U.S. Department of Justice

United States Attorneys' Manual

Civil Rights Division

Title 8

FOR USE OF ADMINISTRATIVE OFFICER

District: _____

Copy No.: _____

1985

UNITED STATES ATTORNEYS' MANUAL
TITLE 8--CIVIL RIGHTS DIVISION

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8-1.000 GENERAL

The Assistant Attorney General in charge of the Civil Rights Division, subject to the general supervision of the Attorney General and under the direction of the Deputy Attorney General, is responsible for conducting, handling, or supervising civil rights matters, as more particularly described in 28 C.F.R. §0.50.

The Civil Rights Division was created in December 1957 pursuant to the provisions of the Civil Rights Act of 1957. The Division is headed by an Assistant Attorney General, and now consists of the following Sections: Administrative Management Section, Appellate Section, Coordination and Review Section, Criminal Section, Educational Opportunities Section, Employment Litigation Section, Housing and Civil Enforcement Section, Special Litigation Section, and Voting Section.

The Civil Rights Division, under the direction of the Assistant Attorney General in charge of the Division, supervises the enforcement of those federal statutes which secure and protect the civil rights of persons within the jurisdiction of the United States. Among such statutes are those relating to voting discrimination, equal access to public accommodations and public facilities, desegregation of public education, equal employment opportunity, equal credit opportunity, and fair housing.

Because of the sensitive nature of the constitutional and statutory issues involved and the desirability of uniform application of federal law in this field, close consultation between U.S. Attorneys and the Division on civil rights matters is of prime importance. Attorneys from the Division may conduct litigation in conjunction with the U.S. Attorney. Such attorneys will maintain close liaison and consult with the U.S. Attorney on a continuing basis.

Any statements issued to the press in connection with the institution of judicial proceedings in civil rights cases should be coordinated through the Department's Office of Public Affairs and the Assistant Attorney General, Civil Rights Division.

8-1.100 STATUTES AND EXECUTIVE ORDERS ADMINISTERED BY THE CIVIL RIGHTS DIVISION

The following is a list of federal statutes and executive orders administered by the Civil Rights Division.

A. CIVIL STATUTES: 15 U.S.C. §§1691e(h), 3151(c); 20 U.S.C. §§1681(a), 1706, 1709; 28 U.S.C. §1862; 29 U.S.C. §§794, 1577(c); 31 U.S.C. §§6720, 6721(d); 42 U.S.C. §§300w-7(c), 300x-7(c), 300y-9(c), 708(c), 1971(c), 1973h(b), 1973j(d), 1973aa-2, 1973bb(a)(1), 1973dd-3(a), 1997a(a), 1997c(a)(1), 2000a-3(a), 2000a-5(a), 2000b(a), 2000c-6(a), 2000d, 2000e-5(f), 2000e-6(a), 2000h-2, 3613, 3789d(c)(3), 3789d(c)(4)(C), 5309(c), 8625(c), 9906(c); 49U.S.C. §§306(e), 1615(a)(4).

B. CRIMINAL STATUTES: 18 U.S.C. §§241-246, 594, 841-848, 875, 876, 1001, 1503, 1504, 1508-1513, 1581-1588, 1621-1623, 2191-2196; 42 U.S.C. §§300a-8, 1973i(a)-(e), 1973j(a)-(c), 1973aa-3, 1973bb(b), 1973dd-3(b)-(c), 1974, 1974a, 2000e-8, 2000e-10, 3631; 46 U.S.C. §§658, 701.

The Civil Rights Division shares enforcement responsibility under some of these statutes with the Criminal Division, generally depending upon whether the matter involves discrimination or intimidation on account of race, or, in the case of those statutes dealing with obstruction of justice, relates to civil rights litigation. See 28 C.F.R. §§0.50 and 0.55 for a full explanation of this division of responsibility. The Civil Rights Division has responsibility under 18 U.S.C. §1001 with respect to false official statements made in connection with alleged violations of federal civil rights statutes.

C. EXECUTIVE ORDERS: 11246, 12250, 12336.

DETAILED TABLE OF CONTENTS FOR CHAPTER 2

8-2.000 ENFORCEMENT OF CIVIL RIGHTS CIVIL STATUTES

Federal law protects against discrimination in voting, public accommodations and facilities, public schools, employment, housing, credit, and in all programs and activities receiving federal financial assistance. In all of these areas the Attorney General is authorized under specific conditions to institute civil actions for appropriate relief.

This chapter will deal first in USAM 8-2.100, infra, with the procedures for investigation and trial which are generally applicable to civil statutes administered by the Civil Rights Division. The functions of Sections with enforcement activities under these statutes will be separately treated in USAM 8-2.200, infra. In addition to the general procedures, many civil rights statutes have special procedures which must be followed. These special procedures are indicated in the paragraphs devoted to the Section which is responsible for enforcing the statute.

8-2.100 GENERAL PROCEDURES FOR CIVIL INVESTIGATION AND TRIALS

Except for any particular civil case or category of civil case (see USAM 8-2.180, infra) that may be assigned by the Assistant Attorney General of the Civil Rights Division to the U.S. Attorney for trial, the Civil Rights Division has the responsibility for the handling of all civil matters and cases, including all correspondence, motions, responses, briefs and arguments. For administrative and informational purposes, the Division will keep the U.S. Attorney advised of the progress of such matters by forwarding to him/her copies of correspondence and pleadings served on opposing counsel and/or filed with the trial court. The Division should confer with the U.S. Attorney with respect to the position to be taken in civil cases, and utilize such assistance as may be mutually agreeable between the Division and the U.S. Attorney. Notwithstanding the foregoing case responsibilities, the Division and the U.S. Attorney should cooperate in assisting each other by taking complementary steps to protect fully the interests of the United States and to assure the successful prosecution of the litigation.

The following procedures are generally applicable to investigations and trials in civil matters in which the Civil Rights Division has responsibility.

8-2.110 Investigations

With certain exceptions noted below, the Federal Bureau of Investigation is generally authorized to conduct preliminary investigations

into civil rights complaints without prior authorization from the Assistant Attorney General, Civil Rights Division, or from the U.S. Attorney. (Instructions for standard preliminary investigations have been devised and furnished to the Federal Bureau of Investigation for many of the civil statutes administered by the Division. See USAM 8-2.300, infra.) The U.S. Attorney will be notified when any investigation is commenced in his/her district, and when the size, extent, or scope of any investigation, absent an emergency, is other than routine, the Assistant Attorney General, Civil Rights Division, or his/her authorized Section Chief shall advise and consult with the U.S. Attorney prior to the instigation of such investigation.

Complaints received by the U.S. Attorney should be referred to the FBI, and the Civil Rights Division should be advised.

When the Division requests the FBI to conduct an investigation, a copy of the request will be forwarded to the U.S. Attorney for the District.

During or upon completion of the preliminary investigation, the U.S. Attorney should forward his/her views to the Assistant Attorney General, Civil Rights Division, to the attention of the Chief of the Section which has enforcement responsibility for the matter being investigated.

8-2.120 Institution of Civil Proceedings: Authorization

The institution of judicial proceedings in civil rights cases must be authorized by the Assistant Attorney General of the Civil Rights Division. In all civil actions, the complaint must be signed by the Assistant Attorney General. Some civil rights statutes also require the complaint to be signed by the Attorney General.

8-2.130 Trials

The Civil Rights Division will supervise, support and coordinate, as appropriate, the preparation of pleadings and other legal documents in connection with the trial and preparation of civil cases under the civil rights statutes. It will ordinarily provide personnel to conduct or to assist at the trial of such cases, after consultation with the U.S. Attorney.

8-2.140 Interventions

Title IX of the Civil Rights Act of 1964 (42 U.S.C. §2000h-2) authorizes the Attorney General to intervene in cases of general public importance involving alleged denials of equal protection of the laws on account of race, color, religion, sex or national origin. In light of the statutory requirement of certification by the Attorney General, any request for intervention from a private litigant received by the U.S. Attorney should be forwarded to the Department with a recommendation. This authority to intervene has been used most frequently in cases involving discrimination in schools and prisons, and in the selection of jurors.

The U.S. Attorney should notify the Assistant Attorney General, Civil Rights Division, upon learning of a case in his/her District in which intervention by the United States under 42 U.S.C. §2000h-2 might be appropriate.

8-2.150 Appeals

Appeals in civil rights cases are supervised by the Appellate Section of the Civil Rights Division. For U.S. Attorneys' appellate responsibilities, see USAM 2-3.210, infra.

8-2.160 Cooperation with Private Litigants

It is the long-standing policy of the Department to avoid providing legal advice or providing information developed through our investigations to private litigants. It is appropriate, however, to advise private citizens who are not litigants of their rights under the federal laws which we are authorized to enforce, including their right to be represented by private attorneys.

8-2.170 Standards for Amicus Participation

The Civil Rights Division's standards concerning amicus participation are as follows:

A. Guidelines

While guidelines cannot cover all possible cases, amicus participation by the Civil Rights Division should generally be limited to the following types of cases:

1. Cases in which a court requests our participation;

2. Cases in which the constitutionality of a federal civil rights statute is challenged (cf. 28 U.S.C. §2403(a));

3. Cases which involve the interpretation of a statutory provision which the Department of Justice (or another federal agency) is empowered to enforce; 1/

4. Cases which raise issues the resolution of which will likely affect the scope of our enforcement jurisdiction (e.g., cases involving the concept of state action under the Fourteenth Amendment);

5. Cases which raise issues which could affect in a major way private enforcement of the statutes we enforce; and

6. Cases where a special federal interest is clear and is not likely to be well served by the private litigants.

There will, of course, be instances not fitting the above criteria where amicus participation should nevertheless be considered.

B. Other Guidelines

In addition to these necessarily general standards, there are other factors which should be considered in determining whether to make a recommendation for amicus participation. These include:

1. The importance of the issue to be addressed, in terms of the novelty of the question presented, the level of the court in which it is posed, and the probable impact of its resolution;

2. The probability of our being able to contribute substantially to the resolution of the case (e.g., competence of private counsel, state of the record, timeliness);

3. The wisdom of amicus participation as distinquished from intervention; and

4. The availability of our resources.

1/ This includes Executive Orders, regulations and other provisions of law, as well as statutes.

Finally, the leadership of the Division will consider at least semi-annually, at section chief meetings, what issues should be given priority in deciding on amicus participation. The Chief of the Appellate Section has primary responsibility for placing this item on the agenda, although other members of the leadership may also do so if they deem it appropriate.

C. Amicus participation in district courts

Section Chiefs or Special Litigation Counsel who wish to recommend amicus participation in a district court should send their proposal to the principal Deputy Assistant Attorney General with a copy to the Deputy Assistant Attorney General for Policy and Planning. They will be notified by the latter if the filing of an amicus brief has been generally approved. Thereafter, they will coordinate the filing of the brief and any other papers through the principal Deputy.

D. Amicus participation in the courts of appeals and the Supreme Court

The Appellate Section has primary responsibility for our amicus participation in appellate courts, subject to the general supervision of the Assistant Attorney General and to authorization by the Solicitor General. The procedures to be followed are:

1. Identification of possible amicus cases.

The Appellate Section reviews Law Week, F. Supps. and F.2d's to learn of appropriate cases. It should also maintain contact with General Counsel offices of other federal agencies, such as the EEOC, Department of Labor, Department of Education, etc., and with private civil rights organizations, and should encourage suggestions from such agencies and groups.

The trial Sections and Special Litigation Counsel will often learn of possible amicus cases in the appellate courts in the ordinary course of carrying out their responsibilities. They should be alert for such cases and should provide the Appellate Section prompt notice of the existence of such cases.

U.S. Attorneys are also encouraged to notify the Appellate Section of possible amicus cases.

2. Selection of amicus cases.

Each Section should make an amicus recommendation to the Appellate Section when it thinks the Appellate Section should consider a case for amicus participation. 2/

3. The memorandum shall state:

a. The date of entry of judgment;

b. The appellate schedule insofar as it has been established;

c. The reasons for amicus participation; and

d. The attorney(s) in the Section, if any, most familiar with the case.

The Appellate Section is to review each possible amicus case and make a determination whether to seek Solicitor General authorization to participate. The Appellate Section shall consult with the appropriate trial Section or Office and with affected federal agencies in the course of making this determination. The Chief of the Appellate Section should consult with the Assistant Attorney General on all cases where there is a substantial disagreement among Sections or when it appears that the case otherwise merits the Assistant Attorney General's personal attention. 3/ In cases raising fundamental issues the resolution of which may affect large segments of our responsibilities, broader interchanges of ideas should precede the final decision. If another federal agency has recommended amicus participation and the Division disagrees, the Division will make a negative recommendation to the Solicitor General.

In all circumstances, the Department files should reflect the reasons for any decision as to amicus participation; also, the Division should convey any decision on amicus participation to all those outside the Department who have suggested or otherwise commented on such participation. A copy of each document reflecting the Division's

2/ The Section should send a copy to the Deputy Assistant Attorney General for Policy and Planning. The same procedures apply to recommendations from Special Litigation Counsel.

3/ The Chief of the Appellate Section should send the Deputy Assistant Attorney General for Policy and Planning a copy of each memorandum assigning a potential amicus case to an attorney.

disposition or recommendation should be sent to the Assistant Attorney General 4/ and to the appropriate Section or Sections in the Division.

8-2.180 Concurrent Enforcement Authority

With respect to civil litigation, U.S. Attorneys presently have concurrent authority with the Civil Rights Division to enforce the following federal civil rights statutes:

A. Section 203 of the Voting Rights Act, 42 U.S.C. §1973aa-1a (see USAM 8-2.281, infra);

B. Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a et seq. (see USAM 8-2.233, infra);

C. Title III of the Civil Rights Act of 1964, 42 U.S.C. §2000b et seq. (see USAM 8-2.262, infra);

D. Section 706 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5, (see USAM 8-2.211, 8-2.216, infra); and

E. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 et seq. (The Fair Housing Act), for cases involving "blockbusting," racial steering, and discrimination in the rental or sale of houses, apartments, and mobile homes (see USAM 8-2.231, infra).

Upon initiation of an investigation, the U.S. Attorney shall notify the Civil Rights Division of the nature and scope of the investigation. Once the U.S. Attorney determines that litigation is warranted, the U.S. Attorney shall provide the Assistant Attorney General for Civil Rights with a copy of a litigation justification memorandum and proposed pleadings.

The U.S. Attorney shall also consult with the Assistant Attorney General for Civil Rights as to the merits of the litigation prior to filing. The Assistant Attorney General for Civil Rights shall retain final authority to determine what cases ought to be filed, compromised, or settled regardless of the judicial districts in which they arise.

In areas where the U.S. Attorneys have concurrent authority with the Civil Rights Division, the U.S. Attorney shall report on a quarterly basis

4/ The Assistant Attorney General need not receive copies in instances where the Appellate Section decides, after an initial examination of the case, that it is of such marginal importance to our enforcement program that further consideration of amicus participation is unwarranted.

(i.e., January 1, April 1, July 1, and October 1 of each year), the name, nature, and status of all civil rights complaints received. The report should identify each matter closed during the quarter and state briefly why it was closed.

8-2.190 Production or Disclosure in Federal and State Proceedings of Material or Information Contained in Civil Rights Division Files

Procedures governing production or disclosure in federal and state proceedings of material or information contained in Civil Rights Division files are set out at USAM 8-3.195. (Demands in judicial proceedings for the production or disclosure of information in Civil Rights Division files most often relate to criminal matters. For this reason the procedures to be followed are set out in the chapter pertaining to the Criminal Section of the Division.)

8-2.200 SECTIONS AND OFFICES RESPONSIBLE FOR SUPERVISING THE ENFORCEMENT OF CIVIL STATUTES

The functions of those Sections of the Division administering civil statutes are described below. Special procedures applicable to each Section are also noted. Cases involving the rights of American Indians, formerly handled by the Office of Indian Rights, are now assigned to the Section responsible for enforcing the particular statute involved.

