The date upon which documents must be produced should be sufficiently beyond the date of service of the subpoena to allow the subpoenaed party to make the required file search and compile the documents demanded.292/

a.

b. To staff

The preferred practice in the Division is to give the subpoenaed party the option of producing the documents before the grand jury or in the office of the staff conducting the investigation.293/ If the latter procedure is followed, attorneys should request the subpoenaed party to number the documents and to submit an affidavit setting forth in substance:

(a) the name of the person or persons who made the search of the company's files for the documents called

for in the subpoena, and the location of the files searched;

(b) that a complete and comprehensive search was made for the documents called for in the subpoena;

292/ See N.L.R.B. v. Duval Jewelry Co., 141 F. Supp. 860 (S.D. Fla. 1956), rev'd on other grounds, 243 F.2d 427 (5th Cir. 1957), rev'd on other grounds, 357 U.S. 1 (1958).

293/ See Appendix III-5 for a sample letter giving a subpoenaed party this option. See § D., supra, for an example of this option set forth in a subpoena attachment.

(c) that all documents which are responsive to the subpoena are included in the company's return;

(d) that the documents submitted are authentic and genuine; and

(e) which documents are produced under each paragraph of the subpoena, and under which paragraphs of the subpoena no documents are produced.

In some instances, at the request of the staff, the affidavit has provided, in substance, that the documents submitted were prepared in the regular course of business at the time of, or a reasonable time after, the event, act, transaction, etc., recorded in the documents and were taken from files maintained in the regular course of business. Such a provision may amount to substantive testimony that goes beyond mere testimony as to subpoena compliance. Although probably undesirable under the old Immunity Act, there appears to be no reason under the 1970 Act why a request for such a statement in the affidavit should not be made.

Production of the required documents in the staff's office generally saves time, inconvenience, and expense -- both for the staff and the grand jury. This is particularly true where a large volume of documents is anticipated. On the other

hand, if a second or follow-up subpoena is involved and staff has had compliance problems with the company with respect to the first subpoena, then it may be preferable to have the documents delivered to the grand jury and to take the testimony of the document custodian. But absent this type of situation or other misgivings by the staff which would call into question good faith subpoena compliance, it is usually more convenient and just as effective to permit the documents to be delivered to the staff's offices under an affidavit of search compliance.

If production in the staff's office is permitted, it should be carefully explained that such production is at the request or option of the subpoenaed party; a subpoena cannot compel the production of documentary material except before the grand jury itself. In addition, the staff should be sure to retain the right to have the custodian appear before the grand jury at a later date, should that prove to be necessary.

If the documents are produced in the staff's office, the subpoenaed party will sometimes request a written statement that the documents will be treated the same as if they had been physically produced before the grand jury. There

would seem to be no objection to such a limited commitment by the staff.

c. Tabulations or compilations in lieu of documents

A subpoena often will require the production of statistics or other data which can be presented more conveniently in a tabulation or compilation than by the production of documents containing such information. In such instances, either in the attachment to the subpoena or in a conference with counsel, the subpoenaed party may be given the option of producing the documents or a certified statement that contains a tabulation or compilation.294/

The propriety of this practice was upheld in United States v. Owens-Corning Fiberglass Corp., 271 F. Supp. 561 (N.D. Cal. 1967). Among other things, the defendants' officers argued that they were denied due process in that the Government purposely made the burden of complying with the subpoenas so onerous that the defendants would have no

choice but to submit compilations. The court stated that the burden was on the defendants to object properly to an unreasonable subpoena before complying in a manner designed to suit their convenience.295/

d. File examination by Department

In lieu of production of subpoenaed documents before the grand jury or in the office of the staff, in some limited instances the staff may offer to make a search of the subpoena addressee's files to alleviate the burden of compliance. Two courts have refused to quash subpoenas as oppressive when the Government attorney offered to make (or have made) file searches in the offices of the addressee.296/ Depending upon the circumstances, the

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294/ See § D., supra, for suggested language to be included in the subpoena attachment.

295/ 271 F. Supp. at 568.

296/ United States v. Linen Serv. Council, 141 F. Supp. 511 (D.N.J. 1956); In re Grand Jury Investigation, 33 F. Supp. 367 (M.D.N.C. 1940).
search may be made by the FBI or the staff assigned to the matter.297/

e. Discretion of staff as to method

The preferred method of subpoena compliance depends upon the facts and circumstances of each grand jury investigation, including but not limited to the workload of the staff, the cost of travel to the site of the grand jury, the expense of convening the grand jury and the cost of transcripts, the attitude of the party subpoenaed, the nature and amount of material subpoenaed, etc. The staff should take all pertinent factors into consideration and arrive at a decision based on the exercise of its sound discretion.

If any concession is granted to a party under subpoena, care should be taken to treat other parties in similar circumstances in the same manner. Although subpoenas are rarely contested on the basis of denial of equal protection under the due process clause of the 5th Amendment, the possibility of such an attack always exists. In the face of such a challenge, the Government attorneys conducting the investigation must be prepared to show that either there has been no discrimination in their enforcement of the subpoena, or, if so, that the discrimination is rationally based on the differing circumstances of each party under investigation.

297/ The subpoena recipient must expressly and voluntarily consent to a search. Otherwise, there may be 4th Amendment problems.

Any deviations from the usual manner of compliance before the grand jury, any changes in the time and place of compliance shown on the face of the subpoena, and any modifications of the subpoena attachment, should normally be

covered in writing. A letter setting forth the arrangements, to which there is no objection, is generally sufficient for this purpose.

1.

2. Government's right to original documents

Corporate counsel often submit or offer to submit copies of documents rather than the originals in compliance with a subpoena duces tecum. The practice is usually the result of a prior agreement between corporate and Government attorneys or a recognition that the demand for originals, after copies have been supplied, necessarily entails a delay in the grand jury investigation.

Copies of documents are often unsatisfactory from a strictly investigative standpoint. Carbon or photostatic

copies in corporate files, or copies of documents on which red, yellow or lead pencil notations have been made are frequently illegible or may be omitted entirely. Writing on the back of originals may not be copied. Further, erasure of notations on original documents may not be discernible on the copies. Opportunities for the alteration of documents are thus enhanced. Copies may also prove unsatisfactory for the confrontation of grand jury witnesses. A witness may more readily disavow knowledge of a copy than of the original.

Possession of copies of documents rather than originals may also pose additional evidentiary problems at the time of trial. The originals in the control of the corporation during the grand jury investigation, may be misplaced or, as happened in one case, "burglarized." In such cases, Government attorneys must overcome the best evidence rule and problems of authentication before the copies can be admitted at trial. Although the Government will generally prevail on these issues if the loss is beyond the control of the Government, an additional burden and delay is interjected into the process.

The staff should exercise its discretion as to whether it will demand originals or accept copies.298/ Generally,

original documents should be required in the absence of a strong showing by the subpoenaed party for the necessity of submitting copies. If the staff determines that originals rather than copies should be submitted, the subpoena duces tecum must unambiguously call for the originals (either as a separate note or within the definition of "documents"). Then, if copies are submitted to the grand jury, the Government attorneys should immediately demand the originals.299/

In In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,826, at 91, 483 (S.D. Ohio), the court upheld the Government's right to the original documents based on Fed. R. Crim. P. 17(c). The rule states generally that

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298/ The staff should be consistent with all subpoenas and avoid any implication of favoritism or unfair treatment.

299/ See In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,826, at 91,483 (S.D. Ohio); see also United States v. Re, 313 F. Supp. 442 (S.D.N.Y. 1970); cf. Canuso v. Niagara Falls, 7 F.R.D. 159, 161 (W.D.N.Y. 1945).

the Government is entitled to the books, records, etc., requested. Therefore, the specific items must be produced if the demand calls for originals. The court stated:

Rule 17 is intended to obtain witnesses and documents for use as evidence, 1 Federal Practice and Procedure (Crim.) § 271, p. 539 (1969), and, generally, original documents must be produced, if available at a criminal prosecution. The government points out other good reasons for requiring originals: to inspect the color of the writing, penciled notations, stamps and other physical characteristics; for authentication before the Grand Jury, and to refresh the recollection of witnesses before it; and to safeguard the material for possible use at trial.

