testimonial communication. The Court noted that the District Court had made a specific finding that "enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his

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<sup>260</sup>United States v. White, 322 U.S. 694, 701 (1944) (denying the 5th Amendment privilege to an unincorporated labor union); see also Rogers v. United States, 340 U.S. 367 (1951) (treasurer of Communist Party could not assert privilege as to books and records of party); In re Grand Jury Proceedings, 633 F.2d 754 (9th Cir. 1980) (trust records are not personal records of trustee); In re Witness Before the Grand Jury, 546 F.2d 825 (9th Cir. 1976) (no expectation of privacy as to the records of investment-limited partnerships or joint ventures).

possession, and that they are authentic."<sup>261</sup> Therefore, although the records themselves are not privileged, the Government may have to grant use immunity for the "act of production" to obtain the business records of a sole proprietorship.<sup>262</sup>

The "act of production" doctrine is limited to sole proprietorships and does not extend to other artificial collective entities such as corporations. In Braswell v. United States, 487 U.S. 99 (1988), the Supreme Court distinguished Doe and held that the president and sole shareholder of a corporation could not interpose a 5th Amendment objection to the compelled production of corporate records, even if the act of production might prove to be personally incriminating.<sup>263</sup> The Court did note, however, that the Government could make

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<sup>261</sup>465 U.S. at 613 n.11.

<sup>262</sup>See U.S.A.M. 9-23.215; see also Fisher v. United States, 425 U.S. 391, 411 (1976) (production of accountant's papers in the possession of a taxpayer would not be testimonial self-incrimination, as the existence and location of the records was a "forgone conclusion").

<sup>263</sup>See also In re Kave, 760 F.2d 343 (1st Cir. 1985); In re Grand Jury Subpoena (Lincoln), 767 F.2d 1130 (5th Cir. 1985); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Malis, 737 F.2d 1511 (9th Cir. 1984); In re Grand Jury Proceedings (Vargas), 727 F.2d 941 (10th Cir.), cert. denied, 469 U.S. 819 (1984).

no evidentiary use of the act of production in any prosecution against that individual.<sup>264</sup>

There are two other areas where, in general, the 5th Amendment privilege is not available. First, there is generally no 5th Amendment protection available for records required to be kept by law.<sup>265</sup> For a particular class of documents to be deemed a "required record", they must be kept pursuant to a law or regulation whose purpose is essentially regulatory; they must be of the type customarily kept by the business and they must have a "public aspect."<sup>266</sup> Second, there is no 5th Amendment protection for demonstrative or physical evidence, since the privilege applies only to testimony. This includes handwriting samples,<sup>267</sup> fingerprints and photographs,<sup>268</sup> voice exemplars,<sup>269</sup> and blood samples.<sup>270</sup>

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<sup>264</sup>See also In re Custodian of Records of Variety Distributing, 927 F.2d 244 (6th Cir. 1991).

<sup>265</sup>Grosso v. United States, 390 U.S. 62 (1968); Shapiro v. United States, 335 U.S. 1 (1948); United States v. Rosenberg, 515 F.2d 190 (9th Cir.), cert. denied, 423 U.S. 1031 (1975).

<sup>266</sup>Grosso v. United States, 390 U.S. at 67-68.

<sup>267</sup>United States v. Mara, 410 U.S. 19 (1973).

<sup>268</sup>Schmerber v. California, 384 U.S. 757, 764 (1966).

<sup>269</sup>United States v. Dionisio, 410 U.S. 1 (1973).

<sup>270</sup>Schmerber v. California, 384 U.S. 757 (1966).

The nature of the documents themselves may also be an issue. In Grand Jury Subpoena Duces Tecum v. United States, 657 F.2d 5 (2d Cir. 1981), the Second Circuit examined a personal 5th Amendment claim asserted by a corporate executive concerning pocket and desk calendars used to record business appointments. The Second Circuit remanded the case to the district court for clarification of the nature of each item. It proposed a "non-exhaustive list of criteria" to be used in deciding whether production of the calendars would amount to self-incrimination. These criteria included: "who prepared the document, the nature of its contents, its purpose or use, who maintained possession and who had access to it, whether the corporation required its preparation, and whether its existence was necessary to the conduct of the corporation's business."<sup>271</sup> The district court held that the desk calendar was a corporate document but that the pocket calendar was more a personal paper and therefore within the scope of the 5th Amendment privilege. Other circuits have applied a similar case-by-case analysis for the determination of the issue.<sup>272</sup>

The few courts that have considered specifically whether documents are personal or corporate find that mixed documents are corporate and outside

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<sup>271</sup>657 F.2d at 8.

<sup>272</sup>See e.g., In re Grand Jury Proceedings United States, 626 F.2d 1051 (1st Cir. 1980); In re Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980); United States v. MacKey, 647 F.2d 898 (9th Cir. 1981).



the privilege. For example, the Ninth Circuit in United States v. MacKey, 647 F.2d 898 (9th Cir. 1981), held that a diary and desk calendar used to record business meetings and transactions, kept in the office, and used in the daily management of the corporation were properly discoverable corporate papers despite personal non-business notations and lack of corporate possession or ownership.<sup>273</sup>

4) Disclosure of records held by third parties. On occasion, it may be necessary to compel a target or subject of an investigation to execute a form consenting to the disclosure of documents held by a third party, for example, in avoiding the application of a foreign blocking statute. The Supreme Court in Doe v. United States, 487 U.S. 201 (1988), held that a court order compelling a target of a grand jury investigation to authorize the disclosure of bank records without specifically identifying those documents or acknowledging their existence does not violate the target's 5th Amendment privilege against self-incrimination.<sup>274</sup> The Court reasoned that execution of the consent form was not testimonial and, therefore, not within the privilege. The holding in Doe should also apply to other third parties in addition to banks.

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<sup>273</sup>See also In re Steinberg, 837 F.2d 527 (1st Cir. 1988).

<sup>274</sup>See also United States v. Ghidoni, 732 F.2d 814 (11th Cir.), cert. denied, 465 U.S. 932 (1984).

Personal documents protected by the 5th Amendment do not lose their privileged status when turned over to an attorney if the production meets all the requirements of the attorney-client privilege. The documents are protected by the attorney-client privilege, not the 5th Amendment.<sup>275</sup> However, if possession goes to a person other than an attorney, the Government may serve a subpoena on the third party, and thus avoid compulsion on the person incriminated by the documents.<sup>276</sup> In addition, a person who is incriminated by documents prepared by a third party may not validly claim a 5th Amendment privilege as to the documents by taking possession of them or by transferring them to his attorney.<sup>277</sup>

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<sup>275</sup>Fisher v. United States, 425 U.S. 391 (1976).

<sup>276</sup>Couch v. United States, 409 U.S. 322 (1973); In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987 (Doe), 834 F.2d 1128 (2d Cir. 1987); In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851 (3d Cir. 1979).

<sup>277</sup>Fisher v. United States, 425 U.S. 391 (1976).

#### D. Boiler Plate/Drafting Tips

Every subpoena duces tecum should be drafted with the particular facts of the matter under investigation in mind. The first step in preparing a subpoena duces tecum should be to analyze the particular facts and necessary elements of the potential violation for use as a checklist and an outline for the subpoena. This section attempts to point out some of the potential pitfalls in the drafting of subpoenas and sets forth particular provisions which have been successfully used in the past.

##### 1. Forms and pitfalls

###### a. Subpoena form--pitfalls

There are several pitfalls in the printed subpoena form itself which must be avoided. ("Subpoena" here means the printed form commanding appearance. The "Attachment" which is affixed to the subpoena form and which is used to demand documents will be discussed in the next section.)<sup>278</sup>

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<sup>278</sup>A sample subpoena (AO Form No. 110) is attached as Appendix III-3.

The subpoena must be directed to the appropriate person or entity. The correct name and address must be used. The subpoena may specify the custodian of the documents, especially in the case of a partnership or association. However, to avoid any doubt, it should be clearly spelled out in the heading that the individual specified is merely the custodian and not the subpoenaed party.

A reasonable time must be allowed for the document search.

The time for the document return must be specified as to time zone and/or daylight saving time.

The place (room number and building) for the document return must be clearly stated.

b. Attachment - pitfalls

While the grand jury subpoena form has space for a duces tecum ("and bring with you"), it is only a few lines and, accordingly, resort must usually be had to an "Attachment" to the form, noting on the form, "See Attachment," or words of similar purport.<sup>279</sup>

There are myriad substantive problems which arise in drafting an attachment, each of which will have its own peculiarities depending on the nature of the violation suspected, the

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<sup>279</sup>The same form is generally used for a grand jury subpoena ad testificandum. In some districts, however, trial subpoena forms, rather than grand jury forms, are used. In such districts, the forms must be converted to grand jury forms by interlineation and crossing out certain words.

industry, the past experience in this industry, the duration of the suspected conspiracy, etc. The following are general pitfalls to be avoided which are common to most types of attachments.

In preparing to draft the attachment, it is self-evident that the nature and scope of the investigation, as well as the primary purpose of the attachment, must be clear to the drafter. The primary purpose of the attachment is to obtain documentary evidence of the possible violation, together with other pertinent information, such as the names of persons and their responsibilities, to be used as the basis for subpoenaing them and other personal information to be used to obtain Criminal Division clearance if immunity becomes appropriate.

Assuming the staff has considered (and hopefully avoided) the pitfalls listed below (and undoubtedly many others), the staff should not agonize over the myriad of potential problems it cannot, at this stage, do anything about. Since the subpoena is usually prepared without knowledge of the filing system (or lack thereof) of the subpoenaed company or problems peculiar to its operations, the staff has to rely upon the subpoenaed party to present these problems for negotiation.<sup>280</sup> Attempting to draft a subpoena to cover every imaginable contingency could result in an overly long and complex subpoena which, at best, would be unsatisfactory and, at worst, unreasonable and unclear.

The general pitfalls that may be encountered and can be avoided are discussed in the paragraphs that follow.

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<sup>280</sup>The courts have demonstrated little patience for motions to quash based on problems which can obviously be worked out between the parties.

1) Time period. The time period for the attachment should be limited where possible so that practical compliance is not unnecessarily delayed and burdensomeness will not likely become an issue.<sup>281</sup> Paragraphs relating to the production of conspiratorial documents should be drafted with the statute of limitations in mind as a general guideline. Substantially longer time periods may be justified by the nature of the violation being investigated, the necessity for background documents and the continuing conspiracy doctrine.

2) Burdensomeness. While burdensomeness is a valid ground for quashing or modifying a subpoena attachment, it is often impossible when drafting a subpoena to determine the exact degree of burden which a particular paragraph may entail. The burdensomeness of a particular paragraph will vary depending upon the time period covered, the nature of the information requested, and the degree to which the documents are clearly described. When in doubt, it is usually advisable to request more documents than fewer with the idea of modifying the particular paragraph when opposing counsel substantiates the difficulty. If the initial subpoena is too narrowly drawn, a second subpoena with a longer time period or new demands can be issued.

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<sup>281</sup>Generally, the further back the time period, the more likely the search will involve dead and stored files -- and a ready excuse for compliance delay and closer court scrutiny of the subpoena. See § C.2.b 2)b), supra.

3) Relevancy. A subpoena attachment may be attacked on the ground that some or all of the documents requested are irrelevant. The principal pitfall here is that the subpoena requests documents which would not be indicative either of a violation of the antitrust laws in general or of those violations specified in the filed letters of authority. Thus, the scope of the letters of authority should be kept in mind as the subpoena attachment is being drafted.

4) Definitions. Two principal pitfalls arise in the definitions section. First, if terms of art or trade language are used in the subpoena, it is essential that their full meaning be known, or that they be carefully defined to include all of the related practices or activities under investigation. In the latter instance, there is a definite possibility that the person receiving the subpoena may continue to apply his or the industry meaning to the defined term rather than using the definition set forth in the subpoena attachment. Second, it is essential that if a common word is defined in the definitions that it not be used, in a different sense, in the body of the attachment. For instance, "team" was defined in a subpoena and later used in the subpoena attachment as a general term rather than as a defined term with a resultant unintended meaning.

5) Repetition. It is important to draft a subpoena attachment so that all of the documents necessary to establish the potential violation are requested. In drafting the attachment, however, care should be taken to avoid, where possible, requesting the same

documents in different paragraphs.<sup>282</sup> The danger of "missing" documents can be avoided to some extent by the use of a "catchall" paragraph which should be very general in scope but exclude all documents previously requested.

## 2. Typical general provisions

The following provisions were taken from various subpoena attachments and are illustrative of the various approaches taken.

### a. Definitions of "company" and "association"

"The Company" means the addressee of this subpoena and each of its predecessors, parents, subsidiaries (wholly-owned or otherwise), affiliates, and other entities controlled by it.

or

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<sup>282</sup>This warning refers to obvious redundancies. Some overlap is unavoidable because, inevitably, paragraphs with different purposes will sometimes require submission of the same document. Counsel will generally submit the document under one of the two paragraphs.



The term "the Company" means the business entity to which this subpoena is addressed, its predecessors, successors, affiliates, subsidiaries, and its parent organization, if any.

or

"Company" means the corporation, partnership or individual proprietorship upon which this subpoena is served, its predecessor organizations, and its divisions and subsidiaries.

or

The term "the Company" means the corporation upon which this subpoena is served and its parents, subsidiaries, affiliates, divisions, and operating management and purchasing units or organizational entities, and the predecessors of any of them.

or

"Your company" means the corporation on which this subpoena is served, successors, parent organization, if any, and its affiliates and controlled subsidiaries and

wholly-owned subsidiaries engaged in the manufacture, sale, or distribution of \_\_\_\_\_  
—.

or

"Association" means (name) Association or any other affiliated or predecessor group of [describe members], whether formal or informal.

b. Definitions of documents

The term "documents" means originals unless otherwise specified, and copies when originals are not available, in the possession, custody, or control of the Company, or any officer, director, agent or employee thereof, including but not limited to the following: correspondence, mailing lists, envelopes, memoranda, notes, agenda of meetings, minutes of meetings, summaries, outlines, studies, surveys, reports, catalogs, drafts of agreements and contracts, agreements, contracts, microfilm, magnetic tapes, punch cards, recording discs, and any other instrument conveying information by mechanical, electronic, photographic, or other means. The term "documents" also includes copies which are not identical duplicates of the originals because of notes made upon the original or otherwise.

or

The term "documents" means all writings of every kind, including letters, telegrams, memoranda, reports, studies, calendar or diary entries, minutes, pamphlets, notes, charts, tabulations and records of meetings, conferences and telephone or other conversations or communications in the possession, custody or control of the company, or any of its officers, directors, employees, or agents, made, sent or received during the period from \_\_\_\_\_ to date of service of this subpoena. The term "documents" also includes reproductions or film impressions of any of the aforementioned writings as well as copies of documents which are not identical duplicates of the originals, and copies of documents of which the originals are not in the possession, custody or control of the company. The term "documents" further includes all punch cards or other cards, tapes, disks or recordings used in data processing, together with the programming instructions and other written material necessary to understand or use such punch cards, tapes, disks or other recordings.

c. Time period

Each paragraph of this subpoena (unless otherwise specified herein) covers the period from     date     up to and including the date of service hereof.

d. Claim of privilege by a subpoenaed party

While a subpoena duces tecum cannot compel the production of privileged documents, the staff may be able to require the identification of the documents which are claimed to be privileged by a subpoenaed party.<sup>283</sup> Different subpoena paragraphs seeking information with respect to documents which are alleged by the subpoenaed party to be privileged are set forth below:

Any documents withheld on a claim of privilege must be preserved. If any document is withheld under any such claim, the Company shall furnish an affidavit, signed by the person responsible for supervising the Company's compliance with this subpoena, identifying each document by: (i) the author(s), (ii) the addressee(s), (iii) each person to whom a copy was addressed, and all other persons to whom such document or its substance was disclosed, together with their job titles, (iv) the date and the subject matter of the document, (v) the number of pages, (vi) the current location of the

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<sup>283</sup>When the field offices have pressed for the identification of privileged documents in court, the parties have withdrawn the claim of privilege as to most of the allegedly privileged documents and, at the court's urging, supplied the requested information on the balance. In any event, the inclusion of such a provision is potentially valuable. See generally Sperry Rand Corp. v. International Business Mach. Corp., 45 F.R.D. 287 (D. Del. 1968) (identification of privileged documents ordered); Standard Pressed Steel Co. v. Astoria Plating Corp., 162 U.S.P.Q. (BNA) 441, 443 (N.D. Ohio 1969) (identification by interrogatory permitted); Stix Prods., Inc. v. United Merchants & Mfgs., Inc., 47 F.R.D. 334, 339 (S.D.N.Y. 1969) (identification held improper where court had inspected documents and agreed on privilege).

document, (vii) the basis on which the privilege is claimed, and (viii) the paragraph of the subpoena to which the document responds.

or

Your firm is required to bring and produce before the grand jury all of the foregoing documents, including any documents which your firm claims to be privileged. Your firm may assert such privilege before the grand jury. If your firm elects to comply with this subpoena in the manner set out in Note 1 (by mail), supra, please furnish a list identifying each document in respect to which a claim of privilege is made, and setting out for it the following information: date, sender, recipient, persons to whom copies were furnished, subject matter, and the bases on which privilege is claimed.

- e. Documents to be produced - articles of incorporation and by-laws -  
company identification

Such documents as will show the full Company name, home office address, formal organization, date and place of its formation, any changes in the Company's name or structure and any additional names used by the Company in the conduct of its business.

or

Such documents (or, in lieu thereof, a certified statement of the Company) as will show:

- (1) the full Company name, home office address, and form of organization (e.g., corporation, partnership or individual proprietorship); and
- (2) the names and addresses of all divisions, subsidiaries, regional offices or other subdivision of the Company responsible for the sale of [the product].

f. Documents to be produced--annual reports

Each annual report of the Company for the period from January 1, 1965 to the date of this subpoena.

Drafting Tip: The annual reports of public corporations may not always contain the detailed financial information which a thorough investigation may require. In such a case, the following paragraph might be necessary:

Each annual report of the Company and each annual financial statement (including, but not limited to, balance sheets, profit and loss statements, and income statements) of the Company for the period from January 1, 1980 to the date of this subpoena.

g. Documents to be Produced--Names and positions of people, officers and directors

(1) General

Such documents as will show:

The full name, current home and business addresses and telephone numbers, date of birth, social security number, the account number of each Company credit card, positions, dates of service in each position, duties and responsibilities in each position, termination date, if applicable, and the reasons for such termination, of each officer and director of the Company;

(2) Job Description

Such documents as will show the job description for each of the persons identified in documents demanded by [preceding paragraph].

(3) Certain Job Responsibilities

Such documents as will show the full name, current home and business addresses and telephone numbers, date of birth, social security number, the account number of each Company credit card, positions, dates of service in each position, duties and responsibilities in each position, annual salary and bonuses, termination date, if applicable, and the reasons for such termination, of each officer, employee or other representative of the Company whose duties and responsibilities have related, in whole or in part, to the marketing, pricing, sale or distribution of \_\_\_\_\_ products;

or

Such documents (or, in lieu thereof, a certified statement of the Company) as will show the names and addresses of the officers and directors and those general managers and sales managers whose responsibilities include selling [the



product] in the trading area, together with the dates of their service in their respective positions for the period of time covered by this subpoena.

or

Such documents as will show the name, current home and business addresses, date of birth, social security number, positions, dates of service in each position, termination date, if applicable, and the reasons for such termination, of each employee of the Company who served as a secretary to, or performed secretarial or stenographic services for, each of the persons identified in response to Demand 11(b) of this subpoena;

h. Documents to be produced--day books, expense vouchers

(1) Day Books, etc.<sup>284</sup>

All appointment books, desk calendars, and diaries, wherever located, of each person identified in documents demanded by paragraph \_\_\_\_ for the period from \_\_\_\_\_ to the date of this subpoena.

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<sup>284</sup>Personal calendars maintained by the chief executive of a company are corporate property subject to production in response to a subpoena duces tecum; the right against self-incrimination of the executive is not violated. See § C.2.c., infra.

or

All appointment records and books, reminders, note pads, telephone call books, calendars, diaries, and day books maintained and used in connection with Company business by each person named in response to paragraph \_\_\_\_ herein.

(2) Expense Vouchers

Such documents as will show the transportation, hotel, entertainment, and other expenses incurred on behalf of the Company by each person named in response to paragraph \_\_\_\_ herein.

The requests for day books and expense records may also be combined:

All appointment books and records, reminder pads, notepads, diaries, calendars, day books, telephone directories, telephone call logs and travel and expense records (together with the documents attached thereto or in support or explanation thereof) used by or maintained for, in whole or in part, by each person identified in response to Demand \_\_ of this subpoena.

i. Request for identification of documents

Please identify each document produced in response to this subpoena with the initials of the Company and number each document consecutively, commencing with number 1. These markings should appear in the lower right-hand corner of each document. It would also be appreciated if you would place the documents called for by each paragraph of this subpoena in a separate file folder or other enclosure, which should be marked with the name of your Company, date of the subpoena, and the paragraph of the subpoena.

Experience has proven that this system of document control will insure the prompt return of the documents to you when they are no longer required.

j. Requests for related or attached documents

In an effort to ensure that all documents that relate to a responsive document are produced so as to put the demanded document in context, subpoenas may instruct the recipient that:

documents attached by staples, paper clips, tape or otherwise to each other should not be separated.

and that:

documents not otherwise responsive to the provisions of this subpoena shall be produced if such documents are or were attached to, or related to, documents which are called for by this subpoena, including, but not limited to, routing slips, transmittal memoranda or letters, comments, evaluations, or similar documents.<sup>285</sup>

All documents that respond, in whole or in part, to any paragraph of this subpoena shall be produced in their entirety. The documents submitted should be grouped according to the individual paragraph or sub-paragraph of this subpoena to which they are responsive. Documents that in their original condition were stapled, clipped or otherwise fastened together, shall be produced in such form. To facilitate the maintenance and return of documents, please mark each document (or the first page of the document if it consists of more than one page) with the letters \_\_\_\_\_. These should be placed so as not to obscure any information on the document.

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<sup>285</sup> Another technique to establish the context of demanded documents is to provide at the end of the "Document definition" paragraph of the subpoena that:

"Document" includes the file and folder tabs associated with each aforesaid original and copy.

Requests for identification of documents and for attached documents can be combined.

k. Optional means of supplying certain information

The staff may wish to offer the addressee the option of responding to certain demands with certified written statements rather than by producing documents. Demands that often lend themselves to this option include those relating to name, address, and organization of the Company and identification of the Company's products, facilities, sales areas, personnel, customers, and trade association affiliations. If this option is offered, it is important to preserve your right to production of the demanded document in the future. Accordingly, the subpoena may contain the following instruction:

In lieu of the documents called for in those paragraphs of this subpoena marked with an asterisk (\*), a written statement setting forth the information demanded, prepared by a duly authorized officer of the Company and certified by him to be truthful and accurate, may be submitted, provided that the documents demanded are maintained intact and available for possible later production under this subpoena.

l. Methods of compliance

Frequently, a party is given the option of producing subpoenaed materials before the grand jury by mail or in the office of the staff. Such an option is generally given in a letter to the

subpoenaed party.<sup>286</sup> However, the paragraphs set forth below have been used in subpoena attachments and apparently have not been questioned by subpoena recipients or by the court. Care should be taken to set forth the option in a separate section of the subpoena attachment and to provide, in substance and beyond any doubt that, if compliance is made by mail or in the office of the staff, such compliance is at the sole discretion of the subpoenaed party. Moreover, staff must ensure that they do not waive the right to call an appropriate witness before the grand jury to respond to questions concerning subpoena compliance if that should prove to be necessary.

Compliance with this subpoena may be by either of the following methods, the election of which shall be within addressee's sole discretion:

- (a) Compliance by the appearance of an authorized representative of Addressee before the grand jury at the time and place stated, who will bring with him all documents required to be produced by this subpoena, or
- (b) Compliance by delivery or mailing by certified mail all documents called for in this subpoena to:

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<sup>286</sup>See § B.4., *supra* and § E.1., *infra*.

[name and address]

This method of compliance may be used provided that: (a) notice of Addressee's election to comply by this method is received by the above office at least ten (10) days prior to the date for appearance before the grand jury; (b) the documents delivered or mailed are accompanied by a notarized affidavit in the form attached hereto; and (c) documents must be received at said office on or before the date for appearance before the grand jury. If this method of compliance is elected by Addressee, personal appearance before the grand jury at the time and place stated need not be made.

It is requested that the documents be numbered serially, each number to be preceded by at least three capital letters from the initial letters of the words composing the exact name of Addressee.

or

The subpoena attached hereto and legal procedures thereunder require Addressee (1) through an authorized knowledgeable representative, to appear before the grand jury at the time and place set; (2) to produce before the grand jury all documents of Addressee described in Appendix A of this subpoena (except that certain paragraphs

of Appendix A by their express terms permit Addressee at its sole election to submit a statement, certified by a proper official of Addressee, setting forth the information shown in the documents called for by those paragraphs, in lieu of production of the documents themselves); and (3) to identify and authenticate all documents so produced.

The representative of Addressee appearing before the grand jury will be questioned under oath regarding methods of compliance and whether all documents described in Appendix A have been produced. Under this method of compliance, all documents described in Appendix A should be brought before the grand jury, including any document with respect to which Addressee will claim privilege. Addressee may then assert any such privilege before the grand jury and withhold the specific documents involved or may waive its privilege and release such documents to the grand jury.

If compliance before the grand jury is elected, all documents should be numbered consecutively, with the symbol "\_\_\_" preceding all said numbers, prior to Addressee's appearance. Numbering in the suggested manner will properly identify the documents produced by Addressee, and will facilitate their handling and return.



The following optional method of compliance is extended to Addressee: At its sole election, and in lieu of a physical appearance and production of documents before the grand jury, Addressee may comply with the subpoena by mail (or other delivery), providing each of the following prerequisites are met:

(a) Notice is given to the Antitrust Division 10 days prior to the date Addressee is scheduled to appear before the grand jury;

(b) Documents called for (full compliance) must reach the Antitrust Division on or before the date Addressee is scheduled to appear before the grand jury (or on or before such other date agreed upon by Addressee and attorneys for the Antitrust Division);

(c) Documents produced by mail should be numbered in consecutive order with the symbol "\_\_\_" preceding all said numbers;

(d) Documents produced must be accompanied by a notarized affidavit of the official of Addressee responsible for the actual compliance with this subpoena by Addressee, identifying said documents by number and certifying that they are all the documents called for, that they constitute full compliance with the demands of the subpoena, and that no documents (except as provided in subparagraph (e) below) have been withheld;

(e) If Addressee withholds any document described in Appendix A under a claim of privilege, Addressee must furnish a list signed by the attorney for Addressee, listing the following information with respect to each document withheld upon the ground of privilege (furnishing the information required in this subparagraph will not be asserted by the Department of Justice to be in itself, a waiver by disclosure of any otherwise valid privilege):

(i) the place, approximate date, and manner of recording or otherwise preparing the document;

(ii) the name and title of sender; and the name and title of recipient of the document;

(iii) the name of each person or persons (other than stenographic or clerical assistants) participating in the preparation of the document;

(iv) the name and corporate position, if any, of each person to whom the contents of the document have heretofore been communicated by copy, exhibition, reading, or substantial summarization;

(v) a statement of the basis on which privilege is claimed and whether or not the subject matter of the contents of the document is limited to legal advice or information provided for the purpose of securing legal advice;

(vi) the paragraph number of Appendix A to which the document is responsive;

(vii) the identity and corporate position, if any, of the person or persons supplying the attorney with the information requested in subsections (i) through (vi) above.

(f) Documents produced under this optional method of compliance should be delivered or mailed to the following address: (address)<sup>287</sup>

m. Substantive provisions

Since the nature of antitrust grand jury investigations varies so greatly from matter to matter, it is not possible to cover the spectrum of substantive demands that would be applicable

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<sup>287</sup>When this form has been used, it has been physically attached to and numbered as part of the subpoena attachment, although the wording indicates it is not a part of the subpoena attachment.

in each conceivable type of matter. Examples of most types of demands are available in the Division files.<sup>288</sup>

Each demand should be tested for every conceivable interpretation, and care should be taken not to broaden the subpoena inadvertently to take in a multitude of unwanted documents. This most often occurs in asking for pricing or sales documents, and unwittingly covering all invoices, purchase orders, etc. If in doubt, it is better to err on the side of caution and inclusiveness, since private counsel will, in most cases, call unforeseeable problems to the staff's attention and they can be worked out at that time. If the subpoena is drawn too narrowly, it is unlikely that counsel will call the loopholes to the staff's attention, and it is likely that counsel will, if given the chance, employ an overly technical and narrow reading of the demand to exclude what he can from compliance.

Finally, where the staff has knowledge of specifically identifiable substantive or conspiracy-related documents, through prior investigation or otherwise, the broader demands of the subpoena should not be relied on exclusively for their production. Such documents should be identified clearly by date, description, addressor, addressee, etc., and demanded specifically, since it is not uncommon for defense counsel, in interpreting a subpoena, to find in broad generic type demands a vehicle for omitting production of crucial documents which do not fit four square into the broad demand.

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<sup>288</sup>An example of a "price-fixing" subpoena attachment is contained in Appendix III-4.

n. Document destruction provisions

(1) Document Destruction Practices

Such documents as will show the Company's practice, procedure or policy with respect to the destruction of documents, for the period from (date) to the date of this subpoena.

(2) Removal and Alteration Definitions

In the event that the paragraphs set out in (3) below are used, the following should be inserted in the "Definitions" Section:

"Removal" refers to the destruction or mutilation of documents previously in the possession, custody, or control of the Company, and/or the taking and carrying away, whether authorized or not, of documents from the possession, custody, or control of the Company.

"Alteration" refers to the alteration, modification, censorship, deletion, addition or the changing in any other manner of documents which are in the possession,

custody, or control of the Company, or which have been subject to removal (as defined above).

(3) Removal and Alteration

For the period from  (date)  to the date of this subpoena, all documents which relate to the removal (as defined herein) of documents falling within the description of any paragraph of this subpoena, including, but not limited to, the identity of the person or persons authorizing the removal, the identity of the person or persons participating in the decision to effect such removal, the date of each such decision, the date of each such removal, the identity of the persons carrying out such removal, the means used to accomplish such removal, and any other circumstances concerning the removal.

For the period from  (date)  to the date of this subpoena, all documents which refer or relate in any way to the alteration (as defined herein) of documents falling within the description of any paragraph of this subpoena including, but not limited to, the identity of the person or persons authorizing the alteration, the identity of the person or persons participating in the decision to effect such alteration, the date of each such alteration, the identity of the

persons carrying out such alteration, the means used to accomplish such alteration, and any other circumstances concerning the alteration.

For the period from     (date)     to the date of this subpoena, all documents which, but for alteration (as defined herein), would have been produced pursuant to any paragraph of this subpoena.<sup>289</sup>

Paragraphs relating to destruction of documents and paragraphs concerning the removal or alteration of documents may be combined.

All documents which refer or relate to any actual, suggested or contemplated policy, plan, procedure, instruction, direction or request concerning the retention, destruction, alteration, removal, secrecy or confidentiality of any documents or the non-commitment to writing of any type of information.

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<sup>289</sup>This small paragraph may prove to be particularly useful in obtaining documents that were altered to disguise the conspiracy.

E. Compliance

1. Methods of document production<sup>290</sup>

a. To grand jury

Technically, compliance with a subpoena duces tecum is made by the presentation of the documents called for by the subpoena to the grand jury at the place and time specified. Although there has been some relaxation in submission procedures, as set forth below, a subpoenaed party may insist that his documents be submitted only to the grand jury sitting as a whole.<sup>291</sup>

Some staffs prefer to have subpoenaed documents produced before the grand jury rather than in the office of the staff conducting the investigation. This is most likely to be appropriate if a small number of documents are involved. If the subpoenaed party is a prospective defendant or the representative of a prospective corporate defendant, he may be more impressed with the serious nature of the proceeding than would be the case if the

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<sup>290</sup>See also Ch. IV § E.3.

<sup>291</sup>In re Grand Jury Investigation (Gen. Motors Corp.), 1960 Trade Cas. (CCH) ¶ 69,796, at 77, 133 (S.D.N.Y.) (delivery to grand jury foreman, as a representative of grand jury, held invalid).



documents were produced either in person or by mail in the office of the staff. Further, the grand jury itself will have more of a feeling of involvement.

Additionally, the staff will have an immediate opportunity to ascertain by appropriate questioning whether complete subpoena compliance has been made and, where deficient, to learn the reasons therefor and request that such additional compliance be made as is appropriate. However, it is sometimes difficult to establish facts regarding the completeness of a search before the staff has had an opportunity to review the subpoenaed documents. Therefore, it may be more useful to save the questioning of the document custodian until after the staff has conducted its document review.

The date upon which documents must be produced should be sufficiently beyond the date of service of the subpoena to allow the subpoenaed party to make the required file search and compile the documents demanded.<sup>292</sup>

b. To staff

The preferred practice in the Division is to give the subpoenaed party the option of producing the documents before the grand jury or in the office of the staff conducting the

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<sup>292</sup>See N.L.R.B. v. Duval Jewelry Co., 141 F. Supp. 860 (S.D. Fla. 1956), rev'd on other grounds, 243 F.2d 427 (5th Cir. 1957), rev'd on other grounds, 357 U.S. 1 (1958).

investigation.<sup>293</sup> If the latter procedure is followed, attorneys should request the subpoenaed party to number the documents and to submit an affidavit setting forth in substance:

- (a) the name of the person or persons who made the search of the company's files for the documents called for in the subpoena, and the location of the files searched;
- (b) that a complete and comprehensive search was made for the documents called for in the subpoena;
- (c) that all documents which are responsive to the subpoena are included in the company's return;
- (d) that the documents submitted are authentic and genuine; and
- (e) which documents are produced under each paragraph of the subpoena, and under which paragraphs of the subpoena no documents are produced.

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<sup>293</sup>See Appendix III-5 for a sample letter giving a subpoenaed party this option. See § D., supra, for an example of this option set forth in a subpoena attachment.

In some instances, at the request of the staff, the affidavit has provided, in substance, that the documents submitted were prepared in the regular course of business at the time of, or a reasonable time after, the event, act, transaction, etc., recorded in the documents and were taken from files maintained in the regular course of business. Such a provision may amount to substantive testimony that goes beyond mere testimony as to subpoena compliance. Although probably undesirable under the old Immunity Act, there appears to be no reason under the 1970 Act why a request for such a statement in the affidavit should not be made.

Production of the required documents in the staff's office generally saves time, inconvenience, and expense -- both for the staff and the grand jury. This is particularly true where a large volume of documents is anticipated. On the other hand, if a second or follow-up subpoena is involved and staff has had compliance problems with the company with respect to the first subpoena, then it may be preferable to have the documents delivered to the grand jury and to take the testimony of the document custodian. But absent this type of situation or other misgivings by the staff which would call into question good faith subpoena compliance, it is usually more convenient and just as effective to permit the documents to be delivered to the staff's offices under an affidavit of search compliance.

If production in the staff's office is permitted, it should be carefully explained that such production is at the request or option of the subpoenaed party; a subpoena cannot compel the production of documentary material except before the grand jury itself. In addition, the staff should be sure to retain the right to have the custodian appear before the grand jury at a later date, should that prove to be necessary.

If the documents are produced in the staff's office, the subpoenaed party will sometimes request a written statement that the documents will be treated the same as if they had been physically produced before the grand jury. There would seem to be no objection to such a limited commitment by the staff.

c. Tabulations or compilations in lieu of documents

A subpoena often will require the production of statistics or other data which can be presented more conveniently in a tabulation or compilation than by the production of documents containing such information. In such instances, either in the attachment to the subpoena or in a conference with counsel, the subpoenaed party may be given the option of producing the documents or a certified statement that contains a tabulation or compilation.<sup>294</sup>

The propriety of this practice was upheld in United States v. Owens-Corning Fiberglass Corp., 271 F. Supp. 561 (N.D. Cal. 1967). Among other things, the defendants' officers argued that they were denied due process in that the Government purposely made the burden of complying with the subpoenas so onerous that the defendants would have no choice but to submit compilations. The court stated that the burden was on the defendants to object

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<sup>294</sup>See § D., *supra*, for suggested language to be included in the subpoena attachment.

properly to an unreasonable subpoena before complying in a manner designed to suit their convenience.<sup>295</sup>

d. File examination by Department

In lieu of production of subpoenaed documents before the grand jury or in the office of the staff, in some limited instances the staff may offer to make a search of the subpoena addressee's files to alleviate the burden of compliance. Two courts have refused to quash subpoenas as oppressive when the Government attorney offered to make (or have made) file searches in the offices of the addressee.<sup>296</sup> Depending upon the circumstances, the search may be made by the FBI or the staff assigned to the matter.<sup>297</sup>

e. Discretion of staff as to method

The preferred method of subpoena compliance depends upon the facts and circumstances of each grand jury investigation, including but not limited to the workload of the staff, the cost of travel to the site of the grand jury, the expense of convening the grand jury and

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<sup>295</sup>271 F. Supp. at 568.

<sup>296</sup>United States v. Linen Serv. Council, 141 F. Supp. 511 (D.N.J. 1956); In re Grand Jury Investigation, 33 F. Supp. 367 (M.D.N.C. 1940).

<sup>297</sup>The subpoena recipient must expressly and voluntarily consent to a search. Otherwise, there may be 4th Amendment problems.

the cost of transcripts, the attitude of the party subpoenaed, the nature and amount of material subpoenaed, etc. The staff should take all pertinent factors into consideration and arrive at a decision based on the exercise of its sound discretion.

If any concession is granted to a party under subpoena, care should be taken to treat other parties in similar circumstances in the same manner. Although subpoenas are rarely contested on the basis of denial of equal protection under the due process clause of the 5th Amendment, the possibility of such an attack always exists. In the face of such a challenge, the Government attorneys conducting the investigation must be prepared to show that either there has been no discrimination in their enforcement of the subpoena, or, if so, that the discrimination is rationally based on the differing circumstances of each party under investigation.

Any deviations from the usual manner of compliance before the grand jury, any changes in the time and place of compliance shown on the face of the subpoena, and any modifications of the subpoena attachment, should normally be covered in writing. A letter setting forth the arrangements, to which there is no objection, is generally sufficient for this purpose.

## 2. Government's right to original documents

Corporate counsel often submit or offer to submit copies of documents rather than the originals in compliance with a subpoena duces tecum. The practice is usually the result of a prior agreement between corporate and Government attorneys or a recognition that the demand

for originals, after copies have been supplied, necessarily entails a delay in the grand jury investigation.

Copies of documents are often unsatisfactory from a strictly investigative standpoint. Carbon or photostatic copies in corporate files, or copies of documents on which red, yellow or lead pencil notations have been made are frequently illegible or may be omitted entirely. Writing on the back of originals may not be copied. Further, erasure of notations on original documents may not be discernible on the copies. Opportunities for the alteration of documents are thus enhanced. Copies may also prove unsatisfactory for the confrontation of grand jury witnesses. A witness may more readily disavow knowledge of a copy than of the original.

Possession of copies of documents rather than originals may also pose additional evidentiary problems at the time of trial. The originals in the control of the corporation during the grand jury investigation, may be misplaced or, as happened in one case, "burglarized." In such cases, Government attorneys must overcome the best evidence rule and problems of authentication before the copies can be admitted at trial. Although the Government will generally prevail on these issues if the loss is beyond the control of the Government, an additional burden and delay is interjected into the process.

The staff should exercise its discretion as to whether it will demand originals or accept copies.<sup>298</sup> Generally, original documents should be required in the absence of a strong showing by the subpoenaed party for the necessity of submitting copies. If the staff determines that

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<sup>298</sup>The staff should be consistent with all subpoenas and avoid any implication of favoritism or unfair treatment.

originals rather than copies should be submitted, the subpoena duces tecum must unambiguously call for the originals (either as a separate note or within the definition of "documents"). Then, if copies are submitted to the grand jury, the Government attorneys should immediately demand the originals.<sup>299</sup>

In In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,826, at 91, 483 (S.D. Ohio), the court upheld the Government's right to the original documents based on Fed. R. Crim. P. 17(c). The rule states generally that the Government is entitled to the books, records, etc., requested. Therefore, the specific items must be produced if the demand calls for originals. The court stated:

Rule 17 is intended to obtain witnesses and documents for use as evidence, 1 Federal Practice and Procedure (Crim.) § 271, p. 539 (1969), and, generally, original documents must be produced, if available at a criminal prosecution. The government points out other good reasons for requiring originals: to inspect the color of the writing, penciled notations, stamps and other physical characteristics; for authentication before the Grand Jury, and to refresh the recollection of witnesses before it; and to safeguard the material for possible use at trial.

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<sup>299</sup>See In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,826, at 91,483 (S.D. Ohio); see also United States v. Re, 313 F. Supp. 442 (S.D.N.Y. 1970); cf. Canuso v. Niagara Falls, 7 F.R.D. 159, 161 (W.D.N.Y. 1945).



If the staff accepts copies, the subpoenaed party should be required to number and identify the copies, by initials or otherwise, and to stipulate, in substance:

- (1) That the subpoenaed party will keep, maintain, and otherwise preserve the originals, and, upon request, will submit such originals to Government counsel at any time during the course of the investigation or in connection with any subsequent legal proceedings to which the United States is a party arising from said investigation;
- (2) That the copies are authentic and genuine copies of original documents in the files of the subpoenaed party; and
- (3) That the subpoenaed party will at no time in legal proceedings brought by the United States contest or deny the authenticity and genuineness of such copies and will waive the "best evidence" rules as to such copies.

Further, it is good practice to insist that the original documents be produced on a temporary basis so that the copies can be checked for accuracy and completeness. This is a wise precaution since, as pointed out earlier, written notations appearing on the original documents may have been omitted in the copying process. Additionally, alterations are more readily ascertained when the originals are compared with the copies.

### 3. Government's right to entire documents

Where the subpoena is reasonable, and the particular document called for by the subpoena is relevant to the grand jury investigation, then the entire document must be produced.<sup>300</sup> A subpoenaed party cannot require "a line-by-line justification for the production of a generally relevant document."<sup>301</sup> Thus, it follows that even if the excised material pertains to trade secrets or confidential corporate information, it must be produced.<sup>302</sup>

### 4. Production in original files

On occasion, staffs have drafted subpoenas to require the production of the file folder or face of the file in which each responsive document is contained. One method is to provide in the definition section of the subpoena that "Documents" includes the files and folders tabs associated with each original and copy. Reference to the title or other identification appearing on the file or folder often serves to place the responsive document in context and provides some indication of the manner in which the subpoena addressee's files are maintained.

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<sup>300</sup>Steamship Co. of 1949 v. China Union Lines, Hong Kong, 123 F. Supp. 802 (S.D.N.Y. 1954).

<sup>301</sup>In re Grand Jury Investigation (Gen. Motors Corp.), 1960 Trade Cas. (CCH) ¶ 69,729, at 76,843 (S.D.N.Y.).

<sup>302</sup>In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952).

Other staffs have included an instruction in their subpoenas that simply requires that subpoena recipients divide and mark the responsive documents so as to identify the file from which the documents were obtained. A typical instruction in this regard is:

. . . . The documents submitted should be grouped according to the individual paragraph or sub-paragraph of this subpoena to which they are responsive and should be subdivided and marked so as to identify the file from which the documents were obtained.

5. Costs of production are borne by subpoena recipient

The Government is generally not required to reimburse a subpoena recipient for its costs in complying with the subpoena.<sup>303</sup>

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<sup>303</sup>See Hurtado v. United States, 410 U.S. 578, 588-89 (1973); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

6. Production by document custodian

The corporate representative who delivers the documents to the grand jury should be knowledgeable as to the completeness of compliance and the search which was conducted and able to answer questions, if any, relative to these areas. The corporation has an obligation to designate a representative who does not have a 5th Amendment problem.

In addition, the custodian may be questioned about deficiencies in compliance and the reasons therefore and instructed to make any appropriate additional compliance. As stated in In re Chilcote Co., 9 F.R.D. 571, 573 (N.D. Ohio), aff'd sub nom. A.A. Chilcote v. United States, 177 F.2d 375 (6th Cir. 1949):

It was the duty and responsibility of the president as chief executive officer of the corporation either to present himself or to send such officer or responsible representative of the corporation who could respond to the requirements of the subpoena, and he or the one selected by him should have attended the session of the Grand Jury on the date fixed by the subpoena and awaited questioning, dismissal or other action by that body.

. . .

A corporation only can act or respond by and through its responsible executives and certainly not through a messenger when a subpoena calls for attendance and testimony.

Although this case involved a corporation, its reasoning, of course, is equally applicable to other types of organizations.

Obviously, where a person appears as a witness in a custodial capacity, the staff should limit its interrogation to his custodial activities and responsibilities.

F. Motions to Quash

1. Grounds

A party may move under Fed. R. Crim. P. 17(c), to quash a grand jury subpoena on the grounds that it lacks specificity or is burdensome or upon claims of constitutional or common law privilege or Government misconduct or harassment.<sup>304</sup>

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<sup>304</sup>For a more detailed discussion of the privileges applicable to grand jury subpoena compliance, see § C., supra.

Courts have applied the 4th and 5th Amendments and Fed. R. Crim. P. 17(c), to limit subpoenas duces tecum. Assuming the 4th Amendment is applicable to grand jury subpoenas,<sup>305</sup> the principal limitation is the prohibition against "unreasonable searches and seizures" which is applicable to corporations as well as individuals. The 5th Amendment's prohibitions against self-incrimination generally protect only individuals and, to a limited extent, sole proprietorships. Sole proprietorships are entitled to 5th Amendment protection only for purely private or personal, as opposed to business, interests. Officers of a corporation, including closely-held corporations, may not object to the disclosure of corporate records, even if the act of production might prove to be personally incriminating.<sup>306</sup> Rule 17(c), which provides that a court "on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive," can also be used to limit subpoenas duces tecum.

The limitations on the scope of a subpoena duces tecum may be generally summarized as follows. It must not be too broad and sweeping.<sup>307</sup> The documents sought must have some relevance to the investigation being conducted.<sup>308</sup> The subpoena must be limited to a reasonable

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<sup>305</sup>See § C.2.b., supra.

<sup>306</sup>Braswell v. United States, 487 U.S. 99 (1988).

<sup>307</sup>Brown v. United States, 276 U.S. 134 (1928); In re Special November 1975 Grand Jury, 433 F. Supp. 1094 (N.D. Ill. 1977); In re Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949).

<sup>308</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991); Hale v. Henkel, 201 U.S. 43 (1906); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

time.<sup>309</sup> The documents requested must be described with sufficient definiteness so that the entity subpoenaed may know what is wanted.<sup>310</sup> The burden of complying with the subpoena must not be too great.<sup>311</sup> The subpoenas may not be used to secure privileged communications.<sup>312</sup> Trade secrets may be obtained because the rules of secrecy of grand jury proceedings will protect the confidentiality of such secrets.<sup>313</sup> In rare instances, a subpoena may be quashed because it was being used to harass or intimidate the subpoena recipient or because of other Government misconduct.<sup>314</sup>

Subpoena recipients have unsuccessfully asserted several other arguments in an attempt to avoid compliance. In In re Dymo Industries Inc., 300 F. Supp. 532 (N.D. Cal. 1969), aff'd, 418 F.2d 500 (9th Cir.), cert. denied, 397 U.S. 937 (1970), the grand jury subpoena was attacked because it was issued by the Antitrust Division. The court held that an investigation

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<sup>309</sup>Brown v. United States, 276 U.S. 134 (1928); In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192, 1198 (N.D. Ga. 1975); In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947).

<sup>310</sup>Brown v. United States, 276 U.S. 134 (1928); In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 991, 999 (D.R.I. 1975); In re United Shoe Mach. Corp., 73 F. Supp. 207 (D. Mass. 1947).

<sup>311</sup>In re Harry Alexander, Inc., 8 F.R.D. supra; In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948).

<sup>312</sup>In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204 (8th Cir. 1985).

<sup>313</sup>Schwimmer v. United States, 232 F.2d supra; In re Grand Jury Subpoenas Duces Tecum, 483 F. Supp. 1085, 1090 (D. Minn. 1979); In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952).

<sup>314</sup>See In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978 (1983); United States v. Doe, 541 F.2d 490 (5th Cir. 1976).

conducted at the initiative of the Department of Justice is and always has been a proper function of the grand jury. Grand jury subpoenas also have been attacked without success on the ground that no probable cause existed supporting the demand.<sup>315</sup> A grand jury is authorized to investigate prior to a determination of probable cause, and, in fact, in order to make this finding.<sup>316</sup>

Where Division attorneys, in the course of a preliminary investigation, interviewed persons who were later subpoenaed in an ensuing grand jury investigation, the court refused to quash the grand jury subpoenas on the ground that the witnesses' constitutional rights were allegedly violated because they were not given Miranda warnings.<sup>317</sup> The court noted that the interviews were voluntary and "part of a routine, preliminary inquiry." Further, the interviewees were not entitled to a Miranda-type warning in any event because there was neither custody nor focus of guilt.

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<sup>315</sup>300 F. Supp. at 534.

<sup>316</sup>Id.; Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).

<sup>317</sup>In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,857, at 91,594-95 (W.D. Ky.).



## 2. Costs of compliance

The Government is generally not required to reimburse a person for his costs in complying with a subpoena duces tecum.<sup>318</sup> However, the court in In re Grand Jury No. 76-3 (Mia.), Subpoena Duces Tecum, 555 F.2d 1306, 1308 (5th Cir. 1977), noted that a court exercising its power under Rule 17(c) of the Fed. R. Crim. P. may, in the appropriate circumstances, modify a grand jury subpoena to require the cost of compliance to be borne by the Government. A showing of financial burden entailed in complying with a subpoena, of course, may be considered by a court in assessing the reasonableness or burdensomeness of a subpoena in the context of a motion to quash.

## 3. Burdens of the parties

A presumption of regularity attaches to all grand jury subpoenas duces tecum.<sup>319</sup> Thus, the party who seeks to quash a subpoena on the grounds that it is unreasonable or burdensome bears a heavy burden.<sup>320</sup>

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<sup>318</sup>See Hurtado v. United States, 410 U.S. 578, 588-89 (1973); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

<sup>319</sup>United States v. R. Enterprises, Inc., \_\_ U.S. \_\_, \_\_ (1991); In re Grand Jury Subpoena, 920 F.2d 235 (4th Cir. 1990); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

<sup>320</sup>United States v. R. Enterprises, Inc., \_\_ U.S. at \_\_ ; In re Grand Jury Subpoena Duces Tecum (M.G. Allen and Assoc., Inc.), 391 F. Supp. 991 (D.R.I. 1975).

Once a motion to quash has been made, at least some courts may require that the Government initially demonstrate the relevance of the subpoenaed documents to a legitimate grand jury investigation. In the Third Circuit, the Government's initial burden may be met by the Government's submission of a "Schofield" affidavit containing a very brief description of the nature and/or purpose of the grand jury investigation and the general relevance of the subpoenaed documents to the investigation.<sup>321</sup> The "Schofield" affidavit should be submitted to the court in camera. Most other circuits do not require such an initial showing of relevancy and have either declined to follow Schofield or have distinguished it.<sup>322</sup>

The Third Circuit's affidavit requirement may no longer be valid or may be severely limited in light of the Supreme Court's recent decision in United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991). Under R. Enterprises, the Government would, at most, have to reveal the general

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<sup>321</sup>In re Grand Jury Proceedings, (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); see also In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc) (Subpoena directed to client's attorney).

<sup>322</sup>Declined to follow: In re Pantojas, 628 F.2d 701 (1st Cir. 1980); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hellman), 756 F.2d 428 (6th Cir. 1985); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663 (8th Cir. 1986); In re Grand Jury Proceedings (Bowe), 694 F.2d 1256 (11th Cir. 1982). Distinguished: United States v. Santucci, 674 F.2d 624 (7th Cir. 1982), cert. denied, 459 U.S. 1109 (1983); United States v. Skipworth, 697 F.2d 281 (10th Cir. 1983).

subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion.<sup>323</sup>

#### 4. Time for filing

Unlike Rule 45(b) of the Fed. R. of Civ. P., the criminal rule allows for the consideration of a motion to quash a subpoena at any time up to and including the time set for compliance.<sup>324</sup>

#### 5. Appeals

Under 18 U.S.C. § 3731, the Government may appeal an order quashing a grand jury subpoena.<sup>325</sup>

One to whom a grand jury subpoena is directed may generally not appeal the denial of a motion to quash the subpoena, but must either comply or refuse to comply with the subpoena. If he refuses to comply, he may contest the validity of the subpoena on appeal, if he is

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<sup>323</sup> \_\_ U.S. at \_\_; see also § A.2.a.

<sup>324</sup>See Wright, Federal Practice and Procedure, Criminal Section 275.

<sup>325</sup>See In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979); United States v. Calandra, 455 F.2d 750 (6th Cir. 1972), rev'd on other grounds, 414 U.S. 338 (1974); In re Special September 1978 Grand Jury (II), 640 F.2d 49 (7th Cir. 1980).

subsequently cited for contempt.<sup>326</sup> Appellate review may be appropriate in a limited class of cases where denial of immediate review would render impossible any review at all.<sup>327</sup> For example, in Perlman v. United States, 247 U.S. 7 (1918), immediate review of an order directing a third party to produce documents that were Perlman's property was allowed because it was unlikely that the third party would risk contempt to vindicate Perlman's rights.<sup>328</sup>

#### G. Enforcement of Subpoenas

A refusal or failure to produce documentary material in compliance with a subpoena or incomplete or untimely compliance may require a motion to compel compliance and, if necessary, initiating civil or criminal contempt proceedings.<sup>329</sup>

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<sup>326</sup>United States v. Ryan, 402 U.S. 530 (1971); see Cobbledick v. United States, 309 U.S. 323 (1940).

<sup>327</sup>United States v. Ryan, 402 U.S. 530 (1971).

<sup>328</sup>See also In re Gren, 633 F.2d 825 (9th Cir. 1980) (immediate appeal from an order denying a motion to quash a subpoena permitted because subpoena recipient was subject to civil suit for improperly divulging consumer credit information).

<sup>329</sup>See Ch. V § M. for a discussion of contempt in the context of a refusal to testify.

1. What constitutes contempt

Contempt by refusing or failing to comply with a subpoena may be either criminal or civil in nature. Its constituent elements are found in Fed. R. Crim. P. 17(g) and 42;<sup>330</sup> 18 U.S.C. § 401,<sup>331</sup> and 28 U.S.C. § 1826 (Organized Crime Control Act).<sup>332</sup>

Simply stated, contempt is committed if a person is properly subpoenaed and willfully fails to produce records which are in existence and under his control at the time the subpoena is

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<sup>330</sup>Fed. R. Crim. P. 17(g):

Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

See also § G.4., infra.

<sup>331</sup>18 U.S.C. § 401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

<sup>332</sup>28 U.S.C. § 1826:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. . . .

issued.<sup>333</sup> Failure to appear is sufficient in itself to constitute contempt. A witness who appears but refuses to produce the documents demanded is not yet in contempt of court (unless an order to testify or produce is secured in advance from the court, as for example, with an immunity order). The act of contempt does not occur until the witness refuses to obey a direct order of the court.<sup>334</sup> This means that the recalcitrant witness must be presented before the court, a proper foundation must be established and the court must issue a direct order to the witness to produce.

To sustain a charge of contempt, whether the charge is criminal or civil, the following must occur:

- (1) There must be valid service of the subpoena;
- (2) The recipient must fail to make production of the documents requested after a court order has directed him to do so;
- (3) In the case of criminal contempt, the recipient's failure must be the result of his willful acts;<sup>335</sup>

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<sup>333</sup>Nilva v. United States, 352 U.S. 385 (1957); Goldfine v. United States, 268 F.2d 941 (1st Cir. 1959), cert. denied, 363 U.S. 842 (1960).

<sup>334</sup>Brown v. United States, 359 U.S. 41 (1959); United States v. Chandler, 380 F.2d 993 (2d Cir. 1967).

<sup>335</sup>Willfulness is not a necessary element of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); T.W.M. Mfg. Co. v. Dura Corp., 722 F.2d 1261 (6th Cir. 1983), cert.  
(continued...)

- (4) The documents must be in existence at the time; and
- (5) The recipient must have control of the requested documents.

## 2. Distinction between civil and criminal contempt

The essential differences between criminal and civil contempt are the nature and purpose of the relief sought. A contempt proceeding is civil if the purpose is remedial and intended to coerce the person into doing what he is supposed to do.<sup>336</sup> The sanction for civil contempt is conditional and must be lifted once the contemnor has complied with the court's order.<sup>337</sup> To more fully realize the coercive effect of a possible contempt sanction, a witness expected to refuse to produce (or testify) should be taken before a grand jury panel which has a period of time left to serve, rather than a panel which is about to expire. If the purpose is to punish the wrongdoer, however, the proceeding is one for criminal contempt and the sentence will be determinate.<sup>338</sup>

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<sup>335</sup>(...continued)  
denied, 479 U.S. 852 (1986).

<sup>336</sup>Shillitani v. United States, 384 U.S. 364 (1966).

<sup>337</sup>Id.; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984).

<sup>338</sup>United States v. United Mine Workers, 330 U.S. 258 (1947).

The Supreme Court, in Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966), held that a sentence for criminal contempt in excess of six months requires a jury trial.<sup>339</sup> Of course, the Government cannot know in advance what penalty will be imposed. Nevertheless, the Government should not press for imprisonment in excess of six months, and should be certain the court is aware of the Cheff rule.

### 3. Proof

The fact of contempt is usually established by the Government by the following proof:

(1) The affidavit or testimony of a deputy marshal that he served the subpoena upon the defendant upon the date and at the time indicated by the return date;

(2) The subpoena itself which may be submitted with the marshal's affidavit, or introduced separately, showing that it was properly issued by the clerk of court upon application of the United States;

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<sup>339</sup>See also United States v. Twentieth Century Fox, 882 F.2d 656 (2d Cir. 1989) (organization has a right to a jury trial when fine imposed for criminal contempt exceeds \$100,000), cert. denied, \_\_ U.S. \_\_ (1990).



(3) If necessary, the affidavit or testimony of the clerk or a deputy clerk showing that issuance of the subpoena was in conformity with Fed. R. Crim. P. 17;

(4) The affidavit or testimony of the foreperson of the grand jury establishing the presence of a quorum on the date and time in question. In this regard, the best evidence would be the minutes of the grand jury as maintained by the secretary that a quorum was present. (Authentication by the grand jury secretary and his testimony would be necessary if the grand jury minutes are used.) The foreperson's affidavit or testimony should also include the fact that:

(a) The defendant did not appear, or

(b) Appeared and refused or failed to produce, or

(c) Appeared and refused or failed to produce all the documents ordered by the subpoena.

Copies of appropriate parts of the grand jury transcript may be offered through the testimony of the court reporter, the foreperson, or a Government attorney;

(5) The testimony of the recipient or the appropriate representative of a corporate recipient before the grand jury, as revealed by the transcript. This testimony would be admissible through the foreperson, or the court reporter, or counsel for the Government by affidavit<sup>340</sup> and;

(6) Whatever evidence is available to show the existence of the documents, their control by the recipient, and his refusal to produce. For criminal contempt, failure to appear on the return date is sufficient to establish the requisite willfulness, thus shifting the burden to the defendant to show a good faith effort to comply.<sup>341</sup>

#### 4. Procedure and forms

The procedure to be followed for failure or refusal to comply with a subpoena to produce documents essentially is the same for both criminal and civil contempt.

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<sup>340</sup>If the recipient or corporate representative appears before the grand jury and fails or refuses to produce the subpoenaed material, in whole or in part, counsel for the Government should take the opportunity to adduce the necessary evidence at that time regarding the document's control, custody or possession and the recipient's willfulness in failing or refusing to produce.

<sup>341</sup>United States v. Johnson, 247 F.2d 5 (2d Cir.), cert. denied, 355 U.S. 867 (1957).

Punishment for failure to produce is criminal in nature, and the procedure to be followed, the refusal or failure not being in the actual presence of the court, must be in accordance with Fed. R. Crim. P. 42(b).<sup>342</sup> Rule 42(b) provides:

Rule 42(b) Disposition Upon Notice And Hearing. A criminal contempt, except as provided in subdivision (a) of this rule, shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

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<sup>342</sup>Harris v. United States, 382 U.S. 162 (1965).

It is settled that the summary procedure provided for by Fed. R. Crim. P. 42(a), is not appropriate for a refusal to produce evidence before a grand jury even though the refusal takes place directly in the presence of the court and at the court's request. This rule is usually utilized where a party, during a court hearing or trial, is abusive of the court or otherwise engages in contemptible conduct.<sup>343</sup>

The courts have held that Rule 42(b) also applies to civil contempt proceedings, including those brought under 28 U.S.C. § 1826, and, therefore, a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense.<sup>344</sup> The notice should specify whether the proceeding will be criminal or civil.<sup>345</sup>

Both criminal and civil contempt may be pursued by way of an Order to Show Cause. Criminal contempt may alternatively be charged in an indictment. Actual criminal or civil contempt proceedings may be preceded by a Motion to Compel Compliance.

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<sup>343</sup>See, e.g., Harris v. United States, 382 U.S. 162 (1965); United States v. Willett, 432 F.2d 202 (4th Cir. 1970).

<sup>344</sup>Shillitani v. United States, 384 U.S. 364 (1966); In re Rosahn, 671 F.2d 690 (2d Cir. 1982); United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977); United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 414 U.S. 1079 (1974).

<sup>345</sup>Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); In re Dinnan, 625 F.2d 1146 (5th Cir. 1980); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983).

1) Order to show cause.<sup>346</sup> As provided in Fed. R. Crim. P. 42(b), a show-cause order can be requested by the Government. The request should take the form of a Petition by the United States for an order to show cause why respondent should not be found in contempt. Affidavits setting forth the foundational facts discussed above should be submitted to the court by the Division attorney or attorneys presenting the matter. The affidavit of the deputy marshal who served the subpoena should also be submitted with the petition.

In addition, the Third Circuit requires an affidavit by the Government setting forth the general relevancy of the subpoenaed documents to the grand jury investigation.<sup>347</sup> Most other circuits, however, have either declined to follow or have distinguished the Third Circuit's approach.<sup>348</sup>

2) Indictment. An alternative procedure which may be followed in pursuing criminal contempt occurring before the grand jury (after direct order of the court) is for the grand jury to return an indictment for violation of 18 U.S.C. § 401.<sup>349</sup>

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<sup>346</sup>See United States v. National Gypsum Co., 1972 Trade Cas. (CCH) ¶ 74,173, at 92,870 (W.D. Pa.).

<sup>347</sup>In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); see also In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc). But see United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991).

<sup>348</sup>See §§ A.1.a. and F.3., supra.

<sup>349</sup>See United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

3) Motion to compel compliance. If a witness appears before the grand jury and refuses to comply with the subpoena based on some objection to the subpoena, e.g., attorney-client privilege, work-product privilege, 1st, 4th or 5th Amendments, 18 U.S.C. § 2515 (Prohibition of use as evidence of intercepted or oral communications) or § 3504 (Evidence derived from an unlawful act), the Government may wish to bring on a motion to compel compliance rather than going directly to contempt proceedings. This affords the Government an opportunity to litigate any issues of fact or law prior to any contempt proceedings.

The motion should be brought upon notice and should be accompanied by some indication in writing to counsel that if the motion is granted and there is then a lack of compliance with the court's order, the Government intends to proceed immediately against the witness in a contempt proceeding under Rule 42(b) or 28 U.S.C. § 1826. The witness should be required to raise all possible objections to the subpoena at the hearing on the motion to compel, rather than litigating such issues at the contempt hearing. Care should be taken to research the case law prior to the hearing on the motion to compel regarding the particular objection because frequently the Government has an initial burden to meet. For example, if a 1st Amendment objection is raised, the Government may have to make certain showings as to the legitimacy of the grand jury investigation.

If a claim of privilege is made, the court will first determine whether the privilege, as a general matter, exists. If so, the court may order an in camera inspection of the documents for which the protection is sought.<sup>350</sup>

## 5. Defenses

### a. 4th Amendment

The 4th Amendment's prohibition against unreasonable searches and seizures has been applied to grand jury subpoenas but only to the extent that a subpoena that is unnecessarily broad in scope will be held unreasonable.<sup>351</sup> A subpoena duces tecum is thus subject only to the general 4th Amendment requirement of reasonableness, and need not be based on probable cause.

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<sup>350</sup>In re Grand Jury Proceedings (Doe), 602 F. Supp. 603, 610 (D.R.I. 1985).

<sup>351</sup>For a more detailed discussion of the application of the 4th Amendment to subpoenas, see § C.2.b.

b. 5th Amendment

A corporation has no 5th Amendment privilege against self-incrimination.<sup>352</sup> This rule has been extended to include all corporations, no matter how small, and most other "artificial entities", such as partnerships.<sup>353</sup> Moreover, a corporation must produce its records even though their contents or the act of production itself may incriminate the custodian of the records or other corporate officials.<sup>354</sup>

Records required to be made or kept by the business, kept by employees within the business, submitted to the business from time-to-time, or kept on the business premises and used in day-to-day transactions of the business are considered business records for purposes of the 5th Amendment.<sup>355</sup> Appointment calendars and diaries kept by employees of the business generally

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<sup>352</sup>Hale v. Henkel, 201 U.S. 43 (1906); United States v. White, 322 U.S. 694 (1944). For a more detailed discussion of the application of the 5th Amendment to subpoenas, see § C.2.c.

<sup>353</sup>Bellis v. United States, 417 U.S. 85 (1974).

<sup>354</sup>See Braswell v. United States, 487 U.S. 99 (1988); United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986); In re Grand Jury Empaneled March 17, 1987, 836 F.2d 150 (3d Cir. 1987); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 479 U.S. 985 (1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Vallance, 793 F.2d 1003, 1005-06 (9th Cir. 1986); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 946 (10th Cir.), cert. denied, 469 U.S. 819 (1984); In re Grand Jury No. 86-3 (Will Roberts), 816 F.2d 569, 570 (11th Cir. 1987).

<sup>355</sup>United States v. MacKey, 647 F.2d 898 (9th Cir. 1981).



are considered business records, even when they contain personal as well as business-related notations.<sup>356</sup>

c. Illegal wiretaps

A grand jury witness is entitled, by reason of 18 U.S.C. §§ 2515 and 3504, to refuse to respond to questions based on illegal interception of oral or wire communications.<sup>357</sup> However, a grand jury witness does not have standing to suppress evidence before a grand jury. He merely has the right not to testify in response to questions based on the illegal interception of his communications.<sup>358</sup>

The Government's response to a claim of an illegal interception depends on whether any interception occurred. If there was no interception, the Government will file an affidavit denying that any interception took place. Under some circumstances, the affidavit must be reasonably specific, and conform with the requirements set forth in United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

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<sup>356</sup>United States v. MacKey, 647 F.2d *supra*; In re Grand Jury Subpoena Duces Tecum, 522 F. Supp. 977 (S.D.N.Y. 1981); United States v. Waltman, 394 F. Supp. 1393 (W.D. Pa.), vacated on other grounds, 525 F.2d 371 (3d Cir. 1975); In re Grand Jury Proceedings, 349 F. Supp. 417 (N.D. Ohio 1972).

<sup>357</sup>Gelbard v. United States, 408 U.S. 41 (1972); *see* Ch IV § D.4.

<sup>358</sup>Id. at 47; *see* In re Marcus, 491 F.2d 901 (1st Cir.), vacated, 417 U.S. 942 (1974).

If an interception did occur, the Government must so indicate, and provide the court with appropriate documents demonstrating that the interception was pursuant to court order.<sup>359</sup>

d. Improper Government motive

A subpoena recipient need not comply with a subpoena if it is issued for an improper motive, for example, to obtain information for use at trial or for use in a civil investigation or to harass or intimidate the subpoena recipient. The subpoena recipient has a heavy burden to justify non-compliance on these grounds.<sup>360</sup>

e. Fear of retaliation

Fear of retaliation and for the physical safety of the witness does not constitute just cause to refuse to testify or produce documents.<sup>361</sup> Even where fears are shown to be legitimate, courts have refused to excuse the witness from testifying.<sup>362</sup> A few courts have recognized the

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<sup>359</sup>For a discussion as to what documents are necessary to prove a valid intercept, see U.S.A.M. 9-7.110 and 7.113.

<sup>360</sup>See § A.1., supra, for a more detailed discussion of the appropriate scope of grand jury subpoenas.

<sup>361</sup>Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975).

<sup>362</sup>In re Grand Jury Proceedings (Taylor), 509 F.2d 1349 (5th Cir. 1975); Latona v. United States, 449 F.2d 121 (8th Cir. 1971).

possibility that duress or coercion may be a defense to a contempt charge, but have found the defense inapplicable to the facts presented.<sup>363</sup>

6. Successive contempt citations

If sanctions have been imposed on a witness found in contempt of the grand jury, that witness may not be called before a second grand jury without prior approval from the Assistant Attorney General, Criminal Division.<sup>364</sup> Although language in Shillitani v. United States, 384 U.S. 364, 371 n.8 (1966), may authorize successive contempts, the Department has taken a more restrictive stance.

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<sup>363</sup>See In re Grand Jury Proceedings (Gravel), 605 F.2d 750 (5th Cir. 1979); United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

<sup>364</sup>See U.S.A.M. 9-11.160.

## 7. Appeals

Contempt adjudications are appealable as final decisions under 28 U.S.C. § 1291.<sup>365</sup> A contempt adjudication is not final for purposes of appeal under § 1291 until a sentence or sanction has been imposed.<sup>366</sup> An application for a show-cause order for criminal contempt is a "criminal case" within the meaning of the Criminal Appeals Act, 18 U.S.C. § 3731, and a Government appeal of the denial of a criminal contempt order is thus subject to the requirements of that provision.<sup>367</sup>

## 8. Refusal to testify or refusal to answer certain questions

Once the problems of self-incrimination and immunity have been overcome,<sup>368</sup> the ingredients of contempt and the procedures to be followed are the same as described above as to production of documents.

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<sup>365</sup>See Wright, Miller & Cooper, Fed. Prac. and Proc. 15 Jurisdiction § 3917 (1976); United States v. Martin Linen Supply Co., 485 F.2d 1143 (5th Cir. 1973) (Government appeal of denial of criminal and civil contempt), cert. denied, 415 U.S. 915 (1974); United States v. Metropolitan Disposal Corp., 798 F.2d 1273 (9th Cir. 1986) (witness appeal of criminal contempt).

<sup>366</sup>Weyerhaeuser Co. v. International Longshoremen's Union, 733 F.2d 645 (9th Cir. 1984).

<sup>367</sup>United States v. Goldman, 277 U.S. 229 (1928); United States v. Sanders, 196 F.2d 895 (10th Cir. 1952).

<sup>368</sup>See Ch. V.

## H. Forthwith Subpoenas

A forthwith subpoena compels a witness to appear or to produce documents shortly after service of the subpoena. Forthwith subpoenas are simply subpoenas whose return times are shorter than what would otherwise be "reasonable" under normal circumstances. The term "forthwith" describes the brief time period between service and appearance or production.

Only two circumstances merit issuing a forthwith subpoena. First, where a potential witness is likely to flee; second, where there is a reasonable likelihood that documents will be destroyed, concealed or fabricated. Decisions to issue a forthwith subpoena must also consider the need for the orderly presentation of evidence before the grand jury, and the degree of inconvenience that the forthwith subpoena might cause a subpoenaed witness.<sup>369</sup> Generally, "the issuance of a 'forthwith' subpoena may be justified by the facts and circumstances of a particular case."<sup>370</sup>

### 1. Efficacy of forthwith subpoenas

When considering whether to issue a forthwith subpoena, attorneys should be aware that even in the extreme circumstances that would justify issuing it, a recipient's efforts to quash a forthwith subpoena may sufficiently delay appearance or production so that the efforts

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<sup>369</sup>See U.S.A.M. 9-11.140.

<sup>370</sup>United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983).

successfully thwart the goals of the "forthwith" nature of the subpoena. This, combined with the efforts necessary to respond to motions to quash, may, in most circumstances, make other means of compelling appearance or production (such as a subpoena with a longer return time, a material witness arrest warrant, or a search warrant) more effective means of securing witness appearances or minimizing document destruction.

A forthwith subpoena is especially susceptible to motions to quash, simply because the filing of such motions will stay compliance. One court has suggested that prosecutors may not enforce a forthwith subpoena until its recipient has the chance to file a motion to quash; the time for this "chance" would seem to set a minimum return.<sup>371</sup> The time that it takes for a court to hear a motion to quash may be such that, in the end, the time between service of the forthwith subpoena and compliance approximates a "normal" subpoena return time. Thus, attorneys should consider the relative efficacies of devoting prosecutorial resources to oppose a motion to quash, perhaps filed simply to gain time, and avoiding such motions, perhaps achieving, in the end, the same compliance time as the original forthwith subpoena.

A particular circumstance in which a forthwith subpoena is appropriate arises when the grand jury is in session, and attorneys become aware of evidence (for example, through other presentations before the grand jury, proffered evidence, witness interviews, or otherwise) that the grand jury must consider during its session, and that such evidence would not likely be available for a subsequent grand jury session. An attorney will have little time to secure a search warrant

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<sup>371</sup>See United States v. Re, 313 F. Supp. at 449-50.

from a court, thus, a forthwith subpoena may be the only way to put the necessary evidence before the grand jury.

2. Timing of a forthwith subpoena; court assessment of "reasonableness"

Courts have approved the use of forthwith subpoenas served only minutes before, and on one occasion, at the precise moment of the required return time before the grand jury.<sup>372</sup> While there is no precise return time that sets apart a "forthwith" from a "normal" subpoena, "forthwith" subpoenas are usually served during a session of the issuing grand jury, and call for a return during the same grand jury session.

When courts consider a motion to quash a forthwith subpoena, they will balance the circumstances under which a forthwith subpoena is issued with the alleged burden and inconvenience that the subpoena may cause. For example, in United States v. Re, 313 F. Supp. at 449-50, the court stated that it would judge the reasonableness of a forthwith subpoena duces tecum on the basis of the following factors: 1) whether the Government had a clear reason to fear destruction and alteration of documents; 2) the prejudice to the subpoena recipient by requirements that they produce documents forthwith; 3) the physical cumbersomeness of the documents; 4) any grounds on which the addressee could quash the subpoena had he been given

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<sup>372</sup>United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983) (document returns required by 4:00 p.m.; subpoenas served at 3:50 p.m. and 4:00 p.m.); United States v. Re, 313 F. Supp. 442 (S.D.N.Y. 1970) (subpoena served on the morning before production was due).

more notice and thus more time to consult with counsel; 5) whether the documents were burdensome in quantity; and 6) whether the subpoena was sufficiently specific.

In general, the shorter a subpoena's return time, the more burdensome and inconvenient the subpoena becomes. Shortened time of return or production will especially compound burden where a subpoena calls for a document search or for appearance by a witness who physically is far removed from the grand jury. The circumstances that surround issuing a forthwith subpoena must outweigh the burden and inconvenience that shortened time has added to the subpoena. Attorneys should accordingly be as certain as possible that the circumstances warrant issuing a forthwith subpoena, and be able to demonstrate the basis for that certainty in court.

### 3. 4th Amendment questions raised by forthwith subpoenas

Courts have been concerned with the misuse of forthwith subpoenas to effect warrantless searches. The 4th Amendment protects against unreasonable "constructive" searches and seizures,<sup>373</sup> and the grand jury's power to issue forthwith subpoenas does not authorize the server of a subpoena either to seize items that the subpoena requires, or to demand that such items immediately be turned over to him. If the subpoena server coerces compliance with the subpoena, the subpoena takes on the nature of a search warrant. The subpoena can never be the

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<sup>373</sup>United States v. International Business Machs. Corp., 83 F.R.D. 97 (S.D.N.Y. 1979).



basis of a valid search because it will not be issued as the result of a direct court order.<sup>374</sup> Misuse of a forthwith subpoena to effect a warrantless search or arrest may lead a court to exclude at trial the evidence, the witness' testimony, or the fruits of either sought by the forthwith subpoena, even if the subpoena recipient initially complied with the subpoena.<sup>375</sup>

To minimize possible 4th Amendment questions, attorneys should make sure that the subpoena server knows to tell the recipient that while the subpoena compels the recipient's return before the grand jury, the subpoena is not a search or arrest warrant. Attorneys should further instruct the server of the forthwith subpoena that he is only to serve the subpoena, and not suggest to recipients that the subpoena allows him to seize or review the documents.

Subpoena recipients may consent to a search by the server of the subpoena.<sup>376</sup> Servers of subpoenas, however, must immediately leave the recipient's premises if a recipient asks them to do so.<sup>377</sup> In cases where consent to search is given, the authority for the search is not the subpoena, but, instead, the consent to the search by the owner or the person in control of the subject of the subpoena.<sup>378</sup> In such cases, acquiescence, not knowing and informed consent are

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<sup>374</sup>Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983).

<sup>375</sup>United States v. Ryan, 402 U.S. 530, aff'g 444 F.2d 1095 (9th Cir. 1971).

<sup>376</sup>See Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d 770 (6th Cir. 1979) (totality of circumstances test to determine if consent was given), cert. denied, 445 U.S. 903 (1980).

<sup>377</sup>Id. at 774.

<sup>378</sup>Id.

sufficient.<sup>379</sup> Questions of consent to search and authority to give consent are often difficult. Accordingly, the best practice is for servers of forthwith subpoenas to promptly leave a recipient's premises after service of the subpoena. Further, in anticipation of any 4th Amendment questions, at least two persons should serve a forthwith subpoena. If necessary, one server may appear as a witness, should the recipient try to quash the subpoena on the grounds that the servers attempted to use the subpoena to effect a warrantless search.

Attorneys should also establish a proper foundation for a forthwith subpoena by arranging, prior to issuing the forthwith subpoena, for witness testimony about the facts and circumstances that would justify issuing the subpoena. Forthwith subpoenas should be issued with the grand jury's approval and at the foreperson's direction.<sup>380</sup>

#### 4. Alternatives to forthwith subpoenas

##### a. Subpoenas with longer return times

A subpoena with a "normal" return time that would be "reasonable" if there were no question of a witness' appearance or document destruction, would have the same effect as a forthwith subpoena of putting a witness on notice that the grand jury requires his appearance or

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<sup>379</sup>Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

<sup>380</sup>See United States v. Hilton, 534 F.2d 556, 565 (3d Cir.) (forthwith subpoena issued when grand jury is not in session is not a substitute for a proper search warrant), cert. denied, 429 U.S. 828 (1976).

his documents. Noncompliance with the subpoena is still enforceable by contempt. Yet, enforcement of the subpoena may, on the whole, be more certain, since its longer return time would likely contribute to a court holding that it was, on the whole, reasonable. As discussed above, after a court hears a motion to quash a forthwith subpoena, the time between service of and compliance with a forthwith subpoena, and that between service and compliance with a subpoena with a longer return time, may end up being identical.

b. Material witness arrest warrants to assure witness appearances

If a witness is likely to flee, attorneys should strongly consider applying to the court for a material witness arrest warrant. 18 U.S.C. § 3149 specifically provides for a material witness arrest warrant to assure a witness' grand jury appearance. Under a material witness arrest warrant, a witness is arrested and held until his grand jury appearance.

c. Search warrants to curtail document destruction, concealment or fabrication

A search warrant is, in most cases, preferable to a subpoena where there is a reasonable likelihood that documents will be destroyed, concealed or fabricated. A search warrant allows a direct search for documents, while a subpoena depends on the recipient or its agents to conduct the search and to produce the documents before the grand jury. Given that the

basis for issuing the warrant would be the likelihood of document destruction, concealment or fabrication, a direct, warranted search is more likely to achieve the desired result of safeguarding documents than merely relying on the subpoena recipient to produce the documents himself.

## I. Search Warrants

### 1. Factors to consider in using warrants

In a limited set of circumstances, attorneys should consider the use of a search warrant to obtain evidence of criminal activity. Generally, warrants should be viewed as an extraordinary method of criminal discovery, and should be sought only when an attorney has a substantial basis for doing so. Moreover, because of differing standards governing their issuance,<sup>381</sup> search warrants cannot be viewed as substitutes for grand jury subpoenas duces tecum. Rather, warrants are useful as complements to subpoenas in cases in which the investigation develops proof either: (a) that material responsive to a previously-issued subpoena was not produced in response to the subpoena; or (b) that there is already probable cause to charge a criminal offense (such as price-fixing) and that evidence not already under subpoena

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<sup>381</sup>A grand jury may issue subpoenas for evidence to discover whether there exists probable cause to believe that a crime has been committed. By contrast, before a search warrant may issue, the Government must establish probable cause to believe that an offense has been committed.

which helps prove that offense can be found at a specified location. In antitrust investigations, the former situation is the more likely one in which a search warrant would be sought.

Where the prosecuting attorney can establish that the recipient of a grand jury subpoena duces tecum has not complied fully with the subpoena, either by deliberately withholding responsive documents or by recklessly searching for responsive materials, the prosecutor could proceed either by search warrant or by follow-up subpoena. The search warrant may be the superior alternative, for the following reasons.

First, if an individual deliberately or recklessly withheld documents responsive to an earlier grand jury subpoena, it is unlikely that the same individual will produce the required documents in response to a subsequent subpoena. The security of the documents is of paramount importance to the prosecution, as the withheld materials are likely to be proof of both the original offense under investigation (e.g., price-fixing or bid-rigging) and the separate offense (e.g., obstruction of justice or criminal contempt) which was committed when the documents were withheld from production under the original subpoena. Use of a search warrant in these circumstances may be essential to prevent the further concealment or the possible destruction of this evidence. Warrants are issued without notice to the person whose premises are to be searched and they are executed by law enforcement officers who immediately take the evidence into their possession, eliminating the opportunity for destruction of evidence.

Second, a search warrant is executed by law enforcement officers without any participation by the owner or custodian of the seized property. Thus, the owner or custodian is not being compelled to do anything which might be deemed "testimonial" and, for that reason, he

has no right to assert a 5th Amendment privilege to block execution of the warrant. On the other hand, the courts have held under some circumstances that if the act of producing documents in response to a subpoena can, itself (i.e., independent of the content of the documents), be said to establish an element of a criminal offense,<sup>382</sup> the act of production is deemed "testimonial," and 5th Amendment self-incrimination interests are implicated.<sup>383</sup>

If an attorney conducting a grand jury investigation has a substantial reason to suspect that the recipient of a subpoena duces tecum has withheld documents, use of a search warrant should be considered. Some indicia of possible withholding of documents are: chronological gaps in a company's production (particularly if those gaps coincide with significant events in the case, such as bid opening dates, etc.); significant differences between the relative quantities of documents produced by different offices of the same company; the existence of documents prepared by, e.g., Company A in Company B's submission, where no counterpart documents were submitted by Company A; and testimony by grand jury witnesses that a particular individual prepared and kept a certain type of record (e.g., a diary or notebook of his activities) and the absence of such records in his company's submission. To establish the requisite probable cause to obtain a warrant, it may be necessary to systematically question grand jury witnesses from the suspect company about the existence or destruction of subpoenaed documents. Staffs

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<sup>382</sup>In a prosecution for obstruction of justice, 18 U.S.C. § 1503, or criminal contempt, 18 U.S.C. § 401 or Fed. R. Crim. P. 42, the defendant's possession of documents responsive to a grand jury subpoena is likely to be a link in the chain of evidence which will convict the defendant.

<sup>383</sup>United States v. Doe, 465 U.S. 605 (1984).

should be cautious as, on occasion, such questioning may prematurely alert a company to our suspicions and lead to further destruction of documents prior to the search.

## 2. Legal standards

The 4th Amendment of the Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The terms "probable cause" and "particularly describing" connote legal standards that must be met before a valid search warrant can issue. Each of these terms has generated a large body of case law, reflecting the case-by-case, fact-bound approach courts have taken in applying them. The following discussion is intended to be only an overview of these two 4th Amendment requirements. Treatises and case law should be consulted to determine whether the probable cause and particularity requirements are met in specific factual situations and in specific jurisdictions.

a. Probable cause

The Supreme Court has formulated several definitions of probable cause. The following is one of the most commonly quoted:

Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.<sup>384</sup>

The Court has also said that probable cause exists if there is a "substantial basis" for believing that a crime has been committed and that a particular location contains evidence of that crime.<sup>385</sup>

In a typical criminal antitrust case, probable cause will have to be shown as to three things to obtain a search warrant: (1) that a crime has been committed, (2) that documents (or

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<sup>384</sup>Carroll v. United States, 267 U.S. 132, 162 (1952); see Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

<sup>385</sup>Jones v. United States, 362 U.S. 257, 271 (1960); United States v. Melvin, 596 F.2d 492 (1st Cir.), cert. denied, 44 U.S. 837 (1979).



other items) evidencing the crime exist,<sup>386</sup> and (3) that the items to be seized are located at a specific location.

The basis for establishing probable cause as to each of these three items usually must be set forth in an affidavit. Under certain circumstances, a warrant may issue based on sworn oral testimony rather than a written affidavit.<sup>387</sup> The standards are the same whether the warrant is based on an affidavit or oral testimony. In antitrust cases, the warrant will usually be based on an affidavit.

