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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.(1) 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.(2)

Corporations have no 5th Amendment privilege.(3) 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 stockholder(4) subchapter S corporations(5), professional corporations(6), and dissolved corporations.(7) 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.(8) 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.(9) 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.(10)

In general, partnerships and other collective entities have been denied the use of the privilege against self-incrimination.(11) 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."(12)

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.(13) 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.(14) 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 person who received the subpoena.(15) 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.(16)

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.(17) However, the compelled testimony must expose the claimant to possible criminal prosecution.(18) A witness may not refuse to answer a question because it would place him in danger of physical harm(19), degrade him(20), or incriminate a third party.(21)

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.(22) 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"(23) or a state crime.(24) The claimant must face a real and substantial hazard of self-incrimination, not an imaginary or insubstantial one.(25) 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 "course of conduct,"(26) and only a single act is needed to connect an individual to a conspiracy once its existence is shown.(27)

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.(28)

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.(29) 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 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.[30]

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.[31]

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.[32] 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.[33] In some cases where the witness was a potential target, courts have 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.[34]

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.[35]

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,[36] 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.

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.[37] Once a witness voluntarily reveals incriminating facts, he may not refuse to disclose the details related to those facts.[38] 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".[39]

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.[40] 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.(41)

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.(42) 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 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.(43) 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(44) 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 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."(45)

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.

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.(46) 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.(47)

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.(48)

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.(49)

The immunity statute only protects a witness from prosecution for offenses committed before the date of the witness' immunized testimony.(50) The witness' immunized testimony can always be used to prosecute him for crimes committed after the date of his testimony.

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.(51) 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.(52) 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.

A request for an immunity order must be authorized by the Assistant Attorney General or any Deputy Assistant Attorney General.(53) 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.(54) A brief discussion of the six standards follows.

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.(55) 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 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.(56)

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.

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.(57) 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.(58)

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 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.(59)

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, 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.(60)

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 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.(61) 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.(62)

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 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.(63)

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 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.(64)

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 Witness Records prepare a memorandum to the Assistant Attorney General in charge of the Antitrust Division, clearing the witnesses for immunity.(65)

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.(66)

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.

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.(67) 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.(68) 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.

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.[(69)] 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.

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.(70)

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.(71) 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.(72) This is normally done ex 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.(73) 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.

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.(74) 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.(75)

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.

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,(76) 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.(77) A strong particularized need must be shown before a transcript of testimony will be given to a grand jury witness.(78)

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).

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.(79)

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.(80) 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.(81) Such written assurances are legally binding upon the Government.(82)

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.

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,[(83)] 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 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.(84) 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:

   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.[(85)] 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.

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.(86)

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:

> 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.(87)

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.(88) 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."

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.(89) 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 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.(90) 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.(91) 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 court held that there was no joint participation exception to the privilege and upheld the assertion of the privilege, the grant of immunity notwithstanding.(92) 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.(93)

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.

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,(94) 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.(95) An immunized witness who refuses to testify before a federal grand jury may be held in civil or criminal contempt.(96)

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."(97) 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."(98) 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.(99)

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 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.(100)

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.(101) 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."(102)

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.(103) 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. Courts may not impose both a fine and imprisonment, nor a fine coupled with probation.(104) 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.(105) 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.(106) 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 deprived of its efficacy.(107) 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."(108)

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 to comply with an order to testify.(109) 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.(110) Two days have been held adequate where no showing of just cause appeared to have been available.(111) 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 18 U.S.C. § 6002.(112) 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[(113)] and being subpoenaed for an improper purpose, e.g., to gather evidence in connection with a pending indictment.[(114)] 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.[(115)] Thus, the statute, itself, affords a sound predicate for Government opposition to an application for bond pending appeal.

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.[(116)]

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.(117)

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.(118) 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 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.(119)

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.(120) Three circuits have indicated that courts may have the inherent power to grant use immunity in cases of Government abuse.(121) 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 question of whether prosecutorial misconduct might require the Government to choose between granting immunity to a defense witness and acquittal.(122)

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.(123) 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.(124) 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.(125)

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, exculpatory and not available elsewhere.(126) If the witness is a current or potential target of prosecution, there is no discrimination.(127)

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.