If the staff accepts copies, the subpoenaed party should be required to number and identify the copies, by initials or otherwise, and to stipulate, in substance:

(1) That the subpoenaed party will keep, maintain, and otherwise preserve the originals, and, upon request, will submit such originals to Government counsel at any time during the course of the investigation or in

connection with any subsequent legal proceedings to which the United States is a party arising from said investigation;

(2) That the copies are authentic and genuine copies of original documents in the files of the subpoenaed party; and

(3) That the subpoenaed party will at no time in legal proceedings brought by the United States contest or deny the authenticity and genuineness of such copies and will waive the "best evidence" rules as to such copies.

Further, it is good practice to insist that the original documents be produced on a temporary basis so that the

copies can be checked for accuracy and completeness. This is a wise precaution since, as pointed out earlier, written notations appearing on the original documents may have been omitted in the copying process. Additionally, alterations are more readily ascertained when the originals are compared with the copies.

3. Government's right to entire documents

Where the subpoena is reasonable, and the particular document called for by the subpoena is relevant to the grand jury investigation, then the entire document must be produced.300/ A subpoenaed party cannot require "a line-by-line justification for the production of a generally relevant

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300/ Steamship Co. of 1949 v. China Union Lines, Hong Kong, 123 F. Supp. 802 (S.D.N.Y. 1954).

document."301/ Thus, it follows that even if the excised material pertains to trade secrets or confidential corporate

information, it must be produced.302/

4. Production in original files

On occasion, staffs have drafted subpoenas to require the production of the file folder or face of the file in which each responsive document is contained. One method is to provide in the definition section of the subpoena that "Documents" includes the files and folders tabs associated with each original and copy. Reference to the title or other identification appearing on the file or folder often serves to place the responsive document in context and provides some indication of the manner in which the subpoena addressee's files are maintained.

Other staffs have included an instruction in their subpoenas that simply requires that subpoena recipients divide and mark the responsive documents so as to identify the file from which the documents were obtained. A typical instruction

in this regard is:

> . . . . The documents submitted should be grouped according to the individual paragraph or sub-paragraph of this subpoena to which they

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301/ In re Grand Jury Investigation (Gen. Motors Corp.), 1960 Trade Cas. (CCH) ¶ 69,729, at 76,843 (S.D.N.Y.).

302/ In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952).

> are responsive and should be subdivided and marked so as to identify the file from which the documents were obtained.

5. Costs of production are borne by subpoena recipient

The Government is generally not required to reimburse a subpoena recipient for its costs in complying with the subpoena.303/

6. Production by document custodian

The corporate representative who delivers the documents to the grand jury should be knowledgeable as to the completeness of compliance and the search which was conducted and able to answer questions, if any, relative to these areas. The corporation has an obligation to designate a representative who does not have a 5th Amendment problem.

In addition, the custodian may be questioned about deficiencies in compliance and the reasons therefore and instructed to make any appropriate additional compliance. As stated in In re Chilcote Co., 9 F.R.D. 571, 573 (N.D. Ohio), aff'd sub nom. A.A. Chilcote v. United States, 177 F.2d 375 (6th Cir. 1949):

303/ See Hurtado v. United States, 410 U.S. 578, 588-89 (1973); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

> It was the duty and responsibility of the president as chief executive officer of the corporation either to present himself or to send such officer or responsible representative of the corporation who could respond to the requirements of the subpoena, and he or the one selected by him should have attended the session of the Grand Jury on the date fixed by the subpoena and awaited questioning, dismissal or other action by that body.
>
> . . .
>
> A corporation only can act or respond by and through its responsible executives and certainly not through a

messenger when a subpoena calls for attendance and testimony.

Although this case involved a corporation, its reasoning, of course, is equally applicable to other types of organizations.

Obviously, where a person appears as a witness in a custodial capacity, the staff should limit its interrogation to his custodial activities and responsibilities.

A.

B.

C.

D.

E.

F. Motions to Quash

1. Grounds

A party may move under Fed. R. Crim. P. 17(c), to quash a grand jury subpoena on the grounds that it lacks specificity or is burdensome or upon claims of constitutional or common law privilege or Government misconduct or harassment.304/

Courts have applied the 4th and 5th Amendments and Fed. R. Crim. P. 17(c), to limit subpoenas duces tecum. Assuming the 4th Amendment is applicable to grand jury subpoenas,305/ the principal limitation is the prohibition against "unreasonable searches and seizures" which is applicable to corporations as well as individuals. The 5th Amendment's

prohibitions against self-incrimination generally protect only individuals and, to a limited extent, sole proprietorships. Sole proprietorships are entitled to 5th Amendment protection only for purely private or personal, as opposed to business, interests. Officers of a corporation, including closely-held corporations, may not object to the disclosure of corporate records, even if the act of production might prove to be personally incriminating.306/ Rule 17(c), which provides that a court "on motion made promptly may quash or

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304/ For a more detailed discussion of the privileges applicable to grand jury subpoena compliance, see § C., supra.

305/ See § C.2.b., supra.

306/ Braswell v. United States, 487 U.S. 99 (1988).

modify the subpoena if compliance would be unreasonable or oppressive," can also be used to limit subpoenas duces tecum.

The limitations on the scope of a subpoena duces tecum may be generally summarized as follows. It must not be too broad and sweeping.307/ The documents sought must have some relevance to the investigation being conducted.308/

The subpoena must be limited to a reasonable time.309/ The documents requested must be described with sufficient definiteness so that the entity subpoenaed may know what is wanted.310/ The burden of complying with the subpoena must not be too great.311/ The subpoenas may not be used to secure privileged communications.312/ Trade secrets may be obtained because the rules of secrecy of grand jury proceedings will protect the confidentiality of such

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307/ Brown v. United States, 276 U.S. 134 (1928); In re Special November 1975 Grand Jury, 433 F. Supp. 1094 (N.D. Ill. 1977); In re Harry Alexander, Inc., 8 F.R.D. 559 (S.D.N.Y. 1949).

308/ United States v. R. Enterprises, Inc., __ U.S. __ (1991); Hale v. Henkel, 201 U.S. 43 (1906); Schwimmer v. United States, 232 F.2d 855 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

309/ Brown v. United States, 276 U.S. 134 (1928); In re Grand Jury Subpoena Duces Tecum, 405 F. Supp. 1192, 1198 (N.D. Ga. 1975); In re United Shoe Mach. Corp., 7 F.R.D. 756 (D. Mass. 1947).

310/ Brown v. United States, 276 U.S. 134 (1928); In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 991, 999 (D.R.I. 1975); In re United Shoe Mach. Corp., 73 F. Supp. 207 (D. Mass. 1947).

311/ In re Harry Alexander, Inc., 8 F.R.D. supra; In re Borden, 75 F. Supp. 857 (N.D. Ill. 1948).

312/ In re Grand Jury Subpoenas Duces Tecum, 773 F.2d 204 (8th Cir. 1985).

secrets.313/ In rare instances, a subpoena may be quashed because it was being used to harass or intimidate the subpoena recipient or because of other Government misconduct.314/

Subpoena recipients have unsuccessfully asserted several other arguments in an attempt to avoid compliance. In In re Dymo Industries Inc., 300 F. Supp. 532 (N.D. Cal. 1969), aff'd, 418 F.2d 500 (9th Cir.), cert. denied, 397 U.S. 937 (1970), the grand jury subpoena was attacked because it was issued by the Antitrust Division. The court held that an investigation conducted at the initiative of the Department of Justice is and always has been a proper function of the grand jury. Grand jury subpoenas also have been attacked without success on the ground that no probable cause existed supporting the demand.315/ A grand jury is authorized to investigate prior to a determination of probable cause, and, in fact, in order to make this finding.316/

Where Division attorneys, in the course of a preliminary investigation, interviewed persons who were later

subpoenaed in an ensuing

313/ Schwimmer v. United States, 232 F.2d supra; In re Grand Jury Subpoenas Duces Tecum, 483 F. Supp. 1085, 1090 (D. Minn. 1979); In re Radio Corp. of Am., 13 F.R.D. 167 (S.D.N.Y. 1952).

314/ See In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); United States v. (Under Seal), 714 F.2d 347 (4th Cir.), cert. denied, 464 U.S. 978 (1983); United States v. Doe, 541 F.2d 490 (5th Cir. 1976).

315/ 300 F. Supp. at 534.

