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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

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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).
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."

E. 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

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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).

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

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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).

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

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).

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

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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).

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/

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

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

96/ 317 U.S. at 54.
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/

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).

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

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

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

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).
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

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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).

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:

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.

> 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

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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.

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

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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).

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

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

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.

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).

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/

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.

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

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

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

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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.

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.

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

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

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115/ Id. at 134-35.

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/

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).

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

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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).

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

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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. 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/

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 __

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.

F. Duplicitous and Multiplicitous Indictments

Indictments charging two or more distinct offenses in a single count are duplicitous. 127/ Such indictments may violate constitutional?

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).
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

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.
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

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).
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

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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).
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.

G. 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

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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).

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

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

146/ Id.

147/ See Ch. II § C.
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/

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.

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.

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).

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.

H. 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

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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.

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

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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).

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

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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.

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

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).

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/

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).

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

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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.

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").

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).
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

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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).
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.

I. 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

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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).

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/

J. 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

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.
(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

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

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

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).
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.

K. 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/ 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/

L. Defense Motions Relating to the Indictment

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.

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.

M. 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

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.
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

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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).

the publicity, their status has not been held relevant. 186/

N. 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.

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.