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VII. INDICTMENT AND INFORMATION

A. Sherman Act Indictments or Informations

1. Distinction between indictment and information

Indictments and informations are written, formal criminal charges on which the accused is brought to trial. Fed. R. Crim. P. 7(c)(1) requires that the indictment or information be a "plain, concise and definite written statement of the essential facts constituting the offense charged." An offense punishable by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment, unless indictment is waived, in which case it may be prosecuted by information.(1) A violation of 15 U.S.C. § 1, which is punishable by a maximum of three years imprisonment, must be prosecuted by indictment, unless waiver of indictment is obtained from the defendant.(2) A waiver of indictment must be obtained from the defendant in open court after he has been advised of the nature of the charge and of his rights. While indictments must be returned by a grand jury,(3) informations may be returned by the Department of Justice on its own authority.

The language of an information differs from an indictment only slightly. The opening sentence of the information will read "The United States of America, acting through its attorneys, charges" rather than "the grand jury charges". If the exact dates are unknown, the information will state "the exact dates being unknown to the United States"; an indictment will state "the exact dates being unknown to the grand jury." An information will not contain a signature line for the grand jury foreperson.

An information will be presented to the presiding judge or magistrate by the prosecuting attorneys rather than by the grand jury. It saves time to have the waiver of indictment form executed by the defendant prior to the hearing at which the information is presented to the court. Some courts, however, require that the execution of the waiver occur in open court. Therefore, you must ascertain the preferred procedure from the local U.S. Attorney's Office.

In most cases, an information will be accompanied by a plea agreement, which will be presented to the court at the time the information is presented.(4) Informations may also be accompanied by a press release similar to that used for the return of an indictment.

Unlike the return of an indictment, the defendant pleading to an information will have been given an opportunity to review the information before it is presented to the court. The charge contained in the information to which the defendant is pleading will have been negotiated between the parties as part of the plea agreement. Within certain constraints, the nature of the charge is an appropriate subject for plea negotiation. However, the terms of the information, like the indictment, should rest exclusively with the prosecuting attorney.

It is not necessary for the grand jury to have any involvement in the return of an information, but you should usually inform the grand jury when an information has been or is being presented. In most circumstances, this will require an explanation of the accompanying plea agreement. Often, this occurs when the defendant, in the case of an individual, is testifying before the grand jury under the terms of the plea agreement. The grand jury should be advised that the information is simply a substitute for an indictment and that it was still the product of their hard work.

When the information is being filed against a corporation, the waiver of indictment must be executed by an officer empowered to act for the corporation. You should ascertain from the U.S. Attorney's Office in the local jurisdiction what proof the court will require that the officer is so empowered. Some judges will require written confirmation of a vote by the board of directors authorizing the officer to execute the waiver of indictment and to enter any accompanying plea. Some courts will permit counsel for the corporation to perform these acts. However, the deterrent effect of requiring a high-ranking officer of a corporation to appear in court for the purpose of executing a waiver of indictment and entering a plea should not be ignored.

The court may permit an information to be amended at any time before verdict or finding, if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced.[(5)]

A sample information and indictment are contained in Appendices VII-1 and VII-2.

2. Function and purpose of an indictment or information

The indictment or information, hereafter referred to as indictment, serves as the initial pleading filed by the Government in criminal litigation. It should set forth the facts evidencing the elements of the offense sought to be charged. Each indictment will require a varying amount of factual detail. In general, it should tell the story of who the defendants are, what their roles were, what they did, when and where they did it, the scheme they used to commit the offense and a description of the offense with which they are charged.

Your goal in drafting an indictment is to tell the Government's story in a simplified and persuasive manner, keeping in mind that the document itself will be seen and scrutinized by the trial judge, the jury, defense counsel, the press, the probation officer and the court of appeals.

> The indictment must adequately apprise the defendant of what theories he must be prepared to meet at trial. Further, the indictment serves as a basis for determining a defendant's 5th Amendment right against double jeopardy. The 5th and 6th Amendments to the U.S. Constitution require that the indictment must describe the crime allegedly committed, every essential element of that crime, and the acts of the defendant alleged to constitute the crime. The description must be in sufficient detail to permit the defendant to understand the nature of the charges against him, to prepare a defense, and to invoke the double-jeopardy provision of the 5th Amendment, if appropriate.[(6)]

The 6th Amendment provides in pertinent part: In all criminal prosecutions, the accused shall enjoy the right. . . to be informed of the nature and cause of the accusation . . . . Fed. R. Crim. P. 7(c)(1) gives effect to these requirements by providing the following:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated.

In reviewing the sufficiency of an indictment, the courts will construe the document as a whole to ascertain whether or not the foregoing requirements have been met.[(7)] An indictment is likely to be found legally sufficient if it describes with reasonable particularity the acts or practices alleged to constitute the offense. What is required are factual allegations rather than a simple recitation of the acts or practices proscribed by the law allegedly violated. There is no requirement, however, that the indictment set forth the Government's evidence to support the factual allegations, or describe in detail the contents of any documents to which reference may be made.[(8)]

3. Standard format for Sherman Act offenses

The Division prefers the use of a standard format for indictments charging violations of Section 1 of the Sherman Act. The purpose of this format is to communicate more effectively the nature of the criminal charges to judges, trial juries, and the general public, while fully satisfying the requirements of Rule 7(c) of the Federal Rules of Criminal Procedure. Utilizing a standard Division-wide format has at least two advantages: it permits the development of a body of caselaw on the sufficiency of the standard Section 1 indictment which helps ensure that individual indictments will be upheld by district and appellate courts; and it facilitates the review of proposed indictments at each level within

the Division. Reprinted below is a sample indictment followed by comments for each section of the indictment.[(9)] Section 1 indictments should be drafted in the form of this sample, subject to the exceptions noted in the comments.

a. Sample Sherman Act indictment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. XYZ COMPANY, INC. and JOHN W. DOE, Defendants.	Criminal No. 15 U.S.C. § 1

INDICTMENT

The Grand Jury charges:

I
DESCRIPTION OF THE OFFENSE

1. XYZ Company, Inc. and John W. Doe, its Executive Vice President, are hereby indicted and made defendants on the charge stated below.

2. Beginning at least as early as 1983 and continuing at least through September 1988, the exact dates being unknown to the Grand Jury, the defendants and others entered into and engaged in a combination and conspiracy to suppress and eliminate competition by rigging bids for the award and performance of dredging construction projects. The dredging projects were awarded from time to time by the United States, through the United States Army Corps of Engineers ("Corps") or the United States Navy ("Navy"), on the Southeast Atlantic Coast and were set aside for qualified small businesses under the Small Business Set Aside ("SBSA") program. The combination and conspiracy, engaged in by the defendants and co-conspirators was an unreasonable restraint of interstate [and foreign] trade and commerce, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

3. During the period covered by this indictment, the United States, through the Corps or the Navy, from time to time invited dredging contractors to submit sealed competitive bids on dredging projects on the Southeast Atlantic Coast, including those projects which are the subject of this indictment. Each such bid was required to be submitted to the appropriate Corps District Office or Navy Office before the time, and at the place, indicated on the bid proposal form. The receipt, opening, and reading aloud of the bids constitute a process known as a bid letting. Following a bid letting, the Corps or the Navy awards a contract for the performance of the specified dredging project to the lowest responsible bidder.

4. The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) to allocate among themselves SBSA dredging projects let by the Corps and the Navy on the Southeast Atlantic Coast; and

(b) to submit collusive, noncompetitive, and rigged bids, and to refrain from submitting bids, to the Corps and the Navy for such dredging projects.

5. For the purpose of forming and carrying out the charged combination and conspiracy, the defendants and co-conspirators did those things that they combined and conspired to do, including, among other things:

(a) discussing the submission of prospective bids on SBSA dredging projects let by the Corps and the Navy on the Southeast Atlantic Coast;

(b) agreeing not to compete by designating the corporate defendant or co-conspirator to be the successful bidder on such dredging projects;

(c) submitting intentionally high bids and refraining from submitting bids on such dredging projects; and

(d) submitting bid proposals to the Corps and the Navy on such dredging projects containing false, fictitious, and fraudulent statements and entries.

II
DEFINITIONS

6. "Southeast Atlantic Coast" means the geographic areas served by the Corps District Offices in Norfolk, Virginia; Wilmington, North Carolina; Charleston, South Carolina; Savannah, Georgia; and Jacksonville, Florida.

7. "Dredging" means the creation or maintenance of harbors, navigable channels, and other waterways through the underwater excavation of material from the bottom of such waterways and the disposal of that material.

III
DEFENDANTS AND CO-CONSPIRATORS

8. Defendant XYZ Company, Inc. is a corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal place of business in Norfolk, Virginia. During the period covered by this indictment, XYZ Company, Inc. engaged in the business of dredging as a contractor on the Southeast Atlantic Coast, including the Eastern District of North Carolina.

9. Defendant John W. Doe is, and was during the period covered by this indictment, the Executive Vice President of XYZ Company, Inc.

10. Various corporations and individuals, not made defendants in this indictment, participated as co-conspirators in the offense charged and performed acts and made statements in furtherance of it.

11. Whenever in this indictment reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed or transaction by or through its officers, directors, employees, agents, or other representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

IV
TRADE AND COMMERCE

12. The business activities of the defendants and co-conspirators that are the subject of this indictment were within the flow of, and substantially affected, interstate [and foreign] trade and commerce.

V
JURISDICTION AND VENUE

13. The combination and conspiracy charged in this indictment was [formed and] carried out, in part, within the Eastern District of North Carolina within the five years preceding the return of this indictment.

DATED:

A TRUE BILL

_____

FOREPERSON
JAMES F. RILL
Assistant Attorney General
Antitrust Division

_____
[Lead Attorney]

_____
[Staff Attorney]

_____
[Name]
United States Attorney
Eastern District of
North Carolina

_____
[Staff Attorney]
Attorneys, Antitrust Division
U.S. Department of Justice
[Section or Office Address]
Tel: (000) 000-0000

b. Comments

1. Caption and page format. The standard caption and page format should be modified only as necessary to comply with the local rules and practice of the U.S. Attorney. The defendants do not have to be listed in any particular order. Usually corporations are listed before individual defendants; however, with multiple defendants, greater clarity may be provided if the individual is listed right after the corporation by which that individual was employed.

2. Paragraph 1 - list of defendants. The defendants should be listed in the same order as they are listed in the caption. The identification should include the full name of each corporate defendant and the name and title of each individual defendant. If the list of defendants is significantly longer than in the sample, the titles of the individual defendants may be omitted as they are more fully described later in the indictment. In some cases, it may be appropriate to note parenthetically any alias or nicknames used by an individual defendant.

3. Paragraph 2 - main charging paragraph. This is the main charging paragraph of the indictment. It should usually contain: the approximate beginning and ending dates of the conspiracy; the specific type(s) of per se offense(s) involved; the industry involved; and, in bid-rigging cases, the letting authority. The last sentence of this paragraph should be substantially the same in all indictments.

   This section should include the time period during which the offense was committed. However, there is no requirement that the beginning and ending dates of the arrangement be pled with precision. The indictment may charge that the exact dates when the alleged offense began and ended are unknown but are believed to have commenced as early as a specified year and to have continued through a specified date that is within the statute of limitations.[(10)]

4. Paragraph 3 - explanation of industry or competitive structure. A paragraph of this

type should be inserted before the "substantial terms" and "means and methods" paragraphs only when it is essential to explain some aspect of the industry or competitive structure involved so that the reader can fully understand the following paragraphs describing the conspiracy.

This paragraph of the indictment may, when necessary, contain a general description of the uses for a product or service and the types of customers for it. In a bid-rigging indictment, such as the sample indictment, it may be appropriate to explain the bidding process. Any discussion of the industry or the competitive structure important enough to be included in the indictment, but not essential to an understanding of the initial charging paragraphs, should be included in the "Trade and Commerce" section.

5. Paragraphs 4 and 5 - the "substantial terms" and "means and methods" paragraphs. Although the introductory portions of the "substantial terms" and "means and methods" paragraphs should be virtually the same in every indictment, the subparts will obviously differ widely in number and structure, depending on the specific facts. Staffs will be given substantial latitude to tailor these paragraphs to fit each case.

   In general, these paragraphs should describe the terms of the allegedly unlawful agreement and list how the defendants formed and carried out the unlawful combination and conspiracy. Since overt acts need not be proven in Sherman Act cases, there is no requirement that they be alleged in an indictment.[(11)]

6. Paragraphs 6 and 7 - definitions. A "Definitions" section is not mandatory and should be included only when the ordinary dictionary definitions of terms used in the indictment will not suffice or when terms, though adequately defined in the dictionary, are not familiar to the general public. If the charging paragraph contains numerous terms that may not be familiar to the general public, then it may be advisable to have the definitions section precede the charging paragraph.[(12)]

   Terms frequently defined in this section include the geographic area where the alleged illegal action occurred, the product or service that was the subject of the conspiracy, and, if federal funding was involved, the federal agency that was involved. Failure to describe such terms is not fatal to an indictment, but doing so may make practical sense in some cases.[(13)]

7. Paragraph 8 - corporate defendant descriptions. For each corporate defendant, the identification should include the full name, main business address and state of incorporation. When there are multiple corporate defendants, the paragraph should contain language similar to the following:

   > Each of the defendant corporations is organized and exists under the laws of the state, and has its principal place of business in the city, identified below:

Corporation	State of Incorporation	Principal Place of Business
ABC Corporation	Florida	Jacksonville, FL
Acme Corporation	Georgia	Savannah, GA
Dredging, Inc.	South Carolina	Charleston, SC
XYZ Company, Inc.	Virginia	Norfolk, VA

During all or part of the period covered by this indictment, the defendant corporations engaged in the business of dredging as contractors on the Southeast Atlantic Coast, including the Eastern District of North Carolina.

In some cases, the principal place of business may not be the relevant location, and staffs may want to use another title or a narrative format to explain that corporation's geographic nexus to the charge.

8. Paragraph 9 - individual defendant descriptions. Individual defendants should be identified by full name, business affiliation and title. When there are multiple individual defendants, language similar to the following should be used for this paragraph:

   During all or part of the period covered by this indictment, each of the individual defendants was associated with the designated defendant corporation in the position or positions indicated:

Individual	Position(s)	Corporation
John W. Doe	Executive Vice President	XYZ Company, Inc.
James T. Smith	General Manager	Dredging, Inc.
William R. Thompson	Vice President	ABC Corporation
Robert J. Wilson	Manager	Acme Corporation

9. Paragraph 10 - co-conspirator paragraph. Whenever there are non-defendant co-conspirators, this paragraph should be included in the indictment. In cases in which there are co-conspirator organizations other than corporations, an appropriate

term such as "firms" or "companies" should be used in lieu of "corporations". Under Department and Division policy, alleged co-conspirators should not be identified by name unless there are compelling reasons to do so.(14) Several courts have condemned the practice of naming unindicted co-conspirators as a violation of due process and have ordered that those portions of the indictment be expunged.(15)

10. Paragraph 11 - This paragraph should be included in all indictments in which a corporation is a defendant.

11. Paragraph 12 - trade and commerce paragraph. This section of the sample indictment represents a minimally sufficient allegation of the "flow" and "effects" theories of the interstate commerce element. If there is any concern that the local court may dismiss an indictment for failure to set out the specific commerce restrained, a brief additional allegation should be added, such as follows:

    The interstate [and foreign] trade and commerce included:

    a. the movement of substantial quantities of goods on dredged waterways;

    b. the movement of substantial quantities of equipment and other essential materials for use on dredging projects; and

    c. payment for dredging projects with funds from the Treasury of the United States.

    Any necessary description of the industry or the competitive structure should be included here or, as previously noted, in Paragraph 3. It is not necessary to list all of the methods by which interstate trade and commerce will be proved at trial.