316/ Id.; Bacon v. United States, 449 F.2d 933 (9th Cir. 1971).

grand jury investigation, the court refused to quash the grand jury subpoenas on the ground that the witnesses' constitutional rights were allegedly violated because they were not given Miranda warnings.317/ The court noted that the interviews were voluntary and "part of a routine, preliminary inquiry." Further, the interviewees were not entitled to a Miranda-type warning in any event because there was neither custody nor focus of guilt.

2. Costs of compliance

The Government is generally not required to reimburse a person for his costs in complying with a subpoena duces tecum.318/ However, the court in In re Grand Jury No. 76-3 (Mia.), Subpoena Duces Tecum, 555 F.2d 1306, 1308 (5th Cir. 1977), noted that a court exercising its power under Rule 17(c) of the Fed. R. Crim. P. may, in the appropriate circumstances, modify a grand jury subpoena to require the cost of compliance to be borne by the Government. A showing of financial burden entailed in complying with a subpoena, of course, may be considered by a court in assessing the reasonableness or burdensomeness of a subpoena in the context of a motion to quash.

317/ In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,857, at 91,594-95 (W.D. Ky.).

318/ See Hurtado v. United States, 410 U.S. 578, 588-89 (1973); In re Grand Jury Investigation, 459 F. Supp. 1335 (E.D. Pa. 1978).

3. Burdens of the parties

A presumption of regularity attaches to all grand jury subpoenas duces tecum.319/ Thus, the party who seeks to quash a subpoena on the grounds that it is unreasonable or burdensome bears a heavy burden.320/

Once a motion to quash has been made, at least some courts may require that the Government initially demonstrate the relevance of the subpoenaed documents to a legitimate grand jury investigation. In the Third Circuit, the Government's initial burden may be met by the Government's submission of a "Schofield" affidavit containing a very brief description of the nature and/or purpose of the grand jury investigation and the general relevance of the subpoenaed documents to the investigation.321/ The "Schofield" affidavit should be submitted to the court in camera. Most other circuits do not require such an initial showing of relevancy and have either declined to follow Schofield or have distinguished

it.322/

319/ United States v. R. Enterprises, Inc., __ U.S. __, __ (1991); In re Grand Jury Subpoena, 920 F.2d 235 (4th Cir. 1990); Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

320/ United States v. R. Enterprises, Inc., __ U.S. at __ ; In re Grand Jury Subpoena Duces Tecum (M.G. Allen and Assoc., Inc.), 391 F. Supp. 991 (D.R.I. 1975).

321/ In re Grand Jury Proceedings, (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings, (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); see also In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc) (Subpoena directed to client's attorney).

322/ Declined to follow: In re Pantojas, 628 F.2d 701 (1st Cir. 1980); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re

Footnote Continued

The Third Circuit's affidavit requirement may no longer be valid or may be severely limited in light of the Supreme

Court's recent decision in United States v. R. Enterprises, Inc., __ U.S. __ (1991). Under R. Enterprises, the Government would, at most, have to reveal the general subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion.323/

4. Time for filing

Unlike Rule 45(b) of the Fed. R. of Civ. P., the criminal rule allows for the consideration of a motion to quash a subpoena at any time up to and including the time set for compliance.324/

322/ Continued

Grand Jury Proceedings (Hellman), 756 F.2d 428 (6th Cir. 1985); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663 (8th Cir. 1986); In re Grand Jury Proceedings (Bowe), 694 F.2d 1256 (11th Cir. 1982). Distinguished: United States v. Santucci, 674 F.2d 624 (7th Cir. 1982), cert. denied, 459 U.S. 1109 (1983); United States v. Skipworth, 697 F.2d 281 (10th Cir. 1983).

323/ __ U.S. at __; see also § A.2.a.

324/ See Wright, Federal Practice and Procedure, Criminal Section 275.

5. Appeals

Under 18 U.S.C. § 3731, the Government may appeal an order quashing a grand jury subpoena.325/

One to whom a grand jury subpoena is directed may generally not appeal the denial of a motion to quash the subpoena, but must either comply or refuse to comply with the subpoena. If he refuses to comply, he may contest the validity of the subpoena on appeal, if he is subsequently cited for contempt.326/ Appellate review may be appropriate in a

limited class of cases where denial of immediate review would render impossible any review at all.327/ For example, in Perlman v. United States, 247 U.S. 7 (1918), immediate review of an order directing a third party to produce documents that were Perlman's property was allowed because it was unlikely that the third party would risk contempt to vindicate Perlman's rights.328/

325/ See In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979); United States v. Calandra, 455 F.2d 750 (6th Cir. 1972), rev'd on other grounds, 414 U.S. 338 (1974); In re Special September 1978 Grand Jury (II), 640 F.2d 49 (7th Cir. 1980).

326/ United States v. Ryan, 402 U.S. 530 (1971); see Cobbledick v. United States, 309 U.S. 323 (1940).

327/ United States v. Ryan, 402 U.S. 530 (1971).

328/ See also In re Gren, 633 F.2d 825 (9th Cir. 1980) (immediate appeal from an order denying a motion to quash a subpoena permitted because subpoena recipient was subject to civil suit for improperly divulging consumer credit information).

G. Enforcement of Subpoenas

A refusal or failure to produce documentary material in compliance with a subpoena or incomplete or untimely compliance may require a motion to compel compliance and, if necessary, initiating civil or criminal contempt proceedings.329/

1. What constitutes contempt

Contempt by refusing or failing to comply with a subpoena may be either criminal or civil in nature. Its constituent elements are found in Fed. R. Crim. P. 17(g) and 42;330/ 18 U.S.C. § 401;331/ and 28 U.S.C. § 1826

329/ See Ch. V § M. for a discussion of contempt in the context of a refusal to testify.

330/ Fed. R. Crim. P. l7(g):

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

See also § G.4., infra.

331/ 18 U.S.C. § 401:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> (l) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official

Footnote Continued (Organized

Crime Control Act).332/

Simply stated, contempt is committed if a person is properly subpoenaed and willfully fails to produce records which are in existence and under his control at the time the subpoena is issued.333/ Failure to appear is sufficient in itself to constitute contempt. A witness who appears but refuses to produce the documents demanded is not yet in contempt of court (unless an order to testify or produce is secured in advance from the court, as for example, with an immunity order). The act of contempt does not occur until the witness refuses to obey a direct order of the court.334/ This means that the recalcitrant witness must be presented before the court, a

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331/ Continued

transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

332/ 28 U.S.C. § 1826:

> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. . . .

333/ Nilva v. United States, 352 U.S. 385 (1957); Goldfine v. United States, 268 F.2d 941 (1st Cir. 1959), cert. denied, 363 U.S. 842 (1960).

334/ Brown v. United States, 359 U.S. 41 (1959); United States v. Chandler, 380 F.2d 993 (2d Cir. 1967).
proper foundation must be established and the court must issue a direct order to the witness to produce.

To sustain a charge of contempt, whether the charge is criminal or civil, the following must occur:

(l) There must be valid service of the subpoena;

(2) The recipient must fail to make production of the documents requested after a court order has directed him to do so;

(3) In the case of criminal contempt, the recipient's failure must be the result of his willful acts;335/

(4) The documents must be in existence at the time; and

(5) The recipient must have control of the requested documents.

2. Distinction between civil and criminal contempt

The essential differences between criminal and civil contempt are the nature and purpose of the relief sought. A contempt proceeding is civil if

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335/ Willfulness is not a necessary element of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); T.W.M. Mfg. Co. v. Dura Corp., 722 F.2d 1261 (6th Cir. 1983), cert. denied, 479 U.S. 852 (1986).

the purpose is remedial and intended to coerce the person into doing what he is supposed to do.336/ The sanction for civil contempt is conditional and must be lifted once the contemnor has complied with the court's order.337/ To more fully realize the coercive effect of a possible contempt sanction, a witness expected to refuse to produce (or testify) should be taken before a grand jury panel which has a period of time left to serve, rather than a panel which is about to expire. If the purpose is to punish the wrongdoer, however, the proceeding is one for criminal contempt and the sentence will be determinate.338/

The Supreme Court, in Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966), held that a sentence for criminal

contempt in excess of six months requires a jury trial.339/ Of course, the Government cannot know in advance what penalty will be imposed. Nevertheless, the Government should not press for imprisonment in excess of six months, and should be certain the court is aware of the Cheff rule.

336/ Shillitani v. United States, 384 U.S. 364 (1966).

337/ Id.; Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984).