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."(128) 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.(129)

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.(130) 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."(131)

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.(132) Thus, a private litigant cannot compel a witness' testimony at a civil deposition if the witness

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.(133) 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.(134) 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."

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."(135)

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 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.(136) 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.(137) 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.(138)

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 Constitution, i.e., use and derivative use immunity.(139) 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.(140)

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.(141) Such a promise ought to be in writing and unambiguous to be enforceable. Otherwise, a court may interpret the promise of immunity to bestow the full Constitutional protection.(142)

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,(143) 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.(144)

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.(145) 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 inculpate 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.

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."(146) 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;(147) 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.(148)

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.

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."(149) 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."(150)

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."(151)

   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.(152) 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."(153) The court found: 1) the witness fully confessed in the transcripts, 2) these transcripts were read in 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."(154) 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."(155)

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.(156)

   Some circuit courts that do not follow McDaniel reason that McDaniel goes too far and creates, in effect, transactional immunity.(157) The reasoning of McDaniel and the cases relying on McDaniel is that under Kastigar, the use and derivative use immunity grant should 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.'"(158)

   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.(159) 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 "deemed to raise a presumption that the decision to indict was not tainted."(160) 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.(161)

5. Taint hearing

The fact that a witness testified under a grant of immunity does not in itself present an insurmountable barrier to prosecution.(162) 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 not tainted by establishing that they had an independent, legitimate source for the disputed evidence."(163) 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."(164) 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.(165)

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.(166) 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.(167) The district court in a case brought by the 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."(168) Nevertheless, some courts require an evidentiary hearing although there is no constitutional requirement for a hearing.(169)

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.(170) Several courts have reiterated this standard without trying to fit it into the traditional categories.(171) Other circuits have held that the Government's burden is a preponderance of the evidence.(172)

The issue as to whether any use has been made of the immunized testimony is a question of fact.(173) Therefore, the trial court's findings can be reversed on appeal only if clearly erroneous.(174)

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(175) 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.(176) 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 Subcommittee.(177) 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.(178)

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.(179)

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.(180) 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.(181) 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 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."(182) 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 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.(183)

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."(184) This reasoning should apply as well when the witness' immunized testimony was given before a federal grand jury.

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."'(185) Some courts, however, read Kastigar to require a pre-trial hearing.(186) 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.(187)

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.(188)

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.(189) 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."(190) 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".(191)

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 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.

FOOTNOTES

1. 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.

2. Fisher v. United States, 425 U.S. 391, 408 (1976).

3. Wilson v. United States, 221 U.S. 361 (1911).

4. 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).

5. United States v. Richardson, 469 F.2d 349 (10th Cir. 1972).

6. Reamer v. Beall, 506 F.2d 1345 (4th Cir. 1974), cert. denied, 420 U.S. 955 (1975).

7. 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).

8. 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).

9. 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.

10. Curcio v. United States, 354 U.S. 118 (1957).

11. 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).

12. 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).

13. 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).

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

15. See Fisher v. United States, 425 U.S. 391, 411 (1976) (existence and location of documents was a "foregone conclusion").

16. See U.S.A.M. 9-23.215 for more information regarding "act of production" immunity for sole proprietors.

17. 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).

18. In re Gault, 387 U.S. 1, 47 (1976).

19. United States v. Gomez, 553 F.2d 958 (5th Cir. 1977).

20. United States v. Frascone, 299 F.2d 824 (2d Cir. 1962).

21. United States v. Seewald, 450 F.2d 1159 (2d Cir. 1971), cert. denied, 405 U.S. 978 (1972).

22. 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).

23. Hoffman v. United States, 341 U.S. 479, 486 (1951).

24. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964).

25. 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).

26. Glasser v. United States, 315 U.S. 60, 80 (1942); Eastern States Lumber Ass'n v. United States, 234 U.S. 600, 612 (1914).

27. 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.

28. 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).

29. Hoffman v. United States, 341 U.S. at 486.

30. 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).

31. See U.S.A.M 1-11.220.

32. United States v. Neff, 615 F.2d 1235, 1238 (9th Cir.), cert. denied, 447 U.S. 925 (1980).

33. United States v. Pilnick, 267 F. Supp. 791 (S.D.N.Y. 1967).

34. 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).