8-2.210 Employment Litigation Section

The Employment Litigation Section is responsible for the enforcement of Title VII of the Civil Rights Act of 1964, as amended, and the revenue sharing acts, the Omnibus Crime Control and Safe Streets Act, and all other laws which prohibit employment discrimination by state and local government bodies; and Executive Orders 11246 and 11375, which prohibit employment discrimination by contractors and subcontractors working on federally-assisted construction contracts. Both offensive and defensive cases involving employment and contractual relationships covered by these laws are the responsibility of the Employment Litigation Section.

8-2.211 Equal Employment Opportunity Laws

Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§2000e et seq.), as amended, forbids employment practices which discriminate on the basis of race, color, religion, sex and national origin by employers,

labor organizations, employment agencies, state and local governments, governmental agencies, political subdivisions and the federal government. In addition to discriminatory terminations and refusals to hire, the Act also forbids all other discriminatory practices with respect to the terms or conditions of employment. The Revenue Sharing Act, the Omnibus Crime Control and Safe Streets Act, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, as amended, and other provisions of law prohibit recipients of federal funds from engaging in employment practices which discriminate on grounds of race, religion, sex, national origin, or handicap.

The Department of Justice shares enforcement activity under Title VII with the Equal Employment Opportunity Commission. Under the 1972 Amendments to Title VII, the Department retained authority to seek to enjoin employment discrimination by state and local governments, agencies and political sub-divisions. Enforcement responsibilities as to private employers were transferred to the EEOC. Enforcement responsibility with respect to the federal government was formerly vested in the Civil Service Commission, but by virtue of the President's Reorganization Plan No. 1 of 1978, has now been transferred to EEOC. (Note: The Civil Division generally defends federal agencies in employment discrimination suits against the government.)

Generally, the Employment Litigation Section has primary responsibility for initiating and handling pattern or practice suits against state or local governments under Title VII or other provisions of law. Responsibility for suits under Section 706 of Title VII is vested concurrently in the Employment Litigation Section and the U.S. Attorneys. See USAM 8-2.216, infra.

Persons who complain to the U.S. Attorney of employment discrimination by employers and other organizations covered by the Act, other than the federal government, should be advised immediately to file their complaint with the EEOC. Those who complain of discrimination by an agency of the federal government should be advised to bring their complaint to the attention of the personnel officer of the agency involved and the EEOC.

In the case of a state or local government, or governmental agency, if the EEOC has been unable to secure an acceptable conciliation agreement, it will refer the case to this Department, which may file a civil action under Section 706 or Title VII. In addition, this Department may, without prior referral, initiate a pattern or practice suit against state or local government employers. U.S. Attorneys should notify this

Division of any such complaints coming to their attention which may be of a systemic, "pattern or practice" nature.

8-2.212 Discrimination by Contractors and Subcontractors with the Federal Government and by Contractors or Subcontractors on Federally-Assisted Construction Contracts (Executive Orders 11246 and 11375)

The Attorney General may also, in certain circumstances, bring actions against contractors or subcontractors with the federal government or contractors or subcontractors on federally-assisted construction contracts to enforce the requirements of Executive Order 11246, as amended by Executive Order 11375. Executive Order 11246 forbids discrimination based on race, color, religion, sex or national origin by such contractors or subcontractors generally when the amount of the contract exceeds $10,000. Primary enforcement responsibility is vested in the Department of Labor, which may, if unable to obtain compliance, refer the case to the Department of Justice for appropriate legal proceedings. The text of Executive Order 11246, as amended by Executive Order 11375, is set forth immediately following Section 2000e of Title 42 of the United States Code. Executive Order 11246 was published at 30 Fed. Reg. 12319-25 (1965); Executive Order 11375 is at 32 Fed. Reg. 14303-4 (1967). Since allegations of the violations of Executive Order 11246 may present some unfamiliar questions, consultation with the Civil Rights Division is appropriate from the outset.

8-2.213 Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§2000d-2000d-6) prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. Title VI does not apply to the employment practices of the recipient, except where a primary objective of the financial assistance is to provide employment or where a recipient's employment practices may have a discriminatory impact on the provision of the federally-assisted services or benefits. Each federal agency is authorized and directed to effectuate Title VI through appropriate rules, regulations, or orders and has primary responsibility for obtaining compliance by recipients who receive assistance through the agency. While requiring preliminary action seeking voluntary compliance, Title VI contemplates enforcement by one of two alternatives: (1) administrative terminations of, or refusals to grant federal assistance, and (2) any other means authorized by law. Administrative fund termination proceedings involve an opportunity for

hearing, notification of appropriate Congressional committees, and are subject to judicial reviews under 42 U.S.C. §2000d-2. "Other means authorized by law" includes referral of the matter to the Department of Justice for appropriate litigation.

Litigation under Title VI may arise in three manners: (1) private actions against federal officials for failure to enforce Title VI, (2) actions against recipients seeking affirmative enforcement of Title VI, and (3) actions seeking judicial review of final agency action under Title VI. Cases involving discrimination in employment are generally supervised by the Employment Litigation Section. Those involving discrimination in educational institutions are generally administered by the Educational Opportunities Section. See USAM 8-2.220, infra. Those involving discrimination in housing and services are generally administered by the Housing and Enforcement Section. See USAM 8-2.230.

8-2.214 Revenue Sharing and Other Fund Granting Acts

In addition to Title VI, there are several general and special revenue sharing acts and other fund granting statutes which establish a policy against discrimination on the basis of race, color, national origin or sex in programs funded in whole or in part by such revenue sharing funds. The nondiscrimination provisions of these revenue sharing acts are Section 122 of the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1242; Section 518 of the Crime Control Act of 1973, 42 U.S.C. §3766; Section 612 of the Comprehensive Employment and Training Act of 1973, 29 U.S.C. §991; and Section 109 of the Housing and Community Development Act of 1974, 42 U.S.C. §5309. These sections permit the federal department or agency extending the revenue sharing funds to exercise the powers and functions provided by Title VI. These sections cover employment practices not covered by Title VI. They additionally give the Attorney General authority to bring a civil action whenever he/she has reason to believe that those recipients administering assistance under these acts are engaged in a pattern or practice of such discrimination. Cases involving discrimination in employment practices by revenue sharing fund recipients are generally administered by the Employment Litigation Section and those involving discrimination in the provision of services (except for education) are generally administered by the Housing and Civil Enforcement Section. In October 1977 the Attorney General authorized the FBI to conduct standard FBI investigations at the request of the Division regarding the above cited Revenue Sharing acts. These standard preliminary investigations are set forth in USAM 8-2.360, infra.

8-2.215 Defensive Suits

The responsibility of the Employment Litigation Section extends to suits in which a federal contractor, subcontractor, or grantee brings suit to enjoin the actual or threatened termination or suspension of federal contracts or funds under Executive Order 11246, Title VI, or a revenue sharing statute. In such cases, the defense of the agency's action is the responsibility of the Employment Litigation Section.

8-2.216 U.S. Attorney Responsibilities

Each U.S. Attorney has concurrent authority with the Employment Litigation Section with respect to individual cases of discriminatory employment practices by state and local governments under Section 706 of Title VII, as amended, 42 U.S.C. §§2000e-5. Each U.S. Attorney's office is encouraged to work out appropriate procedures with the Employment Litigation Section, in conjunction with the local office(s) of the Equal Employment Opportunity Commission, for the handling of suits under Section 706. Authority for the initiation and compromise of such suits remains with the Assistant Attorney General. For a discussion of the U.S. Attorney's concurrent enforcement responsibility under Section 706, see USAM 8-2.180, supra.

Any U.S. Attorney who learns or has reason to believe that a state, county, or other recipient of federal financial assistance is engaging in discrimination should advise the Assistant Attorney General, Civil Rights Division. Similarly, any complaints of discrimination by recipients of federal funds should be forwarded to the Assistant Attorney General, Civil Rights Division.

U.S. Attorneys may also be requested by the Assistant Attorney General, Civil Rights Division, to provide assistance in the defense of actions for judicial review under Title VI, and in judicial actions to enforce the provisions of that Title and the nondiscrimination provisions of the revenue sharing and other fund granting statutes discussed above.

8-2.220 Educational Opportunities Section

The Educational Opportunities Section is responsible for administering the enforcement of federal statutes regarding school desegregation. The primary statutes with which this Section is concerned are Title IV of the Civil Rights Act of 1964 (42 U.S.C. §2000c) and the

Equal Educational Opportunities Act of 1974 (20 U.S.C. §1701 et seq.). In addition, Title IX of the Civil Rights Act of 1964 (42 U.S.C. §2000h-2) authorizes the Attorney General to intervene in cases alleging discrimination in public schools. The Department of Education may refer cases to the Attorney General pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) requesting that suit filed to enforce recipients' assurances of nondiscrimination in federally funded educational programs and Title IX of the 1972 Education Amendments (20 U.S.C. §1681 et seq.) authorizes the Attorney General to file suits upon referrals from federal agencies alleging sex discrimination in federally assisted educational programs. The Section is also responsible for enforcing the rights of noninstitutionalized handicapped persons in education matters arising under Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), and the Education for All Handicapped Children Act of 1975 (20 U.S.C. §1401 et seq.). In addition, cases involving discrimination in the provision of education by revenue sharing fund recipients are generally administered by the Educational Opportunities Section. See USAM 8-2.214, supra.

8-2.221 Title IV of the Civil Rights Act of 1964

Under Title IV of the Civil Rights Act of 1964 (42 U.S.C. §2000c), the Attorney General is authorized, when certain statutory conditions are met, to institute public school desegregation suits against school officials and others who may be necessary to the granting of appropriate relief.

Under the terms of Title IV, complaints of discrimination or segregation in public schools and colleges must be in writing and signed by a parent or group of parents or, in the case of colleges, by the person aggrieved. The complaint should contain a statement to the effect that the children involved are being deprived by a school board of the equal protection of the laws, or, if it is a college-level complaint, to the effect that the complainant has been denied admission to or not permitted to continue in attendance of a public college by reason of race, color, religion, or national origin. Complainants should be advised of these requirements. No particular form of complaint is required; it need not be under oath. When a signed complainant is submitted to the U.S. Attorney, he/she should contact the FBI and request that the complainant be interviewed for details, including his/her financial status, i.e., household income, property, and obligations. (42 U.S.C. §2000e-6 authorizes the Attorney Gerneral to institute a civil action only where the signers of the complaint, in his/her judgment, are unable to initiate and maintain appropriate legal proceedings.) The Bureau, after

interviewing the complainant, will furnish a copy of its report to the U.S. Attorney and to the Department. The U.S. Attorney should review the report and submit his/her recommendations to the Assistant Attorney General, Civil Rights Division, bearing in mind the criteria established by the statute for the Attorney General in determining whether he/she may proceed.

8-2.222 The Equal Educational Opportunities Act of 1974

The Equal Educational Opportunities Act of 1974 (20 U.S.C. §1701 et seq.) also authorizes the Attorney General to institute public school desegregation suits against school officials and others. The segregative acts of school officials which deny equal educational opportunity are specifically described (20 U.S.C. §1703(a)-(e)). In addition, such a suit may be filed when public school officials fail to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program (20 U.S.C. §1703(f)). Unlike Title IV (see USAM 8-2.221, supra) jurisdiction under this Act does not require a written complaint from parents, and the Attorney General may institute a civil action on behalf of any individual denied equal educational opportunity. The U.S. Attorney should review any information indicating a violation of this Act, and submit his/her recommendation concerning further action to the Assistant Attorney General, Civil Rights Division.

8-2.223 Defensive Litigation

The defense of the Department of Education's determination to terminate federal funds to an educational institution under Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d) and other federal statutes is administered by the Educational Opportunities Section.

8-2.230 Housing and Civil Enforcement Section

The Housing and Civil Enforcement Section is responsible for administering the enforcement of federal statutes regarding equal housing opportunity, equal credit opportunity, discrimination in places of public accommodation, and discrimination in the provision of municipal services. The primary statutes with which this Section is concerned are the Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. §§3601-3619); the Equal Credit Opportunity Act (15 U.S.C. §1691-1691f); and Title II of the 1969 Civil Rights Act (42 U.S.C. §2000a). Discrimination in the provision of municipal services is prohibited by 31 U.S.C. §6716 and 42 U.S.C. §1509.

The Housing and Civil Enforcement Section is also responsible for enforcing the rights of noninstitutionalized handicapped persons in housing matters arising under Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794). In addition, cases involving discrimination in the provision of housing by revenue sharing fund recipients are generally administered by the Housing and Civil Enforcement Section. See USAM 8-2.214, supra.

8-2.231 Title VIII of the Civil Rights Act of 1968

Subject to certain specified limitations, Title VII forbids discrimination based on race, color, religion, sex or national origin in the sale, rental or financing of housing. Practices forbidden by the law include not only the direct refusal to sell, rent or finance but also the practice known as "blockbusting," defined in Section 804(e), and the more sophisticated forms of discrimination such as "racial steering" and discrimination by the use of the zoning power.

Certain enforcement responsibilities are given by the statute to the Department of Housing and Urban Development. The Act authorizes that Department to receive and investigate complaints, to attempt to obtain voluntary compliance with the Act, and to notify state and local fair housing agencies of any complaints filed. Private suits are also provided for, and the Attorney General is authorized to sue for injunctive relief in the federal courts against a pattern or practice of discrimination. Relief includes affirmative steps to correct the effects of past discrimination. It has also included monetary compensation to victims of discrimination, but all the courts of appeals which have considered the issue have held that only equitable restitution is available (i.e., no damages).

The U.S. Attorneys have primary responsibility for enforcing administrative subpoenas issued by the Department of Housing and Urban Development under Section 811 of the Fair Housing Act (42 U.S.C. §3611). HUD will keep the Civil Rights Division apprised of these matters by notifying the Housing and Civil Enforcement Section when a subpoena is referred to a U.S. Attorney for enforcement. Also, in some instances where requests for information under Section 811 involve unusual circumstances, the General Counsel's Office at HUD will consult with the Civil Rights Division before a subpoena or demand for information is issued. The U.S. Attorneys have been delegated concurrent authority in Fair Housing Act matters. Pursuant to this delegation, when information about housing discrimination involving "blockbusting," racial steering, or

discrimination in the rental or sale of houses, apartments, or mobile homes is brought to the attention of the U.S. Attorney, he/she should initiate an investigation and notify the Assistant Attorney General, Civil Rights Division, of the nature and scope of the inquiry. The notice should be directed to the attention of the Chief of the Housing and Civil Enforcement Section. In the event that the U.S. Attorney determines that litigation is warranted, he/she shall provide the memorandum and proposed pleadings. The Assistant Attorney General for Civil Rights has the final authority to determine what cases are to be filed, compromised, or settled. This decision will be made after consultation with the U.S. Attorney, concerning the merits of the proposed litigation. See USAM 8-2.180, supra.

When the U.S. Attorney learns of other types of discrimination in housing (e.g., exclusionary zoning) he/she should notify the Assistant Attorney General, Civil Rights Division, attention: Chief of the Housing and Civil Enforcement Section, who will then communicate with complainants by a form letter which advises them of their private rights and of the Attorney General's responsibilities under the Act. The Chief of the Housing and Civil Enforcement Section will also determine, in cooperation with the U.S. Attorney, whether investigative or litigative action is appropriate.

The use of force or threats of force to interfere with fair housing rights may violate the criminal provisions of Title IX of the 1968 Civil Rights Act (42 U.S.C. §3631) as well as Title VIII of the Act. The determination of whether or not to proceed civilly will be made by the Assistant Attorney General, Civil Rights Division, in consultation with the U.S. Attorney. Criminal prosecutions under 42 U.S.C. §3631 are supervised, supported and coordinated as appropriate by the Criminal Section of this Division. See USAM 8-3.000.

For instructions for standard preliminary investigations, see USAM 8-2.320, 8-2.330, 8-2.350, 8-3.230.

8-2.232 The Equal Credit Opportunity Act

The Equal Credit Opportunity Act forbids discrimination in the extension of credit based on race, color, religion, sex, marital status, national origin, age, because a credit applicant receives public assistance, or because a credit applicant has exercised rights under the Consumer Credit Protection Act. The coverage of the law became effective in stages and its final form became effective on March 23, 1977.

Certain administrative enforcement responsibilities are given by the statute to twelve federal agencies, with the Federal Trade Commission having the broadest responsibility. Private suits are also provided for. The Attorney General is authorized to sue for injunctive relief in the federal courts when a case is referred from one of the twelve federal agencies or when he/she finds a pattern or practice of credit discrimination. The Attorney General may sue for "such relief as may be appropriate, including injunctive relief."