12. Paragraph 13 - Jurisdiction, venue and statute of limitations. A legally sufficient indictment should contain an allegation that the offense charged was formed or carried out, at least in part, within the jurisdiction of the federal district court where the indictment is filed. There is, however, case law to the effect that failure of an indictment to allege venue does not require dismissal.(16) The indictment should contain an allegation that the offense charged was formed or carried out, at least in part, within the statute of limitations period for the offense involved.

13. Signature format. The signature format may be modified as necessary to comply with the local rules and practice of the U.S. Attorney, but all indictments must contain the signature of the Assistant Attorney General and the lead attorney.

14. Effects. There should be no "Effects" section or other description of anticompetitive harms in the indictment.

15. Number of counts. A legally sufficient indictment should charge only one offense

per count.[17] Generally, counts should be averred in order of the significance of the offense, such as the Sherman Act count followed by any mail fraud counts. Mail fraud counts should be averred in chronological order. Fed. R. Crim. P. 7(c)(1) permits an allegation made in one count to be incorporated by reference in another count. Normally, this is done by introducing such a count with the language:

> The grand jury (or if in an information, the United States) further charges: Each and every allegation of Paragraphs 1 through of this indictment is here realleged with the same force and effect as though each paragraph was set forth in full detail.

16. Language and tone. A well-drafted indictment should avoid legalese wherever possible and use instead commonly understood language. Naturally, when following the form of typical Sherman Act indictments, it is best to use language that courts have approved. When there is evidence of payoffs, concealment or the signing of false statements of noncollusion, it is good practice to incorporate language describing such practices in the indictment. An indictment should avoid the use of prejudicial or inflammatory language.[18]

B. Requirements for non-Sherman Act Indictments

1. Mail fraud, 18 U.S.C. § 1341

Increasingly, the Division will bring one or more counts of mail fraud in an indictment when a violation of the Sherman Act has been alleged.[19] Because an antitrust violation is a form of fraud, including a mail fraud count often helps to focus juror attention on the fraud aspects of the conspiracy.

An indictment for mail fraud under 18 U.S.C. § 1341, must sufficiently allege the two necessary elements of an offense within the statute:

1. The accused devised or intended to devise a scheme and artifice to defraud, and

2. Used or caused the use of the mails in execution or attempted execution of the scheme.[20]

The indictment must contain a reasonably detailed description of the particular scheme with which the defendant is charged.[21]

A mail fraud count added to a Sherman Act indictment will begin with the language "The grand jury further charges" and will contain an introductory paragraph that realleges the appropriate paragraphs, such as the identification of the defendants, the reference to corporate defendants acting through its officers and those portions of the trade and commerce sections that describe the industry or the bid process which are relevant to the mail fraud count. Thereafter, a legally sufficient mail fraud indictment will contain language similar to the following:

Beginning as early as _____ and continuing thereafter until approximately _____ the exact dates being unknown to the Grand Jury, the defendants, together with other persons known and unknown to the Grand Jury, devised and intended to devise a scheme and artifice to defraud (company) of:

a. money; and

b. property

It was part of said scheme and artifice to defraud that the defendants, and others known and unknown to the Grand Jury, would and did:

a. allocate to one defendant the monthly scrap metal contract at (company)'s plants and allocate to another defendant the monthly scrap metal contract at (company)'s plant; and

b. submit collusive, noncompetitive and rigged bids at (company)'s plants in connection with the award of monthly scrap metal contracts.

On or about the dates of mailing set forth below, for the purpose of executing said scheme and artifice to defraud, and attempting to do so, the defendants did knowingly cause the following bids for (company's) plants' scrap metal contracts to be delivered by mail in (location), by the United States Postal Service, according to the directions thereon, each such use of the mails being a separate Count of this Indictment and each constituting a separate violation of Title 18, United States Code, Section 1341:

Count	**Sender**	**Addressee**	**Approx. Date of Mailing**
2			
3			

In McNally v. United States, 483 U.S. 350 (1987), the Supreme Court held that the mail fraud statute did not apply to schemes to defraud citizens of their intangible right to honest government. Subsequently, in Carpenter v. United States, 484 U.S. 19 (1987) , the Supreme Court clarified that the mail fraud statute did apply to schemes to defraud a victim of intangible property rights.[(22)] In 1988, Congress amended the mail fraud statute to expressly extend its coverage to include "a scheme or artifice to deprive another of the intangible right of honest services",[(23)] thus expressly overruling McNally. As a consequence, the mail fraud statute applies to any fraudulent scheme involving a monetary or property interest, whether that interest is tangible or intangible, and to the intangible right to honest services.

In drafting a mail fraud charge, it is not necessary to allege that the scheme or artifice contemplated a use of the mails in its execution.(24) It is only necessary to prove that the use of the mails was reasonably foreseeable.(25) Each separate use of the mails constitutes a separate and distinct offense.(26)

Other forms of mail fraud frequently alleged in antitrust indictments, aside from the mailing of bids, include the mailing of executed contracts from the owner to the low bidder and the mailing of payments or proceeds from the contract that was awarded to the low bidder.(27) It is necessary to draft the indictment so that the item that is mailed can be proven to have been mailed in furtherance of the scheme and not after the scheme was already completed. In any bid-rigging or price-fixing conspiracy, the object of the conspiracy is not just to rig bids or to fix the prices, but to obtain financial remuneration.(28) Therefore, mailing of bids, mailing of contracts or the mailing of financial proceeds in payment of contractual work fall within the object of the scheme, and the mailings can be proven to have been in furtherance thereof.(29)

Frequently, the mailing of a bid that contains a fraudulent representation, such as a false non-collusion affidavit will constitute the basis of a mail fraud charge. It is important to note, however, that the existence of such a false representation is not necessary to a mail fraud charge.(30) A scheme to defraud may be actionable even though no actual misrepresentation is contained in the mailing.(31)

2. Wire Fraud, 18 U.S.C. § 1343

As with mail fraud, wire fraud is another non-antitrust violation that is found with increasing frequency in indictments stemming from antitrust investigations.(32) The essential elements of a wire fraud offense are:

1. The devising of a scheme and artifice to defraud, and
2. A transmittal in interstate or foreign commerce by means of wire, radio or television communications of writings, signs, signals, pictures, or sounds for the purpose of executing the scheme or artifice to defraud.(33)

Since the wire fraud statute was patterned after the mail fraud statute, mail fraud principles have been applied to wire fraud prosecutions. Each use of an interstate instrumentality constitutes a separate offense.(34) The Division has successfully charged what amounted to attempted bid-rigs or price-fixes as a wire fraud where interstate telephone calls were used to attempt to set up the conspiracy.(35)

An indictment under 18 U.S.C. § 1343, must sufficiently charge the two necessary elements of the offense -- that the accused devised and intended to devise a scheme and artifice to defraud and transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme. One indictment prosecuted by the Division charged

the defendants with bid-rigging and with three counts of wire fraud based upon the transmission of bid prices from the defendants to the owner by use of telexes. The wire-fraud-charging paragraphs of the indictment were as follows:[(36)]

> Beginning sometime in or about February 1980 and continuing thereafter until at least September 1981, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators, devised and intended to devise a scheme and artifice to defraud Nash of:
>
> a. money; and
>
> b. its right to free and open competition for the bidding on the Smallville job, such bidding to be conducted honestly, fairly, and free from craft, trickery, deceit, corruption, dishonesty and fraud.
>
> It was part of the aforesaid scheme and artifice to defraud that the defendants and co-conspirators would and did:
>
> a. allocate the Smallville job to XYZ Company; and
>
> b. submit collusive, noncompetitive, and rigged bids to Nash for the Smallville job.
>
> On or about the dates set forth below, the defendants named in each count listed below, for the purpose of executing and carrying out the scheme and artifice to defraud, did knowingly and willfully transmit and cause to be transmitted, by means of wire communication in interstate commerce, certain signs, signals, and sounds; namely telexes containing bids, from the locations listed below to Nash in Metropolis, New York. Each such use of the wire constitutes a separate count of this indictment and a separate violation of Title 18, United States Code, Section 1343.

COUNT TWO

Defendants:	XYZ Company
	John Jones
Transmitted from:	Gotham, Indiana
Transmitted to:	Metropolis, New York
Wired on or about:	April 21, 1980

COUNT THREE

Defendants:	XYZ Company
	John Jones
Transmitted from:	Gotham, Indiana

Transmitted to: Metropolis, New York
Wired on or about: July 23, 1980

COUNT FOUR

Defendant: Richard Doe
Transmitted from: Littletown, Ohio
Transmitted to: Metropolis, New York
Wired on or about: April 21, 1980

The aforesaid scheme and artifice to defraud was carried out, in part, within the Southern District of Indiana within five years preceding the return of this indictment.

3. False statements, 18 U.S.C. § 1001

Another statute that has been used successfully as a companion criminal count to a Sherman Act indictment is 18 U.S.C. § 1001, False Statements.(37) Proof of five elements is essential to sustain a conviction under this statute: (1) a statement, (2) falsity, (3) materiality, (4) specific intent and (5) agency jurisdiction.(38) A violation requires proof that the defendant had the specific intent to make a false or fraudulent statement.(39) This requires that the statement be made knowingly or willfully. This element must, of course, be alleged in the indictment.

In a case involving the Oklahoma Department of Transportation, the indictment charged a Sherman Act violation in count 1. In the definitions section, federal aid highway was defined. In the trade and commerce paragraph, the role of the Federal Aid Highway Act, the bidding process of the Oklahoma Department of Transportation, the non-collusion affidavit required by the Oklahoma Department of Transportation and the federal highway administration and the Oklahoma statute requiring competition on public contracts were all set forth. In the false statement count of the indictment, these paragraphs were realleged. The charging portion of the false statement count then continued:

On or about October 26, 1979, in the Western District of Oklahoma, (company) and (Defendant), defendants herein, willfully and knowingly made and caused to be made a false, fictitious and fraudulent statement as to material facts in a matter within the jurisdiction of the United States Department of Transportation, Federal Highway Administration, an agency of the United States, in an affidavit submitted to the Oklahoma Department

of Transportation as part of (company)'s bid proposal on Federal-Air Project F-91(15) in which the defendants stated and represented that:

John Doe, of lawful age, being first duly sworn, on oath says, that (s)he is the agent authorized by the bidder to submit the attached bid. Affiant further states that the bidder has not been a part of any collusion among bidders in restraint of freedom of competition by agreement to bid at a fixed price or to refrain from bidding; or with any state official or employee as to quantity, quality or price in the prospective contract, or any other terms of said prospective contract; or in any discussions between bidders and any state official concerning exchange of money or other thing of value for special consideration in the letting of a contract.

when in truth and in fact, as the defendants then knew, (defendant) and (company) had participated in collusion in connection with the bid proposal for the aforesaid Federal-Aid highway construction project, let by the State of Oklahoma on October 26, 1979, in violation of Title 18, United States Code, Section 1001.

4. False, fictitious or fraudulent claims against the government, 18 U.S.C. § 287

Section 287 is very similar in form and content to § 1001, discussed above. Section 1001 involves falsification of any matter within the jurisdiction of a department or agency of the United States but does not require the presentation of a false claim against the United States or the presentation of fraudulent forms or documents in aid of making such claims. Section 287 does involve the presentation of false claims against the United States. In most respects, § 287's purpose is similar to and can be construed in the same manner as § 1001. However, in contrast to § 1001, § 287 requires proof of two additional elements: (1) a claim on the United States for money or property; (2) a presentation of a claim.(40)

Under § 287, it is a violation if defendants directly present a false claim or "cause" a false claim to be presented. A violation can be found whenever a person submits a false or fraudulent claim to an individual, municipality, or state government knowing that funds for the goods or services involved come, at least in part, from the Federal Government.

Section 287 is applicable whenever antitrust violations cause an increase in the cost to the United States of goods or services, whether the goods or services are purchased directly or indirectly, in whole or in part,and where defendant submits false or fraudulent claims knowing that part of the funds they will be receiving come from the United States.(41)

5. Conspiracy to defraud the Government with respect to claims, 18 U.S.C. § 286

Section 286 is a specific conspiracy statute designed to make conspiring to commit acts which violate § 287 illegal. As with § 287, § 286 requires a scheme to present a false

claim to the United States for money or property. The difference, of course, is that § 286 does not require the actual presentation of the claim, merely the formation of the scheme.[42] Though not widely used, the advantage to § 286 is that it carries a ten-year prison sentence, twice that of a § 287, § 1001 or mail or wire fraud conviction.

6. Conspiracy to commit offense or to defraud United States, 18 U.S.C. § 371

Section 371 is the general conspiracy statute of the criminal code. This section covers two different conspiracies: (1) conspiracy to commit any offense against the United States and (2) conspiracy to defraud the United States. Because the Sherman Act itself requires concerted action on the part of the defendants, it is not possible on double jeopardy grounds to charge a conspiracy to commit a conspiracy. It is proper, however, to charge the general § 371 violation in connection with violation of other statutes, such as mail fraud and false statements.

The second clause of § 371, conspiracy to defraud the United States, is an independent crime in and of itself not involving the violation of another substantive offense. As such, it is very broad in scope. Fraud as used in § 371 encompasses not only conspiracies that might involve loss of Government funds but also "any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government."[43] In the antitrust context, § 371 could be used in those cases where federal contracts are inflated due to bid-rigging or other antitrust violations. It might also be used in cases where use of the "interstate commerce" element of a Sherman Act violation is problematic. Since § 371 does not require pecuniary loss to the United States, § 371 could be charged whenever antitrust activity results in the impairment or obstruction of any Government agency's function.[44]

7. Major Frauds Act, 18 U.S.C. § 1031

The Major Frauds Act, 18 U.S.C. § 1031, enacted in 1988, provides in pertinent part that:

> (a) Whoever knowingly executes, or attempts to execute any scheme or artifice with the intent --
>
> (1) to defraud the United States; or
>
> (2) to obtain money or property by means of false or fraudulent pretenses, representations, or premises, in any procurement of property or services as a prime contract or with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more shall . . . be fined not more than

$1,000,000, or imprisoned not more than 10 years or both.

18 U.S.C. § 1031 applies to Sherman Act procurement conspiracies where the United States is a party to the procurement contract and the value of the contract is $1,000,000 or more. It applies to both executed and attempted frauds. Pleading of a § 1031 count is similar to that for the second clause of a § 371 count with the added requirement that an allegation be made that the United States was a party to a contract involving $1,000,000 or more.

8. False declarations and perjury

There are two principal federal perjury statutes, 18 U.S.C. § 1621 and § 1623. The elements of both statutes are substantially the same.(45)

Since virtually all perjury prosecutions brought by the Division will occur in a court proceeding or before the grand jury, only the elements of 18 U.S.C. § 1623 will be described. There are five such elements that should be addressed in an indictment:

1. the testimony was given under oath;
2. the testimony was given in a proceeding before or ancillary to a court or grand jury;
3. the testimony was false in one or more of the respects charged in the indictment;
4. the false testimony was knowingly given; and
5. the false testimony was material.(46)

The identity of the oath giver and proof that such person was competent or authorized to administer the oath are not essential elements of § 1623 and need not be included in the indictment. Instead, § 1623 merely requires the prosecution to prove that the defendant was under oath at the time the false statement was made.(47)

The third element of the offense is established through extrinsic proof that the testimony given by the accused was false in one or more of the respects charged, and is subject to the same standard of proof, beyond a reasonable doubt, that applies in any criminal case.(48) In a false statement count that avers several allegedly false statements in the same count, proof of any one of the specifications is sufficient to support a guilty verdict.(49) Generally, the Division's practice is to have a separate count for each separate fraudulent statement. However, related statements that are in essence the same answer to a rephrased question should be contained in the same count.

The fifth element, materiality of the false declaration, is a legal question for the court's determination.(50) Materiality has been defined broadly to include anything "capable of influencing the tribunal on the issue before it."(51) Before drafting the indictment, consult

the law of the circuit for the jurisdiction you will be in for cases defining materiality.