The grounds for establishing probable cause can be based either on the personal knowledge of the affiant or on hearsay.<sup>388</sup> Where probable cause is based on the affiant's personal knowledge, the specific facts and circumstances constituting probable cause must be set forth in the affidavit. A warrant cannot be based on the affiant's unsupported suspicions or beliefs.

Where probable cause is based on hearsay, the affidavit must contain sufficient information about the informer's credibility and basis of knowledge to establish that his information is worthy of belief. The Supreme Court has stated the standard as follows:

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<sup>386</sup>There are three categories of items that may be seized pursuant to a search warrant: (1) items that are evidence of the commission of a crime; (2) contraband, the fruits of crime or things otherwise criminally possessed; and (3) items that have been used to commit a crime or that are designed or intended to commit a crime. Fed. R. Crim. P. 41(b). In an antitrust case, the search warrants will usually be for documents that constitute evidence of a crime.

<sup>387</sup>Fed. R. Crim. P. 41(c)(2).

<sup>388</sup>Fed. R. Crim. P. 41(c)(1).

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.<sup>389</sup>

Veracity and basis of knowledge do not each need to be independently established; rather, they are related factors relevant to "the common sense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."<sup>390</sup> The basis of an informer's knowledge should be set forth with specificity, as in the case of probable cause based on personal knowledge.

The degree of information necessary to establish an informer's credibility varies according to the likelihood that the informer will produce false or untrustworthy information.<sup>391</sup> Some common reasons for determining that an informer is credible are that the informer has given reliable information in the past,<sup>392</sup> the informer is a participant in the criminal activity under investigation,<sup>393</sup> and the informer's information has been corroborated by other

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<sup>389</sup>Illinois v. Gates, 462 U.S. 213, 238 (1983).

<sup>390</sup>Id. at 230.

<sup>391</sup>See Jaben v. United States, 381 U.S. 214, 224 (1965).

<sup>392</sup>Jones v. United States, 362 U.S. 257, 271 (1960).

<sup>393</sup>United States v. Long, 449 F.2d 288, 293 (8th Cir. 1971), cert. denied, 405 U.S. 974

(continued...)

information.<sup>394</sup> In an antitrust investigation, the basis for probable cause is likely to be an informer's grand jury testimony. The fact that the information is obtained while the informer was under oath, and, therefore, subject to criminal liability for perjury if the information is false, is a factor indicating that the information is reliable.<sup>395</sup>

b. Particularity

The 4th Amendment requires that the warrant describe with particularity both the place to be searched and the items to be seized. The particularity requirement removes discretion from the officer executing the warrant and prevents a "general, exploratory rummaging."<sup>396</sup>

A description of items to be seized is sufficiently particular if it supplies guidelines to the searching officer so that he can reasonably ascertain and identify those items.<sup>397</sup> This

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<sup>393</sup>(...continued)  
(1972).

<sup>394</sup>Draper v. United States, 358 U.S. 307, 313 (1959); United States v. Roman, 451 F.2d 579, 581 (4th Cir. 1971), cert. denied, 405 U.S. 963 (1972); United States v. Jiminez-Badilla, 434 F.2d 170, 172-73 (9th Cir. 1970).

<sup>395</sup>See Illinois v. Gates, 462 U.S. 213, 233-34 (1983); Adams v. Williams, 407 U.S. 143, 146-47 (1972).

<sup>396</sup>Stanford v. Texas, 379 U.S. 476, 485 (1965); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

<sup>397</sup>United States v. Wuagneux, 683 F.2d 1343, 1348 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

requirement is applied "with a practical margin of flexibility, depending on the type of property to be seized, and . . . a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit."<sup>398</sup> A warrant describing "corporate books and records evidencing a violation of 15 U.S.C. § 1" is not sufficiently particular to meet the 4th Amendment's particularity requirement.<sup>399</sup> The warrant must provide specific guidelines by identifying the documents sought,<sup>400</sup> but the degree of specificity required will depend on the circumstances of the case.<sup>401</sup> It is permissible to inspect voluminous files in search of documents sought under the search warrant.<sup>402</sup>

The premises to be searched must be described in sufficient detail to allow others to identify it with reasonable effort.<sup>403</sup> For example, if the search is to take place in a large commercial office building, the name of the tenant of the office to be searched should be included and, if possible, the office number.<sup>404</sup> A physical description of the premises to be searched and a diagram of the location may help meet the particularity requirement if other types of description are inadequate.

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<sup>398</sup>Id. at 1349.

<sup>399</sup>See United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982).

<sup>400</sup>United States v. Tamura, 694 F.2d 591, 595 (9th Cir. 1982).

<sup>401</sup>United States v. Wuagneux, 683 F.2d at 1349.

<sup>402</sup>United States v. Tamura, 694 F.2d at 595.

<sup>403</sup>See Steele v. United States, 267 U.S. 498, 503 (1925).

<sup>404</sup>See United States v. Bedford, 519 F.2d 650, 654-55 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

### 3. Mechanics of obtaining a search warrant

Rule 41 of the Federal Rules of Criminal Procedure sets forth the procedure for obtaining a search warrant. Application for a warrant can be made to either a federal magistrate or a state court judge within the district where the warrant is to be executed. The application consists of an affidavit, which states the grounds for seeking the warrant, and the original warrant for the magistrate to sign.

Rule 41(c)(2) also sets forth an alternative procedure for obtaining a search warrant upon oral testimony where required by special circumstances. Circumstances of urgency requiring such procedures would be rare in any application made by the Antitrust Division.

The warrant must include: a description of the property<sup>405</sup> to be seized (often as a schedule attached to the warrant); a statement that the property is evidence of a stated criminal offense (e.g., Sherman Act, 15 U.S.C. § 1; obstruction of justice, 18 U.S.C. § 1503); an exact description of the location to be searched; the period of time during which the search is to be executed (which under Rule 41(c)(1) cannot exceed ten days after issuance of the warrant); and whether the search is to be conducted in the daytime (6:00 a.m. to 10:00 p.m., as defined by the Rule) or at any time in the day or night. A search warrant must be executed in the daytime unless a showing has been made by the applicant that there is reasonable cause for it to be

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<sup>405</sup>"Property" is defined in Rule 41(h) to "include documents, books, papers and any other tangible objects."

executed at night. Warrants sought by the Antitrust Division are not likely to necessitate execution at night.

The affidavit must include sufficient facts to establish probable cause that a crime has been committed and that evidence of that crime is at the search location. The information in the affidavit can be the personal knowledge of the affiant or it may be entirely hearsay.<sup>406</sup>

The affidavit in support of the warrant should be filed under seal to prevent the disclosure of matters occurring before the grand jury, the identity of informants, or other facts the disclosure of which would hinder an ongoing investigation. In some districts, the affidavit is automatically filed under seal, while in others, the search warrant applicant must specifically request that it be sealed. The local United States Attorney's Office should be consulted to determine whether an application to seal is needed in the district involved. Such an application should be made simultaneously with the presentation of the warrant to the magistrate.

The affiant may be required to appear before the magistrate or judge granting the warrant and may, under Rule 41(c)(1), be examined along with any witnesses the affiant may want to produce. If the magistrate or judge finds that the Government has established the requisite probable cause for the issuance of the warrant, he signs the warrant and provides it to the applicant for execution.

There are no legally required procedures for obtaining internal clearance to seek a search warrant within the Antitrust Division. However, the practice within the Division is for the section or field office seeking the warrant to obtain the approval of the Office of Operations

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<sup>406</sup>See § I.2.a., *supra*.

by sending a memorandum to the Director of Operations explaining the need to obtain the warrant and the grounds on which it is being sought, along with a draft of the warrant and affidavit to be presented to the magistrate. In emergency situations, the section or field office chief may call the Director of Operations, explain the circumstances requiring the warrant, and obtain oral approval for seeking the warrant.

#### 4. Execution of the search warrant

Search warrants are executed by Federal Bureau of Investigation agents. Coordination with the Bureau prior to the search is essential. Most FBI agents are well-versed in search warrant procedures and will be of great assistance in assuring that the procedures required by Rule 41 are followed. If the particular agent working with the Division on a matter is not familiar with the procedures, the assistance of more experienced agents should be sought. To complete the search within a reasonable time, numerous agents may be required. The staff attorneys should consult with the Bureau to determine how many agents will be needed to conduct the search, based on the scope and nature of the search.<sup>407</sup>

Prior to the search, the staff should brief all the agents who are to conduct the search, providing them with a copy of the warrant and affidavit, explaining the background facts giving rise to the search, reviewing the description of the property or documents to be seized, providing

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<sup>407</sup>In a recent search in Portland, Oregon, the FBI assigned eight agents to conduct a search for withheld documents at a single business location, a search which took approximately three hours.

any other information that will assist them in conducting the search, and answering any questions the agents may have.

No staff attorney should be present at the search itself, as such attorney could later be required to testify in a proceeding over the legality of the search. It is advisable, however, to have a paralegal familiar with the case and the target documents present at the search for the agents to consult if any questions arise. A staff attorney should be available throughout the search for phone consultation with the agents or the paralegal who is assisting the agents. The staff may want to suggest a procedure used by some FBI agents, who inform the local law enforcement agency of the search and request a uniformed officer to be present when the warrant is first presented to verify the identity of plain-clothes agents and to facilitate entry and cooperation.

An agent executing a warrant is required by Rule 41(d) to make a verified inventory of the items seized. This inventory must be made in the presence of the person from whose possession or premises the items are taken, or if such person is not present, in the presence of some credible person (usually another agent). If requested in advance, the agents will photograph the search premises to show where the items were seized. Such photographs can be useful in litigation arising from the search. The agents must give the person whose premises were searched a copy of the warrant and a receipt for the items taken. If such person is not present, the warrant and receipt must be left at the premises. A copy of the required inventory is usually signed by an agent and left as a receipt. The warrant and the completed return along



with the inventory is then returned promptly to the issuing magistrate, who files them with the clerk of the court.

5. Use of seized items/chain of custody

Once documents are seized, staff attorneys will probably be anxious to review and use them to pursue the underlying antitrust investigation and to assess the possibility of an obstruction or contempt case. However, it is important to realize that seized documents cannot be treated as subpoenaed material and that a careful record of their chain of custody must be maintained. A rigid document control system must be established before staff attorneys begin handling the documents. This will be essential in any subsequent litigation arising from the search to prove that the documents are in fact those that were seized. If the documents are relatively few in number, the staff can make some arrangement with the FBI to review, copy, or microfilm the documents, and allow the FBI to remain the document custodian and follow their standard chain of custody procedures. If the documents are voluminous, the FBI and the Division attorneys may find other procedures more practical.

One possible procedure is to make a paralegal (if one was present at the search, preferably that person) custodian of the documents. An attorney should not be the custodian, as the custodian may be required to testify in any litigation in which we seek to admit the documents as evidence. Always follow the standard procedures used by the FBI to establish chain of custody. Documents must be kept in a locked room or secure file cabinet to which only

the custodian has access (i.e., the room or file locks must be secure against building and office master keys). Until the documents are marked and numbered by the custodian or in some way identified in such a manner as to insure that the custodian can testify that they are the documents that were seized, any review, copying, or microfilming of the documents must be done in the presence and under the direct observation of the custodian. Once the materials are adequately identified, the custodian may check in and out specific documents to others for use or review. It is recommended that the chain of custody forms used by the FBI be used for this procedure.<sup>408</sup>

## 6. Challenges

Challenges to the use of evidence obtained under a search warrant can be made under either Rule 12 or Rule 41 of the Federal Rules of Criminal Procedure. Challenges may be based on the validity of the warrant or the manner of its execution.

Under Rule 12(b), evidence obtained through a search warrant can be challenged by a motion to suppress. If the motion is granted, the seized evidence cannot be offered into evidence. A Rule 12(b) motion cannot be made until an indictment has been returned.

Under Rule 41(e), a motion for return of the seized property may be made at any time after the seizure. If the motion is granted, the property must be returned and may not be used as evidence at any hearing or trial, just as if it had been suppressed under a Rule 12(b) motion.

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<sup>408</sup>An exemplar of this form is attached as Appendix III-6.

After an indictment has been returned, a Rule 41(e) motion for return of property will be treated as a Rule 12(b) motion to suppress.

The bases for challenges are the same under Rule 12 and Rule 41. Challenges to the validity of a search warrant are of three general types: (1) that there was no probable cause for the issuance of a warrant<sup>409</sup> (2) that the items to be seized or the location to be searched were not described with sufficient particularity in the warrant<sup>410</sup> and (3) that the affiant deliberately provided false information or exhibited a reckless disregard for the truth.<sup>411</sup> The seizure of property may also be challenged on the ground that the warrant was not properly executed. For example, a warrant would be improperly executed if the property were seized at a location other than the one described in the warrant or if the property seized were not the property described in the warrant.

In determining whether there was probable cause to justify issuing the warrant, the court should examine the supporting affidavits in camera. Prior to indictment, the movant should not be provided access to the supporting affidavits because to do so would jeopardize grand jury secrecy and could impede the effective completion of the ongoing investigation.<sup>412</sup> Orders denying motions to suppress or return seized evidence, whether before or after indictment, are interlocutory and, therefore, not appealable by defendants so long as a criminal

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<sup>409</sup>See discussion of probable cause, § 2.a., *supra*.

<sup>410</sup>See discussion of particularity, § 2.b., *supra*.

<sup>411</sup>See *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978).

<sup>412</sup>See *Shea v. Gabriel*, 520 F.2d 879, 882 (1st Cir. 1975); *Offices of Lakeside Non-Ferrous Metals v. United States*, 679 F.2d 778, 779-80 (9th Cir. 1982).

prosecution or investigation is in progress.<sup>413</sup> Thus, if a grand jury investigation is under way, an order denying such a motion is not appealable.<sup>414</sup> An order denying a motion to return or suppress property is appealable only if it "is in no way tied to a criminal prosecution" in progress.<sup>415</sup>

The Government, however, under 18 U.S.C. § 3731, may appeal an order granting a motion to suppress or return seized evidence. The Government attorney must certify "to the district court that the appeal is not taken for purpose of delay and that the [suppressed] evidence is a substantial proof of a fact material in the proceeding."<sup>416</sup>

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<sup>413</sup>DiBella v. United States, 369 U.S. 121, 131 (1962).

<sup>414</sup>Id.

<sup>415</sup>Id. at 131-32.

<sup>416</sup>18 U.S.C. § 3731.

#### IV. PRESENTING EVIDENCE TO THE GRAND JURY

##### A. Initial Session

At the first grand jury session, the staff introduces itself to the grand jurors, explains the nature of the investigation and the applicable antitrust laws, and, if appropriate, conducts a voir dire of the grand jurors. Additionally, the staff should discuss housekeeping details, such as scheduling future grand jury sessions.<sup>1</sup> Copies of the Federal Handbook for Grand Jurors are distributed at this meeting, if they have not been received earlier. The first session also can be used to take testimony or to have documents returned.

This initial session is critical because it is usually the first time the grand jurors meet the Antitrust Division staff and form their first impressions of the staff's competence and professionalism. This meeting also provides an opportunity for the staff to begin to develop a rapport with the grand jurors<sup>2</sup> by letting them know that the staff works for them and demonstrating concern for their needs.

At the beginning of a new grand jury investigation, the lead attorney should identify himself by stating his name and purpose in appearing before the grand jury. For example:

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<sup>1</sup>These details will vary by district, requiring careful coordination with the clerk, the marshal, the court, and the United States Attorney.

<sup>2</sup>Obtaining a list of the names, addresses and telephone numbers of the grand jurors is useful, if that is permissible in the district.

My name is \_\_\_\_\_. I am an attorney for the Antitrust Division of the United States Department of Justice. I am here today to present for your consideration evidence regarding a possible violation of the United States Code, committed by \_\_\_\_\_.

All other Division attorneys appearing before the grand jury should be introduced and identified for the record.<sup>3</sup> A brief explanation of the general makeup and function of the Antitrust Division might also be appropriate. A short explanation that the grand jury's purpose is to investigate alleged antitrust violations in a particular industry should be given. A description of the antitrust laws, including their prohibitions and purposes, and the benefits of competition usually follows. Then the elements of the relevant statute can be explained. For example, when discussing Section 1, the concepts of "agreement", "two or more people", "conspiracy", and "interstate commerce" should be discussed. It is also helpful to give examples of prohibited behavior such as price-fixing, bid-rigging or allocation schemes. If the grand jury is being shared with a United States Attorney, it is prudent to explain the difference between an antitrust investigation and other matters, such as the large amount of documents antitrust cases typically involve and the need to use the grand jury as an investigative tool.

Once the basic legal framework is set forth, the grand jurors can be told generally about the way the investigation will proceed. They should understand that the evidence will consist of both testimony and documents, and should be informed of any actions already taken, such as the issuance of subpoenas duces tecum or ad testificandum, and the entry of impounding, transfer, or any other orders. A copy of the subpoenas issued may be

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<sup>3</sup>Although not required by statute or case law, at the beginning of each session and each time the grand jury reconvenes, the foreperson should state on the record that only the authorized jurors, Government attorneys and reporters are present, and that a quorum of grand jurors is present.

provided and the types of documents requested may be discussed.<sup>4</sup> The jurors should be advised that they can review any documents they wish and request that additional documents be obtained. This is also a good time to explain that some witnesses may receive immunity. What immunity is, why it is necessary, the process used for obtaining it, and its significance should be covered.

If it has not already been covered by the district court judge or the U.S. Attorney, the burden of proof should be discussed, as well as the role of the grand jurors. Point out that their function is different from that of a trial jury and that the burden of proof is different. Explain what they will be asked to do at the completion of the investigation.

The grand jury should be told how and why the grand jury is important, and why attendance at every session is critical. The attorney should explain that he is there to assist them in their jobs, and that their help is essential to the process. A reminder about the secrecy of the proceeding is usually appropriate.

If the investigation is being conducted by a previously-empaneled grand jury, or if the grand jurors were not asked enough information before the empanelment to ensure that they can fairly and impartially consider the evidence presented, a voir dire-like procedure may be used. Practices vary in different districts, so consultation with the U.S. Attorney prior to the session is necessary. One way of proceeding is for the attorney to ask questions about whether any grand juror knows any of the anticipated subjects, is employed by a subject company, has knowledge of any previous investigation or has any other interest which would prevent him from rendering a fair, impartial and just verdict based solely upon the evidence presented. In some districts, this questioning occurs outside the presence

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<sup>4</sup>Staff must be familiar with local practices regarding the issuance of subpoenas and document returns. For example, in some districts the grand jury foreman must initial a copy of each subpoena issued, signifying his approval of its issuance.

of the rest of the jury to minimize any embarrassment to the potential juror. Also, in some districts, the foreperson or the supervising judge will do the questioning. Any juror who indicates any interest that may interfere with a fair, impartial or just verdict should be questioned at length, and if the staff is convinced a juror should be removed, the appropriate steps should be taken.<sup>5</sup>

The staff should also address administrative matters at this initial session. A discussion of how sessions will be scheduled and the anticipated length of the sessions is necessary. (Keep in mind that the grand jury may be needed for other investigations, so coordination with the local U.S. Attorney is essential.) To the extent that the judge, the clerk, or the U.S. Attorney have not already established the schedule, the staff should discuss breaks, lunch hours, and any rules about smoking, eating or drinking in the grand jury room. The grand jurors should be consulted if the staff believes that some change in the schedule is needed. Whether there should be note-taking, and any safeguards to be adopted to protect those notes should also be covered.

The grand jurors will want to know when and how they can ask questions. Most attorneys request that the grand jurors hold their questions until after the attorney's examination has been completed. Sometimes, however, especially during long examinations, questions are handled after particular subject areas.

B. Note-taking by Grand Jurors

18 U.S.C. § 1508 forbids the recording of the proceedings of a grand jury while it is deliberating or voting. However, the statute also states that "nothing in paragraph (a) of this section shall be construed to prohibit

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<sup>5</sup>See Chapter I § C.4.



the taking of notes by a grand or petit juror in any court of the United States in connection with and solely for the purpose of assisting him in the performance of his duties as such juror."

In essence, the statute does not expressly provide that grand jurors have a right to take notes during a session; it only provides that the statute shall not be construed to say that they cannot do so. Note-taking by grand jurors enhances the opportunities for a violation of grand jury secrecy<sup>6</sup> and might lead some jurors to rely more on the notes than on their own recollection of the evidence. On the other hand, note-taking can help jurors follow the testimony and formulate their questions, particularly in complicated or lengthy investigations.

The court, in the exercise of its general supervisory power over the grand jury, has the authority to regulate note-taking and actual practice varies among the districts. Any established note-taking procedures in a particular district should be followed. If there are no set procedures or policies and the grand jurors want to take notes, then the following procedure is recommended: note-taking materials should be provided to the jurors at the beginning of each session and collected at the end of the session, by either the foreman or the attorney conducting the investigation, and deposited under lock with the court clerk. The grand jurors should be instructed that their notes cannot be removed from the grand jury room, except for daily transportation to and from the clerk's office. Upon expiration of the term of service of the grand jury, all notes should be turned in to the clerk for prompt destruction.

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<sup>6</sup>A grand juror taking notes and deliberately releasing them would violate grand jury secrecy and be subject to punishment by contempt. However, such a breach of secrecy should not invalidate any subsequent indictment. Cf. United States v. Thomas, 593 F.2d 615 (5th Cir.), modified, 604 F.2d 450 (5th Cir. 1979), cert. denied, 449 U.S. 841 (1980); United States v. Hoffa, 349 F.2d 20 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966).

It is essential that the grand jurors understand the importance of grand jury secrecy. However, tact should be used in attempting to limit or restrain note-taking so that the grand jurors are not alienated. In difficult situations, the court should always be consulted.

C. Statements by the Prosecutor Before the Grand Jury

The responsibility of the prosecutor is "to advise the grand jury on the law and to present evidence for its consideration."<sup>7</sup> This section defines the parameters of permissible conduct by a prosecutor before the grand jury.

1. All discussions with grand jurors must be recorded

Rule 6(e)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part:

All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. . . . The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

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<sup>7</sup>U.S.A.M. 9-11.020.

Many United States Attorneys' offices have authorized the court reporter who reports grand jury proceedings to act as an agent of the office in maintaining custody and control of all grand jury stenographic notes, electronic tape recordings, and transcripts. The Division practice, however, is to obtain the transcripts as soon as they are ready after a session. The court reporter should be requested to transmit the stenographic notes and tape recordings to the appropriate Division office upon completion of the investigation.

The court reporter should be advised that Rule 6(e)(1) requires that all proceedings and statements made in the presence of the grand jury, whether or not a witness is present, be recorded once the grand jury room door is closed and the foreperson of the grand jury has called the grand jury into session. Prosecutors should not engage in any conversation or answer any questions of grand jurors relating to the investigation until the grand jury session is called to order and the conversations and questions can be recorded. If a grand juror asks a question prior to the commencement of a session or after a session has been concluded, the Division attorney should politely advise the grand juror that it is not proper for the attorney to answer the question until the session is properly being recorded.<sup>8</sup> Attorneys should not state that they are going "off the record" on non-case-related matters, such as lunch schedules. Doing so only invites abuse motions by defense counsel. Instead, the court reporter should be instructed at the outset not to transcribe colloquy with the grand jurors, although the colloquy must be recorded.

Any unintentional failure to record a "grand jury proceeding" would be a Rule 6(e)(1) violation but should not result in the dismissal of an indictment. Rule 6(e)(1) specifically provides that:

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<sup>8</sup>See § C.15., *infra*.

An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution.

## 2. Opening

Since most grand jurors are not familiar with the Division or the antitrust laws, it generally is useful to describe where the Division fits in the Justice Department's organizational structure and the laws the Division is primarily responsible for enforcing. Similarly, since the Division's grand jury investigations tend to be more complex and last longer than the typical presentation by the local U.S. Attorney's office, it may be useful to describe to the grand jury the nature of the investigation and the way in which you expect to conduct it. For example, in a typical investigation of bid-rigging in a specific industry, you might tell the grand jury that the first step in the investigation will be issuance of subpoenas duces tecum to industry members; that the next step will be general testimony from a knowledgeable individual about the bidding process; and, thereafter, that more specific testimony from individual industry participants will be presented. You should also tell the grand jury how long you expect the investigation to continue.

A brief general summary of the evidence may be given at the outset of an investigation to introduce a case to the grand jury. If you decide to give such a statement, you should be careful to treat this like an opening statement at trial. Do not overstate the evidence. You should caution the grand jury that "you expect" they will hear

certain evidence and that what you say is not evidence and should not be considered by the grand jury in any subsequent voting on proposed indictments.<sup>9</sup>

### 3. Legal advice

Although the purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate independently of either prosecuting attorney or judge,<sup>10</sup> the prosecutor is authorized to assist the grand jury in conducting its inquiry by advising the grand jury on the applicable law.<sup>11</sup> By advising the grand jury on the law and the elements of the offense alleged in the proposed indictment, a prosecutor does not become an improper witness before the grand jury.<sup>12</sup>

Since most grand jurors are not familiar with the Sherman Act or with conspiracy law, it generally is useful to instruct the jury completely on the elements of each charged offense. If improper instructions are given, the indictment should not be invalidated because courts generally have held that if an indictment is valid on its face, there is no need to examine grand jury minutes to determine if the prosecutor improperly instructed the grand jury.<sup>13</sup> Nonetheless, Division attorneys should be careful to give accurate instructions.

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<sup>9</sup>See § C.11., infra.

<sup>10</sup>Stirone v. United States, 361 U.S. 212, 218 (1960).

<sup>11</sup>United States v. Sells Eng'g, Inc., 463 U.S. 418 (1983).

<sup>12</sup>See United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

<sup>13</sup>See United States v. Linetsky, 533 F.2d 192, 200 (5th Cir. 1976); United States v. Busic, 472 F. Supp. 880 (E.D.N.Y.), rev'd on other grounds, 549 F.2d 252 (2d Cir. 1977).

4. Discussions of strategy

Because of the length of Division grand jury investigations, it often is advisable to discuss the Government's strategy in subpoenaing documents and the order and nature of witnesses to be called. Occasionally, the jury may have to decide certain questions, for example, whether they want to hear live testimony or to have a transcript of prior testimony read to them. The Division attorney conducting the investigation may discuss the alternatives in a non-argumentative way, but the final decision as to how to proceed must be made by the jurors.

Attorneys should not initiate discussions of internal Division procedures and should as tactfully as possible try to avoid answering questions about such procedures. If questions concerning internal Division procedures should arise, the jurors should be cautioned that neither the internal procedures nor any resulting delay in the grand jury proceedings should influence their vote on any potential indictment.

5. Review of plans for a session

It is sometimes important, at the start of a session or a series of sessions, to review the evidence to ensure that all jurors are fully informed. This is particularly true if a long time has elapsed between sessions, a number of jurors were absent at the most recent sessions, or important evidence was adduced at the last session. Following this recap, it generally is wise to advise the grand jury of the day's witnesses and why they are being called. A brief background sketch of each witness may be useful. While it is normally improper for an attorney to introduce facts

not already in the record, providing the grand jury with a brief background description of a witness should not be objectionable.<sup>14</sup>

At the close of each session, the staff should advise the jurors when to return for the next session, if this is known, and may wish to briefly advise the jurors as to what will occur at the next session.

#### 6. Responding to grand jurors' questions

Time should be set aside, either at the beginning or the end of each day, to permit the grand jurors to ask questions of the staff and make observations. Staff may also find it useful to respond to questions at the conclusion of each witness' testimony. Such questions may concern either legal or factual matters and the staff should be fully prepared to answer them.

Responding to grand jurors' questions is clearly a permissible practice by the prosecutor.<sup>15</sup> The prosecutor may explain the law and necessary burden of proof and weight of evidence issues.<sup>16</sup> He may respond to questions by stating facts that are already part of the record.<sup>17</sup> If facts responsive to the juror's question are not yet a matter of record but are likely to be introduced at a later time, the juror should be so informed and the question deferred. The

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<sup>14</sup>See United States v. Civella, 666 F.2d 1122, 1127 (8th Cir. 1981).

<sup>15</sup>United States v. Ogden, 703 F.2d 629, 636-37 (1st Cir. 1983); United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979); United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983); United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987).

<sup>16</sup>United States v. Linton, 502 F. Supp. 861 (D. Nev. 1980).

<sup>17</sup>United States v. Ogden, 703 F.2d at 636-37.

attorney should avoid a response that is, in effect, new testimony.<sup>18</sup> If the question calls for an opinion, the attorney may politely decline to respond to the question or respond, making it clear that the answer is only his personal opinion based on evidence in the record and in no way binding on the grand jury.<sup>19</sup>

Occasionally, grand jurors will ask questions calling for irrelevant and possibly prejudicial information. While jurors normally should be allowed the widest latitude in receiving evidence, the prosecutor must also recognize his responsibility to prevent the introduction of irrelevant and prejudicial information. In responding to such questions, Division attorneys should either respond to the inquiry and explain the limited value of the response or should tactfully decline to respond, explaining that the material is not relevant and its introduction could result in a claim of grand jury abuse.

#### 7. Advising grand jury on hearsay

Hearsay evidence is admissible in grand jury proceedings.<sup>20</sup> However, the Second Circuit in United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972), established a rule that hearsay is admissible only if "the prosecutor does not deceive grand jurors as to 'the shoddy merchandise they are getting so they can seek something better if they wish'. . . or that the case does not involve 'a high probability that with eyewitness, rather than hearsay testimony, the grand jury would not have indicted.'" The Estepa rule is highly questionable in light of United States v. Calandra, 414 U.S. 338 (1974), Costello v. United States, 350 U.S. 359 (1956), and Bank of Nova Scotia v.

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<sup>18</sup>United States v. Bettencourt, 614 F.2d 214 (9th Cir. 1980).

<sup>19</sup>United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979).

<sup>20</sup>See § D.2., *infra*.



United States, 487 U.S. 250 (1988), and has been met by a general lack of enthusiasm by other circuits.

Nonetheless, as a practical matter, Division attorneys can avoid application of the Estepa rule by informing the grand jury of the hearsay nature of the testimony it is hearing and by offering to present eyewitness testimony if necessary.<sup>21</sup> Further, when transcripts from a prior grand jury are presented to a new grand jury, the grand jurors should be advised of the hearsay nature of the transcripts and should be given the opportunity to recall any witnesses.

The Department disagrees with the rule in Estepa. Nonetheless, Department policy provides that "hearsay evidence should be presented on its merits so that jurors are not misled into believing that the witness is giving his/her own personal account."<sup>22</sup>

#### 8. Advising grand jury on 5th Amendment

Frequently, the subject of an investigation is given the opportunity to testify before the grand jury but does not do so because of his 5th Amendment privilege against self-incrimination. If a grand juror asks why a subject has not appeared to testify, he should be advised that the subject has chosen not to appear and that the grand jury should make no inferences with regard to guilt from this act.<sup>23</sup>

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<sup>21</sup>See United States v. Bari, 750 F.2d 1169 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985).

<sup>22</sup>U.S.A.M. 9-11.232.

<sup>23</sup>See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

9. Use of summaries

Summarizing evidence for the grand jury is a common and useful practice. It is often important to review and summarize the evidence at the start of a series of grand jury sessions. This is particularly important if a long period has elapsed between sessions or if significant evidence was adduced at a prior session at which a juror was absent. Using a witness, particularly an expert witness, to present summaries of documentary evidence or evidence from a prior grand jury may also be extremely useful in complex investigations. Finally, the evidence in general and the evidence implicating each proposed defendant should normally be summarized at the final grand jury session before the grand jury is requested to vote on the proposed indictment.

The practice of summarizing evidence produced before a grand jury has a long history of judicial approval. In United States v. Rintelen, 235 F. 787 (S.D.N.Y. 1916), Judge Augustus Hand concluded that an attorney before a grand jury "may question witnesses, advise as to the law and explain the relation of the testimony to the law of the case. In doing this, he may review the evidence." Judge Hand further noted that no reasonable objection could be urged against allowing the man who prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken perhaps over weeks or months, since in a complicated case, such a practice would prevent confusion on the part of the jurors.<sup>24</sup>

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<sup>24</sup>235 F. at 791-92; see also Costello v. United States, 350 U.S. 359 (1956); United States v. Ogden, 703 F.2d 629, 636-37 (1st Cir. 1983); United States v. Birdman, 602 F.2d 547 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. United States Dist. Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957); United States v. Heffington, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983).

Attorneys should be careful when summarizing evidence to refrain from unduly influencing or coercing the grand jurors. Caution must be exercised to avoid becoming overzealous in presenting the case to the grand jury. Remarks made by a prosecutor may justify dismissal where "such remarks so biased the grand jurors that their votes were based upon their bias."<sup>25</sup> To avoid any problems, attorneys should inform the grand jurors that their remarks are not evidence.

Defendants frequently object to the use of summaries in presenting testimony from prior grand juries<sup>26</sup> or in presenting compilations of documentary evidence.<sup>27</sup> However, dismissal on such grounds is extremely rare. Summaries are generally considered a form of hearsay testimony and indictments based on such summaries will not be dismissed absent a showing that the use of the summary amounted to a flagrant abuse of the grand jury process. As stated in United States v. Al Mudarris, 695 F.2d 1182, 1187 (9th Cir.), cert. denied, 461 U.S. 932 (1983), a case upholding the use of a summary witness:

The summary witness procedure is an economical and expedient means of presenting evidence to a grand jury. But the evidence is necessarily derivative and abbreviated. The prosecutor must not abuse

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<sup>25</sup>United States v. Heffington, 682 F.2d at 1080; see also United States v. Al Mudarris, 695 F.2d 1182 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983).

<sup>26</sup>See Costello v. United States, 350 U.S. 359 (1956); United States v. Schlesinger, 598 F.2d 722 (2d Cir.), cert. denied, 440 U.S. 880 (1979); United States v. Litton Sys., Inc., 573 F.2d 195 (4th Cir.), cert. denied, 439 U.S. 828 (1978); United States v. Brown, 574 F.2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Barone, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Long, 706 F.2d 1044 (9th Cir. 1983).

<sup>27</sup>See United States v. Dunham Concrete Prods. Inc., 475 F.2d 1241, 1247-49 (5th Cir.), cert. denied, 414 U.S. 832 (1973); United States v. Universal Mfg. Co., 525 F.2d 808 (8th Cir. 1975).

the device by pressuring grand jurors into a precipitous decision or otherwise discouraging them from evaluating the predicate evidence.

Attorneys should generally check with the U.S. Attorney's office in the district in which the grand jury is sitting to determine whether there are any special requirements for the use of summaries in that jurisdiction. For example, some courts have held that the use of summaries is permissible provided that the individual presenting the summary is sworn.<sup>28</sup> Another court has stated that the use of a summary is improper if it is "misleading or incomplete."<sup>29</sup> In any event, the use of summaries of evidence should not invalidate an indictment unless there is a showing of actual prejudice to the defendants.<sup>30</sup>

#### 10. Presentation of indictment

When presenting a proposed indictment to a grand jury for its vote, care should be taken to insure that the grand jurors are aware that the decision as to returning an indictment is their own and that they are not obliged to follow any opinions or recommendations that may have been expressed by the Government's attorneys. To avoid any later charge of improper influence, attorneys should be careful to avoid stating any opinions as to guilt. If an opinion is unavoidable, it should be clearly expressed only as the attorney's opinion based upon the evidence before

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<sup>28</sup>See United States v. Hodge, 496 F.2d 87 (5th Cir. 1974). But see United States v. Schlesinger, 598 F.2d *supra*; United States v. Birdman, 602 F.2d *supra*.

<sup>29</sup>United States v. Long, 706 F.2d at 1050.

<sup>30</sup>See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

the grand jury.<sup>31</sup> The jurors also should be reminded that their duty is to determine only whether the evidence is sufficient to convince them that "probable cause" exists of the guilt of any proposed defendant. It is not their job to determine guilt beyond a reasonable doubt.

According to an April 17, 1969 memorandum of the Director of Operations, Division attorneys are directed to use the following procedures when presenting an indictment to the grand jury:

1. Before the grand jury begins its final deliberations, the attorney for the Government should either read verbatim, or summarize in some detail, the various charges contained in the indictment under each count, including the defendants proposed for indictment, and the interstate commerce allegations.
2. At the conclusion of the presentation, the attorney for the Government should leave the original or a copy of the proposed indictment with the grand jury so that it is available to all the jurors during the course of their deliberations.
3. The indictment should be signed by the foreman of the grand jury in the presence of the grand jurors and the attorney for the Government, before presentment to the court.

There is some disagreement as to whether the grand jury should be presented with a signed or unsigned indictment. The preferred practice in the Division is to provide the jurors with a copy of the proposed indictment

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<sup>31</sup>See United States v. McKenzie, 678 F.2d 629, 632-33 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); United States v. Cederquist, 641 F.2d 1347 (9th Cir. 1981).

with the signature page omitted. The original of the indictment containing the signatures of everyone except the foreman is not displayed to the jurors until after a vote has been taken, on the theory that it will prevent any later contention that the jurors were influenced by the prosecutors' signatures. After the foreman advises that a vote has been taken, he is given the original indictment which he signs. Some Division attorneys leave the original signed indictment with the jurors during their deliberations. This is not ordinarily a good practice and is frowned upon in a number of jurisdictions.<sup>32</sup> Nonetheless, no court has dismissed an indictment because of pre-signature by the prosecutor without a showing that the prosecutor actually exerted undue influence on the grand jury.<sup>33</sup>

When leaving the grand jurors to allow them to deliberate, the staff normally should arrange to have all grand jury transcripts and documentary evidence in the grand jury room. The grand jurors should be advised that they are free to review this material during their deliberations.

#### 11. Disclosing facts not in evidence

A prosecutor should not disclose facts not in evidence to the grand jury. By disclosing facts not in evidence, the prosecutor, in effect, becomes an unsworn witness.<sup>34</sup>

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<sup>32</sup>See United States v. Civella, 666 F.2d 1122, 1129-30 (8th Cir. 1981).

<sup>33</sup>See United States v. McKenzie, 678 F.2d at 632-33; United States v. Frantze, 655 F.2d 128, 130-31 (8th Cir. 1981); United States v. Cederquist, 641 F.2d at 1353; United States v. Levine, 457 F.2d 1186 (10th Cir. 1972); United States v. Brown, 684 F.2d 841 (11th Cir. 1982); United States v. Climatemp, 482 F. Supp. 376 (N.D. Ill. 1979), aff'd sub nom. United States v. Reliable Sheet Metal Works, Inc., 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).

<sup>34</sup>See United States v. Hogan, 712 F.2d 757 (2d Cir. 1983).

As with other forms of inappropriate prosecutorial conduct, disclosure of facts not in evidence to the grand jury should not result in the dismissal of an indictment unless the facts so biased the grand jury that they were deprived of autonomous and unbiased judgment.<sup>35</sup> Courts generally will not criticize the disclosure of facts not in evidence where the facts relate to insubstantial or uncontested matters or where they concern a matter of formality rather than a matter substantially material to the indictment.<sup>36</sup> The more substantial the fact, the more likely a court will find fault and consider some form of sanction. Nonetheless, attorneys should caution the grand jury that what they say is not evidence and should not be considered in any subsequent voting on a proposed indictment.

## 12. Presenting evidence from a prior grand jury - limitations and requirements

Attorneys may present evidence from a prior grand jury to a subsequent grand jury in the same district or a different district.<sup>37</sup> The procedures, limitations and requirements for presenting evidence from a prior grand jury vary from jurisdiction to jurisdiction. Thus, the U.S. Attorney's Office and the local case law should be consulted before presenting such evidence. The discussion that follows is intended to highlight the major variables affecting the presentation of evidence from prior grand juries.

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<sup>35</sup>See United States v. Cathey, 591 F.2d 268 (5th Cir. 1979); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Pabian, 704 F.2d 1533 (11th Cir. 1983).

<sup>36</sup>See United States v. Civella, 666 F.2d 1122 (8th Cir. 1981), United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987).

<sup>37</sup>See Chapter II § G., Rule 6(e)(3)(iii); United States v. Contenti, 735 F.2d 628 (1st Cir. 1984); In re Grand Jury Proceedings (Sutton), 658 F.2d 782 (10th Cir. 1981); United States v. Kabbaby, 672 F.2d 857 (11th Cir. 1982).

The preferred practice in the Division is to present the new grand jury with all transcripts of testimony and documentary evidence from the prior grand jury. Most jurisdictions prefer a complete record to be presented to the subsequent grand jury but would not dismiss an indictment for failing to do so.<sup>38</sup> A few jurisdictions permit the presentation of only a selected amount of prior grand jury evidence.<sup>39</sup> Such jurisdictions usually permit this practice only if the sitting grand jury will not be significantly misled.<sup>40</sup>

A frequently used practice of Division attorneys is to read selected grand jury transcripts or portions thereof to a new grand jury. This generally is considered to be permissible. As stated in United States v. Chanen, 549 F.2d 1306, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977): "Reading transcripts of sworn testimony, rather than presenting live witnesses, simply does not constitute . . . fundamental unfairness or a threat to the integrity of the judicial process." Nonetheless, attorneys should be aware of any local restrictions that apply to the reading of prior grand jury transcripts. For example, in those jurisdictions that follow Estepa,<sup>41</sup> the attorney should explain the hearsay nature of the prior transcript and should advise that live witnesses will be called if desired.<sup>42</sup> Most

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<sup>38</sup>See United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B Dec. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Al Mudarris, 695 F.2d 1182, 1185-86 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

<sup>39</sup>See United States v. West, 549 F.2d 545 (8th Cir. 1977).

<sup>40</sup>See United States v. Jacobson, 691 F.2d 110 (2d Cir. 1982).

<sup>41</sup>See §§ C.7., supra and D.2., infra.

<sup>42</sup>See United States v. Schlesinger, 598 F.2d 722, 726 (2d Cir.), cert. denied, 440 U.S. 880 (1979); United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).



jurisdictions permit the attorney for the Government to read the transcripts,<sup>43</sup> while others prefer that the transcripts be read to the grand jury by someone other than one of the presenting attorneys.<sup>44</sup> One Circuit urges that any reading of transcripts by a Government agent be supervised by a presenting attorney.<sup>45</sup> A practice that is followed by other components of the Department is to have the foreman or one of the other grand jurors read the transcript.<sup>46</sup>

Another frequently used method of presenting evidence from prior grand juries is the use of summaries. Summarizing prior grand jury testimony<sup>47</sup> or documentary evidence<sup>48</sup> is perfectly acceptable. Some courts have suggested that the use of summaries would be improper if they were misleading or incomplete<sup>49</sup> or unduly

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<sup>43</sup>See United States v. Blitz, 533 F.2d 1329 (2d Cir.), cert. denied, 429 U.S. 819 (1976); United States v. Wander, 601 F.2d 1251 (3d Cir. 1979); United States v. Anzelmo, 319 F. Supp. 1106 (E.D. La. 1970).

<sup>44</sup>See United States v. Chanen, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

<sup>45</sup>United States v. Kilpatrick, 821 F.2d 1456, 1467-68 (10th Cir. 1987), aff'd sub nom. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988).

<sup>46</sup>See Federal Grand Jury Practice, Narcotics and Dangerous Drug Section monograph Chapter I § F.2, p. 17.

<sup>47</sup>See United States v. Kington, 801 F.2d 733 (5th Cir. 1986), cert. denied, 481 U.S. 1014 (1987).

<sup>48</sup>See United States v. Schlesinger, 598 F.2d supra; United States v. Litton Sys., Inc., 573 F.2d 195 (4th Cir.), cert. denied, 439 U.S. 828 (1978); United States v. Brown, 574 F.2d 1274 (5th Cir.), cert. denied, 439 U.S. 1046 (1978); United States v. Al Mudarris, 695 F.2d at 1185-86; United States v. Kilpatrick, 821 F.2d at 1470.

<sup>49</sup>See United States v. Long, 706 F.2d 1044 (9th Cir. 1983); United States v. Kouba, 632 F. Supp. 937 (D.N.D. 1986).

prejudicial.<sup>50</sup> The practice usually followed by the Division and preferred by some courts is to have available for examination by the grand jury the transcripts of those witnesses whose testimony is summarized.<sup>51</sup>

In general, attorneys are given fairly wide latitude in presenting evidence from one grand jury to another, so long as the attorney's conduct is not so outrageous or prejudicial that his will is substituted for the will of the grand jury. While dismissal of an indictment is rare, it does happen and attorneys should be fully aware of the requirements in their jurisdiction.<sup>52</sup>

### 13. Expressing personal opinions

A prosecutor may explain the law and express an opinion on the legal significance of the evidence, but otherwise should avoid making any statements or arguments that would improperly influence the grand jurors. A prosecutor's personal opinion may be considered a form of unsworn, unchecked testimony.<sup>53</sup> If a prosecutor expresses a personal opinion, he should instruct the grand jury that they are in no way bound by this opinion and must exercise their own independent judgment. In addition, any opinion expressed by a prosecutor should be based on evidence already in the record. As stated in United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982):

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<sup>50</sup>See United States v. Dunham Concrete Prods., Inc., 475 F.2d 1241, 1247-49 (5th Cir.), cert. denied, 414 U.S. 832 (1973); United States v. Donohue, 574 F. Supp. 1263 (D. Md. 1983).

<sup>51</sup>See United States v. Schlesinger, 598 F.2d at 725; United States v. Al Mudarris, 695 F.2d at 1186.

<sup>52</sup>See United States v. Samango, 607 F.2d 877 (9th Cir. 1979).

<sup>53</sup>See United States v. Wells, 163 F. 313 (D. Idaho 1908).

"It is not improper . . . for an attorney merely to state an opinion as to guilt or as to any fact at issue, as long as it is clear to the jury that the opinion is based only on the evidence that is before the jury and the jury itself can evaluate."

One practice that courts particularly dislike is that of vouching for or commenting on the credibility of a witness.<sup>54</sup> On the other hand, commenting on the ultimate guilt or innocence of a proposed defendant is not generally considered to be improper.<sup>55</sup> While many courts have cautioned prosecutors about expressing personal opinions, few indictments have been dismissed on this basis. As with other areas of grand jury abuse, an indictment will be dismissed only if the expression of the prosecutor's personal opinions "so biased the grand jury that their votes were based upon their bias."<sup>56</sup>

#### 14. Testimony by a prosecutor

A Division attorney may not be both an attorney before the grand jury and a witness. If an attorney appearing before the grand jury must testify before the grand jury, he should immediately cease performing his prosecutorial function. In United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978), an attorney for the

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<sup>54</sup>See United States v. Al Mudarris, 695 F.2d 1182, 1187-88 (9th Cir.), cert. denied, 461 U.S. 932 (1983).

<sup>55</sup>See United States v. McKenzie, 678 F.2d 629 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983).

<sup>56</sup>United States v. Cathey, 591 F.2d 268, 273-74 (5th Cir. 1979); see also United States v. Al Mudarris, 695 F.2d at 1185.

Division testified before the grand jury as a witness and then remained in the grand jury room as the lead attorney presenting evidence to the grand jury. The judge held that where a Government attorney provided independent substantive testimony before the grand jury yet remained as presenting attorney, the resulting indictment must be dismissed. The judge's decision was based in large part upon the questionable notion that after the attorney testified and then remained in the grand jury room, he became an unauthorized person before the grand jury.

At least one circuit has declined to automatically dismiss an indictment where the attorney's testimony was procedural in nature. In United States v. Birdman, 602 F.2d 547 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), an SEC attorney, who was designated as a special attorney for purposes of appearing before the grand jury, made sworn statements before the grand jury, summarizing parts of the investigation and outlining the proposed indictment. He later took the witness stand and was questioned by another attorney. The court condemned this practice in principle but refused to dismiss the indictment in the absence of any evidence of actual prejudice to the defendants.<sup>57</sup> In light of recent Supreme Court decisions, it is unlikely that the conduct admonished in Treadway would result in the dismissal of an indictment.<sup>58</sup>

Although a Division attorney should not act as a prosecutor and a witness, an attorney may provide a variety of information to the grand jury without thereby becoming a witness. For example, an attorney may provide basic identifying information to the grand jurors so that they are clear as to the identity of the subject of an

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<sup>57</sup>See also United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); and ABA Code of Professional Responsibility (1975) Disciplinary Rule 5-101(b) and Ethical Consideration 5-9.

<sup>58</sup>See § I., infra.

investigation,<sup>59</sup> summarize prior testimony,<sup>60</sup> explain elements of the law and applicable legal theories,<sup>61</sup> and respond to grand jurors' questions.<sup>62</sup> The key element that seems to determine whether a prosecutor's statements are testimony is whether the prosecutor has placed his credibility on the line. If he has done so, then he may have become an improper witness.<sup>63</sup>

#### 15. Discussions with grand jurors outside of session

Division attorneys should be cordial with grand jurors both inside and outside the grand jury room. However, they should be careful not to discuss any of the matters under consideration by the grand jury except in the grand jury room. Failure to do so could be considered improper conduct by the attorney and is potentially a violation of Rule 6(e)'s general rule of secrecy and Rule 6(e)(1)'s requirement that all proceedings, except deliberations, shall be recorded. If a grand juror asks a question outside of the session, the attorney should politely decline to answer the question and suggest that the question be repeated when the grand jury is again in session.

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<sup>59</sup>See United States v. Civella, 666 F.2d 1122 (8th Cir. 1981).

<sup>60</sup>See United States v. Blitz, 533 F.2d 1329 (2d Cir.), cert. denied, 429 U.S. 819 (1976); United States v. Heffington, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983).

<sup>61</sup>See United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

<sup>62</sup>See United States v. Troutman, 814 F.2d 1428 (10th Cir. 1987). But see United States v. Martin, 561 F.2d 135 (8th Cir. 1977).

<sup>63</sup>See United States v. Blitz, 533 F.2d at 1344.

If an attorney inadvertently makes off-the-record comments to a grand juror concerning the matter under investigation, it is unlikely to result in dismissal of an indictment, absent other prosecutorial misconduct, unless the comments were prejudicial and material to the grand jury's decision to return an indictment. A wise practice is to have any off-the-record conversations repeated for the record.<sup>64</sup>

#### D. Permissible Evidence

##### 1. Admissible evidence

Grand juries may initiate and conduct investigations based on tips, rumors, hearsay, speculation, evidence offered by the prosecutor, and the grand juror's own personal knowledge.<sup>65</sup> The nature of the grand jury's function, unlike that of an adversary proceeding, "contemplates that it will hear from many sources uninhibited by the strict rules of evidence applicable in a trial and untested by the traditional adversary tools such as cross examination".<sup>66</sup> To allow attacks on evidence would relax grand jury secrecy and complicate pretrial procedures. The clear import of the Supreme Court cases dealing with this issue is that grand jury proceedings should not be burdened with the

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<sup>64</sup>See United States v. Venegas, 800 F.2d 868 (9th Cir. 1986), cert. denied, 479 U.S. 1100 (1987).

<sup>65</sup>See United States v. Dionisio, 410 U.S. 1, 15 (1972); In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 214 (3d Cir. 1981); United States v. McKenzie, 678 F.2d 629, 632 (5th Cir.), cert. denied, 459 U.S. 1038 (1982); In re Special February 1975 Grand Jury, 565 F.2d 407, 411 (7th Cir. 1977).

<sup>66</sup>Coppedge v. United States, 311 F.2d 128, 132 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963); see also United States v. McKenzie, 678 F.2d at 632.

delay and disruption that would result from recognizing a right to review the evidence considered by the grand jury.<sup>67</sup> In addition, such attacks may impede the work of the grand jury by limiting access to relevant evidence and may make witnesses more reluctant to testify. Finally, the grand jury is permitted such broad discovery because it does not adjudicate guilt or innocence but is purely an investigative body.<sup>68</sup> Consequently, the grand jury possesses broad investigative power and may draw its information from a wide variety of sources to carry out its function.<sup>69</sup>

The most frequently cited rule governing the range of evidence that may be considered by the grand jury is contained in United States v. Calandra, 414 U.S. 338, 343 (1974), in which the Supreme Court held that:

The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.<sup>70</sup>

In further elaborating on the scope of permissible evidence, the Court stated:

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<sup>67</sup>See United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956).

<sup>68</sup>See United States v. Calandra, 414 U.S. 338, 349 (1974).

<sup>69</sup>See Lawn v. United States, 355 U.S. 339 (1958); United States v. Ciambrone, 601 F.2d 616, 622 (2d Cir. 1979); In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 214 (3d Cir. 1981); United States v. Wilson, 732 F.2d 404, 409 (5th Cir.), cert. denied, 469 U.S. 1099 (1984).

<sup>70</sup>See also United States v. Ciambrone, 601 F.2d at 622; United States v. Wilson, 732 F.2d at 409; United States v. Lane, 716 F.2d 515, 518 (8th Cir. 1983); United States v. Reed, 726 F.2d 570, 579 (9th Cir.), cert. denied, 469 U.S. 871 (1984).

The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence . . . or even on the basis of information obtained in violation of a defendant's 5th Amendment privilege against self-incrimination. . . .<sup>71</sup>

Courts have permitted indictments to stand that were based largely, if not entirely, upon hearsay,<sup>72</sup> illegally obtained or incompetent evidence,<sup>73</sup> irrelevant or false testimony,<sup>74</sup> or other evidence that would not otherwise be admissible at trial.<sup>75</sup>

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<sup>71</sup>414 U.S. at 344-45; see also Costello v. United States, 350 U.S. 359, 362 (1956); United States v. Friedland, 444 F.2d 710, 713 (1st Cir. 1971); United States v. Wilson, 732 F.2d at 409; In re Grand Jury Investigation, 696 F.2d 449, 450 (6th Cir. 1982); United States v. Malsom, 779 F.2d 1228, 1241 (7th Cir. 1985); United States v. Levine, 700 F.2d 1176, 1179 (8th Cir. 1983); United States v. Tham, 665 F.2d 855, 863 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); United States v. Beery, 678 F.2d 856, 859 (10th Cir. 1982), cert. denied, 471 U.S. 1066 (1985); United States v. DiBernardo, 775 F.2d 1470, 1478 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

<sup>72</sup>See § D.2.

<sup>73</sup>See § D.3.

<sup>74</sup>See United States v. DiBernardo, 775 F.2d supra.

<sup>75</sup>See United States v. Camporeale, 515 F.2d 184, 189 (2d Cir. 1975) (evidence of prior convictions); United States v. Levine, 700 F.2d at 1179 (evidence of prior convictions and targets refusal to talk to police officers).



## 2. Hearsay

As with other types of evidence that would be inadmissible at trial, hearsay evidence may be presented to the grand jury even when eyewitnesses could have testified. Moreover, the Supreme Court held in Costello v. United States, 350 U.S. 359 (1956), that a valid indictment may be based solely on hearsay.<sup>76</sup> Nevertheless, some courts have cautioned that the use of hearsay should be avoided when possible,<sup>77</sup> and a few courts have suggested that the excessive use of hearsay may be viewed as a form of prosecutorial misconduct.<sup>78</sup>

In choosing to present hearsay evidence before the grand jury, Division attorneys should appropriately consider factors such as efficiency and the burden on both the Government and the witness of presenting eyewitness rather than hearsay evidence. This issue arises most often when using investigative agents, economists or other experts to summarize evidence or when summarizing evidence of or presenting transcripts from prior grand jury proceedings.

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<sup>76</sup>See also United States v. Jett, 491 F.2d 1078, 1081 (1st Cir. 1974); United States v. Ginsberg, 758 F.2d 823 (2d Cir. 1985); United States v. Steele, 685 F.2d 793 (3d Cir.), cert. denied, 459 U.S. 908 (1982); United States v. Alexander, 789 F.2d 1046 (4th Cir. 1986), United States v. Dunham Concrete Prods., Inc., 475 F.2d 1241, 1248 (5th Cir.), cert. denied, 414 U.S. 832 (1973); United States v. Markey, 693 F.2d 594 (6th Cir. 1982); United States v. Murphy, 768 F.2d 1518, 1533-34 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); United States v. Boykin, 679 F.2d 1240 (8th Cir. 1982); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Rogers, 652 F.2d 972, 975 (10th Cir. 1981).

<sup>77</sup>See United States v. Jett, 491 F.2d at 1081-82; United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973); United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).

<sup>78</sup>See United States v. Umans, 368 F.2d 725 (2d Cir. 1966), cert. dismissed, 389 U.S. 80 (1967).

The Second Circuit attempted to limit the use of hearsay in United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972). In Estepa, the only witness before the grand jury was a police officer who testified in detail about the events surrounding an alleged drug transaction. Although the police officer's actual observations were limited, the grand jury was not advised of the hearsay nature of his testimony. In remanding the case with instructions to dismiss the indictment, the court conceded that "there is no affirmative duty to tell the grand jury in haec verba that it is listening to hearsay".<sup>79</sup> However, the court also stated that the grand jury must not be "mised into thinking it is actually getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed."<sup>80</sup> The court concluded that the grand jury may be presented with hearsay "subject to only two provisos - that the prosecutor does not deceive grand jurors as to 'the shoddy merchandise they are getting so they can seek something better if they wish! . . . or that the case does not involve 'a high probability that with eyewitness rather than hearsay testimony the grand jury would not have indicted'."<sup>81</sup> As a practical matter, Division attorneys can avoid application of the Estepa rule by informing the grand jury of the hearsay nature of the testimony it is hearing.<sup>82</sup>

The Second Circuit's use of its supervisory power to review the nature of the evidence presented to a grand jury is highly questionable in light of the Supreme Court's decisions in United States v. Calandra, 414 U.S. 338 (1974), United States v. Costello, 350 U.S. 359 (1956), and Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), and has been met by a general lack of enthusiasm by other circuits. No other circuit has relied solely on

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<sup>79</sup>471 F.2d at 1136.

<sup>80</sup>Id.

<sup>81</sup>Id. at 1137.

<sup>82</sup>United States v. Bari, 750 F.2d 1169 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985).

Estepa to dismiss an indictment. The First, Third, Seventh and Tenth Circuits have declined to decide whether they would follow Estepa by distinguishing cases on factual grounds, primarily by focusing on the first part of the Estepa rule and finding that the grand jury was not intentionally misled.<sup>83</sup> The Eighth Circuit indicated that it might apply the Estepa rule but also focused on the first part of the rule.<sup>84</sup> The Fifth Circuit has stated that it will dismiss an indictment based on hearsay only if the use of hearsay has "impaired the integrity of the grand jury proceeding".<sup>85</sup> The Sixth and Ninth Circuits have expressly rejected the Estepa rule.<sup>86</sup> The Sixth Circuit would permit a challenge to an indictment because of the use of hearsay "only on a showing of demonstrated and longstanding prosecutorial misconduct".<sup>87</sup>

Although the Department believes that the Estepa rule is an incorrect interpretation of the law, it, nonetheless, has established the following policy regarding the use of hearsay evidence:

Hearsay evidence should be presented on its merits so that the jurors are not misled into believing that the witness is giving his/her own personal account. . . The question should not be so much whether to use hearsay evidence but whether, at the end, the presentation was in keeping with the professional

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<sup>83</sup>See United States v. Rodriguez-Ramos, 704 F.2d 17 (1st Cir.), cert. denied, 463 U.S. 1209 (1983); United States v. Wander, 601 F.2d 1251 (3d Cir. 1979); United States v. Murphy, 768 F.2d at 1533-34; United States v. Rogers, 652 F.2d at 975.

<sup>84</sup>See United States v. Smith, 552 F.2d 257, 261 (8th Cir. 1977).

<sup>85</sup>See United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

<sup>86</sup>See United States v. Barone, 584 F.2d 118 (6th Cir. 1978), cert. denied, 439 U.S. 1115 (1979); United States v. Al Mudarris, 695 F.2d at 1185.

<sup>87</sup>United States v. Markey, 693 F.2d at 596.

obligations of attorneys for the government and afforded the grand jurors a substantial basis for voting upon an indictment.<sup>88</sup>

3. Illegally obtained or incompetent evidence

As a general rule, a grand jury may consider inadequate or incompetent evidence<sup>89</sup> or even illegally obtained evidence.<sup>90</sup> The leading case in this area is United States v. Calandra, 414 U.S. 338 (1974), in which the Supreme Court considered whether evidence obtained by an illegal search and seizure could be used as the basis for questioning a grand jury witness. The Court held that the exclusionary rule, which in a trial context would not permit the use of such evidence, is inapplicable to grand jury proceedings.<sup>91</sup> The Court explained that the

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<sup>88</sup>U.S.A.M. 9-11.232.

<sup>89</sup>See Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); United States v. Myers, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Johnson, 419 F.2d 56, 58 (4th Cir. 1969), cert. denied, 397 U.S. 1010 (1970); United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); United States v. Adamo, 742 F.2d 927, 939 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Roth, 777 F.2d 1200 (7th Cir. 1985); United States v. Levine, 700 F.2d 1176 (8th Cir. 1983); United States v. Al Mudarris, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, 461 U.S. 932 (1983); United States v. Gutierrez, 696 F.2d 753, 754-55 (10th Cir. 1982), cert. denied, 461 U.S. 909 (1983); United States v. DiBernardo, 775 F.2d 1470 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986).

<sup>90</sup>See Lawn v. United States, 355 U.S. 339 (1958); United States v. Ocanas, 628 F.2d 353, 357 (5th Cir. 1980), cert. denied, 451 U.S. 984 (1981); In re Grand Jury Investigation, 696 F.2d 449 (6th Cir. 1982); United States v. Roth, 777 F.2d at 1203; United States v. Fultz, 602 F.2d 830, 833 (8th Cir. 1979).

<sup>91</sup>See also United States v. Blue, 384 U.S. 251 (1966); United States v. Busk, 730 F.2d 129 (3d Cir. 1984); United States v. Ocanas, 628 F.2d at 357; United States v. Fultz, 602 F.2d at 833.

exclusionary rule was designed for its deterrent effect on overzealous prosecutors and that its extension to grand jury proceedings would not greatly increase this deterrent effect. Balanced against the minimal increase in the exclusionary rule's deterrent effect was the Court's belief "that allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties".<sup>92</sup>

In addition to permitting grand juries to hear evidence obtained in violation of a person's 4th Amendment rights, courts have also permitted the use of evidence obtained in violation of a person's 5th Amendment rights,<sup>93</sup> information covered by the Speech or Debate Clause,<sup>94</sup> illegally obtained tax return information,<sup>95</sup> lie detector results,<sup>96</sup> information regarding a target's prior convictions or his refusal to testify<sup>97</sup> and perjured testimony.<sup>98</sup> As to perjured testimony, certain courts have suggested a rule similar to the rule in Estepa governing the use of hearsay evidence: that the knowing use of perjured testimony by a prosecutor to obtain an indictment that would not have

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<sup>92</sup>United States v. Calandra, 414 U.S. at 350.

<sup>93</sup>See United States v. Blue, 384 U.S. 251 (1966).

<sup>94</sup>See United States v. Myers, 635 F.2d 932 (2d Cir.), cert. denied, 449 U.S. 956 (1980); United States v. Helstoski, 576 F.2d 511, 519-20 (3d Cir. 1978), aff'd sub nom. Helstoski v. Meanor, 442 U.S. 500 (1979); United States v. Johnson, 419 F.2d at 58.

<sup>95</sup>See In re Grand Jury Investigation, 696 F.2d supra.

<sup>96</sup>See United States v. Morano, 697 F.2d 923 (11th Cir. 1983).

<sup>97</sup>See United States v. Levine, 700 F.2d supra.

<sup>98</sup>See Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962), cert. denied, 373 U.S. 946 (1963); United States v. Adamo, 742 F.2d at 939-42; United States v. Roth, 777 F.2d 1200, 1203-04 (7th Cir. 1985).

been issued without it is grounds for dismissal.<sup>99</sup> Moreover, while a grand jury may be presented with illegally obtained or incompetent evidence, the grand jury may not violate a valid privilege itself.<sup>100</sup>

The current status of the law in this area is summarized in the U.S.A.M. 9-11.231:

The fact that illegally obtained, privileged, or otherwise incompetent evidence was presented to the grand jury is no cause for abating the prosecution under the indictment, or for inquiring into the sufficiency of the competent evidence before the grand jury, even if the defendant may be expected to have the illegally obtained evidence suppressed or incompetent evidence excluded at trial.

Nonetheless, the Department has established a more exacting standard for its attorneys as follows:

A prosecutor should not present to the grand jury for use against a person whose constitutional rights clearly have been violated evidence which the prosecutor personally knows was obtained as a direct result of the constitutional violation.<sup>101</sup>

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<sup>99</sup>See United States v. Roth, 777 F.2d at 1203-04; United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978).

<sup>100</sup>See United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981); In re Grand Jury Investigation, 696 F.2d 449 (6th Cir. 1982); United States v. Garrett, 797 F.2d 656 (8th Cir. 1986).

<sup>101</sup>U.S.A.M. 9-11.231.

#### 4. Recorded communications

The major exception to the general rule that the validity of an indictment is not affected by the character of the evidence considered is the rule governing the use of recorded communications. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2520, created a comprehensive system for regulating the interception and subsequent use of oral, wire and radio communications.<sup>102</sup> In general, Division attorneys may use evidence derived from lawfully intercepted communications and may present such evidence to the grand jury in the same manner the attorney would use any other item of evidence or information. Under some circumstances, it may be necessary to obtain a disclosure order under 18 U.S.C. § 2517(5), before disclosing the contents of an intercepted communication to the grand jury. Attorneys should check with the local United States Attorney's office before deciding to make any such disclosure to the grand jury.

Recorded communications and evidence derived therefrom that were not lawfully obtained may not be presented to a grand jury. 18 U.S.C. § 2515 provides:

Whenever wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a state, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

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<sup>102</sup>See U.S.A.M. 9-7.000, et seq.

Therefore, Division attorneys must carefully follow the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and should generally contact the local U.S. Attorney to make sure that all recorded communications are lawful and admissible.

Because the suppression provisions of 18 U.S.C. § 2518(10) are not applicable to grand jury proceedings,<sup>103</sup> the remedy normally available for improper use of recorded communications before the grand jury is dismissal of the indictment.<sup>104</sup>

Occasionally, a grand jury witness will make a claim that his testimony is based on illegal electronic surveillance and invoke the prohibition of 18 U.S.C. § 2515 as "just cause" for his refusal to testify. In Gelbard v. United States, 408 U.S. 41 (1972), the Supreme Court held that a witness has the right not to testify in response to interrogation based on the illegal interception of his communication.<sup>105</sup> Most circuits require a positive statement by the witness with at least some colorable basis to suggest that illegal electronic surveillance has occurred.<sup>106</sup>

Faced with a claim by a witness that his interrogation is based on the illegal interception of his communications, the Government must either confirm or deny the allegation. The different circuits vary as to the required specificity of a denial, but as a general rule, most circuits apply a balancing test; the greater the specificity of

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<sup>103</sup>See Gelbard v. United States, 408 U.S. 41, 54 (1972).

<sup>104</sup>See United States v. Brodson, 528 F.2d 214 (7th Cir. 1975).

<sup>105</sup>See also United States v. Yanagita, 552 F.2d 940 (2d Cir. 1977); In re Grand Jury Matter (Doe), 798 F.2d 91 (3d Cir. 1986); In re Grand Jury Proceedings, 664 F.2d 423 (5th Cir. Unit B Nov. 1981), cert. denied, 455 U.S. 1000 (1982); In re Grand Jury Proceedings, 773 F.2d 1071 (9th Cir. 1985).

<sup>106</sup>See United States v. James, 609 F.2d 36, 51 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); United States v. Rubin, 559 F.2d 975, 989 (5th Cir. 1977), cert. denied, 444 U.S. 864 (1979); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); In re Baker, 680 F.2d 721, 722 (11th Cir. 1982).



the allegation, the more detailed the Government's denial must be.<sup>107</sup> For example, a mere unsupported allegation of illegal surveillance requires only a simple affidavit from Government counsel denying the allegation. A detailed allegation might require affidavits from Government counsel and the investigatory agents that include, among other items, a detailed description of the steps that were taken to determine that there was no illegal surveillance. If there was in fact surveillance, the Department's view is that in camera inspection of the court order authorizing the surveillance should preclude further inquiry into the legality of the surveillance.<sup>108</sup> Since the circuits that have considered the question have applied different criteria for responding to a witness' claim, Division attorneys should carefully examine the case law in the circuit in which they are appearing before responding to a witness' illegal surveillance accusation.

The most frequently-occurring form of electronic surveillance conducted by the Division is done with the consent of one of the parties to the conversation or is performed by a party to the communication without direct involvement by the Division. Such consensual monitoring is legal and is not subject to Title III procedures; interception orders under 18 U.S.C. § 2518 are not necessary.<sup>109</sup> Consensual monitoring of this type is governed by 18 U.S.C. § 2511(2)(c), (d). The Attorney General issued policy guidance regarding consensual monitoring in a November 7, 1983 Memorandum which is contained in the United States Attorney's Manual 9-7.300. It should be consulted whenever consensual monitoring is used.

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<sup>107</sup>See United States v. Yanagita, 552 F.2d *supra*; In re Grand Jury Proceedings, 664 F.2d at 427; In re DeMonte, 667 F.2d 590, 599 (7th Cir. 1981); In re Grand Jury Proceedings, 773 F.2d at 1072-73; United States v. Alvillar, 575 F.2d 1316 (10th Cir. 1978).

<sup>108</sup>U.S.A.M. 9-7.410.

<sup>109</sup>United States v. White, 401 U.S. 745 (1971); United States v. Haimowitz, 725 F.2d 1561, 1582 (11th Cir.), cert. denied, 725 U.S. 1561 (1984).

E. Use of Subpoenaed Documents

1. Impounding Order

An impounding order commits the custody of grand jury documents to the Government attorneys or other custodian, such as the FBI, and permits the documents to be removed for study and review by the Government attorneys. Standard Division procedure is to move the court to impound documentary material produced in response to subpoenas duces tecum so that the Government attorneys may, in their offices, keep, study, analyze, and work with such materials.<sup>110</sup>

a. Legal authority for impoundment

The power of the courts to impound is well established. As stated in United States v. Ponder, 238 F.2d 825, 827 (4th Cir. 1956):

The power to impound is inherent in a court as an institution of law enforcement; it may be exercised originally, as well as auxiliary to pending suits or actions. . . .

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<sup>110</sup>See Appendix IV-1 for an example of an application for an impounding order.

Applications for impounding orders are almost always made on an ex parte basis. The application should, of course, be made to the court in the district in which the grand jury is sitting.<sup>111</sup>

b. Government attorneys may examine documents to assist grand jury

It is equally well-established that Government counsel, in the performance of their duties, may assist the grand jury by examining, analyzing, and reviewing voluminous material produced before the grand jury and that such assistance may form the basis for obtaining an impounding order.<sup>112</sup>

In assisting the grand jury, Government counsel are entitled to examine documents outside the presence of the grand jury.<sup>113</sup> To facilitate this examination process, the courts have permitted removal of documents to Government counsel's office in another district.<sup>114</sup> In In re Grand Jury Proceedings (General Dynamics Corp.), 1961 Trade Cas. (CCH) ¶ 70,027, at 78,091 (S.D.N.Y.), Judge Ryan noted that in antitrust proceedings, an order of this kind is usually entered to facilitate Government counsel's preparation of the proceedings.

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<sup>111</sup>In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945).

<sup>112</sup>United States v. United States Dist. Court, 238 F.2d 713 (4th Cir.), cert. denied, 352 U.S. 981 (1957).

<sup>113</sup>United States v. United States Dist. Court, 283 F.2d at 720.

<sup>114</sup>See, e.g., In re Petroleum Indus. Investigation, 152 F. Supp. 646 (E.D. Va. 1957).

c. Timing of impounding order

Although obtaining an impounding order for subpoenaed documents is standard procedure, the time when one is obtained and the form thereof have varied considerably within the Division. The preferred practice is to obtain the impounding order at the initiation of the grand jury proceedings. An impounding order is sometimes obtained only when the documents are to be removed from the jurisdiction in which the grand jury is sitting.

Despite the historical differences, it is strongly recommended that an impounding order be obtained at the initiation of the grand jury investigation (or at least before the return of any documents to the grand jury) and that it impound the documents at least for the life of that grand jury. This will obviate any claim by a subpoena recipient that it has complied with the subpoena by delivering the documents to the grand jury and has a right to remove the documents at the end of that day's session.<sup>115</sup> If the documents are already impounded, especially if they are impounded for the life of the grand jury, then such a claim cannot be sustained.

Obtaining an impounding order at the initiation of the grand jury proceeding also serves two other purposes: First, it protects the Government attorney when he takes the documents out of the grand jury room and to his office (which may be out of the district)<sup>116</sup> by notifying the court of such a possibility. Thus, the court is made fully aware that the staff may remove the documents from the room in which the grand jury is sitting (this may be new to the court if it has only dealt with United States Attorney's grand juries in the past or has no experience with

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<sup>115</sup>See In re Mesta Mach. Co., 184 F.2d 375 (3d Cir. 1950); In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945).

<sup>116</sup>This would in effect remove the documents from the court's jurisdiction. An impounding order should always be obtained in such cases at the initiation of the investigation.

antitrust grand juries), and examine and utilize such documents in the Field Office and/or in Washington. An impounding order will eliminate surprise on the part of the court to any objections later raised by any subpoenaed party regarding such removal.

Second, the application for an impounding order will acquaint the staff with the practice and attitudes of the court vis-a-vis grand jury documents. Different judges may have different practices and procedures regarding the custody and removal of grand jury documents (e.g., one court required that an up-to-date index be supplied to the clerk).

Few problems have been experienced when seeking an impounding order early in the investigation. At most, some courts have stated that an impounding order was not needed, but usually signed one anyway. On the other hand, without an impounding order, later objections to removal of documents have created problems which have required otherwise unnecessary staff time.

- d. An impounding order should specify who will have custody of documents and where they will be maintained.

Many orders impound documents at a specific location. However, it may be necessary, during the course of the investigation, to remove some or all of the documents from that location, such as to the FBI for a handwriting analysis, or to Washington to prepare a price study. Language precluding this possibility should be avoided, if possible; otherwise it may be necessary to obtain a modification of the order.<sup>117</sup>

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<sup>117</sup>See In re Grand Jury Proceedings, 1973 Trade Cas. (CCH) ¶ 74,389 (S.D. Cal.), where  
(continued...)

The application for an impounding order should clearly specify that the subpoenaed documents may be removed from the district in which the grand jury is sitting if, in fact, that is the case. Some orders contain a separate provision to this effect. Other orders merely set forth the location where the documents are to be impounded. The location will show, on its face, whether it is out of the district.

It is suggested that when documents are to be removed from the district, consideration be given to including a provision in the order stating, in substance, that the documents will be returned upon notice from the court. Such a provision may be superfluous. However, it may make the order more acceptable to the court. Similarly, consideration should be given to including a provision that the documents removed from the district remain subject to all provisions of the order and the jurisdiction of the court.

e. Access to documents by their owners

1) Inspection of documents. Generally, impounding orders provide that the party producing the impounded documents shall have the right to inspect them. It is suggested that if the documents are impounded far from the site of the grand jury, consideration be given to the place of inspection. Generally, the subpoenaed party is given the option, in the order, of inspecting the documents in the staff's office or in the office of the United States Attorney for the district in which the grand jury is sitting.

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<sup>117</sup>(...continued)

Chief Judge Schwartz denied a motion of respondent to impound documents in the custody of the Clerk of Court and granted the Government's motion permitting Government counsel to remove the grand jury documents to their Los Angeles office. In response to respondent's demand, Government counsel agreed to keep a record of every grand jury document sent outside the Los Angeles Field Office.

Care should be taken to insure that the order is worded so that a party producing impounded documents may, at his request, allow designated third parties to inspect the documents. Not infrequently, treble damage litigation will be instituted while the documents are impounded and the plaintiff will make arrangements with the subpoenaed party to inspect his documents which have been impounded; or, as sometimes happens, investigations will be instituted by other Government agencies involving the subpoenaed party and the subpoenaed party will arrange to have the documents examined by such agencies.

2) Return of documents. Most impounding orders contain a provision that the Government attorneys may return impounded documents without further order of the court. Such a provision should be simply worded and language such as "irrelevant and immaterial documents may be returned" should be avoided. This language suggests that the subpoena was overbroad and implies that all documents retained may be material and relevant and may possibly be used by the defendants in a subsequent Fed. R. Crim. P. 16 motion.

f. FOIA issues

In general, Division policy is that documents produced to the grand jury are not subject to the disclosure requirements of the Freedom of Information Act (FOIA). There are several reasons for this. First, such documents may constitute matters occurring before the grand jury that are subject to the secrecy requirements of Fed. R. Crim. P. 6(e). Second, the impounding order should separately prevent disclosure to a third party, absent authorization by the subpoena recipient. Third, other exemptions of the FOIA are likely to cover grand jury documents. Obviously,

the important business of the grand jury would be severely disrupted if grand jury documents could be obtained by FOIA requests.<sup>118</sup>

g. Time period to be covered by impounding order

The impounding order should ordinarily cover the documents for the life of the grand jury then sitting, any subsequent grand jury or juries which may continue the investigation, and for any litigation to which the United States is a party arising from such investigation. The advantages of such an impounding order are that (1) if the investigation is not concluded before the first grand jury is discharged, the documents may be retained in the Government's possession without obtaining a new impounding order while the second grand jury is being convened; (2) a second impounding order is not necessary to retain the documents during the proceedings of the second grand jury; and (3) it is not necessary to obtain an impounding order after the indictment has been returned and the case is being prepared for trial.

In some instances, the possible use of a successor grand jury has been clearly spelled out in a separate paragraph of the application; in other instances, the application has merely sought the impoundment of documents for use by attorneys in connection with the investigation "before this grand jury or any other grand jury in this district"; and in still other instances, the application has merely sought to impound documents for use in conducting "grand jury proceedings." If the possible use of a successor grand jury is emphasized by the use of a special

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<sup>118</sup>See Ch. II § B.2. for a more detailed discussion of the application of Fed. R. Crim. P. 6(e) to subpoenaed documents.



paragraph, it may convey an erroneous impression to the court that the investigation will extend an unusually long time and thus create some doubt on its part as to whether the order should be granted.

Insofar as proceedings arising from the investigation are concerned, it is suggested that attorneys use language impounding the documents for "legal proceedings to which the United States is a party". Even with this language, it is by no means certain that a defendant cannot obtain the return of his documents after the criminal case has been concluded and notwithstanding the fact that a civil case is pending.

If the order impounds documents for legal proceedings arising from the grand jury investigation, consideration should be given to including such proceedings in the reason for impoundment. That is, language such as "it is necessary for the Government to work with the documents to make an orderly presentation to the grand jury" should be broadened in scope to include the legal proceedings.

- h. Order should impound those documents produced to the offices of Division staff

A provision that the subpoenaed party may produce the documentary material by mail or in person at the offices of the investigating staff is sometimes used in impounding orders. Such a provision would not seem to be absolutely necessary since, if this procedure is followed, it will be at the option of the subpoenaed party, and third parties would have no standing to object. Nevertheless, it may be advisable to include such a provision where the court is unfamiliar with grand jury proceedings in antitrust matters or where the court's feelings as to the procedure are unknown.

In any event, the application and order should be drafted so that it is clear that documents produced in the offices of the staff are impounded, as well as those physically produced before the grand jury.

## 2. Negotiating Strategy for Document Return

Each staff attorney responsible for document returns to the grand jury should be thoroughly familiar with all paragraphs of the subpoena, precisely what items are sought and why they are sought. Invariably, counsel for the subpoena recipient will call the Government counsel contact noted on the subpoena to discuss subpoena compliance. Typical topics include extensions of time for production, whether originals or copies are called for, clarification of certain subpoena requests, numbering of the documents, whether documents maintained by certain members of the corporation are corporate or "personal" documents, burdensomeness, etc. Staff attorneys should be prepared for such calls as they are an important aspect of obtaining good subpoena compliance. It is recommended that the staff attorneys meet and discuss each paragraph of the subpoenas in advance of their issuance. This discussion should include what documents are sought, the importance of each category, what compromises or concessions you will make, whether you will accept piecemeal production, etc. In other words, you should brainstorm possible objections, problems and difficulties counsel may raise and be ready to address and solve them.

Negotiating sessions with counsel for the subpoenaed company may be an important source of information for you, particularly if you can get counsel to describe his problems specifically. In doing so, you can frequently gain information about (a) the recipient's company; (b) how it conducts its business; and (c) the industry in general.

Your approach should be cordial, firm and fair. Counsel will generally be more cooperative if you can accommodate him or at least make the effort to do so. It may also avoid unnecessary work such as litigating the scope and burdensomeness of the subpoena or some of its parts. While Government counsel generally are successful in such matters, they can be time consuming and generally should be avoided.

To the extent possible, you should attempt to treat each company the same. This will create fewer problems for you not only in terms of keeping track of any modifications or compromises in subpoena compliance<sup>119</sup> but also in avoiding complaints of uneven handed treatment by the subpoena recipients.

Finally, you should consider stipulations, affidavits and admissions where you are only seeking documents to establish a particular fact, such as interstate commerce. The number of documents needed to establish interstate commerce may be voluminous. Frequently, the subpoena recipient is willing to admit or stipulate to that issue rather than to produce all the underlying documents. Such documents are generally of little probative value to other issues. Consequently, the chances of missing a hot document by so stipulating are small. However, if this approach is used, make sure that the stipulation/admission is in a form that will be usable at trial. If no such agreement can be reached, then insist upon production of all the documents bearing on this issue called for by the subpoena.

### 3. Return of Documents to the Grand Jury

The subpoena may require actual production of the subpoenaed documents before the grand jury or it may permit return of the documents by production to the office of the Antitrust Division attorneys conducting the investigation. The subpoena recipient has a right to produce its documents before the grand jury. The Government may insist on the explanatory testimony of a document custodian before the grand jury. The Government may not insist upon production to its own offices if the subpoena recipient does not agree. However, the Government may

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<sup>119</sup>Obviously, all modifications or compromises must immediately be reduced to writing.

give the subpoena recipient the option of producing the documents to the Government's offices. This is generally done for the convenience of both parties. When this option is chosen, it is generally accompanied by the requirement that the subpoena recipient provide an affidavit of search and production compliance in lieu of the grand jury testimony of a document custodian.<sup>120</sup>

Although an affidavit of compliance may not be as thorough and as illuminating as questioning the document custodian before the grand jury, it is generally sufficient to protect the Government's and the grand jury's interests at that early stage of document production. If after reading the documents and conducting some further investigation, the staff believes the affidavit is inadequate or inaccurate, it can always subpoena the document custodian to elaborate before the grand jury. Moreover, the representations in the affidavit, if false, can be the basis for a possible false statements or obstruction charge. Further, it is frequently much easier and more productive to ask relevant questions of the document custodian after the staff has reviewed the documents.

Where the option of a return to the offices of the Division is chosen, the grand jury should be advised that that option has been selected and that the documents have been received, because the power to subpoena documents resides in the grand jury, not in the Antitrust Division. Also, timely disclosure to the grand jury can help defeat any subsequent claims of grand jury abuse.

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<sup>120</sup>See Ch. III § E.1. for a discussion of the relative merits of production directly to the grand jury or to the staff and the contents of the compliance affidavit.

#### 4. Handling of grand jury documents

Once documents have been received in response to subpoenas duces tecum, the staff encounters one of its most difficult and important tasks in developing a criminal investigation. This includes the reading, selecting, numbering, filing, and segregating of the documents received.

##### a. Document identification - numbering

As documents are received during the grand jury investigation, they should be placed into separate packets or boxes to prevent co-mingling with the documents of others. The documents should then be clearly marked with different identification symbols (usually a letter) and numbered consecutively.<sup>121</sup> Complex numbering (e.g., DB-21-C-150-2) should be avoided; it is difficult to cite in the record and increases the chance of reporter error. Further, the initials of the corporation submitting documents should not be used to identify that corporation if confidentiality as to the ownership of the documents is desired.

The precise numbering system is usually left to the desires of the staff (e.g., some attorneys prefer coding by paragraph number of the subpoena) unless a document control system has been installed in a particular office or section. In the latter situation, the practice in the office or section is followed. The important thing is to have an effective control over the documents.

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<sup>121</sup>This presupposes that the documents are not identified and numbered by the party submitting them. That is frequently done at the request of the staff.

The identification of documents, in a simplified manner, should eliminate any confusion as to which company supplied particular documents. The numbering will also permit the examiner to easily identify the document as he uses it to examine a witness.

Initially, a decision must be made as to whether to number all documents received, or just those that appear, at first reading, to have any relevance to the subject matter of the investigation. Numbering all documents will, of course, give the greatest control. However, in matters involving the submission of huge amounts of documents, it may not be feasible to number every document given the size of the staff and time required. In such huge submissions, those documents that likely will not be used should be segregated and kept in a carefully identified file.

You can request (but not compel) the subpoena recipient to number the documents before they are submitted. The company or its counsel are generally happy to oblige because it gives them a measure of control over the submission and the ability to track and organize documents for their own purposes. Generally, they will number the documents in whatever manner and with whatever prefixes the staff suggests. The system the staff desires is usually set forth in the subpoena schedule or in a cover letter accompanying service of the subpoena. It can also be handled after service, either in writing or by telephone, with counsel for the recipient, but delaying the matter runs the risk that the documents will be produced without numbering or that the recipient will start to number in some way that is not useful to the staff.

