GOVERNMENT PROPOSED JURY INST. NO.

Corporate Diversions **1**

Gains or profits and income derived from any source whatever are included in gross income for the purpose of taxation of income. This includes both lawful and unlawful gains.

You have heard evidence that the defendant was a stockholder in and received cash or other property from the [***insert name of corporation***], a corporation.

If you find that the defendant was a stockholder in the [***insert name of corporation***] and obtained cash or other property from the corporation, then you should proceed to determine whether this was income to the defendant.

In this connection, the question for you to determine is whether the defendant had complete control over the cash or other property he [she] obtained from the corporation, took it as his [her] own, and treated it as his [her] own, so that as a practical matter he [she] derived economic value from the money or property received. If you find this to be the case, then the money or property received by the defendant would be income; if you do not find this to be the case, then the money or property obtained by the defendant would not be income to the defendant.

United States v. Ruffin, 575 F.2d 346, 351 n.6 (2d Cir. 1978)

United States v. Miller, 545 F.2d 1204, 1214 n.12, 1215 (9th Cir. 1976), *cert. denied*, 420 U.S. 930 (1977)

United States v. Leonard, 524 F.2d 1076, 1082-1084 (2d Cir. 1975)

DiZenzo v. Commissioner Of Internal Revenue, 348 F.2d 122, 125-127 (2d Cir. 1965)

United States v. Goldberg, 330 F.2d 30, 38 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964)

Hartman v. United States, 245 F.2d 349, 352-353 (8th Cir. 1957)

Davis v. United States, 226 F.2d 331, 334-335 (6th Cir. 1955), *cert. denied*, 350 U.S. 965 (1956)

Cf. ***United States v. Cruz***, 698 F.2d 1148 (11th Cir. 1983)

NOTE

1 In the Second, Third, Sixth, Eighth, and Eleventh Circuits, this instruction should be adequate in those situations where the defendant has not introduced evidence to the effect that there were no corporate earnings or profits from which a dividend could have been paid. If the defense does introduce such evidence, an instruction should be given that explains the part that earnings and profits and capital gains treatment plays in determining whether, and to what extent, currency or property obtained from a corporation constitutes taxable income. For such an instruction, *see infra*. In the Ninth Circuit, this instruction may be adequate even in the face of evidence by the defense that there were no corporate earnings or profits from which a dividend could have been paid. *See* ***United States v. Miller***, 545 F.2d 1204, 1214 n.12, 1215 (9th Cir. 1976), *cert. denied*, 420 U.S. 930 (1977).

In circuits other than the Second, Third, Sixth, Eighth, Ninth, and Eleventh, the law should be researched and a determination made as to whether the above instruction is adequate or whether it is necessary to give an instruction on earnings and profits even though no evidence is introduced by the defendant as to an absence of earnings or profits.

COMMENT

1 Depending on the evidence, an instruction regarding loans may be appropriate. *See infra* for an example of such an instruction.

GOVERNMENT PROPOSED JURY INST. NO.

Constructive Dividends **1**

The government has introduced evidence to establish that the defendant was a stockholder in [***insert name of corporation***], a corporation, and [***e.g., obtained money or property from the corporation***] and/or [***caused the corporation to spend money for personal purposes of the defendant***] **2** which represented a [***dividend***] [***and/or capital gain income***] **3** that should have been reported on the defendant's return.

The defendant has introduced evidence to establish that [***describe defense, e.g., money (or property) obtained by the defendant from the corporation and expenditures made by the corporation for personal purposes of the defendant***] was not income to the defendant but [***e.g., a loan from the corporation or a nontaxable return of the defendant's investment in the corporation***]. **4**

In determining whether the defendant received any income from his [her] corporation, you are instructed as follows:

1. ***Dividend***. A distribution by a corporation to or for the benefit of a stockholder that is not a loan is reportable as a dividend to the extent that the distribution (or any part thereof) could have been paid out of the accumulated earnings and profits of the corporation; or out of the earnings and profits of the corporation for the taxable year in issue.

2. ***Return of Capital***. If the accumulated and current earnings and profits of the corporation are not great enough in amount to account for all, or a part of, the distribution to the defendant, then that portion of the distribution which could not be paid out of earnings and profits would be a nontaxable return of capital up to the amount of money invested in the corporation by the defendant.

3. ***Capital Gain Income***. Finally, any portion of the distribution which exceeds both the accumulated earnings and profits of the corporation and the amount the defendant had invested in the corporation, would be capital gain income to the defendant.

[***4. Loan. If you find that a distribution received by the defendant (or any part thereof) was a loan from the corporation, which was to be repaid, then to the extent that the distribution***

was a loan, it would not be income to the defendant.] **5**

United States v. Thetford, 676 F.2d 170, 175 n.5 (5th Cir. 1982), *cert. denied*, 459 U.S. 1148 (1983)

Bernstein v. United States, 234 F.2d 475, 480-482 (5th Cir.), *cert. denied*, 352 U.S. 915 (1956)

NOTES

1 This instruction should be given in those situations where the defendant has introduced evidence to the effect that there were corporate earnings or profits from which a dividend could have been paid. Where the defendant has not introduced such evidence, the instruction on corporate diversions, *supra*, may be given.

2 Select language and alternatives that reflect the evidence introduced by the government.

3 Select language and alternatives that reflect the evidence introduced by the government.

4 If the defense evidence is to the effect that the defendant received no money or property from the corporation and no expenditures were made for personal purposes of the defendant, this portion of the instruction should be modified accordingly.

5 This portion of the instruction is to cover those situations where evidence has been introduced of a loan defense. Another instruction concerning loans is set forth, *infra*.

GOVERNMENT PROPOSED JURY INST. NO.

Loan -- Explained

A loan which the parties to the loan agree is to be repaid does not constitute gross income as that term is defined by the Internal Revenue Code. However, merely calling a transaction a loan is not sufficient to make it such. When money is acquired and there is no good faith intent on the part of the borrower to repay the funds advanced, such funds are income under the income tax laws and are taxable as such.

United States v. Swallow, 511 F.2d 514, 522 n.7 (10th Cir.), *cert. denied*, 423 U.S. 845 (1975)

See also ***United States v. Rosenthal***, 454 F.2d 1252 (2d Cir. 1972), *cert. denied*, 406 U.S. 931 (1972)

United States v. Rosenthal, 470 F.2d 837, 841-842 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973)

United States v. Rochelle, 384 F.2d 748, 751 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968)

GOVERNMENT PROPOSED JURY INST. NO.

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

If a payment in funds or in property from one person to another proceeds primarily from a duty, either moral or legal, that payment is not a gift. Likewise, if the payment acts as an incentive for an anticipated benefit of an economic nature, then such payment is not a gift. Similarly, where the payment is in return for services rendered, it is not a gift. It does not matter whether the donor derives economic benefit from the payment.

Moreover, the donor's characterization of his [her] action is not conclusive. It is for you, the jury, to determine objectively whether what is called a gift is in reality a gift. Additionally, the parties' expectations or hopes as to the tax treatment of their conduct have nothing to do with the matter.

The decision as to whether individual payments are gifts or income [***or political contributions***] is a question of fact for you to determine in the light of practical human experience. If you find that a payment was a gift, as I have defined it, then that payment does not constitute income and need not be reported on an income tax return.

Commissioner v. Duberstein, 363 U.S. 278, 285-286 (1960)

GOVERNMENT PROPOSED JURY INST. NO.