338/ United States v. United Mine Workers, 330 U.S. 258 (1947).

339/ See also United States v. Twentieth Century Fox, 882 F.2d 656 (2d Cir. 1989) (organization has a right to a jury trial when fine imposed for criminal contempt exceeds $100,000), cert. denied, __ U.S. __ (1990).

3. Proof

The fact of contempt is usually established by the Government by the following proof:

(l) The affidavit or testimony of a deputy marshal that he served the subpoena upon the defendant upon the date and at the time indicated by the return date;

(2) The subpoena itself which may be submitted with the marshal's affidavit, or introduced separately, showing that it was properly issued by the clerk of court upon application of the United States;

(3) If necessary, the affidavit or testimony of the clerk or a deputy clerk showing that issuance of the subpoena was in conformity with Fed. R. Crim. P. l7;

(4) The affidavit or testimony of the foreperson of the grand jury establishing the presence of a quorum on the date and time in question. In this regard, the best evidence would be the minutes of the grand jury as maintained by the secretary that a quorum was present. (Authentication by the grand jury secretary and his testimony would be necessary if the grand jury minutes are used.) The foreperson's affidavit or testimony should also include the fact that:

(a) The defendant did not appear, or

(b) Appeared and refused or failed to produce, or

(c) Appeared and refused or failed to

produce all the documents ordered by

the subpoena.

Copies of appropriate parts of the grand jury transcript may be offered through the testimony of the court reporter, the foreperson, or a Government attorney;

(5) The testimony of the recipient or the appropriate representative of a corporate recipient before the grand jury, as revealed by the transcript. This testimony would be admissible through the foreperson, or the court reporter, or counsel for the Government by affidavit340/ and;

340/ If the recipient or corporate representative appears before the grand jury and fails or refuses to produce the subpoenaed material, in whole or in part, counsel for the Government should take the opportunity to adduce the necessary evidence at that time regarding the document's control, custody or possession and the recipient's willfulness in failing or refusing to produce.

(6) Whatever evidence is available to show the existence of the documents, their control by the recipient, and his refusal to produce. For criminal contempt, failure to appear on the return date is sufficient to establish the requisite willfulness, thus shifting the burden to the defendant to show a good faith effort to comply.341/

4. Procedure and forms

The procedure to be followed for failure or refusal to comply with a subpoena to produce documents essentially is the same for both criminal and civil contempt.

Punishment for failure to produce is criminal in nature, and the procedure to be followed, the refusal or failure not being in the actual presence of the court, must be in accordance with Fed. R. Crim. P. 42(b).342/ Rule 42(b) provides:

> Rule 42(b) Disposition Upon Notice And Hearing. A criminal contempt, except as provided in subdivision (a) of this rule, shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is

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341/ United States v. Johnson, 247 F.2d 5 (2d Cir.), cert. denied, 355 U.S. 867 (1957).

342/ Harris v. United States, 382 U.S. 162 (1965).

entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

It is settled that the summary procedure provided for by Fed. R. Crim. P. 42(a), is not appropriate for a refusal to produce evidence before a grand jury even though the refusal takes place directly in the presence of the court and at the court's request. This rule is usually utilized where a party, during a court hearing or trial, is abusive of the court or otherwise engages in contemptible conduct.343/

343/ See, e.g., Harris v. United States, 382 U.S. 162 (1965); United States v. Willett, 432 F.2d 202 (4th Cir. 1970).

The courts have held that Rule 42(b) also applies to civil contempt proceedings, including those brought under 28 U.S.C. § 1826, and, therefore, a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense.344/ The notice should specify whether the proceeding will be criminal or civil.345/

Both criminal and civil contempt may be pursued by way of an Order to Show Cause. Criminal contempt may alternatively be charged in an indictment. Actual criminal or civil contempt proceedings may be preceded by a Motion to Compel Compliance.

1) Order to show cause.346/ As provided in Fed. R. Crim. P. 42(b), a show-cause order can be requested by the Government. The request should take the form of a Petition by the United States for an order to show cause why respondent should not be found in contempt. Affidavits setting forth the foundational facts discussed above should be submitted to the court by the Division attorney or attorneys presenting the matter. The affidavit of the deputy

marshal who served the subpoena should also be submitted with the petition.

344/ Shillitani v. United States, 384 U.S. 364 (1966); In re Rosahn, 671 F.2d 690 (2d Cir. 1982); United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977); United States v. Hawkins, 501 F.2d 1029 (9th Cir.), cert. denied, 414 U.S. 1079 (1974).

345/ Gompers v. Buck's Stove & Range Co., 221 U.S. 418 (1911); In re Dinnan, 625 F.2d 1146 (5th Cir. 1980); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983).

346/ See United States v. National Gypsum Co., 1972 Trade Cas. (CCH) ¶ 74,173, at 92,870 (W.D. Pa.).

In addition, the Third Circuit requires an affidavit by the Government setting forth the general relevancy of the subpoenaed documents to the grand jury investigation.347/ Most other circuits, however, have either declined to follow or have distinguished the Third Circuit's approach.348/

2) Indictment. An alternative procedure which may be followed in pursuing criminal contempt occurring before the grand jury (after direct order of the court) is for the grand jury to return an indictment for violation of 18 U.S.C. § 401.349/

3) Motion to compel compliance. If a witness appears before the grand jury and refuses to comply with the subpoena based on some objection to the subpoena, e.g., attorney-client privilege, work-product privilege, 1st, 4th or 5th Amendments, 18 U.S.C. § 2515 (Prohibition of use as evidence of intercepted or oral communications) or § 3504 (Evidence derived from an unlawful act), the Government may wish to bring on a motion

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347/ In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); In re Grand Jury Proceedings (Schofield II), 507 F.2d 963 (3d Cir.), cert. denied, 421 U.S. 1015 (1975); see also In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir.), vacated, 697 F.2d 112 (4th Cir. 1982) (en banc). But see United States v. R. Enterprises, Inc., __ U.S. __ (1991).

348/ See §§ A.1.a. and F.3., supra.

349/ See United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970).
to compel compliance rather than going directly to contempt proceedings. This affords the Government an opportunity to litigate any issues of fact or law prior to any contempt proceedings.

The motion should be brought upon notice and should be accompanied by some indication in writing to counsel that if the motion is granted and there is then a lack of compliance with the court's order, the Government intends to proceed immediately against the witness in a contempt proceeding under Rule 42(b) or 28 U.S.C. § 1826. The witness should be required to raise all possible objections to the subpoena at the hearing on the motion to compel, rather than litigating such issues at the contempt hearing. Care should be taken to research the case law prior to the hearing on the motion to compel regarding the particular objection because frequently the Government has an initial burden to meet. For example, if a 1st Amendment objection is raised, the Government may have to make certain showings as to the legitimacy of the grand jury investigation.

If a claim of privilege is made, the court will first determine whether the privilege, as a general matter, exists. If so, the court may order an in camera inspection of the documents for which the protection is sought.350/

350/ In re Grand Jury Proceedings (Doe), 602 F. Supp. 603, 610 (D.R.I. 1985).

5. Defenses

a. 4th Amendment

The 4th Amendment's prohibition against unreasonable searches and seizures has been applied to grand jury subpoenas but only to the extent that a subpoena that is unnecessarily broad in scope will be held unreasonable.351/ A

subpoena duces tecum is thus subject only to the general 4th Amendment requirement of reasonableness, and need not be based on probable cause.

b. 5th Amendment

A corporation has no 5th Amendment privilege against self-incrimination.352/ This rule has been extended to include all corporations, no matter how small, and most other "artificial entities", such as partnerships.353/ Moreover, a corporation must produce its records

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351/ For a more detailed discussion of the application of the 4th Amendment to subpoenas, see § C.2.b.

352/ Hale v. Henkel, 201 U.S. 43 (1906); United States v. White, 322 U.S. 694 (1944). For a more detailed discussion of the application of the 5th Amendment to subpoenas, see § C.2.c.