35. Hoffman v. United States, 341 U.S. 479 (1951).

36. Ordinarily, a target's assertion of the privilege should not be challenged before the grand jury. See U.S.A.M. 9-11.154.

37. Courts are often hesitant to determine that a waiver has occurred. See, e.g., In re Hitchings, 850 F.2d 180 (4th Cir. 1988).

38. Rogers v. United States, 340 U.S. 367, 373 (1951).

39. Id. at 374.

40. United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958).

41. In re Morganroth, 718 F.2d 161, 165 (6th Cir. 1983).

42. Carter v. Kentucky, 450 U.S. 288 (1981).

43. Counselman v. Hitchcock, 142 U.S. 547 (1892), appeared to hold that use immunity would violate the 5th Amendment.

44. Reprinted in ATD Manual at II-80 to 82.

45. 406 U.S. at 460.

46. 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.

47. 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.

48. 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) (perjury).

49. New Jersey v. Portash, 440 U.S. 450 (1979); United States v. Pantone, 634 F.2d

716, 722 (3d Cir. 1980)

50. 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).

51. 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).

52. 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).

53. 28 C.F.R. § 0.175.

54. 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.

55. Procedures for obtaining a proffer are set out in § H., infra.

56. See Ch. IX § E.2.b.

57. 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.

58. 18 U.S.C. §§ 1510, 1512, 1515.

59. Attorneys must check local practice and procedure. Some judges and U.S. Attorneys are unwilling to grant prospective immunity.

60. 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.

61. 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).

62. See U.S.A.M. 9-11.151, Ch. III § A.3.c.

63. The significant amount of lead time is necessitated by the Criminal Division. See discussion in § E.3., infra.

64. 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.

65. See U.S.A.M. 9-23.130.

66. See § I. for a discussion of informal immunity.

67. 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.

68. See U.S.A.M. 9-23.120.

69. 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.

70. See also § D.3., above, for a discussion of some of the problems that may arise with the use of prospective immunity.

71. 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 Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972).

72. As noted above, some judges may also ask to see the Criminal Division clearance memo.

73. 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.

74. 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).

75. See, e.g., Goldberg v. United States, 472 F.2d 513, 514 (2d Cir. 1973)

76. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959).

77. See Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211 (1979).

78. 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).

79. United States v. DiMauro, 441 F.2d 428 (8th Cir. 1971); see Proving Federal Crimes at 3-15 to 17.

80. See § I.3.b., infra.

81. See sample letter attached as Appendix V-I.

82. United States v. Carter, 454 F.2d 426 (4th Cir. 1971), cert. denied, 417 U.S. 933 (1974).

83. 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 trail.

84. A sample letter is attached as Appendix V-2.

85. See Ch. IX for a more detailed discussion of plea agreements.

86. 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).

87. U.S.A.M. 1-11.214.

88. See Appendix V-3.

89. 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.

90. Trammel v. United States, 445 U.S. 40 (1980).

91. 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).

92. 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).

93. 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).

94. See Ch. III § C.1.g., supra.

95. See Ch. III § G. for the text of the relevant contempt statutes and for a discussion of contempt in the context of subpoena enforcement.

96. See United States v. Petito, 671 F.2d 68 (2d Cir.), cert. denied, 459 U.S. 824 (1982).

97. Where non-frivolous defenses are alleged, an evidentiary hearing is required, as discussed below.

98. 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).

99. In re Grand Jury Proceedings, Harrisburg Grand Jury, 658 F.2d 211, 217-18 (3d Cir. 1981).

100. In re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979).

101. United States v. North, 621 F.2d 1255, 1263 (3d Cir.), cert. denied, 449 U.S. 866 (1980).

102. Id. at 1261 n.9, citing United States v. Wilson, 421 U.S. at 317 n.9.

103. In re Grand Jury Proceedings Harrisburg Grand Jury, 658 F.2d at 218.

104. MacNeil v. United States, 236 F.2d 149 (1st Cir.), cert. denied, 352 U.S. 912 (1956).

105. 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).