Gift -- Defined

It is for you, the jury, to decide whether certain funds are taxable or nontaxable as gifts to the defendant. In determining whether a payment of money or property to the defendant is a nontaxable gift, you should look to the intent of the parties at the time the payment was made, particularly the intent of the person making the payment.

A gift proceeds from a detached and disinterested generosity arising from affection, respect, admiration, charity, or like impulses. In this regard, the most critical consideration is the transferor's or donor's intention. What controls is the intention with which the payment, however voluntary, was made.

The characterization given to a certain payment by either the defendant or the person making the payment is not conclusive. Rather, you the members of the jury must make an objective inquiry as to whether a certain payment is a gift. You should look at the terms and substance of any request made by the defendant for the funds. In addition, you may take into account the following factors:

1. A payment is not a gift if it is made to compensate the defendant for his services. In this connection, you should consider how the defendant made his living.

2. A payment is not a gift if the person making the payment expects to receive anything in return for it. A payment would not be a gift if it was made with the expectation that it would allow the defendant to remain in business.

3. A payment is not a gift if the person making the payment felt he had a duty or obligation to make the payment.

4. A payment is not a gift if the person making the payment did so out of fear or intimidation.

[***5. A payment is not a gift to the defendant if it is made with the expectation that it will be used to further the religious or ministerial activities of the defendant.***] **1**

This is not a complete listing of all the factors you should consider. You should take into

account all the facts and circumstances of this case in determining whether any payment was a gift.

United States v. Terrell, 754 F.2d 1139, 1149 n.3 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

NOTE

1 This sentence is reproduced as it appears in the opinion but would appear to be incomplete. In its opinion, the court correctly states the law on this point as follows, ***Terrell***, 754 F.2d at 1149:

> If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

GOVERNMENT PROPOSED JURY INST. NO.

Partnership Income

A partnership as such is not subject to income tax. Instead, each partner is individually taxed on and must report his [her] share of the partnership income, even if the income is not actually distributed to the partners.

If the partnership incurs a loss, each partner can deduct his [her] share of the loss on that partner's individual return.

26 U.S.C. §§ 701, 702

GOVERNMENT PROPOSED JURY INST. NO.

Partnership Losses

A partnership does not pay taxes. Its income or loss flows through to the individual partners. The loss which a partner is entitled to claim on his [her] tax return with respect to a partnership loss is limited to the amount of his [her] contribution to the partnership. A partner's contribution to the partnership includes the amount of money he [she] contributed to the partnership as well as his [her] proportionate share of the partnership's liabilities or debts.

In the present case, if you find that certain asserted partnership liabilities do not exist or are of lesser value than that asserted on the partnership tax return, then such claimed liability, or portion thereof, may not be included in determining a partner's contribution to the partnership.

On the other hand, if you find that liabilities in the amounts asserted by [***Name of partnership***] were in fact incurred, then each partner's contribution to the partnership would include his [her] proportionate share of such partnership liabilities in determining the amount of loss which each partner is entitled to claim on his [her] individual income tax return.

26 U.S.C. §§ 704(d), 722, & 752(a)

GOVERNMENT PROPOSED JURY INST. NO.

Deductions

Generally, there is an inference that a taxpayer will claim all deductions allowed on his [her] return, and the deductions stated on the return are prima facie proof of the maximum deductible amounts to which the defendant is entitled. Accordingly, if the defendant asserts additional deductions other than those shown on the return, it is incumbent upon the defendant to introduce evidence with respect to such additional deductions. The government has no burden of proving deductions beyond those claimed on the return.

This instruction is based on Fed. R. Evid. Rule 801(d) and the rationale of the opinions below:

United States v. Link, 202 F.2d 592, 593-594 (3d Cir. 1953)

United States v. Lacob, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1970)

United States v. Bender, 218 F.2d 869, 871-872 (7th Cir.), *cert. denied*, 349 U.S. 920 (1955)

Clark v. United States, 211 F.2d 100, 103 (8th Cir. 1954), *cert. denied*, 348 U.S. 911 (1955)

United States v. Marabelles, 724 F.2d 1374, 1383 (9th Cir. 1984)

Elwert v. United States, 231 F.2d 928, 933 (9th Cir. 1956)

GOVERNMENT PROPOSED JURY INST. NO.

Overstatement of Lawful Deductions

An income tax return may be false, not only by reason of an understatement of income, but also because of an overstatement of lawful deductions.

The term "deduction" means any item allowed by the internal revenue laws to be subtracted from gross income, in computing the amount of net or taxable income for income tax purposes.

In this case, it is charged that the income tax return was false because of an alleged willful overstatement of the amount of the deductions allowed by the internal revenue laws.

A deduction from gross income is allowed by the internal revenue laws, within limits not pertinent here, for such charitable contributions as are actually paid by the taxpayer during the taxable year to religious, charitable, educational and similar non-profit organizations.

A deduction from gross income is also allowed by the internal revenue laws for certain taxes, including State, County, and City taxes.

The internal revenue laws also permit, within limits not pertinent here, a deduction from gross income for expenses actually paid during the taxable year, not compensated for by insurance or otherwise, for medical and dental care regardless of when the incident or event which occasioned the expense occurred.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.07
See ***United States v. Helmsley***, 941 F2d 71, 92 (2nd Cir. 1991), *cert. denied*, 112 S.Ct. 1162 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Lawful Deductions

The evidence in the case need not establish beyond a reasonable doubt that the deductions, as allowed by the revenue laws, totalled the exact amount alleged in the indictment, or that the allowable deductions were overstated in the exact amounts alleged. The evidence must establish beyond a reasonable doubt only that the accused willfully overstated, or caused to be overstated, in some substantial amount, the deductions to which the taxpayer was entitled under the internal revenue laws, as charged in the indictment.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 36.08

GOVERNMENT PROPOSED JURY INST. NO.

Economic Substance **1**

A transaction without economic substance, which is entered into solely for the purpose of tax avoidance, cannot properly be used to compute taxes. That is to say, the law does not allow a deduction that arises out of a transaction which has no purpose, substance, or utility apart from the anticipated tax consequences. On the other hand, a deduction is proper, in this context, if there is some economic substance to the transaction giving rise to the deduction beyond the taxpayer's desire to secure a deduction.

A taxpayer may of course try to pay as little tax as possible so long as he [she] uses legal means. Transactions may be arranged in an attempt to minimize taxes if the transactions have economic substance.

The government contends that [***describe the transaction***] has no economic substance. The defendant contends that this transaction did have economic substance.

In determining whether a particular transaction had economic substance or not, you are instructed to consider the overall circumstances surrounding the asserted transaction.

If, after reviewing the evidence regarding a transaction, you find that the reduction of taxes was the sole purpose for entering into the transaction, and that the transaction had no other substance or utility, then you may disregard the intended tax effects of such transaction.

If, on the other hand, you find that the defendant's desire to reduce taxes was not the only motive for entering into the transaction but that the transaction had substance or utility apart from the taxpayer's desire to reduce taxes, then you are to consider the tax aspects and impact of such transaction, as I have instructed you previously.

United States v. Ingredient Technology Corporation, 698 F.2d 88, 97 n.9 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983)

Goldstein v. Commissioner, 364 F.2d 734, 740-41 (2d Cir. 1966), *cert. denied*, 385 U.S. 1005 (1967)

NOTE

1 This is an extremely complex area. Consequently, great care should be exercised in framing an instruction on economic substance. The law of your circuit should be carefully checked to insure that the instruction is consistent with the latest law on the question.

GOVERNMENT PROPOSED JURY INST. NO.