353/ Bellis v. United States, 417 U.S. 85 (1974).
even though their contents or the act of production itself may incriminate the custodian of the records or other corporate officials.354/

Records required to be made or kept by the business, kept by employees within the business, submitted to the business from time-to-time, or kept on the business premises and used in day-to-day transactions of the business are considered business records for purposes of the 5th Amendment.355/ Appointment calendars and diaries kept by employees of the business generally are considered business records, even when they contain personal as well as business-related notations.356/

c. Illegal wiretaps

A grand jury witness is entitled, by reason of 18 U.S.C. §§ 2515 and 3504, to refuse to respond to questions

based on illegal interception of

354/ See Braswell v. United States, 487 U.S. 99 (1988); United States v. Antonio J. Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986); In re Grand Jury Empaneled March 17, 1987, 836 F.2d 150 (3d Cir. 1987); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir.), cert. denied, 479 U.S. 985 (1986); In re Grand Jury Proceedings (Morganstern), 771 F.2d 143 (6th Cir.), cert. denied, 474 U.S. 1033 (1985); In re Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986), cert. dismissed, 479 U.S. 1048 (1987); United States v. Vallance, 793 F.2d 1003, 1005-06 (9th Cir. 1986); In re Grand Jury Proceedings (Vargas), 727 F.2d 941, 946 (10th Cir.), cert. denied, 469 U.S. 819 (1984); In re Grand Jury No. 86-3 (Will Roberts), 816 F.2d 569, 570 (11th Cir. 1987).

355/ United States v. MacKey, 647 F.2d 898 (9th Cir. 1981).

356/ United States v. MacKey, 647 F.2d supra; In re Grand Jury Subpoena Duces Tecum, 522 F. Supp. 977 (S.D.N.Y. 1981); United States v. Waltman, 394 F. Supp. 1393 (W.D. Pa.), vacated on other grounds, 525 F.2d 371 (3d Cir. 1975); In re Grand Jury Proceedings, 349 F. Supp. 417 (N.D. Ohio 1972).

oral or wire communications.357/ However, a grand jury witness does not have standing to suppress evidence before a grand jury. He merely has the right not to testify in response to questions based on the illegal interception of his communications.358/

The Government's response to a claim of an illegal interception depends on whether any interception occurred. If there was no interception, the Government will file an affidavit denying that any interception took place. Under some circumstances, the affidavit must be reasonably specific, and conform with the requirements set forth in United States v. Alter, 482 F.2d 1016 (9th Cir. 1973).

If an interception did occur, the Government must so indicate, and provide the court with appropriate documents demonstrating that the interception was pursuant to court order.359/

d. Improper Government motive

A subpoena recipient need not comply with a subpoena if it is issued for an improper motive, for example, to obtain information for use at trial or for use in a civil investigation or to harass or intimidate the subpoena

357/ Gelbard v. United States, 408 U.S. 41 (1972); see Ch IV § D.4.

358/ Id. at 47; see In re Marcus, 491 F.2d 901 (1st Cir.), vacated, 417 U.S. 942 (1974).

359/ For a discussion as to what documents are necessary to prove a valid intercept, see U.S.A.M. 9-7.110 and 7.113.
recipient. The subpoena recipient has a heavy burden to justify non-compliance on these grounds.360/

e. Fear of retaliation

Fear of retaliation and for the physical safety of the witness does not constitute just cause to refuse to testify or produce documents.361/ Even where fears are shown to be legitimate, courts have refused to excuse the witness from testifying.362/ A few courts have recognized the possibility that duress or coercion may be a defense to a contempt charge, but have found the defense inapplicable to the facts presented.363/

6. Successive contempt citations

If sanctions have been imposed on a witness found in contempt of the grand jury, that witness may not be called before a second grand jury without prior approval from the Assistant Attorney General, Criminal

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360/ See § A.1., supra, for a more detailed discussion of the appropriate scope of grand jury subpoenas.

361/ Dupuy v. United States, 518 F.2d 1295 (9th Cir. 1975).

362/ In re Grand Jury Proceedings (Taylor), 509 F.2d 1349 (5th Cir. 1975); Latona v. United States, 449 F.2d 121 (8th Cir. 1971).

363/ See In re Grand Jury Proceedings (Gravel), 605 F.2d 750 (5th Cir. 1979); United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied, 430 U.S. 931 (1977).

Division.364/ Although language in Shillitani v. United States, 384 U.S. 364, 371 n.8 (1966), may authorize successive contempts, the Department has taken a more restrictive stance.

7. Appeals

Contempt adjudications are appealable as final decisions under 28 U.S.C. § 1291.365/ A contempt adjudication is not final for purposes of appeal under § 1291 until a sentence or sanction has been imposed.366/ An application for a show-cause order for criminal contempt is a "criminal case" within the meaning of the Criminal Appeals Act, 18 U.S.C. § 3731, and a Government appeal of the denial of a criminal contempt order is thus subject to the requirements of that provision.367/

8. Refusal to testify or refusal to answer certain questions

364/ See U.S.A.M. 9-11.160.

365/ See Wright, Miller & Cooper, Fed. Prac. and Proc. 15 Jurisdiction § 3917 (1976); United States v. Martin Linen Supply Co., 485 F.2d 1143 (5th Cir. 1973) (Government appeal of denial of criminal and civil contempt), cert. denied, 415 U.S. 915 (1974); United States v. Metropolitan Disposal Corp., 798 F.2d 1273 (9th Cir. 1986) (witness appeal of criminal contempt).

366/ Weyerhaeuser Co. v. International Longshoremen's Union, 733 F.2d 645 (9th Cir. 1984).

367/ United States v. Goldman, 277 U.S. 229 (1928); United States v. Sanders, 196 F.2d 895 (10th Cir. 1952).

Once the problems of self-incrimination and immunity have been overcome,368/ the ingredients of contempt and the procedures to be followed are the same as described above as to production of documents.

H. Forthwith Subpoenas

A forthwith subpoena compels a witness to appear or to produce documents shortly after service of the subpoena. Forthwith subpoenas are simply subpoenas whose return times are shorter than what would otherwise be "reasonable" under normal circumstances. The term "forthwith" describes the brief time period between service and appearance or production.

Only two circumstances merit issuing a forthwith subpoena. First, where a potential witness is likely to flee; second, where there is a reasonable likelihood that documents will be destroyed, concealed or fabricated. Decisions to issue a forthwith subpoena must also consider the need for the orderly presentation of evidence before the grand jury, and the degree of inconvenience that the forthwith subpoena might cause a subpoenaed witness.369/ Generally, "the issuance of a 'forthwith' subpoena may be justified by the facts and circumstances of a particular case."370/

368/ See Ch. V.

369/ See U.S.A.M. 9-11.140.

370/ United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983).

1. Efficacy of forthwith subpoenas

When considering whether to issue a forthwith subpoena, attorneys should be aware that even in the extreme circumstances that would justify issuing it, a recipient's efforts to quash a forthwith subpoena may sufficiently delay appearance or production so that the efforts successfully thwart the goals of the "forthwith" nature of the subpoena. This, combined with the efforts necessary to respond to motions to quash, may, in most circumstances, make other means of compelling appearance or production (such as a subpoena with a longer return time, a material witness arrest warrant, or a search warrant) more effective means of securing witness appearances or minimizing document destruction.

A forthwith subpoena is especially susceptible to motions to quash, simply because the filing of such motions will stay compliance. One court has suggested that prosecutors may not enforce a forthwith subpoena until its recipient has the chance to file a motion to quash; the time for this "chance" would seem to set a minimum return.371/ The time that it takes for a court to hear a motion to quash may be such that, in the end, the time between service of the forthwith subpoena and compliance approximates a "normal" subpoena return time. Thus, attorneys should consider the relative efficacies of devoting prosecutorial resources to oppose a motion to quash, perhaps filed simply to gain time, and avoiding such motions, perhaps

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371/ See United States v. Re, 313 F. Supp. at 449-50.

achieving, in the end, the same compliance time as the original forthwith subpoena.

A particular circumstance in which a forthwith subpoena is appropriate arises when the grand jury is in session, and attorneys become aware of evidence (for example, through other presentations before the grand jury, proffered

evidence, witness interviews, or otherwise) that the grand jury must consider during its session, and that such evidence would not likely be available for a subsequent grand jury session. An attorney will have little time to secure a search warrant from a court, thus, a forthwith subpoena may be the only way to put the necessary evidence before the grand jury.

2. Timing of a forthwith subpoena;
court assessment of "reasonableness"

Courts have approved the use of forthwith subpoenas served only minutes before, and on one occasion, at the precise moment of the required return time before the grand jury.372/ While there is no precise return time that sets apart a "forthwith" from a "normal" subpoena, "forthwith" subpoenas are usually served during a session of the issuing grand jury, and call for a return during the same grand jury session.