The staff may be tempted to number the documents further after receipt for its own internal organizational and working purposes, for example, to identify hot document topics. This practice should be avoided. The better practice to accomplish the same objective is to use separate file folders for each hot document topic. This avoids

cluttering the documents with additional symbols. If some of those symbols should have to be removed, it avoids the problem of having to eradicate them.

b. Indexing/organization

To make effective use of the documents received, it is important to index and organize them as early as possible. Upon receipt of the documents, it is good practice to make a quick index of the nature and types of documents received and their location, particularly in the case of multi-box submissions. This should be done on a company-by-company, box-by-box-basis. This will facilitate ready access.

Thereafter, the staff may wish to organize the files along several lines, e.g.: (1) written by or referring to particular persons; (2) relating to events in a chronological order; (3) pertaining to different possible antitrust violations, e.g., horizontal price-fixing, vertical price-fixing, group boycotts; (4) having to do with particular sections or areas of the country; (5) "hot documents"; or (6) referring to specific companies.

This type of organization may be company-by-company or for all the companies subpoenaed. In either case and with whatever system used, it is good practice to handle the originals as little as possible.

c. Copying/microfilming

As noted above, the staff should work with copies of the original submissions insofar as practicable. The number of copies to be made depends on the files the staff wants to maintain. For example, the staff may want to have a chronological file, a hot documents file and specific individual files. In that case, you might make as many

as three copies of certain documents. Because of security and control problems, as well as expense, the staff should avoid an undue proliferation of copies.

In certain cases, where the document submissions are particularly voluminous, the staff may wish to microfilm the documents to conserve space. However, this is time-consuming and expensive. It also requires the use of a microfilm printout machine when you want to use a copy of a specific document, or retrieving the original for copying.

After copying, the original documents, as selected and marked, should be placed and maintained in an "Original File" until such time as their use is necessary. Usually, such use is essential only at trial or if a witness cannot identify or read a copied document or if he refuses to believe that the copy represents a true copy of the original and his testimony with respect to the document is believed vital.

d. Logs/document control

Some Division Field Offices and Sections have document clerks who receive and log in each company's document submissions. Generally, a separate log book is maintained for each grand jury or each grand jury matter. This log will give the name of the subpoena recipient, the number of cartons of documents submitted, the date or dates they were subpoenaed; the date or dates the documents were received; the storage location of these documents (e.g., Aisle B, Bins 3 and 4); and whether the submission is partial or complete. It may also note additional information, such as the addresses of the recipients; name, address and telephone number of the company's contact; name, address and telephone number of counsel; the existence of search and compliance affidavits; etc. Generally such control logs are arranged in alphabetical order.



Staff members may then be assigned to review the documents of certain of the subpoenaed companies. With the above control system in place, the staff member can then sign for or log out the documents he is to examine. This type of system provides maximum control over the document review phase of the investigation.

e. Exhibits

Once documents have been identified as exhibits or potential exhibits for either grand jury or trial use, the originals should be pulled and replaced with copies. Additional copies should be made for courtroom or grand jury use as needed. For trial use, it is recommended (and in most courts required) that the exhibits be pre-marked. The practice may differ for grand jury use. Since the grand jury is an investigative proceeding, staff may not be able to anticipate a witness' testimony at this stage. Consequently, it may be necessary to mark the exhibits as they are used. Whenever or however they are marked, they should be clearly identified for the record so that it is clear that the witness is testifying about that particular document and no other. This is especially important if you subsequently need to impeach that witness with respect to his testimony about that document. It is also useful in refreshing recollections. Further, it will assist the grand jurors and eliminate ambiguity.

The practice regarding the handling of grand jury exhibits varies widely within the Division. Some attorneys attach the exhibit to the transcript of the witness who first discussed or identified it. The disadvantage of this method is that the staff must remember to which transcript a particular exhibit is attached. An alternative method is to keep all exhibits in separate numbered folders at one location, either in the grand jury room or in the document storage area. As exhibits are needed for subsequent grand jury sessions, they are easily located and

retrieved. Some staffs maintain the original exhibits in the document storage area and leave copies of each in the grand jury room or with the U.S. Attorney's office so the originals do not have to be transported to each session.

f. Chain of custody

Sometimes a subpoena recipient will produce a certain type of document which may later be the subject of a chain of custody dispute. While any document may conceivably fall into this category, some are more susceptible to such claims than others. For example, video, audio and computer tapes or other materials about which claims of alteration or tampering may be lodged are frequently the subject of chain of custody disputes. If you are not able to establish the chain of custody and to account for all the time the materials were in your possession, such materials may be excluded from trial. Consequently, it is important that the staff identify such materials immediately upon receipt and establish appropriate safeguards for them. Logs and the testimony of document custodians are the best safeguards.

5. Computerized document control

a. Description

The uses of computers for grand jury investigations vary with the type and size of the investigation. Lower volume document indexing applications can usually be performed on the Wang using data processing software. Larger document indexing applications and applications requiring numeric computations must usually be

performed on mainframe computers at the Division's computer center. Data may be entered for both Wang and mainframe applications on the Wang by section clericals or at contractor facilities by contract keying vendors. Computerized data obtained in machine readable form from target companies must usually be processed on a mainframe computer.<sup>122</sup> Applications which require minimal retrieval and sorting capabilities can often be accomplished using Wang word processing sort utilities. Examples of recent grand jury support applications include the following:

- (1) Expense report databases into which information from expense reports, credit card receipts, diaries, and airline tickets are entered. Reports are generated showing the travel and expense history of particular firms or groups of firms.
  
- (2) Bid tabulation databases are created from information, (often retained in machine readable form), by states, municipalities, and federal agencies. Reports are generated showing the bidding history of particular firms or groups of firms.
  
- (3) Price analysis databases are created by entering invoice information from invoices, price lists, rate schedules or price quotation documents. Reports are generated showing the effective price charged by or paid by each company on a daily basis.

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<sup>122</sup>Staff members from the Division's Information Systems and Support Group (ISSG), with the assistance of Division attorneys, have drafted a "Schedule of Documents" specifically for machine readable data. ISSG should be contacted whenever it is anticipated that machine readable data will be included within the scope of a subpoena.

(4) Document index databases are created containing bibliographic information, (date, author, recipients, source, document number, document type), and subject codes and/or brief descriptions of content.

Reports are generated to group all documents authored or received by a witness in date order, sorted by subject code, or, in any useful grouping and order.

(5) Telephone databases are created from selected calls appearing on target company telephone bills.

Reports are generated showing telephone activity between target phones numbers by date. As this is a particularly time-consuming analysis, it is recommended that bills first be processed for a highly suspect period for one company on a test basis. Only if it appears that further analysis will be fruitful should larger sets of telephone bills be processed.

(6) Transcript digest databases are created to allow searching for subject and witness information.

(7) Full text transcript databases are created from machine readable copies of testimony provided by court reporters who employ adaptable systems.

(8) Screening of very large document productions has been accomplished by contract paralegals dictating objective descriptions on a box-by-box basis. Descriptions were then transcribed and KWIC (key word in context) listings and box digests provided for attorney review.

(9) If only a simple reordering of information is required, information can be keyed in columns in a word processing document and sorted with word processing software. Some invoice and pricing applications are well-suited to this simplified approach.

(10) Enlargements of computer-generated graphics created on a Division plotter and of maps and subpoenaed documents have frequently been used to depict pricing and bidding information for grand jury and trial presentation. Enlargements and color copies are provided by the FBI graphics shop.

b. Advantages/caveats

The time/cost benefits of a computerized system are usually realized at the conclusion of a process or series of processes. For example, a manual system of typing index cards and a computerized index system may require equal staff resources to implement. However, if properly implemented, the computerized system will provide faster, more reliable retrieval. In addition, the computerized system will provide information based on more criteria and combinations of criteria than a manual system can usefully employ. The reports described above are examples of the useful tools generated by computer systems. The time and resources required to locate pertinent information are greatly reduced and information can be compiled in ways not possible with manual systems.

A computerized system requires attorney involvement in design and implementation to ensure useful retrieval and to protect work-product claims should post-indictment discovery of a system be sought. A computerized system usually will require substantial involvement of non-attorney personnel as well and, in large

applications, non-Government personnel. Training of appropriate staff members is required. Application development and training will be more time-intensive for the first application utilized by a staff.

As with manual systems, overly ambitious projects may be completed too late to be useful. Attention must be given to planning resource requirements and realistic task schedules. Since a computerized system is dependent on hardware and software reliability, attention to backup and reporting procedures is required.

Use of a computerized system requires discipline and planning. While a system can provide retrieval of information not considered significant at the beginning of an investigation, (for example, all documents authored by James T. Smith), retrieval of those documents is precise only if all authors are always entered in a standardized format, i.e., Smith, J.T.

Not all projects are candidates for computerized systems. Many can be accomplished efficiently manually or with combinations of manual and computerized systems.

c. Availability of Division and contract resources

The Information Systems Support Group (ISSG) is the office within the Division responsible for providing automated litigation support services. ISSG is an arm of the Executive Office of the Division; the group consists of three units: Litigation Support, Systems Support, and Office Automation. The three units work closely together to provide the Division automated litigation support services.

In addition to professional Government personnel, ISSG has access to additional assistance through various contracts for both systems and litigation support. Through these contracts, ISSG can staff projects with both

professional personnel (systems analysts, paralegals, etc.) and clerical personnel (coders, keyers, etc.) on an "as needed" basis.

Antitrust Division Directive ATR 2850.1 outlines the formal procedures for obtaining litigation support from ISSG. The procedures are discussed in detail below.

The initial request for litigation support should be made to the chief of the Litigation Support Unit (LSU). The request should be made as soon as the staff has an idea of what types of information they will receive. Often, the initial request is simply a phone call informing ISSG that subpoenas have been served, and that ISSG support may be required to computerize sales or bid data, or to abstract documents, or to process data received in computer form. In some instances, ISSG advice is requested while the staff is drafting the subpoena, especially in those instances when data is requested in computer form. In other cases, the initial phone call is just a general discussion of "what the computer can do for you", and may result in the decision that automated support is not required. In sum, an attorney should contact the chief of LSU whenever he has any questions at all regarding litigation support for a particular investigation.

Once the initial phone call is made, and it is determined that support is warranted, the chief of LSU will assign a case manager to the investigation. The case manager, with the chief of LSU, will meet with the legal staff to discuss preliminary strategies and deadlines. The case manager acts as a "consultant", with the legal staff as his "client". The case manager is not just another paralegal assigned to the investigation. Each case manager is experienced in the logistical and technical problems normally associated with Division matters. It is the case manager's responsibility to determine the most cost efficient way to provide support for a particular investigation. The case manager works very closely with the legal staff to determine the methodology that best meets all budget and time constraints while providing a quality product. It is important to remember that ISSG has no "standard"

way of providing assistance. Each investigation presents a different set of requirements and problems. For example, while it may be feasible for section personnel to computerize sales information for one case, it may not be feasible for another case because of workload or time constraints.

Initially, the case manager is responsible for preparing a "support plan". The plan should outline, among other things, the type of assistance required and whether Government or contract personnel, or both, will perform the required tasks. Once the case manager has prepared the support plan, the contact attorney will receive an "estimate memo" from the chief of LSU, which summarizes the support plan agreed upon and estimates the contract costs and Government time necessary to complete the project requirements known at the time. If the estimate is under \$20,000 for contract costs and requires less than 320 hours of ISSG personnel time, section chief approval is sufficient. If the estimate exceeds either the contract cost or ISSG personnel time limit, the Director of Operations must approve the expenditure of resources. The preferred method of receiving Operations' approval is via a short memo from the section chief, with the estimate memo attached, justifying the expenditures. In most cases, work on the project does not begin until a copy of the estimate, with the appropriate signatures, has been returned to the chief of LSU. However, in those instances with severe time constraints, oral approval, or approval via Wang Office, is sufficient.

Once the project begins, the case manager is responsible for directing and monitoring all aspects of the litigation support process, and for keeping the legal staff apprised of potential problems which may delay completion of the project. The case manager is also responsible for keeping the legal staff apprised of the status of the project on a regular basis.



6. Access to Documents by Owner

The subpoenaed party should be accorded reasonable access to his own documents, although he should not be permitted such access if to do so would seriously disrupt the grand jury proceedings. Generally, these matters can be negotiated by telephone.

Generally, the subpoenaed party is given the option, in the impounding order, of inspecting the documents in the staff's office or in the office of the United States Attorney for the district in which the grand jury is sitting. In addition, the impounding order usually is worded so that a party producing documents is not precluded, at his request, from having the documents inspected by a third party.<sup>123</sup>

Sometimes a dispute may develop regarding whether or not a subpoena recipient was accorded reasonable access to his documents. To meet such allegations, it is advisable to keep a record of the date(s) and time(s) of such access. It is suggested that this record be maintained by the document custodian or document clerk in your office or by someone else who can, if necessary, testify on the subject. Clearly, the record should not be maintained by a staff attorney. The record should also include the date of the request(s) for access and a notation of any reasons why access had to be denied at that time.

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<sup>123</sup>See § E.1.e., supra.

## 7. Return of Documents at Close of Investigation

Documents are usually retained by the Government until the purpose for which they were obtained has been accomplished. Documents lawfully obtained during a grand jury investigation are normally kept until the conclusion of any civil actions arising out of the grand jury proceedings. However, it should be noted that "documents, records or papers produced in obedience to a subpoena duces tecum remain the property exclusively of the person who produces them and they must be returned to him as soon as proper use and examination of them for the purpose for which they were summoned has been completed."<sup>124</sup> A subpoenaed party can demand the return of his documents at the conclusion of the grand jury investigation or at the conclusion of any criminal proceedings arising therefrom. Accordingly, the importance of obtaining an impounding order as discussed previously cannot be overemphasized.

Copies of subpoenaed documents may be made by the Government and retained.<sup>125</sup> However, if the subpoenaed documents were obtained by an illegally constituted grand jury, the Division may have to return the copies.<sup>126</sup>

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<sup>124</sup>In re Bendix Aviation Corp., 58 F. Supp. 953, 954 (S.D.N.Y. 1945); In re Petroleum Indus. Investigation, 152 F. Supp. 646 (E.D. Va. 1957).

<sup>125</sup>In re Petroleum Indus. Investigation, 152 F. Supp. *supra*; Maryland and Virginia Milk Producers Ass'n v. United States, 250 F.2d 425 (D.C. Cir. 1957).

<sup>126</sup>United States v. Wallace & Tiernan Co., 336 U.S. 793, 800 (1949).

Division policy is to return or destroy subpoenaed documents when they are no longer of use to the Division, even absent a specific request from the document submitter.<sup>127</sup> When the documents are to be returned, staff should contact counsel for the subpoena recipient and make appropriate arrangements. Some companies may not want the documents back and will authorize the staff to shred or otherwise destroy them. Obviously, this would save staff some time. However, most companies will want their documents back. Some will pick them up. Others will accept return by mail. The staff should keep accurate written records of the date and method of return for each submission.

F. Witnesses

1. Target/subject definition

A "target" is defined as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant."

A "subject" is defined as "a person whose conduct is within the scope of the grand jury's investigation."<sup>128</sup>

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<sup>127</sup>Division Directive ATR 2710.1.

<sup>128</sup>U.S.A.M. 9-11.150.

2. Rights of witness

A grand jury witness does not have the same rights as someone who is arrested and then interrogated by the police. As a result, a grand jury witness does not have to be advised of his constitutional rights.

a. No right to refuse to answer questions

There is no right to refuse to answer questions unless the witness can assert the right against self-incrimination or establish that some other privilege applies.<sup>129</sup> A witness may also refuse to answer questions based on illegal electronic surveillance.<sup>130</sup>

b. No right to be advised of 5<sup>th</sup> Amendment (Miranda) rights

A witness has no recognized right to be advised of his 5th Amendment right not to be compelled to be a witness against himself. However, the practice of not advising a witness of his 5th Amendment privilege has not been expressly approved. The Supreme Court in United States v. Washington, 431 U.S. 181 (1977), and United States v. Mandujano, 425 U.S. 564 (1976), declined to decide whether a grand jury witness must have been warned prior to testifying of his 5th Amendment privilege against compulsory self-incrimination before such testimony can

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<sup>129</sup>United States v. Mandujano, 425 U.S. 564, 581 (1976) (grand jury witness has absolute duty to answer all questions, subject only to a valid 5th Amendment claim).

<sup>130</sup>See § D.4., *supra*.

be used against the witness in a later prosecution for a substantive criminal offense.<sup>131</sup> In Mandujano, the Court took cognizance of the fact that federal prosecutors customarily warn "targets" of their 5th Amendment rights before grand jury questioning begins. Similarly, in Washington, the Court pointed to the fact that 5th Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting.<sup>132</sup>

Some lower courts appear to have developed the view that if the grand jury witness is a defendant or virtually a defendant (i.e., target or prosecutor has reason to believe he may be indicted), then warnings must be given.<sup>133</sup> But where the Government has not entertained the idea of bringing criminal charges against a witness, it has no duty to warn him.<sup>134</sup>

Based on the above, it is the policy of the Department of Justice to advise a witness of his 5th Amendment privilege, notwithstanding the lack of a clear Constitutional imperative. Division attorneys typically attach an "advice of rights" form to each witness subpoena and reiterate those rights before the grand jury.<sup>135</sup>

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<sup>131</sup>A grand jury witness who was not advised of his 5th Amendment right may, however, have his grand jury testimony used against him in a subsequent perjury prosecution. United States v. Wong, 431 U.S. 174 (1977).

<sup>132</sup>431 U.S. at 188.

<sup>133</sup>United States v. Luxenberg, 374 F.2d 241 (6th Cir. 1967).

<sup>134</sup>See United States v. DiMichele, 375 F.2d 959 (3d Cir.), cert. denied, 389 U.S. 838 (1967); Robinson v. United States, 401 F.2d 248 (9th Cir. 1968).

<sup>135</sup>See § G.3., infra.

c. No right to be notified of status

A witness has no right to be told that he is a potential defendant or target of the investigation.<sup>136</sup> The prosecutor has no duty to tell a grand jury witness what evidence it may have against him.<sup>137</sup> Again, however, it is the policy of the Department of Justice to advise a witness of his "target" status if such is the case.

d. No right to be advised of right to recant testimony

A witness has no right to be advised that he may recant testimony and, thereby, avoid a perjury charge under 18 U.S.C. § 1623.<sup>138</sup>

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<sup>136</sup>United States v. Washington, 431 U.S. 181 (1977) (witness testified following a Miranda-type warning at the grand jury and these statements were later used against him at trial; there was no right to be told that he was a putative or potential defendant); see also United States v. Swacker, 628 F.2d 1250, 1253 (9th Cir. 1980) (witness advised of 5th Amendment privilege but not advised of target status).

<sup>137</sup>See United States v. Del Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

<sup>138</sup>See United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

e. No right to counsel in grand jury room

There is no right to have counsel present in the grand jury room.<sup>139</sup> A witness may leave the grand jury room to consult with counsel.<sup>140</sup> Such consultations should not be allowed to interfere unduly with the grand jury proceedings and may be appropriately regulated.<sup>141</sup>

f. No right to appointed counsel

The 6th Amendment right to counsel does not attach at the grand jury stage because no criminal proceedings have been instituted, nor do the Miranda rights of appointed counsel attach because the grand jury is not the equivalent of custodial police interrogation. Similarly, the Criminal Justice Act, 18 U.S.C. § 3006A, authorizing appointment and payment of counsel in indigent cases, does not provide for appointment of counsel for an indigent grand jury witness.

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<sup>139</sup>Fed. R. Crim. P. 6(d).

<sup>140</sup>See United States v. Mandujano, 425 U.S. 564, 606 (1976) (Brennan, J. concurring) (may consult with attorney at will).

<sup>141</sup>In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972) (witness allowed to consult only after every two or three questions; court has power to prevent disruption of proceedings by frivolous departure from grand jury room), cert. denied, 410 U.S. 914 (1973); In re Lowry, 713 F.2d 616 (11th Cir. 1983) (no right to consult after each question); United States v. Soto, 574 F. Supp. 986 (D. Conn. 1983) (immunized witness may leave grand jury room every 20 minutes to consult with counsel for ten minutes, although witness may write down neither questions nor his answers to them).

Often, it is to the advantage of the Government to seek counsel for the witness. The Federal Defender's Office will represent the witness without appointment. In the unusual case where Federal Defenders will not advise the witness because of a conflict or other reason, appointment of a panel attorney may be made under the provisions of the Criminal Justice Act, allowing for counsel when the witness faces loss of liberty (for example, potential contempt charges).

g. Newsmen have no special rights

There is no right, as a newsman, to refuse to testify concerning news sources.<sup>142</sup> However, the Department of Justice has adopted a policy which restricts the authority to issue subpoenas to newsmen. Departmental procedures are set forth in 28 C.F.R. 50.10.<sup>143</sup>

3. Department of Justice policy re: advice of rights and target status

The Department of Justice has an internal policy for advising grand jury witnesses of their 5th Amendment rights and of their status as "targets," if that is the case.<sup>144</sup> Under Department of Justice policy (U.S.A.M. 9-11.153), witnesses before the grand jury will generally be advised of the following items:

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<sup>142</sup>Branzburg v. Hayes, 408 U.S. 665 (1972).

<sup>143</sup>See Ch. III § A.2.1. and U.S.A.M. 9-2.161; see also ATD Manual III-82.

<sup>144</sup>Division attorneys should also check the local rules in the district where the grand jury is sitting and consult with the U.S. Attorney about any local policies.



a. Nature of the inquiry

This information should not be provided if it would compromise the investigation. For example, if advising the witness that the grand jury is investigating a specific antitrust violation might jeopardize the case, the Division attorney may more generally state that the investigation concerns violations of federal antitrust law.

b. 5th Amendment rights

The witness is told that he may refuse to answer any question if a truthful answer would tend to incriminate him.

c. Anything said may be used against the witness

d. The witness may leave the room to consult with his attorney

e. If appropriate, that they are a target of the investigation

f. Advice concerning counsel's potential or actual conflict of interest

It is the Division's policy, where appropriate, to advise the witness that he is entitled to retain counsel who does not suffer from a potential or actual conflict of interest.

g. Advice of rights attachment to subpoena

The rights set forth in Sections a.-d. above should be attached to the subpoena directing the witness to appear.<sup>145</sup> The witness should acknowledge on the record that he understands his rights. Although Division practice is to advise all witnesses who are expected to assert their 5th Amendment privileges of their rights, only targets need be specifically advised of their rights on the record.

4. Subpoenaing a subject or target

a. Department of Justice policy

The grand jury may subpoena and question a target or a subject.<sup>146</sup> However, because of possible prejudice in requiring a target to invoke the 5th Amendment before the grand jury, a target should not be subpoenaed unless the United States Attorney or appropriate Assistant Attorney General specifically approves.<sup>147</sup> Moreover, if both the target and his attorney signify in writing that the target will invoke his 5th Amendment privilege if called, then ordinarily, the target should be excused from testifying.<sup>148</sup>

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<sup>145</sup>See Appendix IV-2 for a sample advice of rights attachment.

<sup>146</sup>See United States v. Washington, 431 U.S. 181 (1977).

<sup>147</sup>U.S.A.M. 9-11.151.

<sup>148</sup>See Ch. V § D.3.

b. Target letters

In most cases, the Division attorney should notify a target of an antitrust investigation a reasonable time prior to seeking an indictment to afford him an opportunity to testify before the grand jury. The target notification letter should include the following:

- (i) the date on which the target may appear;
- (ii) that the target is advised to consult with counsel about the matter;
- (iii) that the target will have to waive his 5th Amendment privilege against self-incrimination explicitly prior to testifying;
- (iv) that, should he testify, the target will have to consent to a full examination under oath, to be conducted by attorneys for the Government and/or by the grand jurors themselves; and
- (v) that anything the target says before the grand jury may be used against him.<sup>149</sup>

The Government is under no obligation to notify a target prior to indictment and, of course, should not do so in the rare case where such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.<sup>150</sup>

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<sup>149</sup>See Appendix IV-3 for a sample target letter; see also ATD Manual III-0.

<sup>150</sup>U.S.A.M. 9-11.163.

c. Request by targets to testify

Although there is no legal duty to allow a target to testify before the grand jury,<sup>151</sup> as a matter of policy, any such person so requesting should be permitted to testify, unless it will cause delay or otherwise burden the grand jury.<sup>152</sup> Always advise the grand jury of this request.

If the target testifies, the record should reflect:

- (1) an explicit waiver of the privilege against self-incrimination (which may be shown by the target himself or by a letter from his attorney);
- (2) waiver of counsel, if not represented; and
- (3) the fact of the voluntary appearance.

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<sup>151</sup>See United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975); United States v. Leverage Funding Sys., Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

<sup>152</sup>U.S.A.M. 9-11.152.

d. Request by target to read written or prepared statements

The Division will oppose a request by a target to submit a written statement to the grand jury. Such statements are fundamentally self-serving, do not allow the jury to weigh the witness' credibility, and cannot ordinarily be used to develop a case for perjury or false declaration, unless the statement is made under penalty of perjury.<sup>153</sup> Advise the grand jury of your position on any such request and seek their concurrence, for the decision whether to accommodate such a request is left to the sound discretion of the grand jury.<sup>154</sup>

5. Interviewing grand jury witnesses

a. Timing/subject matter

It is often useful to interview a grand jury witness prior to his testimony. Such an interview, however, must be voluntary. The witness' counsel often requests such an interview.

A grand jury witness interview is most helpful when the staff is not certain of the extent of a witness' knowledge. For example, an estimator may be subpoenaed to testify about bidding on public utility projects, when in reality he bids only private work. An interview in such a situation may save time before the grand jury.

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<sup>153</sup>See 18 U.S.C. §§ 1621, 1623.

<sup>154</sup>U.S.A.M. 9-11.152.

An interview's subject matter is left to the discretion of the staff. If a witness has an attorney present, the subject matter may be limited so that the true direction or targets of the grand jury are not disclosed. An attorney taking notes can recall much more than can a witness appearing by himself before the grand jury.

The staff may also want to confront a potential witness with incriminating evidence to prevent the witness from perjuring himself before the grand jury. There are drawbacks, however, to confronting a witness with evidence in an interview. If a witness has knowledge of such evidence before he appears before the grand jury, he will have time to fabricate a credible story. When revealing information to a witness in an interview, keep in mind that "forewarned is forearmed."

The timing of witness interviews must balance several considerations. On the one hand, if an interview is sought to determine whether a witness has evidence that is worth putting before the grand jury, an interview obviously should be conducted well before the grand jury appearance date. There are no savings of time, money or effort if the grand jury is assembled and the staff decides not to require an appearance before the grand jury. On the other hand, if an interview is conducted some time before a grand jury appearance, a witness will have the opportunity to think about the subject matter. This may be a problem if it is thought the witness may not be candid. If a witness is inclined to testify falsely, questioning him cold before the grand jury may result in such obviously false testimony that he will be unattractive as a defense witness at any subsequent trial.

b. Cannot subpoena a witness for an interview

A witness should never be subpoenaed for an interview. "Neither the FBI nor the Strike Force nor the United States Attorney has been granted subpoena power for office interrogation outside the presence of the grand jury."<sup>155</sup> Consistent with the case law, "request subpoenas" directing a witness to appear before the United States Attorney or his assistants are not permissible under departmental regulations.<sup>156</sup> Thus, while the execution of a subpoena ad testificandum may result in an interview with a witness, such an interview must be voluntary.

It is suggested that when a grand jury witness is interviewed, arrangements for the interview be memorialized in writing, showing the voluntary nature of the interview.<sup>157</sup> Otherwise, the staff may be faced with claims of grand jury abuse.<sup>158</sup>

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<sup>155</sup>United States v. DiGilio, 538 F.2d 972, 985 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); see also Durbin v. United States, 221 F.2d 520 (D.C. Cir. 1954) (the statutes do not recognize the United States Attorney's Office as a proper substitute for the grand jury room).

<sup>156</sup>U.S.A.M. 1-14.111.

<sup>157</sup>See Ch. V § H.

<sup>158</sup>See, e.g., Durbin v. United States, 221 F.2d 520, 522 (D.C. Cir. 1954); United States v. Johns-Manville Corp., 213 F. Supp. 65 (E.D. Pa. 1962).

6. Questioning witnesses

a. By attorney

Typically, one attorney is designated as a witness' lead examiner. Before substantive questions are posed, several preliminary matters should be addressed.

Initially, the witness should be sworn by the grand jury foreperson. If the staff wishes to make the witness more comfortable, the nature of the proceeding may be explained and the individuals present identified. While not legally mandated, the staff may choose to read a witness his rights. Thus, each witness may be advised: (1) that his testimony is given under oath and is being recorded; (2) that he can be prosecuted for perjury or for making false statements if he fails to testify truthfully; and when extra emphasis is desired, (3) that perjury is a felony punishable by up to five years imprisonment.

In the area of substantive questioning, preparation is vital. The staff should be fully aware of every document that bears on the testimony of a witness, although for tactical purposes, a witness may not be confronted with every document. The staff should also be familiar with prior grand jury testimony connecting the witness to the matters under investigation and any information about the witness gained from interviews or other sources.

The lead attorney should also develop an outline of areas that should be covered during the questioning with references to relevant documentary material. The outline should fully develop the witness' knowledge of the matters under investigation as well as all relevant implications and inferences to be drawn from the documents. The



outline should further elicit information in a form that is both logical and easy for the grand jury to understand.<sup>159</sup>

The outline is very important since the testimony may not follow the order anticipated by the attorney. Use of an outline will allow the attorney to pay close attention to the witness' answers instead of thinking about the next line of inquiry. A witness' answers may suggest certain avenues that demand immediate follow-up questions, regardless of whether they fit into the order of the outline. An outline enables the attorney to consider and respond to every answer given by the witness, while his checklist ensures that all desired areas are covered.

The attorney's questions should be clear and unambiguous and kept as short as possible. The questions should not be leading unless the questioning is in preliminary areas or the witness becomes evasive, recalcitrant or hostile. They should not be argumentative. Questions such as "explain," "go on," "describe the meeting" are best. There are several reasons for this. First, the witness cannot later claim he did not understand the question. Second, when used for impeachment later at trial, a witness' narrative is far more compelling than a "yes" or "no" answer to a leading question. Finally, the more a witness talks, the more difficult it is to lie. There is no doubt that many witnesses make slips when answering questions in narrative form.

Questioning must be detailed and thorough in an effort to obtain all of the witness' affirmative knowledge and to indicate the boundaries beyond which he is merely speculating. Thus, the examining attorney should not be satisfied with generalized statements or conclusions of the witness since such are of little use in establishing the foundation for an indictment and are generally inadmissible in court. The examining attorney must follow through to obtain the who, what, when, where, and how of matters. This is particularly true regarding statements of

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<sup>159</sup>At this stage, the examining attorney should be alert to any technical terminology or phrases unique to a particular trade or profession that will be used during the questioning for such will have to be clearly defined so that both the witness and the grand jury understand the examination.

conspiracy where the initial inclination may be to accept generalized admissions of culpability. For example, if a witness is testifying concerning certain conspiratorial meetings, it is essential to obtain his recollections of the dates and locations, the names of the participants, the exact nature of the discussions, the specific decisions or agreements which were made, and the subsequent actions of the participants.

If a hostile witness provides affirmative information as to events, it is usually best to develop the details of these events to the fullest extent possible. If a hostile witness is not locked into who, what, when, why and where answers in his grand jury testimony, it is unlikely that those details can be developed for trial. The staff should know if a witness will not or cannot provide specifics before an indictment is sought.

There are some situations, however, where it is unwise to press a witness to give too many details to the grand jury. For example, in a long-term conspiracy, if each witness is pushed for dates, times and places of every meeting, inconsistencies and errors are inevitable. Thus, if a witness gives "good" testimony before the grand jury, it may be wise to delay asking specific questions until the witness has had his memory refreshed in an interview. This approach depends on how cooperative a witness is viewed. This is a judgment call that should be made by an experienced attorney.

When examining the witness, the attorney should have in mind three general objectives. The first and most important is to obtain from the witness all the affirmative knowledge that he has on the events in question. Second, the attorney should make sure that if the witness disclaims knowledge or claims lack of memory, all the areas involved are covered so that if the witness subsequently testifies for the defense in any case, the transcript can be used on cross-examination to confront any "improved memory" of the witness with his lack of memory before the grand jury. Third, the questioning should proceed in a manner whereby the attorney and the jury can evaluate the witness' credibility. When the attorney is satisfied that the witness has been questioned sufficiently so that his

credibility or lack thereof is apparent, and the other two objectives have been satisfied, the witness should be excused. If a witness decides not to disclose what he knows, it will be rare that even the most skillful questioning will change his decision.

To this end, some of the best aids available to an examining attorney are documents. Initially, documents should be given grand jury exhibit numbers that the examining attorney should note for the record immediately prior to showing them to the witness. The examining attorney should then, as a preliminary matter, elicit from the witness sufficient identifying information concerning the document so that it is clear to the grand jury and for the record exactly what document is being discussed. For instance, in the case of a memorandum, the examining attorney may ask the witness the date of the document, the names of the company and individual who created the document, its general subject matter, and the identity of any addressees. When using a complicated document or one that is of central importance to the investigation, the examining attorney may also wish to distribute copies of the document to the grand jurors or use an enlargement that can be easily followed by both the witness and grand jurors as questioning progresses. Once these steps have been taken and the record is clear, substantive questioning can begin.<sup>160</sup>

The examining attorney should, if at all possible, have another staff attorney with him during grand jury sessions. This attorney should be present during all important witness interviews conducted by the examining

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<sup>160</sup>It is extremely helpful in fully developing grand jury testimony to interview cooperating witnesses beforehand and to review with them not only their expected testimony, but also the documents they will be asked to identify. In cases where a number of documents will be used, they should be reviewed with the witness in the order in which the examining attorney intends to use them during questioning. Such a procedure not only allows the witness to understand the interrelationship of the documents and the full import of the attorney's questions concerning them, but frequently reassures the witness concerning his appearance so that the testimony is more coherent and complete.

attorney prior to the grand jury session and should review the examining attorney's grand jury outline of questions. Both attorneys should be satisfied that the outline will elicit all relevant information. The attorneys should then agree on the procedures they will follow during the examination. It is suggested that the attorney not doing the examination closely follow the examining attorney's outline during questioning so that all areas are covered. The listening attorney should make notes of answers and of any areas not fully developed. He should then consult with the examining attorney either at the termination of an area of questioning or at a break to suggest additional or clarifying questions so that any gaps in the examination can be filled. The listening attorney should generally not interrupt the examining attorney's questions or pass notes to him during questioning as this can interfere with the flow of testimony and distract both the witness and the examining attorney.

Despite the best efforts of an examining attorney to elicit full and truthful testimony from a witness, occasionally a witness will be intentionally evasive, misleading or untruthful on points that are material to the investigation. The examining attorney must then be aware that his questions may form the basis for a later charge of perjury (18 U.S.C. § 1621) or false declarations (18 U.S.C. § 1623) and construct a record accordingly.<sup>161</sup>

Initially, all of the admonitions concerning proper questioning techniques apply to the examination of a witness who may be committing perjury. The questions should be clear and concise. They should center on issues material to the investigation. Moreover, the record must be clear that the witness has not misunderstood a question or has been misled, so the examining attorney may wish to define terminology again or ask the witness if he fully understands particular questions. Examination must be fair but firm; vigorous, if necessary, but never abusive. Non-responsive or evasive answers should not be accepted. The examining attorney should not, however, engage

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<sup>161</sup>For elements of these offenses, see Ch. VIII.

in unnecessary repetition or other conduct in an effort to coax the witness into the commission of perjury or false statements as such conduct may be abuse of the grand jury process.<sup>162</sup>

b. By grand jurors

An attentive and interested grand jury will usually have questions for the witness. Whenever possible, questions by members of the grand jury should be deferred until the attorney's examination is completed.

There are at least two procedures that may be used in taking grand juror questions:

1. The attorney may allow the grand jurors to ask the questions without prior screening or discussion.
2. The attorney may ask the witness to leave the room, discuss the questions with the grand jury, and, if necessary, discuss why certain questions may be improper. Upon the witness' return, either the grand jurors or the attorney may pose the question.

In some jurisdictions, it is the practice of the United States Attorney to prescreen grand juror's questions.

The following considerations should be kept in mind when determining whether a question to a witness is appropriate:

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<sup>162</sup>Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

- a. whether the question discloses other facts in the investigation that should not become known to the witness;
- b. whether the witness is hostile;
- c. whether the question may call for privileged, prejudicial, misleading or irrelevant evidence.

Even if not mandated by local practices, prescreening questions may be useful if a "runaway" grand jury is adversely affecting the record.

In many cases, the jurors ask excellent questions and their participation may aid the attorneys. Thus, the staff may also want to consider making copies of certain documents for the grand jurors where it would be helpful to them in following the questioning or the line of testimony. Grand jurors have expressed their appreciation for this practice as a help in their understanding of the testimony. It also furthers their feeling of involvement.

#### 7. Access by witness to counsel

An immunized witness has no clear-cut right to consult with counsel, but reasonable consultation is usually permitted and looked upon with approval by the courts.<sup>163</sup> In the opening remarks to the witness, the Government attorney will often tell the witness to ask for a brief recess if he has a need to consult with counsel. It is

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<sup>163</sup>United States v. Mandujano, 425 U.S. 564, 606 (1976); In re Tierney, 465 F.2d 806, 810 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); see also In re Lowry, 713 F.2d 616 (11th Cir. 1983) (witness has no right to disrupt grand jury to consult with counsel after every question).

prudent to ask the court reporter to note the time the witness leaves the room and the time he returns in case these interruptions become disruptive of the grand jury process.

An immunized witness who insists upon leaving the grand jury room frequently and consulting with an attorney at length may be taken to the court for an order directing the witness to discontinue such a practice and, if necessary, to establish ground rules for such consultations.<sup>164</sup> A witness who has not been immunized presumably has a stronger reason and, therefore, a greater right to consult with counsel, although the extent of this right is not clear.<sup>165</sup> Unreasonable consultations should not be permitted to obstruct the orderly questioning of the witness.

Alternatively, where there is abuse of the right to consult with counsel, the attorney in charge of the grand jury may simply decline to permit consultation. If the witness then refuses to answer questions, the attorney for the Government should take the matter before the court for a ruling on the propriety of the questions. As stated in People v. Ianiello, 21 N.Y.2d 418, 235 N.E.2d 439, cert. denied, 393 U.S. 827 (1968):

By requiring the matter to be taken to the presiding Justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising

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<sup>164</sup>See United States v. Soto, 574 F. Supp. 986 (D. Conn. 1983) (the witness was allowed to consult with counsel for ten minutes after a 20-minute question period before the grand jury).

<sup>165</sup>Compare United States v. Mandujano, 425 U.S. at 606 (Brennan, J., concurring) (may consult with attorney at will) with In re Tierney, 465 F.2d at 810 (witness allowed to consult only after two or three questions).

objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanction of [civil] contempt proceedings.

Questioning a witness about his conversations with counsel to ensure that he has been apprised of rights and responsibilities is perfectly permissible.<sup>166</sup> Care should be taken not to examine the witness as to these conversations with counsel in a manner that would violate the witness' attorney-client privilege.

#### 8. Note-Taking by witness

There are no cases addressing the question of whether a witness may take notes of the questions asked during his grand jury appearance. It is preferable to discourage a witness from taking notes for several reasons. First, it will lengthen and delay the grand jury proceedings if he takes notes on every question he is asked before answering. This delay is compounded if the witness also consults with his attorney before answering the question. Second, it undermines the secrecy of the grand jury proceedings. It allows the witness and his attorney to track more accurately the direction and progress of an investigation than if the witness only has his memory to rely on in reporting what occurred during his appearance before the grand jury. Because the witness and his attorney are under no secrecy obligation under Fed. R. Crim. P. 6(e), they are free to circulate notes to other defense attorneys and prospective witnesses. Finally, verbatim notes essentially provide a witness with a transcript of his testimony. Fed. R. Crim. P. 6(e)(1) provides that the court reporter and Government attorneys are the only people authorized to

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<sup>166</sup>United States v. E.H. Koester Bakery Co., 344 F. Supp. 377 (D. Md. 1971).



make and maintain the record of the grand jury's proceedings. Thus, a witness who prepares verbatim notes is making an "unofficial" transcript of the proceedings. The rules do not authorize such a transcript and it is inconsistent with the majority of case law that denies a witness automatic access to a transcript of his own testimony before the grand jury.<sup>167</sup>

In attempting to prevent witness note-taking, it is best to consult with the U.S. Attorney's Office in the district where the grand jury sits to see if they have encountered this problem before going to the court. The best approach to use with most courts is to emphasize the delay the note-taking is causing and the potential for compromising the secrecy of the grand jury's proceedings.

9. Abuse of witness

a. Appropriate treatment of witnesses

Every witness should be treated firmly but with courtesy and consideration. Each witness should be examined as if his testimony and your examination will become public. In the event that it becomes necessary to cross-examine a witness vigorously, do not be abusive. Such abuse is improper, will not be productive and will alienate the grand jury. Do not examine the witness as to his conversations with his counsel in a manner that would violate the witness' attorney-client privilege.<sup>168</sup> Unnecessary, repetitious questioning should be avoided. If the court

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<sup>167</sup>See Ch. II § E.1.

<sup>168</sup>Questioning designed merely to ensure that a witness has been apprised of his rights and  
(continued...)

determines that the purpose of repetitious questioning is to coax the witness into the commission of perjury or contempt of court, such conduct will be held an abuse of the grand jury process.<sup>169</sup>

Do not attempt to "trick" the witness by asking his reaction to testimony that does not exist, or by advising him that documents are available that demonstrate a certain point when, in fact, the documents do not exist or the documents do not support the examiner's characterization. Should the witness testify on the basis of such confrontation, he will be in a position to retract such testimony at trial. Further, the Government will be embarrassed if the court and jury become aware of the "trick."

b. What constitutes abuse?

Intimidation of the witness by actual threats of criminal proceedings (as distinguished from "cautions" or reminding him of his legal obligation to be truthful) is abusive conduct. Bullying a witness, that is, forcefully questioning in such a manner as to make it obvious that the witness should give certain answers, could constitute abuse. Tone or inflection of the examiner's voice, although not discoverable from the transcripts, can be abusive as well. Such conduct by the staff, if sufficiently excessive, may so bias the jury as to deny a later-indicted defendant the right of due process of law. It may also have the opposite effect of making the grand jury hostile to the Government.

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<sup>168</sup>(...continued)  
responsibilities is permissible. United States v. E.H. Koester Bakery Co., 334 F. Supp. 377 (D. Md. 1971).

<sup>169</sup>Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

c. Appearance of abuse

Care should be taken to avoid even the appearance of abuse. Motions attacking the grand jury on such grounds can only result in harm to the Government; for example, by delaying the investigation. Further, the court, in the exercise of its inherent power to supervise the grand jury, conceivably could halt the examination of any given witness who is allegedly being abused, or even the investigation itself, in a flagrant case. While the court might be reversed on appeal, such a ruling should be avoided.

Of course, the Government attorney should take care that he is not abused by the witness. Obnoxious, recalcitrant witnesses should be dealt with firmly and the Government attorney should make it clear that he is in control of the situation. While experience is the only true teacher, where appropriate, the Government lawyer should not be afraid to cut off the witness, admonish the witness or otherwise control the situation if the witness is not addressing the questions posed.

d. Effect of abuse

Although rare, prosecutorial abuse of a non-defendant grand jury witness has resulted in the dismissal of an indictment. Courts have used two distinct bases for dismissing indictments based on this type of abuse. Some courts have dismissed an indictment on due process grounds if the defendant can show he suffered actual prejudice because of the abuse of a witness before the grand jury.<sup>170</sup> Even if the defendant makes no showing of prejudice, a

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<sup>170</sup>United States v. Serubo, 604 F.2d 807, 816-17 (3d Cir. 1979).

few courts have dismissed indictments in an exercise of their supervisory power to correct flagrant or persistent prosecutorial abuse.<sup>171</sup> However, the continued validity of these cases is highly suspect in light of Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), in which the Supreme Court required a showing of actual prejudice before dismissing an indictment based on alleged misconduct before the grand jury.

An example of an unsuccessful motion alleging a denial of due process because of witness abuse is found in United States v. Bruzgo, 373 F.2d 383 (3d Cir. 1967). Bruzgo moved for dismissal of the indictment because the prosecuting attorney threatened a witness before the grand jury, who was associated with Bruzgo, with loss of United States citizenship, five years imprisonment and a \$10,000 fine. The witness was also referred to as a "thief" and "racketeer" by the prosecuting attorney. The court stated:

On this issue the case comes down to the point that the prosecutors improperly made threats or used abusive language toward a witness connected with defendant in his business and thereby influenced the grand jurors with such a bias toward the defendant that he was not afforded his constitutional right to be indicted by an "unbiased" grand jury.

Without considering the full sweep of the term "unbiased" we turn to an evaluation of the evidence on this question. The grand jurors knew of Miss Williams' business connection with defendant. They also knew that she successfully invoked the 5th Amendment before them. They had evidence which it is not denied was sufficient to support an indictment. In these premises the threats could hardly have had

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<sup>171</sup>Id. See also United States v. DiGregorio, 605 F.2d 1184, 1189 (1st Cir.), cert. denied, 444 U.S. 937 (1979); United States v. Estepa, 471 F.2d 1132, 1136-37 (2d Cir. 1972).

independent material significance in the jurors' minds when they considered whether they wanted to indict defendant. Their "hissing" does not nullify their action in view of what they had properly before them . . .<sup>172</sup>

The thrust of the cases is that the courts will review grand jury transcripts provided that a sufficient preliminary showing of grand jury abuse has been made, to determine if non-defendant witnesses have been abused, but will not find the defendant's due process rights violated if there is sufficient evidence to support the indictment. Under Bank of Nova Scotia and Bruzgo, a defendant must show actual prejudice to prevail on a due process theory.

Prior to Bank of Nova Scotia, some courts had suggested that an indictment could be dismissed even where the defendant had failed to show actual prejudice, for example, in United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979), the prosecutor impugned the testimony of witnesses who failed to link the defendants to organized crime and threatened other uncooperative witnesses. The court stated that "where a defendant can show actual prejudice resulting from the misconduct of the prosecutor before the grand jury, suppression would be proper."<sup>173</sup>

The court also went on to say that:

. . . dismissal of the indictment may be proper even where no actual prejudice has been shown, if there is evidence that the challenged activity was something other than an isolated incident unmotivated by

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<sup>172</sup>373 F.2d at 386; see also Beck v. Washington, 369 U.S. 541, 555 (1962); Beatrice Foods Co. v. United States, 312 F.2d 29 (8th Cir.), cert. denied, 373 U.S. 904 (1963).

<sup>173</sup>604 F.2d at 817.

sinister ends, or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit.<sup>174</sup>

Thus, under Serubo, an indictment may be dismissed based on witness abuse, even if there is sufficient evidence to support the return of the indictment. Under this theory, the indictment is dismissed not because of actual prejudice suffered by the defendant, but rather to uphold the integrity of the grand jury process.

While the Serubo rationale is probably inconsistent with Bank of Nova Scotia, abusive conduct toward grand jury witnesses is improper, unproductive and unnecessary whether or not it provides the basis for subsequent dismissal of an indictment. Such conduct should always be avoided.

#### 10. Advising witness of inconsistent evidence

There is no obligation to advise the witness of evidence inconsistent with his testimony. However, it is sometimes a good practice to tell the witness of such evidence. The witness may not have understood the question and may take advantage of the opportunity to clarify his answer. Additionally, it is often helpful for the attorney to be able to weigh the merits of contradictory evidence at this stage of the investigation.

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<sup>174</sup>Id.

11. Opportunity to correct or recant testimony

A witness has no right to be advised that he may recant untruthful testimony and thereby avoid a perjury charge under 18 U.S.C. § 1621 or a false declaration indictment under 18 U.S.C. § 1623.<sup>175</sup> A good practice, if the attorney suspects the witness may have perjured himself, is to ask the witness if he wishes to retract or correct any testimony and, if appropriate, to advise the witness of the contradictory evidence.

12. Advising witness of perjury statute

At the beginning of the session, it is the practice of the Antitrust Division to warn the witness about the danger of prosecution for perjury and false statements. It is sometimes appropriate to remind the witness that he is under oath and of the possible penalties for untruthful testimony. If the attorney is convinced that the witness is lying, consideration should be given to developing a record for possible indictment.

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<sup>175</sup>United States v. Gill, 490 F.2d 233 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974).

## G. Exculpatory Evidence

### 1. Legal standards

No provision of the Constitution, statute, or court rule imposes a legal obligation on the prosecutor to present exculpatory evidence (substantial evidence which directly negates guilt) to the grand jury. The majority of courts that have addressed the question have found no obligation to present exculpatory evidence.<sup>176</sup> However, some courts have suggested that in some circumstances a prosecutor has a limited duty to present exculpatory evidence to the grand jury, based on constitutional, legal or ethical principles.

In United States v. Page, 808 F.2d 723, 727-28 (10th Cir.), cert. denied, 482 U.S. 918 (1987), the court found that a prosecutor had a duty to disclose evidence that clearly negates the guilt of the target of the grand jury investigation.<sup>177</sup> The Second Circuit, in United States v. Ciambrone, 601 F.2d 616, 622-23 (2d Cir. 1979), recognized that there is no obligation to present such evidence, but advised that prosecutors should make exculpatory evidence known to the grand jury, citing ABA Project on Standards for Criminal Justice - The Prosecution Function, § 3.6, pp. 90-91.<sup>178</sup> More recently, the court in United States v. Dorfman, 532 F. Supp. 1118,

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<sup>176</sup>See United States v. Wilson, 798 F.2d 509 (1st Cir. 1986); United States v. Adamo, 742 F.2d 927, 936-38 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985); United States v. Boykin, 679 F.2d 1240, 1246 (8th Cir. 1982); United States v. Al Mudarris, 695 F.2d 1182, 1185-86 (9th Cir.), cert. denied, 461 U.S. 932 (1983); see also United States v. Hyder, 732 F.2d 841, 844-45 (11th Cir. 1984).

<sup>177</sup>See also United States v. Flomenhoft, 714 F.2d 708, 712 (7th Cir. 1983), cert. denied, 465 U.S. 1068 (1984).

<sup>178</sup>See also United States v. Raineri, 521 F. Supp. 16, 19 (W.D. Wis. 1980) (possible duty to  
(continued...))



1131-33 (N.D. Ill. 1981), dismissed an indictment, holding that a prosecutor has a constitutional duty to present evidence that clearly negates guilt. At least one panel of the Seventh Circuit has expressed its concurrence with the principle enunciated in Dorfman.<sup>179</sup>

## 2. Department of Justice policy

Department of Justice policy regarding the presentation of exculpatory evidence is contained in U.S.A.M. 9-11.233 which states:

[W]hen a prosecutor conducting a grand jury investigation is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

If it is unclear whether known evidence is exculpatory, a prosecutor should err on the side of disclosure.

Division attorneys should carefully consider whether the grand jury should be advised of inconsistent statements made by material witnesses. If appropriate, the grand jury should be provided with the substance of such

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<sup>178</sup>(...continued)  
present evidence that clearly negates guilt); United States v. Boffa, 89 F.R.D. 523, 530 (D. Del. 1980) (citing Ciambrone, prosecutor may be obligated to make known substantial evidence negating guilt).

<sup>179</sup>See United States v. Flomenhoft, 714 F.2d at 712; see also United States v. Prevor, 583 F. Supp. 259, 261 (D.P.R. 1984).

statements. The attorney should also evaluate any statements made by the defendant to determine if they are exculpatory.

3. Requests by subjects or targets to testify or present evidence to the grand jury

In antitrust cases, where it is common practice to advise individuals of their status as targets of the grand jury investigation, a defendant or defense counsel may request an opportunity to have the target testify before the grand jury, have a third party testify, or have a statement or other written information presented to the grand jury. While the prosecutor has no legal obligation to permit this<sup>180</sup>, such opportunities may be granted in some circumstances so as to obviate any appearance of unfairness that a refusal would create. Target appearances may allow the prosecutor to preview a potential defense case, as well.

As a matter of policy, any subject or target who requests the opportunity to personally testify should be permitted to do so, unless it will cause delay or otherwise burden the grand jury.<sup>181</sup> The grand jury should always be informed of such a request.<sup>182</sup>

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<sup>180</sup>United States v. Leverage Funding Sys., Inc., 637 F.2d 645 (9th Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Gardner, 516 F.2d 334 (7th Cir.), cert. denied, 423 U.S. 861 (1975).

<sup>181</sup>U.S.A.M. 9-11.152.

<sup>182</sup>See § F.4. for a more detailed discussion of procedures to be followed when a target testifies.

Requests by a target to submit a written statement to the grand jury should be opposed. It may be wise to advise the grand jury of such a request and the prosecutor's reasons for opposing it.<sup>183</sup>

If a subject or target wants to have the testimony of a third party presented to the grand jury and the potential testimony is arguably relevant to the grand jury's inquiry, the prosecutor should attempt to obtain a proffer of the testimony. When passing on such requests, it must be kept in mind that the grand jury was never intended to be and is not properly either a first-stage adversary proceeding, or the arbiter of guilt or innocence.<sup>184</sup>

## H. Grand Jury Abuse

### 1. Nature of the problem and its effect

A grand jury possesses extraordinary investigative powers that are dependent on and supervised by the prosecuting attorney. Prosecutors should not abuse this serious responsibility or otherwise engage in prosecutorial misconduct before the grand jury. Attorneys should not violate the Federal Rules of Criminal Procedure, the local rules nor the case law as it applies to grand jury practice. Attorneys should also follow all appropriate Division and Department guidelines, although, failure to do so does not create any enforceable rights for a defendant or putative defendant.<sup>185</sup> Further, to the extent possible, attorneys should attempt to avoid even the

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<sup>183</sup>See U.S.A.M. 9-11.262

<sup>184</sup>See, e.g., United States v. Calandra, 414 U.S. 338, 343 (1974).

<sup>185</sup>United States v. Caceres, 440 U.S. 741 (1979).

appearance of impropriety before the grand jury. Given the wide range of permissible conduct that defendants allege as an abuse, the latter is often impossible.

As a general matter, the Department of Justice tries to maintain the highest standards for its attorneys and, therefore, its attorneys should abide by all of the appropriate rules. More specifically, misconduct before the grand jury can adversely affect the conduct of the grand jury and any subsequent prosecution. Although there is a strong presumption of regularity surrounding a grand jury proceeding,<sup>186</sup> sufficiently outrageous misconduct may lead a court to dismiss an indictment on due process grounds<sup>187</sup> or as an exercise of its supervisory powers.<sup>188</sup> Even if the misconduct is insufficient to justify dismissing an indictment, it may be sufficient to delay a trial while abuse motions are resolved or to justify providing a defendant with discovery of grand jury materials under Fed. R. Crim. P. 6(e)(3)(C)(ii), to which the defendant would not otherwise be entitled. Other sanctions used by the courts to remedy grand jury abuse include: quashing subpoenas or issuing protective orders,<sup>189</sup> suppressing grand jury testimony,<sup>190</sup> expunging prejudicial language from indictments,<sup>191</sup> and recommending disciplinary actions against

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<sup>186</sup>See In re Inzirillo, 542 F.2d 90, 91 (1st Cir. 1976); In re Grand Jury Proceedings, Johanson, 632 F.2d 1033, 1041 (3d Cir. 1980); United States v. Ruppel, 666 F.2d 261, 268 (5th Cir.), cert. denied, 458 U.S. 1107 (1982); United States v. Woods, 544 F.2d 242, 250 (6th Cir. 1976), cert. denied, 430 U.S. 969 (1977).

<sup>187</sup>See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

<sup>188</sup>See United States v. Cruz, 478 F.2d 408 (5th Cir.), cert. denied, 414 U.S. 910 (1973).

<sup>189</sup>In re Grand Jury Subpoena Duces Tecum (Model Magazine), 829 F.2d 1291 (4th Cir. 1987), cert. denied, \_\_ U.S. \_\_ (1990).

<sup>190</sup>United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909 (1976).

<sup>191</sup>United States v. Briggs, 514 F.2d 794 (5th Cir. 1975).

the prosecutor.<sup>192</sup> In any event, engaging in abusive conduct inevitably leads to defending abuse motions and puts a prosecutor's credibility in issue at the outset of a case.

## 2. Jurisdiction of the court

Judicial review of grand jury proceedings is extremely limited for several reasons. First, the grand jury is traditionally an independent body that is unrestricted by the technical rules of evidence and procedure. Second, the general rule of secrecy of grand jury proceedings, particularly while an investigation is ongoing, makes courts reluctant to interfere with grand jury proceedings. Third, courts are unwilling to impede or obstruct the grand jury's vital law enforcement function by questioning the grand jury's conduct. Finally, the doctrine of separation of powers limits the court's ability to supervise the conduct of prosecutors who are members of the Executive branch. Nonetheless, courts have on occasion dismissed indictments on either due process grounds or as an exercise of their supervisory powers.

### a. Due process

A few courts have dismissed indictments because of prosecutorial abuse before the grand jury on due process grounds. Dismissal on due process grounds is rare because most courts view grand jury proceedings as outside of the scope of the due process clause, the indictment being a mere technical instrument to bring on the

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<sup>192</sup>United States v. Serubo, 604 F.2d 807 (3d Cir. 1979).

trial.<sup>193</sup> A very few courts have dismissed indictments on due process grounds because of the knowing use of perjured testimony.<sup>194</sup> However, the weight of authority in this area is that dismissal, if justified at all, is only justified in flagrant cases.<sup>195</sup> As discussed more fully below, the Supreme Court's decision in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988), has, at a minimum, established that a due process claim requires a showing that the alleged abuse "substantially influenced the grand jury's decision to indict."<sup>196</sup>

b. Supervisory powers

On occasion, courts have dismissed an indictment based on grand jury abuse as an exercise of the court's inherent supervisory powers. Courts have reasoned that, as inherent supervisor of the grand jury process, they are empowered to establish standards of justice and fair play in grand jury proceedings that are not

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<sup>193</sup>See Bracy v. United States, 435 U.S. 1301, 1302 (1978) (Rehnquist, J., on application for stay).

<sup>194</sup>See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974).

<sup>195</sup>See United States v. Richman, 600 F.2d 286 (1st Cir. 1979) (prosecutorial negligence in not knowing of false testimony is insufficient for dismissal); United States v. Cathey, 591 F.2d 268 (5th Cir. 1979) (use of perjured testimony does not automatically require dismissal); United States v. Kennedy, 564 F.2d 1329 (9th Cir. 1977) (indictment should be dismissed only in flagrant case of knowing use of perjury relating to a material matter), cert. denied, 435 U.S. 944 (1978); Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962) (Burger, J.) (perjury does not require dismissal if sufficient competent evidence is presented), cert. denied, 373 U.S. 946 (1963).

<sup>196</sup>487 U.S. at 256.

specifically required by the Constitution or federal statutes. In exercising these supervisory powers, courts must not encroach on the legitimate prerogatives and independence of the grand jury and the prosecutor.<sup>197</sup>

Courts have exercised their supervisory power to dismiss indictments based on grand jury abuse to remedy the abuse, to preserve the integrity of the grand jury and to deter similar conduct in the future.<sup>198</sup> Courts have dismissed indictments or reversed convictions where the prosecutor's conduct before the grand jury was flagrant and extremely prejudicial;<sup>199</sup> where the particular misconduct had become repetitive and entrenched;<sup>200</sup> where the result of the misconduct was unequal treatment of the accused;<sup>201</sup> or where there was a need to formulate procedural rules governing proper prosecutorial conduct.<sup>202</sup>

The case law noted above has always been suspect because there is no clear authority for the courts' exercise of their supervisory powers and because grand juries are inherently independent bodies. This case law has become even more suspect in light of the decision in Bank of Nova Scotia in which the Supreme Court required a

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<sup>197</sup>United States v. Chanen, 549 F.2d 1306, 1313 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

<sup>198</sup>See United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979).

<sup>199</sup>See United States v. Hogan, 712 F.2d 757 (2d Cir. 1983); United States v. Serubo, 604 F.2d 807 (3d Cir. 1979); Brown v. United States, 245 F.2d 549 (8th Cir. 1957); United States v. Samango, 607 F.2d supra.

<sup>200</sup>See United States v. Broward, 594 F.2d 345, 351 (2d Cir.), cert. denied, 442 U.S. 941 (1979); United States v. Birdman, 602 F.2d 547, 559 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980).

<sup>201</sup>See United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909 (1976).

<sup>202</sup>See United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973).

showing of actual prejudice to the defendant before an indictment could be dismissed on non-constitutional grounds.<sup>203</sup>

3. Supreme Court authority limiting a court's ability to dismiss indictments based on grand jury abuse

The Supreme Court has been reluctant to interfere with grand jury proceedings by permitting challenges to indictments based on prosecutorial misconduct. The Supreme Court has been unwilling to subject grand jury proceedings with the delay and disruption that would be the inevitable result of judicial review.

Typical of this attitude are the Supreme Court's decisions in Costello v. United States, 350 U.S. 359 (1956), and United States v. Calandra, 414 U.S. 338 (1974). In Costello, the Supreme Court refused to allow a challenge to the nature or sufficiency of the evidence presented to the grand jury. The Court held that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face is enough to call for trial of the charge on the merits."<sup>204</sup> In Calandra, the Supreme Court declined to apply the 4th Amendment exclusionary rule to grand jury proceedings. The Court reaffirmed its view as expressed in Costello and stated that any rule that would "saddle the grand jury with minitrials and preliminary showings would assuredly impede its investigation

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<sup>203</sup>See generally Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, Colum. L. Rev. 1433 (1984); cf. United States v. Payner, 447 U.S. 727, 735 (1980) ("Supervisory powers does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court").

<sup>204</sup>350 U.S. at 363.



and frustrate the public's interest in the fair and expeditious administration of the criminal laws."<sup>205</sup> Combined, Costello and Calandra, would seem to bar any challenge to an indictment based on the nature or sufficiency of the evidence presented to the grand jury.

More recently, the Supreme Court has further curtailed a defendant's or putative defendant's ability to challenge prosecutorial misconduct before the grand jury. In United States v. Mechanik, 475 U.S. 66 (1986), the Supreme Court held that certain violations of the Federal Rules of Criminal Procedure were rendered harmless beyond a reasonable doubt by the defendant's subsequent conviction by a petit jury. The holding and logic of Mechanik should prevent most post-conviction attacks based on prosecutorial misconduct before the grand jury.

Following Mechanik, defense counsel argued that if procedural errors became moot after conviction, then they should be afforded earlier and greater access to grand jury materials so that they could pursue relief from grand jury abuses by seeking dismissal of the indictment before trial. However, the Supreme Court in Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989), refused to create an additional basis for immediate appeal in criminal cases based on Mechanik's limitations on post-conviction relief.

Substantial limitations were placed on the court's ability to dismiss indictments based on its supervisory powers over prosecutors and the grand jury in Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). In Bank of Nova Scotia, the district court dismissed the indictment because of a host of violations of Rule 6(d) and (e), as well as other types of prosecutorial misconduct. The Tenth Circuit reversed and the Supreme Court affirmed holding that, for a non-constitutional grand jury challenge, a dismissal of an indictment is appropriate only if the

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<sup>205</sup>414 U.S. at 350.

violation "substantially influenced the grand jury's decision to indict." In other words, the Supreme Court established a requirement of actual prejudice before dismissal could be considered an appropriate remedy.

The combined effect of the Supreme Court cases noted above is to severely limit a defendant's ability to attack the validity of an indictment, valid on its face, that is returned by a legally constituted grand jury.

#### 4. Typical allegations of misconduct

Although the case law severely limits a defendant's ability to successfully attack an indictment based on a prosecutor's misconduct before the grand jury, such attacks are frequently made based either on true misconduct or allegations of misconduct. The following is a listing of typical allegations of misconduct.

Additional information on each allegation can be found elsewhere in this manual. Other valuable sources of information in this area include: Criminal Antitrust Litigation Manual, American Bar Association, 1983; Grand Jury Law and Practice, Beale and Bryson, Ch. 10; and Moore's Federal Practice, Volume 8, ¶ 6.04.

- a. Allegations relating to nature of evidence
  - 1) hearsay evidence
  - 2) use of perjured testimony
  - 3) lack of exculpatory evidence
  - 4) use of inadmissible evidence
  - 5) illegal use of recorded communications

- 6) use of privileged information
- b. Allegations relating to conduct of prosecutor
- 1) abusing witnesses
  - 2) presenting summaries of evidence
  - 3) improperly instructing grand jury in the law
  - 4) improperly inflaming or influencing the grand jury
  - 5) presenting a signed indictment to the grand jury
  - 6) stating personal opinion
  - 7) use of grand jury agents
  - 8) having an unauthorized person in the grand jury room
  - 9) improperly disclosing grand jury information
- c. Allegations involving abuse of the grand jury process
- 1) use of grand jury for a civil investigation
  - 2) delay in presenting indictment or selective prosecution
  - 3) obtaining evidence against defendants that have already  
been indicted

## 5. Preventative Measures

The most important practice to follow to avoid allegations of prosecutorial misconduct is for the prosecuting attorney to be fully aware of the rules in the jurisdiction in which he is practicing and conforming his behavior to those rules. Further, as discussed in § F.9., supra, witnesses should be treated firmly but politely. They should never be abused, harassed or improperly influenced.

Limiting instructions should be liberally used. When appropriate, the grand jurors should be cautioned that statements made by the prosecutor and any opinions expressed by the prosecutor are not evidence and should not be considered in returning an indictment. In those jurisdictions that have special evidentiary requirements, special instructions to the grand jury should be used. For example, in those jurisdictions that follow Estepa, the grand jurors should be informed whenever they are receiving hearsay evidence and should be instructed that they have the right to hear live witnesses.

Special care should be exercised as to any local requirements regarding exculpatory evidence. Where appropriate, it should be solicited from defense counsel and presented to the grand jury.

Finally, if an attorney becomes aware of significant prosecutorial misconduct that would not prejudice a new grand jury, he should consider the possibility of dismissing the pending indictment and seeking a superceding indictment. This will avoid a motion to dismiss and a possible issue on appeal. If an indictment is dismissed because of prosecutorial misconduct, there is usually no prohibition against seeking a new indictment so long as the new grand jury would not be tainted by the prior misconduct.<sup>206</sup>

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<sup>206</sup>United States v. Serubo, 604 F.2d 807, 818-19 (3d Cir. 1979).

## V. IMMUNITY

### A. 5th Amendment Privilege

#### 1. Who can assert?

The 5th Amendment privilege against self-incrimination is personal, applying only to natural individuals. For documents, it protects only the compelled production of self-incriminating documents which are the personal property of the person claiming the privilege or papers in the person's possession in a purely personal capacity.<sup>1</sup> For testimony, it applies only to a compelled testimonial communication by the person claiming the privilege that incriminates that person. It does not prescribe the compulsion of all incriminating evidence.<sup>2</sup>

Corporations have no 5th Amendment privilege.<sup>3</sup> The number of owners or operators and the structural organization of a corporation do not alter its rights under the 5th Amendment. Courts have denied the availability of the 5th Amendment privilege to corporations with a sole

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<sup>1</sup>United States v. White, 322 U.S. 694, 698-99 (1944); see also In re Steinberg, 837 F.2d 527 (1st Cir. 1988). For a detailed discussion of the application of the 5th Amendment to the production of documents, see Ch. III § C.2.c.

<sup>2</sup>Fisher v. United States, 425 U.S. 391, 408 (1976).

<sup>3</sup>Wilson v. United States, 221 U.S. 361 (1911).

stockholder<sup>4</sup> subchapter S corporations<sup>5</sup>, professional corporations<sup>6</sup>, and dissolved corporations.<sup>7</sup> The custodian of corporate records may be required to testify as to the authenticity of documents produced in response to a subpoena duces tecum and that the documents produced are those called for by the subpoena.<sup>8</sup> A custodian of corporate records may not assert the 5th Amendment privilege on the ground that the act of production of the documents is itself incriminatory.<sup>9</sup> However, he cannot be compelled to testify as to the current location of documents not produced and not in his possession if such testimony would be incriminating.<sup>10</sup>

In general, partnerships and other collective entities have been denied the use of the privilege against self-incrimination.<sup>11</sup> The ultimate determination is whether, based on all the circumstances, the particular organization "has a character so impersonal in the scope of its

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<sup>4</sup>Braswell v. United States, 487 U.S. 99 (1988); Hair Indus. Ltd. v. United States, 340 F.2d 510 (2d Cir.), cert. denied, 381 U.S. 950 (1965).

<sup>5</sup>United States v. Richardson, 469 F.2d 349 (10th Cir. 1972).

<sup>6</sup>Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975).

<sup>7</sup>Wilson v. United States, 221 U.S. at 378-79, Wheeler v. United States, 226 U.S. 478 (1913); Grant v. United States, 227 U.S. 74 (1913).

<sup>8</sup>United States v. O'Henry's Film Works, Inc., 598 F.2d 313 (2d Cir. 1979); In re Custodian of Records of Variety Distributing, 927 F.2d 244 (6th Cir. 1991).

<sup>9</sup>Braswell v. United States, 487 U.S. 99 (1988). However, the act of production may not be used against the custodian in a subsequent criminal prosecution of the custodian. 487 U.S. at 118.

<sup>10</sup>Curcio v. United States, 354 U.S. 118 (1957).

<sup>11</sup>Bellis v. United States, 417 U.S. 85 (1974); United States v. Allshouse, 622 F.2d 53 (3d Cir. 1980); United States v. Alderson, 646 F.2d 421 (9th Cir. 1981).

membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interest only."<sup>12</sup>

Non-personal business records of a sole proprietorship are treated differently because of the lack of a collective entity apart from the owner. In United States v. Doe, 465 U.S. 605 (1984), the Supreme Court differentiated between the contents of the documents and the act of producing them. There is no 5th Amendment privilege as to the contents of voluntarily-prepared business documents as there is no compelled self-incrimination. However, the act of producing these documents could, in some circumstances, be privileged.<sup>13</sup> When a sole practitioner submits documents in response to a subpoena, he is asserting that the documents exist and that he has possession and control. It also reveals the sole proprietor's belief that the documents are those called for by the subpoena.<sup>14</sup> The majority opinion in Doe suggests that even in cases where the production of business records by a sole proprietor is privileged, the Government could obtain the documents by granting immunity limited to the act of production, or by introducing evidence to establish that the documents called for by the subpoena exist and are in the possession of the

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<sup>12</sup>United States v. White, 322 U.S. 694, 701 (1944) (denying the 5th Amendment privilege to an unincorporated labor union); see also Rogers v. United States, 340 U.S. 367 (1951) (treasurer of Communist Party could not assert privilege as to books and records of party); In re Grand Jury Proceedings, 633 F.2d 754 (9th Cir. 1980) (trust records are not personal records of trustee); In re Witness Before the Grand Jury, 546 F.2d 825 (9th Cir. 1976) (no expectation of privacy as to the records of investment-limited partnerships or joint ventures).

<sup>13</sup>The act of producing records required to be kept by law or disclosed to a public agency is not privileged. United States v. Grosso, 390 U.S. 62 (1968).

<sup>14</sup>See Curcio v. United States, 354 U.S. 118 (1957).

person who received the subpoena.<sup>15</sup> In cases where immunity has been granted, attorneys would need an outside source to authenticate the documents if they intend to introduce them at trial.<sup>16</sup>

## 2. The witness' assertion of the privilege

The privilege against self-incrimination can be claimed in any proceeding whether it is civil or criminal, administrative or judicial. The privilege may also be asserted at a deposition taken in a civil case.<sup>17</sup> However, the compelled testimony must expose the claimant to possible

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<sup>15</sup>See Fisher v. United States, 425 U.S. 391, 411 (1976) (existence and location of documents was a "foregone conclusion").

<sup>16</sup>See U.S.A.M. 9-23.215 for more information regarding "act of production" immunity for sole proprietors.

<sup>17</sup>See Pillsbury Co. v. Conboy, 459 U.S. 248 (1983) (deponent's testimony could not be compelled over the assertion of his privilege without a grant of immunity even though he was to be questioned about his previously immunized testimony before a grand jury); see also In re Corrugated Container Antitrust Litig., 620 F.2d 1086 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981).



criminal prosecution.<sup>18</sup> A witness may not refuse to answer a question because it would place him in danger of physical harm<sup>19</sup>, degrade him<sup>20</sup>, or incriminate a third party.<sup>21</sup>

A person may invoke his 5th Amendment privilege when he has a good faith belief that a direct, truthful answer would either furnish evidence of a crime or lead to the discovery of evidence needed to prosecute him.<sup>22</sup> The witness need not demonstrate that a prosecution based on the incriminating answer would be successful. It is enough if it would "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime"<sup>23</sup> or a state crime.<sup>24</sup> The claimant must face a real and substantial hazard of self-incrimination, not an imaginary or insubstantial one.<sup>25</sup> This is an easy standard to satisfy in the context of most antitrust grand jury investigations involving conspiracies to restrain trade since conspiracies can be proved by a

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<sup>18</sup>In re Gault, 387 U.S. 1, 47 (1976).

<sup>19</sup>United States v. Gomez, 553 F.2d 958 (5th Cir. 1977).

<sup>20</sup>United States v. Frascone, 299 F.2d 824 (2d Cir. 1962).

<sup>21</sup>United States v. Seewald, 450 F.2d 1159 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972).

<sup>22</sup>See Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (privilege validly invoked if any possibility that response will be self-incriminating); United States v. Neff, 615 F.2d 1235, 1240-41 (9th Cir.) (privilege invalidly invoked when defendant declined to answer questions on tax return because of desire to protest taxes, not fear of self-incrimination), cert. denied, 447 U.S. 925 (1980).

<sup>23</sup>Hoffman v. United States, 341 U.S. 479, 486 (1951).

<sup>24</sup>Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

<sup>25</sup>Marchetti v. United States, 390 U.S. 39, 53 (1968); In re Folding Carton Antitrust Litig., 609 F.2d 867 (7th Cir. 1979); United States v. Neff, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925 (1980).

"course of conduct,"<sup>26</sup> and only a single act is needed to connect an individual to a conspiracy once its existence is shown.<sup>27</sup>

No appellate court has explicitly decided the constitutional question of whether a witness granted immunity may refuse to testify based on a real and substantial fear of foreign prosecution. In the cases litigated to date, the lower courts have held that the fear of foreign prosecution was "remote and speculative," *i.e.*, the witness claiming the privilege had failed to show any real or substantial risk of foreign prosecution.<sup>28</sup>

A judge, not the witness, makes the final determination of the availability of the 5th Amendment based upon the facts of the case and the "implications of the questions in the setting" in which asked.<sup>29</sup> If the witness' basis for asserting the 5th Amendment is not clear from the questions posed or types of documents demanded, the claimant may be required to establish *in camera* the basis for the assertion by describing the nature of the criminal charge for which he

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<sup>26</sup>Glasser v. United States, 315 U.S. 60, 80 (1942); Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 612 (1914).

<sup>27</sup>United States v. Vega, 860 F.2d 779, 792-95 (7th Cir. 1988); Nye and Nissen v. United States, 168 F.2d 846, 852 (9th Cir. 1948), aff'd, 366 U.S. 613 (1949). This is sometimes referred to as the "slight evidence" test.

<sup>28</sup>See, e.g., In re Grand Jury Subpoena of Flanagan, 691 F.2d 116 (2d Cir. 1982); In re Baird, 668 F.2d 432 (8th Cir.), cert. denied, 456 U.S. 982 (1982).

<sup>29</sup>Hoffman v. United States, 341 U.S. at 486.

would be providing evidence or by allowing a judge to examine the documents to determine whether they are of the type protected by the privilege.<sup>30</sup>

If an attorney believes that, based upon the questions posed or documents demanded, a claimant is not entitled to assert the 5th Amendment or has asserted a claim that is broader than necessary to protect his rights, the attorney may challenge the assertion by a motion to compel. A Government attorney should not accept the word of the claimant but should make an independent evaluation based upon the facts of the particular case.<sup>31</sup>

### 3. What questions are incriminating?

In general, the assertion of the privilege against self-incrimination must be made as to specific questions or document requests.<sup>32</sup> Blanket refusals are usually not acceptable and a witness subpoenaed to testify before a grand jury cannot refuse to appear because he intends to assert the 5th Amendment.<sup>33</sup> In some cases where the witness was a potential target, courts have

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<sup>30</sup>In re Horowitz, 482 F.2d 72 (2d Cir.), cert. denied, 414 U.S. 867 (1973); In re Morganroth, 718 F.2d 161 (6th Cir. 1983).

<sup>31</sup>See U.S.A.M 1-11.220.

<sup>32</sup>United States v. Neff, 615 F.2d 1235, 1238 (9th Cir.), cert. denied, 447 U.S. 925 (1980).

<sup>33</sup>United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967).

allowed a blanket refusal to testify or produce documents because the claimant appeared to have a valid 5th Amendment claim as to virtually all questions or documents.<sup>34</sup>

As a rule, a witness appearing before a grand jury should supply his name, home address, and place of business. In some cases, supplying a business address may provide a link connecting the person with the criminal activity under investigation and would, therefore, properly be protected by the 5th Amendment.<sup>35</sup>

In many cases, a witness or his attorney will inform the Government attorney that the witness intends to assert his 5th Amendment privilege. After the nature and extent of the claim is discussed, the Government attorney can decide whether to call the witness, waive his appearance or consider a grant of immunity. If the Government intends to challenge the assertion of the privilege,<sup>36</sup> the witness must be called. The witness need not be asked all questions, but once he asserts the privilege, the Government attorney should ask if the witness intends to assert the privilege as to all questions on the same topic or about the same transaction. Once it is clear the witness does not intend to answer any other questions, he may be excused.

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<sup>34</sup>See Maffie v. United States, 209 F.2d 225 (1st Cir. 1954); In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327 (3d Cir. 1982), modified, 465 U.S. 605 (1984); Marcello v. United States, 196 F.2d 437 (5th Cir. 1952).

<sup>35</sup>Hoffman v. United States, 341 U.S. 479 (1951).

<sup>36</sup>Ordinarily, a target's assertion of the privilege should not be challenged before the grand jury. See U.S.A.M. 9-11.154.

#### 4. Waiver of the 5th Amendment privilege

A witness who fails to invoke the 5th Amendment as to questions to which the privilege would have applied has waived the privilege as to all questions on the same subject.<sup>37</sup> Once a witness voluntarily reveals incriminating facts, he may not refuse to disclose the details related to those facts.<sup>38</sup> Once the waiver has occurred, for each question asked, the appropriate determination for a court is whether the answer demanded would subject the witness to a "real danger of further incrimination".<sup>39</sup>

A witness who has previously discussed facts relevant to a grand jury investigation with an FBI agent, investigator or Government attorney may still assert the 5th Amendment privilege before the grand jury as to testimony concerning those same facts.<sup>40</sup> Such statements do not constitute a waiver of the privilege since intervening events may have created apprehension of potential criminal prosecution or the statements before the grand jury may be an independent source of evidence against the witness.<sup>41</sup>

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<sup>37</sup>Courts are often hesitant to determine that a waiver has occurred. See, e.g., In re Hitchings, 850 F.2d 180 (4th Cir. 1988).

<sup>38</sup>Rogers v. United States, 340 U.S. 367, 373 (1951).

<sup>39</sup>Id. at 374.

<sup>40</sup>United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958).

<sup>41</sup>In re Morganroth, 718 F.2d 161, 165 (6th Cir. 1983).

5. Advising the grand jury about immunity

In a criminal trial, a defendant's failure to testify based on the 5th Amendment cannot be used as evidence against him.<sup>42</sup> Likewise, Government attorneys should advise grand jurors that they are not to infer anything from the fact that a witness has refused to answer questions based upon his privilege against self-incrimination. Once a subpoenaed witness asserts an intent to refuse to testify based on the 5th Amendment and is, therefore, excused from testifying, the grand jurors should be informed not to infer any guilt based upon the witness' excusal.

B. Statutory Basis For Immunity

An immunized witness cannot refuse to testify on the ground that his testimony will incriminate him. Immunity is a useful investigative tool, particularly in antitrust conspiracy cases where there is usually little probative physical evidence and few, if any, uninvolved witnesses. All Division attorneys should have a working knowledge of the relevant law and internal Department and Division policies and procedures before seeking immunity for any witness.

Two broad categories of immunity have been used in the federal system: "transactional" immunity and "use" immunity. Transactional immunity precludes the

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<sup>42</sup>Carter v. Kentucky, 450 U.S. 288 (1981).

Government from prosecuting a witness for any offense (or "transaction") related to the witness' compelled testimony. Use immunity precludes the Government from using, directly or indirectly, a witness' compelled testimony in a prosecution of that witness.

Before 1970, prosecutors of antitrust offenses (as well as most other federal crimes) relied on transactional immunity to compel self-incriminating testimony.<sup>43</sup> Transactional immunity was of only limited usefulness to prosecutors because it provided no incentive for witnesses to be fully cooperative. Once a witness testified about any matter relating to an offense, he achieved full protection from prosecution for that offense, and had little to gain from providing additional details about it. Recognizing that problem, in 1970, Congress repealed the pre-existing federal antitrust immunity statute and other transactional immunity statutes, and adopted a general use immunity statute for all federal crimes. The new statute, commonly called the Witness Immunity Act of 1970, was part of the Organized Crime Control Act of 1970. It is codified at 18 U.S.C. §§ 6001-05<sup>44</sup> and should be read by all Division attorneys staffing grand jury investigations.

The constitutionality of the new immunity statute was upheld in Kastigar v. United States, 406 U.S. 441 (1972). The Supreme Court held that the statute was compatible and coextensive with the 5th Amendment because it provided immunized witnesses with substantially all the protection accorded by the 5th Amendment privilege. A witness testifying

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<sup>43</sup>Counselman v. Hitchcock, 142 U.S. 547 (1892), appeared to hold that use immunity would violate the 5th Amendment.

<sup>44</sup>Reprinted in ATD Manual at II-80 to 82.

under the statute cannot incriminate himself by his testimony because the statute absolutely proscribes any direct or indirect use of the witness' testimony against the witness. Hence, the prosecutor is left in precisely the same position vis-a-vis the witness as if the witness had not testified. The Court observed that transactional immunity provides considerably broader protection than the 5th Amendment, and thus was not constitutionally required. The Court emphasized, however, that if an immunized witness is later prosecuted, the Government has the affirmative duty of proving that the incriminating evidence it proposes to use is "derived from a legitimate source wholly independent of the compelled testimony."<sup>45</sup>

The federal immunity statute is an attempt by Congress to accommodate two crucial yet competing interests: the Government's need to obtain testimony from culpable individuals to prosecute more culpable individuals, and the witness' right to refrain from incriminating himself. It grants the prosecutor a powerful tool for obtaining testimony, and imposes stringent limits on the use of such testimony.

### C. Scope of Protection

18 U.S.C. §§ 6001-6005 is the only immunity statute used by the Division. Its constitutionality is settled beyond any doubt. Requests for transactional immunity should be opposed automatically.

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<sup>45</sup>406 U.S. at 460.



Use immunity is much more useful to prosecutors than transactional immunity. As noted above, witnesses testifying with transactional immunity have little incentive to provide detailed incriminating testimony concerning offenses for which they have exposure.<sup>46</sup> Use immunity, however, gives the witness an incentive to be as forthcoming as possible because the witness is guaranteed only that the information he supplies cannot be used against him. For every new piece of information he supplies, it may become more difficult for a prosecutor to demonstrate that a future prosecution of the witness is based entirely on independent evidence. If this is properly explained to immunized witnesses, considerable detailed inculpatory testimony can often be elicited.<sup>47</sup>

Use immunity is also useful to prosecutors because, unlike transactional immunity, it permits prosecution of immunized witnesses based on independent evidence. The Division is undertaking such prosecutions with increasing frequency. For example, where an immunized witness denies involvement in a conspiracy but is subsequently linked to the conspiracy by other evidence, the Division has prosecuted the witness both for the substantive offense and perjury.<sup>48</sup>

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<sup>46</sup>Culpable witnesses often have an incentive to testify as little as possible about crimes in which they were involved, to minimize the public's and the prosecutor's knowledge of their involvement and to avoid possible retribution by other culpable individuals.

<sup>47</sup>It is the job of the witness' counsel, not the prosecutor, to explain the immunity statute to the witness. When dealing with inexperienced or unsophisticated counsel, it may be useful for the Division staff to summarize the statute's provisions for counsel. In addition, the requirements of the immunity statute should be described to the witness at the beginning of his testimony. See § G., *infra*.

<sup>48</sup>See United States v. Dynalectric Co., 859 F.2d 1559 (11th Cir. 1988) (substantive offense), cert. denied, 490 U.S. 1006 (1989) and United States v. Paxson, 861 F.2d 730 (D.C. Cir. 1988)

(continued...)