Income Tax on Ministers

The federal income tax is levied on income received by ministers. When an individual provides ministerial services as his trade or business, controls the money he receives in that business, and receives no separate salary, the income of that business is taxable to the minister. Voluntary contributions, when received by the minister, are income to him. **1** Payments made to a minister as compensation for his services also constitute income to him. If money is given to a minister for religious purposes, any money used instead for the personal benefit of the minister becomes taxable income to him.

The law provides that funds or property received from certain sources do not constitute taxable income. Since no income tax is levied on such funds or property, they are not properly reported as income. Such nontaxable funds or property includes such items as gifts, inheritances, the proceeds of life insurance policies, loans and other miscellaneous items.

United States v. Terrell, 754 F.2d 1139, 1148-1149 (5th Cir.), *cert. denied*, 472 U.S. 1029 (1985)

NOTE

1 The reference here seems to be to a situation where a minister receives a contribution and uses it for personal purposes as contrasted with turning the contribution over to the church.

GOVERNMENT PROPOSED JURY INST. NO.

Deductions -- Tax Exempt Organizations

The government contends in Counts _____, _____ and _____, that the defendant, _____, falsely claimed, on his [her] income tax return, a deduction for charitable contributions [***made to*** _____]. The defendant contends that the deduction was properly claimed as a charitable contribution made to a tax-exempt organization.

For a contribution to be deductible, it must have been made as a gift to a tax-exempt organization. For an organization to be tax exempt it must have been organized and operated exclusively for religious, charitable, or educational purposes, and no part of the net earnings of such organization may inure to the benefit of any private individual.

An organization is regarded as operated exclusively for religious, charitable, or educational purposes, ***only*** if all of the following criteria are met:

1. The organization must have been organized and operated exclusively for exempt purposes, ***i.e.***, religious, charitable, or educational purposes, and not, except to an insubstantial degree, for a non-exempt purpose. That is to say, an organization is not tax exempt if its activities involve a single non-exempt purpose that is substantial in nature, regardless of the number or importance of truly exempt purposes.

2. No part of the net earnings of the organization may inure in whole, or in part, to the benefit of any private stockholder or individual. A private individual for these purposes is a person having a personal and private interest in the activities of the organization. The phrase, net earnings inure to the benefit of a private individual, means that funds of the organization are used by a private individual for personal purposes.

3. The organization cannot have been organized or operated for the benefit of the personal or private interests of an individual but only for a public purpose. In other words, the

organization cannot have been organized or operated for the benefit of private interests, such as designated individuals, the creator of the organization or his family, or for persons controlled by such private interests.

26 U.S.C. § 170(c)(2)(B)&(C)
26 U.S.C. § 501(a)&(c)(3)
26 C.F.R. § 1.170A-1 (1993)
26 C.F.R. § 1.501(c)(3)-1(c)(2) (1993)
26 C.F.R. § 1.501(a)-1(c) (1993)
26 C.F.R. § 1.501(c)(3)-1(d)(1)(ii) (1993)
United States v. Daly, 756 F.2d 1076, 1082-1083 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985)
McGahen v. Commissioner, 76 T.C. 468, 481-483 (1981), *aff'd*, 720 F.2d 664 (3d Cir. 1983)
Ecclesiastical Order of Ism of Am v. Commissioner, 80 T.C. 833, 839-841 (1983)
Better Business Bureau v. United States, 326 U.S. 279, 283 (1945)
Stephenson v. Commissioner, 79 T.C. 995, 1002 (1982), *aff'd*, 748 F.2d 331 (6th Cir. 1984)
Hall v. Commissioner, 729 F.2d 632, 634 (9th Cir. 1984)
Davis v. Commissioner, 81 T.C. 806, 818 (1983), *aff'd*, 767 F.2d 931 (1985)

GOVERNMENT PROPOSED JURY INST. NO.

Charitable Contribution -- Defined

For income tax purposes, a charitable contribution is defined as a contribution or gift to an organization, corporation, trust, fund, or foundation organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to or is used for the benefit of any private shareholder or individual.

26 U.S.C. § 170(c)

GOVERNMENT PROPOSED JURY INST. NO.

Charitable Contributions And Gifts -- Year Deductible

If you find that a charitable contribution or gift, as previously defined, was made by the defendant to a tax-exempt organization, then you are instructed that any such charitable contribution or gift can only be claimed as a deduction (by the individual who made the contribution or gift) for the tax year in which the contribution was made, ***i.e.***, the year in which it was paid to a tax-exempt organization. For example, if a contribution to a tax-exempt organization is made in the year 1994, then it would only be deductible on the taxpayer's 1994 return.

26 U.S.C. § 170(a)(1)

GOVERNMENT PROPOSED JURY INST. NO.

Vow of Poverty

The government contends that the defendant falsely claimed that he [she] was "exempt" from income taxes and that as a result of such false claim of exemption, he [she] had substantial additional taxes due and owing. The defendant contends that he [she] was correct in claiming that he [she] was exempt from income taxes.

In order to be exempt from income taxes, an individual must have taken a vow of poverty and must contribute all of his [her] assets and income to an organization which meets certain tests. That is to say, the organization must be both organized and operated exclusively for religious, charitable, or educational purposes, and no part of its net earnings may inure to the benefit of any private individual. An organization is regarded as operated exclusively for religious, charitable, or educational purposes only if it engages primarily in activities which accomplish one or more of these exempt purposes. An organization is not so regarded if more than an insubstantial part of its activities is not in furtherance of a religious, charitable, or educational purpose.

26 U.S.C. Section 501(c)(3)

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1 (26 C.F.R.)

An organization is not organized exclusively for religious, charitable, or educational purposes unless its assets upon dissolution would be distributed for an exempt purpose and not to its members or private individuals.

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1(b)(4) (26 C.F.R.)

An organization is not operated exclusively for religious charitable, or educational purposes of its net earnings inure in whole, or in part, to the benefit of "private individuals.".

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1(c)(2) (26 C.F.R.)

A "private individual" for these purposes is a person having a personal and private interest in the activities of the organization.

Treasury Regulations on Income Tax (1986 Code), Secs. 1.501(c)(3)-1(c)(2) &

1.501(a)-1(c) (26 C.F.R.)

An organization is not organized or operated exclusively for religious, charitable, or educational purposes if it meets a private, as opposed to a public, interest. The organization cannot have been organized or operated for the benefit of private interests, such as designated individuals, or the creator of the organization or his family, or for persons controlled by such private interests.

Treasury Regulations on Income Tax (1986 Code), Sec. 1.501(c)(3)-1(d)(1)(ii) (26 C.F.R.)

Therefore, if you find, beyond a reasonable doubt, that:

1. The organization through which the defendant claimed exemption was not organized or not operated exclusively for religious, charitable, or educational purposes; or
2. Any part of the organization's net earnings inured to the benefit of private individuals; or
3. The charter of such organization permitted the return of the organization's assets to any of its members or to private individuals if the organization were dissolved; or
4. The organization met or served a private, as opposed to a public, interest,

if you find that the government has proved any one of these tests beyond a reasonable doubt -- then I instruct you, as a matter of law, that the defendant was not exempt from income taxes.

On the other hand, if you find that the government has failed to prove beyond a reasonable doubt at least one of the four factors or tests I have described above, then I instruct you that the defendant was exempt from income taxes.

GOVERNMENT PROPOSED JURY INST. NO.

Civil Tax Irrelevant

There is a distinction between the civil liability of a defendant and a defendant's criminal liability. This is a criminal case.