372/ United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983) (document returns required by 4:00 p.m.; subpoenas served at 3:50 p.m. and 4:00 p.m.); United States v. Re, 313 F. Supp. 442 (S.D.N.Y. 1970) (subpoena served on the morning before production was due).

When courts consider a motion to quash a forthwith subpoena, they will balance the circumstances under which a forthwith subpoena is issued with the alleged burden and inconvenience that the subpoena may cause. For example, in United States v. Re, 313 F. Supp. at 449-50, the court stated that it would judge the reasonableness of a forthwith subpoena duces tecum on the basis of the following factors: 1) whether the Government had a clear reason to fear destruction and alteration of documents; 2) the prejudice to the subpoena recipient by requirements that they produce documents forthwith; 3) the physical cumbersomeness of the documents; 4) any grounds on which the addressee could quash the subpoena had he been given more notice and thus more time to consult with counsel; 5) whether the documents were burdensome in quantity; and 6) whether the subpoena was sufficiently specific.

In general, the shorter a subpoena's return time, the more burdensome and inconvenient the subpoena becomes. Shortened time of return or production will especially compound burden where a subpoena calls for a document search or for appearance by a witness who physically is far removed from the grand jury. The circumstances that surround issuing a forthwith subpoena must outweigh the burden and inconvenience that shortened time has added to the subpoena. Attorneys should accordingly be as certain as possible that the circumstances warrant issuing a forthwith subpoena, and be able to demonstrate the basis for that certainty in court.

3. 4th Amendment questions

raised by forthwith subpoenas

Courts have been concerned with the misuse of forthwith subpoenas to effect warrantless searches. The 4th Amendment protects against unreasonable "constructive" searches and seizures,"373/ and the grand jury's power to issue

forthwith subpoenas does not authorize the server of a subpoena either to seize items that the subpoena requires, or to demand that such items immediately be turned over to him. If the subpoena server coerces compliance with the subpoena, the subpoena takes on the nature of a search warrant. The subpoena can never be the basis of a valid search because it will not be issued as the result of a direct court order.374/ Misuse of a forthwith subpoena to effect a warrantless search or arrest may lead a court to exclude at trial the evidence, the witness' testimony, or the fruits of either sought by the forthwith subpoena, even if the subpoena recipient initially complied with the subpoena.375/

To minimize possible 4th Amendment questions, attorneys should make sure that the subpoena server knows to tell the recipient that while the subpoena compels the recipient's return before the grand jury, the subpoena is not a search or arrest warrant. Attorneys should further instruct the server of the forthwith subpoena that he is only to serve the subpoena, and not suggest to recipients that the subpoena allows him to seize or review the documents.

373/ United States v. International Business Machs. Corp., 83 F.R.D. 97 (S.D.N.Y. 1979).

374/ Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); United States v. Lartey, 716 F.2d 955, 962 (2d Cir. 1983).

375/ United States v. Ryan, 402 U.S. 530, aff'g 444 F.2d 1095 (9th Cir. 1971).

Subpoena recipients may consent to a search by the server of the subpoena.376/ Servers of subpoenas, however, must immediately leave the recipient's premises if a recipient asks them to do so.377/ In cases where consent to search is given, the authority for the search is not the subpoena, but, instead, the consent to the search by the owner or the person in control of the subject of the subpoena.378/ In such cases, acquiescence, not knowing and informed consent are sufficient.379/ Questions of consent to search and authority to give consent are often difficult. Accordingly, the best practice is for servers of forthwith subpoenas to promptly leave a recipient's premises after service of the subpoena. Further, in anticipation of any 4th Amendment questions, at least two persons should serve a forthwith subpoena. If necessary, one server may appear as a witness, should the recipient try to quash the subpoena on the grounds that the

servers attempted to use the subpoena to effect a warrantless search.

Attorneys should also establish a proper foundation for a forthwith subpoena by arranging, prior to issuing the forthwith subpoena, for witness testimony about the facts and circumstances that would justify issuing the subpoena. Forthwith subpoenas should be issued with the grand jury's approval and at the foreperson's direction.380/

376/ See Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d 770 (6th Cir. 1979) (totality of circumstances test to determine if consent was given), cert. denied, 445 U.S. 903 (1980).

377/ Id. at 774.

378/ Id.

379/ Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

4. Alternatives to forthwith subpoenas

a. Subpoenas with longer return times

A subpoena with a "normal" return time that would be "reasonable" if there were no question of a witness' appearance or document destruction, would have the same effect as a forthwith subpoena of putting a witness on notice that the grand jury requires his appearance or his documents. Noncompliance with the subpoena is still enforceable by contempt. Yet, enforcement of the subpoena may, on the whole, be more certain, since its longer return time would likely contribute to a court holding that it was, on the whole, reasonable. As discussed above, after a court hears a motion to quash a forthwith subpoena, the time between service of and compliance with a forthwith subpoena, and that between service and compliance with a subpoena with a longer return time, may end up being identical.

380/ See United States v. Hilton, 534 F.2d 556, 565 (3d Cir.) (forthwith subpoena issued when grand jury is not in session is not a substitute for a proper search warrant), cert. denied, 429 U.S. 828 (1976).

b. Material witness arrest warrants

to assure witness appearances

If a witness is likely to flee, attorneys should strongly consider applying to the court for a material witness arrest warrant. 18 U.S.C. § 3149 specifically provides for a material witness arrest warrant to assure a witness' grand jury appearance. Under a material witness arrest warrant, a witness is arrested and held until his grand jury appearance.

c. Search warrants to curtail document

destruction, concealment or fabrication

A search warrant is, in most cases, preferable to a subpoena where there is a reasonable likelihood that documents will be destroyed, concealed or fabricated. A search warrant allows a direct search for documents, while a subpoena depends on the recipient or its agents to conduct the search and to produce the documents before the grand jury. Given that the basis for issuing the warrant would be the likelihood of document destruction, concealment or fabrication, a direct, warranted search is more likely to achieve the desired result of safeguarding documents than merely relying on the subpoena recipient to produce the documents himself.

I. Search Warrants

1. Factors to consider in using warrants

In a limited set of circumstances, attorneys should consider the use of a search warrant to obtain evidence of criminal activity. Generally, warrants should be viewed as an extraordinary method of criminal discovery, and should be sought only when an attorney has a substantial basis for doing so. Moreover, because of differing standards governing their issuance,381/ search warrants cannot be viewed as substitutes for grand jury subpoenas duces tecum. Rather, warrants are useful as complements to subpoenas in cases in which the investigation develops proof either: (a) that material responsive to a previously-issued subpoena was not produced in response to the subpoena; or (b) that there is already probable cause to charge a criminal offense (such as price-fixing) and that evidence not already under subpoena which helps prove that offense can be found at a specified location. In antitrust investigations, the former situation is the more likely one in which a search warrant would be sought.

Where the prosecuting attorney can establish that the recipient of a grand jury subpoena duces tecum has not complied fully with the subpoena, either by deliberately withholding responsive documents or by recklessly

381/ A grand jury may issue subpoenas for evidence to discover whether there exists probable cause to believe that a crime has been committed. By contrast, before a search warrant may issue, the Government must establish probable cause to believe that an offense has been committed.
searching for responsive materials, the prosecutor could proceed either by search warrant or by follow-up subpoena. The search warrant may be the superior alternative, for the following reasons.

First, if an individual deliberately or recklessly withheld documents responsive to an earlier grand jury subpoena, it is unlikely that the same individual will produce the required documents in response to a subsequent subpoena. The security of the documents is of paramount importance to the prosecution, as the withheld materials are likely to be proof of both the original offense under investigation (e.g., price-fixing or bid-rigging) and the separate offense (e.g., obstruction of justice or criminal contempt) which was committed when the documents were withheld from production under the original subpoena. Use of a search warrant in these circumstances may be essential to prevent the further concealment or the possible destruction of this evidence. Warrants are issued without notice to the person whose premises are to be searched

and they are executed by law enforcement officers who immediately take the evidence into their possession, eliminating the opportunity for destruction of evidence.