It is not a defect to omit a specific allegation in the indictment that defendant did in fact recall something to which he falsely responded he did not recall[52] as long as the court instructs the jury that in order to convict, it must find that defendant did in fact recall one or more of the matters in question. Nonetheless, the better practice is to include language in the charging paragraph that defendant did in fact recall the matter or matters to which he responded he didn't recall.[53]

9. Obstruction of justice, 18 U.S.C. § 1503

An obstruction of justice charge is appropriate when prosecutors believe that there has been interference with the grand jury's investigative process.[54] The bases for such a charge stem most commonly from destruction or alteration of documents that were called for in a grand jury subpoena, or that were material to the investigation, or from an attempt to influence someone's grand jury testimony.[55] Such charges are usually prosecuted under the broader parameters of the omnibus clause of 18 U.S.C. § 1503.[56]

In charging that the defendant "endeavors" to influence, obstruct or impede, success by the defendant is not necessary.[57] As the Fifth Circuit noted in United States v. Howard, 569 F.2d 1331, 1337 (5th Cir.), cert. denied, 439 U.S. 834 (1978): "Section 1503 is a contempt statute . . . and as such is directed at disruptions of orderly procedure. Thus, it is wholly irrelevant whether defendants' actions had no ultimate effect on the outcome of the grand jury investigation: the question is whether they disturbed the procedure of the investigation."[58]

Several courts of appeal have addressed the issue of whether perjured testimony can form the basis of an obstruction of justice prosecution. While the courts have held that "mere perjury" does not amount to obstruction, the great weight of authority holds that the giving of false testimony can amount to obstruction of justice when the testimony has impeded the administration of justice.[59] For example, the Fourth Circuit in United States v. Caron, 551 F. Supp. 662 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984), upheld (without an opinion) a false testimony-based § 1503 indictment and a concurrent indictment for perjury under § 1623 which had as its basis the same false testimony.

Because of the similarity in the evidence required to prove violations of §§ 1623 and 1503, staffs can expect that a defendant may make a multiplicity motion and argue that false statements and obstruction of justice merge into the same offense on the facts of the case. However, two courts of appeal have rejected the argument that concurrent convictions under §§ 1503 and 1623 constitute double jeopardy on the grounds that the statutory elements of each offense are "clearly distinct" and thus each statute requires proof that the other does not.[60]

In addition to prohibiting the intimidation of and retaliation against grand and petit jurors and judicial officers, 18 U.S.C. § 1503 contains a catch-all, or omnibus clause

prohibiting corrupt "endeavors to influence, obstruct or impede, the due administration of justice." In an omnibus clause prosecution, the Government must prove:

1. there was a pending judicial proceeding;
2. the defendant knew that there was a pending judicial proceeding;
3. the defendant endeavored to influence, obstruct or impede the due administration of justice; and
4. the defendant's acts were done knowingly and corruptly.(61)

Each of these elements must be addressed in the indictment.

10. RICO

The elements of a RICO violation are: (1) the existence of an enterprise; (2) that the enterprise affected interstate commerce; (3) that defendant was employed by or associated with the enterprise; (4) that defendant participated, either directly or indirectly, in the conduct of the affairs of the enterprise; and (5) that defendant participated through a pattern of racketeering activity; i.e., through commission of at least two racketeering acts.(62)

The crux of a RICO offense is that the defendant participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity. Proof of such participation requires a showing that the defendant committed at least two predicate acts of "racketeering activity" as defined in 18 U.S.C. § 1961(1). In addition, a showing must be made that the acts of racketeering were related to the conduct of the affairs of the enterprise and to the defendant's position within the enterprise.(63) Proof that the enterprise benefited from such conduct is not required.(64) The predicate acts of racketeering which may be charged include mail fraud, which appears specifically as a predicate offense under 18 U.S.C. § 1961(1). Sherman Act violations are not predicate acts, but mail fraud or other Title 18 offenses that are committed along with Sherman Act violations are predicate acts.(65) The Division must obtain prior approval from the Criminal Division before seeking the return of an indictment that includes a RICO charge.(66)

11. Sherman Act Misdemeanor

Section 14 of the Clayton Act, 15 U.S.C. § 24, prescribes misdemeanor penalties for corporate officers participating in antitrust violations. Since 1974 when violations of the Sherman Act became felonies, this misdemeanor charge has never been used, and it continues to be the Division's policy that all antitrust violations shall be prosecuted as felonies.

12. Bribery

Occasionally, grand jury investigations will yield evidence of non-antitrust violations, such as commercial bribery. In United States v. Ross, 86-80323 (E.D. Mich.), a former purchasing agent for General Motors was charged with mail fraud stemming from a bribery/payoff scheme which was uncovered during the course of an investigation into bid-rigging by electrical contractors. Because the bribe involved the payment of money by a contractor to the purchasing agent, the agent was charged with having engaged in a scheme and artifice to deprive General Motors of money, its right to the loyal services of the agent and of its right to a bid process free from dishonesty. The Division will prosecute such a case that is discovered during a grand jury investigation even if there is no connection to an antitrust violation.

The Travel Act, 18 U.S.C. § 1952, has also successfully been used to prosecute commercial bribery in the jurisdictions which have defined "bribery" as used in the Act to include instances of commercial bribery.(67)

C. Defendant Selection

Defendant selection is an area where prosecutorial discretion will most require careful consideration. The Principles of Federal Prosecution state that, ordinarily, the attorney for the Government should initiate or recommend federal prosecution if the attorney believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Thus, under the Principles, the standard is one of "probable conviction."

Internally, it is the Division's policy to prosecute corporations that have engaged in criminal activity and also their officers and agents when the evidence so warrants. Because a corporation cannot be sentenced to jail, prosecution of individuals who commit the illegal acts is one of the most potent deterrents to antitrust violations. The case law on corporate liability for the illegal acts of its agents in the antitrust context has uniformly been favorable.(68)

One of the most important considerations in defendant selection will be the impact a prosecutor's decision will have on the outcome at trial. Unless the evidence is quite strong, inclusion of marginal or "fringe" defendants will not help with conviction before a jury. The lack of factual strength as to marginal defendants will often weaken the overall strength of the case against other defendants. In addition, it must be remembered that for every defendant added to an indictment, the trial judge will accord that many more jury selection strikes, each Government witness will face additional cross-examination, and the jury will hear that many more opening statements and closing arguments in favor of the defense.

Division attorneys must strive to apply a consistent standard that will result in fairness and even-handed treatment for all potential defendants. The prosecutor must be guided by the Principles of Federal Prosecution and see to it that cases are brought when warranted and that appropriately culpable defendants are included within the prosecution.

D. Drafting Pitfalls

1. Intent

In bid-rigging and price-fixing indictments, words such as "intentionally" should not appear because the criminal intent required to violate the Sherman Act is defined as general intent, not specific intent. That is, in a per se case, the prosecution may establish the requisite criminal intent by demonstrating that the defendants knowingly joined or participated in a conspiracy to engage in the prohibited activity.(69) The prosecution does not need to prove that a defendant had a specific intent to restrain trade.(70) Accordingly, proof that the defendant knowingly joined or participated in a conspiracy to fix prices sufficiently establishes defendant's "conscious purpose" to restrain trade.(71) No additional evidence of intent is required.

In indictments charging non-Sherman Act offenses, you should track the language of the statute involved in the charging paragraphs. What you must be aware of is case law concerning intent that is engrafted onto certain statutory charges that must be reflected in the indictment. For instance, the statutory elements of obstruction of justice, 18 U.S.C. § 1503, require only that the defendant endeavored to influence, obstruct or impede the due administration of justice. However, when the obstruction of justice charge is based on defendant's perjury, the Government must allege that defendant "did influence, obstruct and impede" justice as well as "endeavored to influence, obstruct and impede" justice.(72)

2. Vagueness

An indictment is legally sufficient if it sets forth the elements of the offense, informs the defendant of the nature of the charges against him, apprises the defendant of what he must be prepared to meet at trial and protects the defendant against double jeopardy.(73) A valid antitrust indictment need not list specific transactions nor name all co-conspirators.(74) Nonetheless, a standard defense practice has been to file motions to dismiss based upon lack of specificity in indictments charging an antitrust offense. Courts have routinely denied such motions as long as the indictment carefully followed the language of the Sherman Act.(75) Specifically, motions to dismiss because an indictment fails to allege an overt act fail because no overt acts need be alleged or proved in Sherman Act cases.(76)

3. Surplusage

Surplusage refers to language in an indictment that is unnecessary to its meaning, and does not affect its validity. Language in an indictment that is neither material nor relevant to the charges contained in the indictment may be deemed to be surplusage.(77)

In drafting indictments, attorneys should try to avoid surplusage. The trial court has discretion to strike language from an indictment because it is surplusage. A court should do so only if the language is irrelevant, inflammatory and prejudicial.(78)

E. Statute of Limitations

A properly pled charge must contain an allegation that the offense charged was formed or carried out, at least in part, within the jurisdiction of the federal district court where the indictment is filed and within the period of limitations for the offense involved. A typical jurisdiction and venue paragraph reads: "The conspiracy charged in this indictment was carried out, in part, within the _____ District of _____ within the five years preceding the return of this indictment."

Bid-rigging and price-fixing conspiracies prohibited by the Sherman Act are subject to a five-year statute of limitations.(79) Such conspiracies begin when the parties agree to rig bids or fix prices.(80) In prosecutions under the Sherman Act and other conspiracy statutes that do not require proof of an overt act,(81) the statute of limitations begins to run only when the conspiracy terminates, either because the offense has been abandoned or it has been completed.(82)

A bid-rigging conspiracy continues, and the statute of limitations does not start to run, until each conspirator receives the benefits contemplated by the conspiracy. These benefits have included payoffs among the conspirators as well as payments by the owner to the conspirator who performs the rigged contract.(83) When relying on a payoff or payments theory for statute of limitations purposes, the indictment should reference the date the payment occurred in the "offense charged" paragraph as follows: "On or about _____ and continuing thereafter until at least (date of final payment)." Also, it should be alleged that receipt of payment under the contract was one of the conspiracy objectives. The following is an example: "For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore charged, they combined and conspired to do, including among other things: (d) having defendant _____ perform the electrical construction portion of the _____ project and receive payments from _____ for said performance."

F. Charging Single or Multiple Conspiracies

1. Single vs. multiple conspiracies

When drafting an indictment, the allegations must mirror what the evidence demonstrates -- if more than one conspiracy was involved, a defendant may properly be charged with more than one violation.(84) If, on the other hand, the evidence supports one overall conspiracy with several subparts, it is entirely appropriate to charge a single conspiracy.(85) It is likely that no matter which path you choose, you will be challenged by defense counsel for having chosen the wrong path.

Whether to charge the defendants' conduct as a single conspiracy or as multiple conspiracies may be difficult to evaluate, primarily because it is a mixed question of law and fact. In general, the final charging decision rests on an analysis of the facts; as the facts change, so may conclusions differ.(86) Thus, making the correct charging decision

often consists of attempting to fit the facts of the instant case within the facts of a previously-decided case, preferably within the same circuit. Nevertheless, this section gives an overview of the legal aspect of the single vs. multiple conspiracies issue. The consequences of making the wrong charging decision are dealt with in the next section, which covers variance and double jeopardy. However, the law on determining whether certain conduct forms the basis for a single vs. multiple conspiracies charge and the law on variance and double jeopardy are so bound together that this section and the next are best considered as a unit.

There is a consensus as to what constitutes a conspiracy, what is required to establish a conspiracy, and how to connect a particular defendant to a given conspiracy. "Agreement is the primary element of a conspiracy."(87) and ". . . the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects."(88) Consequently, distinct agreements constitute distinct violations of the law and may be the subject of distinct prosecutions. Regardless of whether the Government proves those agreements by direct evidence of written agreements, by statements made by the parties, or by inference from the actions of the defendants, the conduct prosecuted in a conspiracy case is the agreement and not any particular action taken by the defendants.

To establish the existence of a conspiracy and connect a defendant to it, three elements must be proved:(89) (1) knowledge of the object of the conspiracy, (2) knowledge of the composition of the conspiracy, and (3) intent to join the conspiracy. "The agreement may be shown if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose."(90) While the Government is required to prove that the defendant knows the essential nature of the conspiracy, it is not required to prove that he knows all of the conspirators or all of the details of the conspiracy, or even all of the means by which the objects of the conspiracy will be accomplished.(91)

Given the necessarily covert nature of a criminal conspiracy, none of these elements is likely to be provable by direct evidence. Thus, proof of an illegal agreement often depends on inferences drawn from circumstantial evidence.(92) "Often [such] crimes are a matter of inference deduced from the acts of the persons accused and done in pursuance of a criminal purpose."(93) Indeed, it is not even necessary to prove a formal agreement existed to prove a conspiracy. The Supreme Court has long held that an agreement could be based on a tacit understanding, created by a long course of conduct. "Not the form or manner in which the understanding is made, but the fact of its existence . . . [is] the crucial matter[ ]. The proof, by the very nature of the crime, must be circumstantial and therefore inferential. . . ."(94)

It is the need to prove conspiracies by inference that makes determining the existence of single vs. multiple conspiracies so difficult. The scope of an agreement must be deduced from the conduct that can be proved. Courts are continually struggling to find some means to analyze the facts in conspiracy cases that will lead to an objective, rather than

totally subjective, determination of the scope of conspiracies. In part, the inferences that courts have been willing to draw depend upon the structure of the conspiracy, what has sometimes been called the "nature of the enterprise."

The starting point of any discussion of the scope of a conspiracy where only one conspiracy statute is involved,[(95)] as would be the case in the overwhelming majority of Antitrust Division prosecutions, is Braverman v. United States, 317 U.S. 49 (1942). In Braverman, the Government indicted certain defendants on seven separate conspiracy counts, each to violate a separate substantive section of the Internal Revenue Code. All of the counts were brought under the general criminal conspiracy provision of the criminal code, what today would be 18 U.S.C. § 371. It was proved at trial that there was a single continuing agreement among the defendants that had as its objectives the violation of the several substantive revenue laws, and the issue to be resolved was whether each object could be punished as a separate conspiracy under the general conspiracy law. The Court held that they could not:

> [T]he precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.[(96)]

Braverman stands for the proposition that the scope of a conspiracy is determined by what the parties agreed to do rather than by how many overt acts were involved or what the objects of the agreement might have been. However, while Braverman squarely focuses the single vs. multiple conspiracies issue on the scope of the agreement, it does little to illuminate the question of how to determine that scope.

Historically, most conspiracies were classified as either "chain" conspiracies or "wheel" conspiracies. Although it is important to understand the basics of chain and wheel conspiracies, antitrust conspiracies often do not conveniently fit either model and must be independently analyzed to determine the scope of the conspiracy.

"Chain" conspiracies are basically those where various people are engaged at different levels of an enterprise involving the same subject matter, the paradigm being a conspiracy to import and distribute narcotics. There is a chain of individual agreements between growers, manufacturers, exporters, importers, distributors, and "retailers" in a typical narcotics conspiracy, but the courts have chosen to ignore the individual agreements and consider all those involved in the overall scheme to have agreed together to a single conspiracy.

> An individual associating himself with a 'chain' conspiracy knows that it has a 'scope' and that for its success it requires an organization wider than may be disclosed by his personal participation. Merely because the Government

> in this case did not show that each defendant knew each and every conspirator and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operated on only one level.(97)

So long as a defendant knows that he is part of a "chain" conspiracy that depends for its success on more than his own agreement, he will be considered a party to all that is necessary for the broader conspiracy's success. He does not have to know the exact scope or composition of the conspiracy.(98)

Unlike the "chain" conspiracy, where people are performing various tasks at different levels to accomplish what amounts to one illegal purpose, "wheel" conspiracies consist of a central person or persons (the "hub") performing basically the same illegal acts with separate other groups (the "spokes") who are not otherwise engaged in unlawful conduct. The issue is whether the hub is engaged in separate conspiracies with each spoke or whether the hub and all of the spokes are engaged in a single conspiracy.

In Kotteakos v. United States, 328 U.S. 750 (1946), one man assisted various other persons to file fraudulent applications for Federal Housing Administration loans. There was no evidence that any of the spokes knew that the others existed, nor did any spoke profit in any way from the loans granted to another. This total lack of interdependence and knowledge easily convinced the Court that there was no single conspiracy.