The defendant is charged under the law with the commission of a crime, and the fact that the defendant has or has not settled his [her] civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

Spies v. United States, 317 U.S. 492, 495 (1943)
United States v. Dack, 747 F.2d 1172, 1174-1175 (7th Cir. 1984)
United States v. Richards, 723 F.2d 646, 648 (8th Cir. 1984)
United States v. Voorhies, 658 F.2d 710, 714 (9th Cir. 1981)
United States v. Buras, 633 F.2d 1356, 1360 (9th Cir. 1980)
Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Settlement of Civil Liability is Immaterial

There is a distinction between civil liability for the payment of taxes, and criminal liability. This is a criminal case. The defendant is here charged with the commission of a crime, and the fact that he may or may not have settled his civil liability for the payment of taxes claimed to be due from him to the United States is not to be considered by the jury in determining the issues in this case, except as such evidence in the case may throw some light on the question of intent.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (3d Ed. 1977), § 35.17

GOVERNMENT PROPOSED JURY INST. NO.

"Guilty Knowledge"

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed her [his] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of her [his] deliberate blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992); ***United States v. Ojebode***, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d at 287; ***United States v. Barnhart***, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see* ***United States v. Stone***, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in ***Cheek v. United States***, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO.

Willful Blindness **1**

The defendant's knowledge may be inferred from proof beyond a reasonable doubt that the defendant deliberately closed his [her] eyes to what would otherwise have been obvious to him [her]. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from proof beyond a reasonable doubt of his [her] willful blindness to the existence of the fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes and the inferences to be drawn from any such evidence. Although knowledge may be inferred from the defendant's behavior, the issue is what the defendant actually knew. A showing of mistake, carelessness, negligence, even gross negligence or recklessness, is not sufficient to support a finding of either willfulness or knowledge.

See ***United States v. MacKenzie***, 777 F.2d 811, 818 n.2 (2d Cir. 1985), *cert. denied*, 476 U.S. 1169 (1976)

NOTE

1 The only difference between this instruction and the preceding one is at the end of the first paragraph. That instruction uses the words "deliberate blindness," whereas this instruction uses the words "willful blindness." Traditionally, this type of an instruction has been referred to as a "willful blindness" instruction. Consequently, use of this terminology seems appropriate. Nevertheless, use of the word "deliberate" in place of the word "willful" may be less confusing to a jury in a criminal tax case which will also be instructed on the special meaning of the word "willfully."

COMMENTS

1 The law on "deliberate ignorance" or "willful blindness" varies from circuit to circuit. Several circuits have indicated that "deliberate ignorance" instructions are rarely appropriate. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d 284, 286 (9th Cir. 1992); ***United States v. Ojebode***, 957 F.2d 1218, 1229 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1291 (1993); ***United States v. deFranciso-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991). Furthermore, several recent cases have found "deliberate ignorance" instructions to constitute reversible error when the evidence did not support the giving of the instruction. *See, e.g.*, ***United States v. Mapelli***, 971 F.2d at 287; ***United States v. Barnhart***, 979 F.2d 647, 652-53 (8th Cir. 1992). *But see* ***United States v. Stone***, 9 F.3d 934 (11th Cir. 1993).

As a result, great care should be exercised in the use of such an instruction. The law of the circuit should be carefully checked and no such instruction should be requested unless the evidence clearly supports it.

2 If the evidence does clearly support a "deliberate ignorance" instruction and a decision is made to request one, care still must be taken regarding its wording. In particular, no instruction should be requested in a criminal tax case which is inconsistent with the standard of willfulness set forth in ***Cheek v. United States***, 498 U.S. 192, 201 (1991), that is, a voluntary, intentional violation of a known legal duty.

3 Unlike the instruction set forth above, which requires actual knowledge, the "deliberate ignorance" instruction in ***United States v. Fingado***, 934 F.2d 1163, 1166 (10th Cir.), *cert. denied*, 112 S. Ct. 320 (1991), provides that the element of knowledge is established if the defendant is "aware of a high probability of the existence of the fact in question unless he actually believes it does not exist." Although we believe that, in the context of a defendant's deliberate ignorance, this standard does satisfy the knowledge component of willfulness in criminal tax cases, we do not recommend its use (although, obviously, such an instruction may be used in the Tenth Circuit) because there is at least some risk that a court of appeals will hold that only a defendant's actual knowledge is sufficient.

GOVERNMENT PROPOSED JURY INST. NO.

Knowledge of Contents of Return

Section 6064 of Title 26 of the United States Code provides, in part, that:

> The fact that an individual's name is signed to a return * * * shall be ***prima facie*** evidence for all purposes that the return * * * was actually signed by him.

In other words, you may infer and find that a tax return was, in fact, signed by the person whose name appears to be signed to it. You are not required, however, to accept any such inference or to make any such finding.

If you find beyond a reasonable doubt from the evidence in the case that the defendant signed the return in question, then you may also draw the inference and may also find, but are not required to find, that the defendant knew of the contents of the return that the defendant signed.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

SIGNATURE - CONTENTS OF RETURN **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Knowledge of Contents of Returns

The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant signed his [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 6.26.7201 and 6.26.7206 (1989)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Knowledge of Contents of Returns

Now, whenever the facts appear beyond a reasonable doubt from the evidence in the case that the accused had signed his tax return, a jury may draw the inference and find that the accused had knowledge of the contents of the return.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22

United States v. Wainwright, 448 F.2d, 984, 986 (10th Cir. 1971), *cert. denied*, 407 U.S. 911 (1972)

GOVERNMENT PROPOSED JURY INST. NO.

Proof of Knowledge of Contents of Returns

Now, whenever the fact appears beyond a reasonable doubt from the evidence in the case that the defendant signed his income tax return, the jury may draw the inference and find that the defendant had knowledge of the contents of the return. Whether or not the jury draws such as inference is left entirely to the jury.

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.22
United States v. Gaines, 690 F.2d 849, 853 (11th Cir. 1982)

GOVERNMENT PROPOSED JURY INST. NO.

Exculpatory Statements - Later Proved False

Statements knowingly and voluntarily made by Defendant ____ upon being informed that a crime had been committed or upon being accused of a criminal charge, may be considered by the jury.

When a defendant voluntarily offers an explanation or voluntarily makes some statement tending to show his [her] innocence and it is later shown that the defendant knew that the statement or explanation was false, the jury may consider this as showing a consciousness of guilt on the part of Defendant _____ since it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his [her] innocence.

Whether or not evidence as to a Defendant's explanation or statement points to a consciousness of guilt on his [her] part and the significance, if any, to be attached to any such evidence, are matters exclusively within the province of the jury as the sole judges of the facts of this case.

In your evaluation of evidence of an exculpatory statement shown to be false, you may consider that there may be reasons--fully consistent with innocence--that could cause a person to give a false statement showing their innocence. Fear of law enforcement, reluctance to become involved, and simple mistake may cause a person who has committed no crime to give such a statement or explanation.

[***Any testimony concerning a false exculpatory statement by Defendant _____ is in no way attributable to any other defendant on trial in this case and may not be considered by you in determining whether the government has proven the charge[s] against any other defendant beyond a reasonable doubt.***]

Devitt, Blackmar, Wolff, and O'Malley, ***Federal Jury Practice and Instructions***, (4th Ed. 1992), § 14.06

COMMENT

1 The Fifth, Seventh, Ninth and Eleventh Circuits either do not include any consciousness of guilt instructions, or specifically recommend that these matters be left to argument and that no such instruction be given. See the Committee Comments to the Seventh Circuit Instruction 3.05 and Ninth Circuit Instruction 4.03. The Federal Judicial Center includes a general instruction on "Defendant's Incriminating Actions after the Crime". See Federal Jury Center Instruction 43. But the Committee Commentary recommends that it should not be given in most cases, and that generally these matters should be left to argument by counsel.