The immunity statute specifically states that immunized testimony cannot be used against the witness in any criminal case, "except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." Clearly, a witness who testifies falsely under an immunity order can be prosecuted for perjury or other false statement offenses. The perjury is not compelled testimony about a past crime that is subject to 5th Amendment protection. Rather, the false testimony is itself the crime, and is not subject to any conceivable constitutional protection. However, if a witness testifies with immunity and confesses that he committed perjury on a previous occasion, his confession cannot be used to prosecute him for the previous testimony.

It should be noted that the immunity statute not only bars use of a witness' testimony as substantive evidence against that witness but also bars use of the immunized testimony to impeach the witness at trial.<sup>49</sup>

The immunity statute only protects a witness from prosecution for offenses committed before the date of the witness' immunized testimony.<sup>50</sup> The witness' immunized testimony can always be used to prosecute him for crimes committed after the date of his testimony.

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<sup>48</sup>(...continued)  
(perjury).

<sup>49</sup>New Jersey v. Portash, 440 U.S. 450 (1979); United States v. Pantone, 634 F.2d 716, 722 (3d Cir. 1980)

<sup>50</sup>See United States v. Freed, 401 U.S. 601 (1971); Mackey v. United States, 401 U.S. 667 (1971); Glickstein v. United States, 222 U.S. 139 (1911).

A grant of immunity before a federal grand jury will preclude use of that testimony in a state criminal prosecution just as a grant of state immunity will foreclose use by federal criminal prosecutors.<sup>51</sup> The second prosecution may, however, go forward, provided the second prosecutor is able to establish that all of the evidence he had against the defendant was derived from sources independent of the earlier immunized testimony.<sup>52</sup> The best practice to follow when there is a state criminal grand jury investigation running simultaneously with the federal antitrust grand jury investigation is to erect a "Chinese wall" to ensure that Division attorneys are not foreclosed from prosecuting an individual immunized by the state by having access to any of the state's evidence.

#### D. Criteria for Granting Immunity

Division attorneys are bound by the Attorney General's Guidelines, dated January 14, 1977, concerning use of federal immunity statutes. The guidelines are reprinted in the United States Attorneys' Manual, 9-23.000, et seq., and should be consulted by every Division attorney seeking an immunity order.

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<sup>51</sup>See Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Ullmann v. United States, 350 U.S. 422 (1956); Reina v. United States, 364 U.S. 507 (1960); Adams v. Maryland, 347 U.S. 179 (1954). Some courts have held that the possibility of prosecution under a foreign government's laws is so remote that it is an insufficient basis to justify a refusal to testify after the grant of immunity. See In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973).

<sup>52</sup>Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); United States v. McDaniel, 449 F.2d 832 (8th Cir. 1971), cert. denied, 405 U.S. 992 (1972).

A request for an immunity order must be authorized by the Assistant Attorney General or any Deputy Assistant Attorney General.<sup>53</sup> An order may not be sought unless two preconditions are satisfied: First, that the testimony or information sought may be in the public interest; and, second, that the potential witness has refused or is likely to refuse to testify or provide information based on the privilege against self-incrimination.

1. Public interest standards for granting immunity

The Attorney General's immunity guidelines set out six standards to be used in evaluating whether an immunity order would be in the public interest. Those standards are not considered to be all-inclusive and should not be applied slavishly, but they are a concise statement of the factors the Assistant Attorney General or Deputy Assistant Attorney General will apply in weighing an immunity request.<sup>54</sup> A brief discussion of the six standards follows.

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<sup>53</sup>28 C.F.R. § 0.175.

<sup>54</sup>The standards are set out and discussed at length in the U.S. Attorneys' Manual 9-23.210 and Division attorneys should consult them as needed.

- a. The seriousness of the offense, and the importance of the case in achieving effective enforcement of the criminal laws

Violation of the Sherman Act is a felony and obviously is considered a serious crime. However, care should be taken not to seek immunity orders to pursue de minimus secondary violations.

- b. The value of the potential witness' testimony or information to the investigation or prosecution

This is one of the most crucial factors, because an immunity order will foreclose prosecution of the witness in the majority of cases. Thus, for the immunity order to be in the public interest, the expected value of the testimony must outweigh the likely damage of allowing a culpable individual to escape prosecution. This requires delicate balancing, and the decision often must be made based on incomplete information. It is usually helpful to obtain a "proffer" of the witness' expected testimony from the witness' counsel, or, if counsel will permit, from the witness himself.<sup>55</sup> If a proffer is unavailable, the Division attorney must scrutinize the witness' position, job responsibilities, known involvement in the conspiracy, and all other available information to gauge the witness' knowledge and likely degree of cooperation with the

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<sup>55</sup>Procedures for obtaining a proffer are set out in § H., infra.

investigation. Prior to calling a to-be-immunized witness, it is advisable to gather as much information about the witness as possible through voluntary interviews with others, public sources, subpoenaed documents, and the prior testimony of less culpable individuals. Such information greatly facilitates substantive questioning, and frequently enables the questioner to know at an early stage if the witness is lying or holding information back.

- c. The likelihood of the witness promptly complying with the immunity order and providing useful testimony

If the witness has a history of lack of cooperation, seeking a compulsion order against him could greatly delay the investigation and provide little useful information.

- d. The person's culpability relative to other possible defendants

This is essentially the "flip side" of the second factor, in the sense that the witness' relative culpability must be weighed against the likely value of his testimony in deciding whether immunity would be in the public interest. The Attorney General's Guidelines state that, in the absence of "unusual circumstances," it would not be in the public interest to compel the testimony of a high-level or extremely culpable witness to convict a lower-level or less culpable individual. However, in appropriate investigations, immunizing such a witness can be justified if

the witness offers his cooperation at an early stage of the investigation, or is an unattractive potential defendant because of factors such as advanced age or demonstrably poor health.

The staff should be aware of the pitfalls of immunizing a highly culpable individual. If the investigation culminates in an indictment and the case goes to trial, an extremely culpable immunized witness is not likely to incur the jury's sympathy, and may severely damage the Division's case. The jury may, with defense counsel's help, focus on the inequity of giving the witness a pass while less involved individuals stand trial. A perceived inequity of that sort can often facilitate a jury's search for a reasonable doubt. As the Guidelines emphasize, it is far preferable that guilty individuals plead guilty to their crimes. If a factual basis for a guilty plea exists and if the individual may be involved in other violations, the possibility of a plea agreement that contains appropriate cooperation and non-prosecution provisions should be considered.<sup>56</sup>

- e. The possibility of successfully prosecuting the witness without immunizing him

This is closely related to the fourth factor. For example, a witness may be highly culpable, even a ringleader, but if his involvement is entirely outside the statute of limitations period, an immunity order may be warranted.

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<sup>56</sup>See Ch. IX § E.2.b.

- f. The possibility of adverse harm to the witness if he testifies pursuant to a compulsion order

Retaliation against a witness can be both economic and physical, and can occur even when investigating antitrust or other white-collar crimes. Where serious potential harms exist, Division attorneys should seriously consider taking advantage of the Department's Witness Security Program. Clearly, it is preferable to err on the side of excess caution.<sup>57</sup> In addition, the obstruction of justice statutes, which prohibit attempts to influence or intimidate witnesses and retaliation against witnesses, are available to deter abuse of witnesses.<sup>58</sup>

## 2. Exercise of the privilege

The second criteria for the grant of immunity is that the witness has refused or is likely to refuse to testify on the basis of his privilege against self-incrimination. Accordingly, requests for authorization should only be made when there is a reasonable expectation that the witness will assert the privilege (or has already done so) and when there is a reasonable expectation that the court would recognize assertion of the privilege. Thus, attorneys should not merely accept at face value an assertion of privilege. Rather, an independent assessment should

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<sup>57</sup>See Departmental Order OBD 2110.2; U.S.A.M. 9-21.000, et seq.; Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, dated October 12, 1982.

<sup>58</sup>18 U.S.C. §§ 1510, 1512, 1515.



be made, based on the law and the known facts, as to whether the privilege is available. If the attorney believes there is no sound basis for invocation of the privilege, consideration should be given to have the validity of the assertion determined by the court. In short, requests for authorization to immunize a witness should not be made solely as a matter of "insurance" to cover a remote contingency.

### 3. Prospective immunity

As previously indicated, the statutory framework authorizes the grant of immunity for witnesses who indicate that they will invoke their 5th Amendment privilege if called to testify. These "likely to refuse", or prospective immunities are subject to the same standards and procedures as immunities for witnesses who have already invoked their privileges before the grand jury.<sup>59</sup>

There is one situation in which attorneys should be cautious in using prospective immunity. When two witnesses from the same company have been subpoenaed and each is in a position to implicate the other in criminal activity, the first witness to appear should assert his privilege before the grand jury, and be immunized by the court, before any action is taken with respect to immunity for the second witness. If the attorney decides that the first witness' testimony was strong enough to justify cancelling the appearance of the second witness and,

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<sup>59</sup>Attorneys must check local practice and procedure. Some judges and U.S. Attorneys are unwilling to grant prospective immunity.

instead, seeking his indictment, the second witness will have no grounds on a motion to dismiss to claim that he believed that he had already been granted immunity.<sup>60</sup>

Another question that may arise in connection with a witness who has indicated that he will invoke the privilege if called before the grand jury is whether the prosecutor may call that individual before the grand jury without granting that witness immunity. The ABA Standards on Criminal Justice, Standard 3-3.6(e), provides as follows:

(e) The prosecutor should not compel the appearance of a witness before the grand jury whose activities are the subject of the inquiry if the witness states in advance that if called he or she will exercise the constitutional privilege not to testify, unless the prosecutor intends to seek a grant of immunity according to law.

The Department's position is that this standard is overbroad, making it too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself. Accordingly, the Department's policy is that a non-target witness may be called before the grand jury even if the prosecutor is unwilling to grant that witness immunity. The Department's policy with respect to "targets", as defined in

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<sup>60</sup>See Memorandum Opinion in U.S. v. Bobby J. Surface, Crim. No. 82-0114-A (E.D. Va.--Alexandria, June 25, 1982) attached to Memorandum from Joseph H. Widmar, Director of Operations, to all Chiefs, dated July 6, 1982.

U.S.A.M 9-11.150, is that if both the target and his attorney signify in writing that the target will assert the privilege if called, then ordinarily, the target should be excused from testifying.<sup>61</sup> However, the attorney may insist on an appearance by the target if the information sought from the target is not subject to the 5th Amendment. In determining the desirability of insisting on such an appearance, the attorney should consider the factors which justified issuing a subpoena to the target in the first place, *i.e.*, the importance of the expected testimony, its unavailability from other sources and the possible applicability of the 5th Amendment.<sup>62</sup>

E. Internal Procedures for Obtaining Immunity

1. Approval authority

Under the statutory framework for formal immunity, the Attorney General is given authority to approve all requests for authority to immunize witnesses. In 28 C.F.R. § 0.175(b), the Attorney General's authority has been specifically delegated to the Assistant Attorney General or any Deputy Assistant Attorney General of the Antitrust Division. This regulation imposes a requirement that the Assistant Attorney General or Deputy Assistant Attorney General

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<sup>61</sup>Since the Department's distinction between target and non-target witnesses appears to conform with the commentary to ABA Standard 3-3.6(e), which refers only to "potential defendants" and not to all witnesses, Department policy would appear to be consistent with ABA Standard 3-3.6(e).

<sup>62</sup>See U.S.A.M. 9-11.151, Ch. III § A.3.c.

may not approve an immunity request without obtaining the approval of the Criminal Division (commonly referred to as "Criminal clearance"). Finally, the U.S. Attorney for the district in which the grand jury is sitting must sign the application for the necessary court order.

## 2. Procedures for obtaining Division approval

All requests for statutory immunity must be reviewed by the Director of Operations and the appropriate Deputy Assistant Attorney General. Requests for immunity must be forwarded to the Office of Operations more than two weeks before the date that the staff wants to have the authorization letter available for use, i.e., physically in the staff's possession.<sup>63</sup>

The staff should prepare an original and one copy of Form OBD-111 for each witness and submit them to the Office of Operations, together with a memorandum (and one copy) stating the status of the investigation and a detailed statement of the reasons why immunity is being requested for the witness. The memorandum should include: (a) a statement of the witness' present position and position(s) held during the period under investigation; (b) identification of the witness' superiors and subordinates and a summary of the testimony they gave, if any; (c) a statement describing any proffer the witness or counsel has given, or if none has been obtained, a statement of whether arrangements have been made to obtain a proffer; (d) a description of any particular circumstances justifying immunity, such as age, health and personal

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<sup>63</sup>The significant amount of lead time is necessitated by the Criminal Division. See discussion in § E.3., infra.

problems, and any equity considerations; and (e) additional information as to how the witness can further the investigation.

In cases where the individual may have engaged directly in the conduct under investigation, Operations usually will require that the witness or counsel give a proffer and that the substance of the proffer be communicated to Operations before the witness' testimony is compelled.

Finally, the staff should include with its package a letter from the appropriate Deputy Assistant Attorney General to the U.S. Attorney in the appropriate district, requesting that the U.S. Attorney apply to the court for an immunity order. The text of the letter is as follows:

Dear \_\_\_\_:

Pursuant to the authority vested in me by 18 U.S.C. § 6003(b) and 28 C.F.R. 0.175(b), you are authorized to apply to the United States District Court for the District of \_\_\_\_ for [an order] [orders] pursuant to 18 U.S.C. §§ 6002-6003 requiring [name of witness or witnesses] to

give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

Deputy Assistant Attorney General

There should be a separate authorization letter for each witness, unless the practice of the local U.S. Attorney's office is to include all witnesses for whom immunity will be requested at a particular session in one letter.<sup>64</sup>

3. Procedures for obtaining Criminal Division clearance

The Office of Operations will handle obtaining Criminal Division clearance for the staff. Clearance is based on the information contained in the OBD-111s which are sent from Operations to the Witness Records Unit of the Criminal Division. Witness Records transmits the relevant information to approximately ten other law enforcement organizations, including the FBI and the Tax and Criminal Divisions for their approval. Only after all of those other organizations have searched their investigative files and have signified their approval will

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<sup>64</sup>The latter approach has potential difficulties. See discussion of Prospective Immunity, in § D.3., supra, and Memorandum from Joseph H. Widmar to all Chiefs, dated July 6, 1982.

Witness Records prepare a memorandum to the Assistant Attorney General in charge of the Antitrust Division, clearing the witnesses for immunity.<sup>65</sup>

The rationale for this process is to ensure that the Antitrust Division does not immunize someone who is a target or subject of another group's criminal investigation. The difficulty in the system is that it is time-consuming. The Witness Records Unit requires a full ten working days (exclusive of holidays) to process the OBD-111s. Attorneys in the field offices must allow a few extra days for mailing. In extraordinary circumstances, a request may be processed through Witness Records on an emergency basis. The procedures for handling emergencies are detailed in U.S.A.M. 1-11.101. However, if immunity is being sought for a low level employee, it is the Division's practice to use informal immunity in those situations where shortness of time does not permit regular Criminal Division clearance.<sup>66</sup>

All Division attorneys should be aware that OBD-111s cannot be processed without, at a minimum, the witness' full name (nicknames and initials are not adequate), an address that includes at least the city and state in which the witness works or resides, and a date of birth. A Social Security number is helpful, but it is not an adequate substitute for the date of birth.

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<sup>65</sup>See U.S.A.M. 9-23.130.

<sup>66</sup>See § I. for a discussion of informal immunity.

4. Circumstances where Criminal Division clearance is not required

In a few circumstances, clearance from the Witness Records Unit is not required. Any attorneys who are unsure whether clearance is required should consult with the Office of Operations.

a. Recalled witness

If a witness has been cleared and immunized in an investigation, new clearance is not required if the witness is being recalled. The attorney should simply read the old immunity order into the record, or, if the old order is not available, state clearly on the record that the witness is appearing under his original compulsion order. This rule applies whether it is the original grand jury hearing the testimony or a successor grand jury.

b. Immunized witness testifying at trial

If a witness was cleared and immunized for the grand jury phase of a matter, new clearance is not required for the witness' appearance as a trial witness in a case that stems from that grand jury investigation. However, the attorney must obtain a new DAAG letter, application and order for use at trial. The witness' name should be included in the immunity request memorandum sent to Operations with a notation that Criminal Division clearance is not required.



A copy of the Criminal Division clearance memorandum should be attached to the immunity request memorandum.

c. Cleared witness who was not immunized

If a witness was cleared for immunity but not in fact immunized, e.g., staff decided not to call the witness at that time or the witness appeared but did not assert the 5th Amendment privilege, new clearance will be required if the witness is being called more than six months after the original clearance was granted. In other words, a clearance lapses after six months if it is not "perfected" by the grant of immunity.

d. No need for district-by-district clearances

Under prior practice, clearances were obtained on a district-by-district basis. For example, an attorney conducting an investigation in two judicial districts that involved significant overlap, had to clear witnesses twice, once for each district. Similarly, if the investigation was moved to a different district, all the witnesses had to be re-cleared. Those procedures were recently revised. Clearance is now granted for the investigation as a whole, regardless of where the grand jury is sitting. Accordingly, if a witness has been cleared and immunized, the witness does not have to be re-cleared if, for example, the investigation moves

from one district to another.<sup>67</sup> However, the staff will need to submit to the Office of Operations all of the other necessary paperwork for obtaining immunity for that witness (excluding the OBD-111), including a copy of the Criminal Division clearance memorandum.

#### 5. Obtaining U.S. Attorney's approval

Division attorneys are responsible for notifying the U.S. Attorney in the district in which the grand jury sits of their intention to seek immunity authorization. Attorneys should send a copy of each OBD-111 to the U.S. Attorney at the same time as the immunity package is sent to the Office of Operations. This will afford the U.S. Attorney an adequate opportunity to make his own independent assessment, as is required by the statute, that it is necessary and desirable for him to seek a compulsion order.<sup>68</sup> It is also convenient, though not necessary, to send the U.S. Attorney all the applications and orders at the same time as the OBD-111s.

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<sup>67</sup>Under Division practice, the witness has to be re-immunized in the second district, because the old immunity order from a judge in a different district is probably not valid in the second district.

<sup>68</sup>See U.S.A.M. 9-23.120.

F. Obtaining and Using a Court Order

1. Written application and proposed order

After obtaining clearance from the Criminal Division and authorization from the appropriate Deputy Assistant Attorney General, the staff attorney must prepare a written application under 18 U.S.C. § 6003, to obtain a compulsion order and a form of proposed order to be signed by the judge assigned to the grand jury matter.

18 U.S.C. § 6003(b) authorizes only the United States Attorney for the district in which the order is to be issued to file the application. Thus, the application should be prepared for the U.S. Attorney's signature. It is wise to include the staff attorney's signature under the U.S. Attorney's signature block. The application is sent to the U.S. Attorney along with the letter of authorization from the Deputy Assistant Attorney General to that U.S. Attorney to apply for the order. It is also suggested that you provide the U.S. Attorney with the proposed order and a copy of the Criminal Division clearance memo. Moreover, certain judges may want to review all the above papers before signing the immunity order.

Note also that the judge who is assigned to a particular grand jury is not necessarily the same judge who empanelled the grand jury. For example, in the Eastern District of Pennsylvania, they are routinely different. Consequently, upon receiving a grand jury number, check with the clerk's office to see what judge has been assigned to your matter. It is that judge to whom you will submit your application and proposed order after the U.S. Attorney has signed

and returned them to you. If that judge is unavailable at the time you need your order signed, then the papers should be presented to the designated emergency judge for that day.

After first checking with the local U.S. Attorney to find out what practice he wishes you to follow, you should find out what particular practices and procedures the judge follows in issuing compulsion orders.

a. 18 U.S.C. § 6003

18 U.S.C. § 6003 describes generally the content of the application and form of proposed order you should submit to the court.<sup>69</sup> 18 U.S.C. § 6003(b)(2) authorizes the U.S. Attorney to seek a compulsion order when the witness (1) "has refused" or (2) "is likely to refuse" to testify on the basis of his privilege against self-incrimination. Thus, the statute authorizes seeking and obtaining a compulsion order prospectively, as well as after the witness has already refused to testify. The language of your application and proposed compulsion order should reflect whether the witness "has refused" or "is likely to refuse" to testify.

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<sup>69</sup>It is recommended that you closely follow the forms used by the local U.S. Attorney's Office unless there is some compelling reason to modify them.

- b. The compulsion order should usually be sought prospectively to avoid disruption, but consult with U.S. Attorney regarding local practice

If you are satisfied in advance that the witness will not testify voluntarily (such as when you have been advised by the witness or his counsel that he will invoke his 5th Amendment privilege before the grand jury), you usually should seek the compulsion order in advance to avoid disruption of the grand jury proceedings. If you wait until the witness appears before seeking the compulsion order, you must then postpone that witness' appearance to a later date or suspend the proceedings to try to get the order signed (assuming one is prepared). In either case, the grand jury proceeding will be disrupted. Sometimes this is unavoidable, such as when you have been advised that the witness will not assert his 5th Amendment privilege and you have no reason to believe otherwise or because of some local practice against seeking immunity orders prospectively. If you have other witnesses scheduled, you may still be able to proceed with a minimum of disruption.<sup>70</sup>

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<sup>70</sup>See also § D.3., above, for a discussion of some of the problems that may arise with the use of prospective immunity.

2. What Division attorney does

a. Limited scope of court's role

18 U.S.C. § 6003 requires a court to issue a compulsion order upon proper application of the U.S. Attorney. The sole function of the court is to ascertain that there has been compliance with the statute; the court is not empowered to inquire into the merits of the application.<sup>71</sup> Accordingly, once Departmental authorization has been obtained, the matter of actually seeking a compulsion order lies in the discretion of the Division attorney and the U.S. Attorney.

b. Who presents application, order, authorization; when to give to court

The staff attorney presents the application (signed by the U.S. Attorney for that district), the proposed order, and the authorization (from the DAAG of the Antitrust Division to that U.S. Attorney) to the judge assigned to that grand jury matter.<sup>72</sup> This is normally done ex

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<sup>71</sup>In re Kilgo, 484 F.2d 1215, 1219 (4th Cir. 1973); see S. Rep. No. 617, 91st Cong., 1st Sess. 145 (1969), H.R. Rep. No. 1549, 91st Cong., 2d Sess. 43 (1970); see also Burse v. United States, 466 F.2d 1059 (9th Cir. 1972).

<sup>72</sup>As noted above, some judges may also ask to see the Criminal Division clearance memo.

parte, as contemplated by the statute. In situations where you are satisfied in advance that the witness "is likely to refuse" to testify, these papers should be presented sufficiently in advance of the witness' grand jury appearance to allow the judge to review the papers and sign the order. In situations where the witness already "has refused" to testify, the papers should be presented as soon as practicable. In both situations, the aim is to avoid disruption of the grand jury proceedings.

How quickly you can get an order signed once the papers have been presented to the judge depends in part on the personality of the judge and what other matters he has before him. A good rapport with the judge's law clerks can prove invaluable.<sup>73</sup> Moreover, although the orders contemplated by 18 U.S.C. § 6003 are ex parte in nature and although the court really has no discretion whether or not to sign them once it is satisfied as to compliance with the statute, some judges routinely require hearings on immunity orders. Further, a witness can sometimes obtain a hearing by filing a motion or having his counsel informally attempt to have the order changed. Any such hearings should be in camera and the records should be sealed to prevent any breach of grand jury secrecy.

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<sup>73</sup>If the papers are for prospective immunity and the Division attorney has developed a good working relationship with the U.S. Attorney's Office, the AUSA assigned as the Division's liaison may be willing to present the pleadings to the court on staff's behalf well in advance of the session.

c. Possible defense counsel objections/challenges

Any attempt by counsel to challenge the validity of a compulsion order should be vigorously opposed. Set forth below are some arguments which might be raised and some suggested answers.

1) Inadequate notice. The statute contemplates that the proceeding be ex parte. Consequently, no notice at all need be given.<sup>74</sup> However, in cases where the witness is expected to be hostile or might defy the order, it may be productive and protective of a later contempt action to have witness and lawyer, if any, present so that the judge can explain the consequences of not testifying.<sup>75</sup>

2) Insistence on an affidavit. Government attorneys should oppose requests for affidavits concerning the authenticity of signatures on Department authorizations. Compliance with such requests would place an unnecessary burden on the Department and require approval by a Departmental official who is not present in the district. In any event, neither the compulsion statute nor the pertinent regulations require an Assistant Attorney General's authorization to be in writing.

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<sup>74</sup>18 U.S.C. § 6003(a), (b); see United States v. Pacella, 622 F.2d 640 (2d Cir. 1980); Ryan v. C.I.R., 568 F.2d 531, 539-40 (7th Cir. 1977), cert. denied, 439 U.S. 820 (1978).

<sup>75</sup>See, e.g., Goldberg v. United States, 472 F.2d 513, 514 (2d Cir. 1973)



3) Invalid order. As long as there has been compliance with the statute in obtaining the order, the order is valid even though obtained ex parte and the court is not empowered to inquire into the merits of the request.

4) Discovery of prior statements to avoid unintentional conflicting statements. Although this is not a valid objection to the court issuing a compulsion order, on motion, a court can order that a witness be given a copy of his current or prior grand jury testimony before he is compelled to testify further. A witness before a grand jury has no inherent right to a transcript of his testimony,<sup>76</sup> but it is within the discretion of the court to provide a witness with such a transcript under Rule 6(e) of the Federal Rules of Criminal Procedure where the witness demonstrates a particularized need for the transcript that outweighs the policy of grand jury secrecy.<sup>77</sup> A strong particularized need must be shown before a transcript of testimony will be given to a grand jury witness.<sup>78</sup>

5) Constitutionality. The constitutionality of the immunity provisions of 18 U.S.C. §§ 6002-6003 was upheld in Kastigar v. United States, 406 U.S. 441 (1972).

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<sup>76</sup>Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

<sup>77</sup>See Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979).

<sup>78</sup>See Ch. II § H.2.; In re Bianchi, 542 F.2d 98, 100 (1st Cir. 1976); Bast v. United States, 542 F.2d 893, 895 (4th Cir. 1976); United States v. Fitch, 472 F.2d 548, 549 (9th Cir.), cert. denied, 412 U.S. 954 (1973).

G. What to Ask the Immunized Witness in the Grand Jury Room

1. Record that witness is testifying pursuant to immunity order

After obtaining the immunity order from the judge, the next step is compelling the testimony of the witness in return for the grant of use immunity. The record must clearly reflect this process. The suggested procedure follows.

a. Initial inquiry and advice of rights

Where you have obtained the compulsion order prospectively or where you anticipate a witness asserting his 5th Amendment rights at the outset of his testimony, it is wise to advise the witness of his rights on the record. Inquire whether he is represented by counsel; the attorney's name; whether counsel has explained his rights, privileges and duties before the grand jury; whether he has been advised of his 5th Amendment rights and whether he understands them; that he has a right not to answer incriminating questions but that if he does answer, anything he says may be used against him; and that he has a duty to testify truthfully.

b. Reading the compulsion order and conferring immunity

Immunity may be conferred in one of two ways.

First, the Government attorney may state that it is his understanding that the witness intends to assert his 5th Amendment rights in response to any questions asked and then ask the witness to affirm that. The foreperson of the grand jury then reads the order to the witness.

Alternatively, the witness may be asked questions until he refuses to answer on the basis of his 5th Amendment rights. You may consider asking the witness if his answer would be the same to any other questions asked of him. You can then have the foreperson read the compulsion order.

In general, the second method is usually preferable both for you and the witness since it is more in line with the literal language of the statute. If you have a hostile witness or if there is any thought that you may have to seek a contempt order, then the second method is clearly preferred. The immunity authorized by the statute is not self-executing. The witness must physically appear and claim the privilege and be advised of the order before he can be held in contempt for refusing to testify.<sup>79</sup>

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<sup>79</sup>United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971); see Proving Federal Crimes at 3-15 to 17.

- c. Questioning immediately after the compulsion order is read

After the immunity order has been read to the witness, it is advisable to inquire whether he understands it. Specifically, ask whether he understands that he no longer has a right to refuse to answer any questions, but that what he does say cannot be used against him; that he does not receive immunity for anything about which he does not testify; and that, notwithstanding the order, he may still be prosecuted for perjury or giving a false statement if he does not testify truthfully. This last provision is normally part of the immunity order, but it is wise to repeat it.

2. Order becomes a grand jury exhibit

In certain jurisdictions, the immunity order is made an exhibit to the witness' grand jury testimony. Of course, the order is part of the record by virtue of the foreperson reading it into the record. Once the order is used, it is filed with the clerk of court under seal.

- H. Proffers and Interviews

It is the policy of the Antitrust Division to try to obtain full and candid proffers of expected testimony concerning culpable subjects or potential targets prior to seeking immunity authorization. This permits the Deputy Assistant Attorney General and the United States

Attorney for the district to make an independent judgment that the grant of immunity is necessary to the public interest. During the proffer procedures, Division attorneys should be careful not to indicate to counsel for the potential witness that immunity will be granted since that decision must ultimately be made by the Deputy Assistant Attorney General and the United States Attorney.

Proffers may be taken from the attorney representing the individual or from the individual himself. Usually, the best practice is to obtain an attorney proffer first which then must be confirmed in its essential details by the individual before immunity is sought. This practice protects both the individual and the Government from becoming involved in inadequate proffers. It also has the advantage of establishing a degree of trust between opposing counsel that is essential for successful negotiations. Before engaging in such proffers, the attorney for the Government should make clear to opposing counsel that immunity will not be sought unless the attorney proffer is confirmed.

Frequently, the attorney will proffer by giving hypothetical facts which form the basis of the expected testimony. If this approach is taken, it is vital that the proffer encompasses all the relevant facts to which the witness can testify and that it be given in sufficient detail so that the attorney for the Government is fully able to evaluate the nature and quality of the expected testimony. As part of this procedure, the attorney for the Government should also review all relevant documents that the witness can identify and obtain outlines of the expected testimony as to each.

Lastly, counsel for the Government and opposing counsel should discuss and agree upon the ground rules under which the witness' confirming proffer will be taken, for absent a legally binding contrary agreement, the witness' statements may be used as substantive evidence against him.<sup>80</sup> This would also be the case if the initial proffer was taken directly from the individual.

The ground rules for the witness proffer should be reduced to letter form and signed by the attorney for the Government, counsel for the witness, and the witness. Generally, such letters permit the Government only to make use of the information for the purpose of pursuing leads or as a basis for cross-examination or rebuttal, should the witness in any subsequent proceeding to which the United States is a party testify inconsistently with the information provided.<sup>81</sup> Such written assurances are legally binding upon the Government.<sup>82</sup>

It is essential that culpable subjects or potential targets give interviews prior to a grant of immunity. The interview assures the prosecution that the witness will in fact confirm an earlier attorney proffer. It also permits the attorney for the Government to judge the credibility of the witness, expand the factual basis of earlier proffers and fully review appropriate documents. During the interview, the witness should be asked if he has given any statement concerning his testimony to other counsel involved in the investigation or has testified or given a sworn statement concerning the matters under investigation in any other proceeding.

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<sup>80</sup>See § I.3.b., *infra*.

<sup>81</sup>See sample letter attached as Appendix V-I.

<sup>82</sup>United States v. Carter, 454 F.2d 426 (4th Cir. 1971), *cert. denied*, 417 U.S. 933 (1974).

## I. Informal Immunity

Although there are often strong reasons for using statutory immunity, judicious use of informal immunity can enhance the effectiveness and efficiency of our investigations and curtail the use of grand jury time. This section sets forth the situations in which informal immunity may be appropriate and the procedures for obtaining authority to grant informal immunity.

### 1. Situations in which informal immunity may be appropriate

There are two general categories of situations in which it may be appropriate or necessary to use informal immunity as an alternative or adjunct to the statutory immunity process.

#### a. Routine situations--interviews and testimony

Oftentimes, the staff may wish to conduct interviews with witnesses before determining whether it is appropriate or necessary to subpoena them to testify. Conducting such interviews may permit the staff to assess more accurately the need to take sworn testimony from a witness, or it may permit the staff to determine the scope of a witness' knowledge of relevant facts. During grand jury investigations, for example, such interviews can be valuable in

selecting witnesses to appear before a grand jury or in limiting the scope of interrogation of a witness, thereby conserving grand jury time.

In addition to the interview situation, it may also be appropriate, in some situations, to grant informal immunity to a witness for his testimony, either before a grand jury or at trial. Some witnesses may be willing to testify before a grand jury if they receive assurances from the prosecution that their testimony will not be used against them in subsequent criminal proceedings. Similarly, some trial witnesses, particularly those who have received statutory immunity for their prior grand jury testimony, may be willing to testify at trial with informal immunity.

b. Emergency situations

There are a number of situations in which time constraints make obtaining statutory immunity impossible. Some examples include:

- (1) Where the Criminal Division is unable to provide timely final clearance to obtain formal immunity and a witness' appearance before the grand jury (and perhaps the grand jury session) would have to be cancelled as a result;



- (2) Where the staff learns about an important witness whose testimony is essential, either before a grand jury or at a trial, and it is too late to obtain clearance for formal immunity; and
  - (3) Where the staff unexpectedly finds it necessary to call at a trial a witness who previously received formal immunity before the grand jury,<sup>83</sup> but for whom no formal trial immunity order has been obtained, and the witness refuses to testify without being immunized for his trial testimony.
2. Procedures for obtaining clearance to grant informal immunity

The procedures for obtaining authority to grant informal immunity to witnesses in Antitrust Division investigations and cases are designed to make the investigative and litigation process more effective and efficient, without reducing the necessary safeguards to assure adequate review. The considerations in balancing efficiency against more detailed, formal review vary depending upon the position of the individual witness in his organization and the likelihood that individuals at higher levels might be more culpable in a given case. Accordingly, both the procedure for obtaining authority to grant informal immunity and the level of approval

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<sup>83</sup>A trial witness who previously received formal immunity before the grand jury does not require Criminal Division clearance before testifying with either formal or informal immunity at trial.

required under these Guidelines vary depending upon the position of the witness in his organization.

a. Low-level employees

This group includes secretaries, other people with essentially clerical or routine administrative positions, and sales department employees with "order taking" or "price quoting" responsibilities but no authority to grant discounts, adjust prices or submit bids. Section and field office Chiefs and Assistant Chiefs have authority to approve staff requests for informal immunity to low-level employees after receiving such approval from the Office of Operations. Such approval, generally given on a category-by-category basis rather than for specific individuals, may be obtained orally from Operations by calling the Special Assistant who will convey the request to the Director of Operations. If oral approval is obtained, a confirming written memo should be sent to Operations. Thereafter, no further authority is necessary unless unusual circumstances arise.

b. Mid-level employees

This group includes non-management employees who might have some input into price determination, but no final pricing or bidding authority. It includes most salesmen, estimators and project engineers. As with low-level employees, Chiefs and Assistant Chiefs may

approve staff requests for informal immunity to mid-level employees after receiving approval from Operations, using the procedures outlined above. In some cases, the Director of Operations may withhold approval for certain categories of people, such as sales managers and chief estimators or for specific individuals in this mid-level group. For those persons for whom approval has been reserved, Chiefs should seek approval for the specific individuals within the group on a case-by-case basis. In all but emergency situations, that request for approval should be in writing.

c. High-level employees

This group includes officers, directors, owners or management-level employees likely to be identifiable targets of an investigation, regardless of official title, who have bidding or pricing authority for, or culpable knowledge of the illegal acts under investigation. Ordinarily, staffs should seek only statutory immunity authority for these individuals because of their significance in the investigation. In some situations, however, such as the emergency situations described above, the use of informal immunity may be appropriate, but only with the approval of the Assistant Attorney General or the appropriate Deputy Assistant Attorney General. The procedures for obtaining authority to grant informal immunity to high-level employees is the same as for obtaining statutory immunity authority. Unless time constraints are such to preclude it, a written memorandum must be submitted to Operations. If a request for oral approval is unavoidable, a confirming written memorandum must be submitted.

3. Informal immunity letters -- form and scope

a. Form of informal immunity grant

The informal immunity conferred under these Guidelines will be in the form of a letter addressed to the witness and signed, in most cases, by the appropriate Chief or Assistant Chief.<sup>84</sup> In emergency situations, where by reason of the location of the witness or other factors making it impossible for the Chief or Assistant Chief to sign the letters, a staff attorney may sign an immunity letter, when specifically authorized to do so and in an approved form.

b. Scope of immunity

In the normal case, the letter conferring immunity will contain the following provisions:

- (1) The Division will forebear making direct (and where necessary, derivative) use of any of the witness' statements in his/her interview (or testimony) against him/her in any subsequent criminal prosecution of the witness for violations:

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<sup>84</sup>A sample letter is attached as Appendix V-2.

- (a) of the Sherman Act (and only such other specified statutes as are appropriate to the case);
  - (b) arising out of the witness' conduct in a specified geographic area;  
and
  - (c) during a specified time period.
- (2) The statements of the witness in the interview or testimony may be used against the witness:
- (a) to impeach his/her testimony in any subsequent proceeding,  
including any subsequent prosecution of the witness; and
  - (b) either for impeachment or as substantive evidence in any subsequent case against the witness for perjury (18 U.S.C. § 1621) or making a false statement under oath (18 U.S.C. § 1623) [in the case of sworn testimony] or making a false statement (18 U.S.C. § 1001) [in the case of interviews not under oath].

- (3) There are no other agreements between the United States and the witness regarding his/her prosecution or non-prosecution for statements made in the interview or testimony.

The witness and his counsel should sign and date our file copy of the letter.

No proposed immunity letter containing substantive provisions different from those outlined above shall be issued by, or under the authority of, a Chief or Assistant Chief without express, prior approval of the Director of Operations.

4. Advising United States Attorneys of informal immunity grants

Section and field office Chiefs or Assistant Chiefs or the lead staff attorney should notify the appropriate U.S. Attorney or his designated representative in advance of conferring informal immunity. We will not be circulating the usual copy of the OBD-111 to the U.S. Attorneys, as we do when seeking statutory immunity. Therefore, to avoid conferring immunity upon individuals who are subjects of local criminal investigations, the U.S. Attorney or his designated representative in the relevant district (which ordinarily would be the district in which the witness will appear before the grand jury) should be contacted and advised that we propose to confer informal immunity on the witness(es).

Ordinarily, this advance notification should be in writing. In certain circumstances, where time is an important consideration, oral notice may be given, but this oral notice should be confirmed by a brief written letter or memorandum.

Where we have also applied contemporaneously for statutory immunity clearance for the same witness, the U.S. Attorney will receive copies of the OBD-111 in connection with the formal immunity clearance procedure. In these situations, no additional notice will be necessary.

5. Reporting of informal immunity grants

Chiefs or Assistant Chiefs shall report, monthly, all grants of informal immunity to the Director of Operations. The purpose of this report is to ensure adequate record-keeping for all grants of informal immunity; to permit analysis of the circumstances under which informal immunity has been used in various investigations and cases; and to facilitate evaluation of the informal immunity program. The monthly report shall be on the form "Report of Informal Immunity Grants." This form shall be maintained cumulatively, for each pending investigation, and should be updated each month with the addition of all names of witnesses for whom immunity was cleared and submitted to Operations. Copies of all letters issued under this program should be maintained by each section or field office in a separate file.

J. Corporate "Amnesty"

The Division has a policy of giving serious consideration to according lenient treatment to corporations voluntarily reporting their illegal activity prior to our detection of it. "Lenient treatment" means not indicting such a firm. (The policy is known variously as the corporate amnesty, immunity or leniency policy.)

There are several factors that are weighed in arriving at the decision to grant leniency. First, only the first corporation to come forward will be considered for leniency. If other corporations involved in the same conspiracy subsequently come in to confess wrongdoing, or if all of the involved corporations come forward as a group, they cannot be given the same consideration. Their cooperation can be given some weight, of course, at the sentencing stage.

Second, in order to redound to the benefit of the corporation, the voluntary confession of wrongdoing must be truly a corporate act, as opposed to the confessions of individual executives or officials. If individual executives cooperate with the Government in the same manner as the corporation, they may also be given serious consideration for immunity.

Other factors that must bear on any decision regarding leniency include the following:

1. whether the Division could have reasonably expected that it would have become aware of the conspiracy in the near future if the corporation had not reported it;



2. whether the corporation, on discovery of the illegal activity previously unknown to it, took prompt and effective action to terminate its part in the conspiracy;
3. the candor and completeness with which the corporation reports the wrongdoing and continues to assist the Division throughout the investigation;
4. the nature of the violation and the confessing party's role in it, e.g., was the corporation's conduct coercive toward its co-conspirators, was it the originating party, and did it have actual exclusionary effects on others in the marketplace;  
and
5. whether the corporation has made, or stated its intention to make, restitution to injured parties.

If the attorney who receives the request for amnesty believes the corporation qualifies for, and should be accorded lenient treatment, he should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request, and forward it to the Assistant Attorney General for final decision. If the staff attorney recommends against lenient treatment, corporate counsel may wish to seek an appointment with the Director of Operations to make his

views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

K. Immunity Under Plea Agreements

The Division attorney negotiating immunity or non-prosecution provisions in a plea agreement should be aware of certain principles.<sup>85</sup> Generally, defendants should not be granted immunity absent a plea of guilty to some violation. Plea agreements may provide for no further prosecution of defendants for antitrust, mail fraud, wire fraud or related violations committed prior to the date of the plea agreement involving the subject product or industry within the specific geographic area in which the defendants have admitted to unlawful conduct. If part of that area is within the territory of another Division office or section, that office or section should be consulted prior to any commitment.

Where a defendant has provided information as to one or more violations but it is believed that additional information is being withheld, it may be desirable to use a sealed appendix to the agreement. This would set forth all the information provided by the defendant and any immunity given would be limited to that information and information derived therefrom. Where, however, there is specific reason to believe that the defendant has information relating to other violations, the Division should generally not enter into an immunity agreement.

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<sup>85</sup>See Ch. IX for a more detailed discussion of plea agreements.

Non-prosecution provisions for mail fraud or wire fraud should be specifically limited to violations committed in connection with Sherman Act violations. The agreement should specifically state that the defendant can still be prosecuted for perjury or giving false statements.

L. Immunizing Close Family Relative of Defendant or Target

Attorneys should consult the U. S. Attorneys' Manual, § 9-23.211, when seeking to immunize an individual to compel that individual to testify about a close family relative. That section describes the factors that should be considered in determining whether to compel an individual to testify against a close family relative. That section reads as follows:

Consideration should be given to whether the witness is a close family relative of the person against whom the testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. Absent specific justification, we will ordinarily avoid compelling the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing. Such justification exists, among other circumstances, where (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its activities; (ii) the testimony to be elicited relates to illegal conduct in which we have reason to believe that both

the witness and the relative were active participants; or (iii) the testimony to be elicited relates to a crime involving overriding prosecutorial concerns.

As this provision makes clear, the ordinary course is to avoid compelling the testimony of a close family relative of a grand jury target or trial defendant. However, many of the Division's criminal investigations focus on family-owned businesses, thus it may be necessary to immunize one of the family members involved in the business to testify against another member also involved in the business.<sup>86</sup>

1. The criteria

- a. Definition of close family relative

The initial guidelines in this area were set forth in the Attorney General's guidelines, published in January, 1977, which provided:

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<sup>86</sup>See United States v. (Under Seal), 714 F.2d 347 (4th Cir.) (appellant compelled to testify before grand jury concerning brother's suspected bid-rigging), cert. denied, 464 U.S. 978 (1983).

Only in exceptional circumstances will authorization be granted to compel the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing.<sup>87</sup>

This exceptional circumstances standard was interpreted by the Criminal Division of the Department of Justice in a letter, dated August 9, 1982, from Deputy Assistant Attorney General John Keeney to Assistant United States Attorney Walter Mack in New York City.<sup>88</sup> The Keeney letter set forth certain policy considerations and interpreted the term "relative" to include husbands and wives, despite the lack of blood relationship and the term "'close' family relative" to include grandparents, grandchildren, fathers, mothers, sons, daughters, brothers and sisters. Excluded were aunts, uncles, nephews, nieces, cousins and in-laws. The letter states that the degree of culpability or participation by the witness is an important factor to consider in determining whether the public interest outweighs the family relationship. The present Department of Justice position incorporates this interpretation of "close family relative."

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<sup>87</sup>U.S.A.M. 1-11.214.

<sup>88</sup>See Appendix V-3.

b. Prospective testimony relating to common business activities

A second letter setting forth a factor to be considered under the "exceptional circumstances" standard was sent on November 23, 1982 from Deputy Associate Attorney General Kenneth A. Caruso to attorney William W. Taylor of Washington, D.C., in connection with Mr. Taylor's representation of a client. The Caruso letter set forth a policy that "where, through a familial relationship, an individual learns of illegal conduct by that individual's close family relative," the Department normally would not compel that individual to testify. However, where an individual, "because of his business or corporate position, becomes aware of illegal conduct by a family business or by a business associate who happens also to be a close family relative," the Department may compel that individual's testimony. The Caruso letter stated that, under such circumstances, there was a likelihood that the Department would compel the individual to testify "as a corporate official of the company under investigation" about "the business activities of business associates who happen to be the witness' close family relatives."

The U.S. Attorneys Manual incorporates the rationale of the Caruso letter. Testimony may be compelled when the prospective witness and relative participate, or have participated, during all or part of the period under scrutiny, in a "common business enterprise" and the questions to be asked and expected testimony relate to the common business enterprise or its activities. Thus, the attorney should set forth in a memorandum the reasons for the belief that the witness will be able to testify based on business association with the relative and why the testimony will not be based exclusively on the familial or marital relationship.

- c. Prospective testimony relating to joint participation in the commission of a crime

The U.S. Attorneys Manual recognizes that when an individual participates with a close family relative in the illegal conduct, such an individual may be compelled to testify. Thus, when an attorney is considering whether it is appropriate to recommend a relative of a target or a subject for immunity under a compulsion order, the attorney should set forth the reason(s) for the belief that the prospective witness will be able to testify about the relative's and the witness' joint participation in a crime.

A brief discussion of the marital privileges is useful to understand the current state of the law as to whether joint participation in a crime will override the assertion of the marital privilege.<sup>89</sup> Although there are no general privileges protecting an individual when compelled to testify against a close family relative, when compelling a witness to testify about his spouse, two marital privileges may be asserted. First, the confidential marital communications privilege protects privately disclosed statements or communications made in confidence during the marriage. This privilege may be asserted by either spouse, and the privilege survives the deterioration of the marriage. The communications, however, must be made during the marriage, and not before or after, to come within the privilege. The privilege protects the privacy of the marital communications. Second, the testifying spouse may claim the privilege

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<sup>89</sup>See Ch. III § C.1.c. and United States v. Byrd, 750 F.2d 585 (7th Cir. 1984), for a discussion of the two marital privileges.

against adverse spousal testimony which applies to all testimony against the spouse, including testimony on non-confidential matters or matters that occurred prior to the marriage. Although this privilege covers a greater range of potential information, it may be asserted only by the spouse called or compelled to testify and not by the spouse against whom the testimony is sought.<sup>90</sup> Furthermore, this privilege does not survive the deterioration of the marriage, as it is intended to protect the sanctity of the marriage as it exists at the time of the trial or grand jury proceeding.

In their attempts to reconcile the policies underlying the privileges against the public interest in obtaining the testimony, the courts have come to a consensus in deciding that there should be a joint participation exception to the confidential marital communications privilege, but are divided on this exception as to the privilege against adverse spousal testimony.

The weight of the law is that joint participation in a crime creates an exception to the confidential marital communications privilege.<sup>91</sup> With respect to the privilege against adverse spousal testimony, the courts which uphold the privilege emphasize the public policy of preserving the harmony of the marriage. In In re Malfitano, 633 F.2d 276 (3d Cir. 1980), the

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<sup>90</sup>Trammel v. United States, 445 U.S. 40 (1980).

<sup>91</sup>United States v. Picciandra, 788 F.2d 39 (1st Cir.), cert. denied, 479 U.S. 847 (1986); United States v. Estes, 793 F.2d 465 (2d Cir. 1986); United States v. Ammar, 714 F.2d 238, 257-58 (3d Cir.), cert. denied, 464 U.S. 936 (1983); United States v. Broome, 732 F.2d 363 (4th Cir.), cert. denied, 469 U.S. 855 (1984); United States v. Mendoza, 574 F.2d 1373 (5th Cir.), cert. denied, 439 U.S. 988 (1978); United States v. Sims, 755 F.2d 1239 (6th Cir.), cert. denied, 473 U.S. 907 (1985); United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974); United States v. Price, 577 F.2d 1356 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979).



court held that there was no joint participation exception to the privilege and upheld the assertion of the privilege, the grant of immunity notwithstanding.<sup>92</sup> Two circuits recognize a joint participation exception to the claim of privilege against adverse spousal testimony because to uphold the privilege would allow one spouse to enlist the aid of the other spouse in a criminal enterprise and, by doing so, protect against having the spouse compelled to testify about the crime.<sup>93</sup>

- d. Prospective testimony regarding crimes involving overriding prosecutorial concerns

The U.S. Attorneys Manual also states that a compulsion order may be sought when "the testimony to be elicited [from the prospective witness concerning the relative] relates to a crime involving overriding prosecutorial concerns." Such crimes are not specifically defined. The recommendation will be considered on a case-by-case basis. Thus, the attorney's memorandum should set forth any facts that demonstrate particular prosecutorial concerns.

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<sup>92</sup>See also In re Grand Jury Subpoena United States, 755 F.2d 1022 (2d Cir.), vacated as moot sub nom. United States v. Koecher, 475 U.S. 133 (1986).

<sup>93</sup>United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974); United States v. Trammel, 583 F.2d 1166 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980).

2. The relative may not claim a privilege to quash a subpoena to testify

Once the criteria for deciding that immunity is appropriate under the above guidelines are satisfied, the witness to be immunized should not prevail on a motion to quash the subpoena on the ground of testimonial privilege. There is no recognized privilege that protects a prospective witness from having to testify against a close family relative,<sup>94</sup> other than the confidential marital communications or the adverse spousal testimony privileges.

M. Refusal to Comply with Compulsion Order

1. Contempt

The refusal of a witness to testify or to produce other information after the issuance of an order of compulsion under 18 U.S.C. § 6002 is punishable by contempt.<sup>95</sup> An immunized witness who refuses to testify before a federal grand jury may be held in civil or criminal contempt.<sup>96</sup>

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<sup>94</sup>See Ch. III § C.1.g., supra.

<sup>95</sup>See Ch. III § G. for the text of the relevant contempt statutes and for a discussion of contempt in the context of subpoena enforcement.

<sup>96</sup>See United States v. Petito, 671 F.2d 68 (2d Cir.), cert. denied, 459 U.S. 824 (1982).

a. Civil contempt (28 U.S.C. § 1826; Fed. R. Crim. P. 17(g))

28 U.S.C. § 1826, a codification of preexisting practices, was enacted in 1970 to provide a statutory basis for the application of summary civil contempt powers to recalcitrant witnesses. It provides that a witness may be held in contempt when he refuses to comply with a court order "without just cause shown."<sup>97</sup> Also pertinent to the contempt power and its exercise, whether civil or criminal, are Rules 17(g) and 42 of the Federal Rules of Criminal Procedure.

Ordinarily, the district courts should first consider the feasibility of effecting compliance with compulsion orders through the imposition of civil contempt under 28 U.S.C. § 1826. "The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate."<sup>98</sup> The court, however, is not required to consider civil contempt on the record expressly prior to the institution of criminal contempt proceedings against recalcitrant witnesses.<sup>99</sup>

The purpose of civil contempt is not to punish the witness by imprisonment, but rather to secure testimony or other evidence through the creation of an incentive for compliance. On

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<sup>97</sup>Where non-frivolous defenses are alleged, an evidentiary hearing is required, as discussed below.

<sup>98</sup>United States v. Wilson, 421 U.S. 309, 317 n.9 (1975), quoting Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966).

<sup>99</sup>In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 217-18 (3d Cir. 1981).

the other hand, the purpose of criminal contempt is to punish the witness for his refusal to obey the court's order, thus vindicating the court's authority.<sup>100</sup>

Confinement for civil contempt is limited to the life of the court proceeding or the term of the grand jury, but in no event may the confinement exceed 18 months. When the potential duration of civil coercive confinement is severely limited, a court may consider civil contempt a futile sanction.<sup>101</sup> Moreover, civil contempt may not be sufficient where "the contemnor is already incarcerated and is, therefore, unlikely to respond to a threat of summary civil contempt."<sup>102</sup>

A witness can purge himself of civil contempt at any time. Thus, when the witness complies with the order, he must be released. When the grand jury has expired, civil contempt is not available.<sup>103</sup> The witness cannot purge himself before a no-longer-existent grand jury.

b. Criminal contempt (18 U.S.C. § 401; Fed. R. Crim. P. 42)

Where it is appropriate to impose punishment upon a recalcitrant witness, the court may invoke the provisions of 18 U.S.C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure. Criminal contempt is punishable under 18 U.S.C. § 401, by fine or imprisonment.

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<sup>100</sup>In re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979).

<sup>101</sup>United States v. North, 621 F.2d 1255, 1263 (3d Cir.), cert. denied, 449 U.S. 866 (1980).

<sup>102</sup>Id. at 1261 n.9, citing United States v. Wilson, 421 U.S. at 317 n.9.

<sup>103</sup>In re Grand Jury Proceedings Harrisburg Grand Jury, 658 F.2d at 218.

Courts may not impose both a fine and imprisonment, nor a fine coupled with probation.<sup>104</sup>

Unlike civil contempt, the confinement or fine imposed is for a definite period or amount. The witness cannot purge himself of the contempt and thereby avoid the sentence.

Sentences of up to and including six months may be given after the notice and hearing required by Fed. R. Crim. P. 42(b). The Supreme Court has ruled, however, that sentences exceeding six months may not be imposed absent a jury trial or waiver thereof.<sup>105</sup> After a jury trial, there is no limit to the length of the sentence as there is no maximum set for punishing criminal contempt under Rule 42(b). The Government cannot know in advance the penalty to be imposed. Nevertheless, the Government should not press in a non-jury hearing for imprisonment in excess of six months and should be certain that the court is aware that any sentence longer than six months requires that the defendant be allowed a jury trial.

In one case involving criminal contempt occurring before the grand jury, a sentence of three years was imposed.<sup>106</sup> Prosecution was by grand jury indictment for violation of 18 U.S.C. § 401.

A sentence for another criminal offense may be interrupted to compel the witness to serve an intervening contempt sentence so that an adjudication of criminal contempt not be

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<sup>104</sup>MacNeil v. United States, 236 F.2d 149 (1st Cir.), cert. denied, 352 U.S. 912 (1956).

<sup>105</sup>Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966); see also United States v. Twentieth Century Fox, 882 F.2d 656 (2d Cir. 1989) (organization has a right to a jury trial when fine imposed for criminal contempt exceeds \$100,000), cert. denied, 493 U.S. 1021 (1990).

<sup>106</sup>United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

deprived of its efficacy.<sup>107</sup> However, in In re Liberatore, 574 F.2d 78 (2d Cir. 1978), the court held that a federal court does not have the authority to interrupt a preexisting state-imposed criminal sentence during the period of confinement to compel the witness to serve the contempt sentence.

## 2. Mechanics

### a. Civil

Federal Rule of Criminal Procedure 42 is applicable to both civil and criminal contempt proceedings. However, the summary procedure provided for by Rule 42(a) is not appropriate for a refusal to testify before a grand jury. Rule 42(a) deprives the contemnor of procedural safeguards and is available only when immediate punishment is necessary to put an end to acts disrupting the proceedings. "Rule 42(b) prescribes the procedural regularity for all contempts in the federal regimes [footnote omitted] except those unusual situations envisioned by Rule 42(a) where instant action is necessary to protect the judicial institution itself."<sup>108</sup>

Rule 42(b) applies to civil contempt proceedings initiated under 28 U.S.C. § 1826, which permits a court to "summarily" order the confinement of a grand jury witness who refused

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<sup>107</sup>United States v. Liddy, 510 F.2d 669, 672-73 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975).

<sup>108</sup>Harris v. United States, 382 U.S. 162, 167 (1965).

to comply with an order to testify.<sup>109</sup> Thus, a potential contemnor is entitled to notice, a hearing, and a reasonable time to prepare his defense as prescribed by Rule 42(b), despite the use of the word "summarily" in § 1826(a).

It is not required that a potential contemnor have formal notice. Rule 42(b) only requires a reasonable time for the preparation of a defense; that is, to show "just cause" for refusing to respond. The determination of how much time is reasonable is within the discretion of the district court and will vary according to the circumstances of each case. One court, noting that contempt proceedings against grand jury witnesses often present complex issues of law and/or fact, was of the opinion that a five-day notice period should be adopted as the standard, absent a showing of some compelling need to shorten the time or of some reason why a longer time is needed.<sup>110</sup> Two days have been held adequate where no showing of just cause appeared to have been available.<sup>111</sup> Where the issues have been considered at an immunity hearing, the witness may have had adequate time to prepare, even though very little time elapses between the alleged contempt and the contempt hearing.

A witness who appears and refuses to testify before a grand jury is not yet in contempt. The refusal must be of a direct order of the court, such as a compulsion order under

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<sup>109</sup>In re Sadin, 509 F.2d 1252 (2d Cir. 1975); In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

<sup>110</sup>United States v. Alter, 482 F.2d 1016, 1023-24 (9th Cir. 1973).

<sup>111</sup>In re Sadin, 509 F.2d 1252, 1255-56 (2d Cir. 1975).

18 U.S.C. § 6002.<sup>112</sup> It should be clear, however, that the witness understands his obligation to testify and that, if he refuses, he can be held in contempt. If there is any doubt about this, or if the immunity order was obtained without the witness being present, it may be advisable to present the recalcitrant witness to the court, reading the relevant questions and responses, and secure a direct order of the court with an appropriate warning; thereafter, the witness should be returned to the grand jury and the request renewed. If the witness again refuses, contempt clearly occurs.

The hearing required under Rule 42(b) and 28 U.S.C. § 1826(a) may conceivably take place the same day and may depend on the nature of the defense, if any, offered by the witness. It may be advisable to consult with the local United States Attorney to ascertain the court's attitude in this regard. As discussed above, courts generally appear reluctant not to grant notice of at least several days when substantial issues are raised. In that event, the courts require an "uninhibited advisory hearing" that, at the very least, allows the witness to pursue all nonfrivolous defenses to the contempt charge. On the other hand, evidentiary hearings are not required in the absence of solid allegations that raise genuine issues. Material issues that have been raised include electronic surveillance of the witness or his counsel<sup>113</sup> and being subpoenaed

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<sup>112</sup>Such an order would be lacking if the witness were appearing pursuant to informal immunity.

<sup>113</sup>United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); see Gelbard v. United States, 408 U.S. 41 (1972).



for an improper purpose, e.g., to gather evidence in connection with a pending indictment.<sup>114</sup> A defendant is not entitled to a jury trial in a civil contempt proceeding.

Whether or not such issues are raised, the Government should be prepared to lay a foundation to establish the contempt, e.g., to establish the presence of a quorum on the date and time in question. This may be shown by an affidavit or testimony of the grand jury foreperson or secretary or by properly authenticated grand jury minutes. In establishing the contempt, it is probably best to read the relevant questions and responses from a properly authenticated transcript of the grand jury proceeding.

Section 1826(b) prohibits granting bail while an appeal from an order of confinement is pending if the appeal appears to be frivolous or taken for delay. An appeal from a confinement order under this section is to be disposed of "as soon as practicable" but not later than thirty days from the filing date. These provisions lend a certainty to the sanction consistent with the urgent public need to obtain testimony.<sup>115</sup> Thus, the statute, itself, affords a sound predicate for Government opposition to an application for bond pending appeal.

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<sup>114</sup>In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976).

<sup>115</sup>See United States v. Coplon, 339 F.2d 192 (6th Cir. 1964).

b. Criminal

Rule 42 of the Federal Rules of Criminal Procedure governs the procedures as to notice and hearing for both criminal and civil contempt. These procedures are discussed above under civil contempt.

Bail for a defendant found in criminal contempt of court is controlled by the provisions of Fed. R. Crim. P. 46.

The obstruction of justice statute (18 U.S.C. § 1510) was designed to deter coercion or intimidation of potential witnesses or informants from giving information to federal criminal investigators prior to initiation of judicial proceedings. It is not used in connection with contempt proceedings.

N. Defense Witness Immunity

The provisions of 18 U.S.C. §§ 6001-6003 are not to be used to compel testimony or production of other information on behalf of a defendant except in extraordinary circumstances where the defendant would be deprived of a fair trial without such testimony or other information. Attorneys for the Government should almost always oppose attempts to use compulsion statutes on behalf of defendants.<sup>116</sup>

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<sup>116</sup>See U.S.A.M. 9-23.214.

The immunity statute gives the prosecutor sole discretion to grant immunity. The court's role in the immunity process is purely ministerial, and a court may neither grant statutory immunity nor force the prosecutor to grant immunity.<sup>117</sup>

Defendants frequently seek immunity for their witnesses from the court. The most common arguments in favor of such grants are that denial of immunity would violate the due process clause of the 5th Amendment or the compulsory process clause of the 6th Amendment. Although there is general agreement among the circuits that defense witness immunity is justified in a few exceptional cases, there is a strong presumption against such immunity. First, judicial immunity decisions inevitably involve encroachment into areas of prosecutorial discretion. An immunized witness can still be prosecuted, but the Government bears a heavy burden of showing that the evidence is not derived from immunized testimony.<sup>118</sup> Thus, granting defense witnesses immunity may seriously impair the Government's ability to prosecute these witnesses later. Second, defense witness immunity would invite cooperative perjury by enabling

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<sup>117</sup>United States v. Heldt, 668 F.2d 1238, 1282 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); United States v. Davis, 623 F.2d 188, 192 (1st Cir. 1980); United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); United States v. Tindle, 808 F.2d 319, 325 (4th Cir. 1986), cert. denied, 490 U.S. 1114 (1989); United States v. Thevis, 665 F.2d 616, 638 (5th Cir. Unit B), cert. denied, 456 U.S. 1008 (1982); United States v. Pennell, 737 F.2d 521, 526 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); United States v. Taylor, 728 F.2d 930, 934 (7th Cir. 1984); United States v. Graham, 548 F.2d 1302, 1315 (8th Cir. 1977); United States v. Mendia, 731 F.2d 1412, 1414 (9th Cir.), cert. denied, 469 U.S. 1035 (1984); United States v. Chalan, 812 F.2d 1302, 1310 (10th Cir. 1987).

<sup>118</sup>Kastigar v. United States, 406 U.S. 441, 461 (1972).

codefendants to obtain immunity for each other and then exonerate each other in their testimony. For these reasons, courts have held there is no general right to defense witness immunity.<sup>119</sup>

The only case in which a guilty verdict has been reversed for failure to grant immunity to a defense witness is United States v. Morrison, 535 F.2d 223 (3d Cir. 1976). However, Morrison involved highly unusual circumstances, including allegations of prosecutorial abuse. Other circuits have also held that there may be cases in which Government abuse justifies dismissal if the witness is not immunized.<sup>120</sup> Three circuits have indicated that courts may have the inherent power to grant use immunity in cases of Government abuse.<sup>121</sup> None of these courts has ever ordered that such judicial immunity be granted. The Sixth and Tenth Circuits, while rejecting any inherent power on the part of the courts to grant immunity, have left open the

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<sup>119</sup>See United States v. Turkish, 623 F.2d 769, 775-76 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); United States v. Thevis, 665 F.2d at 639-40; United States v. Pennell, 737 F.2d at 527-28; United States v. Gottesman, 724 F.2d 1517, 1523-24 (11th Cir. 1984).

<sup>120</sup>See, e.g., United States v. Todaro, 744 F.2d 5, 8-10 (2d Cir. 1984) (prosecutorial overreaching to force the witness to assert the 5th Amendment), cert. denied, 169 U.S. 1213 (1985); United States v. Taylor, 728 F.2d 930, 935-36 (7th Cir. 1984) (clear abuse of discretion, intentional distortion of fact-finding process); United States v. Lord, 711 F.2d 887, 891-92 (9th Cir. 1983) (prosecutorial misconduct that prevents the witness from testifying).

<sup>121</sup>See United States v. Davis, 623 F.2d at 193; United States v. Thevis, 665 F.2d at 640-41; United States v. Sawyer, 799 F.2d 1494, 1506-07 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987); see also United States v. Gravely, 840 F.2d 1156, 1160 (4th Cir. 1988) (no requirement for Government to provide immunity to defense witnesses unless there is a "decisive showing of prosecutorial misconduct or overreaching").

question of whether prosecutorial misconduct might require the Government to choose between granting immunity to a defense witness and acquittal.<sup>122</sup>

In addition to situations involving prosecutorial misconduct, the Third Circuit in Government of the Virgin Islands v. Smith, 615 F.2d 964, 970-74 (3d Cir. 1980), held that defendants have a due process right to present exculpatory evidence and that judicial immunity may be granted to a witness who will provide exculpatory testimony.<sup>123</sup> Defense witness immunity is proper under Smith where immunity is properly sought in the district court, the witness is available to testify, the proffered testimony is essential and clearly exculpatory, and there is no strong Governmental interest against granting immunity.<sup>124</sup> The court stated that granting immunity is usually "virtually costless" to the Government because it can still prosecute the witness if it segregates the existing evidence against the witness or seeks a delay in the defendant's trial until sufficient evidence against the witness can be gathered.<sup>125</sup>

The only other circuit to hold that defense witness immunity can be used to make exculpatory evidence available to the defendant is the Second. Under the Second Circuit standard, immunity can be granted to defense witnesses if the Government has made discriminatory use of immunity to gain tactical advantage, and the testimony is material,

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<sup>122</sup>United States v. Pennell, 737 F.2d at 526-27; United States v. Chalan, 812 F.2d at 1310.

<sup>123</sup>See also United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1980).

<sup>124</sup>615 F.2d at 972.

<sup>125</sup>Id. at 973; United States v. Nolan, 540 F. Supp. 234 (W.D. Pa. 1982), is the only reported decision in which a court granted immunity under the Smith test.

exculpatory and not available elsewhere.<sup>126</sup> If the witness is a current or potential target of prosecution, there is no discrimination.<sup>127</sup>

O. When the Immunized Witness is Prosecuted

1. Introduction

A witness who has provided testimony at a grand jury or trial pursuant to a grant of immunity under 18 U.S.C. § 6001, et seq. or pursuant to a promise of informal immunity or in a state investigation pursuant to a state grant of immunity may nonetheless be prosecuted, even for a crime about which the witness testified. The witness can be prosecuted only if the Government can affirmatively prove that it did not use the witness' immunized testimony against the witness, for example, as direct evidence of the witness' involvement; and that it did not use information directly or indirectly derived from the testimony, for example, as a lead to developing evidence against the witness or in focusing the investigation on the witness.

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<sup>126</sup>United States v. Shandell, 800 F.2d 322, 324 (2d Cir. 1986).

<sup>127</sup>Id.

2. Constitutionality and limitations of protection granted under 18 U.S.C. § 6002

The protection granted to the witness by 18 U.S.C. § 6002, has been upheld as constitutional in the face of a challenge that use and derivative use immunity was violative of a witness' 5th Amendment privilege against self-incrimination. The Court in Kastigar v. United States, 406 U.S. 441 (1972), held that "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of privilege."<sup>128</sup> Prior to the passage of 18 U.S.C. § 6001, et seq., a witness was protected by transactional immunity. Under transactional immunity, a witness could not be prosecuted for the events about which he testified, even if the Government had independent evidence of the witness' participation in the crime. The use and derivative use immunity statute, however, confers a less sweeping protection. A witness may be prosecuted for the very activities about which he testifies if the Government can prove that it did not use the testimony.<sup>129</sup>

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<sup>128</sup>406 U.S. at 453.

<sup>129</sup>A witness derives no protection by way of the grant of immunity for criminal acts committed subsequent to the date of the immunized testimony. United States v. Quatermain, Drax, 613 F.2d 38, 42 (3d Cir.), cert. denied, 446 U.S. 954 (1980); United States v. Phipps, 600 F. Supp. 830 (D. Md. 1985). Only if the subsequent act is part of the criminal occupation or conspiracy as to which the testimony is compelled will that act be protected. See Marchetti v. United States, 390 U.S. 39, 54 (1968).

In Kastigar, the Court stated that the witness should be "in substantially the same position" after testifying under immunity as that witness would have been had the 5th Amendment privilege been claimed.<sup>130</sup> The key term here is "substantially." The immunity protection does not mean that "in order for a grant of immunity to be 'coextensive with the 5th Amendment privilege,' the witness must be treated as if he had remained silent."<sup>131</sup>

As the Court pointed out in United States v. Apfelbaum, 445 U.S. 115, 124-25 (1980), the statutory grant of immunity does not "bar the use of the witness' statements in civil proceedings, but only protects against use in subsequent criminal proceedings. Thus, testimony given under a statutory grant of immunity may be used against the witness in a subsequent civil proceeding. Further, the immunity granted for testimony before the grand jury or at the criminal trial does not cover the same individual if he is subpoenaed to testify at a civil deposition.<sup>132</sup> Thus, a private litigant cannot compel a witness' testimony at a civil deposition if the witness

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<sup>130</sup>406 U.S. at 458-59.

<sup>131</sup>United States v. Apfelbaum, 445 U.S. 115, 124 (1980).

<sup>132</sup>Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).



- a. Use of immunized testimony in a perjury or false statements prosecution

By its very language, the immunity statute does not protect the witness from a prosecution for perjury, 18 U.S.C. § 1621, or false statements to the grand jury or court, 18 U.S.C. § 1623.<sup>133</sup> The untruthful statements which form the basis of the indictment, the corpus delicti, may be used against the witness in the perjury or false statement prosecution.<sup>134</sup> In addition, uncharged statements in the immunized testimony of the witness may be used, for instance, to place the charged statements in context. As the Supreme Court stated in United States v. Apfelbaum, 445 U.S. 115, 131 (1980): "neither the immunity statute nor the 5th Amendment precludes the use of [the witness'] immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence."

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<sup>133</sup>The statute protects the witness from prosecution for prior perjury or false statements. See United States v. Soto, 574 F. Supp. 986, 991-92 (D. Conn. 1983), and cases cited therein.

<sup>134</sup>The statute may protect the witness against use of allegedly perjurious or false testimony in proceedings other than a prosecution. In United States v. Glover, 608 F. Supp. 861 (S.D.N.Y. 1985), aff'd, 779 F.2d 39 (2d Cir.), cert. denied, 475 U.S. 1026 (1986), the Government could not use alleged false testimony given by the witness under immunity at another's trial in the sentencing proceedings against the witness. In that case, however, the sentencing court had not observed the witness giving the testimony. In United States v. Martinez-Navarro, 604 F.2d 1184 (9th Cir. 1979), cert. denied, 444 U.S. 1084 (1980), the court which had heard testimony did consider immunized false testimony at the sentencing.

Furthermore, the immunity statute may not protect a witness who "otherwise fail[s] to comply with the order [of immunity]." In one case, a witness who testified falsely, both to the grand jury and at trial under a grant of immunity, was charged with not only false statements but a conspiracy to commit other crimes, to obstruct justice and to give false testimony. The court upheld the conspiracy count, stating that "the sweep of the exception against the use of immunized testimony . . . extends to any conduct aimed at frustrating the purpose of the grant of immunity."<sup>135</sup>

Division attorneys should be aware that if they intend to prosecute an immunized witness for perjury or false statements, only the regular case approval procedures must be met. If the prosecution is for a substantive offense, attorneys must follow the procedures for obtaining the Attorney General's approval, outlined in § 3, below.

- b. Prosecution of witness granted transactional immunity by operation of state statute

Quite often, states have antitrust statutes that provide a witness who is subpoenaed to testify in the state investigation with an automatic grant of transactional immunity. The federal prosecutor is not bound by the "transactional" language of the state statute. The witness' state immunity is honored in the federal courts only to the extent that the federal statutory immunity

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<sup>135</sup>United States v. Gregory, 611 F. Supp. 1033, 1037 (S.D.N.Y. 1985).

gives the witness protection. The federal prosecution may be brought if the federal Government can show that it made no direct or indirect use of the immunized testimony or of any leads derived therefrom.<sup>136</sup> Thus, a witness who received state transactional immunity is protected from federal prosecution only to the extent that use and derivative use immunity protects him.<sup>137</sup> Of course, a witness who has been compelled to testify under the federal immunity statute may be prosecuted by a state only if the state can show it used evidence independent of the immunized testimony.<sup>138</sup>

c. Prosecution following a grant of informal immunity

Under a grant of informal immunity, a witness may be protected by use and derivative use immunity, even though the prosecutor has not invoked the formal immunity process by seeking a court order compelling the witness' testimony under 18 U.S.C. § 6001, *et seq.* The prosecutor should carefully draft an informal immunity grant, in the form of a letter to the witness or counsel for the witness, so as to grant only the minimal immunity required by the

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<sup>136</sup>Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); see also United v. States v. Helmsley, \_\_ F.2d \_\_ (2d Cir. 1991).

<sup>137</sup>Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); see also United States v. Nemes, 555 F.2d 51, 53 (2d Cir. 1977).

<sup>138</sup>In re Grand Jury Proceedings, No. 84-4 (Hartmann), 757 F.2d 1580 (5th Cir. 1985), and cases cited therein.

Constitution, i.e., use and derivative use immunity.<sup>139</sup> Some courts have interpreted the prosecutor's language granting informal immunity to give that constitutional protection despite arguments by defendants that they were granted transactional immunity.<sup>140</sup>

d. Witness must claim privilege

A witness can receive constitutional immunity co-extensive with the 5th Amendment only when the witness has been compelled to testify following an assertion of the witness' 5th Amendment privilege (or an announcement of the intention to so claim). If, for example, the witness testifies voluntarily after receiving an explicit promise only of use immunity, then the Government is free to prosecute on the basis of evidence derived from the immunized testimony.<sup>141</sup> Such a promise ought to be in writing and unambiguous to be enforceable.

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<sup>139</sup>See § I., *supra*.

<sup>140</sup>See Kastigar v. United States, 406 U.S. 441 (1972); United States v. Kurzer, 534 F.2d 511, 513 n.3 (2d Cir. 1976); see also United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985) (informal immunity grant immunized statements given at a December, 1980 interview but not statements made voluntarily at a May, 1980 interview, even though the interviews covered the same subject matter).

<sup>141</sup>See United States v. Dornau, 491 F.2d 473 (2d Cir.) (witness testified voluntarily under the former Bankruptcy Act which explicitly granted only use immunity), cert. denied, 419 U.S. 872 (1974).

Otherwise, a court may interpret the promise of immunity to bestow the full Constitutional protection.<sup>142</sup>

e. No entitlement to pre-indictment relief

Pre-indictment relief for an immunized witness is generally not granted. An immunized witness who has not been indicted is not likely to prevail on a motion for a preliminary injunction to stop another grand jury investigation from focusing on him and returning an indictment. In Brennick v. Hynes, 471 F. Supp. 863 (N.D.N.Y. 1979), the plaintiff, who had been immunized and gave testimony under the Bankruptcy Act,<sup>143</sup> sought to enjoin state prosecutors from conducting any further grand jury proceedings directed against him and from seeking to indict him. The court found the motion to be premature and held that it was impossible to determine that any indictment returned by the grand jury would be tainted.<sup>144</sup>

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<sup>142</sup>But see United States v. Gutierrez, 696 F.2d 753 (10th Cir. 1982), cert. denied, 461 U.S. 909 (1983), where a witness voluntarily made a statement in return for protection from prosecution for those transactions about which she testified. The court found that she was not granted the minimal constitutional protection, stating that "[b]ecause [the witness], with full knowledge of her rights, voluntarily, agreed to make a statement, the constitutional principles enunciated in Kastigar v. United States [citations omitted], are inapplicable to her claim." 696 F.2d at 756 n.6.

<sup>143</sup>At the time the Brennick case arose, the Bankruptcy Act granted automatic use and, in the opinion of some courts, derivative use, immunity. The Act has been amended to require that an immunity order under 18 U.S.C. § 6001, et seq. be sought.

<sup>144</sup>But see United States v. Rice, 421 F. Supp. 871 (E.D.Ill. 1976), wherein the court in the particular circumstances of that case did grant pre-indictment relief.

3. Department of Justice procedures

The procedures required for prosecution of a witness immunized under 18 U.S.C. § 6001, et seq., are set forth at U.S.A.M. 9-23.400. The prosecutor must obtain the express written authorization of the Attorney General.<sup>145</sup> The Division attorney must set forth in the fact memo to the Assistant Attorney General in charge of the Antitrust Division the following:

1. the unusual circumstances that justify prosecution of the witness, e.g., the witness did not inculcate himself in his immunized testimony or other witnesses provided testimony that serves as the basis for the indictment.
2. the method by which the attorney will affirmatively establish either:
  - a) that all evidence necessary for a conviction was in the hands of the Government prior to the date of the witness' compelled testimony, or
  - b) that all evidence has come from sources independent of the witness' testimony and was not the result of focusing the investigation on the witness because of compelled disclosures.

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<sup>145</sup>No such authorization is necessary where the witness was granted act of production immunity only. See Ch. III § C.2.c.

3. how the attorney will show affirmatively that no other "non-evidentiary" use has been made or will be made of the compelled testimony in connection with the proposed prosecution, e.g., having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony.

The various policies inherent in the immunity provisions, as well as in the granting of informal immunity, are also detailed in the U.S. Attorney's Manual. The immunity statutes are to encourage free and full disclosure by a witness; thus, the attorney in deciding whether to prosecute the immunized witness should consider the extent to which the witness testified freely and fully in compliance with the order. The U.S. Attorney's Manual states that "less than complete testimony should not appear to be rewarded by a declination of prosecution in a case where independent evidence clearly exists and the situation otherwise warrants prosecution." This is a strong policy to argue to a court in a brief or oral argument responding to a motion to dismiss.

Because any case recommended against an immunized witness (other than a case for perjury or false statements) requires the approval of the Attorney General, Division attorneys should submit to Operations, with the fact memo, a draft "Action Memorandum" from the Assistant Attorney General to the Attorney General for the latter's signature that addresses the relevant issues discussed above. Staff should contact the Special Assistant in Operations regarding the format of the "Action Memorandum."

4. Scope of protection

The protection conferred by 18 U.S.C. § 6001, et seq., is a "sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom."<sup>146</sup> The proscription is twofold: 1) the prosecutor cannot use the testimony against the witness, e.g., as the basis for an indictment, as evidence at trial or to impeach the witness if he takes the stand;<sup>147</sup> and 2) the prosecutor cannot use the testimony to derive evidence against the witness, e.g., to obtain the name of a co-conspirator from the testimony and to use that co-conspirator's testimony as a basis for indictment.<sup>148</sup>

a. Indirect and derivative use

Clearly, the prosecutor cannot use the witness' immunized testimony as evidence to charge or try the witness. Nor can the prosecutor glean a lead from the testimony and then use the lead to charge or try the witness. But, the courts have come to differing conclusions as to what other uses are prohibited under the terms "direct and indirect" derivative use.

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<sup>146</sup>Kastigar v. United States, 406 U.S. 441, 460 (1972).

<sup>147</sup>New Jersey v. Portash, 440 U.S. 450 (1979); cf. United States v. Pantone, 634 F.2d 716, 722-23 (3d Cir. 1980) (following Portash that a defendant cannot be impeached by his own immunized grand jury testimony).

<sup>148</sup>See United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).



In Kastigar, the petitioners argued that the immunity statute did not provide adequate protection against derivative or indirect use of the immunized testimony because "enforcement officials may obtain leads, names of witnesses, or other information not otherwise available that might result in a prosecution."<sup>149</sup> The Supreme Court, however, held that the use and derivative use protection was sufficient protection and bars "the use of compelled testimony as an 'investigatory lead,' and . . . the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."<sup>150</sup>

1) The McDaniel case. Some circuits read Kastigar to mean that the prosecuting attorney's access to incriminatory immunized testimony of the witness makes it virtually impossible for the Government to show no indirect derivative use of that testimony. To these courts, once the information from the immunized testimony is read or heard, it cannot be eradicated from the prosecutor's mind. In the leading case supporting this position, United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973), the court held that the prohibition against indirect use "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy."<sup>151</sup>

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<sup>149</sup>406 U.S. at 459.

<sup>150</sup>Id. at 460.

<sup>151</sup>See also United States v. Semkiw, 712 F.2d 891 (3d Cir. 1983); United States v. Carpenter, 611 F. Supp. 768 (N.D. Ga. 1985).

Some salient facts about McDaniel should be noted when confronted with the case. The witness testified under an automatic state grant of transactional immunity and gave three volumes of self-incriminating testimony which was read by the United States Attorney.<sup>152</sup> McDaniel was indicted by the state and twice by the Federal Government, although the state indictment was dismissed before trial. McDaniel was tried and, convicted twice. On appeal, the convictions were vacated with an order remanding for an evidentiary hearing to determine if the prosecution was related to the subject matter of the immunized state testimony. Prior to this hearing, the Supreme Court decided Kastigar, and the Government therefore sought to show its independent evidentiary basis for the indictment, which request was denied at the hearing. The only issue on the second appeal was whether the Government had used the immunized testimony. Even though the district court's opinion upon remand stated that had the court considered the question of use, it would have found that the Government sustained its burden of showing independent evidence, the Eighth Circuit rejected the district court's position that the Government had met its burden. The Eighth Circuit agreed that there was an independent source of the evidence, but held that such evidence did not satisfy the Government's burden that it "did not use [the testimony] in some significant way short of introducing tainted evidence."<sup>153</sup> The court found: 1) the witness fully confessed in the transcripts, 2) these transcripts were read in

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<sup>152</sup>Apparently, at the time the witness testified and at the time the U.S. Attorney read the transcript, neither the State's Attorney nor the U.S. Attorney was aware of the automatic grant of statutory immunity.

<sup>153</sup>482 F.2d at 311.

their entirety three and eight months, respectively, before the indictments, and 3) when he read the transcripts, the U.S. Attorney was unaware of the immunity and thus had "no reason to segregate McDaniel's testimony from his other sources of information."<sup>154</sup> The court stated that the district court had not taken into account "the immeasurable subjective effect" and concluded that "the testimony could not be wholly obliterated from the prosecutor's mind in his preparation and trial of the case."<sup>155</sup>

2) Cases contra to McDaniel. Relying upon language in McDaniel, defendants have argued that once the prosecutor has read the transcript, such a reading imparts a confidence or other benefit that the prosecutor otherwise would not have and thus constitutes an impermissible indirect use. However, most courts have refused to apply such a broad rule that in effect creates a per se rule that exposure to immunized testimony, alone, results in an impermissible use.<sup>156</sup>

Some circuit courts that do not follow McDaniel reason that McDaniel goes too far and creates, in effect, transactional immunity.<sup>157</sup> The reasoning of McDaniel and the cases relying on McDaniel is that under Kastigar, the use and derivative use immunity grant should

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<sup>154</sup>Id. at 311.

<sup>155</sup>Id. at 312; see also In re Grand Jury Proceedings, 497 F. Supp. 979 (E.D. Pa. 1980).

<sup>156</sup>See United States v. Mariani, 851 F.2d 595 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); United States v. Pantone, 634 F.2d 716 (3d Cir. 1980); United States v. Jones, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Crowson, 828 F.2d 1427 (9th Cir. 1987), cert. denied, 488 U.S. 831 (1988).

<sup>157</sup>See United States v. Mariani, 851 F.2d supra; United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).

leave the witness in the same position as if the witness had claimed the 5th Amendment privilege. The Kastigar decision, however, reaffirms the language of Murphy v. Waterfront Commissioner, 378 U.S. 52 (1964), that the witness be left "in substantially the same position as if the witness had claimed his privilege."<sup>158</sup>

In United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985), the witness had given incriminating testimony pursuant to a grant of use and derivative use immunity under 18 U.S.C. § 6001, et seq., before Assistant United States Attorney ("AUSA") Stubbs, and AUSA Stubbs participated in the decision to prosecute Byrd. The grand jury that voted the indictment at issue heard only the testimony of an FBI Agent, who had read the immunized testimony, but who summarized both the testimony of witnesses, excluding Byrd, who had appeared before a previous grand jury and the contents of interviews conducted prior to the time Byrd testified. The district court dismissed the indictment. The court of appeals held that the district court incorrectly applied a test stricter than that required by Kastigar. The court held that the Government need not prove as part of its burden that its "decision to indict was not induced by the content of Byrd's immunized testimony," and that Kastigar did not require inquiry into the prosecutors' motives.<sup>159</sup> The court found that as long as all the independent evidence presented to the grand jury was sufficient to establish probable cause, the existence of such evidence is

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<sup>158</sup>441 U.S. at 458-59; see also discussion in United States v. Apfelbaum, 445 U.S. 115, 124-27 (1980), in which the Supreme Court expressly states that for protection of the grant of immunity to be "coextensive" with . . . the Fifth Amendment, it need not treat the witness as if he had remained silent."

<sup>159</sup>765 F.2d at 1530.