When information about discrimination in credit is brought to the attention of the U.S. Attorney, he/she should notify the Assistant Attorney General, Civil Rights Division, attention: Chief of the Housing and Civil Enforcement Section, who will then communicate with complainants by a form letter which advises them of their private rights and of the Attorney General's responsibilities under the Act. The Chief of the Housing and Civil Enforcement Section will also determine, in cooperation with the U.S. Attorney, whether investigative or litigative action is appropriate.

For instructions for standard preliminary investigation, see USAM 8-2.340, infra.

8-2.233 Title II of the Civil Rights Act of 1964

Title II of the Civil Rights Act of 1964 (42 U.S.C. §2000a) prohibits discrimination on account of race, color, religion, or national origin in places of public accommodation, such as hotels, restaurants, and theaters. Under the Act, the Attorney General is authorized to bring a civil action whenever there is reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by Title II, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights secured by that Title.

The Statute expressly requires the complaint in such a suit to be signed by the Attorney General. The Attorney General is authorized to request that the case be heard by a three-judge court, upon certification that the case is of general public importance. The Act requires the trial court to expedite the case.

Private individuals are authorized to institute civil actions for preventive relief. The Attorney General may intervene in such suits in the discretion of the court upon certification that the case is of general importance.

Court decisions have held that bars, skating rinks, bowling alleys, swimming pools, recreational associations, and other establishments open to the public providing sources of entertainment which move in commerce are covered under Title II. In instances where such establishments hold themselves out as private clubs, investigation should nevertheless be requested since many such establishments are not private within the meaning of the Act but are, in fact, open to the general public.

The U.S. Attorneys' concurrent enforcement responsibilities under Title II are discussed in USAM 8-2.180. To assist U.S. Attorneys in carrying out their responsibilities under Title II, the Civil Rights Division has devised and distributed to U.S. Attorneys' offices a handbook for the investigation and trial of Title II cases. Portions of this handbook are reproduced at USAM 8-6.000.

8-2.234 Unlawful Interference With the Use of Public Accommodations

The use of force or threats of force to injure, intimidate or interfere with a person because of race, color, or national origin and because of use of a public accommodation constitutes a violation of 18 U.S.C. §245(b)(2)(F), as well as Title II of the 1964 Act. The determination whether to proceed civilly or criminally will be made by the Assistant Attorney General, Civil Rights Division, or his/her designee, in consultation with the U.S. Attorney.

8-2.240 Coordination and Review Section

The Coordination and Review Section has staff responsibility for implementing the Attorney General's authority under Executive Order 12250 and 12336.

8-2.241 Executive Order 12250

The Coordination and Review Section has staff responsibility for implementing the Attorney General's authority under Executive Order 12250, 3 C.F.R. §298 (1981), reprinted in 42 U.S.C. §2000d-1 note, at 588 (Supp. IV 1980), to coordinate the enforcement by all executive agencies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-2000d-4, Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. §§1681-1686, section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, and any other provision of federal statutory law that provides, in

whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance. Nondiscrimination sections of federal statutes covered by Executive Order 12250 include:

A. Food Stamp Act of 1964, 7 U.S.C. §2020;

B. National Housing Act of 1934, 12 U.S.C. §1735f-5;

C. National Consumer Cooperative Bank Act of 1978, 12 U.S.C. §3015;

D. Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. §719o;

E. Federal Energy Administration Act of 1974, 15 U.S.C. §775;

F. Full Employment and Balanced Growth Act of 1978, 15 U.S.C. §3151;

G. Youth Conservation Corps Act of 1970, 16 U.S.C. §1704;

H. Higher Education Act of 1965, 20 U.S.C. §§1087-2(e), 1142;

I. Foreign Assistance Act of 1961, 22 U.S.C. §2314(g);

J. Federal-Aid Highway Act of 1963, 23 U.S.C. §140;

K. Federal-Aid Highway Act of 1958, 23 U.S.C. §324;

L. Job Training Partnership Act of 1982, 29 U.S.C. §1577;

M. State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §6716;

N. Federal Water Pollution Control Act of 1948, 33 U.S.C. §1251 note;

O. Amateur Sports Act of 1978, 36 U.S.C. §391(b);

P. Appalachian Regional Development Act of 1965, 40 U.S.C. App. §223 note;

Q. Federal Property and Administrative Services Act of 1946, 40 U.S.C. §476;

R. Public Health Service Act of 1944, 42 U.S.C. §§290dd-2, 290ee-2, 292d, 298b-2, 300a-7(a) to 7(d);

S. Preventive Health and Health Services Block Grant, 42 U.S.C. §300w-7;

T. Alcohol & Drug Abuse & Mental Health Services Block Grant, 42 U.S.C. §300x-7;

U. Primary Care Block Grants, 42 U.S.C. §300y-9;

V. Maternal and Child Health Services Block Grant Act of 1981, 42 U.S.C. §708;

W. Public Works and Economic Development Act of 1965, 42 U.S.C. §3123;

X. Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Justice System Improvement Act of 1979, 42 U.S.C. §3789d;

Y. Domestic Volunteer Services Act of 1973, 42 U.S.C. §5057;

Z. Disaster Relief Act of 1974, 42 U.S.C. §5151;

AA. Housing and Community Development Act of 1974, 42 U.S.C. §5309;

BB. Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §5672;

CC. Energy Reorganization Act of 1974, 42 U.S.C. §5891;

DD. Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §5919(v);

EE. Public Works Employment Act of 1976, 42 U.S.C. §§1609, 6727;

FF. Energy Conservation and Production Act of 1976, 42 U.S.C. §6870;

GG. Home Energy Assistance Act of 1980, 42 U.S.C. §8625;

HH. Community Economic Development Act of 1981, 42 U.S.C. §9821;

II. Head Start Act of 1981, 42 U.S.C. §9849;

JJ. Community Services Block Grant Act of 1981, 42 U.S.C. §9906;

KK. Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. §1651 note;

LL. Federal Land Policy and Management Act of 1976, 43 U.S.C. §1747(10);

MM. Outer Continental Shelf Resource Management Act Amendments of 1978, 43 U.S.C. §1863;

NN. Public Broadcasting Financing Act of 1962, 47 U.S.C. §398(b);

OO. Conveyance of Submerged Lands to Territories Act of 1974, 48 U.S.C. §1708;

PP. Department of Transportation Act, Railroad Revitalization Reform Act of 1976, Regional Rail Reorganization Act of 1973, 49 U.S.C. §306;

QQ. Urban Mass Transportation Act of 1964, 49 U.S.C. §1615; and

RR. Airport and Airway Improvement Act of 1982, 49 U.S.C. §2219.

In order to promote consistency in positions taken by executive agencies in litigation under statutes covered by Executive Order 12250, the U.S. Attorney should, upon receipt of any complaint alleging a violation of any covered statute, forward a copy of the complaint to the Coordination and Review Section.

In order to facilitate enforcement by executive agencies of statutes covered by Executive Order 12250, any U.S. Attorney who learns or has reason to believe that a recipient of federal assistance is engaging in illegal discrimination under any covered statute should notify the Coordination and Review Section.

8-2.242 Executive Order 12336

Executive Order 12336 (3 C.F.R. §219 (1982)) directs the Attorney General to review the United States Code and Code of Federal Regulations for all remaining substantive gender discrimination. The Attorney General has delegated this responsibility to the Civil Rights Division, and the Coordination and Review Section is carrying out the work on a day-to-day basis.

The results of this review are forwarded in periodic reports to the President and Cabinet Council on Legal Policy, who in accordance with the order propose steps "for the systematic elimination of regulatory and procedural barriers which have unfairly precluded women from receiving equal treatment from Federal activities." The order also established the Task Force on Legal Equity for Women, composed of top-level administrators from the major departments and agencies, who are responsible for implementing any changes requested by the President.

Gender discrimination produced by federal laws, regulations, policies or programs should be brought to the attention of the Coordination and Review Section.

8-2.250 Special Litigation Counsel

In addition to the sections described in this chapter, the Civil Rights Division has several Special Litigation Counsel. These are senior litigators who are assigned some of the Division's more complex enforcement problems.

8-2.260 Special Litigation Section

The Special Litigation Section has the responsibility to investigate, initiate, and prosecute cases involving deprivation of federal statutory and constitutional rights of institutionalized persons. The types of institutions covered are state and local governmentally operated or supported mental hospitals, mental retardation facilities, prisons, jails, juvenile facilities, homes for the aged or chronically ill, and institutions for physically handicapped persons. The jurisdiction of the Section also extends to institutionalized handicapped persons falling within the coverage of §504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), the Education for All Handicapped Children Act (20 U.S.C. §1401 et seq.). The Section also has concurrent authority with U.S. Attorneys for enforcing Title III of the Civil Rights Act of 1964 (42 U.S.C. §2000b).

8-2.261 Civil Rights of Institutionalized Persons

The Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247 (42 U.S.C. §1997), signed into law on May 23, 1980, gives the Attorney General authority to sue to vindicate constitutional and federal statutory rights of persons residing in local and state operated institutions.

These persons include mentally and physically handicapped persons of all ages, the elderly, juveniles, and prison and jail inmates. The types of institutions covered are state and local governmentally operated or supported mental hospitals, mental retardation facilities, juvenile reformatories or training schools, pre-trial detention facilities, prisons, homes for the aged or chronically ill, and institutions for physically handicapped persons.

To initiate suit under the Act, the Attorney General must have reasonable cause to believe that the deprivation of rights is part of a pattern or practice of denial rather than an isolated or accidental incident. At the time of commencing the civil action, the Attorney General must personally certify to the court (a) that he/she has previously notified, in writing, the appropriate state officials of the (1) alleged deprivation, (2) supporting facts, and (3) possible remedy; (b) that he/she has notified, in writing, the appropriate state official of his/her intent to conduct an investigation of the state institution and that the Attorney General has (1) made a good faith effort to consult with the appropriate state officials to advise them of federal assistance that may be available, (2) encouraged the appropriate state official to correct the alleged conditions and pattern or practice, and (3) that the appropriate officials have had reasonable time to take appropriate corrective actions; and (c) that this action is of general public importance.

This statute also authorizes the Attorney General to intervene in any action commenced in any court of the United States, when the Attorney has reason to believe that such deprivation is pursuant to a pattern or practice or resistance to the full enjoyment of such rights, privileges, or immunities. A motion to intervene shall not be filed before 90 days after the commencement of the action. In the motion to intervene the Attorney General must certify to the court that the appropriate state officials have been notified of (a) the alleged conditions and pattern or practice; (b) the supporting facts giving rise to the alleged conditions and (c) the minimum measures that may remedy the alleged conditions and pattern or practice. Motions to intervene and certifications must be signed by the Attorney General personally.

When complaints of widespread deprivation in conditions of confinement are received by a U.S. Attorney, they should be forwarded to the Assistant Attorney General, Civil Rights Division, for evaluation and review prior to any request for investigation.

8-2.262 Title III of the Civil Rights Act of 1964

Title III of the Civil Rights Act of 1964 (42 U.S.C. §2000b) prohibits discrimination on account of race, color, religion, or national origin in public facilities, such as parks, libraries, auditoriums, and prisons. The Special Litigation Section supervises the enforcement of Title III.

Under Title III, the Attorney General is authorized to institute a civil suit upon receipt of a written, signed complaint if it is believed that the complaint is meritorious, and upon certification that the complainants are unable to initiate and maintain appropriate legal proceedings for relief and that the institution of the action will materially further the orderly progress of desegregation in public facilities. The statute expressly requires the complaint in such a suit to be signed by the Attorney General.

The U.S. Attorneys' concurrent enforcement responsibilities under Title III are discussed in USAM 8-2.180.

8-2.263 Unlawful Interference With the Use of Public Facilities

The use of force or threats of force to injure, intimidate or interfere with a person because of his/her race, color, or national origin and because of his/her use of a public facility constitutes a violation of 18 U.S.C. §245(b)(2)(B), as well as Title III of the 1964 Act. The determination whether to proceed civilly or criminally will be made by the Assistant Attorney General, Civil Rights Division, or his/her designee, in consultation with the U.S. Attorney.

Prior to the enactment of Pub. L. No. 96-247, the Special Litigation Section participated as amicus curiae, plaintiff-intervenor, or plaintiff in cases which alleged widespread deprivations of constitutional rights of institutionalized persons. Principally, such litigation has involved allegations of overcrowding, violence and brutality, inadequate programming, inappropriate placements, abuse of medications, inadequate medical or psychiatric staff and care, inadequate sanitation, unsafe physical plants, working conditions, inadequate educational services, etc.

Relief obtained through litigative efforts in these areas has been productive in securing substantial improvements and changes in conditions of confinement, and has established valuable case law construing the scope and meaning of constitutional protections retained by the covered classes. See, e.g., Wyatt v. Hardin, 344 F. Supp. 373 (M.D. Ala. 1972), aff'd 503 F.2d 13 (5th Cir. 1974); Adams v. Mathis, 458 F. Supp. 302 (M.D. Ala.

1978); Battle v. Anderson, 447 F. Supp. 516 (E.D. Okla.), aff'd, 564 F.2d 388 (10th Cir. 1972); Davis v. Balson, 384 F. Supp. 1196 (N.D. Ohio 1974); Evans v. Washington, 459 F. Supp. 483 (D. D.C. 1978); Gary W. v. La., 437 F. Supp. 1209 (E.D. La. 1976).

8-2.270 Voting Section

The Voting Section has been assigned primary responsibility for the civil enforcement of the Voting Rights Act of 1965, as amended in 1970, 1975, and 1982 (42 U.S.C. §1973 to §1973bb-1), other statutory provisions designed to prevent racial discrimination in the electoral process, and other statutory provisions relating to the free exercise of the franchise.

8-2.271 Racial Discrimination in Voting, in General, 42 U.S.C. §§1971(a)(1), 1971(b), 1973, 1973i(a) & (b)

Racial discrimination in voting, in whatever form, at whatever stage of the electoral process, and whether or not federal elections are involved, is prohibited.

The Attorney General is authorized to seek relief to enforce this prohibition by 42 U.S.C. §1971(c) and §1973j(d). Criminal enforcement is authorized by 42 U.S.C. §1973j(a) and (c) and 18 U.S.C. §§241, 242, 245(b)(1)(A) and 594. See USAM 8-2.288 (Criminal Sanctions).

The U.S. Attorney should consult with the Chief of the Voting Section prior to requesting any investigation into racial discrimination in voting. Telephonic authorization to initiate an investigation may be obtained in cases where prompt action is necessary.

8-2.272 Literacy Tests, 42 U.S.C. §1973aa

State and local jurisdictions are not permitted to require voters to be able to read and write. The test ban applies to voting in federal, state, and local elections and to voting in primaries as well as in general or special elections. Banned are not only literacy tests but also understanding tests, educational achievement requirements, moral character requirements, and requirements that registrants prove their qualifications by having other persons vouch for them.

Persons authorized to register and vote despite illiteracy must be provided or permitted to receive assistance in marking their ballots. See also USAM 8-2.273 (Voting Assistance).

The Attorney General is authorized to seek civil relief to enforce this provision by 42 U.S.C. §1973aa-2 (a three-judge court is required, with direct appeal to the Supreme Court). Criminal enforcement is authorized by 42 U.S.C. §1973aa-3.

The use of literacy tests and other tests and devices was banned in most of the south and in certain other areas by the Voting Rights Act of 1965. The ban was extended to the entire nation for a five-year trial period by the Voting Rights Act Amendments of 1970 and was made permanent by the Voting Rights Act Amendments of 1975.

8-2.273 Voter Assistance, 42 U.S.C. §1973aa-6

Effective January 1, 1984, a voter who needs assistance in voting because of illiteracy, blindness, or disability may be given assistance from the person of his or her choice (other than the voter's employer or agent of that employer or officer or agent of the voter's union).

Although Congress did not explicitly authorize the Attorney General to enforce the voter assistance provision, violations of it will usually constitute violations of other provisions of federal law that the Attorney General is authorized to enforce. See USAM 8-2.272 (Literacy Tests), and USAM 8-2.271 (Racial Discrimination in Voting, in General).