GOVERNMENT PROPOSED JURY INST. NO.

Exculpatory Statements - Later Proved False

Now, during the course of the trial of this matter you heard witnesses testify about statements made by the defendant _____ after he been confronted with some suggestion that he might have been guilty of the commission of a crime ***and I am expressing no opinion now about the evidence in the case, about what the facts are, but once in awhile I have to refer to some of the evidence which has been heard so that you understand the principle of law that I am referring to***. I charge you that the conduct of a defendant, including statements made and acts done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the Jury in the light of other evidence in the case in determining the guilt or innocence of the accused. When a defendant voluntarily offers an explanation or makes some statement tending to establish his innocence or her innocence, and such explanation or statement is later shown to be false in whole or in part, the Jury may consider whether this circumstantial evidence points to a consciousness of guilt. It is reasonable to infer that an innocent person does not ordinarily find it necessary to invent or fabricate a voluntary explanation or statement tending to establish his innocence. Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance, if any to be attached to any such evidence, are matters for determination by the Jury. I am not suggesting to you that either of the defendants made any contradictory statements. I am not suggesting that at all. I express no opinion about it, but I give you that principle of law in charge because, if you conclude that such contradictory statements were made either in whole or in part then that is the principle of law for your consideration but, as I say, I express no opinion about the matter whatsoever (Emphasis in original).

This instruction was approved in ***United States v. Pringle***, 576 F.2d 1114, 1120 (5th Cir. 1979), but see Comment to prior instruction.

GOVERNMENT PROPOSED JURY INST. NO.

False Exculpatory Statements - Later Proved False

(1) You have heard testimony that after the crime was supposed to have been committed, the defendant _____, _____.

(2) If you believe that the defendant _____, then you may consider this conduct, along with all the other evidence, in deciding whether the government has proved beyond a reasonable doubt that he committed the crime charged. This conduct may indicate that he thought he was guilty and was trying to avoid punishment. On the other hand, sometimes an innocent person may _____ to avoid being arrested, or for some other innocent reason.

Pattern Criminal Jury Instruction of the District Judges Association of the Sixth Circuit, Instruction No. 7.14 (1991)

COMMENT

1 The language in paragraph (1) and (2) should be tailored to the specific kinds of evidence in the particular case.

FALSE EXCULPATORY STATEMENTS **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

False Exculpatory Statements

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No.4.15 (1992)

See also ***United States v. Hudson***, 717 F.2d 1211, 1215 (8th Cir. 1983) and cases cited therein.

COMMENTS

1 If the defendant denies making the statement, or denies that it is exculpatory, this language should be changed to allow the jury to decide whether or not the statement was made or whether or not it was exculpatory. ***United States v. Holbert***, 578 F.2d 128, 130 (8th Cir. 1978).

2 If the falsity of the exculpatory statement is controverted, this language should be changed to allow the jury to find whether or not the statement was false. *See*, ***United States v. Pringle***, 576 F.2d 1114, 1120 n.6 (5th Cir. 1978).

GOVERNMENT PROPOSED JURY INST. NO.

Similar Acts

During this trial, you have heard evidence of acts of the defendant which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However, you may consider this evidence for other, very limited, purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had a motive or the opportunity to commit the acts charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purpose for which any evidence of other similar acts may be considered.

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction No. 1.30 (1990)

COMMENT

United States v. Practi, 861 F.2d 82 (5th Cir. 1988) discusses the use of a limiting instruction when extraneous offenses are introduced. Ordinarily, defendant must request this instruction. Under some circumstances, the failure to give a limiting instruction, even in the absence of a request, may constitute plain error. *Id*.

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Acts

(1) You have heard testimony that the defendant committed some acts other than the ones charged in the indictment.

(2) You cannot consider this testimony as evidence that the defendant committed the crime that he is on trial for now. Instead, you can only consider it in deciding whether _____. Do not consider it for any other purpose.

(3) Remember that the defendant is on trial here for _____, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged beyond a reasonable doubt.

Pattern Jury Instructions for the Sixth Circuit, Criminal 1991, § 7.13

COMMENT

This instruction should be used when evidence of other crimes has been admitted to prove motive, opportunity, intent or the like under Fed. R. Evid 404(b)

PRIOR SIMILAR ACTS **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Acts

You [***are about to hear***] [***have heard***] evidence that the defendant previously committed [***an act***] [***acts***] similar to [***the one***] [***those***] charged in this case. You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged here. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged here, then you may use this evidence concerning [***a***] previous [***act***] [***acts***] to decide [***describe purpose under 404(b) for which evidence has been admitted.***]

[***Remember, even if you find that the defendant may have committed [a] similar [act] [acts] in the past, this is not evidence that he [she] committed such an act in this case. You may not convict a person simply because you believe he [she] may have committed similar acts in the past. The defendant is on trial only for the crime[s] charged, and you may consider the evidence or prior acts only on the issue of (state proper purpose under 404(b), e.g., intent, knowledge, motive.)***]

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction No. 2.08 (1992).

See also, Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 17.08

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Acts

You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's [***e.g. intent***] and for no other purpose.

Model Criminal Jury Instructions for the Ninth Circuit, 1992, § 4.04

COMMENTS

This comports with Fed. R. Evid. 404(b)

See also ***United States v. Herrell***, 588 F.2d 711, 714 (9th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979).

PRIOR SIMILAR OFFENSE **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Prior Similar Offense

You are about to hear testimony that the defendant previously committed a crime similar to the one charged here. I instruct you that testimony is being admitted only for the limited purpose of being considered by you on the question of [***e.g. defendant's intent***].

Manual of Model Criminal Jury Instructions for the Ninth Circuit, (1992 Edition). Instruction No. 210

This instruction comports with Fed. R. Evid. 404(b). Such a limiting instruction must be given, if requested (Fed. R. Evid. 105) and must be given *sua sponte* when appropriate. For an instruction to be given at the end of the case use the following:

> You have heard evidence of other acts by the defendant. You may consider that evidence only as it bears on the defendant's [***e.g. intent***] and for no other purpose.

COMMENT

1 Other circuits suggest that when using prior similar offense evidence as evidence of intent, motive, etc. (not for impeachment) instructions re prior similar acts should be used. *See* related instructions, *supra*.

GOVERNMENT PROPOSED JURY INST. NO.

Cautionary Instruction During Trial - Similar Acts

Evidence that an act was done or that an offense was committed by Defendant _____ at some other time is not, of course, any evidence or proof whatever that, at another time, the defendant performed a similar act or committed a similar offense, including the offense charged in [***Count ____ of***] this indictment.

Evidence of a similar act of offense may not be considered by the jury in determining whether the Defendant _____ actually performed the physical acts charged in this indictment. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds beyond a reasonable doubt from other evidence in the case, standing alone, that the defendant physically did the act charged in [***Count _____ of***] this indictment.

If the jury should find beyond a reasonable doubt from other evidence in the case that the Defendant _____ did the act or acts alleged in the particular count under consideration, the jury may then consider evidence as to an alleged earlier act of a like nature in determining the state of mind or intent with which the Defendant _____ actually did the act or acts charged in the particular count.