"deemed to raise a presumption that the decision to indict was not tainted."<sup>160</sup> To require the Government to prove that the immunized testimony did not enter into the decision to prosecute would be tantamount to treating the grant of use immunity as transactional immunity and would create an impenetrable barrier against prosecution.

b. Use of the fact of testimony

The prohibition against use and derivative use of immunized testimony precludes use of any of the content or substance of the testimony, but does not necessarily preclude use of the fact that a witness testified.<sup>161</sup>

5. Taint hearing

The fact that a witness testified under a grant of immunity does not in itself present an insurmountable barrier to prosecution.<sup>162</sup> The Government, however, bears an affirmative burden. The Supreme Court in Murphy v. Waterfront Commission, 378 U.S. 52 (1964), recognized the necessity for the Government to bear the burden of showing that the "evidence is

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<sup>160</sup>Id. at 1530-31.

<sup>161</sup>See United States v. Jones, 590 F. Supp. 233 (N.D. Ga. 1984).

<sup>162</sup>United States v. Catalano, 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974); United States v. Pantone, 634 F.2d 716 (3d Cir. 1980); United States v. Zielezinski, 740 F.2d 727 (9th Cir. 1984); United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).

not tainted by establishing that they had an independent, legitimate source for the disputed evidence."<sup>163</sup> In Kastigar, the Supreme Court held that the Government's burden of proof "is not limited to the negation of taint, rather it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled."<sup>164</sup> Thus, once the defendant makes a prima facie showing that he gave immunized testimony, the Government must be prepared to go forward to show no use of that testimony and its independent evidence. However, the Government is not required to negate all abstract possibilities of taint.<sup>165</sup>

a. Need for an evidentiary hearing

An evidentiary hearing on a Kastigar issue is not required, the decision lying within the sound discretion of the trial court.<sup>166</sup> In some cases, courts decide the question of whether the Government made any direct or indirect use or derivative use of the testimony on the pleadings and exhibits attached and made part of the record.<sup>167</sup> The district court in a case brought by the

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<sup>163</sup>378 U.S. at 79 n.18.

<sup>164</sup>406 U.S. at 460.

<sup>165</sup>United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).

<sup>166</sup>Id. at 1580.

<sup>167</sup>Id.

Antitrust Division, United States v. Beachner Construction Co., 538 F. Supp. 718 (D. Kan. 1982), denied the witness' motion for an evidentiary hearing after reading the affidavits and transcripts. The court, relying on United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980), found "that the documentary evidence produced by the Government pursuant to the Court's order conclusively shows that the Government previously possessed all material facts revealed by defendant's immunized testimony."<sup>168</sup> Nevertheless, some courts require an evidentiary hearing although there is no constitutional requirement for a hearing.<sup>169</sup>

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<sup>168</sup>See also United States v. Komatz Construction Co., Inc., et al., Crim. No. 85-40007 (D.S.D. 1985); United States v. Thanasouras, 368 F. Supp. 534, 537 (N.D. Ill. 1973); cf. United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985).

<sup>169</sup>In United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975), the court held that the district court had no discretion to dismiss the indictment without giving the Government the opportunity to prove lack of taint and that the failure to hold an evidentiary hearing was "clear error." 511 F.2d at 822 n.4. The court in United States v. Zielezinski, 740 F.2d 727 (9th Cir. 1984), remanded for an evidentiary hearing on the basis of the court's supervisory power and, therefore, did not reach the issue of whether a taint hearing was constitutionally required. In United States v. Tantalo, 680 F.2d 903, 908 (2d Cir. 1982), the court suggests that the due process clause of the Constitution demands an evidentiary hearing on the issue of the use of the witness' immunized testimony and held that a hearing is required. Cf. United States v. Nemes, 555 F.2d 51, 55 (2d Cir. 1977); United States v. Semkiw, 712 F.2d 891 (3d Cir. 1983).

b. The Government's burden of proof to show independent evidence

Whether or not a hearing is mandated, the Government still bears an affirmative and heavy burden of proof.<sup>170</sup> Several courts have reiterated this standard without trying to fit it into the traditional categories.<sup>171</sup> Other circuits have held that the Government's burden is a preponderance of the evidence.<sup>172</sup>

The issue as to whether any use has been made of the immunized testimony is a question of fact.<sup>173</sup> Therefore, the trial court's findings can be reversed on appeal only if clearly erroneous.<sup>174</sup>

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<sup>170</sup>Kastigar v. United States, 406 U.S. 441 (1972).

<sup>171</sup>See United States v. Catalano, 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973).

<sup>172</sup>United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978); United States v. McDonnell, 550 F.2d 1010 (5th Cir.), cert. denied, 434 U.S. 835 (1977); United States v. Zielezinski, 740 F.2d 727, 734 (9th Cir. 1984); United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988); see also United States v. Smith, 580 F. Supp. 1418 (D.N.J. 1984) (citing United States v. Hossbach, 518 F. Supp. 759 (E.D. Pa. 1980)).

<sup>173</sup>United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978); United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976); United States v. Dynalectric, 859 F.2d at 1578.

<sup>174</sup>United States v. Romano, 538 F.2d *supra*; United States v. Provenzano, 620 F.2d 985, 1005 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Jones, 542 F.2d 186, 199 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Shelton, 669 F.2d 446, 464 (7th Cir.), cert. denied, 456 U.S. 934 (1982); United States v. Rogers, 722 F.2d 557 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984); United States v. Dynalectric, 859 F.2d at 1578.



c. Meeting the burden of proof

The burden on the Government is to prove the following: 1) the Government had independent evidence that served as a basis for the indictment; 2) the Government did not use the immunized testimony as a basis for indictment; 3) the Government will not use any of the testimony of the witness against him at trial; 4) the Government did not obtain any leads from the witness' testimony to obtain a basis for the indictment or as potential proof at trial; and 5) the Government has not made use of the witness' immunized testimony in focusing the investigation on the witness, in making the decision to prosecute<sup>175</sup> or in formulating its strategy in its preparation for trial.

To meet its burden, the Government can submit to the court, in camera, the evidence obtained prior to the grant of immunity. This evidence should be considered independently.<sup>176</sup> In United States v. Romano, 583 F.2d 1 (1st Cir. 1978), the Government submitted a memorandum it had prepared prior to the immunized testimony summarizing all the evidence the Government had prior to the defendant's immunized testimony before a United States Senate

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<sup>175</sup>See, however, discussion of United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985), in § 0.4.a, supra and United States v. Helmsley, \_\_ F.2d \_\_ (2d Cir. 1991).

<sup>176</sup>See United States v. First W. State Bank of Minot, N.D., 491 F.2d 780, 783 (8th Cir.) (Federal Bureau of Investigation reports made prior to the date of the testimony and the minutes of two prior grand jury sessions were "independent sources"), cert. denied, 419 U.S. 825 (1974); see also United States v. Lipkis, 770 F.2d 1447 (9th Cir. 1985).

Subcommittee.<sup>177</sup> Where the Government was able to show that the witness was a target of the investigation prior to his immunized testimony, this has weighed in favor of the Government.<sup>178</sup>

The Government may also rely upon the amount of information contained in the questions it asked of the witness. In United States v. Catalano, 491 F.2d 268 (2d Cir.), cert. denied, 419 U.S. 825 (1974), the court found that the Government met its affirmative burden, in part, because most of the questions asked of the immunized witness by the prosecutor in the grand jury session were leading, which indicated that the prosecutor already knew the answers and thus already had the evidence.

The quality and quantity of a witness' testimony is relevant to the court's determination of whether such testimony was used to indict, provide leads, or to prepare for trial or plea bargaining. Where the defendant provides little or no information in his immunized testimony, and the Government can show that it had substantial incriminating information prior to, or apart from, defendant's immunized testimony, some courts have found it impossible for the Government to have gained any substantive information from defendant's testimony. This is especially the case where the defendant claims lack of recollection or exculpates himself.<sup>179</sup>

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<sup>177</sup>See also United States v. Willis, 583 F.2d 203 (5th Cir. 1978); United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985). But see United States v. Carpenter, 611 F. Supp. 768 (N.D. Ga. 1985).

<sup>178</sup>See United States v. Beachner Constr. Co., 538 F. Supp. 718 (D. Kan. 1982).

<sup>179</sup>See United States v. Catalano, 491 F.2d *supra*; United States v. Pantone, 634 F.2d 716, 722 (3d Cir. 1980); United States v. Jones, 542 F.2d 186 (4th Cir.), cert. denied, 426 U.S. 922 (1976); United States v. Dynalectric Co., 859 F.2d 1559, 1579-80 (11th Cir. 1988).

In addition to showing that the defendant was already the focus of an investigation and that the Government had prior evidence against the defendant, the Government also may need to show that the substance of the defendant's immunized testimony did not lead to the decision of other witnesses to testify against the defendant.<sup>180</sup> The attorney for the Government may introduce affidavits with its papers or at the taint hearing in which co-defendants or witnesses who have pled and cooperated certify that the defendant's immunized testimony did not lead to their decision to plead and cooperate.

At a minimum, the Government must offer the transcript of the defendant's immunized testimony and an affidavit of the prosecuting attorney setting forth what evidence he had prior to such testimony, the independent sources of evidence, and what effort was made to segregate the immunized testimony from the prior and other independent evidence.<sup>181</sup> The attorney may supplement this showing with affidavits of investigators, and possibly co-defendants or potential witnesses who have pled guilty or otherwise have cooperated, and the court reporter (e.g., as to the sequence of witnesses). Where courts have relied on Government affidavits, as well as transcripts of the immunized testimony and other prior testimony, the affidavits have contained more than conclusory statements from the Government. Thus, the Government should be

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<sup>180</sup>See United States v. Kurzer, 534 F.2d 511, 517 (2d Cir. 1976); United States v. Beachner, 583 F. Supp. supra; United States v. Jones, 590 F. Supp. 233 (N.D. Ga. 1984).

<sup>181</sup>Where the prosecutor is aware that the proposed defendant has testified under immunity, the prosecutor can segregate the immunized testimony from other sources of evidence. Where an attorney is unaware that he read testimony that was immunized, this segregation may be almost impossible. See United States v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973). But see United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).

prepared with an affidavit of the prosecutor, setting forth specific facts and the sequence of events.

- d. Meeting the burden of proof with respect to immunized state testimony

When the immunized testimony was given before a state grand jury, a showing that a "Chinese wall" existed between the state and federal investigations is a factor, but may not be sufficient in itself. In United States v. Smith, 580 F. Supp. 1418, 1422-23 (D.N.J. 1984), evidence that the state and federal investigations co-existed but that no information passed from state sources to federal investigators together with the Federal Government's claim that it never saw the witness' immunized testimony was but one element of the Government's burden of proof. The court in Smith held a 26-day pre-trial evidentiary hearing in which "federal officials from all phases of the Government's investigation of the defendant testified and were fully cross-examined by defendant's counsel."<sup>182</sup> The prospective trial attorney testified to the evidence that would be introduced at trial and the sources of that evidence, the witnesses to be called at trial, the substance of their testimony, the exhibits that the witnesses would identify, any contact the witnesses had with the defendant's immunized testimony, the time when the trial attorney decided to use particular evidence and the basis for each decision. Clearly, such an

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<sup>182</sup>580 F. Supp. at 1425.

extensive hearing is a discovery tool for the defendant. The attorney for the Government should, therefore, consider the possibility that such discovery may occur when deciding to prosecute an immunized witness.

In United States v. Komatz Construction Co., Inc., et al., Crim. No. 85-40007 (D.S.D. 1985), however, the court relied upon the Government's affidavit that it had gained no information other than that made publicly available and had had no access to defendants' immunized testimony in a concurrent state investigation and denied the defendants' motions to dismiss.<sup>183</sup>

e. Who must testify at the taint hearing

The Government is not required to call each prospective trial witness at a taint hearing. The defense in United States v. Smith, 508 F. Supp. 1418 (D.N.J. 1984), argued that the Government should do so; however, the court rejected that argument: "The focus of a Kastigar hearing is necessarily on the federal investigators and prosecutors and the question of their use or derivative use of defendant's immunized testimony."<sup>184</sup> This reasoning should apply as well when the witness' immunized testimony was given before a federal grand jury.

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<sup>183</sup>See also United States v. Helmsley, \_\_ F.2d \_\_ (2d Cir. 1991).

<sup>184</sup>580 F. Supp. at 1431 n.11; see also United States v. Romano, 583 F.2d 1 (1st Cir. 1978); United States v. Seiffert, 357 F. Supp. 801 (S.D. Tex. 1973), aff'd, 501 F.2d 974 (5th Cir. 1974).

f. Timing of the hearing

The timing of the taint hearing is discretionary with the trial court; the resolution of the immunity issue may be "at a pre-trial hearing, during trial or at a post-trial hearing or 'a combination of these alternatives.'"<sup>185</sup> Some courts, however, read Kastigar to require a pre-trial hearing.<sup>186</sup> An argument for a post-trial hearing is that the court can compare the evidence admitted at trial with the subject matter of the defendant's immunized testimony. The court in United States v. Deerfield Specialty Papers, Inc., 501 F. Supp. 796, 803 (E.D. Pa. 1980), ruled that the Kastigar hearing should be deferred until the completion of the trial "notwithstanding the suggestion made in Kastigar that such matters should be considered on a pretrial basis." The court set forth a number of factors to be considered: 1) whether the Government will have to expose its entire case during the hearing, 2) whether fragmentation of the trial will occur, 3) whether a delay in the trial will be required, and 4) whether and to what degree prejudice will accrue.<sup>187</sup>

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<sup>185</sup>United States v. DeDiego, 511 F.2d 818, 824 (D.C. Cir. 1975); United States v. Tantalo, 680 F.2d 903, 909 (2d Cir. 1982); United States v. Jones, 542 F.2d 186, 198 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

<sup>186</sup>United States v. First W. State Bank of Minot, N.D., 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974); United States v. Smith, 580 F. Supp. 1418, 1424-25 (D.N.J. 1984).

<sup>187</sup>United States v. First W. State Bank of Minot, N.D., 491 F.2d 780 (8th Cir.), cert. denied, 419 U.S. 825 (1974); United States v. Smith, 580 F. Supp. 1418, 1424-25 (D.N.J. 1984).

If there is a problem of extensive pre-trial publicity arising from a Kastigar hearing, it has been suggested that the court hold the taint hearing in camera.<sup>188</sup>

6. Use of the grand jury which heard immunized testimony to indict

Some courts, most notably the Second Circuit in United States v. Hinton, 543 F.2d 1002 (2d Cir.), cert. denied, 429 U.S. 980 (1976), have held as a matter of law, and fundamental fairness, that an indictment voted by the same grand jury that heard the witness' immunized testimony must be dismissed.<sup>189</sup> Other circuits have declined to follow such a flat prohibition. In United States v. Zielezinski, 740 F.2d 727 (9th Cir. 1984), the court pointed out that Hinton, on its facts, was an extreme case and that its rule "was not constitutionally compelled."<sup>190</sup> The court went on to say, however, that the better course was for a prosecutor to present the indictment to a new, untainted grand jury to "avoid the appearance of impropriety".<sup>191</sup>

Even in the Second Circuit, there are recognized exceptions to the Hinton rule. In United States v. Tucker, 495 F. Supp. 607 (E.D.N.Y. 1980), the court made an exception to the "same grand jury" prohibition when at the time of the witness' first appearance, the grand jury was investigating other substantive offenses and the witness was asked no questions related to

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<sup>188</sup>See United States v. DeDiego, 511 F.2d 818, 824 (D.C. Cir. 1975).

<sup>189</sup>See also United States v. Bloom, 586 F. Supp. 939 (S.D. Fla. 1984).

<sup>190</sup>Id. at 729; see also United States v. Garrett, 797 F.2d 656 (8th Cir. 1986).

<sup>191</sup>Id. at 733.

the offenses charged. In addition, Tucker recognized an exception when the charge against the witness is perjury or making false statements to the grand jury.

The prudent course for the attorney who wants to present an indictment charging a person who has testified under a grant of immunity, formal or informal, is to make that presentation to a different grand jury from that which heard the immunized testimony.



## VI. MULTIPLE REPRESENTATION/CONFLICTS OF INTEREST

### A. Introduction

Multiple or dual representation (i.e., when a lawyer or law firm represents more than one client in the same case or investigation) occurs frequently in antitrust grand jury investigations and may lead to conflicts of interest. Conflicts may arise when an attorney represents a corporation and all or several individuals employed by the corporation. Not infrequently, more than one of a target company's officers are also targets and represented by the same lawyer. Even when each target has a different lawyer, the target company may pay all the legal fees. Occasionally, two individual targets from different companies are represented by the same lawyer or law firm, and less frequently, there may be a conflict between a lawyer's present client and his former client who are both subjects or targets of the same investigation.<sup>1</sup>

Multiple representation and attendant conflicts of interest create problems for the Government, the lawyer, the clients and the court. Among the problems created by multiple representation are improper impediments to the grand jury investigation by inhibiting cooperation that might otherwise be forthcoming, and violations of an attorney's ethical obligations to his client and to the court. Finally, and perhaps most significantly, since "[n]o man can serve two masters" (Matt. 6:24), an attorney serving two clients may favor one at the expense of another.

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<sup>1</sup>See Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L.J. 1 (1983).

Initially, multiple representation may impede the grand jury investigation by rendering cooperation less likely. For example, under the immunity statute, 18 U.S.C. § 6003, the testimony of a witness may be compelled where it "may be necessary to the public interest". Commonly, a prosecutor relies on a proffer of the prospective witness' testimony to make this public interest determination based on the importance of the proffered testimony and the relative culpability of the witness, among other factors. But if an attorney is representing multiple clients some of whom are targets of the investigation, he might be unwilling to advise his clients to cooperate with the Government by proffering testimony in the hope of obtaining immunity. As a result, the prosecutor will have to determine whether to grant immunity without the benefit of a proffer. Thus, those with greater culpability may receive immunity and escape prosecution.<sup>2</sup>

Multiple representation inhibits grand jury cooperation in other ways and also creates an ethical dilemma for defense counsel that may result in one client's interests being favored over another's. Although most employees view the company's interest as their own, this may not always be true. For example, if a non-target employee is represented by his employer's lawyer, the lawyer may not advise the employee to consider cooperation with the Government as an option, and the employee may be reluctant to request another attorney, who might offer such advice, if he thinks he will have to pay the fee. Thus, the Government loses a cooperative witness.

Even where the employee has criminal exposure, his interests may be sacrificed for those of his employer as a result of dual representation. For example, a middle level corporate employee (e.g., chief estimator or branch manager) might become a target of an investigation but also might be able to avoid prosecution by agreeing to

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<sup>2</sup>Since virtually all Sherman Act cases require the testimony of co-conspirators, the Government's objective is to use the least culpable individuals to prosecute the most culpable ones.

cooperate with the Government in exchange for a grant of immunity. The defense lawyer representing this individual as well as the target company or other targets is faced with a dilemma: cooperation with the Government is preferable to being prosecuted from the individual's perspective, but that cooperation may enable the Government to prosecute other clients of the attorney.<sup>3</sup> Under these circumstances, an attorney simply cannot be expected to provide objective advice to the individual concerning his legal options. The damage caused by multiple representation is particularly difficult to assess because the evil frequently "is in what the advocate finds himself compelled to refrain from doing."<sup>4</sup>

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<sup>3</sup>At the grand jury stage, the client has not yet been indicted and counsel's primary duty is to prevent his indictment. If a witness represented by an attorney with a conflict ultimately is indicted and convicted, he may claim that he was denied effective assistance of counsel due to the conflict of interest. See United States v. Canessa, 644 F.2d 61 (1st Cir. 1981); United States v. Lutz, 621 F.2d 940 (9th Cir. 1980), cert. denied, 449 U.S. 859 (1981). These claims rarely will be successful, however, since the 6th Amendment right to counsel does not apply to grand jury proceedings. See, e.g., United States v. Mandujano, 425 U.S. 564, 581 (1976) (dictum) (plurality opinion); Kirby v. Illinois, 406 U.S. 682 (1972); Hannah v. Larche, 363 U.S. 420 (1960); In re Groban, 352 U.S. 330 (1957); United States v. DeRosa, 438 F. Supp. 548, 551 (D. Mass. 1977), aff'd, 582 F.2d 1269 (1st Cir. 1978).

<sup>4</sup>Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (emphasis added). See generally Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 125-35 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 Va. L. Rev. 939, 941-50 (1978).

## B. The Law Regarding Multiple Representation

Resolution of conflict of interest problems resulting from multiple representation turns on the facts of each case, on the particular jurisdiction where the grand jury is sitting, and on the individual district judge. Attorney disqualification is within the discretion of the district judge supervising the grand jury and that decision will not be reversed on appeal in the absence of abuse.<sup>5</sup> In determining whether to move to disqualify counsel because of multiple representation, two principal legal sources should be consulted – the case law and the Model Code of Professional Responsibility.<sup>6</sup>

### 1. Leading cases

The case law regarding multiple representation is still evolving and varies from jurisdiction to jurisdiction. Thus, if a multiple representation problem arises, the law of the particular jurisdiction should be consulted. Some common principals may be gleaned from the cases, however, and some representative cases described below may serve as a useful starting point for researching this problem. In addition, the Supreme Court recently provided some guidance in conflict of interest cases in Wheat v. United States, 486 U.S. 153 (1988). The principles of Wheat were

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<sup>5</sup>See Wheat v. United States, 486 U.S. 153 (1988); In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); In re Gopman, 531 F.2d 262, 266 (5th Cir. 1976).

<sup>6</sup>Attorneys should also check the local rules as they may contain provisions that relate to multiple representation.

applied to multiple representation in the grand jury stage in In re Grand Jury Proceedings, 859 F.2d 1021 (1st Cir. 1988).

Initially, the Government has standing to request a hearing to determine the existence of a conflict of interest to protect the integrity of any prosecution,<sup>7</sup> and to fulfill its obligation to advise the court regarding matters concerning the Code of Professional Responsibility.<sup>8</sup> A hearing similar to that contemplated under Fed. R. Crim. P. 44(c)<sup>9</sup> should be requested so that the court can explore any conflict of interest, and if such a conflict exists, the court can inquire whether the clients knowingly, intelligently and voluntarily have waived their right to conflict-free representation.<sup>10</sup> To avoid allegations of impropriety or reversal of a disqualification order, all affected parties and their counsel should be present at the hearing.<sup>11</sup>

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<sup>7</sup>See United States v. Duklewski, 567 F.2d 255 (4th Cir. 1977).

<sup>8</sup>In re Gopman, 531 F.2d 262, 265 (5th Cir. 1976).

<sup>9</sup>Rule 44(c) outlines procedures for avoiding circumstances that may give rise to post-conviction 6th Amendment claims (See United States v. Akinseye, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987)) and provides in pertinent part that:

the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to effective assistance of counsel . . . unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

<sup>10</sup>See United States v. Duklewski, 567 F.2d 255, 257 (4th Cir. 1977).

<sup>11</sup>Id. at 256-57 (disqualification of defense counsel after ex parte hearing with the Government and without providing the defendant with the factual basis for disqualification was improper); see also United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); In re Paradyne Corp., 803 F.2d 604, 607, 612 (11th Cir. 1986). But cf. United States v. Akinseye, 802 F.2d at 745 (no disqualification hearing was held but the trial court discussed joint representation with the

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A district court is endowed with supervisory powers to regulate the professional conduct of lawyers who represent clients in criminal trials and the court need not wait for an actual conflict to arise but may "nip any potential conflict of interest in the bud" by disqualifying the offending attorney.<sup>12</sup> The Supreme Court's decision in Wheat specifically held that:

a presumption in favor of [defendant's] counsel of choice . . . may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court.<sup>13</sup>

There is no real consensus on what constitutes an actual or potential conflict sufficient to require separate counsel. But if a court can be convinced that a conflict is actual, disqualification is almost assured. For example, in In re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977), aff'd, 576 F.2d 1071 (3d Cir.), cert. denied, 439 U.S. 953 (1978), the supervising court found an actual conflict where one of the lawyer's clients (some of whom were prospective defendants) was offered immunity. While the court ordered the immunized witness to obtain separate counsel, it believed that disqualification was premature with respect to the other non-immunized witnesses

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<sup>11</sup>(...continued)  
defendants during an appeal of a magistrate's bond order).

<sup>12</sup>In re Gopman, 531 F.2d at 265-66 (quoting Tucker v. Shaw, 378 F.2d 304, 307 (2d Cir. 1967)); see Pirillo v. Takiff, 462 Pa. 511, 520, 341 A.2d 896, 905 (1975), cert. denied, 423 U.S. 1083 (1976).

<sup>13</sup>486 U.S. at 164; see also United States v. Moscony, 927 F.2d 742 (3d Cir. 1991).

since there was only a potential conflict. In In re Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976), an attorney was disqualified where he represented several subjects and four non-subjects before the grand jury. The attorney had an actual conflict of interest in representing the non-subjects (two of whom were offered immunity) because their testimony could be detrimental to others represented by the attorney. In In re Investigative Grand Jury Proceedings, 480 F. Supp. 162 (N.D. Ohio 1979), appeal dismissed, 621 F.2d 813 (6th Cir. 1980), cert. denied, 449 U.S. 1124 (1981), the court found an actual conflict where an attorney represented two individual targets, the target union and 16 subjects of the grand jury investigation. While no witness had been offered immunity, the court believed that it would be a burden and cause significant delay to allow each witness to assert the 5th Amendment privilege. Moreover, if any witness was offered immunity, a conflict was assured.

Some courts have held disqualification proper where there is only a potential conflict. For example, in In re Gopman, 531 F.2d 262 (5th Cir. 1976), the court disqualified an attorney from representing a union and several union officials before a grand jury investigating possible violations of the Labor Management Reporting and Disclosure Act (Landrum-Griffin, 29 U.S.C. §§ 401, et. seq.). None of the clients was a target although each asserted his 5th Amendment privilege and refused to produce subpoenaed union documents. The court found that there was a potential conflict sufficient to warrant disqualification because the union's interest in full disclosure of the records conflicted with the individual's interest, and thus the lawyer could not "aggressively and diligently pursue the [union's interest] while advising the union's own officials on whether to produce the records."<sup>14</sup> In In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977), two attorneys (one of whom was a target) represented ten witnesses, three of whom were targets of the grand jury investigation. The court

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<sup>14</sup>531 F.2d at 266.

believed that the attorneys could not adequately represent the interests of each witness because, while cooperation with the prosecution might benefit one client, such cooperation might not benefit others. The court also found that several witnesses were improperly asserting the 5th Amendment privilege to protect others, rather than themselves. Therefore, the court held that "the public's right to the proper functioning of a grand jury investigation, and the judge's duty to maintain the integrity of the grand jury he supervised" justified disqualification.<sup>15</sup> In ordering disqualification, other courts have similarly relied on the public interest, the need for witness cooperation before the grand jury, and the need to protect generally the integrity of the grand jury.<sup>16</sup>

Other courts, however, have been less willing to order disqualification in the absence of an actual conflict.<sup>17</sup> For example, in In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976) (Washington Post), the court held that an attorney retained by a target union to advise 21 union employees, who were not subjects of the grand jury investigation, was prematurely disqualified. The court rejected the Government's contention that the investigation was obstructed because several witnesses made unwarranted assertions of the 5th Amendment privilege or because the Government was unable to discuss the possibility of immunity with these witnesses. The court noted that, rather than seeking disqualification, the Government could and should grant immunity to those witnesses who properly invoke the privilege. The court was unmoved by the Government's

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<sup>15</sup>563 F.2d at 655-57.

<sup>16</sup>See, e.g., Pirillo v. Takiff, 341 A.2d at 904 (allowing two attorneys to represent all members of the Philadelphia Fraternal Order of Police, which paid the lawyers' fees and espoused a policy of not cooperating with an investigation, had a "chilling effect" on cooperation).

<sup>17</sup>The Supreme Court's decision in Wheat, which explicitly sanctions disqualification where there is a potential conflict, might persuade more courts to grant disqualification even where there is only a potential conflict.



protestations that this procedure would require it to grant blind immunity. Similarly, in In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d 1009 (3d Cir. 1976), the court reversed an order disqualifying an attorney who represented nine non-target witnesses, each of whom asserted the 5th Amendment privilege. The court held that the multiple representation and assertions of privilege alone were insufficient to interfere with the witnesses' choice of counsel. Nor was it persuaded by the Government's argument that multiple representation interfered with offers of immunity and plea negotiations.<sup>18</sup>

Unfortunately, there seems to be no agreement on when a conflict is actual as opposed to potential. What some courts consider potential conflicts (e.g., In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (only a potential conflict where two of the lawyer's clients were immunized)), others consider actual conflicts (e.g., In re Grand Jury Proceedings, 428 F. Supp. at 277 (an actual conflict exists where attorney represented four witnesses, two of whom were offered immunity)).<sup>19</sup> Some points do seem clear, however. Multiple representation

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<sup>18</sup>In both Washington Post and In re Grand Jury Impaneled Jan. 21, 1975, one of the principal difficulties was the lack of a record sufficient to justify disqualification. In Washington Post, the court noted the absence of any evidence regarding the nature of the conflict, the clients' awareness of the conflict, and whether the clients would have acted differently if separate counsel were retained. 531 F.2d at 607. In In re Grand Jury Impaneled Jan. 21, 1975, the court intimated that disqualification might have been appropriate if there was evidence in the record that the attorney's fees were being paid by the target union or if some witnesses had been offered immunity and others had not. See also In re Taylor, 567 F.2d 1183, 1188-90 (2d Cir. 1977).

<sup>19</sup>Compare In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d at 1013 (where witnesses only invoked the privilege but were not granted immunity, disqualification was improper), and In re Taylor, 567 F.2d at 1188-90 (same), with In re Investigative Grand Jury Proceedings, 480 F. Supp. *supra* (while no witness had been offered immunity, the court found an actual conflict warranting disqualification).

combined with assertions of privilege is probably insufficient to disqualify.<sup>20</sup> Nor is multiple representation funded by a common source, without more, sufficient to disqualify.<sup>21</sup> However, a grant of immunity and the possibility that one witness might have information potentially incriminating of other witnesses represented by the same counsel will probably suffice.<sup>22</sup> The dividing line on when disqualification will be ordered may well be the strength of the record of possible adverse consequences flowing from multiple representation.<sup>23</sup>

## 2. Code of Professional Responsibility

In determining how to handle conflicts of interest before the grand jury, the 1970 Model Code of Professional Responsibility (Code) also provides guidance on lawyers' duties and obligations to their clients.<sup>24</sup>

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<sup>20</sup>See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d supra; In re Taylor, 567 F.2d supra; In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d supra; In re Special Feb. 1977 Grand Jury, 581 F.2d supra.

<sup>21</sup>See In re Special Grand Jury, 480 F. Supp. 174 (E.D. Wis. 1979); In re Special Feb. 1975 Grand Jury, 506 F. Supp. 194 (N.D. Ill. 1975); but cf., In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d supra.

<sup>22</sup>See, e.g., In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d at 655-57; In re Grand Jury Investigation, 436 F. Supp. at 823; In re Grand Jury Proceedings, 428 F. Supp. at 277.

<sup>23</sup>See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d supra; In re Grand Jury Impaneled Jan. 21, 1975, 536 F.2d supra; In re Taylor, 567 F.2d supra; In re Special Grand Jury, 480 F. Supp. supra.

<sup>24</sup>While the original Model Code was adopted in 1970, the ABA adopted a new code in 1983 (See 52 U.S.L.W. 1 (Aug. 16, 1983) (New Code)). The New Code does not apply until the states individually adopt those rules; therefore, in many jurisdictions, the 1970 Code continues to  
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Described below are relevant sections of the Code (with citations to equivalent sections in the New Code) that should be consulted in cases of actual or potential conflicts of interest.

Canon 1, DR 1-102(A)(5)<sup>25</sup> provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice."<sup>26</sup> Canon 4 provides that a lawyer should preserve the confidences and secrets of clients,<sup>27</sup> while DR 4-101(B) prohibits the disclosure of the same to the disadvantage of the client. A lawyer representing multiple clients before the grand jury risks violating this rule when interviewing and debriefing his client. Canon 4<sup>28</sup> could also be applied to successive representation because of a lawyer's duty not to disadvantage a former client with knowledge obtained from that relationship.<sup>29</sup>

With respect to conflicts of interest, Canon 5 is perhaps the most important Canon.<sup>30</sup> It provides that a "lawyer should exercise independent professional judgment on behalf of a client", and mandates that a lawyer avoid representing "differing interests", which include "every interest that will adversely affect either the judgment or

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<sup>24</sup>(...continued)  
govern the conduct of lawyers.

<sup>25</sup>Canons are statements enunciating a lawyer's responsibilities, while Disciplinary Rules (DR) are "mandatory in character", setting forth the minimal standard of ethical conduct which must be observed to avoid disciplinary action. Finally, Ethical Considerations (EC), while potentially useful, are nonetheless only aspirational in character.

<sup>26</sup>See Moore, Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense, 27 UCLA L. Rev. 1, 67-69 (1979).

<sup>27</sup>See also New Code, Rule 1.6.

<sup>28</sup>See New Code, Rule 1.9.

<sup>29</sup>See United States v. Agosto, 538 F. Supp. 1149 (D. Minn. 1982).

<sup>30</sup>See also New Code, Rule 1.7.

loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." In addition, a lawyer may represent two or more clients only if "it is obvious that he can adequately represent the interest of each" and only after "the possible effect of such representation" has been fully disclosed to the client.<sup>31</sup> Canon 5 also regulates compensation from third parties. DR 5-107 allows compensation from a third party only after full disclosure and with the consent of the client.<sup>32</sup> Further, under DR 5-107(b), that third party may not "direct or regulate [the lawyer's] professional judgment."<sup>33</sup>

A person or organization paying a lawyer has the potential to exert strong pressure against the independent judgment of the lawyer and "some employers may be interested in furthering their own economic goals without regard to the professional responsibility of the lawyer to his client."<sup>34</sup> On the other hand, a lawyer retained by a corporation "owes his allegiance to the entity" and not to any officer or employee of the entity.<sup>35</sup> Thus, there is a risk that either the corporation or the employee represented by the same lawyer might suffer from the lawyer's conflicting obligations. Other Ethical Considerations of Canon 5 may also come into play in certain circumstances, such as where the lawyer may be a witness or target of the grand jury investigation.<sup>36</sup>

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<sup>31</sup>DR 5-105(A)-(D).

<sup>32</sup>See also New Code, Rules 1.8(f), 1.13, 5.4(c).

<sup>33</sup>Cf. New Code, Rule 1.13(e) (allowing a lawyer to represent both a corporation and its officers provided there is no conflict).

<sup>34</sup>EC 5-23.

<sup>35</sup>EC 5-18.

<sup>36</sup>See In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977).

Canon 7, which requires a lawyer to "represent a client zealously within the bounds of the law",<sup>37</sup> and Canon 9, which admonishes lawyers to avoid the appearance of impropriety, also may be applicable to cases of multiple representation.<sup>38</sup>

While the Sections of the Code discussed above should be consulted in cases of multiple representation, they are not meant to be exhaustive and other Canons should be considered depending on the particular facts of each case. For example, Canon 1 and DR 1-102(a)(5) and Canon 7 and DR 7-102 taken together support the proposition that it is unethical to advise a client to invoke the 5th Amendment privilege to protect others.<sup>39</sup> There are additional sources that may also prove useful. For example, the American Bar Association's (ABA's) Standards Relating to the Defense Function § 3.5(b)(1980) notes that the "potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations." And, with respect to appointed counsel, the Criminal Justice Act, 18 U.S.C. § 3006A(b), provides that separate counsel must be appointed "for defendants who have such conflicting interests that they cannot properly be represented by the same counsel."

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<sup>37</sup>See Moore, Attorney Disqualification, at 55-56.

<sup>38</sup>See In re Grand Jury Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d at 657 (Canon 9 discussed); In re Abrams, 56 N.J. 271, 276, 266 A.2d 275, 278 (1970) (same). But see In re Special Feb. 1977 Grand Jury, 406 F. Supp. 194, 199 (N.D. Ill. 1975) (Canon 9 inapplicable).

<sup>39</sup>See, e.g., United States v. Fayer, 523 F.2d 661 (2d Cir. 1975).

### 3. Waiver and other defenses

Attorneys representing multiple clients may assert a number of defenses when the Government seeks disqualification. First, they frequently argue that their clients have a 6th Amendment right to counsel of their choice and a 1st Amendment right to associate for purposes of obtaining counsel. Neither of these arguments has merit. The Supreme Court's decision in Wheat v. United States, 486 U.S. 153 (1988), held that the "6th Amendment right to choose one's own counsel is circumscribed", and "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within ethical standards of the profession." Thus, where a court finds a conflict of interest resulting from multiple representation, "it may . . . insist that defendants be separately represented."<sup>40</sup> 1st Amendment claims have been similarly unsuccessful.<sup>41</sup>

Defense counsel also assert that a client can waive any potential or actual conflict. Waiver arguments have had mixed results. Some courts have held that there can be no waiver of a conflict,<sup>42</sup> while other courts have

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<sup>40</sup>486 U.S. at 159-62; accord In re Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 250-51 (2d Cir.), cert. denied, 475 U.S. 1108 (1986); In re Investigation Before Feb. 1977 Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); In re Paradyne Corp., 803 F.2d 604, 611 n.16 (11th Cir. 1986).

<sup>41</sup>See In re Gopman, 531 F.2d 262, 268 (5th Cir. 1976).

<sup>42</sup>See, e.g., In re Grand Jury Investigation, 436 F. Supp. 818, 821 (W.D. Pa. 1977) (a witness could not waive the right to conflict-free counsel since a waiver was "likely a function in large part of one's natural hesitancy to alienate their employer rather than a product of free unrestrained will"), aff'd, 576 F.2d 1071 (3d Cir.), cert. denied, 439 U.S. 953 (1978); In re Grand Jury Proceedings, 428 F. Supp. 273, 278 (E.D. Mich. 1976) (a witness cannot "waive the right of the public to an effective functioning grand jury investigation"); In re Grand Jury, 446 F. Supp. 1132, 1140 (N.D. Tex. 1978) (in dictum court stated that witness could not waive actual conflict of interest).

accepted waivers if they were made knowingly and intelligently, with an understanding of all relevant facts.<sup>43</sup> In any event, the decision in Wheat makes clear that a district court

must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.<sup>44</sup>

Whether a lay defendant has intelligently waived any objections to conflicts of interest<sup>45</sup> is inherently difficult to determine, and generally, the district court is not in a position to educate the defendant fully regarding the possible conflicts.<sup>46</sup> Nor can conflict-ridden counsel be relied on to obtain an informed waiver.<sup>47</sup>

Finally, defense counsel will frequently emphasize the advantages of multiple representation (e.g., economy of legal fees, centralized information and grand jury monitoring that facilitates a unified defense effort), and suggest that the Government is not prejudiced by multiple representation because it can grant immunity,

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<sup>43</sup>See, e.g., In re Taylor, 567 F.2d 1183, 1191 (2d Cir. 1977); see also In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1265 (7th Cir. 1978) (trial court apprised witnesses of potential conflict and each still desired joint representation).

<sup>44</sup>486 U.S. at 163; see also United States v. Moscony, 927 F.2d 742 (3d Cir. 1991).

<sup>45</sup>See, e.g., United States ex rel. Tonaldi v. Elrod, 716 F.2d 431, 437-39 (7th Cir. 1983).

<sup>46</sup>See Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and Professional Responsibilities of the Defense Attorney, 62 Minn. L. Rev. 119, 142-52 (1978).

<sup>47</sup>Id. at 145.

compel testimony, and has the tools (e.g., prosecutions for contempt, perjury or obstruction of justice) to obtain whatever information it needs. While a district court may consider these factors in making a decision to disqualify,<sup>48</sup> they will frequently be outweighed by the need to avoid ethical violations and assure the proper functioning of the judicial system.<sup>49</sup>

### C. Resolving Conflicts of Interest

The first step when confronted with dual representation is to contact the defense lawyer and determine who he represents, the scope of his representation and who is paying the legal fees. These factors are important in initially assessing whether there is a conflict. For example, if the lawyer only represents the company and is merely giving limited advice to company employees regarding grand jury matters, that is, explaining the duty to testify when subpoenaed or explaining the 5th Amendment privilege and when it may be asserted, then there is probably no conflict at that point.

Attorneys should require the defense counsel to describe in writing the basis on which he purports to represent various individuals and to document his authority. You should ordinarily require from corporate counsel a

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<sup>48</sup>See, e.g., In re Paradyne Corp., 803 F.2d at 611 n.16; United States v. James, 708 F.2d 40, 45 (2d Cir. 1983).

<sup>49</sup>Wheat v. United States, 486 U.S. at 160-61; United States v. Dolan, 570 F.2d 1177, 1183-84 (3d Cir. 1978); see also United States v. Diozzi, 807 F.2d 10, 12 (1st Cir. 1986); United States v. O'Malley, 786 F.2d 786, 792 (7th Cir. 1986); United States v. Carrigan, 543 F.2d 1053, 1056 (2d Cir. 1976); United States v. Provenzano, 620 F.2d 985, 1004 (3d Cir.), cert. denied, 449 U.S. 899 (1980); In re Gopman, 531 F.2d at 255.



list of employees who have agreed to be represented rather than accept the attorney's blanket assertion that he represents everyone. You may also wish to have the lawyer's assurance that he has discussed the multiple representation issue with his clients, as well as potential problems, for example, your desire to obtain a proffer from one of his clients and the untenable position of the lawyer advising that client. Counsel should be willing to represent that he has communicated your specific requests, for example, for a proffer, to his client and that the client is aware of the potential conflict, but nonetheless desires counsel's representation. If some of the attorney's clients are targets, you should explicitly advise counsel of the actual and potential conflicts that may result from his continued multiple representation. To the extent that you can tell counsel which of his clients are targets, subjects and nonsubjects, you should ordinarily do so, since this will assist him in evaluating any conflicts.

These initial discussions may be sufficient to convince defense counsel that it is inappropriate for him to continue to engage in multiple representation. If new counsel is hired, you should keep in mind that the company may still be paying the legal fees, in which case the individual's loyalty may still be to the company, and the hiring of separate counsel may not result in more cooperation with the investigation.

If defense counsel declines to cease his multiple representation, your next step will be to analyze the facts, build an adequate record, and consider a disqualification motion. For example, if the lawyer represents multiple targets who can incriminate one another, a disqualification motion may be appropriate and successful.<sup>50</sup> In addition, if defense counsel has advised clients to invoke the 5th Amendment privilege, you should consider which of his clients you are prepared to immunize. If you can offer immunity to a particular client, that may be enough either to

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<sup>50</sup>See In re Special Feb. 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); In re Grand Jury Investigation, 436 F. Supp. 818, 820 (W.D. Pa. 1977), aff'd, 576 F.2d 1071 (3d Cir.), cert. denied, 439 U.S. 953 (1978).

convince the lawyer of the conflict or to support a motion to disqualify.<sup>51</sup> You should also consider whether there are alternative sources of information for the testimony of the witness you are considering immunizing.

If defense counsel is still unwilling to cease representing multiple clients, you should next attempt to obtain additional factual information from one or more of the attorney's clients that might support a motion to disqualify. This information might be obtained by interviewing the client (presumably with his counsel present), or, in appropriate circumstances, by questioning the client before the grand jury. In the event that the witness does not assert his 5th Amendment privilege or invoke the attorney-client privilege,<sup>52</sup> the witness should be asked about how he met counsel and any arrangements, including fee arrangements, regarding the attorney's representation. The witness should also be asked about who else is represented by the same counsel and any arrangements the witness is aware of with those clients. Finally, the witness should be asked about whether he understood that his counsel represented others and that as a result, there may be conflicts of interest. Care should be taken to avoid asking questions that may elicit confidential information protected by the attorney-client privilege. To the extent that you decide to compel the witness to testify before the grand jury without separate counsel and without moving to disqualify, you should consider getting the witness to waive on the record his right to conflict-free representation.

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<sup>51</sup>In re Grand Jury Investigation, 436 F. Supp. at 823; In re Grand Jury Proceedings, 428 F. Supp. 273, 277 (E.D. Mich. 1976).

<sup>52</sup>While questions concerning a witness' legal representation are not likely to incriminate him, a witness who has not been immunized might nevertheless erroneously assert the 5th Amendment privilege, thus requiring Government counsel to file a motion to compel or obtain an immunity order. Similarly, the attorney-client privilege should not prevent disclosure of the identity of the lawyer representing the client, the scope or object of the employment and other background information that does not disclose confidential communications. See generally Ch. III § C.1.a.; Ch. IV § A.; E. Cleary, McCormick on Evidence §§ 89-90 (3d ed. 1984).

If, after having built a record, you decide to move for disqualification, the motion should be accompanied by an affidavit setting forth supporting facts.<sup>53</sup> You should set forth the record of your contacts with opposing counsel and attach your correspondence as exhibits. The affidavit should only set forth the minimum necessary to establish a conflict, and should avoid disclosing facts prematurely (e.g., the basis for your belief that the lawyer's clients can incriminate one another).

At the hearing on the motion, you should ask the court's permission to interrogate the witness, again with a view toward establishing a conflict. For example, the witness should be questioned about his understanding of the attorney-client relationship, the lawyer's obligation to other clients, possible conflicts and the fee arrangement. You might want to question the witness specifically about the 5th Amendment, immunity, and the benefits of cooperation. Where there is an employer-employee relationship between clients, you should seek answers establishing coercion, *i.e.*, that the witness is in no position to ask for separate counsel.<sup>54</sup> Again, caution should be exercised to avoid infringing on the attorney-client privilege.

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<sup>53</sup>There are several benefits that may be derived from a motion to disqualify. First, if successful, one or more targets thereafter may be willing to cooperate (as a result of conflict-free advice from a new attorney). Second, even if unsuccessful, the attorney will be sensitive to the potential conflict and more likely to obtain separate counsel for the client should later developments make the conflict more apparent.

<sup>54</sup>The Government has generally taken the position that a witness cannot waive the public's right to a proper functioning grand jury. Nonetheless, you should advise the court that any waiver must be knowingly and intelligently made.

## D. Appeals

### 1. Appeals by defense counsel

An order disqualifying counsel for a witness in a grand jury investigation is not a final judgment, and, therefore, generally is not immediately appealable. While several courts have permitted appeals from such orders on the grounds that they are "collateral orders",<sup>55</sup> the Supreme Court's decision in United States v. Flanagan, 465 U.S. 259 (1984), establishes that the "collateral order" exception to the final judgment rule does not apply to attorney disqualification orders.<sup>56</sup> Relying on these more recent Supreme Court decisions, the Seventh Circuit in In re Schmidt, 775 F.2d 822 (7th Cir. 1985), has expressly held that an order disqualifying an attorney for a grand jury witness is not appealable. Under Schmidt, to obtain appellate review of such an order, a witness would have to be held in contempt and then appeal from the contempt judgment. Alternatively, rather than filing a direct appeal, defense counsel might seek review of a disqualification order by filing a mandamus petition. Mandamus, however, is an extraordinary remedy that is rarely granted. Cf. United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (court refused to review pretrial disqualification order by writ of mandamus, but reversed the convictions on appeal from the judgment of conviction because the Government failed to justify disqualification).<sup>57</sup>

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<sup>55</sup>See, e.g., In re Investigation Before April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); In re Gopman, 531 F.2d 262 (5th Cir. 1976).

<sup>56</sup>See also Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) (order denying motion to disqualify counsel in civil case not appealable).

<sup>57</sup>Cf. United States v. Diozzi, 807 F.2d 10 (1st Cir. 1986) (court refused to review pretrial  
(continued...)

## 2. Appeals by the Government

It is unclear whether the Government may appeal from the denial of a motion to disqualify. The Criminal Appeals Act, 18 U.S.C. § 3731, does not include orders denying motions to disqualify in the list of orders from which the Government may appeal.<sup>58</sup> Nor is it clear whether the Government can argue that the "collateral order" exception applies.<sup>59</sup> Finally, like defense counsel seeking review of a disqualification order, the Government may file a petition for a writ of mandamus, although this remedy is rarely granted.

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<sup>57</sup>(...continued)

disqualification order by writ of mandamus, but reversed the convictions on appeal from the judgment of conviction because the Government failed to justify disqualification).

<sup>58</sup>Government appeals are not necessarily limited to those expressly listed in 18 U.S.C. § 3731. See United States v. Wilson, 420 U.S. 332, 337 (1975) (while the language of the Criminal Appeals Act is "not dispositive, the legislative history makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit"); see also United States v. Hetrick, 644 F.2d 752, 755 (9th Cir. 1980); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982). But see Government of the Virgin Islands v. Douglas, 812 F.2d 822, 829 (3d Cir. 1987) (Government appeals limited by express language of the Criminal Appeals Act).

<sup>59</sup>See In re Special Feb. 1977 Grand Jury, 581 F.2d 1262, 1264 (7th Cir. 1978) (Government may appeal under the collateral order exception). But see In re Schmidt, 775 F.2d 822, 825 (7th Cir. 1985).

## VII. INDICTMENT AND INFORMATION

### A. Sherman Act Indictments or Informations

#### 1. Distinction between indictment and information

Indictments and informations are written, formal criminal charges on which the accused is brought to trial. Fed. R. Crim. P. 7(c)(1) requires that the indictment or information be a "plain, concise and definite written statement of the essential facts constituting the offense charged." An offense punishable by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, unless indictment is waived, in which case it may be prosecuted by information.<sup>1</sup> A violation of 15 U.S.C. § 1, which is punishable by a maximum of three years imprisonment, must be prosecuted by indictment, unless waiver of indictment is obtained from the defendant.<sup>2</sup> A waiver of indictment must be obtained from the defendant in open court after he has been advised of the nature of the charge and of his rights. While indictments must be returned by a grand jury,<sup>3</sup> informations may be returned by the Department of Justice on its own authority.

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<sup>1</sup>Fed. R. Crim. P. 7(a).

<sup>2</sup>The Ninth Circuit has held that an indictment need not be returned against a corporation since the corporation can be punished only by fine. United States v. Armored Transp., Inc., 629 F.2d 1313, 1317-20 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981). The court reasoned that a crime punishable only by fine is not an "infamous crime" within the terms of the 5th Amendment. The Ninth Circuit is the only circuit to have adopted this approach.

<sup>3</sup>Fed. R. Crim. P. 6(f).

The language of an information differs from an indictment only slightly. The opening sentence of the information will read "The United States of America, acting through its attorneys, charges" rather than "the grand jury charges". If the exact dates are unknown, the information will state "the exact dates being unknown to the United States"; an indictment will state "the exact dates being unknown to the grand jury." An information will not contain a signature line for the grand jury foreperson.

An information will be presented to the presiding judge or magistrate by the prosecuting attorneys rather than by the grand jury. It saves time to have the waiver of indictment form executed by the defendant prior to the hearing at which the information is presented to the court. Some courts, however, require that the execution of the waiver occur in open court. Therefore, you must ascertain the preferred procedure from the local U.S. Attorney's Office.

In most cases, an information will be accompanied by a plea agreement, which will be presented to the court at the time the information is presented.<sup>4</sup> Informations may also be accompanied by a press release similar to that used for the return of an indictment.

Unlike the return of an indictment, the defendant pleading to an information will have been given an opportunity to review the information before it is presented to the court. The charge contained in the information to which the defendant is pleading will have been negotiated between the parties as part of the plea agreement. Within certain constraints, the nature of the charge is an appropriate subject for plea negotiation. However, the terms of the information, like the indictment, should rest exclusively with the prosecuting attorney.

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<sup>4</sup>See Chapter IX for a discussion of plea agreements.

It is not necessary for the grand jury to have any involvement in the return of an information, but you should usually inform the grand jury when an information has been or is being presented. In most circumstances, this will require an explanation of the accompanying plea agreement. Often, this occurs when the defendant, in the case of an individual, is testifying before the grand jury under the terms of the plea agreement. The grand jury should be advised that the information is simply a substitute for an indictment and that it was still the product of their hard work.

When the information is being filed against a corporation, the waiver of indictment must be executed by an officer empowered to act for the corporation. You should ascertain from the U.S. Attorney's Office in the local jurisdiction what proof the court will require that the officer is so empowered. Some judges will require written confirmation of a vote by the board of directors authorizing the officer to execute the waiver of indictment and to enter any accompanying plea. Some courts will permit counsel for the corporation to perform these acts. However, the deterrent effect of requiring a high-ranking officer of a corporation to appear in court for the purpose of executing a waiver of indictment and entering a plea should not be ignored.

The court may permit an information to be amended at any time before verdict or finding, if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.<sup>5</sup>

A sample information and indictment are contained in Appendices VII-1 and VII-2.

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<sup>5</sup>Fed. R. Crim. P. 7(e).



## 2. Function and purpose of an indictment or information

The indictment or information, hereafter referred to as indictment, serves as the initial pleading filed by the Government in criminal litigation. It should set forth the facts evidencing the elements of the offense sought to be charged. Each indictment will require a varying amount of factual detail. In general, it should tell the story of who the defendants are, what their roles were, what they did, when and where they did it, the scheme they used to commit the offense and a description of the offense with which they are charged.

Your goal in drafting an indictment is to tell the Government's story in a simplified and persuasive manner, keeping in mind that the document itself will be seen and scrutinized by the trial judge, the jury, defense counsel, the press, the probation officer and the court of appeals.

The indictment must adequately apprise the defendant of what theories he must be prepared to meet at trial. Further, the indictment serves as a basis for determining a defendant's 5th Amendment right against double jeopardy. The 5th and 6th Amendments to the U.S. Constitution require that the indictment must describe the crime allegedly committed, every essential element of that crime, and the acts of the defendant alleged to constitute the crime. The description must be in sufficient detail to permit the defendant to understand the nature of the charges against him, to prepare a defense, and to invoke the double-jeopardy provision of the 5th Amendment, if appropriate.<sup>6</sup>

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<sup>6</sup>Russell v. United States, 369 U.S. 749, 763-72 (1962).

The 6th Amendment provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . . Fed. R. Crim. P. 7(c)(1) gives effect to these requirements by providing the following:

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated.

In reviewing the sufficiency of an indictment, the courts will construe the document as a whole to ascertain whether or not the foregoing requirements have been met.<sup>7</sup> An indictment is likely to be found legally sufficient if it describes with reasonable particularity the acts or practices alleged to constitute the offense. What is required are factual allegations rather than a simple recitation of the acts or practices proscribed by the law allegedly

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<sup>7</sup>United States v. Hand, 497 F.2d 929, 934-35 (5th Cir. 1974), cert. denied, 424 U.S. 953 (1976); Moore's Federal Practice ¶ 7.04 (1982).

violated. There is no requirement, however, that the indictment set forth the Government's evidence to support the factual allegations, or describe in detail the contents of any documents to which reference may be made.<sup>8</sup>

### 3. Standard format for Sherman Act offenses

The Division prefers the use of a standard format for indictments charging violations of Section 1 of the Sherman Act. The purpose of this format is to communicate more effectively the nature of the criminal charges to judges, trial juries, and the general public, while fully satisfying the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. Utilizing a standard Division-wide format has at least two advantages: it permits the development of a body of caselaw on the sufficiency of the standard Section 1 indictment which helps ensure that individual indictments will be upheld by district and appellate courts; and it facilitates the review of proposed indictments at each level within the Division. Reprinted below is a sample indictment followed by comments for each section of the indictment.<sup>9</sup> Section 1 indictments should be drafted in the form of this sample, subject to the exceptions noted in the comments.

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<sup>8</sup>See Brown v. United States, 143 F. 60, 65 (8th Cir.), cert. denied, 202 U.S. 620 (1906); United States v. Mobile Materials, Inc., 871 F.2d 902, 906-10 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, \_\_ U.S.\_\_ (1990).

<sup>9</sup>An alternative sample indictment is contained in Appendix VII-3. This format may be used when the charging paragraph contains numerous terms that may not be familiar to the general public.

- a. Sample Sherman Act indictment

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WILMINGTON DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.
	)	
XYZ COMPANY, INC. and	)	
JOHN W. DOE,	)	
	)	15 U.S.C. § 1
Defendants.	)	

INDICTMENT

The Grand Jury charges:

I

DESCRIPTION OF THE OFFENSE

1. XYZ Company, Inc. and John W. Doe, its Executive Vice President, are hereby indicted and made defendants on the charge stated below.

2. Beginning at least as early as 1983 and continuing at least through September 1988, the exact dates being unknown to the Grand Jury, the defendants and others entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids for the award and performance of dredging construction projects. The dredging projects were awarded from time to time by the United States, through the

United States Army Corps of Engineers ("Corps") or the United States Navy ("Navy"), on the Southeast Atlantic Coast and were set aside for qualified small businesses under the Small Business Set Aside ("SBSA") program.

The combination and conspiracy, engaged in by the defendants and co-conspirators was an unreasonable restraint of interstate [and foreign] trade and commerce, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. During the period covered by this indictment, the United States, through the Corps or the Navy, from time to time invited dredging contractors to submit sealed competitive bids on dredging projects on the Southeast Atlantic Coast, including those projects which are the subject of this indictment. Each such bid was required to be submitted to the appropriate Corps District Office or Navy Office before the time, and at the place, indicated on the bid proposal form. The receipt, opening, and reading aloud of the bids constitute a process known as a bid letting. Following a bid letting, the Corps or the Navy awards a contract for the performance of the specified dredging project to the lowest responsible bidder.

4. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

- (a) to allocate among themselves SBSA dredging projects let by the Corps and the Navy on the Southeast Atlantic Coast; and
- (b) to submit collusive, noncompetitive, and rigged bids, and to refrain from submitting bids, to the Corps and the Navy for such dredging projects.

5. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did those things that they combined and conspired to do, including, among other things:

- (a) discussing the submission of prospective bids on SBSA dredging projects let by the Corps and the Navy on the Southeast Atlantic Coast;
- (b) agreeing not to compete by designating the corporate defendant or co-conspirator to be the successful bidder on such dredging projects;
- (c) submitting intentionally high bids and refraining from submitting bids on such dredging projects; and
- (d) submitting bid proposals to the Corps and the Navy on such dredging projects containing false, fictitious, and fraudulent statements and entries.

## II

### DEFINITIONS

6. "Southeast Atlantic Coast" means the geographic areas served by the Corps District Offices in Norfolk, Virginia; Wilmington, North Carolina; Charleston, South Carolina; Savannah, Georgia; and Jacksonville, Florida.

7. "Dredging" means the creation or maintenance of harbors, navigable channels, and other waterways through the underwater excavation of material from the bottom of such waterways and the disposal of that material.

### III

#### DEFENDANTS AND CO-CONSPIRATORS

8. Defendant XYZ Company, Inc. is a corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business in Norfolk, Virginia. During the period covered by this indictment, XYZ Company, Inc. engaged in the business of dredging as a contractor on the Southeast Atlantic Coast, including the Eastern District of North Carolina.

9. Defendant John W. Doe is, and was during the period covered by this indictment, the Executive Vice President of XYZ Company, Inc.

10. Various corporations and individuals, not made defendants in this indictment, participated as co-conspirators in the offense charged and performed acts and made statements in furtherance of it.

11. Whenever in this indictment reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

### IV

#### TRADE AND COMMERCE

12. The business activities of the defendants and co-conspirators that are the subject of this indictment were within the flow of, and substantially affected, interstate [and foreign] trade and commerce.

JURISDICTION AND VENUE

13. The combination and conspiracy charged in this indictment was [formed and] carried out, in part, within the Eastern District of North Carolina within the five years preceding the return of this indictment.

DATED:

A TRUE BILL

\_\_\_\_\_  
FOREPERSON  
JAMES F. RILL  
Assistant Attorney General  
Antitrust Division

\_\_\_\_\_  
[Lead Attorney]

\_\_\_\_\_  
[Staff Attorney]

\_\_\_\_\_  
[Name]  
United States Attorney  
Eastern District of  
North Carolina

\_\_\_\_\_  
[Staff Attorney]  
  
Attorneys, Antitrust Division  
U.S. Department of Justice  
[Section or Office Address]  
Tel: (000) 000-0000  
FTS 000-0000

b. Comments

1) Caption and page format. The standard caption and page format should be modified only as necessary to comply with the local rules and practice of the U.S. Attorney. The defendants do not have to be listed in any particular order. Usually corporations are listed before individual defendants; however, with multiple



defendants, greater clarity may be provided if the individual is listed right after the corporation by which that individual was employed.

2) Paragraph 1 - list of defendants. The defendants should be listed in the same order as they are listed in the caption. The identification should include the full name of each corporate defendant and the name and title of each individual defendant. If the list of defendants is significantly longer than in the sample, the titles of the individual defendants may be omitted as they are more fully described later in the indictment. In some cases, it may be appropriate to note parenthetically any alias or nicknames used by an individual defendant.

3) Paragraph 2 - main charging paragraph. This is the main charging paragraph of the indictment. It should usually contain: the approximate beginning and ending dates of the conspiracy; the specific type(s) of per se offense(s) involved; the industry involved; and, in bid-rigging cases, the letting authority. The last sentence of this paragraph should be substantially the same in all indictments.

This section should include the time period during which the offense was committed. However, there is no requirement that the beginning and ending dates of the arrangement be pled with precision. The indictment may charge that the exact dates when the alleged offense began and ended are unknown but are believed to have commenced as early as a specified year and to have continued through a specified date that is within the statute of limitations.<sup>10</sup>

4) Paragraph 3 - explanation of industry or competitive structure. A paragraph of this type should be inserted before the "substantial terms" and "means and methods" paragraphs only when it is essential to

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<sup>10</sup>See Devitt & Blackmar, § 55.02; see also United States v. Kissel, 218 U.S. 601, 608 (1910); United States v. Walker, 653 F.2d 1343, 1345-50 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982).

explain some aspect of the industry or competitive structure involved so that the reader can fully understand the following paragraphs describing the conspiracy.

This paragraph of the indictment may, when necessary, contain a general description of the uses for a product or service and the types of customers for it. In a bid-rigging indictment, such as the sample indictment, it may be appropriate to explain the bidding process. Any discussion of the industry or the competitive structure important enough to be included in the indictment, but not essential to an understanding of the initial charging paragraphs, should be included in the "Trade and Commerce" section.

5) Paragraphs 4 and 5 - the "substantial terms" and "means and methods" paragraphs. Although the introductory portions of the "substantial terms" and "means and methods" paragraphs should be virtually the same in every indictment, the subparts will obviously differ widely in number and structure, depending on the specific facts. Staffs will be given substantial latitude to tailor these paragraphs to fit each case.

In general, these paragraphs should describe the terms of the allegedly unlawful agreement and list how the defendants formed and carried out the unlawful combination and conspiracy. Since overt acts need not be proven in Sherman Act cases, there is no requirement that they be alleged in an indictment.<sup>11</sup>

6) Paragraphs 6 and 7 - definitions. A "Definitions" section is not mandatory and should be included only when the ordinary dictionary definitions of terms used in the indictment will not suffice or when terms, though adequately defined in the dictionary, are not familiar to the general public. If the charging paragraph

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<sup>11</sup>See United States v. Socony Vacuum Oil Co., 310 U.S. 150, 252 (1940); Nash v. United States, 229 U.S. 373, 378 (1913).

contains numerous terms that may not be familiar to the general public, then it may be advisable to have the definitions section precede the charging paragraph.<sup>12</sup>

Terms frequently defined in this section include the geographic area where the alleged illegal action occurred, the product or service that was the subject of the conspiracy, and, if federal funding was involved, the federal agency that was involved. Failure to describe such terms is not fatal to an indictment, but doing so may make practical sense in some cases.<sup>13</sup>

7) Paragraph 8 - corporate defendant descriptions. For each corporate defendant, the identification should include the full name, main business address and state of incorporation. When there are multiple corporate defendants, the paragraph should contain language similar to the following:

Each of the defendant corporations is organized and exists under the laws of the state, and has its principal place of business in the city, identified below:

<u>Corporation</u>	<u>State of Incorporation</u>	<u>Principal Place of Business</u>
ABC Corporation	Florida	Jacksonville, FL
Acme Corporation	Georgia	Savannah, GA
Dredging, Inc.	South Carolina	Charleston, SC
XYZ Company, Inc.	Virginia	Norfolk, VA

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<sup>12</sup>See Appendix VII-3 for a sample of this alternative.

<sup>13</sup>Ordinarily, a court will take judicial notice of terms for which there is a common, undisputed understanding. See Fed. R. Evid. 201. However, some terms would not be subject to judicial notice, for example, the defendant's unique term to describe a geographic area that is different from the commonly understood term.

During all or part of the period covered by this indictment, the defendant corporations engaged in the business of dredging as contractors on the Southeast Atlantic Coast, including the Eastern District of North Carolina.

In some cases, the principal place of business may not be the relevant location, and staffs may want to use another title or a narrative format to explain that corporation's geographic nexus to the charge.

8) Paragraph 9 - individual defendant descriptions. Individual defendants should be identified by full name, business affiliation and title. When there are multiple individual defendants, language similar to the following should be used for this paragraph:

During all or part of the period covered by this indictment, each of the individual defendants was associated with the designated defendant corporation in the position or positions indicated:

<u>Individual</u>	<u>Position(s)</u>	<u>Corporation</u>
John W. Doe	Executive Vice President	XYZ Company, Inc.
James T. Smith	General Manager	Dredging, Inc.
William R. Thompson	Vice President	ABC Corporation
Robert J. Wilson	Manager	Acme Corporation

9) Paragraph 10 - co-conspirator paragraph. Whenever there are non-defendant co-conspirators, this paragraph should be included in the indictment. In cases in which there are co-conspirator organizations other

than corporations, an appropriate term such as "firms" or "companies" should be used in lieu of "corporations".

Under Department and Division policy, alleged co-conspirators should not be identified by name unless there are compelling reasons to do so.<sup>14</sup> Several courts have condemned the practice of naming unindicted co-conspirators as a violation of due process and have ordered that those portions of the indictment be expunged.<sup>15</sup>

10) Paragraph 11 - This paragraph should be included in all indictments in which a corporation is a defendant.

11) Paragraph 12 - trade and commerce paragraph. This section of the sample indictment represents a minimally sufficient allegation of the "flow" and "effects" theories of the interstate commerce element. If there is any concern that the local court may dismiss an indictment for failure to set out the specific commerce restrained, a brief additional allegation should be added, such as follows:

The interstate [and foreign] trade and commerce included:

- (a) the movement of substantial quantities of goods on dredged waterways;
- (b) the movement of substantial quantities of equipment and other essential materials for use on dredging projects; and
- (c) payment for dredging projects with funds from the Treasury of the United States.

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<sup>14</sup>See U.S.A.M. 9-11.230

<sup>15</sup>See United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); see also United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977). The American Bar Association (ABA) has adopted a principle that "the grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy."

Any necessary description of the industry or the competitive structure should be included here or, as previously noted, in Paragraph 3. It is not necessary to list all of the methods by which interstate trade and commerce will be proved at trial.

12) Paragraph 13 - Jurisdiction, venue and statute of limitations. A legally sufficient indictment should contain an allegation that the offense charged was formed or carried out, at least in part, within the jurisdiction of the federal district court where the indictment is filed. There is, however, case law to the effect that failure of an indictment to allege venue does not require dismissal.<sup>16</sup> The indictment should contain an allegation that the offense charged was formed or carried out, at least in part, within the statute of limitations period for the offense involved.

13) Signature format. The signature format may be modified as necessary to comply with the local rules and practice of the U.S. Attorney, but all indictments must contain the signature of the Assistant Attorney General and the lead attorney.

14) Effects. There should be no "Effects" section or other description of anticompetitive harms in the indictment.

15) Number of counts. A legally sufficient indictment should charge only one offense per count.<sup>17</sup> Generally, counts should be averred in order of the significance of the offense, such as the Sherman Act

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<sup>16</sup>United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976); see also United States v. Branam, 457 F.2d 1062 (6th Cir. 1972). 18 U.S.C. § 3237 provides that an offense begun in one district, continued in another, and completed in yet another may be prosecuted in any of those districts.

<sup>17</sup>See United States v. Warner, 428 F.2d 730 (8th Cir.) (where two distinct crimes are charged in one count, the count is void since defendant is denied right to a unanimous concurrence of jury on each offense charged before conviction), cert. denied, 400 U.S. 930 (1970).

count followed by any mail fraud counts. Mail fraud counts should be averred in chronological order. Fed. R. Crim. P. 7(c)(1) permits an allegation made in one count to be incorporated by reference in another count.

Normally, this is done by introducing such a count with the language:

The grand jury (or if in an information, the United States) further charges: Each and every allegation of Paragraphs 1 through \_ of this indictment is here realleged with the same force and effect as though each paragraph was set forth in full detail.

16) Language and tone. A well-drafted indictment should avoid legalese wherever possible and use instead commonly understood language. Naturally, when following the form of typical Sherman Act indictments, it is best to use language that courts have approved. When there is evidence of payoffs, concealment or the signing of false statements of noncollusion, it is good practice to incorporate language describing such practices in the indictment. An indictment should avoid the use of prejudicial or inflammatory language.<sup>18</sup>

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<sup>18</sup>See Fed. R. Crim. P. 7(d); United States v. Saporta, 270 F. Supp. 183 (E.D.N.Y. 1967); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), rev'd on other grounds sub nom. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

B. Requirements for non-Sherman Act Indictments

1. Mail fraud, 18 U.S.C. § 1341

Increasingly, the Division will bring one or more counts of mail fraud in an indictment when a violation of the Sherman Act has been alleged.<sup>19</sup> Because an antitrust violation is a form of fraud, including a mail fraud count often helps to focus juror attention on the fraud aspects of the conspiracy.

An indictment for mail fraud under 18 U.S.C. § 1341, must sufficiently allege the two necessary elements of an offense within the statute:

- (1) The accused devised or intended to devise a scheme and artifice to defraud, and
- (2) Used or caused the use of the mails in execution or attempted execution of the scheme.<sup>20</sup>

The indictment must contain a reasonably detailed description of the particular scheme with which the defendant is charged.<sup>21</sup>

A mail fraud count added to a Sherman Act indictment will begin with the language "The grand jury further charges" and will contain an introductory paragraph that realleges the appropriate paragraphs, such as the

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<sup>19</sup>See U.S.A.M. 9-43.000, et seq.

<sup>20</sup>United States v. Young, 232 U.S.155 (1914).

<sup>21</sup>United States v. Curtis, 506 F.2d 985 (10th Cir. 1974).



identification of the defendants, the reference to corporate defendants acting through its officers and those portions of the trade and commerce sections that describe the industry or the bid process which are relevant to the mail fraud count. Thereafter, a legally sufficient mail fraud indictment will contain language similar to the following:

Beginning as early as \_\_\_\_\_ and continuing thereafter until approximately \_\_\_\_\_ the exact dates being unknown to the Grand Jury, the defendants, together with other persons known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud (company) of:

- (a) money; and
- (b) property

It was part of said scheme and artifice to defraud that the defendants, and others known and unknown to the Grand Jury, would and did:

- (a) allocate to one defendant the monthly scrap metal contract at (company)'s plants and allocate to another defendant the monthly scrap metal contract at (company)'s plant; and
- (b) submit collusive, noncompetitive and rigged bids at (company)'s plants in connection with the award of monthly scrap metal contracts.

On or about the dates of mailing set forth below, for the purpose of executing said scheme and artifice to defraud, and attempting to do so, the defendants did knowingly cause the following bids for (company's) plants' scrap metal contracts to be delivered by mail in (location), by the United States Postal Service, according to the directions thereon, each such use of the mails being a separate Count of this Indictment and each constituting a separate violation of Title 18, United States Code, Section 1341:

<u>Count</u>	<u>Sender</u>	<u>Addressee</u>	<u>Approx. Date of Mailing</u>
2			
3			

In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute did not apply to schemes to defraud citizens of their intangible right to honest government. Subsequently, in Carpenter v. United States, 484 U.S. 19 (1987), the Supreme Court clarified that the mail fraud statute did apply to schemes to defraud a victim of intangible property rights.<sup>22</sup> In 1988, Congress amended the mail fraud statute to expressly extend its coverage to include "a scheme or artifice to deprive another of the intangible right of honest services",<sup>23</sup> thus expressly overruling McNally. As a consequence, the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest, whether that interest is tangible or intangible, and to the intangible right to honest services.

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<sup>22</sup>See United States v. Italiano, 837 F.2d 1480 (11th Cir. 1988), for an extensive discussion of McNally and Carpenter and the ramifications of these cases on the application of the mail fraud statute.

<sup>23</sup>18 U.S.C. § 1346.

In drafting a mail fraud charge, it is not necessary to allege that the scheme or artifice contemplated a use of the mails in its execution.<sup>24</sup> It is only necessary to prove that the use of the mails was reasonably foreseeable.<sup>25</sup> Each separate use of the mails constitutes a separate and distinct offense.<sup>26</sup>

Other forms of mail fraud frequently alleged in antitrust indictments, aside from the mailing of bids, include the mailing of executed contracts from the owner to the low bidder and the mailing of payments or proceeds from the contract that was awarded to the low bidder.<sup>27</sup> It is necessary to draft the indictment so that the item that is mailed can be proven to have been mailed in furtherance of the scheme and not after the scheme was already completed. In any bid-rigging or price-fixing conspiracy, the object of the conspiracy is not just to rig bids or to fix the prices, but to obtain financial remuneration.<sup>28</sup> Therefore, mailing of bids, mailing of contracts or the mailing of financial proceeds in payment of contractual work fall within the object of the scheme, and the mailings can be proven to have been in furtherance thereof.<sup>29</sup>

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<sup>24</sup>United States v. Young, 232 U.S. 155 (1914).

<sup>25</sup>Schmuck v. United States, 489 U.S. 705 (1989); Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Young, 232 U.S. 155 (1914).

<sup>26</sup>Durland v. United States, 161 U.S. 306 (1896); Badders v. United States, 240 U.S. 391 (1916).

<sup>27</sup>See Indictments in United States v. Sachs Electric Company, et al., 85-168 CR(4) and United States v. Washita Construction Company, et al., 84-146 W.D. Okla.

<sup>28</sup>If staff is relying on the mailing of payments, it is useful to include language in the "means and methods" or "charging" paragraph that the conspirators had the expectation that the low bidder would be awarded the contract and would be paid over the course of the contract.

<sup>29</sup>United States v. Northern Improvement Co., 814 F.2d 540, 542 (8th Cir.), cert. denied, 484 U.S. 846 (1987).

Frequently, the mailing of a bid that contains a fraudulent representation, such as a false non-collusion affidavit will constitute the basis of a mail fraud charge. It is important to note, however, that the existence of such a false representation is not necessary to a mail fraud charge.<sup>30</sup> A scheme to defraud may be actionable even though no actual misrepresentation is contained in the mailing.<sup>31</sup>

## 2. Wire Fraud, 18 U.S.C. § 1343

As with mail fraud, wire fraud is another non-antitrust violation that is found with increasing frequency in indictments stemming from antitrust investigations.<sup>32</sup> The essential elements of a wire fraud offense are:

- (1) The devising of a scheme and artifice to defraud, and
- (2) A transmittal in interstate or foreign commerce by means of wire, radio or television communications of writings, signs, signals, pictures, or sounds for the purpose of executing the scheme or artifice to defraud.<sup>33</sup>

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<sup>30</sup>United States v. Watson-Flagg Electric Company, et al., (CR IP 84-103, S.D. Indiana).

<sup>31</sup>Linden v. United States, 254 F.2d 560 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir. 1954); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953).

<sup>32</sup>See U.S.A.M., 9-44.000, et seq.

<sup>33</sup>United States v. Patterson, 534 F.2d 1113 (5th Cir.), cert. denied, 429 U.S. 942 (1976); United States v. Freeman, 524 F.2d 337, 339e (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977); Lindsey v. United States, 332 F.2d 688, 690 (9th Cir. 1964); United States v. O'Malley, 535 F.2d 589, 592 (10th Cir.), cert. denied, 429 U.S. 960 (1976).

Since the wire fraud statute was patterned after the mail fraud statute, mail fraud principles have been applied to wire fraud prosecutions. Each use of an interstate instrumentality constitutes a separate offense.<sup>34</sup> The Division has successfully charged what amounted to attempted bid-rigs or price-fixes as a wire fraud where interstate telephone calls were used to attempt to set up the conspiracy.<sup>35</sup>

An indictment under 18 U.S.C. § 1343, must sufficiently charge the two necessary elements of the offense – that the accused devised and intended to devise a scheme and artifice to defraud and transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme. One indictment prosecuted by the Division charged the defendants with bid-rigging and with three counts of wire fraud based upon the transmission of bid prices from the defendants to the owner by use of telexes. The wire-fraud-charging paragraphs of the indictment were as follows:<sup>36</sup>

Beginning sometime in or about February 1980 and continuing thereafter until at least September 1981, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators, devised and intended to devise a scheme and artifice to defraud Nash of:

(a) money; and

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<sup>34</sup>Henderson v. United States, 425 F.2d 134, 138 (5th Cir. 1970); United States v. Calvert, 523 F.2d 895, 903 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

<sup>35</sup>See, e.g., United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990).

<sup>36</sup>Identifying details from this indictment and other indictments quoted in this section have been charged.

- (b) its right to free and open competition for the bidding on the Smallville job, such bidding to be conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty and fraud.

It was part of the aforesaid scheme and artifice to defraud that the defendants and co-conspirators would and did:

- (a) allocate the Smallville job to XYZ Company; and
- (b) submit collusive, noncompetitive, and rigged bids to Nash for the Smallville job.

On or about the dates set forth below, the defendants named in each count listed below, for the purpose of executing and carrying out the scheme and artifice to defraud, did knowingly and willfully transmit and cause to be transmitted, by means of wire communication in interstate commerce, certain signs, signals, and sounds; namely telexes containing bids, from the locations listed below to Nash in Metropolis, New York. Each such use of the wire constitutes a separate count of this indictment and a separate violation of Title 18, United States Code, Section 1343.

COUNT TWO

Defendants: XYZ Company

John Jones

Transmitted from: Gotham, Indiana

Transmitted to: Metropolis, New York

Wired on or about: April 21, 1980

COUNT THREE

Defendants: XYZ Company

John Jones

Transmitted from: Gotham, Indiana

Transmitted to: Metropolis, New York

Wired on or about: July 23, 1980

COUNT FOUR

Defendant: Richard Doe

Transmitted from: Littletown, Ohio

Transmitted to: Metropolis, New York

Wired on or about: April 21, 1980

The aforesaid scheme and artifice to defraud was carried out, in part, within the Southern District of Indiana within five years preceding the return of this indictment.

3. False statements, 18 U.S.C. § 1001

Another statute that has been used successfully as a companion criminal count to a Sherman Act indictment is 18 U.S.C. § 1001, False Statements.<sup>37</sup> Proof of five elements is essential to sustain a conviction under

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<sup>37</sup>See Chapter VIII § C.

this statute: (1) a statement, (2) falsity, (3) materiality, (4) specific intent and (5) agency jurisdiction.<sup>38</sup> A violation requires proof that the defendant had the specific intent to make a false or fraudulent statement.<sup>39</sup> This requires that the statement be made knowingly or willfully. This element must, of course, be alleged in the indictment.

In a case involving the Oklahoma Department of Transportation, the indictment charged a Sherman Act violation in count 1. In the definitions section, federal aid highway was defined. In the trade and commerce paragraph, the role of the Federal Aid Highway Act, the bidding process of the Oklahoma Department of Transportation, the non-collusion affidavit required by the Oklahoma Department of Transportation and the federal highway administration and the Oklahoma statute requiring competition on public contracts were all set forth. In the false statement count of the indictment, these paragraphs were realleged. The charging portion of the false statement count then continued:

On or about October 26, 1979, in the Western District of Oklahoma, (company) and (Defendant), defendants herein, willfully and knowingly made and caused to be made a false, fictitious and fraudulent statement as to material facts in a matter within the jurisdiction of the United States Department of Transportation, Federal Highway Administration, an agency of the United States, in an affidavit submitted to the Oklahoma Department of Transportation as part of (company)'s bid proposal on Federal-Air Project F-91(15) in which the defendants stated and represented that:

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<sup>38</sup>United States v. Lange, 528 F.2d 1280, 1283 n.2 (5th Cir. 1976); Ogden v. United States, 303 F.2d 724, 742 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964).

<sup>39</sup>United States v. Lange, 528 F.2d supra.



John Doe, of lawful age, being first duly sworn, on oath says, that (s)he is the agent authorized by the bidder to submit the attached bid. Affiant further states that the bidder has not been a part of any collusion among bidders in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding; or with any state official or employee as to quantity, quality or price in the prospective contract, or any other terms of said prospective contract; or in any discussions between bidders and any state official concerning exchange of money or other thing of value for special consideration in the letting of a contract.

when in truth and in fact, as the defendants then knew, (defendant) and (company) had participated in collusion in connection with the bid proposal for the aforesaid Federal-Aid highway construction project, let by the State of Oklahoma on October 26, 1979, in violation of Title 18, United States Code, Section 1001.

4. False, fictitious or fraudulent claims against the government, 18 U.S.C. § 287

Section 287 is very similar in form and content to § 1001, discussed above. Section 1001 involves falsification of any matter within the jurisdiction of a department or agency of the United States but does not require the presentation of a false claim against the United States or the presentation of fraudulent forms or documents in aid of making such claims. Section 287 does involve the presentation of false claims against the United States. In most respects, § 287's purpose is similar to and can be construed in the same manner as § 1001. However, in contrast to

§ 1001, § 287 requires proof of two additional elements: (1) a claim on the United States for money or property; (2) a presentation of a claim.<sup>40</sup>

Under § 287, it is a violation if defendants directly present a false claim or "cause" a false claim to be presented. A violation can be found whenever a person submits a false or fraudulent claim to an individual, municipality, or state government knowing that funds for the goods or services involved come, at least in part, from the Federal Government.

Section 287 is applicable whenever antitrust violations cause an increase in the cost to the United States of goods or services, whether the goods or services are purchased directly or indirectly, in whole or in part, and where defendant submits false or fraudulent claims knowing that part of the funds they will be receiving come from the United States.<sup>41</sup>

5. Conspiracy to defraud the Government with respect to claims, 18 U.S.C. § 286

Section 286 is a specific conspiracy statute designed to make conspiring to commit acts which violate § 287 illegal. As with § 287, § 286 requires a scheme to present a false claim to the United States for money or property. The difference, of course, is that § 286 does not require the actual presentation of the claim, merely the formation of the scheme.<sup>42</sup> Though not widely used, the advantage to § 286 is that it carries a ten-year prison sentence, twice that of a § 287, § 1001 or mail or wire fraud conviction.

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<sup>40</sup>See U.S.A.M. 9-42.200 and .210 and cases cited therein.

<sup>41</sup>See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

<sup>42</sup>See United States v. Downey, 257 F. 364 (D.R.I. 1919).

6. Conspiracy to commit offense or to defraud United States, 18 U.S.C. § 371

Section 371 is the general conspiracy statute of the criminal code. This section covers two different conspiracies: (1) conspiracy to commit any offense against the United States and (2) conspiracy to defraud the United States. Because the Sherman Act itself requires concerted action on the part of the defendants, it is not possible on double jeopardy grounds to charge a conspiracy to commit a conspiracy. It is proper, however, to charge the general § 371 violation in connection with violation of other statutes, such as mail fraud and false statements.

The second clause of § 371, conspiracy to defraud the United States, is an independent crime in and of itself not involving the violation of another substantive offense. As such, it is very broad in scope. Fraud as used in § 371 encompasses not only conspiracies that might involve loss of Government funds but also "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government."<sup>43</sup> In the antitrust context, § 371 could be used in those cases where federal contracts are inflated due to bid-rigging or other antitrust violations. It might also be used in cases where use of the "interstate commerce" element of a Sherman Act violation is problematic. Since § 371 does not require pecuniary loss to the United States, § 371 could be charged whenever antitrust activity results in the impairment or obstruction of any Government agency's function.<sup>44</sup>

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<sup>43</sup>United States v. Johnson, 383 U.S. 169, 172 (1966); Haas v. Henkel, 216 U.S. 462, 479 (1910); see United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

<sup>44</sup>See U.S.A.M. 9-42.300

7. Major Frauds Act, 18 U.S.C. § 1031

The Major Frauds Act, 18 U.S.C. § 1031, enacted in 1988, provides in pertinent part that:

- (a) Whoever knowingly executes, or attempts to execute any scheme or artifice with the intent --
- (1) to defraud the United States; or
  - (2) to obtain money or property by means of false or fraudulent pretenses, representations, or premises, in any procurement of property or services as a prime contract or with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is \$1,000,000 or more shall . . . be fined not more than \$1,000,000, or imprisoned not more than 10 years or both.

18 U.S.C. § 1031 applies to Sherman Act procurement conspiracies where the United States is a party to the procurement contract and the value of the contract is \$1,000,000 or more. It applies to both executed and attempted frauds. Pleading of a § 1031 count is similar to that for the second clause of a § 371 count with the added requirement that an allegation be made that the United States was a party to a contract involving \$1,000,000 or more.