This provision was added to the Voting Rights Act of 1965 by the Voting Rights Act Amendments of 1982.

8-2.274 Dilution of Minority Voting Strength, 42 U.S.C. §1973

Methods of election and redistrictings of election districts that result in the dilution of minority voting strength are in violation of Section 2 of the Voting Rights Act of 1965, as amended by the Voting Rights Act Amendments of 1982, 42 U.S.C. §1973.

The use of at-large elections by a city, county, or school district may unlawfully dilute the voting rights of blacks or other minorities in comparison to the results under a fairly-drawn, single-member district plan. See, e.g., Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984). A re-districting plan may similarly discriminate against blacks (or other

minorities) by unduely overpopulating a majority black district, by dividing concentrations of blacks to prevent the formation of effective black majority districts, or by creating districts that have unnecessarily high black percentages and thus that minimize the number of districts with viable black majorities. A violation of minority voting rights is established by showing, based on the totality of the circumstances, that the political processes leading to nomination or election are not equally open to participation by minorities. However, nothing in this section establishes a right to have members of a protected class or minority elected in numbers equal to their proportion in the population. See 42 U.S.C. §1973(b).

The potential for minority vote dilution in violation of Section 2 is greater where blacks (or other minorities) are residentially segregated, where blacks have been denied access to the political process, where "slating" groups fail to include blacks as members of slates, where white voters generally fail to vote for black candidates or candidates supported by blacks, and where the government is not responsive to the needs of blacks.

A U.S. Attorney who believes that minority vote dilution in violation of Section 2 exists in a jurisdiction within his/her district should bring the facts on which this belief is based to the attention of the Chief of the Voting Section and discuss with the Chief of the Voting Section possible litigation to remedy the violation.

The Attorney General is authorized to seek civil relief to enforce Section 2 by 42 U.S.C. §1973j(d).

8-2.275 Preclearance of Voting Changes (Section 5), 42 U.S.C. §1973c

Certain jurisdictions (primarily but not exclusively in the south, see USAM 8-2.279 (Specially Covered Jurisdictions)), must receive federal "preclearance" under Section 5 of the Voting Rights Act before instituting any change that affects voting. This preclearance can either be obtained from the United States District Court for the District of Columbia in a declaratory judgment action (a three-judge court is required, with direct appeal to the Supreme Court) or from the Attorney General upon administrative review.

Section 5 of the Voting Rights Act and the Attorney General's procedures for its administration are explained in detail in 28 C.F.R. Part 51, Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, reprints of which are available from the Voting

Section. Extensive requirements have been imposed by the courts in applying this provision.

A voting change enacted after the applicable specified date is legally unenforceable if it has not been submitted for preclearance or if a request for preclearance has been denied.

To receive preclearance, the jurisdiction seeking to implement a voting change must demonstrate that the change does not have the purpose and will not have the effect of discriminating on the basis of race or minority languages. Georgia v. United States, 411 U.S. 526 (1973). The preclearance requirement can apply to all kinds of changes, from the relocation of polling places to legislative redistrictings. Not only states and counties but also cities, school districts, other special districts, and (in some circumstances) political parties are subject to the preclearance requirement. See Perkins v. Matthews, 400 U.S. 379 (1971).

Under Section 5, the Attorney General has 60 days in which to make a decision with respect to submitted voting changes. One extension only, or an additional 60 days from the date of receipt of additional information, is permitted the Attorney General upon his/her request for more information.

Jurisdictions seeking to implement voting changes must submit the changes directly to: Chief, Voting Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530. Voting changes should not be submitted for review to the U.S. Attorney. If any voting change is received by a U.S. Attorney it should be immediately forwarded to the Voting Section, and it is imperative that the Chief of the Voting Section be notified by telephone.

Each week the Voting Section distributes to interested persons (including all U.S. Attorneys whose districts include jurisdictions subject to the preclearance requirement) a list of voting changes that have recently been submitted for review. U.S. Attorneys are invited and requested to share with the Voting Section their views with respect to any submitted changes concerning which they have special interest or information. U.S. Attorneys are also encouraged to apprise local officials of the submission requirement and of the consequences of failure to meet the submission requirement.

The Attorney General is authorized to seek civil relief to enforce the preclearance requirement by 42 U.S.C. §1973j(d) (a three-judge court is required, with direct appeal to the Supreme Court). Criminal enforcement is authorized by 42 U.S.C. §1973j(a) and (c).

The preclearance provision was enacted as Section 5 of the Voting Rights Act of 1965.

Jurisdictions not subject to the preclearance requirement can become subject to it through litigation. See USAM 8-2.280 (Application of Preclearance, Examiner, and Observer Provisions to Other Jurisdictions), infra.

8-2.276 Registration for Voting--Federal Examiners, 42 U.S.C. §§1973d, 1973e, 1973g and 1973k

In certain jurisdictions (primarily but not exclusively in the south, see USAM 8-2.279 (Specially Covered Jurisdictions)), if a discriminatory registration system prevents minorities from registering to vote, the Attorney General is authorized (1) to sign a certification that federal examiners are necessary to enforce the guarantees of the Fourteenth or Fifteenth Amendment, and then (2) to request the Office of Personnel Management to appoint federal examiners who will "list" (register) eligible voters. Federally listed voters must be permitted to vote in all elections--federal, state, and local; primary, general, and special. Approval from the Office of Personnel Management must be obtained by a jurisdiction before a federally registered voter can be purged from the local voter lists.

Examiners may be contacted on election day to take complaints of discrimination against federally listed voters.

The Attorney General is authorized to seek civil relief to enforce the examiner provisions by 42 U.S.C. §2973j(d) and (e). Criminal enforcement is authorized by 42 U.S.C. §1973j(a) and (c).

The examiner provisions were enacted as part of the Voting Rights Act of 1965.

Jurisdictions not subject to the examiner provisions can have examiners appointed through litigation. See USAM 8-2.280 (Application of Preclearance, Examiner, and Observer Provisions to Other Jurisdictions), infra.

8-2.277 Observers at Elections, 42 U.S.C. §1973f

In certain jurisdictions (primarily but not exclusively in the south, see USAM 8-2.279 (Specially Covered Jurisdictions)), the Attorney General is authorized to request the Office of Personnel Management to appoint federal observers to monitor polling place activities. Observers can only be sent to counties certified by the Attorney General for the appointment of federal examiners. See USAM 8-2.276 (Registration for Voting--Federal Examiners). Observers are used when it appears likely that minority voters will be denied the right to vote, denied needed voter assistance, or otherwise discriminated against in polling place activities. Observers are authorized to watch all polling place activities, including assistance to voters and the counting of ballots, and the information they obtain can only be given to Department attorneys. Observers are not allowed to give advice or direction to anyone, including poll officials, poll watchers and voters, nor do observers intervene or participate in the conduct of elections in any manner. When observers are present in a county to monitor an election, one or more Department of Justice attorneys (usually from the Voting Section) are also present to act as liaison with local officials and minority leaders and to take corrective action based on the information provided by the observers.

The decision to send federal observers to a county for a particular election is made by the Assistant Attorney General, Civil Rights Division, on the basis of pre-election surveys conducted by Voting Section attorneys and after consultation by the Voting Section with U.S. Attorneys. U.S. Attorneys are encouraged to contact the Chief of the Voting Section to discuss the possible need for or the use of the observers.

The observer provision was enacted as part of the Voting Rights Act of 1965.

Jurisdictions not subject to the observer provision can have observers appointed through litigation. See USAM 8-2.280, infra, (Application of Preclearance, Examiner, and Observer Provisions to Other Jurisdictions).

8-2.278 Minority Languages in the Electoral Process, 42 U.S.C. §§1973b(f)(4), 1973aa-1a(c)

Certain jurisdictions (see USAM 8-2.279 (Specially Covered Jurisdictions)), are required to use the languages of members of specified language minority groups in the electoral process. These groups are: American Indians, Asian Americans, Alaskan natives, and persons of Spanish heritage. The minority language requirements apply to all phases of the electoral process, from voter registration to assistance at the polls; to

federal, state, and local elections, and to primary, general, and special elections. The basic requirement is that affected jurisdictions take whatever steps are necessary to enable minority language citizens to participate effectively in the electoral process.

Jurisdictions other than ones that are specially covered may in some circumstances also be required to use minority languages in their electoral process under 42 U.S.C. §§1973b(f)(2) and 1973(a).

For further information with respect to the application of the minority language requirements and the Attorney General's interpretation of the duty imposed by these requirements, see 28 C.F.R. Part 55, Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, reprints of which are available from the Voting Section.

The Attorney General is authorized to seek civil relief to enforce the minority language provisions by 42 U.S.C. §§1973j(d) and 1973aa-2 (a three-judge court, with direct appeal to the Supreme Court, is required under 42 U.S.C. §1973aa-2 but not under §1973j(d)). Criminal enforcement is authorized by 42 U.S.C. §1973j(a) and (c) and §1973aa-3.

U.S. Attorneys should note that in many jurisdictions the U.S. Attorney is responsible for enforcement of the minority language requirements. See USAM 8-2.281 (U.S. Attorney Enforcement of Minority Language Provisions).

The minority language provisions were added to the Voting Rights Act of 1965 by the Voting Rights Act Amendments of 1975.

8-2.279 Specially Covered Jurisdictions, 42 U.S.C. §§1973(b) and 1973aa-1a(b)

The special provisions of the Voting Rights Act--preclearance (see USAM 8-2.275), examiner (see USAM 8-2.276), observer (see USAM 8-2.277), and minority language (see USAM 8-2.278)--do not apply to the entire United States but only in jurisdictions that have been determined to satisfy criteria set forth in the Act. (But see USAM 8-2.280, infra, Application of Preclearance, Examiner, and Observer Provisions to Other Jurisdictions.)

A. Section 4 Requirements for States that Used Literacy Tests

States (or individual political subdivisions of states) that employed a literacy test in 1964 or 1968 and in which less than half the voting age population voted in the presidential election of 1964 or 1968 are subject to the preclearance, examiner, and observer provisions. (These criteria are set forth in the first two sentences of Section 4(b) of the Act, 42 U.S.C. §1973(b).)

B. Section 4 Minority Language Coverage Formula

States (or individual political subdivisions of states) in which over five percent of the citizen voting age population were members of a single language minority group (American Indians, Asian Americans, Alaskan natives, or persons of Spanish heritage), that did not use the language of that group in the 1972 presidential election, and in which less than half the citizen voting age population voted in that election are subject to the preclearance, examiner, observer, and minority language provisions. (These criteria are set forth in the third sentence of Section 4(b) of the Act, 42 U.S.C. §1973(b).)

C. Section 203 Coverage Formula

Political subdivisions in which over five percent of the citizen voting age population are members of a single language minority group and do not speak or understand English adequately enough to participate in elections conducted in English are subject to the minority language provisions. For the purpose of Section 203 coverage, persons will only be considered members of a single language minority group if they share a common linguistic background. The coverage criteria are set forth in Section 203(b) of the Voting Rights Act and in Section 4 of the Voting Rights Act Amendments of 1982, 42 U.S.C. §1973aa-1a(b).

Section 4 coverage and Section 4 minority language coverage expires on August 5, 2007. Covered jurisdictions can bail out prior to that time by obtaining the kind of declaratory judgment that is described in Section 4(a) of the Act, 42 U.S.C. §1973(a). The statute is quite specific in describing the facts which must be proven to obtain the declaratory judgment. Bail-out actions must be brought in the United States District Court for the District of Columbia, and a three-judge court is required, with direct appeal to the Supreme Court. Effective August 5, 1984, individual political subdivisions in states subject to statewide coverage are eligible to bring bail-out actions.

Section 203 coverage expires on August 6, 1992. Covered jurisdictions can bail out prior to that time by obtaining the declaratory judgment described in Section 203(d) of the Act, 42 U.S.C. §1973aa-1a(d);

the statute is quite specific in describing the facts which must be proven to obtain the declaratory judgment. Bail-out actions may be brought in the district court for the district in which the jurisdiction is located. A three-judge court is not authorized. U.S. Attorneys should immediately telephone the Chief of the Voting Section if a Section 203 bail-out action is filed, to notify the Voting Section of the action, and to discuss the defense of the action.

Political subdivisions subject to the preclearance, examiner, and observer provisions, but not the minority language provisions are located in the following 19 districts:

Alabama (all districts)	Mississippi (all districts)
California (N.D.)	New Hampshire
Georgia (all districts)	North Carolina (all districts)
Louisiana (all districts)	South Carolina
	Virginia (all districts)

(The affected jurisdictions are listed in 28 C.F.R. Part 51, Appendix.)

Political subdivisions subject to the preclearance, examiner, observer, and minority language provisions are located in the following 15 districts:

Alaska	Florida (M.D., S.D.)	North Carolina (W.D.)
Arizona	Michigan (all districts)	South Dakota
California (E.D.)	New York (E.D., S.D.)	Texas (all districts)

(The affected jurisdictions are listed in 28 C.F.R. Part 55, Appendix.)

The 18 districts in which are located political subdivisions subject to the minority language provisions but not to the preclearance, examiner, and observer provisions are listed under USAM 8-2.281 (U.S. Attorney Enforcement of Minority Language Provisions).

D. History

The Voting Rights Act of 1965 brought certain jurisdictions under the coverage of the preclearance, examiner, and observer provisions. The Voting Rights Act Amendments of 1970 brought additional jurisdictions under the coverage of these provisions. The Voting Rights Act Amendments of 1975 brought additional jurisdictions under the coverage of these provisions, as well as the minority language provisions, and brought other jurisdictions under the coverage of the minority language provisions

alone. The Voting Rights Act Amendments of 1982 made certain adjustments in the coverage and bailout criteria and set final coverage termination dates.

8-2.280 Application of Preclearance, Examiner, and Observer Provisions to Other Jurisdictions, 42 U.S.C. §1973a

In voting rights litigation, the courts are authorized, under appropriate circumstances, to impose the preclearance and federal examiner provisions on jurisdictions not otherwise subject to them, and if a court has ordered the federal examiner remedy for a jurisdiction, the Attorney General is authorized to request the use of federal observers in that jurisdiction. See USAM 8-2.275 (Preclearance of Voting Changes); USAM 8-2.276 (Registration for Voting--Federal Examiners); USAM 9-2.277 (Observers at Elections); USAM 8-2.279 (Specially Covered Jurisdictions).

8-2.281 U.S. Attorney Enforcement of Minority Language Provisions

As is explained in the section regarding specially covered jurisdictions (see USAM 8-2.279), some political subdivisions subject to the minority language requirements are also covered by the preclearance, examiner, and observer provisions of the Voting Rights Act, while others are not. Within the Department of Justice, U.S. Attorneys have the primary enforcement responsibility for the minority language requirements in the latter jurisdictions (those covered by Section 203 only), while the Civil Rights Division has enforcement responsibility for those jurisdictions subject not only to the minority language requirements but also to the preclearance, examiner, and observer provisions (jurisdictions covered by Section 4).

Political subdivisions subject to Section 203 only are located in the following 18 districts:

California (E.D., N.D., S.D.)	Idaho	North Dakota
Colorado	Massachusetts	Oklahoma (E.D.)
Connecticut	Michigan (W.D.)	South Dakota
Florida (S.D.)	Montana	Utah
Hawaii	New Jersey	Wisconsin (W.D.)
	New Mexico	

(The affected jurisdictions are listed in 28 C.F.R. Part 55, Appendix.)

U.S. Attorneys for the districts in which are located political subdivisions covered under Section 203 have received memoranda dated May 15 and 17, 1978, from the Acting Deputy Attorney General and the Chief of the Voting Section (Civil Rights Division), respectively, setting out the Department policy for enforcing Section 203. (Earlier, the U.S. Attorneys received from the Acting Assistant Attorney General, Civil Rights Division, a letter dated Octover 22, 1976, and an accompanying memorandum in this regard.)