Second, a search warrant is executed by law enforcement officers without any participation by the owner or custodian of the seized property. Thus, the owner or custodian is not being compelled to do anything which might be deemed "testimonial" and, for that reason, he has no right to assert a 5th Amendment privilege to block execution of the warrant. On the other hand, the courts have held under some circumstances that if the act of producing documents in response to a subpoena can, itself (i.e., independent of the content of the documents), be said to establish an element of a criminal offense,382/ the act of production is deemed "testimonial," and 5th Amendment self-incrimination interests are implicated.383/

If an attorney conducting a grand jury investigation has a substantial reason to suspect that the recipient of a subpoena duces tecum has withheld documents, use of a search warrant should be considered. Some indicia of possible

withholding of documents are: chronological gaps in a company's production (particularly if those gaps coincide with significant events in the case, such as bid opening dates, etc.); significant differences between the relative quantities of documents produced by different offices of the same company; the existence of documents prepared by, e.g., Company A in Company B's submission, where no counterpart documents were submitted by Company A; and testimony by grand jury witnesses that a particular individual prepared and kept a certain type of record (e.g., a diary or notebook of his activities) and the absence of such records in his company's submission. To establish the requisite probable cause to obtain a warrant, it may be necessary to systematically question grand jury witnesses from the suspect company about the existence or destruction of subpoenaed documents. Staffs should be cautious as, on occasion, such questioning may prematurely alert a company to our suspicions and lead to further destruction of documents prior to the search.

382/ In a prosecution for obstruction of justice, 18 U.S.C. § 1503, or criminal contempt, 18 U.S.C. § 401 or Fed. R. Crim. P. 42, the defendant's possession of documents responsive to a grand jury subpoena is likely to be a link in the chain of evidence which will convict the defendant.

383/ United States v. Doe, 465 U.S. 605 (1984).

2. Legal standards

The 4th Amendment of the Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The terms "probable cause" and "particularly describing" connote legal standards that must be met before a valid

search warrant can issue. Each of these terms has generated a large body of case law, reflecting the case-by-case, fact-bound approach courts have taken in applying them. The following discussion is intended to be only an overview of these two 4th Amendment requirements. Treatises and case law should be consulted to determine whether the probable cause and particularity requirements are met in specific factual situations and in specific jurisdictions.

a. Probable cause

The Supreme Court has formulated several definitions of probable cause. The following is one of the most commonly quoted:

Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which

they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.384/

The Court has also said that probable cause exists if there is a "substantial basis" for believing that a crime has been committed and that a particular location contains evidence of that crime.385/

In a typical criminal antitrust case, probable cause will have to be shown as to three things to obtain a search warrant: (1) that a crime has been committed, (2) that documents (or other items) evidencing the crime exist,386/ and (3) that the items to be seized are located at a specific location.

384/ Carroll v. United States, 267 U.S. 132, 162 (1952); see Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

385/ Jones v. United States, 362 U.S. 257, 271 (1960); United States v. Melvin, 596 F.2d 492 (1st Cir.), cert. denied, 44 U.S. 837 (1979).

386/ There are three categories of items that may be seized pursuant to a search warrant: (1) items that are evidence of the commission of a crime; (2) contraband, the fruits of crime or things otherwise criminally possessed; and (3) items that have been used to commit a crime or that are designed or intended to commit a crime. Fed. R. Crim. P. 41(b). In an antitrust case, the search warrants will usually be for documents that constitute evidence of a crime.

The basis for establishing probable cause as to each of these three items usually must be set forth in an affidavit. Under certain circumstances, a warrant may issue based on sworn oral testimony rather than a written affidavit.387/ The standards are the same whether the warrant is based on an affidavit or oral testimony. In antitrust cases, the warrant will usually be based on an affidavit.

The grounds for establishing probable cause can be based either on the personal knowledge of the affiant or on hearsay.388/ Where probable cause is based on the affiant's personal knowledge, the specific facts and circumstances constituting probable cause must be set forth in the affidavit. A warrant cannot be based on the affiant's unsupported

suspicions or beliefs.

Where probable cause is based on hearsay, the affidavit must contain sufficient information about the informer's credibility and basis of knowledge to establish that his information is worthy of belief. The Supreme Court has stated the standard as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.389/

387/ Fed. R. Crim. P. 41(c)(2).

388/ Fed. R. Crim. P. 41(c)(1).

Veracity and basis of knowledge do not each need to be independently established; rather, they are related factors relevant to "the common sense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place."390/ The basis of an informer's knowledge should be set forth with specificity, as in the case of probable cause based on personal knowledge.

The degree of information necessary to establish an informer's credibility varies according to the likelihood that the informer will produce false or untrustworthy information.391/ Some common reasons for determining that an informer is credible are that the informer has given reliable information in the past,392/ the informer is a participant in the criminal activity under investigation,393/ and the informer's information has been corroborated by other information.394/ In an antitrust

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389/ Illinois v. Gates, 462 U.S. 213, 238 (1983).

390/ Id. at 230.

391/ See Jaben v. United States, 381 U.S. 214, 224 (1965).

392/ Jones v. United States, 362 U.S. 257, 271 (1960).

393/ United States v. Long, 449 F.2d 288, 293 (8th Cir. 1971), cert. denied, 405 U.S. 974 (1972).

394/ Draper v. United States, 358 U.S. 307, 313 (1959); United States v. Roman, 451 F.2d 579, 581 (4th Cir. 1971), cert. denied, 405 U.S. 963 (1972); United States v. Jiminez-Badilla, 434 F.2d 170, 172-73 (9th Cir. 1970).

investigation, the basis for probable cause is likely to be an informer's grand jury testimony. The fact that the information is obtained while the informer was under oath, and, therefore, subject to criminal liability for perjury if the information is false, is a factor indicating that the information is reliable.395/

b. Particularity

The 4th Amendment requires that the warrant describe with particularity both the place to be searched and the items to be seized. The particularity requirement removes discretion from the officer executing the warrant and prevents a "general, exploratory rummaging."396/

A description of items to be seized is sufficiently particular if it supplies guidelines to the searching officer so that he can reasonably ascertain and identify those items.397/ This requirement is applied "with a practical margin of flexibility, depending on the type of property to be seized, and . . . a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit."398/ A warrant describing "corporate books and records evidencing a

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395/ See Illinois v. Gates, 462 U.S. 213, 233-34 (1983); Adams v. Williams, 407 U.S. 143, 146-47 (1972).

396/ Stanford v. Texas, 379 U.S. 476, 485 (1965); Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

397/ United States v. Wuagneux, 683 F.2d 1343, 1348 (11th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

398/ Id. at 1349.

violation of 15 U.S.C. § 1" is not sufficiently particular to meet the 4th Amendment's particularity requirement.399/ The warrant must provide specific guidelines by identifying the documents sought,400/ but the degree of specificity required will depend on the circumstances of the case.401/ It is permissible to inspect voluminous files in search of documents sought under the search warrant.402/

The premises to be searched must be described in sufficient detail to allow others to identify it with reasonable effort.403/ For example, if the search is to take place in a large commercial office building, the name of the tenant of the office to be searched should be included and, if possible, the office number.404/ A physical description of the premises to be searched and a diagram of the location may help meet the particularity requirement if other types of description are inadequate.

399/ See United States v. Cardwell, 680 F.2d 75, 77 (9th Cir. 1982).

400/ United States v. Tamura, 694 F.2d 591, 595 (9th Cir. 1982).

401/ United States v. Wuagneux, 683 F.2d at 1349.

402/ United States v. Tamura, 694 F.2d at 595.

403/ See Steele v. United States, 267 U.S. 498, 503 (1925).

404/ See United States v. Bedford, 519 F.2d 650, 654-55 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976).

3. Mechanics of obtaining a search warrant

Rule 41 of the Federal Rules of Criminal Procedure sets forth the procedure for obtaining a search warrant. Application for a warrant can be made to either a federal magistrate or a state court judge within the district where the

warrant is to be executed. The application consists of an affidavit, which states the grounds for seeking the warrant, and the original warrant for the magistrate to sign.

Rule 41(c)(2) also sets forth an alternative procedure for obtaining a search warrant upon oral testimony where required by special circumstances. Circumstances of urgency requiring such procedures would be rare in any application made by the Antitrust Division.