8. False declarations and perjury

There are two principal federal perjury statutes, 18 U.S.C. § 1621 and § 1623. The elements of both statutes are substantially the same.<sup>45</sup>

Since virtually all perjury prosecutions brought by the Division will occur in a court proceeding or before the grand jury, only the elements of 18 U.S.C. § 1623 will be described. There are five such elements that should be addressed in an indictment:

- (1) the testimony was given under oath;
- (2) the testimony was given in a proceeding before or ancillary to a court or grand jury;
- (3) the testimony was false in one or more of the respects charged in the indictment;
- (4) the false testimony was knowingly given; and
- (5) the false testimony was material.<sup>46</sup>

The identity of the oath giver and proof that such person was competent or authorized to administer the oath are not essential elements of § 1623 and need not be included in the indictment. Instead, § 1623 merely requires the prosecution to prove that the defendant was under oath at the time the false statement was made.<sup>47</sup>

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<sup>45</sup>See Chapter VIII § A.

<sup>46</sup>United States v. Whimpy, 531 F.2d 768, 770 (5th Cir. 1976).

<sup>47</sup>United States v. Molinares, 700 F.2d 647, 651-52 (11th Cir. 1983).

The third element of the offense is established through extrinsic proof that the testimony given by the accused was false in one or more of the respects charged, and is subject to the same standard of proof, beyond a reasonable doubt, that applies in any criminal case.<sup>48</sup> In a false statement count that avers several allegedly false statements in the same count, proof of any one of the specifications is sufficient to support a guilty verdict.<sup>49</sup> Generally, the Division's practice is to have a separate count for each separate fraudulent statement. However, related statements that are in essence the same answer to a rephrased question should be contained in the same count.

The fifth element, materiality of the false declaration, is a legal question for the court's determination.<sup>50</sup> Materiality has been defined broadly to include anything "capable of influencing the tribunal on the issue before it."<sup>51</sup> Before drafting the indictment, consult the law of the circuit for the jurisdiction you will be in for cases defining materiality.

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<sup>48</sup>United States v. Parr, 516 F.2d 458, 464 (5th Cir. 1975); 18 U.S.C. § 1623(e).

<sup>49</sup>United States v. Bonacorsa, 528 F.2d 1218, 1222 (2d Cir.), cert. denied, 426 U.S. 935 (1976); Vitello v. United States, 425 F.2d 416, 418 (9th Cir.), cert. denied, 400 U.S. 822 (1970).

<sup>50</sup>Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956); United States v. Crocker, 568 F.2d 1049, 1056 (3d Cir. 1977); United States v. Paolicelli, 505 F.2d 971, 973 (4th Cir. 1974); United States v. Bell, 623 F.2d 1132, 1134 (5th Cir. 1980); United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 459 U.S. 1035 (1982); United States v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982).

<sup>51</sup>Accord United States v. Lardieri, 497 F.2d 317, 319 (3d Cir. 1974); United States v. Cosby, 601 F.2d 754, 756 (5th Cir. 1979); United States v. Ostertag, 671 F.2d at 264; United States v. Molinares, 700 F.2d at 653.

It is not a defect to omit a specific allegation in the indictment that defendant did in fact recall something to which he falsely responded he did not recall<sup>52</sup> as long as the court instructs the jury that in order to convict, it must find that defendant did in fact recall one or more of the matters in question. Nonetheless, the better practice is to include language in the charging paragraph that defendant did in fact recall the matter or matters to which he responded he didn't recall.<sup>53</sup>

9. Obstruction of justice, 18 U.S.C. § 1503

An obstruction of justice charge is appropriate when prosecutors believe that there has been interference with the grand jury's investigative process.<sup>54</sup> The bases for such a charge stem most commonly from destruction or alteration of documents that were called for in a grand jury subpoena, or that were material to the investigation, or from an attempt to influence someone's grand jury testimony.<sup>55</sup> Such charges are usually prosecuted under the broader parameters of the omnibus clause of 18 U.S.C. § 1503.<sup>56</sup>

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<sup>52</sup>See, e.g., United States v. Chapin, 515 F.2d 1274 (D.C. Cir.) (the falsity of an "I don't recall" answer may be proven by circumstantial evidence that tends to show that defendant really knew the things he claimed not to know), cert. denied, 423 U.S. 1015 (1975).

<sup>53</sup>A sample indictment for false declarations before a grand jury is included in Appendix VII-4.

<sup>54</sup>See Chapter VIII § B.

<sup>55</sup>Attempts to influence another's grand jury testimony can also be brought under 18 U.S.C. § 1512(b).

<sup>56</sup>A sample obstruction of justice indictment is included in Appendix VII-5.

In charging that the defendant "endeavors" to influence, obstruct or impede, success by the defendant is not necessary.<sup>57</sup> As the Fifth Circuit noted in United States v. Howard, 569 F.2d 1331, 1337 (5th Cir.), cert. denied, 439 U.S. 834 (1978): "Section 1503 is a contempt statute . . . and as such is directed at disruptions of orderly procedure. Thus, it is wholly irrelevant whether defendants' actions had no ultimate effect on the outcome of the grand jury investigation: the question is whether they disturbed the procedure of the investigation."<sup>58</sup>

Several courts of appeal have addressed the issue of whether perjured testimony can form the basis of an obstruction of justice prosecution. While the courts have held that "mere perjury" does not amount to obstruction, the great weight of authority holds that the giving of false testimony can amount to obstruction of justice when the testimony has impeded the administration of justice.<sup>59</sup> For example, the Fourth Circuit in United States v. Caron, 551 F. Supp. 662 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984), upheld (without an opinion) a false testimony-based § 1503 indictment and a concurrent indictment for perjury under § 1623 which had as its basis the same false testimony.

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<sup>57</sup>United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979); United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975); United States v. McCarthy, 611 F.2d 220 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980).

<sup>58</sup>See United States v. Buffalano, 727 F.2d 50 (2d Cir. 1984) ("endeavor" means less than attempt); United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984) ("endeavor" means any effort to accomplish an evil purpose the statute is designed to prevent).

<sup>59</sup>See United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); United States v. Griffin, 589 F.2d 200 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Gonzales-Mares, 752 F.2d 1485 (9th Cir.), cert. denied, 473 U.S. 913 (1985); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); United States v. Cortese, 568 F. Supp. 119 (M.D. Pa. 1983), aff'd sub nom. United States v. Osticco, 738 F.2d 426 (3d Cir. 1984), cert. denied, 469 U.S. 1158 (1985). Contra United States v. Essex, 407 F.2d 214 (6th Cir. 1969).



Because of the similarity in the evidence required to prove violations of §§ 1623 and 1503, staffs can expect that a defendant may make a multiplicity motion and argue that false statements and obstruction of justice merge into the same offense on the facts of the case. However, two courts of appeal have rejected the argument that concurrent convictions under §§ 1503 and 1623 constitute double jeopardy on the grounds that the statutory elements of each offense are "clearly distinct" and thus each statute requires proof that the other does not.<sup>60</sup>

In addition to prohibiting the intimidation of and retaliation against grand and petit jurors and judicial officers, 18 U.S.C. § 1503 contains a catch-all, or omnibus clause prohibiting corrupt "endeavors to influence, obstruct or impede, the due administration of justice." In an omnibus clause prosecution, the Government must prove:

- (1) there was a pending judicial proceeding;
- (2) the defendant knew that there was a pending judicial proceeding;
- (3) the defendant endeavored to influence, obstruct or impede the due administration of justice; and
- (4) the defendant's acts were done knowingly and corruptly.<sup>61</sup>

Each of these elements must be addressed in the indictment.

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<sup>60</sup>United States v. Bridges, 717 F.2d 1444 (D.C. Cir. 1983), cert. denied, 465 U.S. 1036 (1984); United States v. Langella, 776 F.2d 1078 (2d Cir. 1985), cert. denied, 475 U.S. 1019 (1986).

<sup>61</sup>United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir.), cert. denied, 441 U.S. 963 (1979); United States v. Solow, 138 F. Supp. 812, 816-17 (S.D.N.Y. 1956).

## 10. RICO

The elements of a RICO violation are: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that defendant was employed by or associated with the enterprise; (4) that defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that defendant participated through a pattern of racketeering activity; i.e., through commission of at least two racketeering acts.<sup>62</sup>

The crux of a RICO offense is that the defendant participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. Proof of such participation requires a showing that the defendant committed at least two predicate acts of "racketeering activity" as defined in 18 U.S.C. § 1961(1). In addition, a showing must be made that the acts of racketeering were related to the conduct of the affairs of the enterprise and to the defendant's position within the enterprise.<sup>63</sup> Proof that the enterprise benefited from such conduct is not required.<sup>64</sup> The predicate acts of racketeering which may be charged include mail fraud, which appears specifically as a predicate offense under 18 U.S.C. § 1961(1). Sherman Act violations are not predicate acts, but mail fraud or other Title 18 offenses that are committed along with Sherman Act violations are predicate acts.<sup>65</sup> The

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<sup>62</sup>United States v. Sinito, 723 F.2d 1250 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984); United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983).

<sup>63</sup>United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981).

<sup>64</sup>United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982).

<sup>65</sup>See Indictment in United States v. Evans & Associates Construction Co., Inc., et al., (86-77-E, W.D. Okla.).

Division must obtain prior approval from the Criminal Division before seeking the return of an indictment that includes a RICO charge.<sup>66</sup>

#### 11. Sherman Act Misdemeanor

Section 14 of the Clayton Act, 15 U.S.C. § 24, prescribes misdemeanor penalties for corporate officers participating in antitrust violations. Since 1974 when violations of the Sherman Act became felonies, this misdemeanor charge has never been used, and it continues to be the Division's policy that all antitrust violations shall be prosecuted as felonies.

#### 12. Bribery

Occasionally, grand jury investigations will yield evidence of non-antitrust violations, such as commercial bribery. In United States v. Ross, 86-80323 (E.D. Mich.), a former purchasing agent for General Motors was charged with mail fraud stemming from a bribery/payoff scheme which was uncovered during the course of an investigation into bid-rigging by electrical contractors. Because the bribe involved the payment of money by a contractor to the purchasing agent, the agent was charged with having engaged in a scheme and artifice to deprive General Motors of money, its right to the loyal services of the agent and of its right to a bid process free from

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<sup>66</sup>See U.S.A.M. 9-110.101 and 110.210

dishonesty. The Division will prosecute such a case that is discovered during a grand jury investigation even if there is no connection to an antitrust violation.

The Travel Act, 18 U.S.C. § 1952, has also successfully been used to prosecute commercial bribery in the jurisdictions which have defined "bribery" as used in the Act to include instances of commercial bribery.<sup>67</sup>

### C. Defendant Selection

Defendant selection is an area where prosecutorial discretion will most require careful consideration. The Principles of Federal Prosecution state that, ordinarily, the attorney for the Government should initiate or recommend federal prosecution if the attorney believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Thus, under the Principles, the standard is one of "probable conviction."

Internally, it is the Division's policy to prosecute corporations that have engaged in criminal activity and also their officers and agents when the evidence so warrants. Because a corporation cannot be sentenced to jail, prosecution of individuals who commit the illegal acts is one of the most potent deterrents to antitrust violations. The case law on corporate liability for the illegal acts of its agents in the antitrust context has uniformly been favorable.<sup>68</sup>

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<sup>67</sup>United States v. Pomponio, 511 F.2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975); United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979). But see United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), cert. denied, 429 U.S. 1123 (1977).

<sup>68</sup>See United States v. Koppers, 652 F.2d 290 (2d Cir.), cert. denied, 454 U.S. 1083 (1981);  
(continued...)

One of the most important considerations in defendant selection will be the impact a prosecutor's decision will have on the outcome at trial. Unless the evidence is quite strong, inclusion of marginal or "fringe" defendants will not help with conviction before a jury. The lack of factual strength as to marginal defendants will often weaken the overall strength of the case against other defendants. In addition, it must be remembered that for every defendant added to an indictment, the trial judge will accord that many more jury selection strikes, each Government witness will face additional cross-examination, and the jury will hear that many more opening statements and closing arguments in favor of the defense.

Division attorneys must strive to apply a consistent standard that will result in fairness and even-handed treatment for all potential defendants. The prosecutor must be guided by the Principles of Federal Prosecution and see to it that cases are brought when warranted and that appropriately culpable defendants are included within the prosecution.

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<sup>68</sup>(...continued)

United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); United States v. Automated Medical Laboratories, 770 F.2d 399, 406-08 (4th Cir. 1985); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

## D. Drafting Pitfalls

### 1. Intent

In bid-rigging and price-fixing indictments, words such as "intentionally" should not appear because the criminal intent required to violate the Sherman Act is defined as general intent, not specific intent. That is, in a per se case, the prosecution may establish the requisite criminal intent by demonstrating that the defendants knowingly joined or participated in a conspiracy to engage in the prohibited activity.<sup>69</sup> The prosecution does not need to prove that a defendant had a specific intent to restrain trade.<sup>70</sup> Accordingly, proof that the defendant knowingly joined or participated in a conspiracy to fix prices sufficiently establishes defendant's "conscious purpose" to restrain trade.<sup>71</sup> No additional evidence of intent is required.

In indictments charging non-Sherman Act offenses, you should track the language of the statute involved in the charging paragraphs. What you must be aware of is case law concerning intent that is engrafted onto certain statutory charges that must be reflected in the indictment. For instance, the statutory elements of obstruction of justice, 18 U.S.C. § 1503, require only that the defendant endeavored to influence, obstruct or impede the due

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<sup>69</sup>United States v. Koppers Co., 652 F.2d 290, 294-95 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Continental Group, Inc., 603 F.2d 444, 461-62 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Portsmouth Paving Corp., 694 F.2d 312, 317-18 (4th Cir. 1982); United States v. Cargo Serv. Stations Inc., 657 F.2d 676, 683-84 (5th Cir. Unit B Sept. 1981), cert. denied, 455 U.S. 1017 (1982).

<sup>70</sup>United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106-07 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

<sup>71</sup>United States v. Koppers Co., 652 F.2d at 294-95; United States v. Portsmouth Paving, 694 F.2d at 317-18.

administration of justice. However, when the obstruction of justice charge is based on defendant's perjury, the Government must allege that defendant "did influence, obstruct and impede" justice as well as "endeavored to influence, obstruct and impede" justice.<sup>72</sup>

## 2. Vagueness

An indictment is legally sufficient if it sets forth the elements of the offense, informs the defendant of the nature of the charges against him, appraises the defendant of what he must be prepared to meet at trial and protects the defendant against double jeopardy.<sup>73</sup> A valid antitrust indictment need not list specific transactions nor name all co-conspirators.<sup>74</sup> Nonetheless, a standard defense practice has been to file motions to dismiss based upon lack of specificity in indictments charging an antitrust offense. Courts have routinely denied such motions as long as the

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<sup>72</sup>United States v. Griffin, 589 F.2d 200, 204 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Perkins, 748 F.2d 1519, 1528-29 (11th Cir. 1984); United States v. Caron, 551 F. Supp. 662, 670 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

<sup>73</sup>Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Mobile Materials, Inc., 871 F.2d 902, 906 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, \_\_ U.S. \_\_ (1990). Mobile Materials contains a particularly good discussion on the necessary detail for a valid indictment.

<sup>74</sup>United States v. Mobile Materials, Inc., 871 F.2d at 907.

indictment carefully followed the language of the Sherman Act.<sup>75</sup> Specifically, motions to dismiss because an indictment fails to allege an overt act fail because no overt acts need be alleged or proved in Sherman Act cases.<sup>76</sup>

### 3. Surplusage

Surplusage refers to language in an indictment that is unnecessary to its meaning, and does not affect its validity. Language in an indictment that is neither material nor relevant to the charges contained in the indictment may be deemed to be surplusage.<sup>77</sup>

In drafting indictments, attorneys should try to avoid surplusage. The trial court has discretion to strike language from an indictment because it is surplusage. A court should do so only if the language is irrelevant, inflammatory and prejudicial.<sup>78</sup>

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<sup>75</sup>See Criminal Antitrust Litigation Manual, 9:2.1[8-2], p. 160.

<sup>76</sup>United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Mobile Materials, Inc., 871 F.2d at 909.

<sup>77</sup>See United States v. Terrigno, 838 F.2d 371, 373 (9th Cir. 1988).

<sup>78</sup>Fed. R. Crim. P. 7(d); Wright, Federal Practice and Procedure, Criminal 2d § 127 at 426-27; United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971); United States v. Climatemp, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979); United States v. Ahmad, 329 F. Supp. 292, 297 (M.D. Pa. 1971), aff'd, 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).



E. Statute of Limitations

A properly pled charge must contain an allegation that the offense charged was formed or carried out, at least in part, within the jurisdiction of the federal district court where the indictment is filed and within the period of limitations for the offense involved. A typical jurisdiction and venue paragraph reads: "The conspiracy charged in this indictment was carried out, in part, within the \_\_\_ District of \_\_\_ within the five years preceding the return of this indictment."

Bid-rigging and price-fixing conspiracies prohibited by the Sherman Act are subject to a five-year statute of limitations.<sup>79</sup> Such conspiracies begin when the parties agree to rig bids or fix prices.<sup>80</sup> In prosecutions under the Sherman Act and other conspiracy statutes that do not require proof of an overt act,<sup>81</sup> the statute of limitations begins to run only when the conspiracy terminates, either because the offense has been abandoned or it has been completed.<sup>82</sup>

A bid-rigging conspiracy continues, and the statute of limitations does not start to run, until each conspirator receives the benefits contemplated by the conspiracy. These benefits have included payoffs among the

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<sup>79</sup>18 U.S.C. § 3282.

<sup>80</sup>United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-99 (1927); Nash v. United States, 229 U.S. 373, 378 (1913).

<sup>81</sup>Such as RICO conspiracies, 18 U.S.C. § 1962(d).

<sup>82</sup>United States v. Kissel, 218 U.S. 601, 608-10 (1910); Hyde v. United States, 225 U.S. 347, 369 (1912).

conspirators as well as payments by the owner to the conspirator who performs the rigged contract.<sup>83</sup> When relying on a payoff or payments theory for statute of limitations purposes, the indictment should reference the date the payment occurred in the "offense charged" paragraph as follows: "On or about \_\_\_ and continuing thereafter until at least (date of final payment)."

Also, it should be alleged that receipt of payment under the contract was one of the conspiracy objectives. The following is an example: "For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore charged, they combined and conspired to do, including among other things: (d) having defendant \_\_\_ perform the electrical construction portion of the \_\_\_ project and receive payments from \_\_\_ for said performance."

#### F. Charging Single or Multiple Conspiracies

##### 1. Single vs. multiple conspiracies

When drafting an indictment, the allegations must mirror what the evidence demonstrates -- if more than one conspiracy was involved, a defendant may properly be charged with more than one violation.<sup>84</sup> If, on the other hand, the evidence supports one overall conspiracy with several subparts, it is entirely appropriate to charge a single

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<sup>83</sup>United States v. A A A Elec. Co., 788 F.2d 242 (4th Cir. 1986); United States v. Girard, 744 F.2d 1170 (5th Cir. 1984); United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir.), cert. denied, 484 U.S. 846 (1987); United States v. Inryco, Inc., 642 F.2d 290 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656, 661 (10th Cir. 1988).

<sup>84</sup>United States v. Sargent Elec. Co., 785 F.2d 1123 (3d Cir.), cert. denied, 479 U.S. 819 (1986).

conspiracy.<sup>85</sup> It is likely that no matter which path you choose, you will be challenged by defense counsel for having chosen the wrong path.

Whether to charge the defendants' conduct as a single conspiracy or as multiple conspiracies may be difficult to evaluate, primarily because it is a mixed question of law and fact. In general, the final charging decision rests on an analysis of the facts; as the facts change, so may conclusions differ.<sup>86</sup> Thus, making the correct charging decision often consists of attempting to fit the facts of the instant case within the facts of a previously-decided case, preferably within the same circuit. Nevertheless, this section gives an overview of the legal aspect of the single vs. multiple conspiracies issue. The consequences of making the wrong charging decision are dealt with in the next section, which covers variance and double jeopardy. However, the law on determining whether certain conduct forms the basis for a single vs. multiple conspiracies charge and the law on variance and double jeopardy are so bound together that this section and the next are best considered as a unit.

There is a consensus as to what constitutes a conspiracy, what is required to establish a conspiracy, and how to connect a particular defendant to a given conspiracy. "Agreement is the primary element of a conspiracy."<sup>87</sup> and "... the precise nature and extent of the conspiracy must be determined by reference to the agreement which

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<sup>85</sup>United States v. Vila, 599 F.2d 21, 24 (2d Cir.), cert. denied, 444 U.S. 837 (1979); United States v. Ruggles, 782 F.2d 1044 (6th Cir. 1985); Koolish v. United States, 340 F.2d 513, 525 (8th Cir.), cert. denied, 381 U.S. 951 (1965).

<sup>86</sup>United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982).

<sup>87</sup>United States v. Varelli, 407 F.2d 735, 741 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972); see United States v. Broce, 488 U.S. 563, 570 (1989) (agreement "is all but synonymous" with conspiracy).

embraces and defines its objects."<sup>88</sup> Consequently, distinct agreements constitute distinct violations of the law and may be the subject of distinct prosecutions. Regardless of whether the Government proves those agreements by direct evidence of written agreements, by statements made by the parties, or by inference from the actions of the defendants, the conduct prosecuted in a conspiracy case is the agreement and not any particular action taken by the defendants.

To establish the existence of a conspiracy and connect a defendant to it, three elements must be proved:<sup>89</sup> (1) knowledge of the object of the conspiracy, (2) knowledge of the composition of the conspiracy, and (3) intent to join the conspiracy. "The agreement may be shown if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose."<sup>90</sup> While the Government is required to prove that the defendant knows the essential nature of the conspiracy, it is not required to prove that he knows all of the conspirators or all of the details of the conspiracy, or even all of the means by which the objects of the conspiracy will be accomplished.<sup>91</sup>

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<sup>88</sup>Braverman v. United States, 317 U.S. 49, 53 (1942).

<sup>89</sup>See Note, "Single v. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 Minn. L. Rev. 295, 297-98 (1981) (hereinafter "Student Note").

<sup>90</sup>United States v. Varelli, 407 F.2d *supra*; see Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943); United States v. Continental Group, Inc., 603 F.2d 444, 462-63 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Lemm, 680 F.2d 1193, 1204 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983).

<sup>91</sup>Blumenthal v. United States, 332 U.S. 539, 559 (1947); United States v. Gomberg, 715 F.2d 843, 846 (3d Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Lemm, 680 F.2d at 1204.

Given the necessarily covert nature of a criminal conspiracy, none of these elements is likely to be provable by direct evidence. Thus, proof of an illegal agreement often depends on inferences drawn from circumstantial evidence.<sup>92</sup> "Often [such] crimes are a matter of inference deduced from the acts of the persons accused and done in pursuance of a criminal purpose."<sup>93</sup> Indeed, it is not even necessary to prove a formal agreement existed to prove a conspiracy. The Supreme Court has long held that an agreement could be based on a tacit understanding, created by a long course of conduct. "Not the form or manner in which the understanding is made, but the fact of its existence . . . [is] the crucial matter[ ]. The proof, by the very nature of the crime, must be circumstantial and therefore inferential. . . ."<sup>94</sup>

It is the need to prove conspiracies by inference that makes determining the existence of single vs. multiple conspiracies so difficult. The scope of an agreement must be deduced from the conduct that can be proved. Courts are continually struggling to find some means to analyze the facts in conspiracy cases that will lead to an objective, rather than totally subjective, determination of the scope of conspiracies. In part, the inferences that courts have been willing to draw depend upon the structure of the conspiracy, what has sometimes been called the "nature of the enterprise."

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<sup>92</sup>United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978); United States v. Mulherin, 710 F.2d 731, 737-38 (11th Cir.), cert. denied, 464 U.S. 964 (1983).

<sup>93</sup>American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); see also Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939); United States v. Nolan, 718 F.2d 589, 595 (3d Cir. 1983).

<sup>94</sup>Direct Sales Co. v. United States, 319 U.S. 703, 714 (1943).

The starting point of any discussion of the scope of a conspiracy where only one conspiracy statute is involved,<sup>95</sup> as would be the case in the overwhelming majority of Antitrust Division prosecutions, is Braverman v. United States, 317 U.S. 49 (1942). In Braverman, the Government indicted certain defendants on seven separate conspiracy counts, each to violate a separate substantive section of the Internal Revenue Code. All of the counts were brought under the general criminal conspiracy provision of the criminal code, what today would be 18 U.S.C. § 371. It was proved at trial that there was a single continuing agreement among the defendants that had as its objectives the violation of the several substantive revenue laws, and the issue to be resolved was whether each object could be punished as a separate conspiracy under the general conspiracy law. The Court held that they could not:

[T]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.<sup>96</sup>

Braverman stands for the proposition that the scope of a conspiracy is determined by what the parties agreed to do rather than by how many overt acts were involved or what the objects of the agreement might have

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<sup>95</sup>Where more than one conspiracy statute is involved, the issue is basically a double jeopardy issue, which is discussed in the following section.

<sup>96</sup>317 U.S. at 54.

been. However, while Braverman squarely focuses the single vs. multiple conspiracies issue on the scope of the agreement, it does little to illuminate the question of how to determine that scope.

Historically, most conspiracies were classified as either "chain" conspiracies or "wheel" conspiracies. Although it is important to understand the basics of chain and wheel conspiracies, antitrust conspiracies often do not conveniently fit either model and must be independently analyzed to determine the scope of the conspiracy.

"Chain" conspiracies are basically those where various people are engaged at different levels of an enterprise involving the same subject matter, the paradigm being a conspiracy to import and distribute narcotics. There is a chain of individual agreements between growers, manufacturers, exporters, importers, distributors, and "retailers" in a typical narcotics conspiracy, but the courts have chosen to ignore the individual agreements and consider all those involved in the overall scheme to have agreed together to a single conspiracy.

An individual associating himself with a 'chain' conspiracy knows that it has a 'scope' and that for its success it requires an organization wider than may be disclosed by his personal participation. Merely because the Government in this case did not show that each defendant knew each and every conspirator and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operated on only one level.<sup>97</sup>

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<sup>97</sup>United States v. Agueci, 310 F.2d 817, 827 (2d Cir. 1962) (citations omitted), cert. denied, 372 U.S. 959 (1963); see United States v. Bastone, 526 F.2d 971, 981 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976).

So long as a defendant knows that he is part of a "chain" conspiracy that depends for its success on more than his own agreement, he will be considered a party to all that is necessary for the broader conspiracy's success. He does not have to know the exact scope or composition of the conspiracy.<sup>98</sup>

Unlike the "chain" conspiracy, where people are performing various tasks at different levels to accomplish what amounts to one illegal purpose, "wheel" conspiracies consist of a central person or persons (the "hub") performing basically the same illegal acts with separate other groups (the "spokes") who are not otherwise engaged in unlawful conduct. The issue is whether the hub is engaged in separate conspiracies with each spoke or whether the hub and all of the spokes are engaged in a single conspiracy.

In Kotteakos v. United States, 328 U.S. 750 (1946), one man assisted various other persons to file fraudulent applications for Federal Housing Administration loans. There was no evidence that any of the spokes knew that the others existed, nor did any spoke profit in any way from the loans granted to another. This total lack of interdependence and knowledge easily convinced the Court that there was no single conspiracy.

The Court reached the opposite conclusion in Blumenthal v. United States, 332 U.S. 539 (1947). The crime involved was selling wholesale liquor at a higher price than the law allowed. Two wholesale dealers working together obtained the liquor. Three middlemen, each working independent of the others, sold the liquor to various retailers. When the liquor was delivered, the middlemen collected the cash from the retailers and paid the cash to the wholesalers.

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<sup>98</sup>United State v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.). For a rare example of a chain conspiracy where the court refused to extend the chain to its furthest limits, see United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).



The Government charged that all five men were involved in a single conspiracy. At trial, the wholesalers alleged that they were not the brains behind the scheme, that another man actually owned the wholesale liquor, and that they merely received a commission for selling what they did. None of the middlemen had known this; they all believed that the wholesalers owned the liquor they were selling. It was also proved that each middleman, though working independently, knew in a general sense that more middlemen existed and that more liquor was being sold illegally by the wholesalers than each individual was selling.

The Court found a single conspiracy. It was sufficient to show that each conspirator knew the essential nature of the scheme that he was joining without a need to prove that he knew the exact details of the plan or of the participation of others. Knowledge of the general outline of the overall scheme and knowing participation in that scheme were sufficient where each defendant's actions were in furtherance of the same goal, even though the middlemen were indifferent to the success of any but their individual part of the scheme. In this sense, the reasoning is similar to "chain" conspiracy reasoning where knowledge of a broader scheme plus participation is enough to make a defendant a party to the overall conspiracy, even though he is only concerned with his individual part, where success of the overall goal is dependent on the success of each of the parts.

Perhaps the best known example of an antitrust case that fits the model of a wheel conspiracy is Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). In Interstate Circuit, the manager of a group of motion picture exhibitors sent copies of a letter to eight motion picture distributors, each letter naming all of the distributors as addressees, setting forth certain demands (largely restrictions on later-run exhibitors) that would have to be met before Interstate would continue to show the distributors' films in its theaters. Subsequently, all eight distributors substantially complied with Interstate's demands. The Government charged the distributors with conspiring among

themselves to impose the restrictions on later-run exhibitors, and the district court agreed. On appeal, the Supreme Court affirmed.

While the Court found sufficient evidence in the record to support a finding of overt agreement among the distributors, it held that an overt agreement was not essential to prove an unlawful conspiracy in that case.

It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act.<sup>99</sup>

Thus, the Court found that knowledge of the general contours of a conspiracy, acting with intent to further the goals of the conspiracy, and actual interdependence between the members in the success of the overall scheme would suffice to prove the existence of an agreement regardless of lack of perceived interdependence or explicit agreement among the spokes of the wheel.

In addition to obvious "chain" and "wheel" conspiracies, there are some agreements that have characteristics of both "wheel" and "chain" conspiracies and some that really look like neither, and the federal courts have long recognized this. Indeed, more recent conspiracy cases in the federal courts have generally abandoned the older "wheel" and "chain" type of analysis.<sup>100</sup> Nevertheless, much of the law on single vs. multiple conspiracies was

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<sup>99</sup>306 U.S. at 226-27.

<sup>100</sup>See United States v. Perez, 489 F.2d 51 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

developed using the "wheel" and "chain" analyses, and the principles involved in those analyses are useful in analyzing all types of conspiracies.

Recent cases have used a "totality of the circumstances" test to resolve the single/multiple conspiracy question.<sup>101</sup> This test requires the consideration of all of the available evidence to determine whether there is one conspiracy or several. While nothing is beyond the bounds of consideration under a "totality of the circumstances" test, those courts that have adopted this test have developed checklists of the most important factors to consider before reaching a decision. Such factors include: (1) the number of alleged overt acts in common, (2) the overlap in personnel, (3) the time period during which the alleged acts took place, (4) the similarity in methods of operation, (5) the locations in which the alleged acts took place, (6) the extent to which the purported conspiracies share a common objective, and (7) the degree of interdependence needed for the overall operation to succeed.<sup>102</sup> The weight to be accorded each of these factors varies from court to court and case to case, and it is entirely possible for two different people to analyze the same fact situation using this list and, depending on the

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<sup>101</sup>See United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); United States v. Marable, 578 F.2d at 153-54; United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981); United States v. Castro, 629 F.2d at 461; United States v. Tercero, 580 F.2d 312, 315 (8th Cir. 1978); United States v. Bendis, 681 F.2d 561, 564-65 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982). Three circuits have moved toward a "totality of the circumstances" test without expressly adopting it. United States v. Mallah, 503 F.2d at 971, 985-86 (2d Cir. 1974); United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); Ward v. United States, 694 F.2d 654, 662-63 (11th Cir. 1983). The Tenth Circuit has expressly rejected the "totality of the circumstances" test in favor of the "same evidence" test. United States v. Hines, 713 F.2d 584, 586 (10th Cir. 1983).

<sup>102</sup>See Note, "Single v. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 Minn. L. Rev. 295, 297-78 (1981).

weight they assign to the different factors, reach contradictory conclusions. Nevertheless, this is the test that courts are adopting in considering whether a given course of conduct is one or several conspiracies.

The "totality of the circumstances" test is particularly useful in most Division prosecutions because the fact patterns do not fit comfortably into either the "wheel" or "chain" conspiracy model. There is no central core of conspirators as in a "wheel" conspiracy, nor are various groups of conspirators working for the same objective at different levels as in a "chain" conspiracy. These conspiracies, perhaps typified by the Division's road-building cases, involve diffuse agreements spread out over time, territory, and personnel. They may involve conduct occurring in several states or regions, there may appear to be both national and local aspects to the violations, and there may be various degrees of overlap in personnel. Although such complicated fact patterns make the determination of single vs. multiple conspiracies difficult, the basic questions that must be answered remain the same: Were the defendants generally aware of the objectives and composition of the larger conspiracy, and was the success of the various parts of the conspiracy necessary to the success of the whole and vice versa? Mere knowledge of a broad conspiracy is not enough. But knowledge and a stake in the success of the broad conspiracy may be enough to be considered a part of the broad conspiracy. And, once the outer boundaries of an agreement have been determined, that becomes the conspiracy that must be charged; it may not be broken down into numerous lesser conspiracies because it embraced numerous lesser objectives.<sup>103</sup>

A case brought by the Division that has had a significant impact in this area is United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978), a part of the Division's folding carton litigation. The

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<sup>103</sup>Of course, the overall conspiracy may be broken down into numerous lesser conspiracies so long as no defendant is charged more than once, since there would then be no ground on which to challenge the Government's actions.

Government proved a longstanding industry practice whereby folding carton manufacturers could clear bids on new contracts in advance and get authorization to raise prices to existing customers. Consolidated made use of this system on a number of occasions, and the Government alleged that Consolidated was a member of a nationwide conspiracy. Consolidated claimed on appeal that the Government had either not proved a single nationwide conspiracy or, if it had, had failed to prove that Consolidated had joined.

The court found that a single conspiracy was shown by the evidence and, in effect, that this had been admitted by 70 other defendants. Thus, the opinion deals primarily with the issue of whether Consolidated had joined the conspiracy. The court's reasoning on the issue of single vs. multiple conspiracies is as follows:

This illegitimate business practice appears to have flourished among so many of the conspirators for so long that it could reasonably be considered the customary way of doing business. All the facts and circumstances fully justify the view that a custom-made conspiratorial understanding had been developed and fashioned in a size and style most suited to their particular needs. Whenever the needs of any conspirator might require it, the conspirator had only to plug into the system, get 'on the phone,' and make the necessary arrangements. This system which developed and remained viable among them to be available for use by any conspirator was a pervasive aspect of the conspiracy. The many minor individual or particular conspiracies which the system fostered and spawned were evidence of the effectiveness of the general conspiracy. The conspiracy was in the nature of an industry utility, operated totally for the benefit of its shareholders, the carton producing conspirators, and to the detriment of its customers and the public.

. . .

Because of the nature of this conspiracy, it could not reasonably be expected that any one conspirator would have full knowledge. Consolidated did not need full knowledge to participate in the benefits of the conspiracy and therefore proof that Consolidated had some knowledge that activities of the same type as practiced by them for the same mutual purposes must have been widespread in the industry. We believe it may reasonably be inferred from the evidence that the overall design, purpose and functioning of the conspiracy were within the reasonable contemplation of Consolidated when it engaged in the episodes. Consolidated endeavored to abide by and assist in the enforcement of the rules of the conspiracy. By its behavior, Consolidated demonstrated it knew enough about the conspiracy to use it to serve its own purposes when needed. There is more than suspicion; there was interested cooperation with a stake in the venture.

The Consolidated court found that while, subjectively, each conspirator was only interested in its own particular bid, there was such an established, interconnected bid-rigging system that, objectively, each bid was facilitated by the overall agreement and the overall agreement was strengthened by each rigged bid that made use of it. Thus, the court found a single agreement.

The court also stated that it would have been permissible for the Government to charge numerous separate conspiracies rather than the overall conspiracy actually charged. If there was a single nationwide agreement, Braverman holds that it is improper to charge individual objectives of that single agreement as separate conspiracies. However, the Government is not obligated to charge the fullest extent of a given conspiracy. It is free to charge different defendants with being parties to different aspects of a larger conspiracy so long as each defendant is charged with only one violation.

The broad language of Consolidated Packaging must be interpreted in light of the specific facts of that case to avoid confusing a passive understanding that certain illegal conduct is an acceptable way of business with an actual conspiratorial agreement. For example, a bank robber might have a passive understanding that several of his friends would be willing and able, if asked, to drive the getaway car, and that other friends would be willing and able, if asked, to crack the safe the next time he robs a bank. That understanding does not amount to a conspiracy between the bank robber and his friends. If the bank robber calls on two of his friends (one driver and one safecracker) to help him rob Bank A and later calls on the same or different friends to help him rob bank B, the Government may prosecute both conspiracies separately, as long as both arrangements were negotiated "from scratch."<sup>104</sup>

The key issue in this area is whether the bid-rigging conspiracy is limited to the individual rounds of bidding on each new contract. If individual negotiations concerning quid pro quos must be engaged in by the persons interested in each award to determine whether an agreement can be reached with respect to rigging that particular bid, and if the award will be bid competitively if those negotiations fail, then each separately negotiated agreement is best viewed as a separate conspiracy and not as part of some overreaching, on-going bid-rigging conspiracy.<sup>105</sup>

A rather thorough examination of separate indictments brought by the Antitrust Division as part of its road-building investigation, using the "totality of the circumstances" test to determine whether they involved the

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<sup>104</sup>See United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972); In re Grand Jury Proceedings, 797 F.2d at 1384-85 (although the court's use of the term "superconspiracy" may be confusing, its distinction between a passive understanding and an agreement is correct).

<sup>105</sup>In re Grand Jury Proceedings, 797 F.2d at 1384-85.

same conspiracy, can be found in United States v. Ashland-Warren, Inc., 537 F. Supp. 433 (M.D. Tenn. 1982).

The defendant had pled guilty to rigging bids on several highway construction contracts in Virginia, and was trying to have the instant indictments – alleging bid-rigging on several Tennessee highway construction contracts – dismissed on double jeopardy grounds as part of the same conspiracy.

In a thoughtful analysis, the court first held that the Virginia and Tennessee conspiracies were separate as a matter of law because the firms involved in each state were not in competition with each other. The two sets of companies may have been aware of each other, and may have used the same method of rigging bids, "[b]ut price-fixing by means of bid-rigging is flatly impossible where the alleged conspirators are not also competitors."<sup>106</sup> The court then went on to apply the "totality of the circumstances" test to the facts – examining such factors as overlap in personnel and time, methods of operation, degree of interdependence, etc. – and concluded that the conspiracies were separate as a matter of fact.<sup>107</sup>

The Tenth Circuit reached a different conclusion in United States v. Beachner Construction Co., 729 F.2d 1278 (10th Cir. 1984), in which the court held a *la Consolidated Packaging*, that a pattern of bid-rigging on construction contracts in Kansas going back several decades was but a single conspiracy, with individual contract lettings separate objects of the one conspiracy. The court was undoubtedly influenced by the existence of evidence – unusual in a road-building case – that a statewide clearing agent had presided over bid-rigging meetings for several years. Those meetings ended many years before the return of the indictment but the court may have

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<sup>106</sup>537 F. Supp. at 445; see also United States v. Korfant, 771 F.2d 660, 663 (2d Cir. 1985).

<sup>107</sup>Id. at 445-47; see also United States v. Sargent Elec. Co., 785 F.2d 1123 (3d Cir.), cert. denied, 479 U.S. 819 (1986); United States v. Wilshire Oil Co., 427 F.2d 969, 975-77 (10th Cir.), cert. denied, 400 U.S. 829 (1970).



believed, incorrectly in the Division's view, that a single conspiracy continued into the period covered by the indictment. Moreover, other parts of the court's opinion appear to confuse a passive understanding with an actual agreement.<sup>108</sup>

While the Division generally has been successful in limiting Beachner to its particular facts, attorneys can anticipate being second-guessed regardless of how an indictment is framed. If a single broad conspiracy is charged, the defendant will argue that there were multiple conspiracies. If multiple conspiracies are charged, the defendant will argue that there was only a single conspiracy. All that can be done is to keep the essentials of single vs. multiple conspiracies in mind when deciding how to charge. The key is the scope of the agreement. However, this is not agreement in a subjective, contract sense of the word, for this would often result in extremely narrow conspiracies. If the general contours of a conspiracy are known, all those that interact with any other conspirators in such a way as to further the goals of the conspiracy are parties to the conspiracy, and the sum of the interactions becomes the scope of the agreement. Where groups of people interact in such a way as to further objectively independent goals, they are not conspiring together and the individual groups may be prosecuted as multiple conspiracies. That is the law. Inferring the true state of affairs from the facts is the problem.

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<sup>108</sup>See In re Grand Jury Proceedings, 797 F.2d at 1384-85 (criticizing Beachner analysis).

2. Variance and double jeopardy problems in charging conspiracies

As noted in the previous section, in a complex factual situation whether the Government charges a single conspiracy or multiple conspiracies, its decision is likely to be challenged by the defendant. This section discusses those challenges.

The issue of single vs. multiple conspiracies can be raised by a defendant in two ways: the Government charges a single conspiracy and the proof at trial reveals multiple conspiracies, or the Government charges multiple conspiracies and the proof at trial reveals a single conspiracy. The first scenario will be discussed under the rubric of variance; the second under double jeopardy.

a. Variance

When the Government alleges a single conspiracy and its evidence shows multiple conspiracies, the problem is a variance between the indictment and the Government's proof at trial. However, the Supreme Court has clearly held that the real issue is not whether there is a variance in proof but whether the variance is harmless or fatal – the mere fact that there has been a variance is not sufficient to overturn a conviction in the absence of prejudice. The seminal case on this point is Berger v. United States, 295 U.S. 78 (1935), where the Court stated:

The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken

by surprise by the evidence offered at trial; and (2) that he may be protected against another prosecution for the same offense.<sup>109</sup>

As a practical matter, both of these conditions are met whenever the multiple conspiracies proved at trial are fully contained within the single conspiracy charged. However, while the Court's direction that a variance is fatal only when it "affects the substantial rights" of the accused remains the law, the issues to be considered in making a decision on this point have been broadened to cover more than the issues of surprise and double jeopardy specifically noted by the Court in Berger.

The most common additional issue presented by a variance is the jury's ability to keep straight the evidence presented with respect to the various defendants and the various conspiracies actually proved, *i.e.*, the jury's ability to avoid transferring guilt among separate conspiracies. In deciding whether jury confusion has resulted from the variance, courts look at two key areas: First, if the conspiracies ultimately proved had been charged separately, could they have been joined together for trial; and second, was the jury properly instructed on the multiple conspiracies issue. If joinder would, in fact, have been proper, then the existence of a jury instruction requiring separate consideration of the conspiracies actually proved and each defendant's connection to each conspiracy "largely attenuate[s] any prejudice flowing from the establishment of a variance."<sup>110</sup>

In Berger, for example, the Government charged a single conspiracy involving five persons, and the proof at trial showed two conspiracies with a common figure (who was not the defendant). Although the Court did

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<sup>109</sup>295 U.S. at 82; see also United States v. Miller, 471 U.S. 130 (1985); United States v. Cina, 699 F.2d 853 (7th Cir.), *cert. denied*, 464 U.S. 991 (1983); Fed. R. Crim. P. 52(a).

<sup>110</sup>United States v. Griffin, 464 F.2d 1352, 1357 (9th Cir.), *cert. denied*, 409 U.S. 1009 (1972).

not discuss the jury instruction issue, it examined the record below and expressly found that the defendant suffered no prejudice resulting from the variance.<sup>111</sup>

At the opposite extreme is Kotteakos v. United States, 328 U.S. 750 (1946), a classic "wheel" conspiracy case. Thirty-two persons were indicted, 19 went to trial, and 13 had their cases considered by the jury. At least eight separate conspiracies were shown at trial. The Court found the connection between the conspiracies so slight and the risk of improper transference of guilt so high that joinder would have been improper. The Court also noted the lack of a proper jury instruction. Under these circumstances, the Court held that the variance was fatal.<sup>112</sup>

In between these two cases is United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972), also a "wheel" conspiracy. As in Berger, the Government charged one conspiracy but proved two at trial, each conspiracy having defendants in common. The court found that the conspiracies were sufficiently close that joinder would have been proper. Nevertheless, as a result of the lack of a proper jury instruction on guilt transference in multiple conspiracies, the court found a fatal variance.

Notwithstanding the simple logic of these cases that a variance in proof is harmless unless a defendant's substantial rights are adversely affected, a few courts of appeals have gone beyond this reasoning and held the Government to a stricter standard. For example, in United States v. Tramunti, 513 F.2d 1087, 1107 (2d Cir.), cert.

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<sup>111</sup>The fact that the number of defendants and conspiracies is small does not necessarily preclude a finding of juror confusion. In United States v. Coward, 630 F.2d 229 (4th Cir. 1980), the court reversed the conviction of two men charged with conspiring with an unindicted co-conspirator, where the proof at trial showed that each had conspired with the unindicted co-conspirator separately, on the ground of juror confusion.

<sup>112</sup>See also United States v. Bertolotti, 529 F.2d 149, 157-58 (2d Cir. 1975).

denied, 423 U.S. 832 (1975), the court, in essence, held that if the Government charges a single conspiracy ABCD, and proves at trial conspiracies AB and CD but not ABCD, the defendants must be acquitted, regardless of the fact that AB and CD are both unlawful conspiracies and there is clear proof that a given defendant was a member of one or both, and regardless of whether the defendant's rights were adversely affected or the jury confused.<sup>113</sup> This is clearly not the law. Further, the logic of Tramunti would appear to have been overruled by United States v. Miller, 753 U.S. 19 (1985), discussed more fully below.

Another issue that courts sometimes note in dealing with the question of harmless vs. fatal variance is whether the variance may have deprived the defendant of his right to be tried only on indictment by a grand jury. This issue may arise where the Government has proved, not the entire conspiracy charged in the indictment, but what might be considered a "lesser included" conspiracy. For example, the Government charges conspiracy ABC and only proves conspiracy AB. In addition to the standard issues of surprise, double jeopardy, and juror confusion, some courts have also asked whether a grand jury would have indicted solely on AB.

This issue was confronted in United States v. Miller, 471 U.S. 130 (1985), wherein the Supreme Court unanimously held that the 5th Amendment's grand jury clause only prohibits convicting a defendant of an offense that is either not charged or that is broader than any offense charged in the indictment. With respect to convicting a defendant of an offense narrower than, but completely encompassed by, the offenses charged in the indictment, the Court stated:

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<sup>113</sup>See also United States v. Gomberg, 715 F.2d 843, 846-47 (3d Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Abushi, 682 F.2d 1289, 1300 (9th Cir. 1982). An earlier case in the Ninth Circuit, United States v. Griffin, 464 F.2d supra, had approved a jury instruction permitting conviction notwithstanding proof of conspiracies different from the one charged in the indictment. Griffin is not cited in Abushi.

The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime. Indeed, a number of longstanding doctrines of criminal procedure are premised on the notion that each offense whose elements are fully set out in an indictment can independently sustain a conviction.<sup>114</sup>

Thus, Miller firmly lays to rest any question of the propriety of a conviction where the Government charges conspiracy ABC and proves AB, or charges conspiracies AB and CD and proves AB. Accordingly, attorneys should strongly resist any jury instruction that suggests that the Government must prove every offense charged in the indictment or each means charged for committing a given offense to win a conviction.

Unfortunately, clearing away the confusion created by cases decided before Miller on the issue of a defendant's grand jury rights does not automatically help in overcoming a Tramunti-type charge. Defendants will no doubt continue to raise Tramunti in those instances where the Government charges conspiracy ABCD and proves conspiracies AB and CD. Although Miller did not specifically address this issue, it does reaffirm the Berger and Kotteakos reasoning that it is not the existence of a variance, but whether the variance actually prejudiced the fairness of the defendant's trial, that is the relevant consideration.<sup>115</sup> It is incorrect to instruct a jury that it must always acquit where the Government charges a single conspiracy and proof at trial establishes multiple conspiracies

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<sup>114</sup>471 U.S. at 136 (citations omitted).

<sup>115</sup>Id. at 134-35.

(unless one of the conspiracies proved is the overall conspiracy); this makes the very fact of a variance in proof fatal.

Where the multiple conspiracies proved are fully contained within the overall conspiracy charged, longstanding Supreme Court precedent holds that whether such a variance is fatal turns on the complexity of the case (i.e., the appropriateness of joinder) and the presence or absence of proper jury instructions.

In general, the judge should be requested to charge that defendants should be convicted if the jury finds them a party to any unlawful conspiracy or conspiracies within the bounds of the indictment, with proper limiting instructions given as to transference of guilt. If a court instructs the jury that notwithstanding the Government's charging conspiracy ABCD, defendants can be convicted if they are found to have engaged in illegal conspiracy AB or CD or ABC, the court should make clear that the jury must unanimously find a defendant guilty of being a party to the same conspiracy to convict, i.e., it is not sufficient that six jurors find defendant X a party to conspiracy AB while the other six find him a party to conspiracy CD. While this seems an obvious point, several courts have mentioned it in reviewing jury instructions.<sup>116</sup>

b. Double jeopardy

When the Government charges multiple conspiracies – whether in the same, simultaneous, or wholly distinct indictments – but proves only one, double jeopardy issues are raised. The Double Jeopardy Clause<sup>117</sup>

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<sup>116</sup>United States v. Mastelotto, 717 F.2d at 1247-50; United States v. Barlin, 686 F.2d 81, 88-89 (2d Cir. 1982); United States v. Lyons, 703 F.2d 815, 821-22 (5th Cir. 1983).

<sup>117</sup>U.S. Const. amend. V states, in part: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb. . . ."



prohibits the imposition of multiple punishments for the same offense, prosecution for the same offense after acquittal, and prosecution for the same offense after conviction.<sup>118</sup>

In determining whether a single act can be punished under two different statutes, the Supreme Court, in Blockburger v. United States, 284 U.S. 299, 304 (1932), has stated that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Thus, a single act may violate two statutes, and as long as each statute requires proof of an additional fact that the other does not, an acquittal or conviction under one does not exempt a defendant from prosecution and punishment under the other, "notwithstanding a substantial overlap in the proof offered to establish the crimes."<sup>119</sup> In Brown v. Ohio, 432 U.S. 161, 166 (1977), the Supreme Court stated that the Blockburger holding was the ". . . established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of multiple punishments. . . ."

Over time, the Blockburger test came to be reformulated by lower courts to focus more on allegations in indictments and proofs at trial, and less on the elements of crimes set down in statutes. As reformulated, the test became known as the "same evidence" test.<sup>120</sup> In fact, the Blockburger test as formulated by the Supreme Court is

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<sup>118</sup>North Carolina v. Pearce, 335 U.S. 711, 717 (1969). The issue of whether the Double Jeopardy Clause applies to corporations has apparently never been directly decided by the Supreme Court. One court of appeals has expressly held that it does apply, United States v. Hospital Monteflores, Inc., 575 F.2d 332 (1st Cir. 1978), and the Supreme Court on several occasions has applied the Double Jeopardy Clause to corporations without addressing the issue. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Fong Foo v. United States, 369 U.S. 141 (1962).

<sup>119</sup>Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

<sup>120</sup>A description of the "same evidence" test can be found in United States v. Marable, 578 F.2d 153 (5th Cir. 1978).

not particularly useful in conspiracy cases. While the Blockburger test can determine whether a defendant can be separately prosecuted under the double jeopardy clause for a single act that violates more than one statute,<sup>121</sup> it is of little help in determining whether a course of conduct can constitutionally be treated as multiple violations of the same statute. Thus, the Blockburger test is not helpful in resolving the double jeopardy issue that arises when a defendant who has already been prosecuted for a Sherman Act conspiracy is prosecuted for another Sherman Act conspiracy. Such cases raise a "unit of prosecution" issue; *i.e.*, they raise the question of whether a particular course of conduct constitutes discrete violations of the same statute that appropriately are characterized as separate offenses for purposes of double jeopardy analysis.

In any event, to refer to the Blockburger test as a "same evidence test" is a misnomer. The Blockburger test has nothing to do with the evidence presented at trial. It is concerned solely with the statutory elements of the offenses charged.<sup>122</sup> Thus, the better approach to the double jeopardy problems that arise in conspiracy cases is to apply a totality of the circumstances test.<sup>123</sup> As already noted in the preceding section, most courts have adopted a "totality of the circumstances" test to distinguish one conspiracy from another where the same statutory violation is charged.<sup>124</sup>

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<sup>121</sup>See also United States v. Albernaz, 450 U.S. 333 (1981) (central issue in deciding whether one act can be punished under separate statutes is legislative intent).

<sup>122</sup>Grady v. Corbin, \_\_ U.S. \_\_, \_\_ n. 12 (1990).

<sup>123</sup>See, e.g., United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (finding separate price-fixing conspiracies); In re Grand Jury Proceedings, 797 F.2d at 1380 (separate bid-rigging conspiracies found); but see United States v. Calderone, 917 F.2d 717 (2d Cir. 1991) (holding that Korfant is "no longer good law" to the extent that it conflicts with Grady v. Corbin, \_\_ U.S. \_\_ (1990)). The Solicitor General has filed a petition for a writ of certiorari in the Calderone case.

<sup>124</sup>See United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981), cert. denied, 455 U.S. 907  
(continued...)

Grady v. Corbin, \_\_\_ U.S. \_\_\_ (1990) is a recent double jeopardy case that could potentially affect successive conspiracy prosecutions. In Grady, the defendant pled guilty to two traffic violation misdemeanors. He was later indicted for several more serious felonies relating to a death that had resulted from the traffic violations. The Supreme Court affirmed the lower court's dismissal of the indictment on double jeopardy grounds. The Court held:

[T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. . . . The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove the conduct.<sup>125</sup>

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<sup>124</sup>(...continued)

(1982); United States v. Marable, 578 F.2d at 153-54; United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981); United States v. Castro, 629 F.2d at 461; United States v. Tercero, 580 F.2d 312, 315 (8th Cir. 1978); United States v. Bendis, 681 F.2d 561, 564-65 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982). Three circuits have moved toward a "totality of the circumstances" test without expressly adopting it. United States v. Mallah, 503 F.2d 971, 985-86 (2d Cir. 1974) United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); Ward v. United States, 694 F.2d 654, 662-63 (11th Cir 1983). The Tenth Circuit has expressly rejected the "totality of the circumstances" test in favor of the "same evidence" test. United States v. Hines, 713 F.2d 584, 586 (10th Cir. 1983).

<sup>125</sup> \_\_\_ U.S. at \_\_\_

The lower courts have just begun to apply the Grady holding to other fact patterns, including successive conspiracy prosecutions.<sup>126</sup> Consequently, how the holding in Grady will affect our prosecutions has yet to be clearly determined.

The law on double jeopardy in the multiple conspiracies context may be summarized as follows: The Government may not try to sentence a defendant twice for the same conspiracy. Whether there are multiple conspiracies depends on the nature of the agreement or agreements involved, and in most circuits, the court will consider all aspects of the conspiracies charged by the Government to determine, as a matter of fact, the scope of the agreements. Unfortunately, there is nothing beyond common sense and reading as many conspiracy cases as possible to serve as a guide to resolving the factual inquiry at the charging stage of a grand jury investigation.

#### G. Duplicious and Multiplicitous Indictments

Indictments charging two or more distinct offenses in a single count are duplicious.<sup>127</sup> Such indictments may violate constitutional protections, including the defendant's right to notice of the charges against him and prevention of exposure to double jeopardy in a subsequent prosecution by obscuring the specific charges

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<sup>126</sup>See United States v. Calderone, 917 F.2d 717 (2d Cir. 1990); United States v. Felix, 926 F.2d 1522 (10th Cir. 1991). The Government has requested certiorari in both cases.

<sup>127</sup>United States v. Wood, 780 F.2d 955, 962 (11th Cir.) (indictment in question struck appropriate balance and not duplicious), cert. denied, 476 U.S. 1184 (1986); see United States v. Kimberlin, 781 F.2d 1247, 1250-51 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986); cf. United States v. Hawks, 753 F.2d 355, 357-58 (4th Cir. 1985); United States v. Morse, 785 F.2d 771, 774 (9th Cir.), cert. denied, 476 U.S. 1186 (1986); United States v. Alvarez, 735 F.2d 461, 465 (11th Cir. 1984); Fed. R. Crim. P. 7(c)(1).

on which the jury convicted the defendant.<sup>128</sup> Duplicitous indictments may also prevent the jury from deciding guilt or innocence on each offense separately and lead to uncertainty as to whether the defendant's conviction was based on a unanimous jury decision.<sup>129</sup> A single count of an indictment alleging that the means used by the defendant to commit an offense are unknown or that the defendant committed the offenses by more than one specified means is not duplicitous.

Since the rule prohibiting duplicity is a rule of pleading, a violation is generally not fatal to the indictment.<sup>130</sup> The Government may correct a duplicitous indictment by electing the basis upon which it will continue.<sup>131</sup> A corrective instruction to the jury may also cure the violation.<sup>132</sup> A duplicitous indictment, however, that is found prejudicial to the defendant may be dismissed.<sup>133</sup> By failing to challenge a duplicitous indictment before trial, a defendant risks waiver.<sup>134</sup>

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<sup>128</sup>See United States v. Kimberlin, 781 F.2d at 1250; United States v. Morse, 785 F.2d at 774.

<sup>129</sup>See United States v. Kimberlin, 781 F.2d at 1250; United States v. Morse, 785 F.2d at 774; cf. United States v. Margiotta, 646 F.2d 729, 732-33 (2d Cir. 1981) (dictum), cert. denied, 461 U.S. 913 (1983).

<sup>130</sup>See Wright, Federal Practice and Procedure, Criminal 2d § 142, at 475.

<sup>131</sup>Id. § 145, at 523; cf. United States v. Elam, 678 F.2d 1234, 1251 (5th Cir. 1982) (when duplicity objection not raised in timely manner, defendant's motion to require Government to elect between two conspiracy statutes properly denied).

<sup>132</sup>See United States v. Kimberlin, 781 F.2d at 1250; United States v. Moran, 759 F.2d 777, 784 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); United States v. Wood, 780 F.2d at 962.

<sup>133</sup>See United States v. Bowline, 593 F.2d 944, 947-48 (10th Cir. 1979); cf. United States v. Drury, 687 F.2d 63, 66 (5th Cir. 1982), cert. denied, 461 U.S. 943 (1983); United States v. Kimberlin, 781 F.2d at 1250-51.

<sup>134</sup>Fed. R. Crim. P. 12(b)(2); see United States v. Leon, 679 F.2d 534, 539 (5th Cir. 1982);  
(continued...)

Indictments charging a single offense in different counts are multiplicitous.<sup>135</sup> Such indictments may result in multiple sentences for a single offense or otherwise prejudice the defendant.<sup>136</sup> Multiplicity does not exist if each count of the indictment requires proof of facts that the other counts do not require.<sup>137</sup> When deciding whether an indictment is multiplicitous, courts must consider whether Congress unambiguously intended to provide for the possibility of multiple convictions and punishments for the same act.<sup>138</sup>

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<sup>134</sup>(...continued)

United States v. Mosley, 786 F.2d 1330, 1333 (7th Cir.), cert. denied, 474 U.S. 1004 (1986); cf. United States v. Price, 763 F.2d 640, 643 (4th Cir. 1985) (dictum) (though holding that appellant waived right to challenge duplicitous indictment by failure to raise claim before trial, court indicated that for proper showing of cause, consequences of waiver might be relieved); United States v. Kimberlin, 781 F.2d at 1251-52 (considering post-trial challenge to duplicitous indictment, court applied practical, not "hypertechnical," standard).

<sup>135</sup>See United States v. Love, 767 F.2d 1052, 1062-63 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); United States v. Maggitt, 784 F.2d 590, 599 (5th Cir. 1986); United States v. Gann, 732 F.2d 714, 721 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); United States v. Swingler, 758 F.2d 477, 491-92 (10th Cir. 1985); United States v. Pierce, 733 F.2d 1474, 1476 (11th Cir. 1984).

<sup>136</sup>See United States v. Gullett, 713 F.2d 1203, 1211-12 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984); United States v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986). But see United States v. Brown, 688 F.2d 1112, 1120 (7th Cir. 1982) (rejecting claim that allowing multiplicitous indictments to go to jury exaggerated defendant's alleged criminality).

<sup>137</sup>See Lovgren v. Byrne, 787 F.2d 857, 863 (3d Cir. 1986); United States v. Maggitt, 784 F.2d at 599; United States v. Marquardt, 786 F.2d 771, 778-79 (7th Cir. 1986); United States v. Roberts, 783 F.2d 767, 769 (9th Cir. 1985); see also United States v. Blakeney, 753 F.2d 152, 154-55 (D.C. Cir. 1985).

<sup>138</sup>See United States v. Grandison, 783 F.2d 1152, 1156 (4th Cir. 1986); United States v. Kimberlin, 781 F.2d at 1252; United States v. Wilson, 781 F.2d 1438, 1439-40 (9th Cir. 1986) (per curiam); see also United States v. Long, 787 F.2d 538, 539 (10th Cir. 1986) (ambiguity in definition of activity to be punished by criminal statute must be evaluated against turning a single transaction into multiple offenses); cf. United States v. Woodward, 469 U.S. 105, 108-10 (1985) (per curiam) (no indication of congressional intention not to allow separate punishment

(continued...)

Since the rule prohibiting multiplicity is a rule of pleading, the defect is not necessarily fatal to the indictment.<sup>139</sup> When multiplicity becomes apparent before trial, the court may order the Government to choose the count on which it will continue.<sup>140</sup> The court may require the Government to dismiss or consolidate multiplicitous counts when the violation becomes apparent after the trial has begun.<sup>141</sup> A multiplicitous indictment will not necessarily be dismissed after trial, especially if the error did not result in an increased sentence or can be remedied by vacating duplicative convictions.<sup>142</sup> The defendant risks waiver by failing to challenge a multiplicitous indictment before trial.<sup>143</sup> The court may grant relief from waiver for good cause.<sup>144</sup>

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<sup>138</sup>(...continued)

for distinct offenses of making false statements to federal agency and intentionally failing to report transporting over \$5,000 into country); United States v. Shaw, 701 F.2d 367, 396-97 (5th Cir. 1983) (in absence of congressional directive indicating otherwise, defendant can be charged and convicted of two separate offenses resulting from one action provided each offense requires proof of fact not necessary to other), cert. denied, 465 U.S. 1067 (1984).

<sup>139</sup>See generally Wright, § 142, at 475.

<sup>140</sup>Id. § 142, at 525; see United States v. Anderson, 709 F.2d 1305, 1306 (9th Cir. 1983), cert. denied, 465 U.S. 1104 (1984).

<sup>141</sup>See United States v. Molinares, 700 F.2d 647, 653 n.11 (11th Cir. 1983).

<sup>142</sup>See United States v. Lewis, 716 F.2d 16, 23 (D.C. Cir.), cert. denied, 464 U.S. 996 (1983); United States v. Wilson, 721 F.2d 967, 971 (4th Cir. 1983); United States v. Kimberlin, 781 F.2d at 1254; United States v. Long, 787 F.2d at 540; United States v. Fiallo-Jacome, 784 F.2d 1064, 1067 (11th Cir. 1986).

<sup>143</sup>Fed. R. Crim. P. 12(b)(2); see United States v. Price, 763 F.2d at 643 (dictum); United States v. Mosely, 786 F.2d at 1333; United States v. Mastrangelo, 733 F.2d 793, 800 (11th Cir. 1984).

<sup>144</sup>Fed. R. Crim. P. 12(f); see United States v. Marino, 682 F.2d 449, 454 n.3, 455 (3d Cir. 1982).

To avoid duplicitous or multiplicitous indictments, Division attorneys should carefully examine the charges to be contained in the indictment and the facts supporting them. Then, applying the basic principles contained in the preceding section, Division attorneys should carefully draft an indictment that accurately and adequately describes the offense to be charged in the indictment.

#### H. Other Enforcement Matters

##### 1. Companion civil complaint

The Division sometimes files a companion civil injunctive case with an indictment or a damage action under Section 4A of the Clayton Act, 15 U.S.C. § 15a. These cases are generally filed against the same defendants named in an indictment or information. Because of differing standards of proof, among other considerations, occasionally defendants other than those indicted may be named in civil cases.<sup>145</sup> The civil complaint charges will ordinarily track the substantive charges of the indictment or information.

While prosecuting the criminal case, the prosecution will usually seek to have the companion civil cases stayed. Staying the civil cases preserves the more restrictive discovery rules of criminal prosecutions and comports with the requirements of the Speedy Trial Act of an early trial date. In Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), the leading decision on this point, the Fifth Circuit cautioned trial judges to be sensitive to the differences in allowable discovery in civil and criminal cases, and warned against the use of civil

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<sup>145</sup>See ABA Criminal Antitrust Litigation Manual, 8:3.1[1-1].



discovery rules to expand the more restrictive criminal rules.<sup>146</sup> Moreover, courts will carefully examine any attempt by Government litigators to utilize information obtained during the grand jury investigation in civil cases.<sup>147</sup> Sensitivity over the primary use to which grand jury material will be put favors the staying of companion civil cases until the criminal case is completed.

## 2. State civil/criminal actions

Because the penalties for criminal violations of the federal antitrust laws generally are more severe than state criminal penalties, most criminal prosecutions will be conducted in the first instance by the Division. State enforcement has come primarily in the form of civil cases, which also will follow federal enforcement because of the prima facie benefit that will flow from criminal conviction.

In those instances where states seek to pursue criminal investigations simultaneously with the federal criminal investigation, care must be taken to ensure that any immunity conferred by state prosecutors in no way binds federal prosecutors. This is usually taken care of by requesting state enforcers to specifically state the immunity limits in the written immunity documents they use.

Rule 6(e) was recently amended to permit disclosure of federal grand jury material to state prosecutors for the purpose of enforcing state criminal law.<sup>148</sup> The amendment requires court approval before disclosure, and

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<sup>146</sup>Id.

<sup>147</sup>See Ch. II § C.

<sup>148</sup>Rule 6(e)(3)(C)(iv).

Department of Justice internal guidelines require the approval of the Assistant Attorney General prior to requesting court approval.<sup>149</sup>

Division attorneys should also be familiar with the Department's Dual Enforcement (or Petite) Policy which, under certain circumstances, prohibits federal criminal enforcement following state criminal enforcement for the same violations of law.<sup>150</sup>

### 3. Damage actions

Again, because of the benefit to plaintiffs in civil damage actions of awaiting federal criminal convictions, most damage actions will follow federal prosecutions. Prosecutors should be aware, however, of the keen interest plaintiffs' counsel will have in keeping apprised of the federal prosecution's developments.<sup>151</sup> It is the Division's policy to provide plaintiffs with information whenever it is appropriate to do so. At the conclusion of grand jury proceedings, plaintiffs will frequently request access to grand jury materials such as documents and transcripts. When this does not interfere with any ongoing investigation or prosecution, the Division will inform the court of such so that the court may consider this in determining whether a plaintiff has met the particularized need

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<sup>149</sup>See, Ch. II § H.5.; ATD Manual VII-18; Notes of Advisory Committee on Rules, 1985 amendment.

<sup>150</sup>See ATD Manual III-81 for a complete discussion of this policy and its applicability.

<sup>151</sup>A defendant in our criminal case, who is also a defendant in a private civil damage case, may try to use civil discovery in the private case to get information relevant to the criminal case. The Division may be able to get discovery enjoined in the private case.

showing.<sup>152</sup> It is also the Department's policy not to file matters under seal during pretrial criminal proceedings so that the public, including plaintiffs who believe they have suffered damages, may have access to the public record. In summary, the Division does not promote civil damage actions and cannot inappropriately disclose information to plaintiffs, but whenever disclosure is appropriate, the Division's policy is to assist the public to obtain redress for damages suffered by antitrust violators.

#### 4. Suspension and debarment

Upon indictment, many agencies, both federal and state, will seek to suspend defendant contractors or suppliers from bid lists until the trial's outcome. The Division takes no part in these proceedings and requests from agencies for an opinion by the Division as to what the agency should do must be turned aside. To act otherwise would not only be unfair to the defendants who have only been charged and not yet convicted, but will pose evidentiary problems as well. For instance, if contractor A has entered into a plea agreement or its officers have received immunity and will testify at trial for the prosecution against contractor B, you do not want to be put in the position of recommending suspension for B but not for A, because A is cooperating. If you do make such a recommendation, your favorable treatment to contractor A must be disclosed as Brady material, and your witness, contractor A, will be impeached upon this at trial. It will appear that A has the incentive to keep B off the bid list as long as possible and has thus tailored the testimony accordingly.

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<sup>152</sup>Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

Upon conviction, agencies may renew their request for an opinion from the Division as to how long a contractor should be debarred. Again, you should resist any request for such a recommendation and limit your remarks at this stage, consistent with the secrecy requirements of Rule 6(e), to the nature of the violation, its seriousness, the relative culpability of the contractors involved and whether or not anyone has cooperated. These are all factors the agency will want to consider, and you can certainly provide facts that will assist them, but it is generally the policy of the Division not to make recommendations about what an agency should do.

## I. Pre-Indictment Procedures

### 1. Target notifications and meetings with opposing counsel

As the grand jury investigation concludes, Antitrust Division attorneys will usually inform counsel for potential defendants of the status of the investigation. In most instances, potential individual defendants will be sent a letter identifying the individual as a target of that investigation, *i.e.*, one who may be considered for indictment. Counsel for corporations normally will be advised by the investigating attorneys that they are about to recommend action against a corporation to their superiors. Antitrust Division attorneys customarily will not disclose the specifics of their final recommendations to counsel. Even though an individual or a company is a target of the investigation, or may be recommended for prosecution, this does not automatically mean they will be prosecuted. The final decision is made by the Assistant Attorney General.

The notification of a potential defendant's status triggers two events: first, it advises counsel that his client may be able to appear before the grand jury voluntarily, without immunity, if desired; and, second, it provides counsel with notice that this is the time to meet with the prosecution team to make whatever arguments seem

appropriate before a final decision concerning indictment is made. It is up to counsel to take the initiative and request a meeting once the staff informs him of his client's position. If counsel wants such a meeting, the staff attorneys who have conducted the investigation and their section chief ordinarily will meet with counsel. The purpose of this meeting is not for the prosecution to disclose its case against a particular defendant; rather, it is a vehicle for counsel to explain to the staff the reasons why a corporation or an individual should not be prosecuted. Division attorneys can provide a very general statement of the charges that are being considered. However, because of the requirements of Fed. R. Crim. P. 6(e), Division attorneys cannot give counsel any detailed information about a case without compromising the secrecy of the grand jury process.

The meeting is intended to provide counsel with a full and fair opportunity to address the substance of the evidence against his client as well as mitigating circumstances that should be considered in deciding whether to prosecute. For an individual, such mitigating considerations include the individual's status in the company, personal and health problems, age and other circumstances that may lead the prosecutor to conclude that indictment of the individual would not be in the public interest. Similarly, counsel for a corporation may discuss, among other possibly mitigating circumstances, the financial condition of a company and the adverse consequences of an indictment. These meetings are often helpful in focusing more sharply on issues that were not clearly defined or fully developed during an investigation and which, on occasion, may affect the final decision whether to prosecute.

After meeting with the staff, counsel is usually given an opportunity to make a similar presentation to the Office of Operations. The Director of Operations (or, on occasion, the Deputy Director of Operations) and his staff will have reviewed the recommendations of the staff and section chief. As with the investigating staff, the Director of Operations and his subordinates will not disclose any detailed information concerning the evidence in the case, nor are they likely to engage in a debate with counsel over specific matters that are part of the grand jury record.

The meeting should be considered as an opportunity to make a presentation by defense counsel which is not likely to result in any specific commitment other than the fact that the Division will evaluate all information counsel has presented.<sup>153</sup> Counsel's final meeting with the Division is usually with the Office of Operations. Only in extraordinary circumstances or cases that present unique factual or policy issues will the Assistant Attorney General meet counsel for proposed defendants.

The prosecution strategy at these meetings is simply to listen to relevant matters that may have a bearing on a decision to prosecute in a particular situation. Usually, counsel will argue against the prosecution of his client rather than against the indictment of all parties that may be targets of the investigation. In this way, counsel can differentiate the conduct and the particular circumstances of his client from those of others. This information is generally helpful to the Division, not only from the perspective of making a decision whether to prosecute, but for other considerations that may arise later, such as the Division's sentencing recommendation or a decision to bring a companion civil suit or a damage suit against the parties.

The Assistant Attorney General must review each recommendation for indictment. If an indictment is approved, the staff will summarize the evidence for, and present the indictment to, the grand jury.

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<sup>153</sup>In the past, counsel have attempted to create a right to obtain information from the Division through the use of these meetings. By characterizing the meeting with the Office of Operations as an "administrative" hearing, counsel have argued unsuccessfully that they are entitled to a statement of issues relating to a proposed indictment as well as other pertinent information developed before the grand jury. In In re Grand Jury Proceedings, (Northside Realty Assoc. Inc.), 613 F.2d 501 (5th Cir. 1980), the Fifth Circuit held that an order that required the Government to provide such information violates the principle of separation of powers and compromises the secrecy of the grand jury. The court also held that the Department's refusal to provide such information was consistent with its established procedures for pre-indictment conferences. The court stated that the standard by which such pre-indictment conferences are granted is within the discretion of the Antitrust Division. Indeed, they need not be granted at all.

Since no action can be taken before the grand jury makes its decision, Division attorneys usually will not inform counsel of the Division's final recommendation to prosecute. The staff may, however, inform counsel when the grand jury will be meeting unless this practice is precluded by the local rules. If the grand jury votes a true bill, staff attorneys usually inform counsel of the indictment as soon as it is returned.

If the Assistant Attorney General follows the staff recommendation to indict, a grand jury session will be scheduled for the return of the indictment. It is not unusual for defense counsel to request advance notification of when the indictment will be returned. It is safest to provide only a generalized time frame of when you expect the indictment, if any, to be returned, for several reasons. First, last minute exigencies may require a change in the grand jury schedule, matters over which you have no control. Second, defense counsel in highly publicized cases may use the information you provide to make premature statements to the press that are prejudicial to the Government's case. Third, precise notice to defense counsel about when an indictment will be returned provides them the window of opportunity to seek to have the grand jury proceedings stayed before an indictment can be returned.<sup>154</sup> Finally, local rules may prohibit notice as to when an indictment is likely to be returned.

## 2. U.S. Attorney's signature

As with the signatures of the other attorneys for the Government, as a courtesy, you should obtain the signature of the U.S. Attorney for the district you are in prior to the return of the indictment. In the absence of the

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<sup>154</sup>See Deaver v. Seymour, 822 F.2d 66 (D.C. Cir. 1987).

U.S. Attorney's signature, however, the signature of the Assistant Attorney General of the Antitrust Division is sufficient to validate the indictment.<sup>155</sup>

3. Grand jury review of testimony/documents

Before your last session with the grand jury, you want to ensure that all document subpoenas have been fully complied with. If counsel have not produced documents, you want to insist upon production prior to the return of the indictment to avoid any basis for a motion to dismiss the indictment because of post-indictment abuse of the grand jury process. If production of such documents is not immediately necessary to your case, and insistence upon pre-indictment production would be burdensome to the subpoena recipient, you will want written assurance that your continued cooperation in not insisting upon immediate production will not form the basis of an abuse motion. This assurance must come not only from the subpoena recipient, but defendants and co-defendants as well.<sup>156</sup> If you cannot obtain such assurance, you should insist upon compliance prior to the indictment's return.

On the day of indictment, you should have in the grand jury room all transcripts of testimony taken that is relevant to the indictment and all relevant grand jury exhibits. You should note for the record that all the transcripts and exhibits are available for review by the grand jurors. This will establish two important facts. First, that the

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<sup>155</sup>Rule 7(c) specifies that an indictment "shall be signed by the attorney for the government." In relevant part, Rule 54(c) defines "attorney for the government" to be: the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, an authorized assistant of a U.S. Attorney. . . ." But see United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965); United States v. Panza, 381 F. Supp. 1133 (W.D. Pa. 1974).

<sup>156</sup>Division attorneys should be careful not to disclose any information covered by Rule 6(e) of the Fed. R. Crim. P. when seeking such assurances.



accurate record of the testimony itself was available to the grand jury so they were not operating on the basis of the prosecutor's summary of the evidence alone when returning the indictment. Second, it establishes that any juror who may have missed some portion of the live testimony had access to the transcript of proceedings prior to voting on the indictment. This will help neutralize a post-indictment attack on the indictment based upon the allegation that some jurors who voted on the indictment did not hear all of the evidence. Such an attack should be unsuccessful in any event, since an indictment is valid even though some jurors voting to indict did not attend every session.<sup>157</sup>

#### 4. Summary of the evidence

You will want to briefly summarize the evidence for the grand jury prior to the indictment. The case law that exists on this issue indicates that there is no impropriety in the prosecutor summarizing the evidence or making a closing statement.<sup>158</sup> Your summary must be accurate and you should remind the jurors several times that it is their recollection, not your summary, that controls. Your summary should include the facts you have marshalled against each defendant, and you should remind the jurors of any inconsistent or exculpatory evidence they have

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<sup>157</sup>Neither the Constitution nor the Federal Rules require that all jurors voting to indict be present at every session. An indictment is valid if a quorum is present and at least 12 jurors vote to indict. See United States ex rel. McCann v. Thompson, 144 F.2d 604, 607 (2d Cir.), cert. denied, 323 U.S. 790 (1944); United States v. Provenzano, 688 F.2d 194, 202-03 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Mayes, 670 F.2d 126, 128-29 (9th Cir. 1982); United States v. Cronin, 675 F.2d 1126, 1130 (10th Cir. 1982), rev'd on other grounds, 466 U.S. 648 (1984).

<sup>158</sup>See Ch IV § C.9.; United States v. United States Dist. Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957).

heard. When appropriate, interstate commerce and background evidence (e.g., a description of the bidding process) should also be summarized.

5. Summary of law

You should briefly cover the elements of the offenses charged in the indictment and the standard of proof – probable cause to believe an offense has been committed by the prospective defendants – that covers the return of an indictment. You should remind the grand jury that the defendants will have the benefit of the "beyond a reasonable doubt" standard at trial and that more rigorous standard does not govern their proceeding. When referring to the elements of the offense and any other question of law, you should use the case law of the circuit in which you are returning the indictment. Note, however, that even if improper instructions are given, the indictment is not invalidated.<sup>159</sup> In all comments to the grand jury, you should be guided by principles of fairness and the knowledge that what you are saying is being recorded – if your comments to the grand jury are reviewed by a court, you want the comfort of knowing that you said nothing inflammatory or prejudicial.

A Government prosecutor who explains to the grand jury the elements of the offense under investigation does not act as an improper witness before the grand jury in violation of Rule 6(d). Such conduct falls within the prosecutor's role as the "guiding arm of the grand jury" and is consistent with the prosecutor's responsibility for an orderly and intelligible presentation of the case.<sup>160</sup>

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<sup>159</sup>United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976).

<sup>160</sup>See Ch IV § C.3.; United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 (continued...)

## 6. Presentation of indictment

The original indictment should be left with the grand jurors for their deliberation. No one other than the jurors, not even the court reporter, is to be present during deliberation.

Fed. R. Crim. P. 7(c)(1) states the indictment "shall be signed by the attorney for the government." It does not state when the indictment should be so signed, and for all practical purposes, you will have obtained all the appropriate signatures before presentation to the grand jury. However, it is common practice to present the jury with a substitute final page that contains only the signature line for the grand jury foreperson, even though courts have regularly held that presentation of a signed indictment to the grand jury is insufficient ground for dismissal.<sup>161</sup>

Before leaving the grand jury to begin their deliberations, you should inquire whether there are any questions. You should advise the foreman to call you back into the grand jury room if any problems arise during deliberations that you may be able to resolve.<sup>162</sup> If the grand jury has any questions once they have begun their deliberation, you should carefully state that you do not want the question in any way to indicate the status of their deliberation or any kind of head-count as to where the deliberation stands. And, of course, any colloquy between

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<sup>160</sup>(...continued)  
U.S. 1156 (1982).

<sup>161</sup>United States v. Boykin, 679 F.2d 1240, 1246 (8th Cir. 1982); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972); United States v. Brown, 684 F.2d 841, 842 (11th Cir. 1982); United States v. Climatemp, Inc., 482 F. Supp. 376, 386 (N.D. Ill. 1979); United States v. Tedesco, 441 F. Supp. 1336, 1342 (M.D. Pa. 1977). But see United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (presentation of a signed indictment to a grand jury cited as one of many reasons for dismissal of an indictment due to prosecutorial abuse). Gold has been labeled "an unusual case", In re November 1979 Grand Jury, 616 F.2d 1021, 1023 (7th Cir. 1980).

<sup>162</sup>Federal Grand Jury Practice, Narcotic and Dangerous Drug Section Monograph, March 1983, p. 14.

you and the grand jurors must be recorded. Answering questions once deliberation has begun would seem to be consistent with the prosecutor's role as the "guiding arm of the grand jury."<sup>163</sup>

Rule 6(f) requires concurrence of 12 jurors for the return of a true bill. The existence of a proper vote is determined from the record kept by the foreperson or other designated grand juror which is filed with the clerk of the court pursuant to Rule 6(c). This record, according to Rule 6(c) "shall not be made public except on order of the court." There need be no separate vote on each count of the indictment,<sup>164</sup> though it is better practice to have the jurors vote on each count. It is not necessary that the record disclose that 12 or more grand jurors concurred on each count for each defendant.<sup>165</sup> After return of the indictment, it shall be signed by the foreperson or deputy foreperson.<sup>166</sup> The foreperson's signature attests that the bill is an official act of the grand jury (a "true bill"). Failure of the foreperson to sign or endorse the indictment is an irregularity but is not fatal.<sup>167</sup>

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<sup>163</sup>See United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

<sup>164</sup>United States v. Felice, 481 F. Supp. 79 (N.D. Ohio), aff'd, 609 F.2d 276 (6th Cir. 1978); United States v. Winchester, 407 F. Supp. 261 (D. Del. 1975).

<sup>165</sup>United States v. Bally Mfg., 345 F. Supp. 410 (E.D. La. 1972).

<sup>166</sup>Fed. R. Crim. P. 6(c).

<sup>167</sup>Hobby v. United States, 468 U.S. 339, 344 (1984) (citing Frisbie v. United States, 157 U.S. 160, 163-65 (1985)); United States v. Perholtz, 662 F. Supp. 1253 (D.D.C. 1985); see also Notes of Advisory Committee of Rules, Note 1 to Subdivision (c), 6.

7. Return of indictment in court

The grand jury returns the indictment to a federal magistrate in open court.<sup>168</sup> The jurors usually accompany the foreperson into court so that the court may inquire whether the jury concurs in the indictment. How this is done, however, will depend upon local practice, so be sure to consult the U.S. Attorney's office.

8. Administrative procedures after return

Once the indictment has been returned, you should inform your section office and the Office of Operations. This will trigger notification of the Press Office. You should also notify counsel for defendants of the indictment's return.

Neither the Criminal Rules nor the Speedy Trial Act, 18 U.S.C. § 3161, *et. seq.*, require that arraignment take place within a set period of time after indictment. However, in most cases, defendants will voluntarily appear for arrest at the arraignment, and this operates as their first appearance before a judicial officer, triggering the 70-day Speedy Trial Act period.<sup>169</sup> Accordingly, you do not want an undue long period to elapse between indictment and arraignment.

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<sup>168</sup>Fed. R. Crim. P. 6(f).

<sup>169</sup>18 U.S.C. § 3161(c)(1).

J. Re-presentation

Rule 6(e)(3)(c)(iii) provides that no court order is necessary to transfer one grand jury's material to a successor grand jury. Such language "contemplates that successive grand juries may investigate the same or similar crimes."<sup>170</sup> Usually, all documents and testimony before the first grand jury should be presented to the new grand jury.<sup>171</sup> Nevertheless, a prosecutor has some discretion, particularly where numerous witnesses were called before the first grand jury, and only a small percentage were actually necessary for the proposed indictment. A successor grand jury need not hear all of the direct testimony presented to the predecessor grand jury, but rather may choose to rely on transcripts or on accurate summaries.<sup>172</sup> Caution must be exercised, however, because the use of

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<sup>170</sup>United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); cf. In re Grand Jury Proceedings (Sutton), 658 F.2d 782, 783 (10th Cir. 1981) (dictum) (second subpoena may be required when party contends documents are incomplete or subpoena orders witness to testify).

<sup>171</sup>See United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979); United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

<sup>172</sup>United States v. Flomenhoft, 714 F.2d 711 (7th Cir. 1983) (reliance on transcripts permissible), cert. denied, 450 U.S. 1068 (1984); United States v. Long, 706 F.2d 1044 (9th Cir. 1983) (summaries permissible); see also United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (prosecutor may exercise some discretion in choosing evidence to bring before grand jury so long as grand jury is not misled); United States v. Fogg, 652 F.2d 551, 558 (5th Cir. Unit B Aug. 1981); United States v. Chanen, 549 F.2d 1036, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

incomplete or misleading summaries of prior testimony can bias a grand jury and void the indictment.<sup>173</sup> To avoid any appearance of unfairness, all exculpatory evidence should be re-presented to the new grand jury.<sup>174</sup>

#### K. Superseding Indictments

The procedures for preparing and presenting superseding indictments to the grand jury are the same as for original indictments, with the following exceptions:

##### 1. Caption

The caption should reflect that it is a superseding indictment, and should reference the case number of the original indictment.