U.S. Attorneys with primary minority language enforcement responsibility will assign to one person the principal responsibility for Section 203 enforcement activities. The Voting Section of the Civil Rights Division should be apprised by U.S. Attorneys on a regular basis of the Section 203 compliance program activities they are pursuing and evaluative determinations made with respect to compliance by each covered political subdivision in their districts. Before any Section 203 suit is filed, a memorandum justifying the suit and a copy of the proposed complaint will be forwarded to the Assistant Attorney General, Civil Rights Division, for approval. In those instances where the need for prompt litigation may not permit the mailing of such documents, approval should be obtained telephonically. All such complaints should be filed over the name of the Assistant Attorney General, Civil Rights Division. See also USAM 8-2.180.

8-2.282 Poll Tax, 42 U.S.C. §1973h

Under the 24th Amendment (1964) and Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the payment of a poll tax cannot be required as a prerequisite to voter registration or voting. The Attorney General is authorized to seek civil relief against the imposition of a poll tax by 42 U.S.C. §1973h and §1973j(d). Criminal enforcement is authorized by 42 U.S.C. §1973j(1) and (c).

8-2.283 Eighteen-Year-Old Voters, 42 U.S.C. §1973bb

Under the 26th Amendment (1971) denial of the right to vote of anyone over the age of eighteen, on account of age, is prohibited. The Attorney General is authorized to seek civil relief to enforce the 26th Amendment by 42 U.S.C. §1973bb(a)(1). (A three-judge court is required, with direct appeal to the Supreme Court.) Criminal enforcement is authorized by 42 U.S.C. §1973bb(b).

8-2.284 Absentee Voting--for President, 42 U.S.C. §1973aa-1

Any person, otherwise eligible, must be permitted to register to vote for President if he or she applies at least 30 days before the election, and must be permitted to vote for President by absentee ballot if he or she applies at least 7 days before the election and returns the ballot by the close of the polls on election day. Any person who moves to a new jurisdiction within 30 days of a presidential election must be allowed to vote for President by absentee ballot in his or her old jurisdiction.

The Attorney General is authorized to seek civil relief to enforce this provision by 42 U.S.C. §1973aa-2. (A three-judge court is required, with direct appeal to the Supreme Court.) Criminal enforcement is authorized by 42 U.S.C. §1973aa-3.

This provision was enacted as part of the Voting Rights Act Amendments of 1970.

8-2.285 Absentee Voting--by Overseas Voters, 42 U.S.C. §1973dd-1, §1973dd-2(a) and (b)

Any American citizen who is abroad must be permitted to register for and vote in federal elections of the state in which he or she was last domiciled, even if he or she would not now satisfy the residency requirements of that state for voting purposes. The voter must apply for an absentee ballot at least 30 days before the election and must return the ballot by the close of the polls on election day. This provision applies to voting for federal offices only, and applies in primary, general and special elections.

The Attorney General is authorized to seek civil relief to enforce this provision by 42 U.S.C. §1973dd-3(a). Criminal enforcement is authorized by 42 U.S.C. §1973dd-3(b). Fraudulent use of this provision is a crime under 42 U.S.C. §1973dd-3(c).

This provision was enacted as part of the Overseas Citizens Voting Rights Act of 1975.

8-2.286 Absentee Voting--by Military Voters, 42 U.S.C. §1973cc(b)

Members of the Armed Forces (and spouses and dependents) and members of the merchant marine (and spouses and dependents) must be permitted to register absentee for and vote by absentee ballot in federal elections.

This provision applies to voting for federal offices only, applies in primary, general, and special elections, and applies whether the absent voter is stationed within the United States or abroad.

Although the Attorney General is not expressly authorized to seek civil relief to enforce this provision, it was a basis for relief in actions brought primarily under the Overseas Citizens Voting Rights Act. See USAM 8-2.285 (Absentee Voting--by Overseas Citizens).

This provision was added in 1978 to the Federal Voting Assistance Act of 1955.

8-2.287 Preservation and Production of Voting Records, 42 U.S.C. §§1974-1974d

State and local officials are required to retain and preserve all records or papers in their possession in connection with registration or other requisites for voting in any general, special, or primary election for federal office. The record must be preserved for a period of 22 months from the date of the particular election. The duty to preserve devolves upon any other person to whom the records may be delivered.

The person having control, custody, or possession of the records shall, upon a demand in writing by the Attorney General or the Attorney General's representative, make the records available for inspection, reproduction and copying. It should be noted that the records must be made available by anyone having custody, whether it be a state executive official or a judicial or quasi-judicial body.

The Attorney General is authorized to seek civil relief to enforce this provision by 42 U.S.C. §1974b and §1974d. Criminal enforcement is authorized by 42 U.S.C. §1974 and §1974a.

This provision was enacted as Title III of the Civil Rights Act of 1960.

8-2.288 Criminal Sanctions, 42 U.S.C. §1973i(a-e) and §1973j(a-c), 18 U.S.C. §245(b)(1)(A)

The Voting Rights Act of 1965 provides for criminal penalties for the following acts: (1) failure or refusal to permit the casting or tabulation of votes; (2) intimidation, threats, or coercion against voters; (3) giving false information in registering or voting; (4)

falsification or concealment or material facts of giving false statements in matters within the jurisdiction of examiners or hearing officers; (5) depriving or attempting to deprive persons of rights secured under the Act; (6) conspiring to violate or interfere with rights secured under the Act; (7) destroying, defacing, mutilating, or altering ballots or official voting records; and (8) voting twice in a federal election. (These sanctions appear in 42 U.S.C. §1973i and j.) The use of force or threats of force to interfere in an election is proscribed by 18 U.S.C. §245(b)(1)(A).

U.S. Attorneys should also be aware that 18 U.S.C. §245(b)(1)(A) and §594 provide criminal penalties where force or threat of force is used to interfere with a person's right to vote.

Cases are supervised by the Criminal Section, Civil Rights Division, when the violation is racially based. The determination whether to proceed civilly or criminally will be made by the Assistant Attorney General, Civil Rights Division, or designee, in consultation with the U.S. Attorney.

Complaints involving violations of any of these provisions should be handled in the same way as complaints in other civil rights criminal violations described in USAM 8-3.110 to USAM 8-3.150 and USAM 8-3.200 to USAM 8-3.220.

8-2.300 INSTRUCTIONS FOR STANDARD PRELIMINARY INVESTIGATIONS

8-2.310 Relating to Public Accommodations

The standard preliminary investigation to be conducted for alleged violations of Title II of the 1964 Civil Rights Act is set out at USAM 8-6.110.

8-2.320 Relating to Discrimination in Sale or Rental of Apartments and Trailer Parks

The form below is used by the Housing and Civil Enforcement Section for requesting investigations in cases involving alleged discrimination in the sale or rental of apartments and trailer parks. The form should be attached to a forwarding memorandum to the Director of the Federal Bureau of Investigation indicating the alleged violations to be investigated.

Portions of the form may be deleted, modified, or expanded upon, depending upon the requirements of a particular investigation.

A. Interview the complainant, if other than the victim, for full details of his/her complaint, including the names of the subject, victim and any others with knowledge of the alleged discriminatory acts.

B. Interview the victim to obtain the following information:

1. Obtain full background information, including his/her address, telephone number at home and at work, age, race, religion or national origin (as relevant to his/her allegations); and the occupation, place of employment, length of time employed, income (including type of income, i.e., salary, alimony, child support) and educational background of the victim and his/her spouse. Please also determine the size of family living at home, ages of children, and such other background data as may appear to be pertinent.

2. Obtain full details of all dealings the victim has had with the subject or any of his/her agents, including all oral or written communications with these persons, the date and time such communications were made, the nature of the alleged discriminatory act, the names and addresses of the persons who were involved, and the victim's description of what was said or done.

3. If the allegation relates to discrimination in the terms of rental, i.e., if black persons claim they were quoted higher rates than are quoted to white persons for a similar unit, ascertain the rental rates and the amount of the security deposit quoted to the interviewee and determine why the interviewee believes the rates to be discriminatory; also, please determine the number of bedrooms requested, size of apartment shown to interviewee, location of apartment shown (ground floor or above), and whether the unit contains a balcony, patio, fireplace or other feature (such as utilities furnished by the management) which would affect the rental rate.

4. Determine from the victim the reason or reasons the subject or his/her agents gave for refusing to rent or deal with him/her.

5. Ascertain the names and addresses of any witnesses to the incident.

6. Obtain copies of any pertinent written materials or documents that the victim may have in his/her possession, such as

copies of application forms for the subject housing, copies of purchase agreements or applications for financing, advertising materials dealing with the subject housing, or correspondence between the subject and the victim.

7. Determine if the victim believes he/she was discriminated against with respect to any other housing. If so, please secure all details.

C. Obtain details of any complaint made by the complainant or victim with any local, state or federal agency concerning the same incident of housing discrimination. From the specific agency involved, please secure copies of any complaints about any building or complex, etc., owned or managed by the subject, as well as the name, address and race of each obvious victim and complainant and the results of that agency's investigation and action taken on each complaint.

D. Please interview the owner, resident manager or other appropriate representative of the owner to secure his/her version of the facts resulting in the complaint, and to obtain the following additional information:

1. Determine the name, address, race and position or function of every person and organization having an ownership interest in, or participating in the management of, the building or complex in question. If the subject is incorporated, please ascertain the state and date of incorporation and the name and address of all officers.

2. Determine the name, address, number of units, age and type of buildings, and number of tenants by race (including the date the first non-white moved in) of every residential building or apartment complex owned by the owners or any of them, or managed by the managers or any of them.

3. Please determine the number of tenants by race at the subject building or complex, and the name and address (dwelling or apartment number, etc.) of each non-white tenant. Please also determine the number of units rented by couples, the number rented by unmarried men and the number rented by unmarried women. Also, ascertain the range of rent for each type of unit, including information as to whether the rental rate is affected by features such as patio, balcony, location (ground floor or above), and all other factors which would determine the rental rate.

4. If a trailer park is involved, also ascertain the total number of spaces, the number of units owned by the subject and the tenants. Ascertain the conditions of occupancy (utilities, lease, rent, race, number of occupants, etc.), race and marital status of tenants, and address of each non-white tenant.

5. Please determine the name, race, address, date of application and action taken in the applications of the last twenty applicants for a dwelling at the subject building, complex, etc. Please also secure the name, race, and address of every non-white applicant for the past two years (or of the last twenty black applicants, if there have been so many during a shorter period). If it is determined in response to paragraph (c) above that there are no (or very few) unmarried tenants of either sex, please also secure the names and addresses of all unmarried applicants of the sex not rented to for the last two years (or the last twenty, if there have been so many during a shorter period).

6. Ascertain the number and type of vacant dwellings that were available at the time of the incident involved, the average number of vacancies per month and the duration of such vacancies.

7. Please ascertain the rents charged at the complex where the incident occurred for each type of apartment, features which affect the rental rate, the approximate rate of turnover, and the approximate number of applicants, by race, per year. If there are no black or other minority tenants or very few, determine why the interviewee believes this to be so.

8. Ascertain whether and the degree to which management acquires new tenants through the recommendation and recruitment by existing tenants and through the acceptance of walk-in applicants for apartments, and full details as to the existence or nonexistence of such policy.

9. Please determine if instructions were given to resident managers when the managers were hired regarding the rental of dwellings or spaces to blacks or other minority members; whether any changes occurred in these instructions, and if so, when; if the interviewee was ever advised by a manager of black applicants or of blacks who inquired, and if so, determine how the situation was handled and the results of the applications or inquiries. Also, ascertain whether interviewee has a specific policy concerning renting to blacks or other minority members, and, if so, ascertain

the details of the policy and if it has changed, when and why the change was made.

10. Please ascertain all criteria and qualifications prospective tenants must meet (credit rating, salary, marital status, race, children, deposit, written application, and the like), and a complete description of all steps from initial inquiry to moving in. Please determine to what extent the income of an applicant's spouse or the special income categories of alimony and child support are counted in determining tenant eligibility. Determine if the manager's subjective impression of the applicant plays any part in the decision to rent an apartment. If so, please determine specifics. (For example, are managers free to accept or reject applicants because of hair styles, neatness, age or type of car, etc.)

11. Ascertain whether any racial or other codes, such as a small "c" (often used for "colored") or "XX" (XX has often been used in the industry as a symbol for blacks) or other mark, appears on the application sheet or card to designate the race of the applicant. If coding or racial designations appear, please inspect as many of the records as possible and obtain copies of a representative number. Whether or not such markings are found, please secure a copy of the application form and any other forms used routinely by subject to record information about persons who inquire about apartments.

12. If a credit, employment, prior landlord, or other check is or has been in use, please obtain full details as to what check is made, whether such check is made for all applicants or merely some, and whether the same check is made as to the applicant's spouse, and whether the same check is made as to all applicants. If a check is conducted in some but not all cases, or if a different check is conducted in some cases than in others, please determine all criteria on which the decision as to what, if any, check should be made. Please determine what check was made for the last ten black applicants and the last ten white applicants who reached this stage in their application. If a form is used for the various types of checks, please obtain copies of each.

13. If the subject advertises, please secure details of the media used and copies of representative advertisements. If possible, obtain the entire page of the publication in which a written advertisement appears. If different media are used for different properties, please determine which properties are advertised in which media, and the general racial characteristics of the properties so

advertised and of the neighborhood in which they are located (white, black, transitional, etc.). Determine whether the rental or other property is listed with any rental agency, brokerage firm or multiple listing service, and, if so, obtain the name, and address of such agency, firm or service.

14. Please ascertain the number of employees by race and job position at each building or complex and identify any maintenance or other personnel who reside in the building.

15. From personal observation and from interviews with the owner and the manager, ascertain whether a fair housing poster, which is required by the Department of Housing and Urban Development, is displayed in each rental office of the subject.

E. Please interview all persons who witnessed any dealings or conversations (which are the subject of this investigation) between the victim or complainant and the subject to obtain information similar to that requested to be obtained from the victim in Part B of this memorandum.

F. Please secure responsive interviews from five former employees and five present employees of the subject (giving preference to those who had rental or employment responsibilities, and including some non-white employees if possible) to obtain the following information:

1. Determine how the apartments are advertised and how vacancies are made known to potential tenants. For example, are present tenants encouraged to locate or recommend potential tenants, are newspaper advertisements used, and if so, when, etc. Determine what proportion of applicants are referred by present tenants and whether such applicants are given any kind of preference.

2. Determine the normal procedure followed from the time a potential tenant first contacts the rental agent or manager until the time the person is either rented an apartment or not rented an apartment. This should include the use of application forms, credit checks, necessity for references, procedures for verification of income or employment, etc.

3. Determine the criteria used by a rental agent or manager in deciding whether to rent to a particular applicant. Were credit rating, income, marital status, race, sex, children, relevant? Was spouse's income, or alimony or child support counted in determining eligibility? Is the manager given any discretion in the selection of

tenants; if so, how is it used and is it reviewed by the owner? Obtain copies of any written or published criteria.

4. Ascertain the extent to which the manager or the rental agent was instructed about the rental of apartments by the owner. If any of the instructions were in writing, obtain copies.

5. Determine whether the owner instructed or discussed with him/her the effect of federal Civil Rights Act of 1968, of the 1974 amendments to the Act prohibiting sex discrimination, or of any state or local fair housing act or regulation on the operation of the apartments. If so, please obtain details and the dates of such events. If exact dates are not known, please determine if such instructions or discussions occurred at about the same time as the passage or amendments of the acts.

6. For those managers or rental agents who were employed by any of the subjects at the time of the passage of the 1968 Act (April 1968), or its general effective date (January 1, 1969), or at the time of the passage or effective date of a state or local Fair Housing Act, please determine the effect of such legislation on the operation or management of the apartments and the extent of any discussions with the owners concerning the changes.

7. Determine whether the interviewee is aware of any policy or procedure followed in the taking and processing of applications from, or rental of apartments to, black persons which was different from that used in the case of others. This includes any statements or instructions the interviewee received in this regard, even though a particular interviewee did not necessarily follow those instructions. Also, determine if the interviewee is aware of any limitations on the use of facilities (pool, recreation areas, etc.) that may be imposed on black tenants or if there is any limitation on white tenants having black guests, etc.

8. Determine whether a credit check is conducted in the case of each applicant, whether the same procedures are used in each case, and by whom the check is conducted. If a check is not always made, or if different procedures are followed, please determine what criteria are used to decide how a particular applicant will be checked. Determine how many of the last 20 black applicants and how many of the last 20 white applicants were subjected to a full credit check.