The Court reached the opposite conclusion in Blumenthal v. United States, 332 U.S. 539 (1947). The crime involved was selling wholesale liquor at a higher price than the law allowed. Two wholesale dealers working together obtained the liquor. Three middlemen, each working independent of the others, sold the liquor to various retailers. When the liquor was delivered, the middlemen collected the cash from the retailers and paid the cash to the wholesalers.

The Government charged that all five men were involved in a single conspiracy. At trial, the wholesalers alleged that they were not the brains behind the scheme, that another man actually owned the wholesale liquor, and that they merely received a commission for selling what they did. None of the middlemen had known this; they all believed that the wholesalers owned the liquor they were selling. It was also proved that each middleman, though working independently, knew in a general sense that more middlemen existed and that more liquor was being sold illegally by the wholesalers than each individual was selling.

The Court found a single conspiracy. It was sufficient to show that each conspirator knew the essential nature of the scheme that he was joining without a need to prove that he knew the exact details of the plan or of the participation of others. Knowledge of the general outline of the overall scheme and knowing participation in that scheme were sufficient where each defendant's actions were in furtherance of the same goal, even though the middlemen were indifferent to the success of any but their individual part of the

scheme. In this sense, the reasoning is similar to "chain" conspiracy reasoning where knowledge of a broader scheme plus participation is enough to make a defendant a party to the overall conspiracy, even though he is only concerned with his individual part, where success of the overall goal is dependent on the success of each of the parts.

Perhaps the best known example of an antitrust case that fits the model of a wheel conspiracy is Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). In Interstate Circuit, the manager of a group of motion picture exhibitors sent copies of a letter to eight motion picture distributors, each letter naming all of the distributors as addressees, setting forth certain demands (largely restrictions on later-run exhibitors) that would have to be met before Interstate would continue to show the distributors' films in its theaters. Subsequently, all eight distributors substantially complied with Interstate's demands. The Government charged the distributors with conspiring among themselves to impose the restrictions on later-run exhibitors, and the district court agreed. On appeal, the Supreme Court affirmed.

While the Court found sufficient evidence in the record to support a finding of overt agreement among the distributors, it held that an overt agreement was not essential to prove an unlawful conspiracy in that case.

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish unlawful conspiracy under the Sherman Act.(99)

Thus, the Court found that knowledge of the general contours of a conspiracy, acting with intent to further the goals of the conspiracy, and actual interdependence between the members in the success of the overall scheme would suffice to prove the existence of an agreement regardless of lack of perceived interdependence or explicit agreement among the spokes of the wheel.

In addition to obvious "chain" and "wheel" conspiracies, there are some agreements that have characteristics of both "wheel" and "chain" conspiracies and some that really look like neither, and the federal courts have long recognized this. Indeed, more recent conspiracy cases in the federal courts have generally abandoned the older "wheel" and "chain" type of analysis.(100) Nevertheless, much of the law on single vs. multiple conspiracies was developed using the "wheel" and "chain" analyses, and the principles involved in those analyses are useful in analyzing all types of conspiracies.

Recent cases have used a "totality of the circumstances" test to resolve the single/multiple conspiracy question.(101) This test requires the consideration of all of the available evidence to determine whether there is one conspiracy or several. While nothing is beyond the bounds of consideration under a "totality of the circumstances" test, those courts that have adopted this test have developed checklists of the most important factors

to consider before reaching a decision. Such factors include: (1) the number of alleged overt acts in common, (2) the overlap in personnel, (3) the time period during which the alleged acts took place, (4) the similarity in methods of operation, (5) the locations in which the alleged acts took place, (6) the extent to which the purported conspiracies share a common objective, and (7) the degree of interdependence needed for the overall operation to succeed.(102) The weight to be accorded each of these factors varies from court to court and case to case, and it is entirely possible for two different people to analyze the same fact situation using this list and, depending on the weight they assign to the different factors, reach contradictory conclusions. Nevertheless, this is the test that courts are adopting in considering whether a given course of conduct is one or several conspiracies.

The "totality of the circumstances "test is particularly useful in most Division prosecutions because the fact patterns do not fit comfortably into either the "wheel" or "chain" conspiracy model. There is no central core of conspirators as in a "wheel" conspiracy, nor are various groups of conspirators working for the same objective at different levels as in a "chain" conspiracy. These conspiracies, perhaps typified by the Division's road-building cases, involve diffuse agreements spread out over time, territory, and personnel. They may involve conduct occurring in several states or regions, there may appear to be both national and local aspects to the violations, and there may be various degrees of overlap in personnel. Although such complicated fact patterns make the determination of single vs. multiple conspiracies difficult, the basic questions that must be answered remain the same: Were the defendants generally aware of the objectives and composition of the larger conspiracy, and was the success of the various parts of the conspiracy necessary to the success of the whole and vice versa? Mere knowledge of a broad conspiracy is not enough. But knowledge and a stake in the success of the broad conspiracy may be enough to be considered a part of the broad conspiracy. And, once the outer boundaries of an agreement have been determined, that becomes the conspiracy that must be charged; it may not be broken down into numerous lesser conspiracies because it embraced numerous lesser objectives.(103)

A case brought by the Division that has had a significant impact in this area is United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978), a part of the Division's folding carton litigation. The Government proved a longstanding industry practice whereby folding carton manufacturers could clear bids on new contracts in advance and get authorization to raise prices to existing customers. Consolidated made use of this system on a number of occasions, and the Government alleged that Consolidated was a member of a nationwide conspiracy. Consolidated claimed on appeal that the Government had either not proved a single nationwide conspiracy or, if it had, had failed to prove that Consolidated had joined.

The court found that a single conspiracy was shown by the evidence and, in effect, that this had been admitted by 70 other defendants. Thus, the opinion deals primarily with the issue of whether Consolidated had joined the conspiracy. The court's reasoning on the issue of single vs. multiple conspiracies is as follows:

> This illegitimate business practice appears to have flourished among so many of the conspirators for so long that it could reasonably be considered the customary way of doing business. All the facts and circumstances fully justify the view that a custom-made conspiratorial understanding had been developed and fashioned in a size and style most suited to their particular needs. Whenever the needs of any conspirator might require it, the conspirator had only to plug into the system, get 'on the phone,' and make the necessary arrangements. This system which developed and remained viable among them to be available for use by any conspirator was a pervasive aspect of the conspiracy. The many minor individual or particular conspiracies which the system fostered and spawned were evidence of the effectiveness of the general conspiracy. The conspiracy was in the nature of an industry utility, operated totally for the benefit of its shareholders, the carton producing conspirators, and to the detriment of its customers and the public.
>
> . . .
>
> Because of the nature of this conspiracy, it could not reasonably be expected that any one conspirator would have full knowledge. Consolidated did not need full knowledge to participate in the benefits of the conspiracy and therefore proof that Consolidated had some knowledge that activities of the same type as practiced by them for the same mutual purposes must have been widespread in the industry. We believe it may reasonably be inferred from the evidence that the overall design, purpose and functioning of the conspiracy were within the reasonable contemplation of Consolidated when it engaged in the episodes. Consolidated endeavored to abide by and assist in the enforcement of the rules of the conspiracy. By its behavior, Consolidated demonstrated it knew enough about the conspiracy to use it to serve its own purposes when needed. There is more than suspicion; there was interested cooperation with a stake in the venture.

The Consolidated court found that while, subjectively, each conspirator was only interested in its own particular bid, there was such an established, interconnected bid-rigging system that, objectively, each bid was facilitated by the overall agreement and the overall agreement was strengthened by each rigged bid that made use of it. Thus, the court found a single agreement.

The court also stated that it would have been permissible for the Government to charge numerous separate conspiracies rather than the overall conspiracy actually charged. If there was a single nationwide agreement, Braverman holds that it is improper to charge individual objectives of that single agreement as separate conspiracies. However, the Government is not obligated to charge the fullest extent of a given conspiracy. It is free to charge different defendants with being parties to different aspects of a larger conspiracy so long as each defendant is charged with only one violation.

The broad language of Consolidated Packaging must be interpreted in light of the specific

facts of that case to avoid confusing a passive understanding that certain illegal conduct is an acceptable way of business with an actual conspiratorial agreement. For example, a bank robber might have a passive understanding that several of his friends would be willing and able, if asked, to drive the getaway car, and that other friends would be willing and able, if asked, to crack the safe the next time he robs a bank. That understanding does not amount to a conspiracy between the bank robber and his friends. If the bank robber calls on two of his friends (one driver and one safecracker) to help him rob Bank A and later calls on the same or different friends to help him rob bank B, the Government may prosecute both conspiracies separately, as long as both arrangements were negotiated "from scratch."(104)

The key issue in this area is whether the bid-rigging conspiracy is limited to the individual rounds of bidding on each new contract. If individual negotiations concerning quid pro quos must be engaged in by the persons interested in each award to determine whether an agreement can be reached with respect to rigging that particular bid, and if the award will be bid competitively if those negotiations fail, then each separately negotiated agreement is best viewed as a separate conspiracy and not as part of some overreaching, on-going bid-rigging conspiracy.(105)

A rather thorough examination of separate indictments brought by the Antitrust Division as part of its road-building investigation, using the "totality of the circumstances" test to determine whether they involved the same conspiracy, can be found in United States v. Ashland-Warren, Inc., 537 F. Supp. 433 (M.D. Tenn. 1982). The defendant had pled guilty to rigging bids on several highway construction contracts in Virginia, and was trying to have the instant indictments -- alleging bid-rigging on several Tennessee highway construction contracts -- dismissed on double jeopardy grounds as part of the same conspiracy.

In a thoughtful analysis, the court first held that the Virginia and Tennessee conspiracies were separate as a matter of law because the firms involved in each state were not in competition with each other. The two sets of companies may have been aware of each other, and may have used the same method of rigging bids, "[b]ut price-fixing by means of bid-rigging is flatly impossible where the alleged conspirators are not also competitors."(106) The court then went on to apply the "totality of the circumstances" test to the facts -- examining such factors as overlap in personnel and time, methods of operation, degree of interdependence, etc. -- and concluded that the conspiracies were separate as a matter of fact.(107)

The Tenth Circuit reached a different conclusion in United States v. Beachner Construction Co., 729 F.2d 1278 (10th Cir. 1984), in which the court held a la Consolidated Packaging, that a pattern of bid-rigging on construction contracts in Kansas going back several decades was but a single conspiracy, with individual contract lettings separate objects of the one conspiracy. The court was undoubtedly influenced by the existence of evidence -- unusual in a road-building case -- that a statewide clearing agent had presided over bid-rigging meetings for several years. Those meetings ended many years before the return of the indictment but the court may have believed, incorrectly in

the Division's view, that a single conspiracy continued into the period covered by the indictment. Moreover, other parts of the court's opinion appear to confuse a passive understanding with an actual agreement.(108)

While the Division generally has been successful in limiting Beachner to its particular facts, attorneys can anticipate being second-guessed regardless of how an indictment is framed. If a single broad conspiracy is charged, the defendant will argue that there were multiple conspiracies. If multiple conspiracies are charged, the defendant will argue that there was only a single conspiracy. All that can be done is to keep the essentials of single vs. multiple conspiracies in mind when deciding how to charge. The key is the scope of the agreement. However, this is not agreement in a subjective, contract sense of the word, for this would often result in extremely narrow conspiracies. If the general contours of a conspiracy are known, all those that interact with any other conspirators in such a way as to further the goals of the conspiracy are parties to the conspiracy, and the sum of the interactions becomes the scope of the agreement. Where groups of people interact in such a way as to further objectively independent goals, they are not conspiring together and the individual groups may be prosecuted as multiple conspiracies. That is the law. Inferring the true state of affairs from the facts is the problem.

2. Variance and double jeopardy problems in charging conspiracies

As noted in the previous section, in a complex factual situation whether the Government charges a single conspiracy or multiple conspiracies, its decision is likely to be challenged by the defendant. This section discusses those challenges.

The issue of single vs. multiple conspiracies can be raised by a defendant in two ways: the Government charges a single conspiracy and the proof at trial reveals multiple conspiracies, or the Government charges multiple conspiracies and the proof at trial reveals a single conspiracy. The first scenario will be discussed under the rubric of variance; the second under double jeopardy.

a. Variance

When the Government alleges a single conspiracy and its evidence shows multiple conspiracies, the problem is a variance between the indictment and the Government's proof at trial. However, the Supreme Court has clearly held that the real issue is not whether there is a variance in proof but whether the variance is harmless or fatal -- the mere fact that there has been a variance is not sufficient to overturn a conviction in the absence of prejudice. The seminal case on this point is Berger v. United States, 295 U.S. 78 (1935), where the Court stated:

> The true inquiry . . . is not whether there has been a variance in proof, but whether there has been such a variance as to "affect the substantial rights" of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at

trial; and (2) that he may be protected against another prosecution for the same offense.(109)

As a practical matter, both of these conditions are met whenever the multiple conspiracies proved at trial are fully contained within the single conspiracy charged. However, while the Court's direction that a variance is fatal only when it "affects the substantial rights" of the accused remains the law, the issues to be considered in making a decision on this point have been broadened to cover more than the issues of surprise and double jeopardy specifically noted by the Court in Berger.

The most common additional issue presented by a variance is the jury's ability to keep straight the evidence presented with respect to the various defendants and the various conspiracies actually proved, i.e., the jury's ability to avoid transferring guilt among separate conspiracies. In deciding whether jury confusion has resulted from the variance, courts look at two key areas: First, if the conspiracies ultimately proved had been charged separately, could they have been joined together for trial; and second, was the jury properly instructed on the multiple conspiracies issue. If joinder would, in fact, have been proper, then the existence of a jury instruction requiring separate consideration of the conspiracies actually proved and each defendant's connection to each conspiracy "largely attenuate[s] any prejudice flowing from the establishment of a variance."(110)

In Berger, for example, the Government charged a single conspiracy involving five persons, and the proof at trial showed two conspiracies with a common figure (who was not the defendant). Although the Court did not discuss the jury instruction issue, it examined the record below and expressly found that the defendant suffered no prejudice resulting from the variance.(111)

At the opposite extreme is Kotteakos v. United States, 328 U.S. 750 (1946), a classic "wheel" conspiracy case. Thirty-two persons were indicted, 19 went to trial, and 13 had their cases considered by the jury. At least eight separate conspiracies were shown at trial. The Court found the connection between the conspiracies so slight and the risk of improper transference of guilt so high that joinder would have been improper. The Court also noted the lack of a proper jury instruction. Under these circumstances, the Court held that the variance was fatal.(112)

In between these two cases is United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972), also a "wheel" conspiracy. As in Berger, the Government charged one conspiracy but proved two at trial, each conspiracy having defendants in common. The court found that the conspiracies were sufficiently close that joinder would have been proper. Nevertheless, as a result of the lack of a proper jury instruction on guilt transference in multiple conspiracies, the court found a fatal variance.

Notwithstanding the simple logic of these cases that a variance in proof is harmless unless a defendant's substantial rights are adversely affected, a few courts of appeals have gone beyond this reasoning and held the Government to a stricter standard. For example, in United States v. Tramunti, 513 F.2d 1087, 1107 (2d Cir.), cert. denied, 423 U.S. 832

(1975), the court, in essence, held that if the Government charges a single conspiracy ABCD, and proves at trial conspiracies AB and CD but not ABCD, the defendants must be acquitted, regardless of the fact that AB and CD are both unlawful conspiracies and there is clear proof that a given defendant was a member of one or both, and regardless of whether the defendant's rights were adversely affected or the jury confused.(113) This is clearly not the law. Further, the logic of Tramunti would appear to have been overruled by United States v. Miller, 753 U.S. 19 (1985), discussed more fully below.

Another issue that courts sometimes note in dealing with the question of harmless vs. fatal variance is whether the variance may have deprived the defendant of his right to be tried only on indictment by a grand jury. This issue may arise where the Government has proved, not the entire conspiracy charged in the indictment, but what might be considered a "lesser included" conspiracy. For example, the Government charges conspiracy ABC and only proves conspiracy AB. In addition to the standard issues of surprise, double jeopardy, and juror confusion, some courts have also asked whether a grand jury would have indicted solely on AB.