The defendant is not on trial for any acts or crimes not alleged in the indictment. Nor may a defendant be convicted of the crime[s] charged even if you were to find that he [she] committed other crimes--even crimes similar to the one charged in this indictment.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th. Ed. 1992), § 17.08

COMMENTS

1 While Federal Rule of Evidence 404(b) prohibits evidence or prior acts of offenses "to show action in conformity therewith," the United States Supreme Court has held that such evidence is admissible for other purposes, including proof of knowledge or intent. ***Anderson v. Maryland***, 427 U.S. 463, 483 (1976).

2 A limiting instruction must be given, if requested. Fed. R. Evid. Rule 105.

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

The rules of evidence ordinarily do not permit witnesses to testify as to their own opinions or their own conclusions about issues in the case. An exception to this rule exists as to those witnesses who are described as "expert witnesses." An "expert witness" is someone who, by education or by experience, may have become knowledgeable in some technical, scientific, or very specialized area. If such knowledge or experience may be of assistance to you in fact, an "expert witness" in that area may state an opinion as to relevant and material matter in which he or she claims to be an expert.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should consider the testimony of expert witnesses just as you consider other evidence in this case. If you should decide that the opinion of an expert witness is not based upon sufficient education or experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you should conclude that the opinion is outweighed by other evidence [***including that of other "expert witnesses"***], you may disregard the opinion in part or in its entirety.

As I have told you several times, you -- the jury -- are the sole judges of the facts of this case.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.01

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

During the trial you heard the testimony of _____, who was described to us as an expert in _____.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state an opinion concerning such matters.

Merely because an expert has expressed an opinion does not mean, however, that you must accept this opinion. The same as with any other witness, it is up to you to decide whether you believe this testimony and choose to rely upon it. Part of that decision will depend on your judgment about whether the witness's background or training and experience is sufficient for the witness to give the expert opinion that you heard. You must also decide whether the witness's opinions were based on sound reasons, judgment, and information.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit, Instruction No. 1.18 (1990)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

(1) You have heard the testimony of _____, an expert witness. An expert witness has special knowledge or experience that allows the witness to give an opinion.

(2) You do not have to accept an expert's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

Pattern Criminal Jury Instructions, Sixth Circuit, Instruction No. 7.03 (1991)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

You have heard testimony of expert witnesses. This testimony is admissible where the subject matter involved required knowledge, special study, training, or skill not within ordinary experience, and the witness is qualified to give an expert opinion.

However, the fact that an expert has given an opinion does not mean that it is binding upon you or that you are obligated to accept the expert's opinion as to the facts. You should assess the weight to be given the expert opinion in the light of all the evidence in this case.

Federal Criminal Jury Instructions, Seventh Circuit, Instruction No. 3.27 (1980)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by knowledge, skill, training, education or experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, the acceptability of the methods used, and all other evidence in the case.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.10 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

You have heard testimony from persons described as experts. Persons who, by education and experience, have become expert in some field may state their opinion on matters in that field and may also state their reasons for the opinion.

Expert opinion testimony should be judged just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons for the opinion, and all the other evidence in the case.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.16 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Opinion Evidence -- The Expert Witness

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field -- one who is called an expert witness -- is permitted to state his or her opinion concerning those technical matters.

Merely because an expert has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit, (1985 Ed.) Basic Instruction No. 7. p. 20

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

Charts or summaries have been prepared by _____ and shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, and other documents which are in evidence in the case. Such charts or summaries are not evidence in this trial or proof of any fact. If you find that these charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard the charts or summaries.

In other words, such charts or summaries are used only as a matter of convenience for you and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you can disregard them entirely.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 14.02

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

You have seen some charts and summaries that may help explain the evidence. That is their only purpose, to help explain the evidence. They are not themselves evidence or proof of any facts.

Pattern Criminal Jury Instructions, Sixth Circuit, Instruction No. 7.12 (1991)

CHARTS AND SUMMARIES **July 1994**

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, or other underlying evidence in the case. Those charts or summaries are used for convenience. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the books, records or other underlying evidence.

Manual of Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.11 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Not Admitted

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.17 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

Charts or summaries have been prepared by _____, have been admitted into evidence, and have been shown to you during the trial for the purpose of explaining facts that are allegedly contained in books, records, or other documents which are in evidence in the case. You may consider the charts and summaries as you would any other evidence admitted during the trial and give it such weight or importance, if any, as you feel it deserves.

Devitt, Blackmar, Wolff and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), Section 14.02

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

There have been admitted in evidence certain schedules or summaries. They truly and accurately summarize the contents of voluminous books, records or documents, and should be considered together with and in the same manner as all other evidence in the case. **1**

and/or

There have been admitted in evidence certain schedules or summaries. Their accuracy has been challenged by [***the government***] [***the defendant***]. Thus the original materials upon which the exhibits are based have also been admitted into evidence so that you may determine whether the schedules or summaries are accurate. **2**

Pattern Criminal Jury Instructions, Seventh Circuit, Instruction No. 3.29 and 3.30 (1980)

NOTES

1 This instruction should only be given when the accuracy and authenticity of the exhibits are not in question.

2 This instruction is not intended to cover the situation where some or all of the underlying materials are unavailable.

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

You will remember that certain [***schedules***] [***summaries***] [***charts***] were admitted in evidence. You may use those [***schedules***] [***summaries***] [***charts***] as evidence, even though the underlying documents and records are not here. [***However, the [accuracy] [authenticity] of those [schedules] [summaries] [charts] has been challenged. It is for you to decide how much weight, if any, you will give to them. In making that decision, you should consider all of the testimony you heard about the way in which they were prepared.***]

Model Criminal Jury Instructions, Eighth Circuit, Instruction No. 4.12 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Charts and Summaries -- Admitted

Certain charts and summaries have been received into evidence to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Manual of Model Criminal Jury Instructions, Ninth Circuit, Instruction No. 4.18 (1992)

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

The law permits the jury to determine whether the government has proven the guilt of the defendant for an [***less serious***] [***other***] offense which is, by its very nature, necessarily included in the crime of [***insert name of charged offense***] that is charged in Count _____ of the indictment.

If the jury should unanimously find that the government has proven each of the essential elements of the offense of [***insert name of charged offense***] that is charged in Count _____ of the indictment beyond a reasonable doubt, the foreperson should write "guilty" in the space provided and the jury's consideration of that count [***for that defendant***] is concluded.

If the jury should determine unanimously **2** that the government has not proven each element of the offense of [***insert name of charged offense***] that is charged in Count _____ of the indictment beyond a reasonable doubt, then the foreperson should write "not guilty" in the space provided and the jury should then consider the guilt or innocence of the defendant for the [***less serious***] [***other***] offense necessarily included in the offense of [***insert name of charged offense***] charged in Count _____ of the indictment.

The crime of [***insert name of charged offense***] charged in Count _____ of the indictment necessarily includes the [***less serious***] [***other***] offense of [***insert name of lesser included offense***]. In order to find the defendant guilty of the [***less serious***] [***other***] included offense, the government must prove the following essential elements beyond a reasonable doubt: [***list elements of lesser included offense***].

The difference between the crime charged in Count _____ of the indictment and the [***less serious***] [***other***] included offense is [***list additional elements necessary to prove charged offense***].

The jury will bear in mind that the burden is always upon the government to prove, beyond a reasonable doubt, each and every essential element of any [***less serious***] [***other***] offense which is necessarily included in any crime charged in Count _____ of the indictment. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 20.05 (modified)

NOTES

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

2 Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.,* ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

> If, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense charged in Count _____ of the indictment beyond a reasonable doubt, the jury should then consider whether the defendant is guilty or not guilty of the [***less serious***] [***other***] crime of [***insert name of lesser included offense***] which is necessarily included in the offense of [***insert name of charged offense***] charged in Count _____ of the indictment.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense
~~(Attempted Evasion of Payment/Failure to Pay)~~ **1**

The law permits the jury to determine whether the government has proven the guilt of the defendant for any offense that is necessarily included in any crime charged in the indictment, whenever such a course is consistent with the facts found by the jury from the evidence in the case, and with the law as given in the instructions of the court.