The warrant must include: a description of the property405/ to be seized (often as a schedule attached to the warrant); a statement that the property is evidence of a stated criminal offense (e.g., Sherman Act, 15 U.S.C. § 1; obstruction of justice, 18 U.S.C. § 1503); an exact description of the location to be searched; the period of time during which the search is to be executed (which under Rule 41(c)(1) cannot exceed ten days after issuance of the warrant); and whether the search is to be conducted in the daytime (6:00 a.m. to 10:00 p.m., as defined by the Rule) or at any time in the day or night. A search warrant must be executed in the daytime unless a showing has been made by the applicant that there

is reasonable cause for it

405/ "Property" is defined in Rule 41(h) to "include documents, books, papers and any other tangible objects."
to be executed at night. Warrants sought by the Antitrust Division are not likely to necessitate execution at night.

The affidavit must include sufficient facts to establish probable cause that a crime has been committed and that evidence of that crime is at the search location. The information in the affidavit can be the personal knowledge of the affiant or it may be entirely hearsay.406/

The affidavit in support of the warrant should be filed under seal to prevent the disclosure of matters occurring before the grand jury, the identity of informants, or other facts the disclosure of which would hinder an ongoing investigation. In some districts, the affidavit is automatically filed under seal, while in others, the search warrant applicant must specifically request that it be sealed. The local United States Attorney's Office should be consulted to determine whether an application to seal is needed in the district involved. Such an application should be made simultaneously with the presentation of the

warrant to the magistrate.

The affiant may be required to appear before the magistrate or judge granting the warrant and may, under Rule 41(c)(1), be examined along with any witnesses the affiant may want to produce. If the magistrate or judge finds that the Government has established the requisite probable cause for the issuance of the warrant, he signs the warrant and provides it to the applicant for execution.

406/ See § I.2.a., supra.

There are no legally required procedures for obtaining internal clearance to seek a search warrant within the Antitrust Division. However, the practice within the Division is for the section or field office seeking the warrant to obtain the approval of the Office of Operations by sending a memorandum to the Director of Operations explaining the need to obtain the warrant and the grounds on which it is being sought, along with a draft of the warrant and affidavit to be presented

to the magistrate. In emergency situations, the section or field office chief may call the Director of Operations, explain the circumstances requiring the warrant, and obtain oral approval for seeking the warrant.

4. Execution of the search warrant

Search warrants are executed by Federal Bureau of Investigation agents. Coordination with the Bureau prior to the search is essential. Most FBI agents are well-versed in search warrant procedures and will be of great assistance in assuring that the procedures required by Rule 41 are followed. If the particular agent working with the Division on a matter is not familiar with the procedures, the assistance of more experienced agents should be sought. To complete the search within a reasonable time, numerous agents may be required. The staff attorneys should consult with the Bureau to determine how many agents will be needed to conduct the search, based on the scope and nature of the search.407/

Prior to the search, the staff should brief all the agents who are to conduct the search, providing them with a copy of the warrant and affidavit, explaining the background facts giving rise to the search, reviewing the description of the property or documents to be seized, providing any other information that will assist them in conducting the search, and answering any questions the agents may have.

No staff attorney should be present at the search itself, as such attorney could later be required to testify in a proceeding over the legality of the search. It is advisable, however, to have a paralegal familiar with the case and the target documents present at the search for the agents to consult if any questions arise. A staff attorney should be available throughout the search for phone consultation with the agents or the paralegal who is assisting the agents. The staff may want to suggest a procedure used by some FBI agents, who inform the local law enforcement agency of the search and request a uniformed officer to be present when the warrant is first presented to verify the identity of plain-clothes agents and to facilitate entry and cooperation.

An agent executing a warrant is required by Rule 41(d) to make a verified inventory of the items seized. This inventory must be made in the presence of the person from whose possession or premises the items are taken, or if such person is not present, in the presence of some credible person (usually another agent). If requested in advance, the agents will photograph the search premises to show where the items were seized. Such photographs can be useful in litigation arising from the search. The agents must give the person whose premises were searched a copy of the warrant and a receipt for the items taken. If such person is not present, the warrant and receipt must be left at the premises. A copy of the required inventory is usually signed by an agent and left as a receipt. The warrant and the completed return along with the inventory is then returned promptly to the issuing magistrate, who files them with the clerk of the court.

407/ In a recent search in Portland, Oregon, the FBI assigned eight agents to conduct a search for withheld documents at a single business location, a search which took approximately three hours.

5. Use of seized items/chain of custody

Once documents are seized, staff attorneys will probably be anxious to review and use them to pursue the underlying antitrust investigation and to assess the possibility of an obstruction or contempt case. However, it is important to realize that seized documents cannot be treated as subpoenaed material and that a careful record of their chain of custody must be maintained. A rigid document control system must be established before staff attorneys begin handling the documents. This will be essential in any subsequent litigation arising from the search to prove that the documents are in fact those that were seized. If the documents are relatively few in number, the staff can make some arrangement with the FBI to review, copy, or microfilm the documents, and allow the FBI to remain the document custodian and follow their standard chain of custody procedures. If the documents are voluminous, the FBI and the Division attorneys may find other procedures more practical.

One possible procedure is to make a paralegal (if one was present at the search, preferably that person) custodian of the documents. An attorney should not be the custodian, as the custodian may be required to testify in any litigation in which we seek to admit the documents as evidence. Always follow the standard procedures used by the FBI to establish chain of custody. Documents must be kept in a locked room or secure file cabinet to which only the custodian has access (i.e., the room or file locks must be secure against building and office master keys). Until the documents are marked and numbered by the custodian or in some way identified in such a manner as to insure that the custodian can testify that they are the documents that were seized, any review, copying, or microfilming of the documents must be done in the presence and under the direct observation of the custodian. Once the materials are adequately identified, the custodian may check in and out specific documents to others for use or review. It is recommended that the chain of custody forms used by the FBI be used for this procedure.408/

408/ An exemplar of this form is attached as Appendix III-6.

6. Challenges

Challenges to the use of evidence obtained under a search warrant can be made under either Rule 12 or Rule 41 of the Federal Rules of Criminal Procedure. Challenges may be based on the validity of the warrant or the manner of its execution.

Under Rule 12(b), evidence obtained through a search warrant can be challenged by a motion to suppress. If the motion is granted, the seized evidence cannot be offered into evidence. A Rule 12(b) motion cannot be made until an indictment has been returned.

Under Rule 41(e), a motion for return of the seized property may be made at any time after the seizure. If the

motion is granted, the property must be returned and may not be used as evidence at any hearing or trial, just as if it had been suppressed under a Rule 12(b) motion. After an indictment has been returned, a Rule 41(e) motion for return of property will be treated as a Rule 12(b) motion to suppress.

The bases for challenges are the same under Rule 12 and Rule 41. Challenges to the validity of a search warrant are of three general types: (1) that there was no probable cause for the issuance of a warrant409/ (2) that the items to be seized or the location to be searched were not described with sufficient particularity in the warrant410/ and (3) that the affiant deliberately provided false information or exhibited a reckless disregard for the truth.411/ The seizure of property may also be challenged on the ground that the warrant was not properly executed. For example, a warrant would be improperly executed if the property were seized at a location other than the one described in the warrant or if the property

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409/ See discussion of probable cause, § 2.a., supra.

410/ See discussion of particularity, § 2.b., supra.

seized were not the property described in the warrant.

In determining whether there was probable cause to justify issuing the warrant, the court should examine the supporting affidavits in camera. Prior to indictment, the movant should not be provided access to the supporting affidavits because to do so would jeopardize grand jury secrecy and could impede the effective completion of the ongoing investigation.412/ Orders denying motions to suppress or return seized evidence, whether before or after indictment, are interlocutory and, therefore, not appealable by defendants so long as a criminal prosecution or investigation is in progress.413/ Thus, if a grand jury investigation is under way, an order denying such a motion is not appealable.414/ An order denying a motion to return or suppress property is appealable only if it "is in no way tied to a criminal prosecution" in progress.415/

411/ See Franks v. Delaware, 438 U.S. 154, 171-72 (1978).

412/ See Shea v. Gabriel, 520 F.2d 879, 882 (1st Cir. 1975); Offices of Lakeside Non-Ferrous Metals v. United States, 679 F.2d 778, 779-80 (9th Cir. 1982).

413/ DiBella v. United States, 369 U.S. 121, 131 (1962).

414/ Id.

415/ Id. at 131-32.

The Government, however, under 18 U.S.C. § 3731, may appeal an order granting a motion to suppress or return seized evidence. The Government attorney must certify "to the district court that the appeal is not taken for purpose of delay and that the [suppressed] evidence is a substantial proof of a fact material in the proceeding."416/

416/ 18 U.S.C. § 3731.

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