This issue was confronted in United States v. Miller, 471 U.S. 130 (1985), wherein the Supreme Court unanimously held that the 5th Amendment's grand jury clause only prohibits convicting a defendant of an offense that is either not charged or that is broader than any offense charged in the indictment. With respect to convicting a defendant of an offense narrower than, but completely encompassed by, the offenses charged in the indictment, the Court stated:

> The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways. As long as the crime and the elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime. Indeed, a number of longstanding doctrines of criminal procedure are premised on the notion that each offense whose elements are fully set out in an indictment can independently sustain a conviction.(114)

Thus, Miller firmly lays to rest any question of the propriety of a conviction where the Government charges conspiracy ABC and proves AB, or charges conspiracies AB and CD and proves AB. Accordingly, attorneys should strongly resist any jury instruction that suggests that the Government must prove every offense charged in the indictment or each means charged for committing a given offense to win a conviction.

Unfortunately, clearing away the confusion created by cases decided before Miller on the issue of a defendant's grand jury rights does not automatically help in overcoming a Tramunti-type charge. Defendants will no doubt continue to raise Tramunti in those instances where the Government charges conspiracy ABCD and proves conspiracies AB and CD. Although Miller did not specifically address this issue, it does reaffirm the Berger and Kotteakos reasoning that it is not the existence of a variance, but whether the

variance actually prejudiced the fairness of the defendant's trial, that is the relevant consideration.(115) It is incorrect to instruct a jury that it must always acquit where the Government charges a single conspiracy and proof at trial establishes multiple conspiracies (unless one of the conspiracies proved is the overall conspiracy); this makes the very fact of a variance in proof fatal. Where the multiple conspiracies proved are fully contained within the overall conspiracy charged, longstanding Supreme Court precedent holds that whether such a variance is fatal turns on the complexity of the case (i.e., the appropriateness of joinder) and the presence or absence of proper jury instructions.

In general, the judge should be requested to charge that defendants should be convicted if the jury finds them a party to any unlawful conspiracy or conspiracies within the bounds of the indictment, with proper limiting instructions given as to transference of guilt. If a court instructs the jury that notwithstanding the Government's charging conspiracy ABCD, defendants can be convicted if they are found to have engaged in illegal conspiracy AB or CD or ABC, the court should make clear that the jury must unanimously find a defendant guilty of being a party to the same conspiracy to convict, i.e., it is not sufficient that six jurors find defendant X a party to conspiracy AB while the other six find him a party to conspiracy CD. While this seems an obvious point, several courts have mentioned it in reviewing jury instructions.(116)

b. Double jeopardy

When the Government charges multiple conspiracies -- whether in the same, simultaneous, or wholly distinct indictments -- but proves only one, double jeopardy issues are raised. The Double Jeopardy Clause(117) prohibits the imposition of multiple punishments for the same offense, prosecution for the same offense after acquittal, and prosecution for the same offense after conviction.(118)

In determining whether a single act can be punished under two different statutes, the Supreme Court, in Blockburger v. United States, 284 U.S. 299, 304 (1932), has stated that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Thus, a single act may violate two statutes, and as long as each statute requires proof of an additional fact that the other does not, an acquittal or conviction under one does not exempt a defendant from prosecution and punishment under the other, "notwithstanding a substantial overlap in the proof offered to establish the crimes."(119) In Brown v. Ohio, 432 U.S. 161, 166 (1977), the Supreme Court stated that the Blockburger holding was the ". . . established test for determining whether two offenses are sufficiently distinguishable to permit the imposition of multiple punishments. . . ."

Over time, the Blockburger test came to be reformulated by lower courts to focus more on allegations in indictments and proofs at trial, and less on the elements of crimes set down in statutes. As reformulated, the test became known as the "same evidence" test.(120) In fact, the Blockburger test as formulated by the Supreme Court is not particularly useful in conspiracy cases. While the Blockburger test can determine whether a defendant can be separately prosecuted under the double jeopardy clause for a single

act that violates more than one statute,[121] it is of little help in determining whether a course of conduct can constitutionally be treated as multiple violations of the same statute. Thus, the Blockburger test is not helpful in resolving the double jeopardy issue that arises when a defendant who has already been prosecuted for a Sherman Act conspiracy is prosecuted for another Sherman Act conspiracy. Such cases raise a "unit of prosecution" issue; i.e., they raise the question of whether a particular course of conduct constitutes discrete violations of the same statute that appropriately are characterized as separate offenses for purposes of double jeopardy analysis.

In any event, to refer to the Blockburger test as a "same evidence test" is a misnomer. The Blockburger test has nothing to do with the evidence presented at trial. It is concerned solely with the statutory elements of the offenses charged.[122] Thus, the better approach to the double jeopardy problems that arise in conspiracy cases is to apply a totality of the circumstances test.[123] As already noted in the preceding section, most courts have adopted a "totality of the circumstances" test to distinguish one conspiracy from another where the same statutory violation is charged.[124]

Grady v. Corbin, U.S. (1990) is a recent double jeopardy case that could potentially affect successive conspiracy prosecutions. In Grady, the defendant pled guilty to two traffic violation missdemeanors. He was later indicted for several more serious felonies relating to a death that had resulted from the traffic violations. The Supreme Court affirmed the lower court's dismissal of the indictment on double jeopardy grounds. The Court held:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. . . . . The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove the conduct.[125]

The lower courts have just begun to apply the Grady holding to other fact patterns, including successive conspiracy prosecutions.[126] Consequently, how the holding in Grady will affect our prosecutions has yet to be clearly determined.

The law on double jeopardy in the multiple conspiracies context may be summarized as follows: The Government may not try to sentence a defendant twice for the same conspiracy. Whether there are multiple conspiracies depends on the nature of the agreement or agreements involved, and in most circuits, the court will consider all aspects of the conspiracies charged by the Government to determine, as a matter of fact, the scope of the agreements. Unfortunately, there is nothing beyond common sense and reading as many conspiracy cases as possible to serve as a guide to resolving the factual inquiry at the charging stage of a grand jury investigation.

G. Duplicitous and Multiplicitous Indictments

Indictments charging two or more distinct offenses in a single count are duplicitous.(127) Such indictments may violate constitutional protections, including the defendant's right to notice of the charges against him and prevention of exposure to double jeopardy in a subsequent prosecution by obscuring the specific charges on which the jury convicted the defendant.(128) Duplicitous indictments may also prevent the jury from deciding guilt or innocence on each offense separately and lead to uncertainty as to whether the defendant's conviction was based on a unanimous jury decision.(129) A single count of an indictment alleging that the means used by the defendant to commit an offense are unknown or that the defendant committed the offenses by more than one specified means is not duplicitous.

Since the rule prohibiting duplicity is a rule of pleading, a violation is generally not fatal to the indictment.(130) The Government may correct a duplicitous indictment by electing the basis upon which it will continue.(131) A corrective instruction to the jury may also cure the violation.(132) A duplicitous indictment, however, that is found prejudicial to the defendant may be dismissed.(133) By failing to challenge a duplicitous indictment before trial, a defendant risks waiver.(134)

Indictments charging a single offense in different counts are multiplicitous.(135) Such indictments may result in multiple sentences for a single offense or otherwise prejudice the defendant.(136) Multiplicity does not exist if each count of the indictment requires proof of facts that the other counts do not require.(137) When deciding whether an indictment is multiplicitous, courts must consider whether Congress unambiguously intended to provide for the possibility of multiple convictions and punishments for the same act.(138)

Since the rule prohibiting multiplicity is a rule of pleading, the defect is not necessarily fatal to the indictment.(139) When multiplicity becomes apparent before trial, the court may order the Government to choose the count on which it will continue.(140) The court may require the Government to dismiss or consolidate multiplicitous counts when the violation becomes apparent after the trial has begun.(141) A multiplicitous indictment will not necessarily be dismissed after trial, especially if the error did not result in an increased sentence or can be remedied by vacating duplicative convictions.(142) The defendant risks waiver by failing to challenge a multiplicitous indictment before trial.(143) The court may grant relief from waiver for good cause.(144)

To avoid duplicitous or multiplicitous indictments, Division attorneys should carefully examine the charges to be contained in the indictment and the facts supporting them. Then, applying the basic principles contained in the preceding section, Division attorneys should carefully draft an indictment that accurately and adequately describes the offense to be charged in the indictment.

H. Other Enforcement Matters

1. Companion civil complaint

The Division sometimes files a companion civil injunctive case with an indictment or a damage action under Section 4A of the Clayton Act, 15 U.S.C. § 15a. These cases are generally filed against the same defendants named in an indictment or information. Because of differing standards of proof, among other considerations, occasionally defendants other than those indicted may be named in civil cases.(145) The civil complaint charges will ordinarily track the substantive charges of the indictment or information.

While prosecuting the criminal case, the prosecution will usually seek to have the companion civil cases stayed. Staying the civil cases preserves the more restrictive discovery rules of criminal prosecutions and comports with the requirements of the Speedy Trial Act of an early trial date. In Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1963), the leading decision on this point, the Fifth Circuit cautioned trial judges to be sensitive to the differences in allowable discovery in civil and criminal cases, and warned against the use of civil discovery rules to expand the more restrictive criminal rules.(146) Moreover, courts will carefully examine any attempt by Government litigators to utilize information obtained during the grand jury investigation in civil cases.(147) Sensitivity over the primary use to which grand jury material will be put favors the staying of companion civil cases until the criminal case is completed.

2. State civil/criminal actions

Because the penalties for criminal violations of the federal antitrust laws generally are more severe than state criminal penalties, most criminal prosecutions will be conducted in the first instance by the Division. State enforcement has come primarily in the form of civil cases, which also will follow federal enforcement because of the prima facie benefit that will flow from criminal conviction.

In those instances where states seek to pursue criminal investigations simultaneously with the federal criminal investigation, care must be taken to ensure that any immunity conferred by state prosecutors in no way binds federal prosecutors. This is usually taken care of by requesting state enforcers to specifically state the immunity limits in the written immunity documents they use.

Rule 6(e) was recently amended to permit disclosure of federal grand jury material to state prosecutors for the purpose of enforcing state criminal law.(148) The amendment requires court approval before disclosure, and Department of Justice internal guidelines require the approval of the Assistant Attorney General prior to requesting court approval.(149)

Division attorneys should also be familiar with the Department's Dual Enforcement (or Petite) Policy which, under certain circumstances, prohibits federal criminal enforcement following state criminal enforcement for the same violations of law.(150)

3. Damage actions

Again, because of the benefit to plaintiffs in civil damage actions of awaiting federal

criminal convictions, most damage actions will follow federal prosecutions. Prosecutors should be aware, however, of the keen interest plaintiffs' counsel will have in keeping apprised of the federal prosecution's developments.(151) It is the Division's policy to provide plaintiffs with information whenever it is appropriate to do so. At the conclusion of grand jury proceedings, plaintiffs will frequently request access to grand jury materials such as documents and transcripts. When this does not interfere with any ongoing investigation or prosecution, the Division will inform the court of such so that the court may consider this in determining whether a plaintiff has met the particularized need showing.(152) It is also the Department's policy not to file matters under seal during pretrial criminal proceedings so that the public, including plaintiffs who believe they have suffered damages, may have access to the public record. In summary, the Division does not promote civil damage actions and cannot inappropriately disclose information to plaintiffs, but whenever disclosure is appropriate, the Division's policy is to assist the public to obtain redress for damages suffered by antitrust violators.

4. Suspension and debarment

Upon indictment, many agencies, both federal and state, will seek to suspend defendant contractors or suppliers from bid lists until the trial's outcome. The Division takes no part in these proceedings and requests from agencies for an opinion by the Division as to what the agency should do must be turned aside. To act otherwise would not only be unfair to the defendants who have only been charged and not yet convicted, but will pose evidentiary problems as well. For instance, if contractor A has entered into a plea agreement or its officers have received immunity and will testify at trial for the prosecution against contractor B, you do not want to be put in the position of recommending suspension for B but not for A, because A is cooperating. If you do make such a recommendation, your favorable treatment to contractor A must be disclosed as Brady material, and your witness, contractor A, will be impeached upon this at trial. It will appear that A has the incentive to keep B off the bid list as long as possible and has thus tailored the testimony accordingly.

Upon conviction, agencies may renew their request for an opinion from the Division as to how long a contractor should be debarred. Again, you should resist any request for such a recommendation and limit your remarks at this stage, consistent with the secrecy requirements of Rule 6(e), to the nature of the violation, its seriousness, the relative culpability of the contractors involved and whether or not anyone has cooperated. These are all factors the agency will want to consider, and you can certainly provide facts that will assist them, but it is generally the policy of the Division not to make recommendations about what an agency should do.

I. Pre-Indictment Procedures

1. Target notifications and meetings with opposing counsel

As the grand jury investigation concludes, Antitrust Division attorneys will usually inform counsel for potential defendants of the status of the investigation. In most instances,

potential individual defendants will be sent a letter identifying the individual as a target of that investigation, i.e., one who may be considered for indictment. Counsel for corporations normally will be advised by the investigating attorneys that they are about to recommend action against a corporation to their superiors. Antitrust Division attorneys customarily will not disclose the specifics of their final recommendations to counsel. Even though an individual or a company is a target of the investigation, or may be recommended for prosecution, this does not automatically mean they will be prosecuted. The final decision is made by the Assistant Attorney General.

The notification of a potential defendant's status triggers two events: first, it advises counsel that his client may be able to appear before the grand jury voluntarily, without immunity, if desired; and, second, it provides counsel with notice that this is the time to meet with the prosecution team to make whatever arguments seem appropriate before a final decision concerning indictment is made. It is up to counsel to take the initiative and request a meeting once the staff informs him of his client's position. If counsel wants such a meeting, the staff attorneys who have conducted the investigation and their section chief ordinarily will meet with counsel. The purpose of this meeting is not for the prosecution to disclose its case against a particular defendant; rather, it is a vehicle for counsel to explain to the staff the reasons why a corporation or an individual should not be prosecuted. Division attorneys can provide a very general statement of the charges that are being considered. However, because of the requirements of Fed. R. Crim. P. 6(e), Division attorneys cannot give counsel any detailed information about a case without compromising the secrecy of the grand jury process.

The meeting is intended to provide counsel with a full and fair opportunity to address the substance of the evidence against his client as well as mitigating circumstances that should be considered in deciding whether to prosecute. For an individual, such mitigating considerations include the individual's status in the company, personal and health problems, age and other circumstances that may lead the prosecutor to conclude that indictment of the individual would not be in the public interest. Similarly, counsel for a corporation may discuss, among other possibly mitigating circumstances, the financial condition of a company and the adverse consequences of an indictment. These meetings are often helpful in focusing more sharply on issues that were not clearly defined or fully developed during an investigation and which, on occasion, may affect the final decision whether to prosecute.

After meeting with the staff, counsel is usually given an opportunity to make a similar presentation to the Office of Operations. The Director of Operations (or, on occasion, the Deputy Director of Operations) and his staff will have reviewed the recommendations of the staff and section chief. As with the investigating staff, the Director of Operations and his subordinates will not disclose any detailed information concerning the evidence in the case, nor are they likely to engage in a debate with counsel over specific matters that are part of the grand jury record. The meeting should be considered as an opportunity to make a presentation by defense counsel which is not likely to result in any specific commitment other than the fact that the Division will evaluate all information counsel has presented.[(153)] Counsel's final meeting with the Division is usually with the Office of

Operations. Only in extraordinary circumstances or cases that present unique factual or policy issues will the Assistant Attorney General meet counsel for proposed defendants.