So, if the jury should unanimously **2** find the accused "Not Guilty" of the crime of willfully attempting to evade or defeat payment of tax as charged in Count _____ of the indictment, then the jury must proceed to determine whether the government has proven the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

The crime of willfully attempting to evade or defeat payment of taxes, which is the crime charged in Count _____ of the indictment, necessarily includes the lesser offense of willful failure to pay the tax. This lesser offense is defined in Section 7203 of the Internal Revenue Code [***26 U.S.C. § 7203***], which provides in part that:

> "Any person required . . . to pay any . . . tax, . . ., who willfully fails
> to pay such . . . tax . . . at the time or times required by law

shall be guilty of an offense against the laws of the United States.

In order for the defendant to be found guilty of the lesser included offense of willful failure to pay the tax, the government must prove each of the following elements beyond a reasonable doubt:

1. That there was a tax due and owing by the defendant;
2. That the defendant failed to pay the tax when due; and,
3. That the failure was willful.

As stated before, the burden is always on the prosecution to prove beyond a reasonable doubt each essential element of the crime charged; the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

Devitt & Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.09 (modified)

Schmuck v. United States, 489 U.S. 705 (1989)

Sansone v. United States, 380 U.S. 343, 351-352 (1965)

NOTES

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

2 Some courts have noted that a jury need not unanimously decide upon a verdict of not guilty before proceeding to a consideration of the lesser included offense. *See, e.g.*, ***United States v. Jackson***, 726 F.2d 1466 (9th Cir. 1984); ***United States v. Tsanas***, 572 F.2d 340 (2d Cir.), *cert. denied*, 435 U.S. 995 (1978). The law of your circuit should be consulted on this point. If a unanimous decision of not guilty is not required, the following language may be substituted for this paragraph:

> So, if, after reasonable efforts have been unsuccessful, the jury is unable to reach a verdict as to whether the government has proven each element of the offense of willfully attempting to evade or defeat payment of a tax as charged in Count _____ of the indictment beyond a reasonable doubt, then the jury must proceed to determine whether the government has proven beyond a reasonable doubt the guilt of the defendant as to any lesser offense, which is necessarily included in the crime charged.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

We have just talked about what the government has to prove for you to convict the defendant of [***insert name of greater crime***]. Your first task is to decide whether the government has proved, beyond a reasonable doubt, that the defendant committed that crime, If your verdict on that is guilty, you are finished. But if your verdict is not guilty, or if you are unable to reach a verdict, you should go on to consider whether the defendant is guilty of [***insert name of lesser included crime***]. You should find the defendant guilty of [***insert name of lesser included crime***] if the government has proved, beyond a reasonable doubt, that the defendant did everything we discussed before except that it did not prove that the defendant [***describe missing element***].

To put it another way, the defendant is guilty of [***insert name of lesser included crime***] if the following things are proved beyond a reasonable doubt: [***list elements of lesser included crime***]. The defendant is guilty of [***insert name of greater crime***] if it is proved beyond a reasonable doubt that the defendant did all those things and, in addition, [***describe missing element***]. If your verdict is that the defendant is guilty of [***insert name of greater crime***], you need go no further. But if your verdict on that crime is not guilty, or if you are unable to reach a verdict on it, you should consider whether the defendant has been proved guilty of [***insert name of lesser included crime***].

Of course, if the government has not proved beyond a reasonable doubt that the defendant committed [***insert name of lesser included crime***], your verdict must be not guilty of all of the charges.

Pattern Jury Instructions, Criminal Cases, Fifth Circuit (1990 Ed.), General & Preliminary Instructions, Instruction No. 1.32, p.45 (modified)

NOTE

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

The crime of [***insert name of greater offense***] with which the defendant is charged in the indictment includes the lesser offense of [***insert name of lesser included offense***].

If you find the defendant not guilty of the crime of [***insert name of greater offense***] charged in the indictment [***or if you cannot unanimously agree that the defendant is guilty of that crime***], then you must proceed to determine whether the defendant is guilty or not guilty of the lesser offense of [***insert name of lesser included offense***].

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), § 2.03, p.12 (modified)

NOTE

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

The crime of [***insert name of greater offense***] includes the lesser crime of [***insert name of lesser included offense***]. If (1) [***any***] [***all***] **2** of you are not convinced beyond a reasonable doubt that the defendant is guilty of [***insert name of greater offense***] and (2) all of you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime of [***insert name of lesser included offense***], you may find the defendant guilty of [***insert name of lesser included offense***].

In order for the defendant to be found guilty of the lesser crime of [***insert name of lesser included offense***], the government must prove each of the following elements beyond a reasonable doubt: [***list elements of lesser included offense***].

Manual of Model Criminal Jury Instructions For The Ninth Circuit (1992 Ed.). § 3.13, p.43.

NOTES

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

2 Although, if the defendant expresses no choice, the trial court may employ either a jury instruction requiring the jury to unanimously acquit on the greater charge before considering the lesser included offense or an instruction advising the jury that it can consider the lesser included offense if it is unable after a reasonable effort to reach a verdict on the greater offense, it is error to reject the form of instruction that is timely requested by the defendant. ***United States v. Jackson***, 726 F.2d 1466, 1469-1470 (9th Cir. 1984).

GOVERNMENT PROPOSED JURY INST. NO.

Lesser Included Offense **1**

In some cases the law which a defendant is charged with breaking actually covers two separate crimes -- one is more serious than the second, and the second is generally called a "lesser included offense."

So, in this case, with regard to the offense charged in Count _____, if you should find the defendant "not guilty" of that crime as defined in these instructions, you should then proceed to decide whether the defendant is guilty or not guilty of the lesser included offense of [***insert name of lesser included offense***]. The lesser included offense would consist of proof beyond a reasonable doubt of the following element[s]: [***list elements of lesser included offense***], as defined above, but not the element[s] of: [***insert additional elements required for conviction of greater offense***].

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 5, p.41 (modified)

NOTE

1 ***CAUTION***: There are only a limited number of circumstances where a lesser included offense instruction is appropriate in a criminal tax case. *See* Section 8.09 of this Manual.

GOVERNMENT PROPOSED JURY INST. NO.

Action on Advice of Counsel

Defendant claims that he [she] is not guilty of willful wrongdoing as charged in Count _____ of the indictment because he [she] acted on the basis of advice from his [her] attorney.

If before taking any action [failing to take any action], the defendant, while acting in good faith and for the purpose of securing advice on the lawfulness of his [her] future conduct, sought and obtained the advice of an attorney he [she] considered to be competent, and made a full and accurate report or disclosure to his [her] attorney of all important and material facts of which he [she] had knowledge or the means of knowing, and acted strictly in accordance with the advice his [her] attorney gave following this full report or disclosure, then the defendant would not be willfully doing wrong in performing [***omitting***] some act the law forbids [***requires***], as that term is used in these instructions.

Whether the defendant acted in good faith for the purpose of truly seeking guidance as to questions about which he [she] was in doubt, and whether he [she] acted strictly in accordance with the advice received, are all questions for the jury to determine.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1992), § 19.08 (modified)

GOVERNMENT PROPOSED JURY INST. NO.