106. United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

107. United States v. Liddy, 510 F.2d 669, 672-73 (D.C. Cir. 1974), cert. denied, 420 U.S. 980 (1975).

108. Harris v. United States, 382 U.S. 162, 167 (1965).

109. 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).

110. United States v. Alter, 482 F.2d 1016, 1023-24 (9th Cir. 1973).

111. In re Sadin, 509 F.2d 1252, 1255-56 (2d Cir. 1975).

112. Such an order would be lacking if the witness were appearing pursuant to informal immunity.

113. United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); see Gelbard v. United States, 408 U.S. 41 (1972).

114. In re Grand Jury Investigation (Bruno), 545 F.2d 385 (3d Cir. 1976).

115. See United States v. Coplon, 339 F.2d 192 (6th Cir. 1964).

116. See U.S.A.M. 9-23.214.

117. 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).

118. Kastigar v. United States, 406 U.S. 441, 461 (1972).

119. 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).

120. 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).

121. 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").

122. United States v. Pennell, 737 F.2d at 526-27; United States v. Chalan, 812 F.2d at 1310.

123. See also rUnited States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), cert. denied, 441 U.S. 913 (1980).

124. 615 F.2d at 972.

125. 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.

126. United States v. Shandell, 800 F.2d 322, 324 (2d Cir. 1986).

127. Id.

128. 406 U.S. at 453.

129. 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).

130. 406 U.S. at 458-59.

131. United States v. Apfelbaum, 445 U.S. 115, 124 (1980).

132. Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

133. 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.

134. 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.

135. United States v. Gregory, 611 F. Supp. 1033, 1037 (S.D.N.Y. 1985).

136. Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964); see also United v. States v. Helmsley, F.2d (2d Cir. 1991).

137. Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); see also United States v. Nemes, 555 F.2d 51, 53 (2d Cir. 1977).

138. In re Grand Jury Proceedings, No. 84-4 (Hartmann), 757 F.2d 1580 (5th Cir. 1985), and cases cited therein.

139. See § I., supra.

140. 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).

141. 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).

142. 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.

143. 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.

144. 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.

145. No such authorization is necessary where the witness was granted act of production immunity only. See Ch. III § C.2.c.

146. Kastigar v. United States, 406 U.S. 441, 460 (1972).

147. 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).

148. See United States v. Kurzer, 534 F.2d 511 (2d Cir. 1976).

149. 406 U.S. at 459.

150. Id. at 460.

151. 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).

152. 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.

153. 482 F.2d at 311.

154. Id. at 311.

155. Id. at 312; see also In re Grand Jury Proceedings, 497 F. Supp. 979 (E.D. Pa.

1980).

156. 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).

157. See United States v. Mariani, 851 F.2d supra; United States v. Byrd, 765 F.2d 1524 (11th Cir. 1985).

158. 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."

159. 765 F.2d at 1530.

160. Id. at 1530-31.

161. See United States v. Jones, 590 F. Supp. 233 (N.D. Ga. 1984).

162. 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).

163. 378 U.S. at 79 n.18.

164. 406 U.S. at 460.

165. United States v. Dynalectric Co., 859 F.2d 1559, 1578 (11th Cir. 1988), cert. denied, 490 U.S. 1006 (1989).

166. Id. at 1580.

167. Id.

168. 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).

169. 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).

170. Kastigar v. United States, 406 U.S. 441 (1972).

171. 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).

172. United States v. Romano, 583 F.2d 1, 7 (1st Cir. 1978); United States v. McDonnel, 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)).

173. 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.

174. 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.

175. 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).

176. 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).

177. 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).

178. See United States v. Beachner Constr. Co., 538 F. Supp. 718 (D. Kan. 1982).

179. 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).

180. 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).

181. 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).

182. 580 F. Supp. at 1425.

183. See also United States v. Helmsley, F.2d (2d Cir. 1991).

184. 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).

185. 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).

186. 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).

187. 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).

188. See United States v. DeDiego, 511 F.2d 818, 824 (D.C. Cir. 1975).

189. See also United States v. Bloom, 586 F. Supp. 939 (S.D. Fla. 1984).

190. Id. at 729; see also United States v. Garrett, 797 F.2d 656 (8th Cir. 1986).

191. Id. at 733.