The superseding indictment should be presented to the same grand jury that returned the original indictment. Under exceptional circumstances (i.e., the original grand jury panel has expired, etc.) the case can be re-presented to a new grand jury.

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<sup>173</sup>United States v. Mahoney, 495 F. Supp. 1270 (E.D. Pa. 1980).

<sup>174</sup>See Federal Grand Jury Practice, Narcotic and Dangerous Drug Section Monograph, p. 17.

2. Advice to the grand jury

The grand jury should be advised that a superseding indictment is being presented, the date of the original indictment, the nature of the intended change in the indictment, and the manner in which the case will be re-presented.<sup>175</sup>

3. Speedy trial act considerations

Under 18 U.S.C. § 3161(h)(6), the running of the "trial clock" is suspended from the date the indictment is dismissed upon motion of the Government until a charge is filed against the defendant for the same offense, or any offense required to be joined with the offense charged in the original indictment. As explained in the original Senate Report on the Speedy Trial Act, § 3161(h)(6) provides that only the time period during which the prosecution has actually been halted is excluded from the 70-day time limit. For example, if the Government decides 50 days after indictment to dismiss charges against the defendant, then waits six months and reindicts the defendant for the same offense, the Government has only 20 days in which to prepare for trial, absent other excludable time periods.<sup>176</sup> Since the exclusion begins only with the dismissal of the original charges, once a superseding indictment is intended, it is important to obtain dismissal of the original charge as soon as possible to stop the clock.

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<sup>175</sup>See Federal Grand Jury Practice, Narcotic and Dangerous Drug Section Monograph, p. 18.

<sup>176</sup>S. Rep. No. 1021, 93d Cong., 2d Sess. 38 (1974).



Section 3161(h)(6) applies only when the Government obtains dismissal of charges contained in the indictment. If the defendant successfully moves to dismiss the indictment, 18 U.S.C. § 3161(d) applies, and all time limits on the new charges are computed without regard to the existence of the original charge.<sup>177</sup>

Note also that even where the Government obtained dismissal of the original indictment, time limits on new offenses charged in the superseding indictment – i.e., those which are not the "same offense" or "offenses which are required to be joined with" the offense charged in the original indictment – would be computed without reference to the time limits on the original charge. Consequently, where the Government dismisses an indictment and returns superseding charges, different time limits for trial will apply to different charges in the same indictment if the superseding charges are new or if the superseding indictment adds new defendants. 18 U.S.C. § 3161(h)(7) can be used to equalize the trial date for multiple defendants charged in the same indictment. Where multiple charges with different time limits are contained in an indictment against a single defendant, a continuance under 18 U.S.C. § 3161(h)(8) might be appropriate, to avoid the need for either multiple trials or trial of all charges by the earliest date.

#### L. No Bills

Occasionally, a grand jury will refuse to return an indictment recommended by the Division. This is referred to as a "No Bill." If a grand jury refuses to indict, the prosecutor may resubmit evidence to a different grand

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<sup>177</sup>United States v. Sebastian, 428 F. Supp. 967, 973 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977).

jury.<sup>178</sup> 178/ However, once a grand jury declines to return an indictment on the merits, an internal Justice Department policy requires approval of the responsible Assistant Attorney General prior to resubmission. Approval for resubmission will "ordinarily not be granted, absent additional or newly-discovered evidence or a "clear miscarriage of justice."<sup>179</sup>

#### M. Defense Motions Relating to the Indictment

Grand jury proceedings receive a strong presumption of regularity;<sup>180</sup> the burden of proving irregularity is on the person, usually the defendant, alleging it.<sup>181</sup> Accordingly, indicted defendants face great difficulty challenging the grand jury or the indictment. However, that does not mean that defense motions will not be filed.

Attorneys should consult the appropriate sections of this Manual for guidance in responding to these motions. In addition, some of the most common defense motions relating to the indictment are discussed in Chapter 9 of the Criminal Antitrust Litigation Manual, American Bar Association, 1983.

#### N. Press

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<sup>178</sup>United States v. Thompson, 251 U.S. 407, 413-14 (1920); United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 457 U.S. 1120 (1986); United States v. Radetsky, 535 F.2d 556, 565 (10th Cir.), cert. denied, 429 U.S. 820 (1976).

<sup>179</sup>U.S.A.M. 9-11.120.

<sup>180</sup>See, e.g., Costello v. United States, 350 U.S. 359, 363-64 (1959); United States v. Jones, 766 F.2d 994, 1001 (6th Cir.), cert. denied, 474 U.S. 1006 (1985).

<sup>181</sup>See, e.g., United States v. Battista, 646 F.2d 237 (6th Cir.), cert. denied, 454 U.S. 1046 (1981).

When preparing the indictment or information for submission to the Office of Operations, you should also prepare a draft press release.<sup>182</sup> After review and editing by Operations, the press release is forwarded to the Department's Public Affairs office, along with a recommendation as to whether the press release should be issued.<sup>183</sup> Upon return of the indictment or information, you should immediately call the Office of Operations, thus triggering their call to Public Affairs and the publication of the press release, if any.

As soon as the indictment becomes public, you will no doubt be contacted by the press seeking more information. Only Section Chiefs may talk to the press, absent express authority otherwise. If authorized, it is important that your comments be circumspect, referring only to the charges in the indictment and whatever else is already on the public record, such as whether the AAG has said the investigation is continuing. When in doubt about whether to answer a question, the best route is to refer the reporter to Public Affairs for additional information or comment.

Allegations of prejudicial pretrial publicity will most commonly occur in motions for a change of venue under Fed. R. Crim. P. 21. The standard a defendant must meet is high, the Rule itself specifying that a change in venue is proper only when there exists "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial. . . ." Routine press reports that are not inflammatory will not occasion a change of venue.<sup>184</sup> When the prosecution is the source of the complained-of publicity, a court may look more closely at the venue motion.<sup>185</sup>

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<sup>182</sup>A sample press release is contained in Appendix VII-6.

<sup>183</sup>Press releases are not issued if a case is not of sufficient general public interest.

<sup>184</sup>Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), cert. denied, 371 U.S. 862 (1962).

<sup>185</sup>Silverthorne v. United States, 400 F.2d 627, 633 (9th Cir. 1968), cert. denied, 400 U.S. (continued...)

Where non-prosecutorial Government officials are the source of the publicity, their status has not been held relevant.<sup>186</sup>

O. Closing the Investigation

When an investigation has been closed, all files and grand jury documents that are appropriate for retention should be sent for safekeeping to the Federal Records Center in case retrieval becomes necessary.<sup>187</sup> A short closing memorandum should be forwarded to the Office of Operations, requesting authority to close the matter. In criminal cases, this will occur after sentencing upon convictions or acquittal after trial. If no indictment is returned and none is expected, the matter can be closed at that time.

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<sup>185</sup>(...continued)

1022 (1971); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), rev'd on other grounds, 285 F.2d 408 (2d Cir. 1960).

<sup>186</sup>See, e.g., People v. Atoigue, 508 F.2d 680 (9th Cir. 1974) (elected officials); Northern California Pharmaceutical Ass'n v. United States, 306 F.2d supra (trial judge).

<sup>187</sup>See Division Directive ATR 2710.1.

## VIII. PERJURY AND OBSTRUCTION OF JUSTICE

### A. Perjury

This section describes the two principal perjury statutes, 18 U.S.C. §§ 1621 and 1623.<sup>1</sup> Although Title 18 of the United States Code contains over 150 statutes that proscribe perjury,<sup>2</sup> virtually all perjuries occurring in the course of Governmental inquiries, proceedings, and the Federal judicial process are prosecuted under §§ 1621 or 1623.<sup>3</sup> A third statute, 18 U.S.C. § 1622, subornation of perjury, is dealt with in passing.

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<sup>1</sup>Sample indictments are contained in Appendices VII-4 and VII-5.

<sup>2</sup>For a complete list of these statutes, see "Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. I" (cited hereafter as "Working Papers") p. 675, et seq.

<sup>3</sup>In the past, several important political figures have been charged with violating 18 U.S.C. § 1001. This statute is discussed in § C., infra.

1. Text of perjury statutes

a. 18 U.S.C. § 1621 - perjury generally

Whoever--

(1) having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

b. 18 U.S.C. § 1623 - false declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under § 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if (1) each declaration was material to the point in question, and (2) each declaration was made within the period of the statute of limitations for the offense charged under this section. In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made

pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

## 2. Elements of perjury

There are four essential elements of perjury that are substantially the same under § 1623 as under § 1621.

### a. The actor must be under oath

First, the actor must be under oath during his testimony, declaration, or certification (except in the case of unsworn declarations under penalty of perjury as permitted by 28 U.S.C. § 1746). So long as the oath is of sufficient clarity that the actor is aware that he is under oath and that he is required to speak the truth, no particular



form of oath is required.<sup>4</sup> However, some courts have held that prosecutions under § 1621 require proof of who administered the oath and the competency and authorization of the oath giver.<sup>5</sup> On the other hand, the identity of the person administering the oath is not an essential element under § 1623, nor is proof that such person was competent or authorized to administer the oath. Section 1623 only requires that the Government prove that the maker of a knowingly false declaration be under oath at the time the statement is made.<sup>6</sup> Under § 1623, the testimony of the foreperson of the grand jury before which the defendant appeared is sufficient to establish that the requisite oath was taken.<sup>7</sup> Although it would be better practice to have the person who administered the oath to the defendant, or at least another grand juror, testify that the oath was given, the transcript of the defendant's grand jury testimony should be sufficient to prove that he testified under oath.<sup>8</sup> Further, although § 1623 does not specify, as does § 1621, that the oath must be taken "before a competent tribunal," false swearing before a court having no jurisdiction would undoubtedly not be prosecutable under § 1623.<sup>9</sup>

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<sup>4</sup>Holy v. United States, 278 F. 521 (7th Cir. 1921).

<sup>5</sup>United States v. Molinares, 700 F.2d 647, 651 (11th Cir. 1983).

<sup>6</sup>Id. at 651-52.

<sup>7</sup>United States v. Prior, 546 F.2d 1254, 1257-58 (5th Cir. 1977).

<sup>8</sup>United States v. Picketts, 655 F.2d 837, 840 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Arias, 575 F.2d 253, 254-55 (9th Cir.), cert. denied, 439 U.S. 868 (1978).

<sup>9</sup>United States v. Young, 113 F. Supp. 20 (D.D.C. 1953), aff'd, 212 F.2d 236 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954); United States v. Cuddy, 39 F. 696 (S.D. Cal. 1889); see "Working Papers" at 664.

b. The actor must make a false statement

The second necessary element of perjury is that the actor make a false statement. This element is subject, under § 1621, to the "two-witness rule".<sup>10</sup> Falsity is a question of fact for the jury to decide.<sup>11</sup> In determining the falsity of the defendant's answer, neither the court nor jury must accept the defendant's interpretation of a question or answer.<sup>12</sup> Words clear on their face are to be understood in their common sense and usage unless it is clear in the context in which they are used that a different sense or usage was intended.<sup>13</sup>

c. False statement must be material

The third necessary element is that the false statement must be material to the proceedings. Materiality has been broadly defined to include anything "capable of influencing the tribunal on the issue before it,"<sup>14</sup> or which

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<sup>10</sup>See § A.7.e., infra.

<sup>11</sup>United States v. Sampol, 636 F.2d 621, 655 (D.C. Cir. 1980); United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986).

<sup>12</sup>United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); Bednar v. United States, 651 F. Supp. 672, 674 (E.D. Mo. 1986), aff'd, 855 F.2d 859 (8th Cir. 1988).

<sup>13</sup>United States v. Nixon, 816 F.2d 1022, 1030 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988).

<sup>14</sup>United States v. Moreno Morales, 815 F.2d 725, 747 (1st Cir.), cert. denied, 484 U.S. 966 (1987); United States v. Friedhaber, 826 F.2d 284, 286 (4th Cir. 1987); United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980); United States v. Swift, 809 F.2d 320, 324 (6th Cir. 1987); United States v. Anderson, 798 F.2d 919, 929 (7th Cir. 1986); United States v.

(continued...)

"has a natural tendency to influence, impede or dissuade a grand jury from pursuing its investigations."<sup>15</sup> Thus, the testimony need not actually have influenced, misled, or impeded the proceeding.<sup>16</sup> A potential interference with the grand jury's line of inquiry is sufficient to establish materiality.<sup>17</sup> The statement need not be material to any particular issue, but may be material to the subject of the inquiry in general.<sup>18</sup> The statement may be material to collateral matters that might influence the outcome of decisions before the grand jury.<sup>19</sup> Thus, a statement is material if it is relevant to a subsidiary issue under consideration,<sup>20</sup> or to an issue of credibility.<sup>21</sup> Furthermore, the statement need not be relevant to an offense that is ultimately prosecutable by the grand jury so long as it is a proper

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<sup>14</sup>(...continued)

Sablosky, 810 F.2d 167, 169 (8th Cir.), cert. denied, 484 U.S. 833 (1987); United States v. Vap, 852 F.2d 1249, 1253 (10th Cir. 1988); United States v. Molinares, 700 F.2d 647, 653 (11th Cir. 1983).

<sup>15</sup>United States v. Friedhaber, 826 F.2d at 286; United States v. Thompson, 637 F.2d 267, 268 (5th Cir. Unit B Jan. 1981); United States v. Drape, 753 F.2d 660, 663 (8th Cir.), cert. denied, 474 U.S. 821 (1985); United States v. Prantil, 764 F.2d 548, 557 (9th Cir. 1985); United States v. Neal, 822 F.2d 1502, 1506 (10th Cir. 1987).

<sup>16</sup>United States v. Whimpy, 531 F.2d 768, 770 (5th Cir. 1976); United States v. Harrison, 671 F.2d 1159, 1162 (8th Cir.), cert. denied, 459 U.S. 847 (1982); United States v. Anfield, 539 F.2d 674, 677-78 (9th Cir. 1976); United States v. Vap, 852 F.2d at 1253.

<sup>17</sup>United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984).

<sup>18</sup>United States v. Ostertag, 671 F.2d 262 (8th Cir. 1982).

<sup>19</sup>United States v. Thompson, 637 F.2d at 268 n.2; United States v. Sablosky, 810 F.2d at 169.

<sup>20</sup>United States v. Sisack, 527 F.2d 917, 920 (9th Cir. 1975).

<sup>21</sup>United States v. Moreno Morales, 815 F.2d at 747; United States v. Anderson, 798 F.2d at 926; United States v. Sablosky, 810 F.2d at 169.

subject for investigation by the grand jury.<sup>22</sup> Materiality is not negated if the information sought is cumulative or the grand jury does not believe the answer.<sup>23</sup>

The issue of materiality is a question of law to be decided by the court.<sup>24</sup> Materiality need only be shown as of the time the false statement was made.<sup>25</sup> The Government need not prove materiality beyond a reasonable doubt but must show it by a preponderance of the evidence.<sup>26</sup> Materiality may be proven in various ways. The Government may introduce a transcript of the grand jury proceedings; produce testimony from the foreperson of the grand jury or another grand juror; produce the testimony of the defendant before the grand jury; produce other indictments returned by the grand jury; or produce the testimony of the prosecutor concerning the scope of the grand jury's investigation, and the relationship to it of the questions that elicited the perjury.<sup>27</sup>

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<sup>22</sup>United States v. Paxson, 861 F.2d 730, 734 (D.C. Cir. 1988); United States v. Vap, 852 F.2d at 1253.

<sup>23</sup>United States v. Berardi, 629 F.2d 723 (2d Cir.), cert. denied, 449 U.S. 995 (1980); United States v. Brown, 666 F.2d 1196, 1200 (8th Cir. 1981), cert. denied, 457 U.S. 1108 (1982).

<sup>24</sup>United States v. Paxson, 861 F.2d at 731; United States v. Stackpole, 811 F.2d 689, 695 (1st Cir. 1987); United States v. Weiss, 752 F.2d 777, 786 (2d Cir.), cert. denied, 474 U.S. 944 (1985); United States v. Bailey, 769 F.2d 203 (4th Cir. 1985); United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); United States v. Seltzer, 794 F.2d 1114, 1123 (6th Cir. 1986), cert. denied, 479 U.S. 1054 (1987); United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 459 U.S. 1035 (1982); United States v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982); United States v. Laranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Carter, 721 F.2d 1514, 1535 n.29 (11th Cir.), cert. denied, 469 U.S. 819 (1984).

<sup>25</sup>United States v. Gremillion, 464 F.2d 901, 904-05 (5th Cir.), cert. denied, 409 U.S. 1085 (1972).

<sup>26</sup>United States v. Watson, 623 F.2d 1198 (7th Cir. 1980); United States v. Armilio, 705 F.2d 939 (8th Cir.), cert. denied, 464 U.S. 891 (1983).

<sup>27</sup>United States v. Berardi, 629 F.2d at 727; United States v. Farnham, 791 F.2d 331, 333 (4th Cir.)  
(continued...)

d. Statement must be made with knowledge of its falsity

The fourth necessary element is that the actor make the false statement with knowledge of its falsity.<sup>28</sup>

Perjury requires a showing of specific intent.<sup>29</sup> It cannot be the result of inadvertence, honest mistake, carelessness, misunderstanding, mistaken conclusions, or unjustified inferences testified to negligently, or even recklessly.<sup>30</sup> Actual knowledge of falsity may be proven from circumstantial evidence.<sup>31</sup> If the defendant believed

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<sup>27</sup>(...continued)

Cir. 1986); United States v. Thompson, 637 F.2d at 268; United States v. Anderson, 798 F.2d at 926; United States v. Ashby, 748 F.2d 467, 470 (8th Cir. 1984).

<sup>28</sup>Section 1621 punishes one who "willfully . . . states . . . any material matter which he does not believe to be true. . . ." Section 1623 punishes one who "knowingly makes any false material declaration. . . ." There does not appear to be any effective difference between these two definitions of the mens rea of the offense. In its report on the Organized Crime Control Act of 1969, the Senate Judiciary Committee stated that in § 1623(a), "[l]anguage changes have been made in the provision as introduced to achieve economy of words . . ." (Senate Report No. 91-617, at 149).

<sup>29</sup>United States v. Dudley, 581 F.2d 1193, 1198 (5th Cir. 1978).

<sup>30</sup>Government of the Canal Zone v. Thrush, 616 F.2d 188, 190-91 (5th Cir. 1980); United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982); United States v. Joseph, 651 F. Supp. 1346, 1347 (S.D. Fla. 1987); Dale v. Bartels, 552 F. Supp. 1253, 1266 (S.D.N.Y. 1982), modified, 732 F.2d 278 (2d Cir. 1984).

<sup>31</sup>United States v. Chapin, 515 F.2d 1274 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Nixon, 816 F.2d 1022, 1029 (5th Cir. 1987), cert. denied, 484 U.S. 1026 (1988); United States v. Kelly, 540 F.2d 990, 994 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); United States v. Watson, 623 F.2d 1198, 1206-07 (7th Cir. 1980).

his statement to be true when he made it, even though it was, in fact, false, an essential element of the crime cannot be proven and a charge of perjury will be defeated.<sup>32</sup>

3. Principal differences between § 1623 and § 1621

There are four principal differences between § 1623 and § 1621. First, § 1623 applies only to perjury occurring "before or ancillary to any court or grand jury. . . ." <sup>33</sup> The Supreme Court in Dunn v. United States, 442 U.S. 100, 113 (1979), interpreted this language to preclude prosecution under § 1623 for any false statement made in circumstances less formal than a deposition. False statements made in affidavits in anticipation of their being submitted to a court or grand jury cannot be prosecuted under § 1623. Subsection (a) of the statute, however, does provide for prosecution of statements to a grand jury or court made in reliance on documents which the witness knows are false.<sup>34</sup>

Second, under § 1623, the Government's evidentiary burden is reduced as subsection (e) does away with the two-witness rule which still hampers prosecutions under § 1621.<sup>35</sup> In addition, § 1623(c) allows a conviction for making two or more statements which are inconsistent to the degree that one of them is necessarily false.<sup>36</sup> The

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<sup>32</sup>United States v. Winter, 348 F.2d 204 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

<sup>33</sup>18 U.S.C. § 1623(a).

<sup>34</sup>See United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974).

<sup>35</sup>See § A.7.e., infra.

<sup>36</sup>United States v. Flowers, 813 F.2d 1320, 1324 (4th Cir. 1987); United States v. Harvey, 657 (continued...)

Government does not have to prove which statement is false, but it is a defense to such a prosecution that, at the time each statement was made, the defendant believed he was speaking the truth.<sup>37</sup>

Third, § 1623 is different from § 1621 in that under the former, in certain circumstances, a recantation is a bar to prosecution for perjury.<sup>38</sup>

Finally, both § 1621 and § 1623 provide for maximum prison terms of five years, but the maximum fine under § 1621 is \$2,000, while under § 1623, it is \$10,000.

#### 4. Section 1622 - subornation of perjury

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

Prosecution for subornation of perjury requires that the perjury sought must actually have been committed.<sup>39</sup> But a conspiracy to suborn perjury may be prosecuted whether or not perjury has been committed.<sup>40</sup>

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<sup>36</sup>(...continued)  
F. Supp. 111, 113-14 (E.D. Tenn. 1987).

<sup>37</sup>United States v. Flowers, 813 F.2d at 1324.

<sup>38</sup>Section 1623(d). See § A.8.d., infra.

<sup>39</sup>United States v. Brumley, 560 F.2d 1268, 1278 n.5 (5th Cir. 1977); United States v. Tanner, 471 F.2d 128 (7th Cir.), cert. denied, 409 U.S. 949 (1972); United States v. Silverman, 745 F.2d 1386, 1394 n.7 (11th Cir. 1984).

<sup>40</sup>Williamson v. United States, 207 U.S. 425 (1908); Outlaw v. United States, 81 F.2d 805  
(continued...)

Where perjured testimony is solicited, either by an individual or through a conspiracy, an obstruction of justice has occurred whether or not the perjured testimony has taken place.<sup>41</sup> It is quite common to join both obstruction of justice and subornation of perjury counts in a single indictment when they arise from the same transaction.<sup>42</sup> Because the crime of subornation of perjury is distinct from that of perjury, the suborner and perjurer are not accomplices.<sup>43</sup>

The gravamen of the offense of subornation is the procuring of perjury with knowledge that the testimony to be given is false, and that the one testifying is aware of the falsity of his statement.<sup>44</sup> To establish a prima facie case for subornation of perjury, a prosecutor must show:

- (1) that perjury was committed;
  
- (2) that the defendant procured the perjury corruptly, knowing, believing or having reason to believe it to be false testimony; and,

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<sup>40</sup>(...continued)  
(5th Cir.), cert. denied, 298 U.S. 665 (1936).

<sup>41</sup>18 U.S.C. §§ 1503, 1512.

<sup>42</sup>See, e.g., United States v. Kahn, 366 F.2d 259 (2d Cir.), cert. denied, 385 U.S. 948 (1966); United States v. Root, 366 F.2d 377 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967).

<sup>43</sup>Segal v. United States, 246 F.2d 814, 821 (8th Cir.), cert. denied, 355 U.S. 894 (1957).

<sup>44</sup>Boren v. United States, 144 F. 801 (9th Cir. 1906).



(3) that the defendant knew, believed or had reason to believe that the perjurer had knowledge of the falsity of his testimony.

The existence of the perjury must be proved under the same standards as required by the applicable perjury statute. Thus, if § 1621 applies to the underlying perjury, the demands of the two-witness rule must be met.<sup>45</sup> If § 1623 is applicable to the perjury, the two-witness rule does not apply.<sup>46</sup> If the charge consists only of conspiracy to suborn perjury, compliance with the two-witness rule is not necessary.<sup>47</sup>

#### 5. Investigative responsibility

The Federal Bureau of Investigation has primary investigative responsibility for perjury violations in all cases and matters involving departments and agencies of the United States, except those arising out of a substantive matter being investigated by the Secret Service, Internal Revenue Service, Immigration and Naturalization Service, Bureau of Customs, Bureau of Narcotics and Dangerous Drugs, Bureau of Alcohol, Tobacco and Firearms, and the Postal Inspection Service.<sup>48</sup>

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<sup>45</sup>Hammer v. United States, 271 U.S. 620, 626 (1926).

<sup>46</sup>United States v. Gross, 375 F. Supp. 971, 975 (D.N.J. 1974), aff'd, 511 F.2d 910 (3d Cir.), cert. denied, 423 U.S. 924 (1975).

<sup>47</sup>United States v. Gross, 511 F.2d 910 (3d Cir.), cert. denied, 423 U.S. 924 (1975); Hall v. United States, 78 F.2d 168 (10th Cir. 1935).

<sup>48</sup>See 28 C.F.R. 0.85(a).

6. Supervisory jurisdiction

Generally, perjury is under the supervisory jurisdiction of the Division and Section of the Department having responsibility for the basic subject matter. Where such subject matter responsibility cannot be identified, supervisory responsibility is with the General Litigation and Legal Advice Section of the Criminal Division.

The General Litigation and Legal Advice Section should be notified in any perjury case involving exceptional circumstances, regardless of the subject matter of the underlying offense, particularly when a question of statutory construction is involved.

Because perjury affects the integrity of the judicial fact-finding process, all offenders should be vigorously prosecuted. Cases may be submitted to the grand jury for its consideration or an information may be filed without prior authorization from the Criminal Division, except with regard to Congressional matters.<sup>49</sup>

7. Special problems

- a. Prosecutorial discretion to indict under 18 U.S.C. § 1621 or § 1623

There is a latent problem in the area of prosecutorial discretion and 18 U.S.C. § 1623, that has surfaced in two decisions by different panels of the Second Circuit and decisions of the Seventh and Ninth Circuits. In United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973), appellant argued that he was

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<sup>49</sup>See U.S.A.M. 9-69.230.

denied equal protection of the law by the prosecutor's decision to proceed against him under § 1623 rather than under § 1621 because the evidentiary burden of the prosecution is lesser and the penalty more severe under the former statute. The court, citing Yick Wo v. Hopkins, 118 U.S. 356 (1886), held that "where criminal statutes overlap the government is entitled to choose among them provided it does not discriminate against any class of defendants." The court found no discrimination because Ruggiero had failed to demonstrate membership in a specific class of defendants.

In United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973), however, the specter of such a class was raised in dictum. Kahn was charged under § 1621 and claimed that, had he been charged under § 1623, his subsequent "recantation" would have barred a perjury prosecution. The court failed to confront the issue directly by holding that Kahn's subsequent "recantation" would not have barred prosecution under § 1623 because at the time it was made, it had become manifest that Kahn's original falsity was exposed. However, the court said "we find not a little disturbing the prospect of the government employing § 1621 whenever a recantation exists, and § 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."<sup>50</sup> Thus, defendants charged under § 1621 whose perjury would not be prosecutable under § 1623 because of a valid "recantation", might constitute a class denied equal protection under Ruggiero.

In addition to Ruggiero's equal protection argument seeking to limit the prosecutor's discretion, attorneys for Kahn advanced the proposition that a statute aimed at specific conduct (i.e., § 1623) must prevail over an otherwise applicable general statute (i.e., § 1621).<sup>51</sup> The Second Circuit did not reach this question in Kahn.

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<sup>50</sup>472 F.2d at 283.

<sup>51</sup>See Kepner v. United States, 195 U.S. 100, 125 (1904); Shelton v. United States, 165 F.2d  
(continued...)

However, in dictum in United States v. Devitt, 499 F.2d 135 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975), the Seventh Circuit disagreed with Kahn's proposition. The court, in rejecting the defendant's equal protection argument, also stated: "Defendant cites no case in support of the novel proposition that where conduct is proscribed by two or more separate criminal statutes, the government must elect to prosecute under the statute imposing the greatest burden of proof."<sup>52</sup>

In United States v. Clizer, 464 F.2d 121, 125 (9th Cir.), cert. denied, 409 U.S. 1086 (1972), a different approach was taken by the Ninth Circuit. Although appellant had been charged with making false statements before a grand jury, the indictment was under § 1621. The court disregarded the statutory reference in the indictment and considered it as an indictment under § 1623: "The government, despite its reference to 18 U.S.C. § 1621, in fact charged Clizer with a violation of 18 U.S.C. § 1623."

While it appears from the case law that it may be advisable to use 18 U.S.C. § 1623 when it applies to a given factual setting, it is clear that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. . . . Whether to prosecute and what charge to file or bring before the grand jury are decisions that generally rest in the prosecutor's discretion."<sup>53</sup>

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<sup>51</sup>(...continued)  
241, 244 (D.C. Cir. 1947); Wechsler v. United States, 158 F. 579, 581 (2d Cir. 1907).

<sup>52</sup>499 F.2d at 139.

<sup>53</sup>United States v. Batchelder, 442 U.S. 114, 123-24 (1979); United States v. Nixon, 418 U.S. 683, 693 (1974); United States v. Swainson, 548 F.2d 657, 665 (6th Cir.), cert. denied, 431 U.S. 937 (1977).

b. Venue

Venue for perjury actions lies in the district where the false oath was made, or, where the perjury is committed in an ancillary proceeding,<sup>54</sup> in the district in which the parent proceeding is pending.<sup>55</sup>

c. Unresponsive answers: the case against Samuel Bronston

Occasionally, a witness under oath will try to deceive the questioner and mislead the inquiry by giving answers to questions which, although literally true, are evasive or unresponsive. This occurred in Bronston v. United States, 409 U.S. 352 (1973), in which the Supreme Court unanimously held that such conduct does not violate 18 U.S.C. § 1621.<sup>56</sup> The Court rejected the Government's effort to expand the scope of the perjury statute, noting that "if a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination."<sup>57</sup> Thus "any special

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<sup>54</sup>See Dunn v. United States, 442 U.S. 100, 108-10 (1979) (depositions are considered ancillary proceedings); United States v. Scott, 682 F.2d 695, 698 (8th Cir. 1982) (same).

<sup>55</sup>United States v. Reed, 773 F.2d 477, 483 (2d Cir. 1985) (distinguishing and departing from its prior decision in United States ex rel. Starr v. Mulligan, 59 F.2d 200 (2d Cir. 1932)).

<sup>56</sup>The Court's opinion is equally applicable to 18 U.S.C. § 1623, since the elements of the crime of perjury are substantially the same in each statute. See, e.g., United States v. Slawik, 548 F.2d 75, 83 (3d Cir. 1977); United States v. Abrams, 568 F.2d 411, 422 n.54 (5th Cir.), cert. denied, 437 U.S. 903 (1978); United States v. Eddy, 737 F.2d 564, 571 (6th Cir. 1984).

<sup>57</sup>409 U.S. at 358-59.

problems arising from the literally true but unresponsive answer are to be remedied through the questioner's acuity and not by a federal perjury prosecution."<sup>58</sup>

d. The "I don't remember" syndrome

Prosecutors are often faced with witnesses who, rather than deny a fact, claim that they do not remember it. These witnesses may be prosecuted for perjury.<sup>59</sup> To prove that a witness actually remembered something, it is necessary to prove both that the witness at one time knew the fact and that he must have remembered it at the time he testified.

For example, a witness testifies that he does not remember having ever paid money to a police officer. The first element of proof in a perjury prosecution against him would be that he had, in fact, paid money to a police officer. It would then be necessary to prove that he must have remembered that payment when he testified. If the dates of the transaction and testimony are sufficiently close, memory may be inferred. Probative of his memory at the time of his testimony would be evidence that he mentioned such payments either before or after his testimony or that he remembered other events that occurred at the same time or earlier than the event in question.

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<sup>58</sup>Id. at 362; see also United States v. Earp, 812 F.2d 917 (4th Cir. 1987).

<sup>59</sup>United States v. Chapin, 515 F.2d 1274, 1284 (D.C. Cir.), cert. denied, 423 U.S. 1015 (1975); United States v. Swainson, 548 F.2d 657, 662 (6th Cir.), cert. denied, 431 U.S. 937 (1977); United States v. Nicoletti, 310 F.2d 359 (7th Cir. 1962), cert. denied, 372 U.S. 942 (1963); In re Battaglia, 653 F.2d 419, 421 (9th Cir. 1981).

It has been held in perjury prosecutions under § 1621 that proof that a defendant lied when he stated that he could not remember an event need not be by direct evidence or meet the standards of the two-witness rule.<sup>60</sup> These cases reason that since no direct evidence as to what the defendant actually believed is possible, circumstantial evidence is sufficient.

e. "Two-witness rule"

The so-called "two-witness rule" applies only to prosecutions for perjury brought under 18 U.S.C. § 1621.<sup>61</sup> Congress has eliminated the rule for prosecutions under § 1623 and since the rule is not of constitutional dimension, the courts have deferred to legislative judgment.<sup>62</sup> Thus, because § 1623 is the preferred vehicle for prosecutions of perjury occurring before a court or grand jury,<sup>63</sup> the handicap of the two-witness rule is generally avoided.

The two-witness rule is somewhat of a misnomer. It provides that the falsity of a statement alleged to be perjurious must be established either by the testimony of two independent witnesses, or by one witness and

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<sup>60</sup>United States v. Chapin, 515 F.2d at 1284; United States v. Swainson, 548 F.2d at 662; United States v. Nicoletti, 310 F.2d at 363.

<sup>61</sup>United States v. Diggs, 560 F.2d 266, 269 (7th Cir.), cert. denied, 434 U.S. 925 (1977).

<sup>62</sup>See Weiler v. United States, 323 U.S. 606 (1945); Hammer v. United States, 271 U.S. 620 (1926); United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir.), cert. denied, 412 U.S. 939 (1973); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979).

<sup>63</sup>See § A.7.a., supra.

independent corroborating evidence which is inconsistent with the innocence of the accused.<sup>64</sup> Thus, the rule is satisfied by the testimony of a second witness who has given testimony independent of another which, if believed, would prove that what the accused said under oath was false. In this case, it is immaterial whether such witness corroborates the first witness.<sup>65</sup> Alternatively, the rule is satisfied by one witness and independent corroborating evidence which is inconsistent with the innocence of the accused and of a quality to assure that a guilty verdict is solidly founded.<sup>66</sup>

It should be emphasized that the two-witness rule applies only to proof that a given statement was objectively false. Circumstantial evidence may be used to establish that a perjury defendant made the false statement willfully or with knowledge of its falsity.<sup>67</sup>

The two-witness rule does not apply to § 1621 prosecutions where the defendant is prosecuted for falsely testifying that he was unable to remember a certain event.<sup>68</sup> Neither does it apply to prosecutions for obstruction of justice (18 U.S.C. §§ 1503, 1505), even if the gravamen of the obstruction is that the defendant perjured himself.<sup>69</sup>

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<sup>64</sup>United States v. Maultasch, 596 F.2d 19, 25 n.9 (2d Cir. 1979); United States v. Forrest, 639 F.2d 1224, 1226 (5th Cir. Unit B Mar. 1981).

<sup>65</sup>United States v. Maultasch, 596 F.2d at 25.

<sup>66</sup>United States v. Maultasch, 596 F.2d at 25 n.9; United States v. Forrest, 639 F.2d at 1226.

<sup>67</sup>United States v. Hagarty, 388 F.2d 713, 716 n.2 (7th Cir. 1968).

<sup>68</sup>See § A.7.d, *supra*.

<sup>69</sup>United States v. Alo, 439 F.2d 751 (2d Cir.) (prosecution for obstruction of justice, rather than for perjury, is not an improper evasion of the two-witness rule), *cert. denied*, 404 U.S. 850 (1971).



f. The "use" of material containing false statements

In addition to prohibiting the making of false statements, § 1623 applies to one who:

... under oath in any proceeding ... makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration. . . .

The legislative history of § 1623 is silent as to what type of conduct the "makes or uses" part of the statute is intended to cover. In United States v. Pommerening, 500 F.2d 92 (10th Cir.), cert. denied, 419 U.S. 1088 (1974), the prosecutor subpoenaed defendants and their corporate records. The defendants altered the records, brought them to the grand jury and "relied upon these false documents in answering the United States Attorney's questions. . ." The appellate court found such conduct to be "use" of the documents before the grand jury.<sup>70</sup> In United States v. Dudley, 581 F.2d 1193, 1197 (5th Cir. 1978), the court held that physical delivery by the alleged user is not a necessary prerequisite to use under § 1623. It is sufficient that the testimony of the accused tended to give verity to the document.

Other conduct that may constitute perjury is the use of false affidavits submitted in federal court proceedings. In Dunn v. United States, 442 U.S. 100 (1979), the Supreme Court held that a false affidavit submitted to a federal court in support of a motion to dismiss an indictment could not be prosecuted as perjury

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<sup>70</sup>See also United States v. Larranaga, 787 F.2d 489 (10th Cir. 1986); United States v. Norton, 755 F.2d 1428 (11th Cir. 1985).

under § 1623 since such an affidavit lacked the formality required of court proceedings or depositions and therefore was not given in a "proceeding before or ancillary to any court or grand jury of the United States" as required by § 1623(a). However, prosecutions for false affidavits submitted in federal court proceedings can be prosecuted under § 1621. Venue for such prosecutions is in the district where the affidavit is sworn. Thus, in those cases in which an affidavit filed in United States District Court in one district was sworn in another district, the perjury prosecution under § 1621 must be brought in the latter district.

g. Indictments<sup>71</sup>

Based on current case law, the Government has some discretion as to how to charge separate, but related, false statements. Courts have held that all of the false declarations pertaining to a particular subject matter may be embraced in one count.<sup>72</sup> This includes minor questions which assign falsity to a witness' denial of knowledge about the general line of inquiry.<sup>73</sup> Charging the crime in this manner does not render the indictment infirm for duplicity as only one offense is contained in the count.<sup>74</sup> In such a situation, proof of the falsity of any one

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<sup>71</sup>See Ch. VII § B.8.

<sup>72</sup>United States v. Edmondson, 410 F.2d 670, 673 n.6 (5th Cir.), cert. denied, 396 U.S. 966 (1969); United States v. Isaacs, 493 F.2d 1124, 1155 (7th Cir.), cert. denied, 417 U.S. 976 (1974); Vitello v. United States, 425 F.2d 416, 418 (9th Cir.), cert. denied, 400 U.S. 822 (1970).

<sup>73</sup>See Arena v. United States, 226 F.2d 227 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956).

<sup>74</sup>United States v. Ramos, 666 F.2d 469, 473 (11th Cir. 1982); see also United States v. Wood, 780 F.2d 955, 962 (11th Cir.), cert. denied, 476 U.S. 1184 (1986).

statement charged will sustain the count.<sup>75</sup> On the other hand, false statements made during one grand jury session which are separate and distinct can be charged in multiple counts with separate sentences imposed for a conviction on each count.<sup>76</sup> For instance, in United States v. Scott, 682 F.2d at 698, the court held that separate and distinct false declarations which require different factual proof of falsity may be charged in separate counts even though they are related and arise out of the same transaction.<sup>77</sup> Furthermore, the fact that a single piece of evidence may be used to prove two counts does not make an indictment multiplicitous.<sup>78</sup> Two counts are considered to be separate offenses if the proof of one requires an additional fact that proof of the other does not require.<sup>79</sup>

A perjury indictment must set forth the precise falsehoods alleged and the factual basis of their falsity with sufficient clarity to permit a jury to determine their verity and to allow meaningful judicial review of the materiality

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<sup>75</sup>United States v. Kehoe, 562 F.2d 65, 69 (1st Cir. 1977); United States v. De La Torre, 634 F.2d 792, 794-95 (5th Cir. Unit A Jan. 1981); United States v. Isaacs, 493 F.2d at 1155; Vitello v. United States, 425 F.2d at 418.

<sup>76</sup>United States v. De La Torre, 634 F.2d at 794-95.

<sup>77</sup>See also United States v. Harrelson, 754 F.2d 1182, 1184 (5th Cir.), cert. denied, 474 U.S. 908 (1985); United States v. Wood, 780 F.2d at 962.

<sup>78</sup>United States v. Stanfa, 685 F.2d 85, 88 (3d Cir. 1982).

<sup>79</sup>Id. at 87; see also Blockburger v. United States, 284 U.S. 299, 304 (1932); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.), cert. denied, 429 U.S. 895 (1976). Chapter VII § G contains a more detailed discussion of multiplicity.

of those falsehoods.<sup>80</sup> However, the materiality requirement of a perjury indictment may be satisfied by a general statement that the matter was material.<sup>81</sup>

There is no requirement that the perjury occur before the grand jury that issues the indictment<sup>82</sup> and it is the preferred Division practice to present a perjury indictment to a grand jury that did not hear the perjured testimony. Nor is there a requirement that the grand jury must be able to indict for the substantive offense inquired into. A grand jury may ask questions about events outside of the statute of limitations, or about acts that otherwise would not lead to indictments.<sup>83</sup> However, the courts will strictly scrutinize for fairness any indictment and conviction for perjury before a grand jury that rests upon a defendant's responses to leading questions.<sup>84</sup>

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<sup>80</sup>United States v. Slawik, 548 F.2d 75 (3d Cir. 1977); see also United States v. Ryan, 828 F.2d 1010, 1015 (3d Cir. 1987).

<sup>81</sup>United States v. Ponticelli, 622 F.2d 985, 989 (9th Cir.), cert. denied, 449 U.S. 1016 (1980).

<sup>82</sup>United States v. Sun Myung Moon, 532 F. Supp. 1360, 1371 (S.D.N.Y. 1982).

<sup>83</sup>United States v. Picketts, 655 F.2d 837, 841 (7th Cir.), cert. denied, 454 U.S. 1056 (1981); United States v. Reed, 647 F.2d 849, 853 (8th Cir. 1981).

<sup>84</sup>United States v. Vesaas, 586 F.2d 101, 105 (8th Cir. 1978).

8. Defenses and bars to prosecution

a. In general

A primary defense to an indictment for perjury is that the defendant believed his statement to be true at the time he made it. Belief that a declaration was true when made is specifically a defense to prosecution under § 1623(c). The major element the Government must prove under § 1621 and § 1623 is that the defendant made a false statement knowing it to be false. If the Government is unable to prove this element beyond a reasonable doubt, the defendant is entitled to a directed verdict. Proof that a defendant believed a declaration was true defeats a charge of perjury even if the statement was, in fact, false.<sup>85</sup> The defense of advice of counsel usually may only be considered by the jury in determining whether the defendant willfully or knowingly gave false testimony.<sup>86</sup>

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<sup>85</sup>United States v. Winter, 348 F.2d 204, 210 (2d Cir.), cert. denied, 382 U.S. 955 (1965).

<sup>86</sup>United States v. Becker, 203 F. Supp. 467 (E.D. Va. 1962).

b. Collateral estoppel

Collateral estoppel<sup>87</sup> "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future law suit."<sup>88</sup>

Collateral estoppel has been an established rule of federal law at least since United States v. Oppenheimer, 242 U.S. 85 (1916), and is now viewed as an integral part of the 5th Amendment ban against double jeopardy.<sup>89</sup>

A prosecutor encounters no double jeopardy or collateral estoppel problem when prosecuting a convicted defendant for perjury committed during his former trial on a substantive offense.<sup>90</sup> Nor is there any collateral estoppel problem when prosecuting a trial witness for perjury, since a witness is not a party to the suit.

The question of whether collateral estoppel bars prosecution for perjury usually arises where a defendant who has taken the stand and perjured himself has been acquitted of the substantive offense and is charged with perjury for testimony given at his trial. The collateral estoppel claim is that the jury, by acquitting the defendant, adjudicated the truthfulness of his testimony in his favor and that the Government is barred from litigating that issue again.

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<sup>87</sup>Res judicata, though sometimes used interchangeably with collateral estoppel, has a distinct meaning and refers to "the preclusion of a claim or cause of activity where that claim has been fully litigated and decided in prior suit." United States v. Drevetzki, 338 F. Supp. 403, 405 (N.D. Ill. 1972).

<sup>88</sup>Ashe v. Swenson, 397 U.S. 436, 443 (1970); see also United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978).

<sup>89</sup>Harris v. Washington, 404 U.S. 55, 56 (1971).

<sup>90</sup>United States v. Williams, 341 U.S. 58, 62 (1951); United States v. Nixon, 634 F.2d 306, 309 (5th Cir.), cert. denied, 454 U.S. 828 (1981).

The problem with such a claim is that since the Government must prove every element of its case beyond a reasonable doubt and since the jury's general verdict does not indicate which elements it found lacking in proof, it is difficult to determine whether the jury's acquittal was based on a finding that the defendant's testimony was credible or whether, even though it disbelieved the defendant, the jury found the Government's case deficient in some other respect.

Clearly, if the defendant's only testimony is a general denial of guilt, an acquittal would be a bar to a perjury prosecution. In most situations, however, an inquiry must be made into what issues the jury's acquittal "necessarily" adjudicated. In Sealfon v. United States, 332 U.S. 575, 579 (1948), the Supreme Court held that the determination "depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

In confirming this point, the Court in Ashe v. Swenson, 397 U.S. 436, 444 (1970),<sup>91</sup> held:

Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which defendant seeks to foreclose from consideration.

Thus, the acquittal of a defendant following a trial on criminal charges does not necessarily bar his subsequent prosecution for perjury committed during the course of the trial. It is only when an issue of ultimate fact

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<sup>91</sup>See United States v. Williams, 341 U.S. 58 (1951).

or an element essential to conviction has once been determined by a final judgment in a criminal case that the same issue cannot be relitigated.<sup>92</sup> In such situations, the collateral estoppel doctrine requires: (1) an identification of the issues in the two actions to determine whether they are sufficiently similar and material; (2) an examination of the record of the prior case to decide whether the issue was litigated in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.<sup>93</sup>

Significantly, the burden is on the defendant to establish that the verdict in the prior trial necessarily determined in his favor the issue which he contends should not be considered.<sup>94</sup>

The prosecutor must make a thorough analysis of each case to determine if collateral estoppel dictates that an acquittal in a prior trial forecloses a subsequent perjury indictment. Before an indictment of an acquitted defendant for perjury based upon his testimony at trial is sought, the possibility that such a prosecution has been foreclosed should be explored fully so the Government will avoid the appearance of vindictive prosecution or waste of Government resources. In appropriate cases, the Criminal Division may be consulted prior to bringing such prosecutions to avoid development of restrictive precedents.

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<sup>92</sup>United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831 (1978); United States v. Giarratano, 622 F.2d 153, 155 (5th Cir. 1980); United States v. Sarno, 596 F.2d 404, 407-08 (9th Cir. 1979).

<sup>93</sup>United States v. Sarno, 596 F.2d at 408.

<sup>94</sup>United States v. Fayer, 573 F.2d at 745; United States v. Giarratano, 622 F.2d at 156 n.4.



c. Lack of Miranda warning

Generally, an indictment for perjury before a grand jury will not be dismissed for failure to advise the witness of his right not to incriminate himself.<sup>95</sup> There is also no duty to warn the witness of the consequences of committing perjury before the grand jury.<sup>96</sup> However, Department of Justice guidelines require prosecutors to give grand jury witnesses warnings resembling Miranda warnings and to advise putative defendants of their status as such,<sup>97</sup> although failure to do so does not constitute grounds for dismissal of an indictment.<sup>98</sup>

d. Recantation

1) In general. 18 U.S.C. § 1623(d) provides that, in certain limited circumstances, a retraction and correction of false testimony by a witness will act as a bar to prosecution for the initial perjury. Before the enactment of § 1623, the federal law, under § 1621, was that the crime of perjury was complete as soon as the

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<sup>95</sup>United States v. Prior, 553 F.2d 381, 383 (5th Cir. 1977).

<sup>96</sup>United States v. Babb, 807 F.2d 272, 277 (1st Cir. 1986).

<sup>97</sup>See U.S.A.M. 9-11.150; United States v. Jacobs, 547 F.2d 772, 774-75 (2d Cir. 1976) (court may exercise supervisory power to suppress perjured testimony when prosecutor fails to advise grand jury witness of putative defendant status in accordance with practice of United States attorneys in circuit), cert. dismissed per curiam, 436 U.S. 31 (1978).

<sup>98</sup>United States v. Catino, 735 F.2d 718, 725 (2d Cir.), cert. denied, 469 U.S. 855 (1984). For a more complete discussion of the rights of witnesses before the grand jury, see Ch. IV § F.2.

false statement was made,<sup>99</sup> and that a subsequent retraction and correction of the testimony did not erase the perjury, but was only relevant as an affirmative defense in showing the absence of intent to commit perjury.<sup>100</sup> Since recantation is a bar to prosecution under § 1623 rather than an affirmative defense, the issue of recantation is an issue of law to be decided by the court.<sup>101</sup> This defense must be raised before trial under Fed. R. Crim. P. 12(b)(2), as a jurisdictional bar to prosecution.<sup>102</sup>

18 U.S.C. § 1623(d), which was adopted in modified form from the New York Penal Code § 210.5,<sup>103</sup> provides:

Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

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<sup>99</sup>United States v. Norris, 300 U.S. 564, 574 (1937).

<sup>100</sup>United States v. Goguen, 723 F.2d 1012, 1020 (1st Cir. 1983); United States v. Kahn, 472 F.2d 272, 284 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

<sup>101</sup>United States v. Goguen, 723 F.2d at 1017; United States v. D'Auria, 672 F.2d 1085, 1091 (2d Cir. 1982); United States v. Denison, 663 F.2d 611, 618 (5th Cir. Unit B Dec. 1981).

<sup>102</sup>United States v. Goguen, 723 F.2d at 1017; United States v. D'Auria, 672 F.2d 1085, 1091 (2d Cir. 1982); United States v. Denison, 663 F.2d 611, 618 (5th Cir. Unit B Dec. 1981).

<sup>103</sup>See People v. Ezaugi, 2 N.Y.2d 439, 141 N.E.2d 580 (1957).

It is clear from the above that a witness' admission of the falsity of his declarations does not automatically bar prosecution, but that prosecution is barred only if the admission occurs at a time when the false declarations have "not substantially affected the proceeding, and it has not become manifest that such falsity has been or will be exposed."<sup>104</sup> Thus, if either of these conditions has already occurred prior to the time of the witness' reappearance to correct his testimony, the recantation provisions of § 1623(d) are inapplicable and cannot be invoked to bar prosecution.<sup>105</sup> Moreover, the burden is on the defendant to show that he is within the protection of the recantation exemption.<sup>106</sup>

In ruling on the timeliness of claimed recantation by a witness, the courts have generally interpreted the "manifest" proviso of § 1623(d) as applying specifically to the witness' knowledge, derived either from independent sources or directly from the Government prosecutor, that the falsity of his prior statements "has been or will be exposed." In the cases where the witness possesses such knowledge, the courts have consistently held that no effective recantation can thereafter be made.<sup>107</sup>

At least one case, however, suggests, by implication, that "manifest" can also be interpreted to mean that the falsity of the witness' statements has merely become known to the Government or the grand jury, as opposed to the witness. In United States v. Kahn, 472 F.2d 272 (2d Cir.), cert. denied, 411 U.S. 982 (1973), the Second Circuit

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<sup>104</sup>See United States v. Dworkin, 116 F.R.D. 29, 30 n.1 (E.D. Va. 1987).

<sup>105</sup>United States v. Moore, 613 F.2d 1029, 1039-40 (D.C. Cir. 1979), cert. denied, 446 U.S. 954 (1980); United States v. Goguen, 723 F.2d at 1018 n.7; United States v. Denison, 663 F.2d at 615.

<sup>106</sup>United States v. Moore, 613 F.2d at 1044; United States v. Scrimgeour, 636 F.2d at 1024.

<sup>107</sup>United States v. Moore, 613 F.2d at 1039; United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Del Toro, 513 F.2d 656, 666 (2d Cir.), cert. denied, 423 U.S. 826 (1976); United States v. Dennison, 663 F.2d supra.

held that a § 1623(d) defense was not available to the defendant since at the time of his alleged recantation, several other witnesses had already testified concerning the bribes, knowledge of which he had falsely denied during his initial- grand jury appearance. There is no indication in the opinion of a finding by the court that at the time of the defendant's attempted recantation, he had any knowledge of the contradictory testimony heard by the grand jury.

There is also some question as to the standards to be applied in determining when the false declarations of a witness will be considered as having "substantially affected the proceedings", thereby precluding an effective recantation. Certainly, a timely recantation would be precluded in any case where the grand jury has already acted.<sup>108</sup>

Further, in United States v. Crandall, 363 F. Supp. 648 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974), the court found that the defendant's false declarations had substantially affected the proceedings since the grand jury had been deprived initially of relevant testimony as to the guilt of other individuals which resulted in a several month delay in the grand jury's investigation.

While the cases offer some guidance, the determination of whether a given proceeding has been substantially affected by the witness' false declarations can only be made after a consideration of the facts and circumstances of the particular court or grand jury proceeding.

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<sup>108</sup>See United States v. Baldwin, 506 F. Supp. 300, 301 (M.D. Tenn. 1980); United States v. Krogh, 366 F. Supp. 1255, 1256 (D.D.C. 1973).

Since the statutory language of § 1623(d) requires both conditions to be satisfied for a valid recantation, reappearance before a grand jury to correct testimony after one of the conditions has occurred does not preclude prosecution for false declarations under § 1623.<sup>109</sup>

2) Necessity of advising a witness of recantation provision of § 1623(d). A prosecutor is under no duty to advise a witness of the possibility of recanting under § 1623(d).<sup>110</sup> This is so even if the prosecutor advises the witness of the penalties for perjury.<sup>111</sup> In addition, there is no requirement that the Government reveal to a perjurer that it has evidence of the untruthfulness of his statements, nor must the Government delay revealing incriminating evidence to allow the witness to reflect on his perjury.<sup>112</sup>

A heretofore unraised problem exists when a prosecutor gives a witness an opportunity to "straighten out" his testimony by recanting at a point in time when a recantation will not be valid. As set forth above, a recantation is effective only if made before it is clear that the perjury will be exposed or before the perjurious statement has misled the proceeding. It would seem that an argument could be made that the Government is estopped from challenging a witness' eligibility to recant if it solicits the recantation. Therefore, a prosecutor usually should not solicit a

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<sup>109</sup>United States v. Del Toro, 513 F.2d *supra*; United States v. Mitchell, 397 F. Supp. 166 (D.D.C. 1974), *aff'd*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

<sup>110</sup>United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982); United States v. Scrimgeour, 636 F.2d 1019, 1026 (5th Cir. Unit B), *cert. denied*, 454 U.S. 878 (1981); United States v. Anfield, 539 F.2d 674, 679 (9th Cir. 1976).

<sup>111</sup>United States v. Lardieri, 506 F.2d 319, 322 n.2 (3d Cir. 1974).

<sup>112</sup>United States v. D'Auria, 672 F.2d at 1093; United States v. Denison, 663 F.2d 611, 616-17 (5th Cir. Unit B Dec. 1981).

recantation unless he is willing to forego a prosecution for perjury and, normally, no perjury prosecution should be undertaken subsequent to a solicited recantation even if the defendant was technically ineligible under § 1623(d).

3) Witness' right to recant. If a witness who has completed his testimony requests that he be allowed to reappear before the grand jury for the purpose of recantation, the prosecutor should grant the request, if timely made, in keeping with the legislative intent of § 1623(d) – promotion of truthful testimony.<sup>113</sup>

To recant, the witness must, as a condition precedent to giving truthful testimony, admit that his perjurious testimony was false.<sup>114</sup> An outright retraction and repudiation of the false testimony is essential to a recantation within the meaning of the statute.<sup>115</sup> Ambiguous statements regarding confusion of the witness or requests to add to and clarify testimony are not sufficient. "Unless he admits that he gave false testimony, there is no occasion for a recantation."<sup>116</sup>

It is clear, however, that the reappearance by the witness after it has become "manifest" that the falsity of his previous testimony "has been or will be exposed" does not preclude the Government from prosecuting the witness for his prior false declarations before the grand jury.<sup>117</sup>

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<sup>113</sup>See Congressional Record - Senate, June 9, 1970, S. Rep. No. 8656.

<sup>114</sup>United States v. Vesich, 724 F.2d 451, 460 (5th Cir. 1984).

<sup>115</sup>United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. D'Auria, 672 F.2d 1085, 1091-92 (2d Cir. 1982); United States v. Vesich, 724 F.2d at 460.

<sup>116</sup>United States v. D'Auria, 672 F.2d at 1092; accord United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983).

<sup>117</sup>United States v. Del Toro, 513 F.2d 656, 666 (2d Cir.), cert. denied, 423 U.S. 826 (1975); United States v. Mitchell, 397 F. Supp. 166, 177 (D.D.C. 1974), aff'd, 559 F.2d 31 (D.C. Cir.

(continued...)

e. Immunity

The fact that the defendant testified with immunity before the grand jury or in a trial does not protect him from prosecution for perjured testimony made during the giving of the immunized testimony.<sup>118</sup> Perjury prosecutions based on immunized testimony are permissible and all statements made during the giving of the immunized testimony, both true and false, may be admitted in the course of a subsequent perjury action if such use is not otherwise prohibited by the 5th Amendment.<sup>119</sup>

B. Obstruction of Justice

Obstruction of justice is covered by a number of overlapping statutes generally found within Chapter 73 of Title 18 of the U.S. Code, "Obstruction of Justice." These statutes are result oriented and most activities that would obstruct or impede the administration of justice can be addressed by one or more of them. Perjury (18 U.S.C. § 1621), false declarations (18 U.S.C. § 1623), and false statements (18 U.S.C. § 1001), which are also

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<sup>117</sup>(...continued)  
1976), cert. denied, 431 U.S. 933 (1977); United States v. Crandall, 363 F. Supp. 648, 655 (W.D. Pa. 1973), aff'd, 493 F.2d 1401 (3d Cir.), cert. denied, 419 U.S. 852 (1974).

<sup>118</sup>See 18 U.S.C. §§ 6002, 6003; United States v. Wong, 431 U.S. 174, 178-79 (1977); United States v. Martinez-Navarro, 604 F.2d 1184, 1187 (9th Cir. 1979), cert. denied, 444 U.S. 1084 (1980).

<sup>119</sup>United States v. Apfelbaum, 445 U.S. 115, 130 (1980); In re Corrugated Container Antitrust Litig., 661 F.2d 1145, 1158 (7th Cir. 1981), aff'd sub nom. Pillsbury v. Conboy, 459 U.S. 248 (1983).

methods by which justice can be obstructed, are discussed elsewhere in this chapter. This section will focus primarily on 18 U.S.C. § 1503, and touch only in passing on the narrow statutes.<sup>120</sup>

1. Text of 18 U.S.C. § 1503

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503 is one of three broadly drawn statutes prohibiting conduct that would obstruct justice. The other two, 18 U.S.C. § 1512, tampering with a witness, victim, or an informant, and 18 U.S.C. § 1513,

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<sup>120</sup>For a more detailed exposition of these statutes, see U.S.A.M. 9-69.100, et seq.



retaliating against a witness, victim, or an informant, became effective in October of 1982 as part of the Victim and Witness Protection Act of 1982 (VWPA).<sup>121</sup>

## 2. The nature of the crime

18 U.S.C. § 1503 is comprised of two parts. The first part generally prohibits endeavors to "corruptly, or by threats or force, influence, intimidate, or impede. . ." any grand or petit juror, or court official. The second part – the so-called omnibus clause – punishes anyone, who "corruptly, or by threats or force, influences, obstructs, or impedes, the due administration of justice," or endeavors to do so. The omnibus clause extends to "those means of interference the draftsmen were not prescient enough to enumerate."<sup>122</sup> It is not limited by the concept of ejusdem generis to actions accomplished by means of coercion or intimidation.<sup>123</sup> Nor are actions taken against witnesses outside of its purview.<sup>124</sup>

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<sup>121</sup>Prior to the passage of the VWPA, actions affecting witnesses were also specifically covered by § 1503.

<sup>122</sup>United States v. Bonanno, 177 F. Supp. 106, 114 (S.D.N.Y. 1959).

<sup>123</sup>United States v. Walasek, 527 F.2d 676 (3d Cir. 1975).

<sup>124</sup>See the legislative history of the VWPA, particularly S. 2420, 97th Cong., 2d Sess., 128 Cong. Rec. S11430 (daily ed. Sept. 14, 1982), S. Rep. No. 532, 97th Cong., 2d Sess. 17-19, reprinted in 1982 U.S. Code Cong. & Ad. News 2515, 2523-25, and 128 Cong. Rec. S13063 (daily ed. Oct. 1, 1982) (remarks of Senator Heinz). Initially, an omnibus clause such as that in § 1503 was included within § 1512; it was taken out of the bill because it was beyond the scope of the witness protection legislation, and probably duplicative of other obstruction of justice statutes. But see United States v. Hernandez, 730 F.2d 895 (2d Cir. 1984), interpreting 18 U.S.C. §§ 1512 and 1503.

Courts have not been particularly concerned with defining the conduct that constitutes interference with the "due administration of justice." A definition put forth by the Ninth Circuit is "conduct designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court."<sup>125</sup>

a. Civil as well as criminal proceedings can be obstructed

The great majority of cases under § 1503 have involved endeavors to obstruct witnesses, jurors or officials in grand jury investigations or criminal trials. But the handful of courts that have addressed the issue directly have held that the statute also covers endeavors to obstruct pending civil proceedings.<sup>126</sup> Furthermore, the United States need not be a party to the case, as the justice being administered is that of the United States.<sup>127</sup>

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<sup>125</sup>Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

<sup>126</sup>Wilder v. United States, 143 F. 433, 440 (4th Cir. 1906) (construing Rev. Stat. §§ 5399 and 5440, precursors of § 1503), cert. denied, 204 U.S. 674 (1907); Sneed v. United States, 298 F. 911, 912 (5th Cir.) (construing 18 U.S.C. § 241, another precursor of § 1503), cert. denied, 265 U.S. 590 (1924); Roberts v. United States, 239 F.2d 467, 476 (9th Cir. 1956).

<sup>127</sup>Pettibone v. United States, 148 U.S. 197 (1893); Wilder v. United States, 143 F. supra; Sneed v. United States, 298 F. supra.

b. "Endeavors" as well as actual obstructions prohibited

The statute speaks of "endeavors" rather than "attempts" to obstruct. The term "endeavor" has been held to be broader than "attempt." As stated in United States v. Russell, 255 U.S. 138, 143 (1921):

The word of the section is "endeavor," and by using it the section got rid of the technicalities which might be urged as besetting the word "attempt," and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent. . . .<sup>128</sup>

In United States v. Tedesco, 635 F.2d 902, 907 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981), the court observed, "'endeavor' connotes a somewhat lower threshold of purposeful activity than 'attempt,' . . . the fact that the effort to influence was subtle or circuitous' made no difference," (quoting United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975)).

An endeavor "can be committed merely by words"<sup>129</sup> and need not be successful to be criminal.<sup>130</sup>

Factual impossibility is not a defense.<sup>131</sup>

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<sup>128</sup>Accord Osborn v. United States, 385 U.S. 323, 333 (1966).

<sup>129</sup>United States v. Fasolino, 586 F.2d 939, 941 (2d Cir. 1978).

<sup>130</sup>Overton v. United States, 403 F.2d 444, 446 (5th Cir. 1968); Catrino v. United States, 176 F.2d 884, 886 (9th Cir. 1949).

<sup>131</sup>See generally Osborn v. United States, 385 U.S. 323, 332-33 (1966); United States v.  
(continued...)

c. Endeavors to influence jurors or officials

The first clause of § 1503 prohibits endeavors to influence, intimidate or impede any grand or petit juror, or officer of any court whether these endeavors are by threat or force or are "corrupt". The term "officer" has been held to include veniremen,<sup>132</sup> federal district judges,<sup>133</sup> and U.S. Attorneys.<sup>134</sup>

d. Endeavors to obstruct the due administration of justice

The omnibus clause of § 1503 has been interpreted very broadly to cover actions that, whether or not taken with respect to jurors, officials, or witnesses, or by means of threats, force or intimidation, tend to impede the due administration of justice. Thus, it covers destruction of documents sought by a federal grand jury,<sup>135</sup> presenting fraudulent documents at a civil attachment proceeding,<sup>136</sup> attempts to sell grand jury transcripts,<sup>137</sup> concealment,

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<sup>131</sup>(...continued)

Lizzerini, 611 F.2d 940, 941-42 (1st Cir. 1979); United States v. Rosner, 485 F.2d 1213, 1228-29 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974); United States v. Roe, 529 F.2d 629, 631-32 (4th Cir. 1975); Knight v. United States, 310 F.2d 305, 307 (5th Cir. 1962) (per curiam).

<sup>132</sup>United States v. Jackson, 607 F.2d 1219, 1222 (8th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

<sup>133</sup>United States v. Margoles, 294 F.2d 371, 373 (7th Cir.), cert. denied, 368 U.S. 930 (1961).

<sup>134</sup>United States v. Polakoff, 112 F.2d 888, 890 (2d Cir.), cert. denied, 311 U.S. 653 (1940).

<sup>135</sup>United States v. Walasek, 527 F.2d 676 (3d Cir. 1975); United States v. Siegel, 152 F. Supp. 370 (S.D.N.Y. 1957).

<sup>136</sup>United States v. Coven, 662 F.2d 162, 170 (2d Cir. 1981), cert. denied, 456 U.S. 916

(continued...)

destruction or alteration of documents subpoenaed by a federal grand jury,<sup>138</sup> and falsifying a report likely to be submitted to a grand jury.<sup>139</sup>

An indictment charging an endeavor to impede the work of a grand jury by destroying, concealing or altering documents must allege that the defendant knew, or had reason to know, that the documents would be called for by the grand jury.<sup>140</sup> The documents, however, need not be subject to a subpoena.<sup>141</sup> It does not matter whether the administration of justice is actually hindered.<sup>142</sup>

The Second Circuit in United States v. Weiss, 491 F.2d at 466, approved the trial court's instruction that a § 1503 conviction "requires proof of more than mere failure to produce. . . documents. . ." and that ". . . some affirmative conduct. . . such as destruction, concealment or removal of the documents" must be shown.

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<sup>136</sup>(...continued)  
(1982).

<sup>137</sup>United States v. Howard, 569 F.2d 1331 (5th Cir.), cert. denied, 439 U.S. 834 (1978).

<sup>138</sup>United States v. Weiss, 491 F.2d 460 (2d Cir.), cert. denied, 419 U.S. 833 (1974); United States v. Simmons, 591 F.2d 206 (3d Cir. 1979); United States v. Faudman, 640 F.2d 20 (6th Cir. 1981); United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).

<sup>139</sup>United States v. Shoup, 608 F.2d 950 (3d Cir. 1979).

<sup>140</sup>United States v. Faudman, 640 F.2d at 21; United States v. Siegel, 152 F. Supp. at 376; United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), aff'd, 571 F.2d 572 (3d Cir.), cert. denied, 436 U.S. 945 (1978).

<sup>141</sup>United States v. Solow, 138 F. Supp. 812, 814 (S.D.N.Y. 1956).

<sup>142</sup>Osborn v. United States, 385 U.S. 323, 333 (1966); United States v. Russell, 255 U.S. 138, 143 (1921); United States v. Nicosia, 638 F.2d 970, 975 (7th Cir. 1980), cert. denied, 452 U.S. 961 (1981).

The omnibus clause of § 1503 has also been held to cover endeavors to suborn perjury or influence a witness not to testify,<sup>143</sup> giving false denials of knowledge and memory,<sup>144</sup> giving false and evasive testimony,<sup>145</sup> and endeavoring to influence a judge<sup>146</sup> or a juror through a third party.<sup>147</sup>

### 3. Elements of the crime

To prove the defendant guilty of a violation of 18 U.S.C. § 1503, the Government must prove that he knew or had reason to know that a judicial proceeding was pending in a federal court,<sup>148</sup> and that the effect of his act would be to obstruct justice.<sup>149</sup> Furthermore, the Government must show that the defendant acted with specific intent, or "corruptly."<sup>150</sup>

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<sup>143</sup>United States v. Partin, 552 F.2d 621 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

<sup>144</sup>United States v. Griffin, 589 F.2d 200 (5th Cir.), cert. denied, 444 U.S. 825 (1979).

<sup>145</sup>United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972).

<sup>146</sup>United States v. Glickman, 604 F.2d 625 (9th Cir. 1979), cert. denied, 444 U.S. 1080 (1980).

<sup>147</sup>United States v. Ogle, 613 F.2d 233 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

<sup>148</sup>Pettibone v. United States, 148 U.S. 197, 206 (1893).

<sup>149</sup>United States v. Solow, 138 F. Supp. 812, 816 (S.D.N.Y. 1956).

<sup>150</sup>A sample indictment is contained in Appendix VII-5.

a. A pending proceeding

The Government must prove that a proceeding was pending in a federal court and that the defendant in the § 1503 action had reason to know of it before he acted to or endeavored to obstruct justice.<sup>151</sup> The proceeding may be civil<sup>152</sup> or criminal, including a grand jury investigation.<sup>153</sup> The United States need not be a party to the proceeding as the justice being administered is that of the United States.<sup>154</sup>

A civil proceeding is pending once a complaint has been filed with a United States Commissioner.<sup>155</sup> A grand jury proceeding is pending once a subpoena has been "issued in furtherance of an actual grand jury investigation, i.e., to secure a presently contemplated presentation of evidence before the grand jury".<sup>156</sup> No

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<sup>151</sup>Pettibone v. United States, 148 U.S. 197 (1893); United States v. Johnson, 605 F.2d 729, 730 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974).

<sup>152</sup>Wilder v. United States, 143 F. 433, 440 (4th Cir. 1906) (construing Rev. Stat. §§ 5399 and 5440, precursors of § 1503), cert. denied, 204 U.S. 674 (1907); Roberts v. United States, 239 F.2d 467, 476 (9th Cir. 1956).

<sup>153</sup>United States v. Campanale, 518 F.2d 352, 356 (9th Cir. 1975) (per curiam), cert. denied, 423 U.S. 1050 (1976).

<sup>154</sup>Pettibone v. United States, 148 U.S. 197 (1893); Wilder v. United States, 143 F. supra.

<sup>155</sup>United States v. Metcalf, 435 F.2d 754, 756 (9th Cir. 1970).

<sup>156</sup>United States v. Walasek, 527 F.2d 676, 678 (3d Cir. 1975).

testimony need have been taken by the grand jury.<sup>157</sup> In fact, the grand jury need not be aware that subpoenas have been issued.<sup>158</sup>

A criminal action continues to be pending "in the district court until disposition is made of any direct appeal taken by the defendant assigning error that could result in a new trial."<sup>159</sup>

b. An act, the effect of which would be to obstruct justice

Any conduct "designed to interfere with the process of arriving at an appropriate judgment in a pending case and which would disturb the ordinary and proper functions of the court" can constitute an act which violates 18 U.S.C. § 1503.<sup>160</sup> The acts held to constitute obstructive conduct have varied so widely that one court observed that the reach of § 1503 is only limited by the imagination of the criminally inclined.<sup>161</sup>

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<sup>157</sup>Id.

<sup>158</sup>United States v. Simmons, 591 F.2d 206, 210 (3d Cir. 1979).

<sup>159</sup>United States v. Johnson, 605 F.2d 729, 731 (4th Cir. 1979), cert. denied, 444 U.S. 1020 (1980).

<sup>160</sup>Haili v. United States, 260 F.2d 744, 746 (9th Cir. 1958).

<sup>161</sup>Falk v. United States, 370 F.2d 472, 476 (9th Cir. 1966), cert. denied, 387 U.S. 926 (1967).



c. The act was done "corruptly", or with specific intent

The state of mind required to violate 18 U.S.C. § 1503, is that of specific intent.<sup>162</sup> The act forming the basis for the obstruction charge must have been knowingly and deliberately done for an improper or evil purpose.

The use of the word "corruptly" in the statute has been widely held to connote specific intent.<sup>163</sup> The specific intent standard goes not only to the act itself but also to proving that the defendant knew that a federal judicial proceeding was pending and that he acted with the purpose of interfering with it.<sup>164</sup> Only one case, United States v. Neiswender, 590 F.2d 1269 (4th Cir.), cert. denied, 441 U.S. 963 (1979), deviates from the specific intent standard. In Neiswender the defendant offered to "guarantee" a jury acquittal in return for a bribe from defense counsel. During his trial for obstruction of justice, the defendant argued that he had only intended to defraud defense counsel, not to cause him to reduce his efforts on behalf of his client and thus obstruct justice. The court held:

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<sup>162</sup>United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

<sup>163</sup>United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978), cert. denied, 440 U.S. 981 (1979); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982); United States v. Ogle, 613 F.2d 233, 238 (10th Cir. 1979), cert. denied, 449 U.S. 825 (1980).

<sup>164</sup>See Pettibone v. United States, 148 U.S. 197, 207 (1893); United States v. Baker, 494 F.2d 1262, 1265 (6th Cir. 1974); United States v. White, 557 F.2d 233, 235-36 (10th Cir. 1977) (per curiam). But see United States v. Yermian, 468 U.S. 63 (1984), where the Supreme Court held that 18 U.S.C. § 1001 did not require actual knowledge that the matter was under federal agency jurisdiction.

[a] defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired.<sup>165</sup>

Specific intent may be proved by circumstantial evidence.<sup>166</sup> It may not, however, be presumed as a matter of law.<sup>167</sup>

#### 4. Venue

Where the act forming the basis of the obstruction charge and the proceeding at which it is aimed are in the same district, there is no question as to where venue lies. When they are in different districts, however, the circuits are split on whether venue lies where the proceeding is pending or where the act occurred. The greater

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<sup>165</sup>590 F.2d at 1274.

<sup>166</sup>United States v. White, 557 F.2d at 235.

<sup>167</sup>United States v. Haldeman, 559 F.2d 31, 116 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977).

weight of authority is that venue lies where the proceeding is pending.<sup>168</sup> The D.C. Circuit, Seventh Circuit, and the Eastern District of Pennsylvania hold that venue is only proper where the act occurred.<sup>169</sup>

C. False Statements 18 U.S.C. § 1001

1. Text of 18 U.S.C. § 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined no more than \$10,000 or imprisoned not more than five years or both.

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<sup>168</sup>United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981); United States v. Kibler, 667 F.2d 452 (4th Cir.), cert. denied, 456 U.S. 961 (1982); United States v. O'Donnell, 510 F.2d 1190 (6th Cir.), cert. denied, 421 U.S. 1001 (1975); United States v. Barham, 666 F.2d 521 (11th Cir.), cert. denied, 456 U.S. 947, reh'g denied, 456 U.S. 1012 (1982). Kibler, Barham, Tedesco and O'Donnell all reserve decision on the question of whether venue only lies where the proceeding is pending.

<sup>169</sup>United States v. Swann, 441 F.2d 1053 (D.C. Cir. 1971); United States v. Nadolny, 601 F.2d 940 (7th Cir. 1979) (§ 1510); United States v. Bachert, 449 F. Supp. 508 (E.D. Pa. 1978).

18 U.S.C. § 1001, the general false statements statute, is aimed at "protect[ing] the authorized functions of governmental departments and agencies from the perversion which might result from . . . deceptive practices. . . ." <sup>170</sup> The statute overlaps with a myriad of other false statements statutes that are keyed to specific federal agencies or federally-assisted activities. <sup>171</sup> The courts have held that the making of a false statement may be prosecuted under § 1001 even if another, more specific false statement statute applies to the alleged conduct. <sup>172</sup> The fact that the more specific statute authorizes less severe penalties than § 1001 is of no consequence. <sup>173</sup>

## 2. The nature of the offense

The forerunner of the present § 1001 proscribed the making of false pecuniary claims to the Federal Government, but not the furnishing of false information. In 1934, the statute was amended to substantially its present form. <sup>174</sup>

Section 1001 applies to three types of conduct: (1) falsifying, concealing, or covering up a material fact by

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<sup>170</sup>United States v. Gilliland, 312 U.S. 86, 93 (1941) (construing predecessor statute to § 1001).

<sup>171</sup>E.g., 18 U.S.C. § 1012 (Department of Housing and Urban Development transactions); 18 U.S.C. § 1020 (Highway projects).

<sup>172</sup>E.g., United States v. Gilliland, 312 U.S. at 95; United States v. Anderez, 661 F.2d 404, 407-08 (5th Cir. Unit B Nov. 1981).

<sup>173</sup>Id.

<sup>174</sup>For a discussion of the legislative history of the Act, see United States v. Yermian, 468 U.S. 63 (1984).

any trick, scheme, or device; (2) making false, fictitious or fraudulent statements or representations; and (3) making or using any false document or writing. It has been said that § 1001 "encompasses two distinct offenses, false representation and concealment of a material fact."<sup>175</sup>

### 3. The elements of the offense

The elements of a § 1001 violation are generally stated to be: (1) a statement (2) that is false, (3) material, (4) made knowingly and willfully, and (5) made in relation to a matter within the jurisdiction of a department or agency of the United States.<sup>176</sup>

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<sup>175</sup>United States v. Tobon-Builes, 706 F.2d 1092, 1096 (11th Cir. 1983). But see United States v. Uco Oil Co., 546 F.2d 833, 838 (9th Cir. 1976) (concluding that § 1001 does not create distinct offenses and that the Government cannot charge separate offenses under the "making a false statement" and "concealing" clauses of the statute based on the same false document), cert. denied, 430 U.S. 966 (1977).

<sup>176</sup>See, e.g., United States v. Jackson, 714 F.2d 809, 812 (8th Cir. 1983).

a. Statements

The courts agree that § 1001 covers both oral and written statements.<sup>177</sup> The statement need not be sworn.<sup>178</sup> Writing "N/A" in response to a question may be considered an "answer" and thus a statement within the meaning of § 1001.<sup>179</sup>

A person who leaves the space provided on a form for an answer blank may be deemed to represent implicitly that he has no relevant information to supply. If the contrary is true, the failure to disclose may be punishable under the "concealing" clause of § 1001.<sup>180</sup> Note, however, that with respect to a charge under the "concealing" clause of § 1001, the Government may be required to show that "the defendant had a duty to disclose the material facts at the time he was alleged to have concealed them."<sup>181</sup> It is not always easy to draw clear

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<sup>177</sup>See United States v. Beacon Brass Co., 344 U.S. 43, 46 (1952).

<sup>178</sup>See United States v. Isaacs, 493 F.2d 1124, 1157 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

<sup>179</sup>United States v. Mattox, 689 F.2d 531, 532 (5th Cir. 1982).

<sup>180</sup>United States v. Muntain, 610 F.2d 964, 971-72 (D.C. Cir. 1979); United States v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982). But see United States v. London, 550 F.2d 206, 213 (5th Cir. 1977) (to sustain a charge under concealing clause, the Government must "demonstrat[e] not merely that the [defendants] failed to disclose the existence of [material facts], but rather that the defendants committed affirmative acts constituting a trick, scheme, or device by which they sought to conceal material facts.").

<sup>181</sup>United States v. Irwin, 654 F.2d at 678-79.

distinctions between the "making a false statement" and "concealing" clauses of § 1001 because falsifying one fact may serve to conceal another fact that should have been disclosed.<sup>182</sup>

b. Falsity

The element of falsity is satisfied either by the making of a false statement or the concealing of a material fact. "A statement is 'false' or 'fictitious' if untrue when made and known to be untrue by the person making it or causing it to be made."<sup>183</sup>

The rule is that "absent [a] fundamental ambiguity, the question of what a defendant meant when he made his representation will normally be for the jury."<sup>184</sup> If a statement objectively admits of more than one interpretation, the Government sustains its burden of proof only if it "negative[s] any reasonable interpretation that would make the defendant's statement factually correct."<sup>185</sup>

The courts have held that the making of false statements concerning future intentions is actionable under § 1001.<sup>186</sup>

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<sup>182</sup>See United States v. Private Brands, Inc., 250 F.2d 554, 555-56 (2d Cir. 1957), cert. denied, 355 U.S. 957 (1958); Coil v. United States, 343 F.2d 573, 576 (8th Cir.), cert. denied, 382 U.S. 821 (1965).

<sup>183</sup>United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979).

<sup>184</sup>United States v. Diogo, 320 F.2d 898, 907 (2d Cir. 1963).

<sup>185</sup>United States v. Anderson, 579 F.2d 455, 460 (8th Cir.), cert. denied, 439 U.S. 980 (1978).

<sup>186</sup>See, e.g., United States v. Diggs, 613 F.2d 988, 999 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980); Russell v. United States, 222 F.2d 197, 198 (5th Cir. 1955).

c. Materiality

Section 1001 does not contain an explicit materiality requirement for the offenses of making a false statement or using a false writing or document, but does contain such a requirement for the offense of falsifying, concealing, or covering up a material fact. Nevertheless, the great weight of authority holds that § 1001 should be read to require a showing of materiality regardless of which clause the defendant has been charged with violating.<sup>187</sup> The question of the materiality of a false statement under § 1001 is one of law.<sup>188</sup>

The materiality requirement of § 1001 has been liberally construed. A statement is "material" within the meaning of the statute if it has "a natural tendency to influence, or [is] capable of affecting or influencing, a government function."<sup>189</sup> To establish materiality, it is not necessary to show that a federal agency relied upon the

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<sup>187</sup>See, e.g., United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir.) (prosecution under "making a false statement" clause), cert. denied, 447 U.S. 907 (1980); United States v. Voorhees, 593 F.2d 346, 349 (8th Cir.) (prosecution under "making or using a false document" clause), cert. denied, 441 U.S. 936 (1979). Contra United States v. Elkin, 731 F.2d 1005, 1009 (2d Cir.) ("materiality is not an element of the offense of making a false statement in violation of § 1001"), cert. denied, 469 U.S. 822 (1984).

<sup>188</sup>E.g., United States v. Abadi, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961). Contra United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979).

<sup>189</sup>United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975); United States v. Steele, 896 F.2d 998, 1006 (6th Cir. 1990).



false statement,<sup>190</sup> that the false statement influenced a federal agency,<sup>191</sup> that a federal agency was misled by the false statement,<sup>192</sup> or that the Federal Government sustained a loss on account of the false statement.<sup>193</sup> A false statement may be material under § 1001 even if it is not required to be made by statute or regulation,<sup>194</sup> and even if it is not made directly to a federal agency.<sup>195</sup> These issues are usually discussed by the courts in connection with the federal agency jurisdiction element of § 1001. The courts have recognized that the materiality and jurisdictional elements of § 1001 "are logically related."<sup>196</sup>

d. Intent

To violate § 1001, a false statement must be made knowingly and willfully. A statement is made "knowingly" if it is made with knowledge or awareness of the true facts, and is not prompted by mistake, accident,

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<sup>190</sup>United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. Unit A Sept. 1981), cert. denied, 455 U.S. 948 (1982); United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982).

<sup>191</sup>United States v. Cole, 469 F.2d 640, 641 (9th Cir. 1972) (per curiam); United States v. Fern, 696 F.2d 1269, 1274 (11th Cir. 1983).

<sup>192</sup>United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976).

<sup>193</sup>See United States v. Gilliland, 312 U.S. 86, 93 (1941).

<sup>194</sup>See United States v. Diaz, 690 F.2d at 1358.

<sup>195</sup>See United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980).

<sup>196</sup>United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980).

or other innocent reason.<sup>197</sup> The Government is not required to show that the defendant had actual knowledge of federal agency jurisdiction, or of the statutory provision proscribing the alleged conduct.<sup>198</sup>

The Supreme Court in United States v. Yermian, 468 U.S. 63 (1984), noted that § 1001 "contains no language suggesting any . . . requirement that false statements be . . . [made] with the intent to deceive the federal government."<sup>199</sup> However, some pre-Yermian cases hold that § 1001 extends only to conduct undertaken with the intent to deceive.<sup>200</sup> The legislative history of § 1001 clearly supports the conclusion that the intent to defraud is not an element of the offense.<sup>201</sup>

The knowledge requirement of § 1001 may be satisfied by proof that the defendant made a false statement with "reckless disregard of the truthfulness of the statement and with a conscious purpose to avoid learning the truthfulness of the statement."<sup>202</sup>

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<sup>197</sup>United States v. Di Fonzo, 603 F.2d 1260, 1266 (7th Cir. 1979), cert. denied, 444 U.S. 1018 (1980).

<sup>198</sup>Johnson v. United States, 410 F.2d 38, 47 (8th Cir.), cert. denied, 396 U.S. 822 (1969).

<sup>199</sup>United States v. Yermian, 468 U.S. at 69.

<sup>200</sup>See, e.g., United States v. Markey, 693 F.2d 594, 596 (6th Cir. 1982).

<sup>201</sup>See United States v. Yermian, 468 U.S. at 70; United States v. Gilliland, 312 U.S. 86, 93-94 (1941).

<sup>202</sup>United States v. Evans, 559 F.2d 244, 246 (5th Cir. 1977), cert. denied, 434 U.S. 1015 (1978); cf. United States v. Sarantos, 455 F.2d 877, 880-82 (2d Cir. 1972).

An act is committed "willfully" under § 1001 if it is done "deliberately and with knowledge."<sup>203</sup> The willfulness element of § 1001 has been construed to require proof that the defendant had "the intent of bringing about the forbidden act."<sup>204</sup> The element of willfulness does not require a showing of evil intent.<sup>205</sup>

e. Federal agency jurisdiction

1) Department or agency.<sup>206</sup> In United States v. Bramblett, 348 U.S. 503, 509 (1955), the Supreme Court stated that the term "department" as used in § 1001 "was meant to describe the executive, legislative, and judicial branches of the Government." Hence, a host of governmental units have been found to constitute "departments or agencies" within the meaning of § 1001.