Defenses -- Reliance on Preparer

The defendant has introduced evidence showing that he [she] did not prepare the tax return in question and that it was prepared for him by [***insert name of person who prepared return***], a person who held himself [herself] out as one qualified to prepare federal income tax returns for others.

If the defendant, while acting in good faith and believing [***insert name of person who prepared return***] to be competent to prepare federal income tax returns, provided [***insert name of person who prepared return***] with full information with relation to his [her] taxable income and expenses during the year, and the defendant then, in good faith, adopted, signed, and filed the tax return as prepared by [***insert name of person who prepared return***] without having reason to believe that it was not correct, then you will find the defendant not guilty.

If, on the other hand, you find beyond a reasonable doubt that the defendant did not provide full and complete information to [***insert name of person who prepared return***], or that he [she] knew that the return as prepared by [***insert name of person who prepared return***] was not correct and substantially understated the tax liability of defendant [***and his wife***] [***and her husband***], then you are not required to find the defendant not guilty simply because he [she] did not prepare the return himself [herself] but rather had it prepared for him [her] by another.

Sand, Siffert, Loughlin & Reiss, ***Modern Federal Jury Instructions: Criminal*** (1993 Ed.), Vol. 1, Instruction 8-4 (Comment), pp. 8-20 -- 8-22.

See ***United States v. Vannelli***, 595 F.2d 402, 404-405 (8th Cir. 1979)

GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Reliance Upon Advice of Counsel

Good faith is a complete defense to the charge in the indictment if good faith on the part of the defendant is inconsistent with the existence of willfulness, which is an essential part of the charge. The burden of proof is not on the defendant to prove his good faith, of course, since he [she] has no burden to prove anything. The government must establish beyond a reasonable doubt that the defendant acted willfully as charged in the indictment.

So, a defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, he [she] consulted in good faith an attorney whom he [she] considered competent, made a full and accurate report to her [his] attorney of all material facts of which he [she] had the means of knowledge, and then acted strictly in accordance with the advice given to him [her] by his [her] attorney.

Whether the defendant acted in good faith for the purpose of seeking advice concerning questions about which he [she] was in doubt, and whether he [she] made a full and complete report to her [his] attorney, and whether he [she] acted strictly in accordance with the advice he [she] received, are all questions for you to determine.

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Special Instructions, Instruction No. 14, p. 51

GOVERNMENT PROPOSED JURY INST. NO.

Good Faith Belief of Accused

If a person, in good faith, believes that he [she] has paid all the taxes he [she] owes, he [she] cannot be guilty of criminal intent to evade the tax. But if a person acts without reasonable ground for belief that his [her] conduct is lawful, it is for the jury to decide whether he [she] acted in good faith, or whether he [she] willfully intended to evade the tax. This issue of intent, as to whether the defendant willfully attempted to evade or defeat the tax, is one which the jury must determine from a consideration of all the evidence in the case bearing on the defendant's state of mind.

Devitt and Blackmar, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), § 56.26 (modified)

COMMENTS

1 See also the instructions concerning a good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.

2 In light of the decision in ***Cheek v. United States***, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with ***Cheek***. *See, e.g.*, ***United States v. Grunewald***, 987 F.2d 531, 536 (8th Cir. 1993).

GOVERNMENT PROPOSED JURY INST. NO.

First Amendment

The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose. Speech which "incites imminent lawless activity" is not protected speech under the First Amendment. Speech which "merely advocates law violation" is protected by the First Amendment.

If you find that the defendant's speech was limited to the advocacy of violations of the income tax laws or remote action, then his speech is protected by the First Amendment and cannot be a basis for a guilty verdict. If, however, you find that the defendant's speech both was intended by him and, in fact, tended to produce or incite a likely imminent filing of a false income tax return, then such speech is not protected by the First Amendment.

Brandenburg v. Ohio, 395 U.S. 444 (1969)

United States v. Kelley, 769 F.2d 215, 216-17 (4th Cir. 1985)

United States v. Damon, 676 F.2d 1060, 1062-63 (5th Cir. 1982)

United States v. Holecek, 739 F.2d 331, 334-35 (8th Cir. 1984)

United States v. Buttorff, 572 F.2d 619, 622-24 (8th Cir. 1978), *cert. denied*, 437 U.S. 906 (1978)

United States v. Freeman, 761 F.2d 549, 551-52 (9th Cir. 1985)

COMMENT

1 An instruction such as this is appropriate, if at all (*see* ***United States v. Daly***, 756 F.2d 1076, 1082 (5th Cir.), *cert. denied*, 474 U.S. 1022 (1985) ("the speech Daly claims is protected was not itself the wrong for which he was convicted, but it was merely the means by which he committed the crimes of which he was convicted")), only when the government's case is predicated solely on what

the defendant said. If the defendant engaged in an illegal course of

conduct, his activities are not protected by the First Amendment merely because the conduct was in part carried out by language in contrast to direct action. *See* ***United States v. Kelley***, 864 F.2d 569, 577 (7th Cir.), *cert. denied*, 110 S. Ct. 55 (1989); ***United States v. Solomon***, 825 F.2d 1292, 1297 (9th Cir. 1987), *cert. denied*, 484 U.S. 1046 (1988); ***United States v. Gilbert***, 813 F.2d 1523, 1529 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987).

COMMENT

This instruction is reproduced in the United States Attorneys' Manual. USAM, Sec. 9-23.350, pp. 11-12 (Oct. 1, 1990).
INST. NO. 285
REL. NO. 255IMMUNITY INSTRUCTION NO. 255
(Devitt and Blackmar)

GOVERNMENT PROPOSED JURY INST. NO.

Credibility of Witnesses -- Immunized Witness

The testimony of an immunized witness, someone who has been told either that his [her] crimes will go unpunished in return for testimony or that his [her] testimony will not be used against him [her] in return for that cooperation, 1 must be examined and weighed by the jury with greater care than the testimony of someone who is appearing in court without the need for such an agreement with the government.

[Insert name of witness] may be considered to be an immunized witness in this case.

The jury must determine whether the testimony of the immunized witness has been affected by self-interest, or by the agreement he [she] has with the government, or by his [her] own interest in the outcome of this case, or by prejudice against the defendant.

Devitt and Blackmar, Federal Jury Practice and Instructions (4th Ed. 1992), Vol. 1, Sec. 15.03 (modified)

NOTE

1 Only the clause which fits the facts of the case should be chosen for use in the instruction.

IMMUNITY INSTRUCTION NO. 256
(Seventh Circuit)INST. NO. 286
REL. NO. 256

GOVERNMENT PROPOSED JURY INST. NO.

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness] who received immunity; that is, a promise from the government that any testimony or other information he [she] provided would not be used against him [her] in a criminal case. You may give her [his] testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Vol. I, Sec. 3.19 (modified)

INST. NO. 287
REL. NO. 257IMMUNITY INSTRUCTION NO. 257
(Ninth Circuit)

GOVERNMENT PROPOSED JURY INST. NO.

Testimony Under Grant of Immunity

You have heard testimony from [insert name of witness], a witness who has received immunity. That testimony was given in exchange for a promise by the government that [insert either "the witness will not be prosecuted" or "the witness' testimony will not be used in any case against him [her]"].

In evaluating [insert name of witness]'s testimony, you should consider whether that testimony may have been influenced by the government's promise of immunity given in exchange for it, and you should consider that testimony with greater caution than that of ordinary witnesses.

Manual of Model Criminal Jury Instructions for the Ninth Circuit (1992 Ed.), Sec. 4.09 (modified)