The prosecution strategy at these meetings is simply to listen to relevant matters that may have a bearing on a decision to prosecute in a particular situation. Usually, counsel will argue against the prosecution of his client rather than against the indictment of all parties that may be targets of the investigation. In this way, counsel can differentiate the conduct and the particular circumstances of his client from those of others. This information is generally helpful to the Division, not only from the perspective of making a decision whether to prosecute, but for other considerations that may arise later, such as the Division's sentencing recommendation or a decision to bring a companion civil suit or a damage suit against the parties.

The Assistant Attorney General must review each recommendation for indictment. If an indictment is approved, the staff will summarize the evidence for, and present the indictment to, the grand jury.

Since no action can be taken before the grand jury makes its decision, Division attorneys usually will not inform counsel of the Division's final recommendation to prosecute. The staff may, however, inform counsel when the grand jury will be meeting unless this practice is precluded by the local rules. If the grand jury votes a true bill, staff attorneys usually inform counsel of the indictment as soon as it is returned.

If the Assistant Attorney General follows the staff recommendation to indict, a grand jury session will be scheduled for the return of the indictment. It is not unusual for defense counsel to request advance notification of when the indictment will be returned. It is safest to provide only a generalized time frame of when you expect the indictment, if any, to be returned, for several reasons. First, last minute exigencies may require a change in the grand jury schedule, matters over which you have no control. Second, defense counsel in highly publicized cases may use the information you provide to make premature statements to the press that are prejudicial to the Government's case. Third, precise notice to defense counsel about when an indictment will be returned provides them the window of opportunity to seek to have the grand jury proceedings stayed before an indictment can be returned.(154) Finally, local rules may prohibit notice as to when an indictment is likely to be returned.

2. U.S. Attorney's signature

As with the signatures of the other attorneys for the Government, as a courtesy, you should obtain the signature of the U.S. Attorney for the district you are in prior to the return of the indictment. In the absence of the U.S. Attorney's signature, however, the signature of the Assistant Attorney General of the Antitrust Division is sufficient to validate the indictment.(155)

3. Grand jury review of testimony/documents

Before your last session with the grand jury, you want to ensure that all document

subpoenas have been fully complied with. If counsel have not produced documents, you want to insist upon production prior to the return of the indictment to avoid any basis for a motion to dismiss the indictment because of post-indictment abuse of the grand jury process. If production of such documents is not immediately necessary to your case, and insistence upon pre-indictment production would be burdensome to the subpoena recipient, you will want written assurance that your continued cooperation in not insisting upon immediate production will not form the basis of an abuse motion. This assurance must come not only from the subpoena recipient, but defendants and co-defendants as well.(156) If you cannot obtain such assurance, you should insist upon compliance prior to the indictment's return.

On the day of indictment, you should have in the grand jury room all transcripts of testimony taken that is relevant to the indictment and all relevant grand jury exhibits. You should note for the record that all the transcripts and exhibits are available for review by the grand jurors. This will establish two important facts. First, that the accurate record of the testimony itself was available to the grand jury so they were not operating on the basis of the prosecutor's summary of the evidence alone when returning the indictment. Second, it establishes that any juror who may have missed some portion of the live testimony had access to the transcript of proceedings prior to voting on the indictment. This will help neutralize a post-indictment attack on the indictment based upon the allegation that some jurors who voted on the indictment did not hear all of the evidence. Such an attack should be unsuccessful in any event, since an indictment is valid even though some jurors voting to indict did not attend every session.(157)

4. Summary of the evidence

You will want to briefly summarize the evidence for the grand jury prior to the indictment. The case law that exists on this issue indicates that there is no impropriety in the prosecutor summarizing the evidence or making a closing statement.(158) Your summary must be accurate and you should remind the jurors several times that it is their recollection, not your summary, that controls. Your summary should include the facts you have marshalled against each defendant, and you should remind the jurors of any inconsistent or exculpatory evidence they have heard. When appropriate, interstate commerce and background evidence (e.g., a description of the bidding process) should also be summarized.

5. Summary of law

You should briefly cover the elements of the offenses charged in the indictment and the standard of proof -- probable cause to believe an offense has been committed by the prospective defendants -- that covers the return of an indictment. You should remind the grand jury that the defendants will have the benefit of the "beyond a reasonable doubt" standard at trial and that more rigorous standard does not govern their proceeding. When referring to the elements of the offense and any other question of law, you should use the case law of the circuit in which you are returning the indictment. Note, however, that even if improper instructions are given, the indictment is not invalidated.(159) In all comments to

the grand jury, you should be guided by principles of fairness and the knowledge that what you are saying is being recorded -- if your comments to the grand jury are reviewed by a court, you want the comfort of knowing that you said nothing inflammatory or prejudicial.

A Government prosecutor who explains to the grand jury the elements of the offense under investigation does not act as an improper witness before the grand jury in violation of Rule 6(d). Such conduct falls within the prosecutor's role as the "guiding arm of the grand jury" and is consistent with the prosecutor's responsibility for an orderly and intelligible presentation of the case.(160)

6. Presentation of indictment

The original indictment should be left with the grand jurors for their deliberation. No one other than the jurors, not even the court reporter, is to be present during deliberation.

Fed. R. Crim. P. 7(c)(1) states the indictment "shall be signed by the attorney for the government." It does not state when the indictment should be so signed, and for all practical purposes, you will have obtained all the appropriate signatures before presentation to the grand jury. However, it is common practice to present the jury with a substitute final page that contains only the signature line for the grand jury foreperson, even though courts have regularly held that presentation of a signed indictment to the grand jury is insufficient ground for dismissal.(161)

Before leaving the grand jury to begin their deliberations, you should inquire whether there are any questions. You should advise the foreman to call you back into the grand jury room if any problems arise during deliberations that you may be able to resolve.(162) If the grand jury has any questions once they have begun their deliberation, you should carefully state that you do not want the question in any way to indicate the status of their deliberation or any kind of head-count as to where the deliberation stands. And, of course, any colloquy between you and the grand jurors must be recorded. Answering questions once deliberation has begun would seem to be consistent with the prosecutor's role as the "guiding arm of the grand jury."(163)

Rule 6(f) requires concurrence of 12 jurors for the return of a true bill. The existence of a proper vote is determined from the record kept by the foreperson or other designated grand juror which is filed with the clerk of the court pursuant to Rule 6(c). This record, according to Rule 6(c) "shall not be made public except on order of the court." There need be no separate vote on each count of the indictment,(164) though it is better practice to have the jurors vote on each count. It is not necessary that the record disclose that 12 or more grand jurors concurred on each count for each defendant.(165) After return of the indictment, it shall be signed by the foreperson or deputy foreperson.(166) The foreperson's signature attests that the bill is an official act of the grand jury (a "true bill"). Failure of the foreperson to sign or endorse the indictment is an irregularity but is not fatal.(167)

7. Return of indictment in court

The grand jury returns the indictment to a federal magistrate in open court.(168) The jurors usually accompany the foreperson into court so that the court may inquire whether the jury concurs in the indictment. How this is done, however, will depend upon local practice, so be sure to consult the U.S. Attorney's office.

8. Administrative procedures after return

Once the indictment has been returned, you should inform your section office and the Office of Operations. This will trigger notification of the Press Office. You should also notify counsel for defendants of the indictment's return.

Neither the Criminal Rules nor the Speedy Trial Act, 18 U.S.C. § 3161, et. seq., require that arraignment take place within a set period of time after indictment. However, in most cases, defendants will voluntarily appear for arrest at the arraignment, and this operates as their first appearance before a judicial officer, triggering the 70-day Speedy Trial Act period.(169) Accordingly, you do not want an unduly long period to elapse between indictment and arraignment.

J. Re-presentation

Rule 6(e)(3)(c)(iii) provides that no court order is necessary to transfer one grand jury's material to a successor grand jury. Such language "contemplates that successive grand juries may investigate the same or similar crimes."(170) Usually, all documents and testimony before the first grand jury should be presented to the new grand jury.(171) Nevertheless, a prosecutor has some discretion, particularly where numerous witnesses were called before the first grand jury, and only a small percentage were actually necessary for the proposed indictment. A successor grand jury need not hear all of the direct testimony presented to the predecessor grand jury, but rather may choose to rely on transcripts or on accurate summaries.(172) Caution must be exercised, however, because the use of incomplete or misleading summaries of prior testimony can bias a grand jury and void the indictment.(173) To avoid any appearance of unfairness, all exculpatory evidence should be re-presented to the new grand jury.(174)

K. Superseding Indictments

The procedures for preparing and presenting superseding indictments to the grand jury are the same as for original indictments, with the following exceptions:

1. Caption

The caption should reflect that it is a superseding indictment, and should reference the case number of the original indictment.

The superseding indictment should be presented to the same grand jury that returned the original indictment. Under exceptional circumstances (i.e., the original grand jury panel

has expired, etc.) the case can be re-presented to a new grand jury.

2. Advice to the grand jury

The grand jury should be advised that a superseding indictment is being presented, the date of the original indictment, the nature of the intended change in the indictment, and the manner in which the case will be re-presented.(175)

3. Speedy trial act considerations

Under 18 U.S.C. § 3161(h)(6), the running of the "trial clock" is suspended from the date the indictment is dismissed upon motion of the Government until a charge is filed against the defendant for the same offense, or any offense required to be joined with the offense charged in the original indictment. As explained in the original Senate Report on the Speedy Trial Act, § 3161(h)(6) provides that only the time period during which the prosecution has actually been halted is excluded from the 70-day time limit. For example, if the Government decides 50 days after indictment to dismiss charges against the defendant, then waits six months and reindicts the defendant for the same offense, the Government has only 20 days in which to prepare for trial, absent other excludable time periods.(176) Since the exclusion begins only with the dismissal of the original charges, once a superseding indictment is intended, it is important to obtain dismissal of the original charge as soon as possible to stop the clock.

Section 3161(h)(6) applies only when the Government obtains dismissal of charges contained in the indictment. If the defendant successfully moves to dismiss the indictment, 18 U.S.C. § 3161(d) applies, and all time limits on the new charges are computed without regard to the existence of the original charge.(177)

Note also that even where the Government obtained dismissal of the original indictment, time limits on new offenses charged in the superseding indictment -- i.e., those which are not the "same offense" or "offenses which are required to be joined with" the offense charged in the original indictment -- would be computed without reference to the time limits on the original charge. Consequently, where the Government dismisses an indictment and returns superseding charges, different time limits for trial will apply to different charges in the same indictment if the superseding charges are new or if the superseding indictment adds new defendants. 18 U.S.C. § 3161(h)(7) can be used to equalize the trial date for multiple defendants charged in the same indictment. Where multiple charges with different time limits are contained in an indictment against a single defendant, a continuance under 18 U.S.C. § 3161(h)(8) might be appropriate, to avoid the need for either multiple trials or trial of all charges by the earliest date.

L. No Bills

Occasionally, a grand jury will refuse to return an indictment recommended by the Division. This is referred to as a "No Bill." If a grand jury refuses to indict, the prosecutor may resubmit evidence to a different grand jury.(178) 178/ However, once a grand jury declines to return an indictment on the merits, an internal Justice Department policy

requires approval of the responsible Assistant Attorney General prior to resubmitment. Approval for resubmitment will "ordinarily not be granted, absent additional or newly-discovered evidence or a "clear miscarriage of justice."[(179)]

M. Defense Motions Relating to the Indictment

Grand jury proceedings receive a strong presumption of regularity;[(180)] the burden of proving irregularity is on the person, usually? the defendant, alleging it.[(181)] Accordingly, indicted defendants face great difficulty challenging the grand jury or the indictment. However, that does not mean that defense motions will not be filed.

Attorneys should consult the appropriate sections of this Manual for guidance in responding to these motions. In addition, some of the most common defense motions relating to the indictment are discussed in Chapter 9 of the Criminal Antitrust Litigation Manual, American Bar Association, 1983.

N. Press

When preparing the indictment or information for submission to the Office of Operations, you should also prepare a draft press release.[(182)] After review and editing by Operations, the press release is forwarded to the Department's Public Affairs office, along with a recommendation as to whether the press release should be issued.[(183)] Upon return of the indictment or information, you should immediately call the Office of Operations, thus triggering their call to Public Affairs and the publication of the press release, if any.

As soon as the indictment becomes public, you will no doubt be contacted by the press seeking more information. Only Section Chiefs may talk to the press, absent express authority otherwise. If authorized, it is important that your comments be circumspect, referring only to the charges in the indictment and whatever else is already on the public record, such as whether the AAG has said the investigation is continuing. When in doubt about whether to answer a question, the best route is to refer the reporter to Public Affairs for additional information or comment.

Allegations of prejudicial pretrial publicity will most commonly occur in motions for a change of venue under Fed. R. Crim. P. 21. The standard a defendant must meet is high, the Rule itself specifying that a change in venue is proper only when there exists "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial. . . ." Routine press reports that are not inflammatory will not occasion a change of venue.[(184)] When the prosecution is the source of the complained-of publicity, a court may look more closely at the venue motion.[(185)] Where non-prosecutorial Government officials are the source of the publicity, their status has not been held relevant.[(186)]

O. Closing the Investigation

When an investigation has been closed, all files and grand jury documents that are

appropriate for retention should be sent for safekeeping to the Federal Records Center in case retrieval becomes necessary.(187) A short closing memorandum should be forwarded to the Office of Operations, requesting authority to close the matter. In criminal cases, this will occur after sentencing upon convictions or acquittal after trial. If no indictment is returned and none is expected, the matter can be closed at that time.

FOOTNOTES

1. Fed. R. Crim. P. 7(a).

2. The Ninth Circuit has held that an indictment need not be returned against a corporation since the corporation can be punished only by fine. United States v. Armored Transp., Inc., 629 F.2d 1313, 1317-20 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981). The court reasoned that a crime punishable only by fine is not an "infamous crime" within the terms of the 5th Amendment. The Ninth Circuit is the only circuit to have adopted this approach.

3. Fed. R. Crim. P. 6(f).

4. See Chapter IX for a discussion of plea agreements.

5. Fed. R. Crim. P. 7(e).

6. Russell v. United States, 369 U.S. 749, 763-72 (1962).

7. United States v. Hand, 497 F.2d 929, 934-35 (5th Cir. 1974), cert. denied, 424 U.S. 953 (1976); Moore's Federal Practice ¶ 7.04 (1982).

8. See Brown v. United States, 143 F. 60, 65 (8th Cir.), cert. denied, 202 U.S. 620 (1906); United States v. Mobile Materials, Inc., 871 F.2d 902, 906-10 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, U.S. (1990).

9. An alternative sample indictment is contained in Appendix VII-3. This format may be used when the charging paragraph contains numerous terms that may not be familiar to the general public.

10. See Devitt & Blackmar, § 55.02; see also United States v. Kissel, 218 U.S. 601, 608 (1910); United States v. Walker, 653 F.2d 1343, 1345-50 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982).

11. See United States v. Socony Vacuum Oil Co., 310 U.S. 150, 252 (1940); Nash v. United States, 229 U.S. 373, 378 (1913).

12. See Appendix VII-3 for a sample of this alternative.

13. Ordinarily, a court will take judicial notice of terms for which there is a common, undisputed understanding. See Fed. R. Evid. 201. However, some terms would not be

subject to judicial notice, for example, the defendant's unique term to describe a geographic area that is different from the commonly understood term.

14. See U.S.A.M. 9-11.230

15. See United States v. Briggs, 514 F.2d 794 (5th Cir. 1975); see also United States v. Chadwick, 556 F.2d 450 (9th Cir. 1977). The American Bar Association (ABA) has adopted a principle that "the grand jury shall not name a person in an indictment as an unindicted co-conspirator in a criminal conspiracy."

16. United States v. Votteller, 544 F.2d 1355 (6th Cir. 1976); see also United States v. Branan, 457 F.2d 1062 (6th Cir. 1972). 18 U.S.C. § 3237 provides that an offense begun in one district, continued in another, and completed in yet another may be prosecuted in any of those districts.

17. See United States v. Warner, 428 F.2d 730 (8th Cir.) (where two distinct crimes are charged in one count, the count is void since defendant is denied right to a unanimous concurrence of jury on each offense charged before conviction), cert. denied, 400 U.S. 930 (1970).