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<sup>203</sup>United States v. Carrier, 654 F.2d 559, 561 (9th Cir. 1981).

<sup>204</sup>United States v. Markee, 425 F.2d 1043, 1046 (9th Cir.), cert. denied, 400 U.S. 847 (1970).

<sup>205</sup>McBride v. United States, 225 F.2d 249, 253-55 (5th Cir. 1955), cert. denied, 350 U.S. 934 (1956).

<sup>206</sup>18 U.S.C. § 6. Department and agency defined

As used in this title:

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows such term was intended to be used in a more limited sense.

Although the Supreme Court in Bramblett expressly included the judicial branch of the Government in the definition of the term "department" for the purposes of § 1001, the lower courts have tended to construe the statute more narrowly in prosecutions based upon the making of false statements in judicial proceedings. The prevailing view is that § 1001 protects the "'administrative' or 'housekeeping' functions, not the 'judicial machinery' of the court[s]." <sup>207</sup> Thus, the courts have extended the reach of § 1001 to providing false identifying information to a magistrate <sup>208</sup>, filing false affidavits with the court clerk in connection with a bail related transaction <sup>209</sup> and filing fraudulent appearance bonds in a bankruptcy action. <sup>210</sup> However, courts have refused to extend § 1001 to the giving of false testimony before a grand jury, <sup>211</sup> the making of false representations to a United States Magistrate at a removal and bail hearing, <sup>212</sup> the filing of an affidavit containing false statements in a private civil action in federal court, <sup>213</sup> the introduction of a false document at a federal criminal trial, <sup>214</sup> and the falsification of a judicial order in a federal civil action. <sup>215</sup>

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<sup>207</sup>United States v. Morgan, 309 F.2d 234, 237-38 (D.C. Cir. 1962) (*dicta*), *cert. denied*, 373 U.S. 917 (1963); United States v. Holmes, 840 F.2d 246, 248 (4th Cir. 1988).

<sup>208</sup>United States v. Plascencia-Orozco, 768 F.2d 1074, 1076 (9th Cir. 1985).

<sup>209</sup>United States v. Burkley, 511 F.2d 47 (4th Cir. 1975).

<sup>210</sup>United States v. Rowland, 789 F.2d 1169 (5th Cir. 1986).

<sup>211</sup>United States v. Allen, 193 F. Supp. 954, 959 (S.D. Cal. 1961).

<sup>212</sup>United States v. Abrahams, 604 F.2d 386, 393 (5th Cir. 1979).

<sup>213</sup>United States v. D'Amato, 507 F.2d 26, 30 (2d Cir. 1974).

<sup>214</sup>United States v. Ehrhardt, 381 F.2d 173, 175 (6th Cir. 1967).

<sup>215</sup>United States v. London, 714 F.2d 1558, 1562 (11th Cir. 1983). But see United States v.  
(continued...)

2) Jurisdiction. The issue of whether a false statement was made "in any matter within the jurisdiction of any department or agency of the United States" is ordinarily treated as a question of fact.<sup>216</sup> Some circuits hold, however, that this question may properly be decided by the trial judge.<sup>217</sup>

The Supreme Court has stated that the "term 'jurisdiction' should not be given a narrow or technical meaning for purposes of § 1001."<sup>218</sup> In United States v. Rodgers, 466 U.S. 475, 479 (1984), the Supreme Court defined the rule as follows:

A department or agency has jurisdiction [under § 1001] when it has the power to exercise authority in a particular situation. . . . Understood in this way, the phrase "within the jurisdiction" merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body.

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<sup>215</sup>(...continued)

Burkley, 511 F.2d 47, 50 (4th Cir. 1975) (§ 1001 covers submitting false affidavits to Clerk of the District Court to secure bail bonds); United States v. Powell, 708 F.2d 455, 457 (9th Cir.) (§ 1001 covers submitting a false affidavit to a United States Magistrate in applying for leave to proceed in forma pauperis), cert. denied, 467 U.S. 1254 (1983); United States v. Stephens, 315 F. Supp. 1008, 1010 (W.D. Okla. 1970) (§ 1001 covers making false statements in a federal civil proceeding to vacate a criminal sentence).

<sup>216</sup>See, e.g., United States v. Montemayor, 712 F.2d 104, 106-07 (5th Cir. 1983).

<sup>217</sup>Terry v. United States, 131 F.2d 40, 44 (8th Cir. 1942); Pitts v. United States, 263 F.2d 353, 358 (9th Cir.), cert. denied, 360 U.S. 935 (1959); United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982); United States v. Goldstein, 695 F.2d 1228, 1236 (10th Cir. 1981), cert. denied, 462 U.S. 1132 (1983).

<sup>218</sup>Bryson v. United States, 396 U.S. 64, 70 (1969).

The defendant in Rodgers allegedly made false crime reports to the FBI and the Secret Service. The Court held these facts stated an offense under § 1001 because there was a "'statutory basis' for the authority of the FBI and the Secret Service over investigations sparked by [the defendant's] false reports."<sup>219</sup>

Federal agency jurisdiction under § 1001 has been found to exist in a wide variety of circumstances. The statute reaches statements not required to be made by statute or regulation,<sup>220</sup> as well as statements not made directly to a federal agency.<sup>221</sup> False statements made to federal agencies possessing only police or investigatory powers are also covered.<sup>222</sup>

It is settled that the making of a false statement may be prosecuted under § 1001 even when "the federal agency's role is limited to financial support of a program it does not directly administer."<sup>223</sup> When a false statement is made to a non-federal entity that administers or implements a program that is funded by a federal agency, jurisdiction has been found to exist under § 1001 on the theory that:

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<sup>219</sup>466 U.S. at 481; cf. Bryson v. United States, 396 U.S. at 70-71.

<sup>220</sup>See, e.g., Ogden v. United States, 303 F.2d 724, 743 n.70 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964).

<sup>221</sup>See, e.g., United States v. Uni Oil, Inc., 646 F.2d 946, 955 (5th Cir. May 1981), cert. denied, 455 U.S. 908 (1982); United States v. Balk, 706 F.2d 1056, 1059 (9th Cir. 1983).

<sup>222</sup>See generally United States v. Rodgers, 466 U.S. 475 (1984); United States v. International Business Machs. Corp., 415 F. Supp. 668, 672 (S.D.N.Y. 1976) (dicta) (false statements made to Antitrust Division attorneys covered by § 1001).

<sup>223</sup>United States v. Petullo, 709 F.2d 1178, 1180 (7th Cir. 1983).

The necessary link between deception of the non-federal agency and effect on the federal agency is provided by the federal agency's retention of "the ultimate authority to see that federal funds are properly spent."<sup>224</sup>

Consistent with this approach, the courts have upheld a finding of federal agency jurisdiction when a false statement is made in connection with a federally-assisted program that is subject to auditing by a federal agency.<sup>225</sup>

When a federal agency acts in an essentially regulatory as opposed to funding capacity, agency jurisdiction has been found to exist when a false statement is made in a document that bears a reasonable relationship to an authorized function of the agency.<sup>226</sup> In addition, § 1001 punishes the making of a false statement to a private party who submits the information to a federal agency for use in connection with an authorized function of that agency.<sup>227</sup>

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<sup>224</sup>United States v. Petullo, 709 F.2d at 1180 (quoting United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980)); United States v. Wolf, 645 F.2d 23, 25 (10th Cir. 1981); see United States v. Jones, 464 F.2d 1118, 1123 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973); United States v. Munoz, 392 F. Supp. 183, 186 (E.D. Mich. 1974), aff'd, 529 F.2d 526 (6th Cir. 1975).

<sup>225</sup>See United States v. Candella, 487 F.2d 1223, 1226 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); United States v. Beasley, 550 F.2d 261, 276 (5th Cir.), cert. denied, 434 U.S. 863 (1977); United States v. Hooper, 596 F.2d 219, 223 (7th Cir. 1979); United States v. Canel, 569 F. Supp. 926, 928-29 (D.V.I. 1982), aff'd, 708 F.2d 894, 898 (3d Cir.), cert. denied, 464 U.S. 852 (1983).

<sup>226</sup>See generally United States v. Montemayor, 712 F.2d at 106-07; United States v. Diaz, 690 F.2d at 1357.

<sup>227</sup>See generally United States v. Uni Oil, Inc., 646 F.2d at 954-55; United States v. Wolf, 645 F.2d at 25.

#### 4. Venue

The general rule is that venue to prosecute a violation of § 1001 lies either in the district where the false statement is prepared, executed, mailed or physically delivered to a federal agency, or in the district where the false statement is filed for final agency action.<sup>228</sup> However, when a false document is filed under a statute that makes the filing of the document a condition precedent to the exercise of federal jurisdiction, venue is proper only in the district where the document was filed for final agency action.<sup>229</sup>

#### 5. Defenses

##### a. Exculpatory denial defense

The courts disagree on the applicability of § 1001 to exculpatory "no" statements -- false denials of culpability unaccompanied by other false statements. Some courts have suggested that the exculpatory denial defense is necessary to preserve the protection afforded by the privilege against self-incrimination.<sup>230</sup> Although

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<sup>228</sup>See United States v. Deloach, 654 F.2d 763, 766-67 (D.C. Cir. 1980), cert. denied, 450 U.S. 933 (1981); United States v. Herberman, 583 F.2d 222, 225-27 (5th Cir. 1978); United States v. Candella, 487 F.2d 1223, 1228 (2d Cir. 1973), cert. denied, 415 U.S. 977 (1974); 18 U.S.C. § 3237(a).

<sup>229</sup>Travis v. United States, 364 U.S. 631, 635-36 (1961).

<sup>230</sup>See, e.g., United States v. Lambert, 501 F.2d 943, 946 n.4 (5th Cir. 1974).



several courts recognize the exculpatory denial defense, at least to some extent, the proper way to exercise the privilege against self-incrimination is to remain silent, not to lie.<sup>231</sup>

The Fifth Circuit was the first court of appeals to recognize the exculpatory denial defense.<sup>232</sup> The First, Sixth, Eighth and Ninth Circuits have also approved this defense to a limited extent.<sup>233</sup> The extent to which the exculpatory denial defense will be recognized outside these Circuits is unclear.<sup>234</sup> It is clear, however, that the courts will refuse recognize the defense where a truthful statement by the defendant "would not have involved possible self-incrimination."<sup>235</sup>

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<sup>231</sup>See Bryson v. United States, 396 U.S. 64, 72 (1969); United States v. Knox, 396 U.S. 77, 80-83 (1969); United States v. Steele, 933 F.2d 1313 (6th Cir. 1991).

<sup>232</sup>See Paternostro v. United States, 311 F.2d 298, 305 (5th Cir. 1962) ("mere negative responses to questions. . . by an investigating agent during a question and answer conference not initiated by the [defendant]" do not violate § 1001); see also United States v. Hajecate, 683 F.2d 894, 901 (5th Cir. 1982) (question on an income tax return regarding existence of foreign bank accounts was "investigative" and, thus, false answer to the question was beyond the scope of § 1001), cert. denied, 461 U.S. 927 (1983).

<sup>233</sup>See United States v. Chevoor, 526 F.2d 178, 182-84 (1st Cir. 1975), cert. denied, 425 U.S. 935 (1976); United States v. Steele, 896 F.2d 998, 1001 (6th Cir. 1990); United States v. Taylor, 907 F.2d 801, 804 (8th Cir. 1990); United States v. Medina De Perez, 799 F.2d 540 (9th Cir. 1986).

<sup>234</sup>See United States v. Grotke, 702 F.2d 49, 53-54 (2d Cir. 1983); United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988); United States v. King, 613 F.2d 670, 674 (7th Cir. 1980); United States v. Fitzgibbon, 619 F.2d 874, 879-81 (10th Cir. 1980); United States v. Tabor, 788 F.2d 714, 718-19 (11th Cir. 1986).

<sup>235</sup>See, e.g., United States v. Morris, 741 F.2d 188 (8th Cir. 1984).

b. Multiplicity

An indictment charging separate violations of § 1001 for each false document submitted is not multiplicitous,<sup>236</sup> even if all the false documents are submitted at one time.<sup>237</sup>

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<sup>236</sup>United States v. Bennett, 702 F.2d 833, 835 (9th Cir. 1983).

<sup>237</sup>United States v. Uco Oil Co., 546 F.2d 833, 838-39 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977); United States v. Bettenhausen, 499 F.2d 1223, 1234 (10th Cir. 1974).

## IX. PLEA AGREEMENTS

### A. Rule 11

#### 1. General authority

At any time during an investigation, particularly after a putative defendant has been advised of his status or after a defendant has been indicted, his attorney may want to discuss a plea agreement. The burden of initiating such discussions usually rests on the defendant and his counsel, but Division attorneys may appropriately advise defense counsel that they are willing to engage in plea negotiations, because it is the policy of the Division that, absent unusual circumstances, criminal cases may be disposed of pursuant to plea agreements.

The disposition by plea agreement of criminal antitrust charges, like all other federal criminal charges, is authorized and governed by Rule 11(e)(1), Federal Rules of Criminal Procedure,<sup>1</sup> which provides that:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a

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<sup>1</sup>Rule 11(a)(2) provides for conditional pleas, which are fully described later in this chapter.

charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

Although the rule contemplates the possibility of a defendant conducting negotiations pro se, that eventuality is extremely unlikely in an antitrust context, and it is the practice of most prosecuting attorneys to enter into plea discussions only with counsel for a defendant. Also, the rule contemplates agreements by defendants to plead nolo contendere, but it is the policy of the Division that, except in highly unusual circumstances, nolo pleas will not be negotiated.

Under Rule 11(e)(1), a charge may be reduced to a lesser or related offense. There is no lesser-included offense in the Sherman Act,<sup>2</sup> so there is no possibility of reducing a charge, but there may be circumstances where it is appropriate for a defendant to plead guilty to a charge other than the one for which he has been indicted. Assuming a sufficient factual basis, a plea agreement could appropriately provide for the filing of a new charge, usually in an information, and the dismissal of the pending charge.

## 2. Types of plea agreements

### a. 11(e)(1)(A) agreements

The attorney for the Government may promise to move for dismissal of other charges. This situation would arise only when a defendant had been indicted on more than one count or named in more than one indictment, and the Government decides that a guilty plea on fewer than all of the pending charges is sufficient, or in a substitution of charges as mentioned above. In prosecutor's shorthand, this is known as an "A" type agreement, because it is authorized by Rule 11(e)(1)(A). In antitrust cases, "A" type agreements virtually always have substantive provisions that are similar to those found in "B" or "C" type agreements, as described below.

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<sup>2</sup>Arguably, § 14 of the Clayton Act (15 U.S.C. § 24) provides a lesser-included offense. However, the Division has never permitted a defendant to plead under this provision.

b. 11(e)(1)(B) agreements

The attorney for the Government may agree to recommend, or agree not to oppose the defendant's request for a particular sentence. Such an agreement is known as a "B" type, and is probably the most frequently used. In its purest form, the attorney for the Government will agree to recommend a particular sentence of incarceration or fine, or both, and defense counsel is free to oppose the recommendation and argue for a lesser sentence. The agreement could also provide for a non-specific recommendation of incarceration or fine. Further, the plea agreement may include a provision that the defendant will not oppose or argue against the Government's recommendation.<sup>3</sup> Thus, in effect, the plea agreement becomes a joint sentencing recommendation, binding upon the Government and the defendant, but not upon the court. Indeed, Rule 11(e)(2) provides that in a "B" type of plea agreement, the court shall advise the defendant that if the recommended sentence is not imposed, the defendant nevertheless has no right to withdraw his guilty plea. In other words, in a "B" type plea agreement, the defendant is bound to whatever sentence the court imposes, regardless of the Government's recommendation. Many courts are reluctant to give up their sentencing discretion and will accept "B" type agreements, but not "C" types.

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<sup>3</sup>It should be noted, however, that a defendant may not be precluded from furnishing background and character information to the court. See 18 U.S.C. § 3577. Also, some courts that do not accept "C" agreements view agreed-upon sentencing recommendations as, in effect, "C" agreements.

c. 11(e)(1)(C) agreements

The attorney for the Government and the attorney for the defendant may agree that a particular specific sentence is the appropriate disposition of the case. After presentation of this type of agreement, known as a "C" type or binding agreement, to the court, the court may either accept or reject it, or defer the decision to accept or reject until after it has had an opportunity to consider the presentence investigation report of the probation office. If the court decides to accept a "C" type agreement (or a combined "A" and "C" type), it shall inform the defendant on the record that the sentence to be imposed will be as provided in the agreement. However, if the court decides to reject a "C" type agreement, it must advise the parties of that fact on the record and, further, must advise the defendant that the court is not bound by the agreement, that the defendant may withdraw his plea of guilty, and that if he does not withdraw his plea, the disposition of the case may be less favorable to him than the sentence provided in the plea agreement.

A "C" type agreement has the advantage for the Government and the defendant of eliminating uncertainty from the sentencing process. However, as suggested above, "C" type agreements have the disadvantage that a great many courts will not accept them because it removes the court's sentencing discretion. In response to this problem, the practice of entering into a joint sentencing recommendation "B" type (or even a straight "B" type) agreement with the defendant has evolved. Such a procedure may save the negotiations and has, by and large,

been successful. Another alternative, that has also been successful is to include a provision in a "C" agreement that automatically converts the agreement into an agreed-upon "B" agreement should the court reject the "C" agreement.

### 3. Factors to consider before entering into plea agreements

The decision as to what type of plea agreement to negotiate with a defendant is obviously dependent on many variables, and it is impossible to state generally that any one type is preferable. It is, however, incumbent upon Government counsel to consider, among other things: whether the court is likely to accept or reject a "C" type agreement; whether a plea on one or more charges will result in an appropriate sentence; and whether the contemplated agreement is consistent with the practice of the local U.S. Attorney's Office.<sup>4</sup> Knowledge of these and other facts must be incorporated into the decision as to what kind of agreement to negotiate with a defendant and to recommend to the Assistant Attorney General.

The Department of Justice, in the Principles of Federal Prosecution, has provided the following check list of factors attorneys for the Government should consider before entering into plea agreements:

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<sup>4</sup>The Division has successfully used "C" agreements in some jurisdictions where the U.S. Attorney does not use or the courts do not generally accept "C" agreements. The U.S. Attorney, however, must be consulted before taking such an action.



- (a) the defendant's willingness to cooperate in the investigation or prosecution of others;
- (b) the defendant's history with respect to criminal activity;
- (c) the nature and seriousness of the offense or offenses charged;
- (d) the defendant's remorse or contrition and his willingness to assume responsibility for his conduct;<sup>5</sup>
- (e) the desirability of prompt and certain disposition of the case;
- (f) the likelihood of obtaining a conviction at trial;

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<sup>5</sup>The Division does not enter plea agreements with individual defendants who will not admit their guilt in open court during the plea and sentencing procedure. (Such pleas, called "Alford" pleas after North Carolina v. Alford, 400 U.S. 25 (1970), are discussed later in this chapter.) However, corporate defendants may be liable for the criminal acts of employees who have since died or are not subject to the corporation's control and, therefore, a corporate defendant may be unable to make an independent assessment of its own guilt, such as would support an admission. In those limited circumstances, the corporate defendant's agreement to accept as true the Government's version of the offense is enough.

- (g) the probable effect on witnesses;<sup>6</sup>
- (h) the probable sentence or other consequences if the defendant is convicted;
- (i) the public interest in having the case tried rather than disposed of by a guilty plea;
- (j) the expense of trial and appeal; and
- (k) the need to avoid delay in the disposition of other pending cases.<sup>7</sup>

Attorneys for the Government should also be aware of the additional plea bargaining requirements imposed by the Sentencing Reform Act of 1984 ("SRA"), Title II of Pub. L. No. 98-473, which applies to all criminal offenses committed or continuing on or after November 1, 1987. Sentences -- including sentences arrived at through plea agreements -- for crimes subject

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<sup>6</sup>The possibility of physical retaliation against a witness in an antitrust case is usually remote, but the danger of economic retaliation of one form or another is very real.

<sup>7</sup>In an ongoing antitrust grand jury investigation, this standard, or a variant of it, may be the most important factor to consider in favor of a plea agreement, because a plea may lead to the speedy resolution of other cases, including the filing of some which might never be made if the case is tried, particularly if the defendant should be acquitted, or if the statute of limitations runs out on other possible cases in the meantime.

to the SRA must be imposed pursuant to the Sentencing Guidelines promulgated by the United States Sentencing Commission.

In accordance with 28 U.S.C. § 994(a)(2)(E), the Commission has issued policy statements applicable to plea agreements as Part 6B of the Sentencing Guidelines. Guideline § 6B1.2 provides that courts may accept "A" type agreements if they determine, for reasons stated on the record, that the remaining charges adequately reflect the seriousness of the actual offense behavior and that accepting the plea will not undermine the statutory purposes of sentencing, and that courts may accept "B" and "C" type agreements if the sentences are within the applicable Guideline range or depart from the Guidelines for justifiable reasons.

In a March 13, 1989 memorandum, Attorney General Thornburgh (hereafter, "the Thornburgh Memorandum") set forth the Department's policy on plea bargaining under the Sentencing Guidelines. The policy discussed in this memorandum should be followed in all plea bargaining under the Guidelines. In essence, the policy requires that plea bargaining result in convictions that are consistent with the goals of the Guidelines -- *i.e.*, that are uniform for defendants guilty of similar crimes and that reflect the seriousness of the crime(s) committed. A detailed exposition of how attorneys for the Government should conduct the plea bargaining process for crimes covered by the SRA can be found in the Department of Justice's Prosecutors Handbook on Sentencing Guidelines, 41-50 (1987).

Although the foregoing list of standards is intended primarily as a guide to assist prosecutors in deciding whether to enter into a plea agreement in a particular case, many of them

are also factors that can impact substantively on the bargaining positions of the Government and the defendant in their plea negotiations. In other words, in considering these factors, the prosecutor should concurrently be evaluating not only whether to enter into a plea agreement, but what the terms of that agreement should be.

#### B. Plea Agreement Negotiations

Negotiations leading to a plea agreement are conducted in a similar fashion regardless of the type of agreement that is under consideration. The Division approves the commencement of such negotiations both before and after indictment. In either situation, it is absolutely crucial that the staff make clear to defense counsel that the result of their negotiations will be only a recommendation and that no agreement exists until it has been approved by the Assistant Attorney General.

Methods of negotiating are extremely subjective, and it is not possible to do more than make general observations about them. Similarly, procedures for negotiations require much flexibility if they are to be productive. The discussion that follows offers examples of procedures for and methods of negotiating plea agreements rather than hard-and-fast rules.

Generally, before plea negotiations begin, the staff and the chief discuss the desirability and feasibility of such negotiations. During those discussions, the parameters of the agreements that would be appropriate are usually decided, including the provisions that should

be considered non-negotiable, as well as provisions that would be negotiable. Operations may be consulted at this time. Ranges of jail time and/or fines<sup>8</sup> within which the negotiations should be centered, depending on whether a "B" or a "C" agreement is likely to result, are normally decided. The staff then may provide defense counsel with either a proposed draft agreement (with the amount of jail time and/or fine left blank) or a copy of a similar plea agreement already entered, for the purpose of further discussion. From then on, negotiations with defense counsel are generally conducted by lead counsel and staff. On occasion, the chief will participate directly if that appears likely to further the negotiations. The chief is kept informed of the progress of the negotiations, and his advice often is sought concerning questions that may arise and, of course, the final disposition of the matter that would be appropriate to recommend to the Assistant Attorney General.

The topics of negotiation are those enumerated above as factors to consider and the provisions that will ultimately be included in the plea agreement, which are fully described later in this chapter. In addition, the relationship of third parties to plea negotiations is an issue that sometimes arises because some putative defendants may be motivated to engage in plea agreement discussions by demands or promises of prospective civil plaintiffs. "Outsiders" are never participants in the plea negotiations as such negotiations are only conducted between the Government and the prospective defendant.

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<sup>8</sup>In assessing the appropriate level of fine for a defendant, staff attorneys should consult with the Corporate Finance Unit of EAG.

All plea discussions are privileged communications, and their subsequent use as evidence is strictly governed by Rule 11(e)(6), which provides that:

Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (a) a plea of guilty which was later withdrawn;
- (b) a plea of nolo contendere;
- (c) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in

a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

A substantially identical provision is included in Rule 410, Federal Rules of Evidence.

### C. Plea Agreement Interviews

The privilege protection of Rule 11(e)(6) applies not only to statements made by defense counsel, but to statements made by the defendant (or putative defendant) in the course of plea negotiations.<sup>9</sup> This provision is significant because whenever a plea agreement requires the defendant's cooperation, an interview with the defendant is usually necessary before the plea agreement becomes final. It is good practice for the staff to require the defendant and his attorney to sign a statement acknowledging the ground rules for such an interview.<sup>10</sup> The statement should recite that the proposed plea agreement is contingent upon the staff's belief that the defendant is truthful and candid in the interview. The statement also should contain a provision that the defendant's statements are protected as provided in Rule 11(e)(6), but that the Government reserves the right to use leads, or otherwise make indirect use of any information

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<sup>9</sup>Some courts have held that the Rule applies only to statements made during formal plea discussions. See Rachlin v. United States, 723 F.2d 1373, 1377 (8th Cir. 1983); United States v. Ceballos, 706 F.2d 1198 (11th Cir. 1983).

<sup>10</sup>See Appendix IX-1 for an exemplar.

developed during the interview, against the defendant, if no plea agreement is reached, and against others in any event. Failure to include such a reservation of rights might lead a court to grant equitable or de facto use immunity treatment to the defendant's statements -- a result definitely to be avoided. The statement should also include a provision reserving the right to use the results of the interview against the defendant to prosecute him for perjury.

The scope of the exclusionary provision of Rule 11(e)(6) and Fed. R. Evid. 410, as applied by the courts, is broader than may at first appear. Obviously, statements made by a defendant or his attorney in the course of unsuccessful plea discussions cannot be used as direct evidence against the defendant at trial. The law as to whether such statements may be used for impeachment is unclear.<sup>11</sup> It may be wise to include a provision that reserves the right of the Government to use such statements for impeachment in the plea interview agreements.

#### D. How and What to Charge

##### 1. Selection of charge or charges

One of the most important provisions in a plea agreement is the charge or charges to which the defendant agrees to plead guilty. In a grand jury investigation involving multiple

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<sup>11</sup>The Second Circuit, the only circuit to address this issue, held that such statements may not be used for impeachment. United States v. Lawson, 683 F.2d 688 (2d Cir. 1982).



offenses, such as bid-rigging or price fixing, there may or may not be evidence available to support more than one charge. In addition, the criminal conduct that violates the Sherman Act may be connected with offenses under other federal statutes, the most common being mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), false statements and entries (18 U.S.C. § 1001), and false claims (18 U.S.C. §§ 286, 287). In the latter situation, the prosecutor must consider the charge or charges to which the defendant must agree to plead. In some circumstances, the selection of charge may be a proper subject for negotiation with defense counsel.

The Principles of Federal Prosecution sets forth the standards that a selected charge must satisfy:

If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

- (a) that bears a reasonable relationship to the nature and extent of his criminal conduct;
- (b) that has an adequate factual basis;

- (c) that makes likely the imposition of an appropriate sentence under all the circumstances of the case; and
- (d) that does not adversely affect the investigation or prosecution of others.

The commentary, set forth below, explaining this principle is as applicable to antitrust crimes as to any other.

(a) Relationship to criminal conduct - The charge or charges to which a defendant pleads guilty should bear a reasonable relationship to the defendant's criminal conduct, both in nature and in scope. This principle covers such matters as the seriousness of the offense (as measured by its impact upon the community and the victim), not only in terms of the defendant's own conduct but also in terms of similar conduct by others, as well as the number of counts to which a plea should be required in cases involving offenses different in nature or in cases involving a series of similar offenses. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. In many cases, this will probably require that the defendant plead to the most serious offense charged. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty than is a single offense.

The requirement that a defendant plead to a charge that bears a reasonable relationship to the nature and extent of his criminal conduct is not inflexible. There may be situations involving cooperating defendants in which [special] considerations . . . take precedence. Such situations should be approached cautiously, however. Unless the Government has strong corroboration for the cooperating defendant's testimony, his credibility may be subject to successful impeachment if he is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

(b) Factual basis - The attorney for the Government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11(f), Fed. R. Crim. P., a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea . . . (reference to nolo pleas deleted).

(c) Basis for sentencing - In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the Government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the Government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute for the offense to which the guilty plea is entered. Thus, the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes, the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject (reference to restitution deleted).<sup>12</sup>

(d) Effect on other cases - In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution

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<sup>12</sup>Restitution will not normally be sought in antitrust cases. See ATD Manual IV-108 et seq., for a complete discussion of the Victim and Witness Protection Act.

of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

For crimes occurring or continuing on or after November 1, 1987, in addition to the Principles of Federal Prosecution, attorneys should also take into account Part 6B of the Sentencing Guidelines and the Prosecutors Handbook on Sentencing Guidelines in selecting charges for plea agreements.

Section 6B1.2(a) of the Sentencing Guidelines deals with plea agreements that involve dismissals of counts or agreements not to pursue potential charges. It provides that such agreements may be accepted if the court determines, on the record, that the remaining charges "adequately reflect the seriousness of the actual offense behavior and that accepting the agreement will not undermine the statutory purposes of sentencing." While the Department believes that prosecutors have greater flexibility in charge bargaining than in sentence bargaining, it takes this policy statement seriously, and believes that it translates into a

requirement that readily provable serious charges should not be bargained away: "The sole legitimate ground for agreeing not to pursue a charge that is relevant under the guidelines to assure that the sentence will reflect the seriousness of the defendant's 'offense behavior' is the existence of real doubt as to the ultimate provability of the charge."<sup>13</sup>

Ultimate provability considerations aside, it is important to recognize that, because of the way the Guidelines operate in practice, some relatively serious charges could be dismissed or never brought without unduly undercutting the assurance that the sentence will reflect the seriousness of the defendant's conduct. For example, a mail fraud count that might be brought in connection with an antitrust charge of bid-rigging likely would be grouped with the antitrust count under the grouping rules in § 3D1.2 such that the defendant's offense level would be determined by the highest level in the group. If the antitrust count carried the higher offense level, or if there were no significant difference between the two offense levels, dropping the mail fraud count would not appear to undermine the purposes of sentencing, as those purposes find expression in the Guidelines. Moreover, even if the offense level for the mail fraud count were somewhat higher than the level for the remaining antitrust count, the overlapping nature of the imprisonment ranges in the Sentencing Table could moot or at least mute any objection to a marginal decrease in the offense level that resulted from such charge bargaining.

There is, of course, also the question of provability. The Prosecutors Handbook notes that the prosecutor is in the best position to assess the strength of the Government's case, and

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<sup>13</sup>Prosecutors Handbook at 46-47; see also Thornburgh Memorandum at 3-4.

enjoys broad discretion in making judgments as to which charges are most likely to result in conviction on the basis of the available evidence.<sup>14</sup> This discretion may be significant when plea bargaining occurs early in a grand jury investigation when relatively less proof of one or more possible charges may be available. However, prosecutors are warned against instructing investigators not to pursue leads, or making less than ordinary efforts to ascertain facts, simply to be in a position to say that they are unable to prove a sentencing fact.<sup>15</sup>

Notwithstanding the general prohibition against prosecutors bargaining away readily provable charges whenever doing so would affect, to any significant degree, the resulting guideline sentence, defendants may still gain significant benefits by entering into a plea agreement with the Government. First, a defendant who pleads guilty will in most instances receive a two-level downward adjustment to his or her offense level (USSG § 3E1.1) or, if an organization, a one-point decrease in its culpability score (USSG § 8C2.5(g)(3)). Second, when a defendant agrees to cooperate with the Government by providing information concerning unlawful activities of others, the Government may agree that self-incriminating information provided pursuant to the cooperation agreement that was not previously known to the Government shall not be used in determining the defendant's guideline range (USSG § 1B1.8). Furthermore, where the defendant has provided substantial assistance in the investigation or prosecution of another person, the Government may move for a departure from the Guidelines

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<sup>14</sup>Prosecutors Handbook at 47.

<sup>15</sup>Id. at 49.

under USSG § 5K1.1. Finally, even when the defendant is unable to provide the Government with substantial assistance in the investigation or prosecution of others, the Government may recommend, when appropriate, that a defendant entering into a plea agreement receive a sentence at or near the bottom of the applicable guideline range or receive an alternative sentence in lieu of imprisonment in whole or part.

The practices of the Division in implementing these principles require little additional comment. Except in perjury or false-declarations cases, the defendant usually must plead guilty to one or more Sherman Act counts, either alone or in conjunction with other charges. The selected charge or charges should be typical of the defendant's anti-competitive conduct (was the defendant a leader or a follower) and should usually be among the most serious (if there is a choice) in terms of egregiousness or impact, that the defendant committed and for which there is an adequate factual basis. Another factor that should be considered is how the selection of a charge will affect other cases yet to be prosecuted and whether a guilty plea is likely to lead to additional guilty pleas. In the most common situation, there will probably be enough evidence available to support only one, or at best a few charges, so the selection process will not be as complicated as this discussion may suggest. However, when the luxury of choice is present, the application of these principles will result in the proper exercise of that choice.



## 2. Indictment or information

Both the Principles of Federal Prosecution and the practices of the Division authorize plea agreement negotiations prior to the time that a putative defendant is indicted as well as after. If a plea agreement is reached before indictment, the initiation of the prosecution can be by the filing of a criminal information, with a waiver of indictment by the defendant.<sup>16</sup> The use of an information usually has certain advantages over an indictment for the Government and is desirable to the defendant as well.

An information is of benefit to the Government because its use obviates the resource commitment in time, expense and effort necessary to present an indictment to the grand jury. Depending upon the totality of circumstances, the presentation of an indictment to a grand jury can be an expensive and time-consuming task, particularly when the grand jury must be called to sit merely to consider the indictment. Also, the staff must spend time and effort preparing its presentation, including a summing-up of the relevant evidence and the presentation of relevant documents, as well as arranging to have all the documents and transcripts available for the grand jurors' consideration. Although such work is not particularly onerous, it is time-consuming, and the ability to avoid it is usually a benefit.<sup>17</sup> However, there may be other strategic considerations

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<sup>16</sup>See § E.2., infra.

<sup>17</sup>Some prosecutors believe that a grand jury that has been conducting an investigation is entitled to see the fulfillment of its labors in the form of an indictment presented to it.

(continued...)

in specific factual settings that would lead a prosecutor to prefer an indictment over an information.

If pre-indictment plea discussions do not appear to be making progress, particularly if the defendant or his counsel is apparently dragging his feet or otherwise not negotiating in good faith, the staff should proceed with an indictment. On occasion, this will force the issue and put an end to delaying tactics and result in a post-indictment plea agreement.

There is no doubt that most defendants prefer to plead guilty to an information rather than to an indictment. There is no legal difference, so the reason for that preference may be largely emotional, i.e., an indictment simply sounds more serious than an information.

#### E. Provisions To Include In Plea Agreements

##### 1. Introduction

Once the staff and defense counsel have tentatively agreed upon the type of plea agreement ("B", "C", etc.), the length of incarceration or amount of fine that will be recommended by the Government or presented to the court as the agreed-upon disposition, the

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<sup>17</sup>(...continued)

Depending upon the personality of the particular grand jury, an explanation that an information is legally the same as an indictment, and that the information is as much the result of their efforts as an indictment will minimize any bad reaction.

geographic and industry scope of any defendant's cooperation provision and any non-prosecution provision, it falls upon the staff to draft the appropriate agreement. It is important to keep in mind that what is being drafted is a document intended to reflect the agreement tentatively reached, and that will vary with the circumstances of the investigation and the violation alleged. Therefore, the following discussion and hypothetical examples are offered only as helpful guides or starting points, based upon previous experience, and should not be viewed as inflexible boilerplate. The staff should draft a document that reflects the agreement tentatively reached with defense counsel and present that agreement to Operations, with appropriate explanation and support, for review and approval.

The agreement may be styled similar to a pleading in a criminal case against the defendant, because it will eventually be filed in the case. However, if the staff prefers, the agreement can take the form of an uncaptioned document or a letter to defense counsel subsequently adopted by the defendant, his counsel and counsel for the United States.

The introductory paragraph should be the same for all types of agreements. It simply recites that the United States and the defendant enter into the agreement, identifies the appropriate Rule(s) of Federal Criminal Procedure pursuant to which the agreement is entered and identifies the investigation out of which the agreement arises. For example:

The UNITED STATES OF AMERICA and the defendant, \_\_\_\_\_, hereby enter into the following plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.

2. Pre-indictment plea agreements

a. The sentencing provisions<sup>18</sup>

1) "C" agreements. The first paragraph(s) of a pre-indictment plea agreement ordinarily recites the defendant's agreement to waive indictment<sup>19</sup> and plead guilty to

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<sup>18</sup>What follows is a discussion of, and examples based on plea agreements entered in cases brought by the Division during the 1980's. These are samples only and should be modified as needed to satisfy particular factual situations. In addition, the Criminal Fine Enforcement Act of 1984 (P.L. 98-596), which contains new fines and fine collection procedures and became effective on January 1, 1985, applies to offenses committed on or after that date through October 31, 1987. The Comprehensive Crime Control Act of 1984 (P.L. 98-473), contains the Sentencing Reform Act of 1984, which materially changes the sentencing procedures with respect to all federal crimes, and which applies to offenses committed on or after November 1, 1987. The Sentencing Reform Act was itself amended shortly after its effective date by the Sentencing Act of 1987, Pub. L. No. 100-182 and the Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185. The provisions of those Acts materially affect the sentencing process in the federal courts, and necessitated revisions of, and additions to, the sentencing provisions in our plea agreements, particularly with respect to the maximum sentence possible, the timing of the payment of any fines imposed, the amount of interest on any unpaid balance and the collection process in general. These Acts and any further revisions of them should be carefully reviewed before drafting any plea agreement.

<sup>19</sup>The staff should be aware that if a court rejects a plea agreement, it might permit the  
(continued...)

a criminal information charging a violation, usually, of Section 1 of the Sherman Act.<sup>20</sup> It also recites the defendant's understanding of the maximum penalties for a violation under the statute to which he is pleading guilty, and the effect of the agreement on the sentencing court, *i.e.*, whether or not it is a binding agreement. The paragraph also recites the sentence agreed to as the appropriate disposition of the case ("C" agreement), or the sentence that the Government will recommend to the court ("B" agreement). For example, paragraph 1 of a "C" agreement with a corporate defendant might read as follows:

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is the greatest of: a fine of \$1,000,000; twice the gross pecuniary gain

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<sup>19</sup>(...continued)  
defendant to withdraw his waiver of indictment. See generally United States v. I.H. Hammerman, III, 528 F.2d 326 (4th Cir. 1975); United States v. Scavo, 593 F.2d 837 (8th Cir. 1979).

<sup>20</sup>Ordinarily, when negotiating a pre-indictment plea agreement, we agree to forego indictment and charge the defendant by the filing of a criminal information. However, if the staff prefers, they can have the grand jury return an indictment against the defendant pursuant to a pre-indictment plea agreement by simply changing the language of the first paragraph to provide that the defendant will enter a guilty plea to an indictment as opposed to waiving indictment and pleading to an information.

derived from the crime; or twice the gross pecuniary loss caused to the victims of the crime. The United States and the defendant agree that the appropriate disposition of the charge in this case is the imposition of a fine, payable to the United States, in the amount of \$\_\_\_\_\_, to be paid in \_\_\_\_\_ installments. The first installment of \_\_\_\_\_ shall be due and payable within 90 days of the date of sentencing in this case. The remaining \_\_\_\_\_ payments of \_\_\_\_\_ each shall be due and payable annually thereafter, together with accrued interest at the rate of \_\_\_\_ on the unpaid balance. In the event the court rejects the aforesaid agreed-upon disposition, this entire agreement shall be rendered null and void.

It should be noted that the language quoted above provides for the payment of the fine over a period of time. If the fine is substantial or the defendant has particular hardships, we may agree to its payment in installments. However, in such a situation, the defendant must pay interest on the unpaid balance unless the court or the Attorney General waives it.<sup>21</sup> Normally, such interest is not waived. The provision calling for payment in installments and payment of interest should be included as part of the "appropriate disposition" language in a "C" agreement so that if the court accepts the plea agreement, those terms become a part of the court's sentence. The staff should check the court's Judgment and Probation/Commitment Order to be sure that it reflects the payment of interest as provided in the plea agreement.

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<sup>21</sup>See 18 U.S.C. § 3612(f)(h).

Paragraph 1 of a typical "C" plea agreement with an individual is set out below. Note that we ordinarily agree not to oppose the defendant's reasonable requests regarding the details of the service of his prison sentence. We do, however, insist that the sentence be one of actual imprisonment and not a community-service or work-release program.

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is a term of imprisonment of three years and a fine in an amount equal to the largest of: (a) \$250,000; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the gross pecuniary loss caused to the victims of the crime. The United States and the defendant agree that the appropriate disposition of the charge in this case is the imposition of a sentence of \_\_\_\_\_ days actual imprisonment, with no work release and a fine of \_\_\_\_\_. The United States agrees that it will not oppose any reasonable request of the defendant for imprisonment in a specific federal prison camp, e.g., (identify specific federal prison camp), any reasonable request regarding his ability to report directly to such institution as may be designated, or the

date on which he must report to begin service of his sentence. In the event the court rejects the aforesaid agreed-upon disposition, this entire agreement shall be rendered null and void, the defendant will be free to withdraw his plea of guilty (Rule 11(e)(4)), and the guilty plea, if withdrawn, shall not be admissible against the defendant in any criminal or civil proceeding (Rule 11(e)(6)).

2) Rejected "C" agreements. Obviously, if the court rejects a "C" agreement and refuses to impose the agreed-upon sentence, the entire agreement is void. In most cases, the defendant, nevertheless, will want to dispose of his or its criminal liability despite the court's refusal to accept the "C" agreement. Likewise, the Division will want to dispose of the case against the defendant and obtain his cooperation in continuing the investigation. This can be accomplished in several ways.

The staff can negotiate a "B" agreement in which the agreed-upon disposition becomes the sentencing recommendation. However, some judges also are opposed to the Government recommending a specific length of incarceration for an individual. If the staff is aware that a judge is unlikely to accept such a recommendation, it should consider obtaining authority to enter into a straight "B" agreement which recommends only that the individual be incarcerated without specifying the length of incarceration.



In some cases in which the court has rejected a "C" agreement and a "B" agreement had not been drafted, the defendant has simply persisted in his plea of guilty and been sentenced without an agreement with the Government. In those cases, we later (after sentencing) could compel the defendant's testimony pursuant to 18 U.S.C. § 6001. Also, under appropriate circumstances, we could tell the defendant that we would be willing to enter into a non-prosecution agreement with him in exchange for his cooperation. An example of such a post-sentencing non-prosecution and cooperation agreement follows:

AGREEMENT BETWEEN THE UNITED STATES

AND \_\_\_\_\_

WHEREAS, on \_\_\_\_\_, the United States and (the defendant) entered into a plea agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure, which called for, among other things, the defendant's cooperation with the United States' investigation into bid-rigging on (type of) projects in (geographic location) and a commitment by the United States not to bring further criminal charges against the defendant under the federal antitrust laws (15 U.S.C. § 1 et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of that plea agreement arising out of any conspiracy, combination or scheme to

submit collusive, fraudulent or non-competitive bids in connection with any (type of) project bid or let in (geographic location); and

WHEREAS, on \_\_\_\_\_, United States District Court Judge \_\_\_\_\_ rejected the plea agreement pursuant to Federal Rules of Criminal Procedure, Rule 11(e)(4); and

WHEREAS, the defendant persisted in his plea of guilty to the charges contained in the Criminal Information filed against him on \_\_\_\_\_ and the court imposed a sentence of \_\_\_\_\_ based upon said guilty plea; and

WHEREAS, the United States desires the cooperation of the defendant in its continuing investigation of bid-rigging on (type of) projects in (geographic location); and

WHEREAS, the defendant desires to obtain a commitment by the United States not to bring further criminal charges against the defendant under the federal antitrust laws (15 U.S.C. § 1, et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of that plea agreement arising out of any

conspiracy, combination or scheme to submit collusive, fraudulent or non-competitive bids in connection with any (type of) project bid or let in (geographic location);

NOW THEREFORE, IT IS AGREED AS FOLLOWS:

[Here the staff should insert, with minor obvious alterations, the appropriate cooperation and non-prosecution paragraphs discussed in Section E(1)(b) below, and a paragraph reflecting the defendant's understanding that the agreement does not affect potential administrative actions or civil claims against the defendant which is discussed in Section E(1)(c) below.]

3) Agreed-upon "B" agreements. In some districts, the judges may be opposed to accepting "C" agreements, yet the staff may wish to limit the defendant's ability to argue for a lesser sentence.<sup>22</sup> We have been able to accomplish this by use of a modified or agreed-upon "B" agreement. In such an agreement, the court remains free to impose any sentence it wishes, up to the statutory maximum, but the defendant agrees not to argue for a sentence less than that recommended by the United States. In the case of a company, this may be accomplished by the following three paragraphs:

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<sup>22</sup>But see § A.2.b. n.3., supra.

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is the greatest of: a fine of \$1,000,000; twice the gross pecuniary gain derived from the crime; or twice the gross pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a fine, payable to the United States, in the amount of \$\_\_\_\_\_. The United States further agrees that it will not oppose any reasonable request that the defendant might make to pay any fine imposed against it in installments over a period of time not to exceed \_\_ years. However, the United States will recommend to the court that it not waive the interest in the amount of \_\_ per month, computed from the date of sentencing, be imposed on any part of the fine that is not paid within 90 days of the date of sentencing.

2. The defendant understands and agrees that the sentence recommended by the United States shall not be binding upon the court, and that, under this agreement, the court retains complete discretion to impose any sentence up to the maximum

provided by 15 U.S.C. § 1. Furthermore, the defendant understands and agrees that, as provided in Rule 11(e)(2) of the Federal Rules of Criminal Procedure, if the court does not impose the sentence recommended by the United States, the defendant nevertheless has no right to withdraw its plea of guilty.

3. The defendant agrees that it will not present evidence or arguments to the court in opposition to the sentencing recommendation made to the court by the United States, although both parties may present facts to the probation office and to the court to assist the court in determining the sentence to be imposed. The defendant agrees that any fine is to be paid to the Treasury of the United States and also agrees not to propose, recommend or advocate that any payment be made, or services rendered, to any person, organization, institution or agency in lieu of a fine or any part thereof.<sup>23</sup>

The sentencing paragraphs of an agreed-upon "B" agreement with an individual may read as follows:

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<sup>23</sup>The language in this sentence is mandatory in agreed-upon "B" and straight "B" agreements with corporations and simply states that the corporate defendant will not suggest that the court order that which, under our view of the law, the court has no authority to order. See United States v. John Scher Presents, Inc., 746 F.2d 959 (3d Cir. 1984); United States v. Wright Contracting Co., 728 F.2d 648 (4th Cir. 1984); United States v. Prescon Corp., 695 F.2d 1236 (10th Cir. 1982).

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is a term of imprisonment of three years and a fine equal to the largest of: (a) \$250,000; (b) twice the gross pecuniary gain derived from the crime; or (c) twice the pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a sentence of \_\_\_ days actual imprisonment, with no work release and a personal fine of \_\_\_\_\_. The United States further agrees that it will not oppose any reasonable request of the defendant for imprisonment in a specific federal prison camp, e.g., (identify specific federal prison camp), any reasonable request regarding his ability to report directly to such institution as may be designated, or the date on which he must report to begin service of his sentence.

2. [Same as for corporations with, of course, "his" or "hers" and "he" or "she" substituted for "its" and "it".]

3. The defendant agrees that he [she] will not present evidence or arguments to the court in opposition to the sentencing recommendation made to the court by the United States, although both parties may present facts to the probation office and to the court to assist the court in determining the sentence to be imposed.

4) Straight "B" agreements. In a straight "B" agreement, the defendant simply agrees to waive indictment and plead guilty, and the United States agrees to recommend that the court impose a certain sentence. The defendant is free to argue for a lesser sentence, except that the corporate defendant nevertheless agrees that it will not argue that payment be made to an entity other than the United States in lieu of a fine. (A corporate defendant also agrees not to argue that the court order it to render services in lieu of a fine.) In the case of a corporate defendant, this may be accomplished as follows:

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against it upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is the greatest of: a fine of \$1,000,000; twice the gross pecuniary gain

derived from the crime; or twice the gross pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a fine, payable to the United States, in the amount of \$\_\_\_\_\_. The United States further agrees that it will not oppose any reasonable request that the defendant might make to pay any fine imposed against it in installments over a period of time not to exceed five years. However, the United States will recommend to the court that it not waive the interest in the amount of \_\_\_ per month, computed from the date of sentencing, to be imposed on any part of the fine that is not paid within 90 days of the date of sentencing.

2. The defendant understands and agrees that the sentence recommended by the United States shall not be binding upon the court, and that, under this agreement, the court retains complete discretion to impose any sentence up to the maximum provided by 15 U.S.C. § 1. Furthermore, the defendant understands and agrees that, as provided in Rule 11(e)(2) of the Federal Rules of Criminal Procedure, if the court does not impose the sentence recommended by the United States, the defendant nevertheless has no right to withdraw its plea of guilty.

3. The defendant agrees that any fine imposed against it by the court is to be paid to the Treasury of the United States and also agrees not to propose, recommend



or advocate that any payment be made, or services rendered, to any person, organization, institution or agency in lieu of a fine or any part thereof.

The sentencing paragraphs of a straight "B" agreement with an individual may read as follows:

1. The defendant will waive indictment pursuant to Rule 7(b) of the Federal Rules of Criminal Procedure and plead guilty to a one-count criminal information charging a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date). The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of the Sherman Act (15 U.S.C. § 1) is a term of imprisonment of three years and a fine equal to the largest of:

- (a) \$250,000; (b) twice the pecuniary gain derived from the crime; or
- (c) twice the pecuniary loss caused to the victims of the crime. The United States agrees that it will recommend, as the appropriate disposition of this case, that the court impose against the defendant a sentence of \_\_\_\_ days actual imprisonment, with no work release and a personal fine of \_\_\_\_\_. The United States further agrees that it

will not oppose any reasonable request of the defendant for imprisonment in a specific federal prison camp, e.g., (identify specific federal prison camp), any reasonable request regarding his ability to report directly to such institution as may be designated, or the date on which he must report to begin service of his sentence.

2. [Same as for corporations with, of course, "his" substituted for "its".]

3. The defendant agrees that any fine imposed against him by the court should be paid to the Treasury of the United States and also agrees not to propose, recommend or advocate that any payment be made to any person, organization, institution or agency in lieu of such fine or any part thereof.

Note that in a straight "B" agreement with an individual, the defendant remains free to argue for an alternative sentence, i.e., service to a community organization as a term of probation, but agrees not to argue that any fine imposed be paid to anyone other than the United States.

b. Cooperation and non-prosecution provisions

Following the sentencing paragraphs, the defendant and the United States agree upon the nature and scope of the defendant's cooperation and the scope of the Government's non-prosecution agreement. Ordinarily, the defendant agrees to cooperate fully with the federal antitrust investigations and prosecutions relating to the industry under investigation within the agreed-upon geographic area. Conditioned upon the fullness of that cooperation, the United States usually agrees not to prosecute the defendant further for violations of the antitrust (15 U.S.C. § 1), mail or wire fraud (18 U.S.C. §§ 1341, 1343) and false statements and entries (18 U.S.C. § 1001) statutes, committed prior to the date of the agreement. However, the Government's non-prosecution agreement with respect to these statutes should be limited to those violations arising out of, or in connection with, antitrust violations in the industry being investigated. The geographic scope of the non-prosecution agreement should be limited to where the defendant does business. In addition, the staff may want to limit the non-prosecution agreement to a specific list of violations (e.g., specific instances of bid-rigging to which the defendant has admitted.)<sup>24</sup> This may be accomplished in an agreement with an individual as follows:

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<sup>24</sup>Of course, the defendant should understand that if other crimes have been committed but not disclosed to us, he may be subject to further prosecution for the undisclosed crimes.

4. The defendant agrees that he will fully and candidly cooperate with the United States in the conduct of any federal grand jury or other federal criminal investigations involving antitrust violations in the (type of) industry, including the presently ongoing federal grand jury investigation being conducted in the \_\_\_\_\_ District of \_\_\_\_\_, and in any litigation or other proceedings arising or resulting therefrom. The defendant understands and agrees that he is required to respond fully and truthfully to all inquiries of the United States about practices in the (type of) industry in the (geographic location). The defendant also understands and agrees that, upon reasonable notice, he will make himself available to attorneys and agents of the United States for interviews and otherwise give the United States access to the knowledge or information he may have concerning practices in the (type of) industry. Further, the defendant understands and agrees that, when called upon to do so by the United States, he is required to testify fully, truthfully and under oath, subject to the penalties of perjury (18 U.S.C. § 1621) and making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), about practices in the (type of) industry in the (geographic location).

5. Subject to the defendant's full and continuing cooperation, as described above, the United States agrees not to bring further criminal charges against the defendant under the federal antitrust statutes (15 U.S.C. § 1, et seq.) or under the mail

or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of this plea agreement arising out of any conspiracy, combination or scheme to submit collusive, fraudulent or noncompetitive bids in connection with any (type of) project in the (geographic location) bid or let prior to the date of this plea agreement.<sup>25</sup>

Quite often, plea agreements with a corporate defendant and its most culpable officer(s) will be negotiated at the same time. Generally, the corporate defendant is anxious that its other officers not be prosecuted, and the staff will be desirous of obtaining the testimony of those less culpable -- and not likely to be prosecuted -- individuals at the company, who have some useful information regarding the matter under investigation. This may be accomplished as follows:

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<sup>25</sup>If the staff wishes specifically to tie the individual's non-prosecution agreement to the faithful performance of his obligation to cooperate, the following language can be added to paragraph 5 of the agreement:

In the event of a failure by the defendant to fulfill his obligations pursuant to paragraph 4 above, the United States shall be relieved of its agreement under this paragraph not to further prosecute the defendant.

However, the staff should consider whether such a provision may increase the impeachment value of the plea agreement without actually enhancing the cooperation obtained.

2. The defendant agrees that it will cooperate fully with the United States in the conduct of any federal grand jury or other federal criminal investigations involving antitrust violations in the (type of) industry, including the presently ongoing federal grand jury investigation being conducted in the \_\_\_\_\_ District of \_\_\_\_\_ and in any litigation arising therefrom. Each officer or employee of the defendant (other than \_\_\_\_\_, who has entered a separate plea agreement with the United States) who may have knowledge which would be of substantial assistance to the currently ongoing grand jury investigation of bid-rigging on (type of) projects, within a reasonable time from the date of this plea agreement may provide the Antitrust Division staff a proffer generally outlining the substance of his knowledge. If, in the judgment of the staff, the proffer is full and candid, the staff agrees to request authority from the Assistant Attorney General in charge of the Antitrust Division to obtain a court order compelling such officer's or employee's testimony before an appropriate grand jury pursuant to 18 U.S.C. § 6001, et seq., which provides that no testimony or other information compelled under such an order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

This paragraph requires that the staff obtain a court order and compel the testimony, before the grand jury, of those corporate officers and employees offering useful information under this provision. Often, some corporate officers or employees will have information which may be of some value to the investigation, but which really does not warrant presentment to the grand jury. Also, it is often desirable to be able to re-interview witnesses as the investigation progresses without returning to the grand jury each time a question arises. If either situation is anticipated, the staff may wish to provide for non-prosecution, as opposed to immunity, for cooperating corporate officers or employees. This may be accomplished as follows:

2. The defendant agrees that it will cooperate fully with the United States in the conduct of any federal grand jury or other federal criminal investigations involving antitrust violations in the (type of) industry, including the presently ongoing federal grand jury investigation being conducted in the \_\_\_\_\_ District of \_\_\_\_\_ and in any litigation arising therefrom. Each officer or employee of the defendant (other than \_\_\_\_\_, who has entered a separate plea agreement with the United States) who may have knowledge which would be of substantial assistance to the currently ongoing grand jury investigation of bid-rigging on (type of) projects, within a reasonable time from the date of this plea agreement may provide the Antitrust Division staff a proffer generally outlining the substance of his knowledge. If, in the judgment of the United States, the proffer is full and candid and internal Department clearance for the

individual is obtained, the United States agrees, upon the continued and full cooperation of such officer or employee, not to bring criminal charges against such person under the federal antitrust statutes (15 U.S.C. § 1, et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense, committed prior to the date of this plea agreement, and while such person was employed by the defendant arising out of any conspiracy, combination or scheme between the defendant and any other (type of) contractor to submit collusive, fraudulent, or non-competitive bids in connection with any (type of) project in the (geographic location) bid or let prior to the date of this plea agreement.

Even when the above provision is used, however, the staff should obtain Criminal Division clearance before extending this non-prosecution provision to any individual. Note also that whether the non-prosecution or immunity provision for other cooperating officials of the company is used, the provision usually is limited to present officers and employees for activities engaged in while in the employ, and on behalf, of the settling company.

Of course, in addition to non-prosecution or immunity assurances to cooperating corporate officers or employees, we usually include a non-prosecution agreement for the corporate defendant similar to the following:



3. Subject to the defendant's full and continuing cooperation, as described above, the United States agrees not to bring further criminal charges against the defendant under the federal antitrust statutes (15 U.S.C. § 1, et seq.) or under the mail or wire fraud statutes (18 U.S.C. §§ 1341, 1343) or under the false statements and entries statute (18 U.S.C. § 1001) for any act or offense committed prior to the date of this plea agreement arising out of any conspiracy, combination or scheme to submit collusive, fraudulent, or noncompetitive bids in connection with any (type of) project in the (geographic location) bid or let prior to the date of this plea agreement.

The language in the paragraphs quoted above obligates only the named corporate defendant to cooperate and, likewise, protects from further prosecution only the named corporate defendant. It also provides for immunity or non-prosecution only for the named corporate defendant's cooperating officers and employees. On occasion, it may be appropriate to extend the cooperation obligation and the assurance of non-prosecution to the named corporate defendant's subsidiaries, parent or affiliates, and to extend the opportunity for immunity or non-prosecution to the cooperating officers and employees of those companies. If that is to be the case, it can be accomplished by minor, obvious revisions to the language quoted above. This

should be done explicitly, however, and care should be taken not to extend the agreement to corporations or individuals the staff does not want to "immunize."<sup>26</sup>

c. Civil liability and administrative actions

The defendant should acknowledge that the criminal plea agreement does not limit the defendant's civil liability or any administrative action which might be undertaken by some agency other than the Division. The defendant also should acknowledge the existence of plea agreements with its corporate employee(s) or his corporate employer, as appropriate, and acknowledge the completeness of the agreement. This may be accomplished as follows:

6. The defendant understands that it (he/she) may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, as a result of the guilty plea entered

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<sup>26</sup>The courts have traditionally relied by analogy on the principles of contract law in reviewing and enforcing plea agreements. See Cooper v. United States, 594 F.2d 12, 15-16 (4th Cir. 1979). It has been held that plea agreements in which third parties are beneficiaries of promises by the Government are enforceable by the third-party beneficiaries. See United States v. C.F.W. Constr. Co., 583 F. Supp. 197, 202-03 (D.S.C.), aff'd, 749 F.2d 33 (4th Cir. 1984). Such provisions should be drawn to make the substantive offenses, time periods and geographic areas covered by the protection as narrow as possible. (The United States Attorney for every covered geographic area must be consulted prior to entering the agreement.) Generally, the Division gives non-prosecution or immunity assurances only to those third parties who have demonstrated a specific need for them through proffers or otherwise.

pursuant hereto, and that this plea agreement in no way limits the action, if any, such other agencies may take. In addition, the defendant understands that it (he/she) may be subject to civil and equitable claims, demands or causes of action by the United States and others, and that this plea agreement in no way affects these claims, demands or causes of action.

7. The United States and the defendant enter into this agreement with knowledge of the plea agreement between the United States and \_\_\_\_\_. Other than in that agreement, the United States has made no other promises to, or agreements with, the defendant. This plea agreement constitutes the entire agreement between the United States and the defendant concerning the disposition of the charges in this case.

In some cases, it may be appropriate to agree with the defendant that we will advise various administrative agencies of the value and timeliness of the defendant's cooperation. This is particularly appropriate where the defendant's cooperation is offered early in an investigation, prior to the development of incriminating evidence against the defendant, and the defendant's business or livelihood would be substantially adversely affected by administrative debarment. Ordinarily, we simply tell defendants that we will inform agency officials of the value of their

cooperation if asked. However, where more assertive action is appropriate, the following language has been used:

The United States agrees that it will inform the appropriate officials of the (federal agency) and any other federal agency with which the defendant has contracted, of the timeliness and value to the United States of the defendant's cooperation as provided for herein.<sup>27</sup>

d. Waiver of statute of limitations

In a few instances, it may be desirable to enter into a plea agreement in which the defendant pleads guilty to a conspiracy to which he has an arguable, or even a clear, statute of limitations defense. Such a plea agreement would require a valid waiver by the defendant of the statute of limitations defense, and this raises the issue of whether this defense is waivable by the defendant.

Several circuits have addressed the issue and concluded that the statute of limitations is an affirmative defense and, therefore, waivable.<sup>28</sup> However, the Sixth Circuit has concluded

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<sup>27</sup>In appropriate circumstances, staff should consider including state or local agencies in this provision.

<sup>28</sup>See United States v. Wild, 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); United States v. Doyle, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965); United States v. Levine, 658 F.2d 113 (3d Cir. 1981); United States v. Williams, 684 F.2d 296, 299-300 (4th (continued...))

that the statute of limitations is a jurisdictional bar to prosecution and may not be waived.<sup>29</sup> In addition, the Tenth Circuit considers the statute of limitations jurisdictional, but has not addressed whether it may be voluntarily waived by the defendant for his benefit.<sup>30</sup>

Plea agreements that require waivers of the statute of limitations generally should be avoided in the Sixth and possibly the Tenth Circuits. In any event, when entering a plea agreement that requires a waiver of the statute of limitations, the staff should be thoroughly familiar with the law on the subject in the circuit where the prosecution is to take place and realize that such a plea agreement might result in litigation. Plea agreements containing waivers of the statute of limitations should be entered only where the waiver is for the defendant's benefit and is given only after the defendant has fully discussed the matter with his attorney and the attorney has advised the defendant to waive the defense. This should be stated specifically in the plea agreement. The following language may be used to set forth a defendant's waiver of the statute of limitations:

The defendant further agrees to waive and not to raise any defense or other rights defendant may otherwise have under the statute of limitations with respect

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<sup>28</sup>(...continued)  
Cir. 1982), cert. denied, 459 U.S. 1110 (1983); Capone v. Aderhold, 65 F.2d 130 (5th Cir. 1933); United States v. Franklin, 188 F.2d 182 (7th Cir. 1951); United States v. Akmakjian, 647 F.2d 12 (9th Cir.), cert. denied, 454 U.S. 964 (1981).

<sup>29</sup>Benes v. United States, 276 F.2d 99 (6th Cir. 1960).

<sup>30</sup>Waters v. United States, 328 F.2d 739 (10th Cir. 1964).

to the criminal information referred to in Paragraph 1. The defendant further states that this waiver is knowingly and voluntarily made after fully conferring with, and on the advice of, defendant's counsel, and is made for defendant's own benefit.

3. Post-indictment plea agreements

So far, this chapter has focused on plea agreements in the pre-indictment setting. Often, however, plea agreements will be negotiated only after the return of an indictment against the defendant, and may involve the dismissal of counts or even the indictment itself. This is done pursuant to Rule 11(e)(1)(A). The introductory paragraph of such an agreement reads:

The UNITED STATES OF AMERICA and the defendant, \_\_\_\_\_, hereby enter into the following plea agreement pursuant to Rules 11(e)(1)(A) and (here insert 11(e)(1)(B) or 11(e)(1)(C) as appropriate) of the Federal Rules of Criminal Procedure.

If the defendant is to plead to an information and the pending indictment is to be dismissed, paragraph 1 of the plea agreement remains the same as in any pre-indictment agreement and the following paragraph is added to the agreement:

The United States agrees that once the court has accepted the defendant's (plea of guilty to the criminal information referred to herein, -- in a (B) agreement) or (plea of guilty and this plea agreement, and has imposed sentence against the defendant, as provided herein, -- in a (C) agreement) the United States, pursuant to Rule 11(e)(1)(A) and 48(a) of the Federal Rules of Criminal Procedure, will move to dismiss the indictment in (here cite the case pending against the defendant).

If the defendant is to plead to one or more counts of the pending indictment and the remaining counts are to be dismissed, the first sentence of paragraph 1 of the pre-indictment plea agreement will be changed to read as follows:

The defendant will (plead guilty) or (change his plea of not guilty to guilty) to Count \_\_\_ of the indictment in (here cite the case pending against the defendant) which charges a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig the bids on (type of) project (identifying number), let by the (letting authority) on (date).

In addition, the following paragraph is added to the agreement:

The United States agrees that once the court has accepted the defendant's (plea of guilty to Count \_\_\_ of the indictment, -- in a (B) agreement) or (plea of guilty to Count \_\_\_ of the indictment and this plea agreement, and has imposed sentence against the defendant, as provided herein, -- in a (C) agreement) the United States, pursuant to Rule 11(e)(1)(A) and 48(a) of the Federal Rules of Criminal Procedure, will move to dismiss Counts \_\_\_ and \_\_\_ of the indictment in (here cite the case pending against the defendant).

#### 4. Conditional plea agreements

In 1983, Rule 11 of the Federal Rules of Criminal Procedure was amended to provide for the acceptance of conditional pleas. The amendment reads as follows:

11(a)(2) Conditional pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.<sup>31</sup>

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<sup>31</sup>The Advisory Committee notes concerning this amendment may be found in West Publishing Company's edition of the federal rules or at 97 F.R.D. 278.



This amendment is fairly straightforward. Its main requirements are that the issue to be appealed be reserved in writing, the court approve entry of the plea and the Government consent. Any appeals pursuant to a conditional plea must be brought in compliance with Rule 4(b), Fed. R. App. P., and relief via 28 U.S.C. § 2255 (habeas corpus) is not available. Even most constitutional objections (e.g., a claim of double jeopardy) may not be raised after a plea of guilty.<sup>32</sup>

The amendment was adopted to promote prosecutorial and judicial economy, and advance speedy trial objectives, by providing a process for avoiding trials that are undertaken primarily to preserve pretrial issues for which interlocutory appeals are not available (e.g., a motion to dismiss based on speedy trial grounds or a motion to suppress evidence). The amendment does not limit, in any fashion, the issues that may be appealed pursuant to a conditional plea, and instead relies on the provision that both the court and the Government must approve a conditional plea to ensure that the reserved issues are not frivolous.

In certain limited situations, conditional plea agreements can be an effective manner in which to conserve the Division's resources. They should be entered into only when the issues that are to be appealed will be dispositive of the case. For example, in two cases where conditional plea agreements were entered into, the issues to be appealed included: (1) whether the defendant was protected from indictment by a previous plea agreement; (2) whether the

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<sup>32</sup>United States v. Broce, 488 U.S. 563 (1989). Under very unusual circumstances, not likely to occur in the antitrust context, constitutional objections may be raised after a guilty plea. See Menna v. New York, 423 U.S. 61 (1975); Blackledge v. Perry, 417 U.S. 21 (1974).

statute of limitations barred the indictment; (3) whether the indictment should be dismissed because provisions of the Speedy Trial Act allegedly had been violated; and (4) whether the indictment placed the defendant in double jeopardy. If the defendants were successful on any of these issues, the cases would have been dismissed. By entering into conditional plea agreements on these issues, the Division and the defendants avoided the time and expense of trial. It would not be to the Division's advantage, however, to enter into a conditional plea agreement that included an issue to be appealed which was not dispositive of the case. In such an instance, if the defendant were successful on the non-dispositive issue, the Government would be faced with the possibility of having to try the case at a considerably later date with stale evidence.

In deciding whether to enter into a conditional plea agreement, care also should be exercised in determining whether a sufficient factual basis exists in the record to support the Division's position on appeal. In addition, thought should be given as to what sort of cooperation, if any, is desired from the defendant.<sup>33</sup>

Since the amendment speaks only of adverse determinations of pretrial motions being appealed, it would seem that conditional plea agreements normally would be entered into only after indictment. However, there is no specific prohibition against entering into an agreement prior to indictment or the filing of an information. Also, while the rule provides for the entry of

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<sup>33</sup>The Division's Appellate Section should be consulted before entering into a conditional plea agreement.

a conditional plea of nolo contendere, the Division's policy against a standard plea of nolo would apply to a conditional plea of nolo.

An 11(a)(2) conditional plea agreement generally has the same provisions as a standard plea agreement and normally would be joined with an 11(e)(1)(B) or 11(e)(1)(C) provision to include some sort of sentencing recommendation. It might also be coupled with an 11(e)(1)(A) provision to dismiss other counts of an indictment.

When drafting a conditional plea agreement, many of the same paragraphs found in a standard plea agreement may be used but should be modified accordingly. Thus, the introductory paragraph should make reference to the fact that this is a conditional plea agreement pursuant to Rule 11(a)(2). Similarly, the first numbered paragraph should make reference to the fact that the defendant will enter a conditional plea of guilty pursuant to Rule 11(a)(2). For example:

1. \_\_\_\_\_ will enter a conditional plea of guilty, pursuant to Rule 11(a)(2), to Count One of the Indictment in this case, which charges a violation of Section 1 of the Sherman Act (15 U.S.C. § 1) in connection with a conspiracy to rig bids on a (type of) project (identifying number), let by the (letting authority) on (date).

The next numbered paragraph should set forth with great specificity the issue which is to be appealed. If there are several issues, each one should be set forth with particularity. In

addition, a waiver of any other issues may be specifically included in the paragraph. For example:

2. \_\_\_\_\_ reserves the right to take an appeal from the judgment on the issue of \_\_\_\_\_. However, the defendant waives his/its right to appeal any other issue that arose at the pretrial stage of the captioned case or that might have arisen at trial.

The next paragraph then should set forth a statement that the defendant understands that he/it may withdraw the guilty plea only if he/it prevails on appeal. For example:

3. \_\_\_\_\_ has been fully advised and understands that if he/it prevails on appeal, he/it shall be allowed to withdraw his/its guilty plea. If \_\_\_\_\_ does not prevail on appeal, he/it has no right to withdraw his/its plea of guilty.

A conditional plea agreement also may contain the other provisions normally found in a plea agreement and discussed above. If a particular sentence is recommended, the agreement should address when that sentence should be imposed with respect to the appeal. If there is a non-prosecution provision, the agreement should address what happens to that provision if the defendant's appeal is successful and the plea is withdrawn. Similarly, if the agreement contains a provision for the Division to dismiss other counts in the indictment, consideration should be

given to not dismissing these counts until after the appeal is final. However, if a count is not dismissed until the appeal is final, care must be taken to be sure that the provisions of the Speedy Trial Act are met. Finally, as discussed above, if the plea agreement requires cooperation by the defendant, consideration should be given as to when this cooperation is to begin and what will happen if the defendant's appeal is successful.

F. Procedure for Obtaining Approval

1. Within the Division

After a proposed plea agreement acceptable to the staff, section or field office chief and defense counsel has been reached, the agreement, of course, is (or already has been) reduced to writing. The proposed agreement, with a copy of a proposed information (or indictment, if applicable), press release and a supporting memorandum are forwarded to the Office of Operations, under a cover memorandum from the section or field office chief.

The supporting memorandum is substantially similar in purpose and form to a fact memorandum in support of an indictment and should include all information relevant to the proposed plea agreement. In the pre-indictment plea agreement situation, the memorandum obviously will need to include more information than post-indictment, since in the latter

situation, there will already exist a fact memorandum, a copy of which can be attached to the plea agreement memorandum if necessary.

To evaluate a proposed plea agreement, the Office of Operations needs the following information in the memorandum:

- (a) complete background information on individual defendants, including age, health, corporate position and anything else of relevance;
- (b) complete background information on corporate defendants, including sales figures, net worth and all other relevant financial data;
- (c) a description of all criminal conduct in which the defendant is known or believed to have engaged;
- (d) a detailed description of the evidence available to support the charge(s) to which the defendant has agreed to plead guilty;
- (e) a description and explanation of the terms of the proposed plea agreement, with particular emphasis on the proposed sentence;

(f) an explanation of the relative role of the defendant in the conspiracy and how the agreement will effect the investigation and other pending or future prosecutions;

(g) an assessment of the defendant's civil liability and the impact of the proposed plea agreement on that liability; and

(h) a full description of anything unusual about the plea agreement or factors that relate to it.

With respect to point (e) above, for crimes continuing or occurring on or after November 1, 1987, the memorandum must contain an analysis of the Sentencing Guidelines implications of the plea agreement. If charge bargaining has occurred, the memo should make clear how the remaining charges satisfy the Sentencing Commission's and the Department's requirements.<sup>34</sup> If the plea agreement is a "C" type agreement, or a "B" type agreement where the Government will be making a specific sentencing recommendation to the judge, the staff should set forth either their analysis of why the sentence falls within the applicable guideline range for the particular charges at issue or their reasons for recommending a departure from the Guidelines.

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<sup>34</sup>See § D., *supra*.

Section 6B1.3(b) and (c) of the Sentencing Guidelines express the Commission's views regarding the acceptance of plea agreements insofar as they reflect sentence bargaining. Both recommended sentences under Rule 11(e)(1)(B) and agreed sentences under Rule 11(e)(1)(C) must either be within the applicable guideline range or only depart from that range "for justifiable reasons."

The Criminal Division has noted that (1) the Sentencing Reform Act permits downward departures only when mitigating circumstances that were not adequately taken into account by the Commission in formulating the Guidelines exist and should result in a different sentence, and (2) it is not possible to argue that the Commission has not adequately taken the value of a plea agreement into consideration.<sup>35</sup> Nonetheless, sentence bargaining is still a valuable enforcement tool. First, bargaining "within guidelines" is possible with respect to the acceptance-of-responsibility adjustment, to where within the applicable imprisonment and fine ranges a defendant's sentence should be set and to any available alternative sentences. The imprisonment and fine ranges in Division cases are, relatively speaking, quite broad. Moreover, it is possible to agree on legitimate grounds for departure, including particularly "substantial assistance to the authorities."<sup>36</sup>

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<sup>35</sup>See Prosecutors Handbook at 42; see also 18 U.S.C. § 3553(b).

<sup>36</sup>See Guidelines § 5K1.1.



The section or field office chief will provide a cover memorandum, briefly highlighting the important points in the staff's recommendation and explaining his reasons for concurring or not concurring in the recommendation.

2. Within the Department

At the same time that the proposed plea agreement package is forwarded to the Office of Operations, the staff should consider sending copies of the proposed agreement to all U.S. Attorneys in whose jurisdictions the agreement (particularly the non-prosecution provision) will have any effect. The agreement should be accompanied by a letter from the lead attorney on the investigation explaining the proposed agreement and inviting the U.S. Attorney to address any questions, comments or objections to the lead attorney or, if more appropriate, to the Director of Operations. Most U.S. Attorneys do not object to the Division's plea agreements, but occasionally, certain U.S. Attorneys have strong views on certain types of agreements or provisions in them.

## G. Presenting the Plea Agreement to the Court

The procedures for tendering plea agreements to the court vary from district to district and from judge to judge.<sup>37</sup> It is advisable to consult with an Assistant United States Attorney on the local practice in each district. In the case of a pre-indictment plea agreement, the process normally is begun by the filing of a criminal information. Depending on the district, it may be filed in the clerk's office or submitted in open court to a magistrate or district judge. If the defendant has already been indicted and has pled not guilty, it is usually only necessary to request the judge handling the case to schedule a change-of-plea hearing.

Two hearings normally are required to dispose of a case by plea agreement. At the first hearing, the defendant states his intention to plead guilty, and the terms of the plea agreement are presented to the court. If it is a pre-indictment agreement, the defendant must, under Fed. R. Crim. P. 7(b), waive, in open court, prosecution by indictment (usually by signing a form) after he has been advised of the nature of the charges and of his rights. Rule 11(e)(2) requires that at the time the plea is offered, all of the terms of the plea agreement be disclosed on the record in open court (or in camera on a showing of good cause). As with any plea of guilty,

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<sup>37</sup>Before presenting any plea agreement with a corporation to the court, the staff should obtain a resolution of the board of directors approving the agreement and authorizing the corporate representative signing the agreement to do so on behalf of the corporation and authorizing that individual or counsel to enter a plea of guilty. This ensures that there will be no question later about the validity of the agreement. Many judges require that such a resolution be made a part of the record before accepting a corporate guilty plea tendered pursuant to a plea agreement.

the court must ensure that there is a factual basis for the plea (Rule 11(f)). The court also must determine that the plea is voluntary and advise the defendant of his rights under Rule 11(c) and (d).

If the plea agreement is a "B" type, judges normally will accept the change of plea at the first hearing. However, before doing so, the court, under Rule 11(e)(2), must advise the defendant that if the court does not accept the recommendation or request set out in the agreement, the defendant has no right to withdraw his plea. After accepting the guilty plea, the court will order a presentence investigation and report, pursuant to Fed. R. Crim. P. 32(c)(1), unless the court finds on the record that there is already sufficient information for the meaningful exercise of sentencing discretion. (It is unusual for a judge to impose sentence on a "B" type agreement without benefit of a presentence report.) If the defendant's guilty plea is not formally accepted at the first hearing, Rule 32(c)(1) requires that the judge obtain the written consent of the defendant to inspect the presentence report.

When a presentence investigation has been ordered, the judge probably will allow several weeks for its completion before holding the sentencing hearing. The procedures for imposing sentence under a "B" type agreement are essentially the same as for any guilty plea. Of course, the Government (and defendant, if applicable) must strictly comply with any provisions of the plea agreement regarding arguments or recommendations to be made, or not to be made, to the court at sentencing.

The procedures for accepting a pre-indictment "A" type or "C" type agreement are different in some respects from those for a "B" type. The filing of the information, waiver of indictment, disclosure of the terms of the agreement, providing of a factual basis and the advice to and questioning of the defendant under Rule 11(c) and (d) are basically the same for all three types of agreements. However, since "A" and "C" type agreements provide for the ultimate disposition of the case, the court must decide whether to accept the agreement, as is, or reject it entirely. That being the case, some judges defer formal acceptance of the guilty plea until they have read the presentence report and decided whether the disposition provided for in the agreement is appropriate. If acceptance of the plea is deferred, the court, under Rule 32(c)(1), must obtain the written consent of the defendant to inspect the presentence report.

Rule 11(e)(3) provides that if the court accepts the "C" agreement, the court shall inform the defendant that it will impose the sentence provided for in the agreement. If the agreement is rejected, the court must inform the parties of this fact, advise the defendant in open court (or in camera on a showing of good cause) that the court is not bound by the agreement, allow the defendant to withdraw his plea and inform him that if he persists in his guilty plea, the disposition of the case may be less favorable than the one in the plea agreement (Rule 11(e)(4)). Some plea agreements involving multiple counts may contain "B" type agreements as to some counts and "A" or "C" type agreements as to others. In that case, the judge must carefully explain to the defendant the various dispositions provided in the agreement and his rights

regarding withdrawal of his guilty plea if the agreement is rejected.<sup>38</sup> After a guilty plea has been accepted, the judge must comply with the standard Rule 32 sentencing procedures.

When a post-indictment plea agreement is involved, the first step usually is to request a hearing before the judge to whom the case has been assigned once the parties have finalized the agreement. After that, the procedures for accepting the plea agreement and imposing sentence are the same as for a pre-indictment agreement. Rule 11(e)(5) provides that the plea agreement should be disclosed at the arraignment or at such other time, prior to trial, as may be fixed by the court. This provision enables the court to require that the agreement be disclosed sufficiently in advance of trial so that the scheduling of criminal cases can be handled efficiently.

The statements made by the defendant during a plea agreement hearing may not be used against him in any civil or criminal proceeding if the guilty plea is later withdrawn, with two exceptions. Rule 11(e)(6) prohibits the use of such statements unless (1) another statement made during the same hearing has been introduced and, in fairness, the defendant's statement ought to be considered with it, or (2) the statement was made under oath, on the record, with defense counsel present and is offered in a prosecution for perjury or making false statements. If an "A" or "C" type agreement is rejected and the defendant withdraws his guilty plea, the withdrawn plea may not be used against him.

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<sup>38</sup>See Advisory Committee Note to 1979 Amendment to Rule 11.

## H. Other Issues

### 1. Enforcement of plea agreements

As the Supreme Court has recognized, plea bargaining is "an essential component of the administration of justice."<sup>39</sup> Although plea bargaining is a part of the criminal justice system, the courts generally have viewed plea bargains as contractual in nature and "subject to contract-law standards."<sup>40</sup> Yet, while the courts rely heavily on contract principles, they also view the matter as one of fairness to the defendant.<sup>41</sup> As the Supreme Court stated in Santobello in discussing plea bargaining:

. . . [A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.<sup>42</sup>

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<sup>39</sup>Santobello v. New York, 404 U.S. 257, 260 (1971).

<sup>40</sup>United States v. Krasn, 614 F.2d 1229, 1233 (9th Cir. 1980).

<sup>41</sup>See, e.g., Cooper v. United States, 594 F.2d 12, 15-16 (4th Cir. 1979).

<sup>42</sup>404 U.S. at 262.

Courts require that the prosecution meticulously carry out the plea agreement.<sup>43</sup> Moreover, the prosecution need not intentionally violate a plea agreement for any ensuing sentence to be void.<sup>44</sup>

What constitutes a promise or agreement will by necessity turn on the individual facts of each case. Disputes as to the terms of a plea agreement are to be resolved by objective standards, and the nature and extent of any agreement are questions of fact to be resolved by the district court to whom the plea was originally submitted.<sup>45</sup> Once it has been determined that a plea agreement has been violated, the issue then shifts to the appropriate remedy. The fashioning of an appropriate remedy is a matter of discretion for the court according to the circumstances of the case.<sup>46</sup> Appropriate remedies include allowing a defendant to withdraw a guilty plea,<sup>47</sup> directing specific performance of the agreement,<sup>48</sup> or ordering the imposition of a specific sentence where the aforementioned remedies would be meaningless or infeasible.<sup>49</sup>

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<sup>43</sup>United States v. Bowler, 585 F.2d 851 (7th Cir. 1978).

<sup>44</sup>Knight v. United States, 611 F.2d 918, 921 (1st Cir. 1979).

<sup>45</sup>United States v. Arnett, 628 F.2d 1162, 1164 (9th Cir. 1979).

<sup>46</sup>United States v. Bowler, 585 F.2d 851, 856 (7th Cir. 1978).

<sup>47</sup>United States v. Hammerman, 528 F.2d 326 (4th Cir. 1975).

<sup>48</sup>United States v. Runck, 601 F.2d 968, 970 (8th Cir. 1979), cert. denied, 444 U.S. 1015 (1980).

<sup>49</sup>Correale v. United States, 479 F.2d 944 (1st Cir. 1973).

## 2. Nolo contendere and Alford pleas

Since it is Division policy to oppose the acceptance of nolo contendere pleas, except in unusual circumstances, a dilemma sometimes is created for the defendant who wishes to dispose of his criminal liability and is willing to agree to the sentence sought by the Government, but who is only willing to plead nolo. It should be made clear to the defendant that if he persists in refusing to plead guilty, he will not be able to enter into any type of plea agreement with the Division and, as a result, may be risking a more severe sentence. In certain rare situations, the Division may consider entering into negotiations with a defendant over an appropriate sentence after the defendant's nolo plea already has been accepted by the court. In that context, a true plea agreement is impossible, since the plea has already been accepted. If an agreement is reached, it becomes nothing more than a joint sentencing recommendation, which is not binding on the court.

An Alford plea is one in which the defendant pleads guilty, but continues to maintain his innocence. In North Carolina v. Alford, 400 U.S. 25 (1970), the defendant, who was charged with first degree murder, agreed with the prosecution that he would plead guilty to a reduced charge of second degree murder. However, at the plea hearing, he tendered his guilty plea but denied his guilt. The State then demonstrated a strong factual basis for the plea, and the plea was accepted by the court. The Supreme Court held that the judge could have refused the plea in that



situation, but acted properly in accepting it, in view of the factual basis presented and the showing that the plea was a voluntary decision by the defendant.

Every effort should be made to avoid entering into a plea agreement with a defendant who is likely to refuse to admit his guilt. If the prosecutor has any reason to suspect that the defendant may protest his innocence at the plea hearing, the prosecutor should be prepared to demonstrate a convincing factual basis for the offense. In some cases, such as where the plea agreement requires the full cooperation of the defendant, or the defendant's protestations of innocence were completely unexpected, it may be more appropriate to argue that the defendant has not upheld his part of the bargain and ask the court for leave to withdraw from the agreement.