9. Determine if the interviewee is aware of the identity of any black applicants who inquired about or applied for rental and if so, whether such applicants obtained an apartment. If they were not rented an apartment, obtain the reasons for not renting. Also, please obtain the names and addresses of all such persons (both successful and unsuccessful applicants) known to the interviewees, determine the number of units in each apartment managed by each interviewee and ascertain the highest number of apartments rented to blacks at any one time at each such apartment complex.

10. Determine if the apartment rental office contains or has contained a sign or notice which indicated the existence of a policy of renting to persons without regard to race or color and if, in any way, the existence of such policy was known to the community.

11. Determine on what terms the interviewee left his/her employment, and the reason or reasons for his/her departure. If the interviewee received references or testimonials from subject, obtain copies thereof.

G. Secure responsive interviews from at least five black tenants of the trailer park, apartment building or complex in question (if there are so many) and from at least five rejected black applicants as to all of their dealings with the subject. Please include the following information:

1. Ascertain how the interviewee learned of the subject dwellings and why he/she decided to apply or inquire at the subject dwellings.

2. Determine how many times he/she went to the rental office, what was said, the manner in which he/she was received and the attitude, name and position of the person with whom he/she spoke.

3. Determine if, in fact, the interviewee knew of a vacancy, and if so, the basis of that knowledge.

4. Ascertain the type of information requested or sought by the persons in the office, such as credit references, names of employers, former addresses, etc. Please determine if the subject or his/her representative based tenant eligibility on the full income of both spouses, or on the income of one spouse and part of the other, etc., and determine what types of income were considered, (i.e., salary, alimony, child support payments).

5. Determine the reason given to the applicant why he/she was not rented a dwelling, or if he/she was rented a dwelling, ascertain the length of the waiting period.

6. Determine if the interviewee threatened to complain, or did complain, to a fair housing group, a lawyer, or a governmental agency because of any aspect of his/her dealings with the subject. If so, obtain details.

7. Determine if the person interviewed knows of any tenants who are black. If so, secure the address and identity, if known, of each such tenant.

8. Determine if the interviewee knows of both male and female single persons to whom units have been rented. If he/she knows of single persons only of one sex, please secure their addresses and identities.

H. Secure responsive interviews with ten present white tenants for the following information:

1. Obtain the information requested in Part G, above.

2. Determine the interviewee's understanding of the subject's policy or practice with regard to the rental of apartments to black persons, to other minority persons, or to persons without regard to sex (e.g., are there distinctions as between single men and women or between divorced or separated men and women). If he/she has an understanding of the policy or practice, please determine the factual basis for it.

3. Determine if the interviewee is aware of any instance when a black or other minority person was not rented an apartment and the reasons for the failure to rent, if known.

4. Determine if the interviewee has ever been advised by a representative of the subject about any rules which may pertain to entertaining black guests in the apartments, black guests using the pool or other recreational facilities, or any other matter which may indicate a policy or practice based on race or color.

5. Determine whether the interviewee was told that blacks or other minority persons or persons of a particular sex, or single, divorced, or separated persons of a particular sex, were not rented apartments there, kept out, etc. If so, secure details concerning

those who were present, the dates, exactly what was said, and whether such conversation occurred when the interviewee was seeking an apartment at the subject building or complex, or after he/she moved in.

8-2.330 Relating to Discrimination in the Financing of Housing

The form below is used by the Housing and Civil Enforcement Section for requesting investigations in cases involving alleged discrimination in the financing of housing. The relevant portions of the form should be attached to a forwarding memorandum to the Director of the Federal Bureau of Investigation indicating the alleged violation(s) to be investigated, and the form should be modified to fit the requirements of the particular case. The Housing and Civil Enforcement Section is available for consultation and assistance in formulating the appropriate modifications.

A. BACKGROUND

1. General

This investigation is requested pursuant to the Federal Fair Housing Act of 1968 (42 U.S.C. §3601 et seq.), to determine whether there is a pattern or practice of discrimination in lending, or a denial to a group of persons of rights guaranteed by the Fair Housing Act. The Act prohibits the refusal to make a home mortgage loan or the fixing of terms or conditions for such a loan on the basis of the race, color, religion, sex or national origin of any of the following categories of people or any combination of these categories.

a. The applicant for the loan;

b. Persons "associated" with the applicant;

c. Persons associated with the purpose of the loan;

d. The present or future occupants of the dwelling for which the loan is sought; and

e. The present or future occupants of the neighborhood where such dwelling is located (i.e., "racial redlining").

The "terms and conditions" of a loan can include the amount of the loan, the interest rate, the term of years, the type of mortgage

or any other factor which affects the nature or character of the loan transaction.

The types of loans covered include any mortgage or Deed of Trust or note or other extension of credit sought for the purpose of buying, building, improving, repairing or maintaining a dwelling. Accordingly, second and third mortgages are also covered. In addition, the law covers all dwellings, including single family homes, apartment houses, trailer parks, recreational projects, condominiums, and vacant land intended for a dwelling.

2. Sex Discrimination

The law prohibits a lender from basing any lending decision upon presumed or stereotyped characteristics associated with gender. Lenders are required to consider and evaluate the creditworthiness of women in the exact same way as they consider and evaluate the creditworthiness of male applicants. Recent experience and statistics indicate that nearly fifty percent of the women in the United States are in the work force and that a lender is factually inaccurate if he/she presumes that, because an applicant is a woman she is more likely to leave the work force (e.g., because of pregnancy) than a man. The law requires each applicant to be evaluated on his or her own merits. Accordingly, it is unlawful for a lender to:

a. In any way "discount" or disregard the income of a working wife or single woman;

b. Refuse to make a loan, or make the loan on different terms and conditions, because of sex;

c. Require more or different information from a woman applicant than a man (e.g., birth control arrangements or family plans);

d. Subject a woman applicant to a different or more extensive credit check than that which is usually required for men;

e. Refuse to include alimony or child support as viable income, where evidence is provided of a history of consistent prior payment and payments are likely to continue;

f. Base any aspect of a lending decision on presumptions about women (e.g., women in the child bearing age are poor risks);

g. Treat single working mothers differently than single working fathers; and

h. Require women, but not men, to obtain a co-signor.

3. Racial Redlining

The words "racial redlining" describe a practice that began many years ago in the Federal Housing Administration, whereby lenders were encouraged to literally draw a red line on a map to indicate residential areas where black people and other ethnic groups resided, for the express purpose of determining where to refrain from making loans. At that time, the presence of black persons in a neighborhood was described as an "adverse influence" and, on that basis, FHA would refuse to issue mortgage insurance in areas occupied by such "inharmonious racial groups."

In the present day, the practice may still continue in varying degrees of overtness, although it has no basis in fact or sound lending policy. The Federal Home Loan Bank Board has also prohibited such practices in regulations issued under the Fair Housing Act.

In areas where minorities reside that are also poor or low income areas, lenders may attempt to justify not lending because of physical conditions in the neighborhood. In areas where minorities reside which are not poor, lenders may attempt to justify not lending for other reasons. Often, lenders deny that any geographical area is considered "off limits" and that each loan is evaluated on its own merit.

The law prohibits a lender from any action which has the purpose or effect of basing any lending decision in whole or in part on the racial or ethnic composition of the area where the property is located. In a redlining investigation, this Department will seek to determine the following:

a. Is there any geographic area in which the lender will not lend, or will lend only on different terms and conditions? (I.e., only with short term loan or high interest, only an FHA or VA loan, or only on a small loan-to-value ratio.)

b. If the lender does not acknowledge the existence of such areas, can their existence be determined from:

(1) Interviews with present and former employees;

(2) Interviews with area real estate brokers;

(3) Interviews with persons who sought loans from the subject; and

(4) Inspection of bank records to determine where loans are made?

c. If the existence of such areas is determined, is there any correlation between the boundaries of such areas and the race of the residents in the area?

d. If the lender is determined to have a policy which treats geographic areas differently, or which has that effect (i.e., no loans on homes over 25 years old), what are the ostensible reasons for such a policy? If the reasons involved a perception by the lender of greater risk in a particular area, or on certain types of loans, on what is this perception based and how is it measured?

e. Does the lender rely on appraisals which are based upon assumptions about the effect of racial integration on value? Do the appraisal reports contain racial notations? Why?

f. Does an inspection of loan records reveal different loan patterns in areas of minority concentration than in areas which are all white or predominantly white?

Because factors which go into lending decisions are often subtle and subjective, redlining investigations can be complex and require analysis and copying of numerous bank documents. Where the subject does not provide the information requested, it will have to be developed by other means, including general investigative methods. In some instances, attorneys in the Civil Rights Division may be able to arrange to obtain certain information through federal regulatory agencies. This will be the exception rather than the rule. Accordingly, these investigations must be accomplished primarily through field work.

Most loan applicants who are rejected are rejected without any written record being made. Thus, it will be necessary to develop other sources who can identify possible victims (e.g., real estate brokers, local citizen groups).

B. CONTACT WITH THE INSTITUTION

1. General Information

Please contact the president of the subject, or vice president in charge of real estate loans, or other appropriate person to ascertain the following information (in addition to the interviewee's name, title, race and sex):

a. Determine the full legal name of the institution and obtain a description of the type of institution which it is (i.e., commercial bank, savings and loan, mutual savings association, mortgage banker, etc.).

b. Determine when, where and how it was chartered (e.g., National Bank, State Chartered, Federal Savings and Loan) and determine the name of the federal regulatory agency which audits or examines the institution (i.e., FHLBB, FDIC, Federal Reserve, Comptroller of Currency, FSLIC). If it is a Mortgage Banker or other non-regulated organization, determine if it is incorporated and, if so, where and when.

c. Determine the size of the total assets of the institution and determine what proportion of its loan portfolio is in first home mortgages and what proportion is in second home mortgages.

d. Determine the location of each branch of the subject and the date it was opened. Also determine the location of any branch closed in the past five years and the reason it was closed.

e. Determine the institution's "service area," i.e.,

(1) Where it is authorized to make loans; and

(2) Where it considers its effective market area to be.

f. Determine the name and last known address, race, and sex of each person who is, or within the past five years has been, an officer or director of the subject.

g. Determine the name and last known address, race and sex of each person who is, or within the past five years has been, employed by the subject as:

(1) Real estate loan officer;

(2) Branch manager;

(3) Assistant branch manager; and

(4) Real estate appraiser (if the institution uses outside appraisers, as opposed to staff appraisers, obtain the name of all such organizations used in the past five years).

h. Determine the title or position or job category of each employee who presently or within the past five years has been, authorized to fulfill any of the following functions (including clerical personnel):

(1) Give information to people who inquire about the availability of loans or the terms of loans (in person or by phone or by mail);

(2) Take information from an applicant or assist an applicant in filling out an application;

(3) Check or verify information on an application (e.g., order credit reports);

(4) Evaluate creditworthiness or viability of income;

(5) Determine eligibility for a loan (i.e., the person(s) who checks to see if loan-to-income ratios are met, or who determines which income is or is not counted);

(6) Establish or suggest the proposed terms of a loan (e.g., term, rate, amount of loan, loan-to-value ratio);

(7) Evaluate the marketability or value of security property, or review the appraisal; and

(8) Participate in the approval or rejection of a loan (including the persons with authority to screen applicants and property as to eligibility, before submitting the loan for final approval).

i. If any category of employee described in section h, above, was not also included in the categories listed in section g, above, obtain the name, last known address, race and sex for each person who presently or within the past five years has held a position included in such categories described in section h. Also obtain:

(1) Any manual, book or compilation of memoranda or minutes (including memos to employees) describing or containing the institution's loan policy in whole or in part. This might include underwriting criteria, standards on evaluating income, directions as to current interest rates, loan to value ratios, etc. If there have been changes in the past two years, obtain a copy of all prior versions.

If the interviewee states that no such compilation exists, determine how employees, such as branch managers, know what information to give applicants about present policy or what standards to apply to applications. If the interviewee states that these things are communicated orally or at meetings, determine if minutes are kept. Obtain copies of all written instructions for the past two years to employees with respect to lending policies, practices and procedures.

(2) All loan application forms in present use, or used within the past five years.

(3) All single family home property appraisal forms in present use or used within the past five years.

(4) All worksheets for figuring income and loan limits or evaluating credit information, in present use or used within the past five years.

(5) Many institutions issue regular bulletins, under various names, listing the "going" interest rate, loan-to-value ratio and other current terms. These change

frequently in response to market conditions. If such memoranda exist, formal or informal, obtain copies from the present going back at least two years.

If such memos are not available, determine how it can be obtained from the institution's records, or who would have such information (e.g., Board of Directors minutes).

(6) Many institutions have some written material prepared for the use and information of builders or brokers who refer applicants to the lender. Obtain copies of any such writings used in the past two years.

2. Past and Present Policies with Respect to Race and Sex

If a subject has engaged in a pre-act or prior policy of discrimination, but fails to take sufficient steps to overcome the present effects of such policy, the subject may be in violation of the Fair Housing Act. Such information is highly relevant to this investigation, even if it occurred prior to enactment of the Fair Housing Act. Prior to the enactment of the Fair Housing Act, many lenders had an overt or express policy of refusing to lend in integrated areas or refusing to lend to a black in a predominantly white area. To a large extent, this policy may have been based upon a belief that the presence of non-whites in an area universally lowers property value and creates greater underwriting risk. The following questions are intended to determine whether the subject institution has ever had a racially-based lending policy:

a. Determine whether, to the interviewee's knowledge, the subject institution has ever observed a policy, formal or informal, of:

(1) Being reluctant or refusing to lend to black persons or other minorities in a homogeneous white neighborhood.

(2) Being reluctant or refusing to lend in racially integrated areas, or areas which are predominantly black or Spanish.

(3) Considering black persons or other minority persons to be poor credit risks, or being reluctant to lend to blacks or other minorities.

(4) Using any grid or scoring guide which assigned points or demerits on the basis of race or sex.

(5) Discounting in any way the income of working wives or single women, or refusing or being reluctant to lend to single women or to women in child bearing age.

(6) Requiring women, but not men, to indicate their intention to continue working.

(7) Requiring co-signers for women but not men applicants.

(8) Requiring any credit check, examination or evaluation for blacks that is different than for whites; or for women, that is different than for men.

b. If any of the above policies were ever followed by the institution, determine all details, including when the policy began, why it began, when it ended, why it ended (if it did end), how the change in policy was effectuated and the source of the interviewee's knowledge. Obtain copies of any written documents relating to such policies. Also obtain the name, address, race and sex of any other person who the interviewee believes has similar knowledge.

c. Determine whether, to the interviewee's knowledge, the subject presently maintains any of the policies enumerated in paragraph a(1) through (8). If so, obtain full details including the name, address, sex, race and phone number of any possible victim of these policies.

d. Determine whether the subject presently or at any time has maintained a code or other notation method to identify either the race of the applicant or the predominant race or nationality of the area where the security property is located on any form including the application or appraisal. If so, obtain all details, including why this information was or is kept and how it was or is used.

e. Determine whether the subject presently or at any time maintained or utilized or consulted any map or list which identified geographic areas by:

(1) Race, nationality or ethnic composition;

(2) Income level of residents;

(3) Rising or declining value levels;

(4) Age range of properties;

(5) Value range of properties;

(6) Loan, no loan, or preferred loan areas;

(7) High or low risk loans;

(8) Crime rate; and

(9) Other similar category.

If such a map or list is or was maintained, obtain all details about how it is or was used, why it is no longer used (if that is the case), who maintains it and how areas are determined to belong to one or the other category. Determine where the map or list is kept and a description of the boundaries of each area demarcated therein and a full description of the characteristics of the area.

If possible, obtain a copy of the list or map and a copy of all documents relating to its use.

3. General Loan Policy

Please obtain the following information with respect to loan policy.

a. Obtain a general description of the institution's policy with respect to the terms of loans available including:

(1) Maximum and minimum loan amounts and how these maximum and minimum amounts are arrived at (e.g., by federal law or regulation or by lender policy or both). Also determine what circumstances would justify a deviation from these limits.

(2) Maximum and minimum loan terms (duration), how these are arrived at and what circumstances would justify a deviation from these limits.