18. See Fed. R. Crim. P. 7(d); United States v. Saporta, 270 F. Supp. 183 (E.D.N.Y. 1967); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), rev'd on other grounds sub nom. United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

19. See U.S.A.M. 9-43.000, et seq.

20. United States v. Young, 232 U.S.155 (1914).

21. United States v. Curtis, 506 F.2d 985 (10th Cir. 1974).

22. See United States v. Italiano, 837 F.2d 1480 (11th Cir. 1988), for an extensive discussion of McNally and Carpenter and the ramifications of these cases on the application of the mail fraud statute.

23. 18 U.S.C. § 1346.

24. United States v. Young, 232 U.S. 155 (1914).

25. Schmuck v. United States, 489 U.S. 705 (1989); Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Young, 232 U.S. 155 (1914).

26. Durland v. United States, 161 U.S. 306 (1896); Badders v. United States, 240 U.S. 391 (1916).

27. See Indictments in United States v. Sachs Electric Company, et al., 85-168 CR(4) and United States v. Washita Construction Company, et al., 84-146 W.D. Okla.

28. If staff is relying on the mailing of payments, it is useful to include language in the "means and methods" or "charging" paragraph that the conspirators had the expectation

that the low bidder would be awarded the contract and would be paid over the course of the contract.

29. United States v. Northern Improvement Co., 814 F.2d 540, 542 (8th Cir.), cert. denied, 484 U.S. 846 (1987).

30. United States v. Watson-Flagg Electric Company, et al., (CR IP 84-103, S.D. Indiana).

31. Linden v. United States, 254 F.2d 560 (4th Cir. 1958); Silverman v. United States, 213 F.2d 405 (5th Cir. 1954); Henderson v. United States, 202 F.2d 400 (6th Cir. 1953).

32. See U.S.A.M., 9-44.000, et seq.

33. United States v. Patterson, 534 F.2d 1113 (5th Cir.), cert. denied, 429 U.S. 942 (1976); United States v. Freeman, 524 F.2d 337, 339e (7th Cir. 1975), cert. denied, 424 U.S. 920 (1976); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977); Lindsey v. United States, 332 F.2d 688, 690 (9th Cir. 1964); United States v. O'Malley, 535 F.2d 589, 592 (10th Cir.), cert. denied, 429 U.S. 960 (1976).

34. Henderson v. United States, 425 F.2d 134, 138 (5th Cir. 1970); United States v. Calvert, 523 F.2d 895, 903 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

35. See, e.g., United States v. Ames Sintering Co., 927 F.2d 232 (6th Cir. 1990).

36. Identifying details from this indictment and other indictments quoted in this section have been charged.

37. See Chapter VIII § C.

38. United States v. Lange, 528 F.2d 1280, 1283 n.2 (5th Cir. 1976); Ogden v. United States, 303 F.2d 724, 742 (9th Cir. 1962), cert. denied, 376 U.S. 973 (1964).

39. United States v. Lange, 528 F.2d supra.

40. See U.S.A.M. 9-42.200 and .210 and cases cited therein.

41. See United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

42. See United States v. Downey, 257 F. 364 (D.R.I. 1919).

43. United States v. Johnson, 383 U.S. 169, 172 (1966); Haas v. Henkel, 216 U.S. 462, 479 (1910); see United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975).

44. See U.S.A.M. 9-42.300

45. See Chapter VIII § A.

46. United States v. Whimpy, 531 F.2d 768, 770 (5th Cir. 1976).

47. United States v. Molinares, 700 F.2d 647, 651-52 (11th Cir. 1983).

48. United States v. Parr, 516 F.2d 458, 464 (5th Cir. 1975); 18 U.S.C. § 1623(e).

49. United States v. Bonacorsa, 528 F.2d 1218, 1222 (2d Cir.), cert. denied, 426 U.S. 935 (1976); Vitello v. United States, 425 F.2d 416, 418 (9th Cir.), cert. denied, 400 U.S. 822 (1970).

50. Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956); United States v. Crocker, 568 F.2d 1049, 1056 (3d Cir. 1977); United States v. Paolicelli, 505 F.2d 971, 973 (4th Cir. 1974); United States v. Bell, 623 F.2d 1132, 1134 (5th Cir. 1980); United States v. Raineri, 670 F.2d 702, 718 (7th Cir.), cert. denied, 459 U.S. 1035 (1982); United States v. Ostertag, 671 F.2d 262, 265 (8th Cir. 1982).

51. Accord United States v. Lardieri, 497 F.2d 317, 319 (3d Cir. 1974); United States v. Cosby, 601 F.2d 754, 756 (5th Cir. 1979); United States v. Ostertag, 671 F.2d at 264; United States v. Molinares, 700 F.2d at 653.

52. See, e.g., United States v. Chapin, 515 F.2d 1274 (D.C. Cir.) (the falsity of an "I don't recall" answer may be proven by circumstantial evidence that tends to show that defendant really knew the things he claimed not to know), cert. denied, 423 U.S. 1015 (1975).

53. A sample indictment for false declarations before a grand jury is included in Appendix VII-4.

54. See Chapter VIII § B.

55. Attempts to influence another's grand jury testimony can also be brought under 18 U.S.C. § 1512(b).

56. A sample obstruction of justice indictment is included in Appendix VII-5.

57. United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980), cert. denied, 452 U.S. 962 (1981); United States v. Shoup, 608 F.2d 950 (3d Cir. 1979); United States v. Roe, 529 F.2d 629, 632 (4th Cir. 1975); United States v. McCarthy, 611 F.2d 220 (8th Cir. 1979), cert. denied, 445 U.S. 930 (1980).

58. See United States v. Buffalano, 727 F.2d 50 (2d Cir. 1984) ("endeavor" means less than attempt); United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984) ("endeavor" means any effort to accomplish an evil purpose the statute is designed to prevent).

59. See United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), cert. denied, 405 U.S. 975 (1972); United States v. Griffin, 589 F.2d 200 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Gonzales-Mares, 752 F.2d 1485 (9th Cir.), cert. denied, 473 U.S. 913 (1985); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); United

States v. Cortese, 568 F. Supp. 119 (M.D. Pa. 1983), aff'd sub nom. United States v. Osticco, 738 F.2d 426 (3d Cir. 1984), cert. denied, 469 U.S. 1158 (1985). Contra United States v. Essex, 407 F.2d 214 (6th Cir. 1969).

60. United States v. Bridges, 717 F.2d 1444 (D.C. Cir. 1983), cert. denied, 465 U.S. 1036 (1984); United States v. Langella, 776 F.2d 1078 (2d Cir. 1985), cert. denied, 475 U.S. 1019 (1986).

61. United States v. Neiswender, 590 F.2d 1269, 1273 (4th Cir.), cert. denied, 441 U.S. 963 (1979); United States v. Solow, 138 F. Supp. 812, 816-17 (S.D.N.Y. 1956).

62. United States v. Sinito, 723 F.2d 1250 (6th Cir. 1983), cert. denied, 469 U.S. 817 (1984); United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983).

63. United States v. Scotto, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981).

64. United States v. Provenzano, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982).

65. See Indictment in United States v. Evans & Associates Construction Co., Inc., et al., (86-77-E, W.D. Okla.).

66. See U.S.A.M. 9-110.101 and 110.210

67. United States v. Pomponio, 511 F.2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975); United States v. Perrin, 580 F.2d 730 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979). But see United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), cert. denied, 429 U.S. 1123 (1977).

68. See United States v. Koppers, 652 F.2d 290 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971); United States v. Automated Medical Laboratories, 770 F.2d 399, 406-08 (4th Cir. 1985); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973).

69. United States v. Koppers Co., 652 F.2d 290, 294-95 (2d Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. Continental Group, Inc., 603 F.2d 444, 461-62 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Portsmouth Paving Corp., 694 F.2d 312, 317-18 (4th Cir. 1982); United States v. Cargo Serv. Stations Inc., 657 F.2d 676, 683-84 (5th Cir. Unit B Sept. 1981), cert. denied, 455 U.S. 1017 (1982).

70. United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106-07 (7th Cir.), cert. denied, 444 U.S. 840 (1979).

71. United States v. Koppers Co., 652 F.2d at 294-95; United States v. Portsmouth Paving, 694 F.2d at 317-18.

72. United States v. Griffin, 589 F.2d 200, 204 (5th Cir.), cert. denied, 444 U.S. 825 (1979); United States v. Perkins, 748 F.2d 1519, 1528-29 (11th Cir. 1984); United States v. Caron, 551 F. Supp. 662, 670 (E.D. Va. 1982), aff'd mem., 722 F.2d 739 (4th Cir. 1983), cert. denied, 465 U.S. 1103 (1984).

73. Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. Mobile Materials, Inc., 871 F.2d 902, 906 (10th Cir.), modified on other grounds, 881 F.2d 866 (10th Cir. 1989), cert. denied, U.S. (1990). Mobile Materials contains a particularly good discussion on the necessary detail for a valid indictment.

74. United States v. Mobile Materials, Inc., 871 F.2d at 907.

75. See Criminal Antitrust Litigation Manual, 9:2.1[8-2], p. 160.

76. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Mobile Materials, Inc., 871 F.2d at 909.

77. See United States v. Terrigno, 838 F.2d 371, 373 (9th Cir. 1988).

78. Fed. R. Crim. P. 7(d); Wright, Federal Practice and Procedure, Criminal 2d § 127 at 426-27; United States v. Bullock, 451 F.2d 884, 888 (5th Cir. 1971); United States v. Climatemp, Inc., 482 F. Supp. 376, 391 (N.D. Ill. 1979); United States v. Ahmad, 329 F. Supp. 292, 297 (M.D. Pa. 1971), aff'd, 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).

79. 18 U.S.C. § 3282.

80. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-99 (1927); Nash v. United States, 229 U.S. 373, 378 (1913).

81. Such as RICO conspiracies, 18 U.S.C. § 1962(d).

82. United States v. Kissel, 218 U.S. 601, 608-10 (1910); Hyde v. United States, 225 U.S. 347, 369 (1912).

83. United States v. A A A Elec. Co., 788 F.2d 242 (4th Cir. 1986); United States v. Girard, 744 F.2d 1170 (5th Cir. 1984); United States v. Northern Improvement Co., 814 F.2d 540 (8th Cir.), cert. denied, 484 U.S. 846 (1987); United States v. Inryco, Inc., 642 F.2d 290 (9th Cir. 1981), cert. dismissed, 454 U.S. 1167 (1982); United States v. Evans & Assocs. Constr. Co., 839 F.2d 656, 661 (10th Cir. 1988).

84. United States v. Sargent Elec. Co., 785 F.2d 1123 (3d Cir.), cert. denied, 479 U.S. 819 (1986).

85. United States v. Vila, 599 F.2d 21, 24 (2d Cir.), cert. denied, 444 U.S. 837 (1979); United States v. Ruggles, 782 F.2d 1044 (6th Cir. 1985); Koolish v. United States, 340 F.2d 513, 525 (8th Cir.), cert. denied, 381 U.S. 951 (1965).

86. United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982).

87. United States v. Varelli, 407 F.2d 735, 741 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972); see United States v. Broce, 488 U.S. 563, 570 (1989) (agreement "is all but synonymous" with conspiracy).

88. Braverman v. United States, 317 U.S. 49, 53 (1942).

89. See Note, "Single v. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 Minn. L. Rev. 295, 297-98 (1981) (hereinafter "Student Note").

90. United States v. Varelli, 407 F.2d supra; see Direct Sales Co. v. United States, 319 U.S. 703, 711 (1943); United States v. Continental Group, Inc., 603 F.2d 444, 462-63 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Lemm, 680 F.2d 1193, 1204 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983).

91. Blumenthal v. United States, 332 U.S. 539, 559 (1947); United States v. Gomberg, 715 F.2d 843, 846 (3d Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Lemm, 680 F.2d at 1204.

92. United States v. Marable, 578 F.2d 151, 153 (5th Cir. 1978); United States v. Mulherin, 710 F.2d 731, 737-38 (11th Cir.), cert. denied, 464 U.S. 964 (1983).

93. American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); see also Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939); United States v. Nolan, 718 F.2d 589, 595 (3d Cir. 1983).

94. Direct Sales Co. v. United States, 319 U.S. 703, 714 (1943).

95. Where more than one conspiracy statute is involved, the issue is basically a double jeopardy issue, which is discussed in the following section.

96. 317 U.S. at 54.

97. United States v. Agueci, 310 F.2d 817, 827 (2d Cir. 1962) (citations omitted), cert. denied, 372 U.S. 959 (1963); see United States v. Bastone, 526 F.2d 971, 981 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976).

98. United State v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.). For a rare example of a chain conspiracy where the court refused to extend the chain to its furthest limits, see United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).

99. 306 U.S. at 226-27.

100. See United States v. Perez, 489 F.2d 51 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

101. See United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); United States v. Marable, 578 F.2d at 153-54; United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981); United States v. Castro, 629 F.2d at 461; United States v. Tercero, 580 F.2d 312, 315 (8th Cir. 1978); United States v. Bendis, 681 F.2d 561, 564-65 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982). Three circuits have moved toward a "totality of the circumstances" test without expressly adopting it. United States v. Mallah, 503 F.2d at 971, 985-86 (2d Cir. 1974); United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); Ward v. United States, 694 F.2d 654, 662-63 (11th Cir. 1983). The Tenth Circuit has expressly rejected the "totality of the circumstances" test in favor of the "same evidence" test. United States v. Hines, 713 F.2d 584, 586 (10th Cir. 1983).

102. See Note, "Single v. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 Minn. L. Rev. 295, 297-78 (1981).

103. Of course, the overall conspiracy may be broken down into numerous lesser conspiracies so long as no defendant is charged more than once, since there would then be no ground on which to challenge the Government's actions.

104. See United States v. Varelli, 407 F.2d 735 (7th Cir. 1969), cert. denied, 405 U.S. 1040 (1972); In re Grand Jury Proceedings, 797 F.2d at 1384-85 (although the court's use of the term "superconspiracy" may be confusing, its distinction between a passive understanding and an agreement is correct).

105. In re Grand Jury Proceedings, 797 F.2d at 1384-85.

106. 537 F. Supp. at 445; see also United States v. Korfant, 771 F.2d 660, 663 (2d Cir. 1985).

107. Id. at 445-47; see also United States v. Sargent Elec. Co., 785 F.2d 1123 (3d Cir.), cert. denied, 479 U.S. 819 (1986); United States v. Wilshire Oil Co., 427 F.2d 969, 975-77 (10th Cir.), cert. denied, 400 U.S. 829 (1970).

108. See In re Grand Jury Proceedings, 797 F.2d at 1384-85 (criticizing Beachner analysis).

109. 295 U.S. at 82; see also United States v. Miller, 471 U.S. 130 (1985); United States v. Cina, 699 F.2d 853 (7th Cir.), cert. denied, 464 U.S. 991 (1983); Fed. R. Crim. P. 52(a).

110. United States v. Griffin, 464 F.2d 1352, 1357 (9th Cir.), cert. denied, 409 U.S. 1009 (1972).

111. The fact that the number of defendants and conspiracies is small does not necessarily preclude a finding of juror confusion. In United States v. Coward, 630 F.2d 229 (4th Cir. 1980), the court reversed the conviction of two men charged with conspiring with an unindicted co-conspirator, where the proof at trial showed that each had conspired with the unindicted co-conspirator separately, on the ground of juror confusion.

112. See also United States v. Bertolotti, 529 F.2d 149, 157-58 (2d Cir. 1975).

113. See also United States v. Gomberg, 715 F.2d 843, 846-47 (3d Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Abushi, 682 F.2d 1289, 1300 (9th Cir. 1982). An earlier case in the Ninth Circuit, United States v. Griffin, 464 F.2d supra, had approved a jury instruction permitting conviction notwithstanding proof of conspiracies different from the one charged in the indictment. Griffin is not cited in Abushi.

114. 471 U.S. at 136 (citations omitted).