(3) Maximum and minimum interest rates. (Note: Interest rates vary periodically according to market conditions. Please determine how the institution arrives at its "going rate," what benchmarks it uses and how it uses them.)

(4) Which persons or group officially sets the maximum and minimum as described above, or the "going rate" for interest rates.

b. Obtain a description of any policy, formal or informal, relating to the type of loan (by purpose) available or preferred by the lender. (Many institutions allocate or earmark a certain amount of funds for specific types of loans, or have "goals" in these categories, e.g., so much for first mortgages, so much for auto loans, so much for apartments, or commercial loans. Some institutions believe a certain type of loan to be more profitable or easier to administer, and "specialize" in such loans. For instance, some lenders like construction loans better than "spot loans." Some prefer only new communities over developed areas. Some institutions are limited, by law, in terms of the percentage of their assets which may be placed in certain types of loans.)

Determine from the interviewee the subject's policy with respect to the following types of loans, and if a category of loan is preferred, why this is so.

(1) Spot loans on single family homes. (Are they encouraged, solicited, discouraged? Are a certain amount of funds allocated for them?)

(2) Construction loans on single family projects. Are they preferred over spot loans? Why?

(3) Multi-family dwellings, both existing and proposed.

(4) Second trusts.

(5) Home repair or home improvement loans.

(6) Any other category of home loan not mentioned above.

Also determine the percentage of each category of loan, by category, which the institution has in its portfolio.

c. Obtain a description of all limitations on single family home loans which are presently or which have been observed within the past five years, and the relationship of such limitation to the loan terms and conditions. (By limitation it is meant a factor which would preclude a loan from being made, or which if present, would require the observance of certain safeguards in the making of the loan.) These can include:

(1) The age of the property. Is there a limit on the age of property which will qualify for a conventional loan? Is this chronological age, effective age or remaining economic life? Are there any circumstances under which the age limits would not be observed? Does the age of the property dictate the term of years of the loan? If so, on what scale? Are there any exceptions to this? Obtain a complete description of all of the ways in which the age of the property affects a loan application.

(2) Style or size of the property.

(3) Crime rate or vandalism rate in an area. (How are these measured or determined?)

(4) Economic level of residents in an area. (How is this measured or determined?)

(5) The age or age range of other properties in the neighborhood where the security property is located.

(6) The value range of other properties in the neighborhood where the security property is located.

(7) The predominant nationality or race of persons in the area where the security property is located.

(8) Racial or ethnic change in the composition of the population in the area where the security property is located.

(9) The percentage of the neighborhood that is "built up." (Degree of development in area.)

d. Obtain a complete description of all factors affecting the neighborhood where a security property is located which can have a bearing on whether a loan is made or the terms of a loan. Is racial composition or change ever such a factor? If so, how is this taken into account?

e. Obtain a list of any specific areas in which the institution prefers to make loans, or has made many loans in the past three years. Obtain a description of the type of area (in terms of housing and population characteristics) where the institution prefers to make loans, e.g., new communities rather than older ones.

f. Are there any areas, streets, communities or neighborhoods in which the institution will not make loans? If so, obtain a complete description of the boundaries of such areas and determine the reason the institution will not make loans there. Also determine whether the institution has ever made any loans in the area and if so, how many, when and whether there is a higher delinquency or default rate on such loans. Also determine the interviewee's estimate of the number of applications, per month, from such areas. If the number is low, determine why the interviewee believes more applications do not come in from these areas.

g. Are there any areas, streets, communities or neighborhoods in which the institution will make only FHA or VA loans? If so, obtain a complete description of the boundaries of such areas and determine the reason that only FHA or VA loans will be made in this area. Also determine whether the institution has ever made conventional, non-insured loans in the area and, if so, how many, when and whether there was a higher delinquency or default rate on such loans. Also determine the interviewee's estimate of the number of applications for conventional, non-insured loans, per month, from such areas. If the number is low, determine why the interviewee believes it to be low.

h. Are there any areas, streets, communities or neighborhoods which, for any reason, the lender considers to be high risk areas for lending, but will make conventional loans on a high downpayment, low loan-to-value ratio basis, or for higher

than market interest rates or shorter than normal duration (that is less than 25 years)? If so, obtain a complete description of the boundaries of such areas and determine why the area is considered high risk, how risk is measured and how terms are fixed or decided on for loans in such areas. Also determine the interviewee's estimate of the number of applications for loans per month from such areas. If the number is low, determine the interviewee's opinion as to why it is low.

i. Does the lender have a policy against originating or processing FHA loans or VA loans? If so, why? Was there ever a time during which such loans were made? If so, when was this and why did the policy change?

j. Are there any areas where the institution will not originate FHA loans? If so, obtain complete details.

k. Determine whether at any time during the past five years the institution was "out of the market" for home mortgage loans. If so, determine the dates of such a condition and the reason for it. Were any home loans being made at that time? If so, to whom?

l. Does the institution give or has it given any preference to depositers in granting loans? If so, how does this operate?

m. Does or has the institution maintained any ongoing relationship with builders or brokers who refer single family home loan applicants to the institution? If so, obtain a description of the relationship, the name and address of each such broker or builder and the name of the contact person in such organization. How are salespeople in these organizations advised of the institution's requirements or terms? If any material is in writing, obtain copies.

n. Has the institution advertised for loans of any kind in the past five years? If so, obtain all details and if possible, obtain a copy of the ads.

o. Has the institution had employees, officers or agents personally solicit loans at any time in the past five years? (Many lenders send officers or agents to individual brokers or builders or to meetings of trade associations, to establish

"good will," etc.). Please obtain all details of any such solicitation and identify the persons solicited.

p. Determine the interviewee's estimate of the number of single family home loans which are the result of "walk-ins," the percentage referred by brokers, the percentage referred by builders and the percentage referred by other sources. If not otherwise obtained in response to question m. above, obtain the name and address of all brokers and other referring sources.

q. Determine if the institution has ever been the subject of a complaint of discrimination in lending or employment, on the basis of race, color, religion, sex or national origin. If so, obtain all details of such complaint, the agency which handled it, identity of complainant and resolution. Obtain a copy of all documents and correspondence in the institution's possession with respect to such matter.

4. Loan Application Procedures

Obtain a complete description of how an application is made, how it is processed and what records are maintained. Among the information to be obtained is the following:

a. Where can applications be picked up and where can they be submitted?

b. Is there an application fee or appraisal fee? How much is it? When is it paid? Is it always paid?

c. Is anyone authorized to go over the applicant's financial data or property characteristics prior to formally submitting an application, to determine eligibility? If so, how does this operate, who is so authorized and is any record kept of applications not ultimately submitted? Does this practice occur even though not formally authorized?

d. What information is available to applicants by phone? Is any pre-qualification or pre-screening done by phone?

e. What information is an inquirer asked to give, if he or she calls on the telephone for information? Is the property address asked? Why? Are persons ever told on the phone that loans are not being made in certain areas? Under what circumstances would this occur?

f. After an application is submitted, where does it go, i.e., are they all forwarded to a central loan department or can the branches process them?

g. Obtain a description of all checks and verifications performed on the information supplied by the applicant.

h. When is the appraisal ordered? Under what circumstances would an appraisal not be ordered?

i. What happens after all of the verifications are made and the appraisal is returned? Who reviews the file at this point? If any information is unfavorable, or does not check, can the application be rejected at this stage? Is any record kept of this, if it happens? Who has authority to make such a rejection?

j. If the information on the application is verified, and the appraisal supports the loan sought, how is it decided whether or not to make the loan? Who decides? Is there a loan committee? Loan officer? Board of Directors? What record is kept of decisions and reasons for decisions?

k. If an application is rejected, is it retained? How long? How is the file organized (alphabetically, chronologically, etc.)?

l. If the loan is made, where is this entered? If a loan register is kept, obtain a description of all entries. Also obtain a description of all computer entries or index entries made, i.e., how is information on the loan retrievable?

m. Determine how loan jackets are organized and filed (e.g., by number, by name).

n. Is a separate file of appraisals kept? If so, describe its organization?

o. Do the applicants fill in their own application, or does an institution employee take the information?

p. Are applicants asked to sign a blank application, so that information may be typed in later?

5. Underwriting Policies

Please obtain a description of all factors which go into the decision that: (1) The applicant is qualified; (2) The property is eligible; and (3) The specific terms and conditions of each loan.

These factors may include the following:

a. Obtain a complete description of the institution's guidelines or standards with respect to sufficiency of income. What loan-to-income or debt-to-income ratios or formula are used? Why were these ratios adopted? Under what circumstances would these ratios be varied and a loan made even though the income does not meet the ratio? Are there written guidelines in use? If so, obtain a copy.

b. Obtain a complete description of the subject's guidelines or standards with respect to judging viability, stability or reliability of income and income sources. How is this measured? What factors are looked for? Does it vary according to the applicant's profession or social status?

Are there any types of sources of income which are discounted or not counted (e.g., part-time income, bonuses, commissions, income from jobs held less than two years?)

Are there any written standards in use? If so, obtain a copy.

c. Is any preference given to loans based on only one, as opposed to two incomes? Is the total qualified income calculated on the basis of one spouse's income or both spouses' incomes? If any one income is used, which one and why? When would the other spouse's income be included?

d. Obtain a description of the institution's policy with respect to:

(1) The income of working women (are there any circumstances under which it might be discounted or disregarded?).

(2) Loans to single women with or without children.

(3) Inclusion of alimony or child support as viable income.

(4) The viability of the income of women in child bearing years.

(5) The ability of a woman to obtain a loan in her own name, whether married, single, separated or divorced. (Is a co-signor required?)

(6) Is a husband's signature required for a female applicant who is separated or divorced? If so, why? Is a wife's signature required for a male applicant who is separated or divorced?

Determine if the policy with respect to any of the above six items was different from present policy at any time within the past three years. If so, obtain full details of prior policy, why a change was made, when a change was made and how this change was communicated to employees.

e. Is any type of grid or scoring device used to evaluate credit? If so, obtain a complete description and a copy of any written guidelines.

f. Obtain a description of any factors which would disqualify an applicant (i.e., bankruptcy, prior foreclosure).

g. Obtain a description of all factors which go into the determination that a property is eligible or ineligible for a loan. Does the appraiser include comments on the future predictable value of a property, or of an area?

h. What standards are used to set the loan-to-value ratio (LTV) if the LTV applied for by the customer is considered too high? Obtain full details.

i. If a loan is determined to contain more than normal risk, will it be rejected or are there circumstances in which it will be made, but on terms which reflect higher risk? If so, who makes this determination and how is the risk objectively measured? What factors go into this decision? How is the LTV set? How is the term of years arrived at (on the basis of what standards)? How is the interest rate arrived at? How are points arrived at?

j. In a loan which is accepted which is not considered to contain greater than normal risk, how are rate, term, LTV and points arrived at? Who fixes them? What standards are followed (i.e., under what circumstances will the interest rate be raised or lowered on a particular loan (as opposed to a change in the going rate?) What factors would require a term of less than 25 years?

k. Have employees ever been given any instruction in the areas of civil rights or non-discrimination in lending? If so, obtain all details including copies of any written material.

6. Lending Patterns

a. Determine whether the institution can provide, either in computer print-out form or otherwise, a list of loans, either by address or by total number, broken down by zip code, census tract or other geographic basis. If so, obtain such a breakdown for loans made in the past two years, or for total portfolio, or both, if available. (With respect to larger institutions this request may be modified to include only loans made in the past one year. It is important to obtain at least a six-month sample, even at the largest institutions.)

b. Determine the interviewee's estimate (if more precise data is unavailable) of the number of depositers who are black and the number of loans made to black persons.

c. Obtain the following information with respect to each home mortgage loan made in the three calendar months preceding the date of this request. In lieu of obtaining the information outlined below, please obtain a copy of the following documents from the files of such loans: application, appraisal, and worksheets, and any documents which list the amount of loan made, interest rate, term of years, points and date of approval.

(1) Name, address, phone number, race and sex of applicants (and address of property if different from address of applicants);

(2) Date of application;

(3) Amount applied for, term and interest applied for, whether FHA, VA or conventional applied for;

(4) Appraised value;

(5) Purchase price;

(6) Amount of loan made;

(7) Amount of down payment, term of years, interest, points and whether FHA, VA or conventional;

(8) Age of home; and

(9) Place, employment and salary (of each borrower where two or more persons apply for one loan).

d. Obtain the following information with respect to each loan rejected and each loan withdrawn by the applicant during the period described in section c. above. An application is rejected or turned down at any stage after written application has been made. (In lieu of obtaining the information, please obtain copies of the following documents from each such file: application, appraisal, any worksheets, any correspondence with applicant or inter-office memo, any document giving reason for rejection and date of rejection, or reason for withdrawal, any credit reports and employment verification forms.)

(1) Name, address, phone number, race and sex of applicants and address of property if different from address of applicants;

(2) Applicant's employer and phone number, and salary at time of application. (Obtain this for each borrower, if two or more persons apply for one loan);

(3) Date of application;

(4) Amount applied for, term and interest applied for, whether FHA, VA or conventional applied for;

(5) Appraisal value;

(6) Purchase price;

(7) Age of home;

(8) Date of rejection and reason for rejection (if applicable);

(9) Date of withdrawl and reason for withdrawl (if applicable);

(10) If counter-offer made by lender, terms of this offer; and

(11) If rejection was for credit reasons, obtain all details.

e. If available from branch managers or other employees, obtain the name, address, race and sex of each person who, in the three months prior to the date of this request, was turned down prior to submitting a written application on the basis of information provided. Also determine the reason turned down.

f. If copies of documents are not obtained pursuant to c. and d. above, please examine a representative number of files (at least 50 of each) for accepted home loans and rejected home loans. Examine the application, appraisal, worksheet and letters or memos in the file. Please determine:

(1) Whether any racial notation or code is used (in the appraisal form, look under "neighborhood data"). (Note: Certain applications used by federal agencies (FHA, VA, FNMA and FHLMC) require racial identification for record keeping purposes. If you observe any racial notation or code other than these, ascertain why it is kept and how it is used.)

(2) Whether any worksheet indicates that the income of a working wife was discounted or not included. (Compare figures with entry on application form and on employment verification forms.)

g. Determine the percentage (or approximate percentage or dollar volume) of home loans made in the past year which have been sold to other investors or in the secondary market. Identify the buyers and determine how loans are selected to be included in packages to be sold (e.g., are only FHA loans sold, or loans in certain areas or with certain characteristics). Determine if this is a greater or lesser amount than sold in previous years, and if either, the reason for the change.

h. Determine whether, at any time in the past two years, the institution has had more funds available than required by qualified applicants and identify such time periods. If so, determine how these funds were invested.

7. Delinquency and Foreclosure

This aspect of the investigation is intended to ascertain the rate of delinquency (slow pay) and default in loans held by the institution, the predominant reasons for delinquencies, if known by the institution and, where applicable, the procedures used in collection. Use of different collection procedures on account of race or sex is violative of the Fair Housing Act.

a. Determine the number of home loans foreclosed in each year for the past five years and what percentage this is of the total portfolio.

b. Determine the number of delinquent home loan accounts in each year in the past five years (i.e., accounts which become more than three months behind in the year). Determine what percentage this is for the total portfolio.

c. Determine whether the institution has ever analyzed its delinquencies or foreclosures to determine the factors which cause or contribute to delinquency or foreclosure. If so, obtain all details, including copies of any written analysis.

d. Determine the name, last known address and property address of every home loan account which has been foreclosed upon or resulted in legal proceedings in the past year.

e. Determine the institution's policy with respect to collection, including all steps taken in the chain of collection. This should include:

(1) What actions by the borrower are considered "default" or delinquency requiring attention (e.g., one month non-payment, two months non-payment);

(2) What steps are initially taken in these circumstances;

(3) What follow-up steps are taken, and when;

(4) Under what circumstances would foreclosure be instituted;

(5) Under what circumstances would the institution forebear from foreclosure; and

(6) What factors would cause the above schedule to be accelerated? Decelerated? Determine all factors which would cause a variation in the collection process (e.g., does it vary on the basis of the neighborhood where the home is located?).

f. Obtain a sample copy of all collection letters used, and an indication of the point at which they are sent.

g. Examine a representative sample (at least 100) of collection files and collection cards to determine if any of these bear a racial notation or code (e.g., in one instance of which this Division is aware, the words "black problem" appeared on "collection chase" cards).

h. Determine whether the race or sex of the borrower is ever a factor in determining what collection steps to undertake or whether to foreclose. If so, obtain all details.