115. Id. at 134-35.

116. United States v. Mastelotto, 717 F.2d at 1247-50; United States v. Barlin, 686 F.2d 81, 88-89 (2d Cir. 1982); United States v. Lyons, 703 F.2d 815, 821-22 (5th Cir. 1983).

117. U.S. Const. amend. V states, in part: "No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb. . . ."

118. North Carolina v. Pearce, 335 U.S. 711, 717 (1969). The issue of whether the Double Jeopardy Clause applies to corporations has apparently never been directly decided by the Supreme Court. One court of appeals has expressly held that it does apply, United States v. Hospital Monteflores, Inc., 575 F.2d 332 (1st Cir. 1978), and the Supreme Court on several occasions has applied the Double Jeopardy Clause to corporations without addressing the issue. See United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Fong Foo v. United States, 369 U.S. 141 (1962).

119. Iannelli v. United States, 420 U.S. 770, 785 n.17 (1975).

120. A description of the "same evidence" test can be found in United States v. Marable, 578 F.2d 153 (5th Cir. 1978).

121. See also United States v. Albernaz, 450 U.S. 333 (1981) (central issue in deciding whether one act can be punished under separate statutes is legislative intent).

122. Grady v. Corbin, U.S. , n. 12 (1990).

123. See, e.g., United States v. Korfant, 771 F.2d 660, 662 (2d Cir. 1985) (finding separate price-fixing conspiracies); In re Grand Jury Proceedings, 797 F.2d at 1380 (separate bid-rigging conspiracies found); but see United States v. Calderone, 917 F.2d 717 (2d Cir. 1991) (holding that Korfant is "no longer good law" to the extent that it

conflicts with Grady v. Corbin, U.S. (1990)). The Solicitor General has filed a petition for a writ of certiorari in the Calderone case.

124. See United States v. Chagra, 653 F.2d 26, 29 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); United States v. Marable, 578 F.2d at 153-54; United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981); United States v. Castro, 629 F.2d at 461; United States v. Tercero, 580 F.2d 312, 315 (8th Cir. 1978); United States v. Bendis, 681 F.2d 561, 564-65 (9th Cir. 1981), cert. denied, 459 U.S. 973 (1982). Three circuits have moved toward a "totality of the circumstances" test without expressly adopting it. United States v. Mallah, 503 F.2d 971, 985-86 (2d Cir. 1974) United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); Ward v. United States, 694 F.2d 654, 662-63 (11th Cir 1983). The Tenth Circuit has expressly rejected the "totality of the circumstances" test in favor of the "same evidence" test. United States v. Hines, 713 F.2d 584, 586 (10th Cir. 1983).

125. ____ U.S. at ____

126. See United States v. Calderone, 917 F.2d 717 (2d Cir. 1990); United States v. Felix, 926 F.2d 1522 (10th Cir. 1991). The Government has requested certiorari in both cases.

127. United States v. Wood, 780 F.2d 955, 962 (11th Cir.) (indictment in question struck appropriate balance and not duplicitous), cert. denied, 476 U.S. 1184 (1986); see United States v. Kimberlin, 781 F.2d 1247, 1250-51 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986); cf. United States v. Hawks, 753 F.2d 355, 357-58 (4th Cir. 1985); United States v. Morse, 785 F.2d 771, 774 (9th Cir.), cert. denied, 476 U.S. 1186 (1986); United States v. Alvarez, 735 F.2d 461, 465 (11th Cir. 1984); Fed. R. Crim. P. 7(c)(1).

128. See United States v. Kimberlin, 781 F.2d at 1250; United States v. Morse, 785 F.2d at 774.

129. See United States v. Kimberlin, 781 F.2d at 1250; United States v. Morse, 785 F.2d at 774; cf. United States v. Margiotta, 646 F.2d 729, 732-33 (2d Cir. 1981) (dictum), cert. denied, 461 U.S. 913 (1983).

130. See Wright, Federal Practice and Procedure, Criminal 2d § 142, at 475.

131. Id. § 145, at 523; cf. United States v. Elam, 678 F.2d 1234, 1251 (5th Cir. 1982) (when duplicity objection not raised in timely manner, defendant's motion to require Government to elect between two conspiracy statutes properly denied).

132. See United States v. Kimberlin, 781 F.2d at 1250; United States v. Moran, 759 F.2d 777, 784 (9th Cir. 1985), cert. denied, 474 U.S. 1102 (1986); United States v. Wood, 780 F.2d at 962.

133. See United States v. Bowline, 593 F.2d 944, 947-48 (10th Cir. 1979); cf. United States v. Drury, 687 F.2d 63, 66 (5th Cir. 1982), cert. denied, 461 U.S. 943 (1983);

United States v. Kimberlin, 781 F.2d at 1250-51.

134. Fed. R. Crim. P. 12(b)(2); see United States v. Leon, 679 F.2d 534, 539 (5th Cir. 1982); United States v. Mosley, 786 F.2d 1330, 1333 (7th Cir.), cert. denied, 474 U.S. 1004 (1986); cf. United States v. Price, 763 F.2d 640, 643 (4th Cir. 1985) (dictum) (though holding that appellant waived right to challenge duplicitous indictment by failure to raise claim before trial, court indicated that for proper showing of cause, consequences of waiver might be relieved); United States v. Kimberlin, 781 F.2d at 1251-52 (considering post-trial challenge to duplicitous indictment, court applied practical, not "hypertechnical," standard).

135. See United States v. Love, 767 F.2d 1052, 1062-63 (4th Cir. 1985), cert. denied, 474 U.S. 1081 (1986); United States v. Maggitt, 784 F.2d 590, 599 (5th Cir. 1986); United States v. Gann, 732 F.2d 714, 721 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); United States v. Swingler, 758 F.2d 477, 491-92 (10th Cir. 1985); United States v. Pierce, 733 F.2d 1474, 1476 (11th Cir. 1984).

136. See United States v. Gullett, 713 F.2d 1203, 1211-12 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984); United States v. Marquardt, 786 F.2d 771, 778 (7th Cir. 1986). But see United States v. Brown, 688 F.2d 1112, 1120 (7th Cir. 1982) (rejecting claim that allowing multiplicitous indictments to go to jury exaggerated defendant's alleged criminality).

137. See Lovgren v. Byrne, 787 F.2d 857, 863 (3d Cir. 1986); United States v. Maggitt, 784 F.2d at 599; rUnited States v. Marquardt, 786 F.2d 771, 778-79 (7th Cir. 1986); United States v. Roberts, 783 F.2d 767, 769 (9th Cir. 1985); see also United States v. Blakeney, 753 F.2d 152, 154-55 (D.C. Cir. 1985).

138. See United States v. Grandison, 783 F.2d 1152, 1156 (4th Cir. 1986); United States v. Kimberlin, 781 F.2d at 1252; United States v. Wilson, 781 F.2d 1438, 1439-40 (9th Cir. 1986) (per curiam); see also United States v. Long, 787 F.2d 538, 539 (10th Cir. 1986) (ambiguity in definition of activity to be punished by criminal statute must be evaluated against turning a single transaction into multiple offenses); cf. United States v. Woodward, 469 U.S. 105, 108-10 (1985) (per curiam) (no indication of congressional intention not to allow separate punishment for distinct offenses of making false statements to federal agency and intentionally failing to report transporting over $5,000 into country); United States v. Shaw, 701 F.2d 367, 396-97 (5th Cir. 1983) (in absence of congressional directive indicating otherwise, defendant can be charged and convicted of two separate offenses resulting from one action provided each offense requires proof of fact not necessary to other), cert. denied, 465 U.S. 1067 (1984).

139. See generally Wright, § 142, at 475.

140. Id. § 142, at 525; see United States v. Anderson, 709 F.2d 1305, 1306 (9th Cir. 1983), cert. denied, 465 U.S. 1104 (1984).

141. See United States v. Molinares, 700 F.2d 647, 653 n.11 (11th Cir. 1983).

142. See United States v. Lewis, 716 F.2d 16, 23 (D.C. Cir.), cert. denied, 464 U.S. 996 (1983); United States v. Wilson, 721 F.2d 967, 971 (4th Cir. 1983); United States v. Kimberlin, 781 F.2d at 1254; United States v. Long, 787 F.2d at 540; United States v. Fiallo-Jacome, 784 F.2d 1064, 1067 (11th Cir. 1986).

143. Fed. R. Crim. P. 12(b)(2); see United States v. Price, 763 F.2d at 643 (dictum); United States v. Mosely, 786 F.2d at 1333; United States v. Mastrangelo, 733 F.2d 793, 800 (11th Cir. 1984).

144. Fed. R. Crim. P. 12(f); see United States v. Marino, 682 F.2d 449, 454 n.3, 455 (3d Cir. 1982).

145. See ABA Criminal Antitrust Litigation Manual, 8:3.1[1-1].

146. Id.

147. See Ch. II § C.

148. Rule 6(e)(3)(C)(iv).

149. See, Ch. II § H.5.; ATD Manual VII-18; Notes of Advisory Committee on Rules, 1985 amendment.

150. See ATD Manual III-81 for a complete discussion of this policy and its applicability.

151. A defendant in our criminal case, who is also a defendant in a private civil damage case, may try to use civil discovery in the private case to get information relevant to the criminal case. The Division may be able to get discovery enjoined in the private case.

152. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

153. In the past, counsel have attempted to create a right to obtain information from the Division through the use of these meetings. By characterizing the meeting with the Office of Operations as an "administrative" hearing, counsel have argued unsuccessfully that they are entitled to a statement of issues relating to a proposed indictment as well as other pertinent information developed before the grand jury. In In re Grand Jury Proceedings, (Northside Realty Assoc. Inc.), 613 F.2d 501 (5th Cir. 1980), the Fifth Circuit held that an order that required the Government to provide such information violates the principle of separation of powers and compromises the secrecy of the grand jury. The court also held that the Department's refusal to provide such information was consistent with its established procedures for pre-indictment conferences. The court stated that the standard by which such pre-indictment conferences are granted is within the discretion of the Antitrust Division. Indeed, they need not be granted at all.

154. See Deaver v. Seymour, 822 F.2d 66 (D.C. Cir. 1987).

155. Rule 7(c) specifies that an indictment "shall be signed by the attorney for the

government." In relevant part, Rule 54(c) defines "attorney for the government" to be: the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney, an authorized assistant of a U.S. Attorney. . . ." But see United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965); United States v. Panza, 381 F. Supp. 1133 (W.D. Pa. 1974).

156. Division attorneys should be carefull not to disclose any information covered by Rule 6(e) of the Fed. R. Crim. P. when seeking such assurances.

157. Neither the Constitution nor the Federal Rules require that all jurors voting to indict be present at every session. An indictment is valid if a quorum is present and at least 12 jurors vote to indict. See United States ex rel. McCann v. Thompson, 144 F.2d 604, 607 (2d Cir.), cert. denied, 323 U.S. 790 (1944); United States v. Provenzano, 688 F.2d 194, 202-03 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Mayes, 670 F.2d 126, 128-29 (9th Cir. 1982); United States v. Cronic, 675 F.2d 1126, 1130 (10th Cir. 1982), rev'd on other grounds, 466 U.S. 648 (1984).

158. See Ch IV § C.9.; United States v. United States Dist. Court, 238 F.2d 713, 721 (4th Cir. 1956), cert. denied, 352 U.S. 981 (1957).

159. United States v. Linetsky, 533 F.2d 192, 200-01 (5th Cir. 1976).

160. See Ch IV § C.3.; United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

161. United States v. Boykin, 679 F.2d 1240, 1246 (8th Cir. 1982); United States v. Levine, 457 F.2d 1186, 1189 (10th Cir. 1972); United States v. Brown, 684 F.2d 841, 842 (11th Cir. 1982); United States v. Climatemp, Inc., 482 F. Supp. 376, 386 (N.D. Ill. 1979); United States v. Tedesco, 441 F. Supp. 1336, 1342 (M.D. Pa. 1977). But see United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979) (presentation of a signed indictment to a grand jury cited as one of many reasons for dismissal of an indictment due to prosecutorial abuse). Gold has been labeled "an unusual case", In re November 1979 Grand Jury, 616 F.2d 1021, 1023 (7th Cir. 1980).

162. Federal Grand Jury Practice, Narcotic and Dangerous Drug Section Monograph, March 1983, p. 14.

163. See United States v. Singer, 660 F.2d 1295 (8th Cir. 1981), cert. denied, 454 U.S. 1156 (1982).

164. United States v. Felice, 481 F. Supp. 79 (N.D. Ohio), aff'd, 609 F.2d 276 (6th Cir. 1978); United States v. Winchester, 407 F. Supp. 261 (D. Del. 1975).

165. United States v. Bally Mfg., 345 F. Supp. 410 (E.D. La. 1972).

166. Fed. R. Crim. P. 6(c).

167. Hobby v. United States, 468 U.S. 339, 344 (1984) (citing Frisbie v. United States,

157 U.S. 160, 163-65 (1985)); United States v. Perholtz, 662 F. Supp. 1253 (D.D.C. 1985); see also Notes of Advisory Committee of Rules, Note 1 to Subdivision (c), 6.

168. Fed. R. Crim. P. 6(f).

169. 18 U.S.C. § 3161(c)(1).

170. United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986); cf. In re Grand Jury Proceedings (Sutton), 658 F.2d 782, 783 (10th Cir. 1981) (dictum) (second subpoena may be required when party contends documents are incomplete or subpoena orders witness to testify).

171. See United States v. Samango, 607 F.2d 877, 881 (9th Cir. 1979); United States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975).

172. United States v. Flomenhoft, 714 F.2d 711 (7th Cir. 1983) (reliance on transcripts permissible), cert. denied, 450 U.S. 1068 (1984); United States v. Long, 706 F.2d 1044 (9th Cir. 1983) (summaries permissible); see also United States v. Ciambrone, 601 F.2d 616, 623 (2d Cir. 1979) (prosecutor may exercise some discretion in choosing evidence to bring before grand jury so long as grand jury is not misled); United States v. Fogg, 652 F.2d 551, 558 (5th Cir. Unit B Aug. 1981); United States v. Chanen, 549 F.2d 1036, 1311 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

173. United States v. Mahoney, 495 F. Supp. 1270 (E.D. Pa. 1980).

174. See Federal Grand Jury Practice, Narcotic and Dangerous Drug Section Monograph, p. 17.

175. See Federal Grand Jury Practice, Narcotic and Dangerous Drug Section Monograph, p. 18.

176. S. Rep. No. 1021, 93d Cong., 2d Sess. 38 (1974).

177. United States v. Sebastian, 428 F. Supp. 967, 973 (W.D.N.Y.), aff'd, 562 F.2d 211 (2d Cir. 1977).

178. United States v. Thompson, 251 U.S. 407, 413-14 (1920); United States v. Claiborne, 765 F.2d 784, 794 (9th Cir. 1985), cert. denied, 457 U.S. 1120 (1986); United States v. Radetsky, 535 F.2d 556, 565 (10th Cir.), cert. denied, 429 U.S. 820 (1976).

179. U.S.A.M. 9-11.120.

180. See, e.g., Costello v. United States, 350 U.S. 359, 363-64 (1959); United States v. Jones, 766 F.2d 994, 1001 (6th Cir.), cert. denied, 474 U.S. 1006 (1985).

181. See, e.g., United States v. Battista, 646 F.2d 237 (6th Cir.), cert. denied, 454 U.S. 1046 (1981).

182. A sample press release is contained in Appendix VII-6.

183. Press releases are not issued if a case is not of sufficient general public interest.

184. Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), cert. denied, 371 U.S. 862 (1962).

185. Silverthorne v. United States, 400 F.2d 627, 633 (9th Cir. 1968), cert. denied, 400 U.S. 1022 (1971); United States v. Bonanno, 177 F. Supp. 106 (S.D.N.Y. 1959), rev'd on other grounds, 285 F.2d 408 (2d Cir. 1960).

186. See, e.g., People v. Atoigue, 508 F.2d 680 (9th Cir. 1974) (elected officials); Northern California Pharmaceutical Ass'n v. United States, 306 F.2d supra (trial judge).

187. See Division Directive ATR 2710.1.