C. INTERVIEWS WITH FORMER AND PRESENT EMPLOYEES

Unless otherwise directed in the forwarding letter which accompanies this request, please interview the following number of persons in the following categories (if there are so many).

	Present	Former
Members of the Board of Directors	3	3
Officers of the institution other than real estate loan officers	2	2
Real estate loan officers	3	3
Branch managers	3	3
Persons authorized to give information to applicants or persons who inquire (other than the persons included above)	3	3
Persons who conduct credit checks or verifications	3	3

The names and locations of such persons will be provided pursuant to paragraphs B.1, f, g, h, i. If the subject does not provide the names of employees, it will be necessary to obtain them from another source. Directors, officers and branch managers (or branch locations are often listed in brochures available in the bank lobby. Present employees may be interviewed unless the subject or its attorney expressly refuse permission for such interviews. If the employee requests it, you may conduct the interview in the presence of a bank officer or attorney. If this is the case, please contact an appropriate person in the appropriate bank regulatory agency of the state where the institution is located and determine if this agency has the necessary information on employees, or whether it can obtain this for the Department. In addition, please notify the Civil Rights Division if the subject refuses to disclose present and former employees, so that we may attempt to obtain the information from federal regulatory agencies.

1. Please obtain from all interviewees the information requested in the questions set forth in the following parts of this investigative request:

a. Part B.2. (all questions)

b. Part B.3. (all questions)

c. Part B.4. (all questions)

d. Part B.5. (all questions)

2. If this is a foreclosure investigation, please also interview five present and five former employees who were or are involved in collection functions and obtain the information requested in Part B.6. (all questions).

D. INTERVIEWS WITH APPRAISERS

Appraisers may be employed on the institution's staff or may be "independent fee appraisers" who work on a contractor basis. If the institution uses independent appraisers, please contact the appraisal company and interview all persons who presently or within the past five years did appraisals for the subject (up to a limit of four in each category). If the appraisers are staff people, interview all present appraisers and those who were employed within the past five years, also up to a maximum of four in each category. Obtain the following information:

1. Determine the interviewee's name, address, race, sex, and employer's name and date of employment.

2. Determine the interviewee's training as an appraiser, professional designation or affiliation (if any), and years as an appraiser.

3. Determine the approximate number of single family homes appraised by the interviewee per year (or per month or per week). If the interviewee works for an independent fee company, determine the number done by the company.

4. If the interviewee is an independent fee company, determine the name and address of every lender for which single family home appraisals have been done in the past year.

5. Please obtain a blank sample copy of every appraisal report form in use presently or since 1972 for the appraisal of single family homes and determine which forms are or were used by or for the subject of this investigation.

6. Determine from the interviewee whether the racial composition or ethnic or nationality composition of an area is ever a factor in:

a. Determining fair market value;

b. Neighborhood analysis;

c. Future value of a parcel of property; and

d. Soundness of a loan.

If so, in any respect, obtain all details of the way in which these factors are affected by race or nationality.

7. Determine the way in which the racial or ethnic composition of an area is reflected on the appraisal report or is reported in any way to the subject, and why it is reported.

8. Determine whether any person associated with the subject has ever inquired about the racial composition of any area. If so, obtain all details including, who, when, and why.

9. Determine whether the interviewee has ever had any discussions, correspondence, or instructions from his/her superiors or from the subject with respect to a particular appraisal or appraising generally in areas in which are integrating, integrated or predominantly non-white. Obtain all details including what was said, by whom, when and how any directives were implemented.

10. Determine whether the interviewee is aware of any map or list presently or within the past five years used by the subject or by appraisers on behalf of the subject which demarcates geographical areas on any of the following bases:

a. Racial, nationality or ethnic composition;

b. Income level of residents;

c. Rising or declining value levels;

d. Age range of properties;

e. Value range of properties;

f. Loan or no loan areas;

g. High or low risk;

h. Crime rate; and

i. Other similar category.

If so obtain all details, including how the map or list is used, why it is no longer used (if that is the case), who maintains it and how areas are determined to belong to one or the other category. Determine where the map or list is kept and a description of each area demarcated therein.

If possible, obtain a copy of the list or map and all documents related to its use.

11. Please obtain the information requested in Part B.2., questions a, b and c, (exclude sections which deal with sex discrimination), Part B.3, questions f, g, and h.

12. Determine the interviewee's operational definition of economic obsolescence and how this is measured. (Standard appraisal texts cite the presence of "inharmonious racial groups" as a case of economic obsolescence, which leads to depreciation on the basis of race.)

13. Determine whether in the interviewee's professional judgment, economic obsolescence can be caused by the infiltration of inharmonious groups. Determine what is meant by "inharmonious groups" and whether this includes racial groups. Determine how the economic obsolescence from such infiltration is measured or measurable. Determine whether the interviewee uses the concept of "infiltration" in his/her own appraisal practices, and if so, how.

14. Determine whether in the interviewee's judgment values are higher in homogeneous areas than non-homogeneous. Determine what is meant by "homogeneous" and whether this can include racial and ethnic homogeneity. Determine which specific areas the interviewee believes have declined in value due to the presence of non-homogeneous people.

15. Determine whether, in the interviewee's professional judgment, the presence of black persons or Spanish persons is an "adverse influence" in a neighborhood. If so, obtain all details.

16. Determine whether the interviewee ever includes comments about the future of a neighborhood, or values in a neighborhood on an appraisal report to the subject. If so, why is this done?

E. INTERVIEWS WITH REAL ESTATE BROKERS

A large number of applications for loans are forwarded to lenders by real estate brokers. Accordingly, local area brokers are often aware of the general loan policy of lenders and whether lenders are making loans in certain areas, or to women on a nondiscriminatory basis. With respect to investigation of "racial redlining" the brokers most likely to have relevant information are those who deal in racially integrated or predominantly black areas. In some respects, non-white brokers and agents may be most likely to have relevant information.

To conduct this part of the investigation, it will be necessary to identify brokers who deal with the subject. A list of such persons may be provided by the subject under Part B.3. m, and n of this request. If not, determine the name of at least ten brokerage companies in the general vicinity of the subject's main office and/or its branches. (Use telephone directories or broker association directories or directories issued by the state real estate commission). Attempt to identify as many non-white brokers as possible. (In some instances, non-white brokers may belong to the National Association of Real Estate Brokers, a predominantly black organization.)

Please interview at least six brokers and obtain the following information. (Interview the owner of the company or the registered broker. You may inform the interviewee of the purpose of the interview.)

1. Name, address, sex, race and company name.

2. Whether the interviewee or any agents in his or her company has ever forwarded loan applicants to the subject. If so, approximately how many per month. If not, determine why not and determine what institution(s) the interviewee does use and why.

3. Please obtain the name and address of other real estate companies which may send or have sent applicants to the subject. (Please attempt to identify non-white brokers);

4. Determine the interviewee's understanding of the subject's loan policies with respect to lending to minorities (including women) or in integrated areas. Please obtain the information requested in the questions contained in Part B.2. a, b, c, and e (prior policies are important); Part B.3. b, c, e, f, g, h, i, j, k, l and m; and Part B.5. c, and d;

5. Determine the basis of the interviewee's understandings about the subject's policies, including any aspects of the subject's reputation or any incident or experiences which the interviewee may have had with the subject, even if these took place a long time ago.

6. Determine whether any employee of the subject or other person associated with it has ever instructed the interviewee (or any other broker or agent) not to forward loans from a particular area or type of person. Obtain all details.

7. Obtain the name, race, sex and last known address and place of employment of every person known to the interviewee to have been declined a loan by the subject in the past two years, and the reason, if known. Also obtain this information for each applicant discouraged by subject from applying, or pursuing an application for a home loan.

F. INTERVIEW WITH BUILDERS

Lenders often have relationships with builders of new homes whereby the lender provides the construction financing and is given a commitment to provide the permanent "take out" loans for individual mortgages. Since the builder's employees have first contact with the applicants, lenders frequently provide instruction, both written and oral, to these persons to provide guidance in qualifying applicants and giving information to the public. Lenders also frequently canvass builders or contact them to establish "good will" so that they will forward applicants to the subject.

The names of such builders may have been provided by subject pursuant to Part B. Otherwise, a list of subdivisions sponsored by this subject may be available, as public record from the local affiliate of the National Association of Home Builders, or from the local board of the National Association of Realtors.

Please interview an appropriate person associated with three such builders and obtain the following information:

1. Full name, address, race, sex, employer and title.

2. Whether the subject has ever given any instruction or training, formal or informal, to employees of the builder or to sales agents retained by the builder with respect to eligibility of applicants for loans on single family homes (or condominiums) or qualifications for a loan. If so, obtain all details including what standards were established, by whom, to whom and when. Obtain copies of any written material.

3. Obtain the information requested in Part B.2. a, b, c, and d (section d is particularly important); Part B.3. i, k; and Part B.5. a, b, c, d, and e.

G. INTERVIEWS WITH CITIZEN GROUPS

From time to time, various civic groups conduct projects designed to combat "redlining" or other forms of discrimination. These groups are often aware of persons who applied for loans at various institutions. In some cases, a group may have done a study in this area or filed a complaint with a local, state or federal agency. If such groups exist in the metropolitan area where the subject is located, they should be contacted as a valuable source of information.

The existence and location of such groups is most readily obtainable through newspaper accounts of their activities. (Usually filed in recent newspaper indexes under "civil rights," "redlining," "banks," "integration.")

Please identify such groups in the area and interview the director or chairperson of each, for the following information (in addition to the interviewee's name, address, race, sex, group name and phone number):

1. Please obtain any information which the organization may have with respect to the subject's lending policy, including:

a. Where loans will not be made and why;

b. Where only FHA loans will be made;

c. Whether FHA loans will not be made in certain areas;

d. Where loans will be made on higher interest rates, shorter terms, etc.; and

e. Areas considered by the subject as high risk areas.

2. Determine the basis of the interviewee's information.

3. Obtain the information requested in A and B for any other lender which the interviewee believes may be engaged in racial redlining.

4. Obtain the name, last known address, race and sex of any person known to the organization to have been rejected for a loan by the subject, or other lender within the past two years. Determine whether the organization can obtain the names of such persons, if they do not have them, and forward them to the Bureau.

5. Obtain copies of any studies, analyses, position papers or other documents produced by the group pertaining to allegations of discrimination in lending.

6. Obtain the name and address of any other person or group which the interviewee believes may have additional information in this regard.

7. Determine any information this organization has with respect to the subject's (or any lender's) policies with regard to:

a. Loans to women;

b. Counting the income of working women; and

c. Including alimony and child support as income.

H. INTERVIEWS WITH APPLICANTS AND PERSONS WHO HAVE DEALT WITH THE SUBJECT (Possible Victims)

Many persons who seek financing call or inquire at several different lenders before obtaining a loan. Sometimes this is to "shop" for terms and sometimes it is because the applicant is discouraged verbally by lenders to whom inquiries are made. It is believed to be a common practice for the lender's employee to ask the location of the property and tell the applicant immediately whether loans are made there or whether certain terms are available there (e.g., conventional loans, 25 year terms). It is also believed to be a common practice for the lender's

employee to "pre-screen" applicants, often on the basis of a quick review of income or credit. This is usually done informally, often on a scratch pad. In each of the above instances, no record is kept by the lender of the transactions. This pre-screening, however, may result in many discriminatory rejections of loans. The only way to obtain information about such pre-screening is through contact with applicants and prospective applicants.

Lenders frequently deny that such pre-screening takes place. However, because of the red tape involved in applying and the appraisal or application fee, it has been our experience that the vast majority of persons who inquire about submitting an application do not do so.

The identities of persons to be interviewed pursuant to this section should be provided by other interviewees contacted during this investigation. Please interview such persons for the following information. (You may advise each interviewee of the purpose of this interview and that all personal or financial information will be communicated only to attorneys in the Civil Rights Division of the Department of Justice and will not be disclosed except as is necessary in connection with court proceedings in this matter.)

1. Obtain full background information, including name, address, race (as ascertained by visual observation), sex, spouse's name and address, and places of employment and phone numbers.

2. Obtain the following information concerning the interviewee's dealings with the subject prior to filing an application:

a. Determine why the interviewee contacted the subject.

b. Ascertain the approximate date of the initial contact and the method of contact (telephone, mail, in person).

c. Ascertain the identity of the person contacted. If the interviewee does not know the person's name, please ascertain his or her title and obtain a description if possible.

d. Determine what, if any, information was initially requested by the subject (location of property, age, employment characteristics, etc., of applicant).

e. Ascertain what information was provided by the interviewee, either voluntarily or as a result of a specific request.

f. Determine all details of the subject's response. Were additional questions asked? Were any comments made about any area or neighborhood or community? If so, obtain all details. Were there any indications that not all of the wife's income would be considered, or that the wife's income would be considered only in certain circumstances? If so, what were the indications?

g. Determine the nature of the interviewee's loan request, including:

(1) The location of the property;

(2) The purchase price;

(3) The down-payment available;

(4) The loan amount requested;

(5) The interest rate requested;

(6) The term of years requested (length of loan); and

(7) Was a conventional loan or FHA or VA or privately insured loan requested.

h. Determine all details of the subject's response including whether the interviewee believes that he or she was discouraged from seeking a loan at the institution or discouraged from obtaining a loan on the terms required, or discouraged from obtaining a loan in the area where the property was located. Obtain all details. Please ascertain whether there were any witnesses to any of the dealings with the subject and obtain the name, address and phone number of such persons, if possible.

3. If the loan request was rejected because of insufficient income or credit reasons, determine the following information from the applicants (both spouses):

a. Full income at the time of application (both spouses);

b. Sources of income (including child support and alimony, part-time jobs, etc.);

c. Total amounts of other debts (including child support alimony);

d. Total monthly debt payments;

e. Any bankruptcies, delinquencies or other credit history which might have been cause for decline;

f. Marital status of applicants, age of applicants, number of children and ages; please explain to the interviewee that it is necessary to obtain this information in order to determine whether a loan denial was discriminatory;

g. Obtain written permission to obtain a credit report; and

h. Obtain written permission to secure a copy of the interviewee's file from the lender, contact the lender and obtain a copy of the file (if not already done pursuant to other parts of this request).

4. Please ascertain whether the interviewee ultimately submitted a written loan application to the subject. If not, ascertain the reason no application was submitted, whether one was subsequently submitted to another institution and its disposition, and full details of any subsequent dealings with the subject.

If the interviewee did submit a written loan application to the subject, please obtain the following information:

a. Please obtain full details of the type, amount and terms of loan requested, if different from the information obtained in item 2g above.

b. Please ascertain when the application was filed and with whom the interviewee dealt in making the application. Please determine whether the interviewee had a personal interview with a representative of the subject, and if so, ascertain the identity of that representative, or of all such representatives with whom the interviewee dealt.

c. Please ascertain whether the loan was approved, declined, offered on other terms or withdrawn. Obtain all details including why withdrawn, other terms offered or all reasons given, in writing or orally, for denying the loan.

d. If the interviewee tried to obtain additional information or had other contact with the subject after the above action, please obtain all details.

e. Please obtain copies of all correspondence with the subject in the interviewee's possession, and of all documents (e.g., application) relating to the loan application, which the interviewee can provide.

f. If the application was not accepted, please ascertain whether the interviewee sought financing for the purpose from any other institution, and, if so, what other institution(s) did he or she apply to and was the application successful.

g. Please determine whether the interviewee believes that the reason given by the subject for rejecting the application was the actual reason, and if not, what he or she believes the actual reason was, and why.

5. If this investigation includes aspects related to alleged discrimination on the basis of sex, please determine the following:

a. If the application was a joint one, were both prospective borrowers (husband and wife) present and/or did both participate in providing information on the subject?

b. Who filled out the application form?

c. Was it assumed by the subject that the husband was to the "borrower" and the wife the "co-borrower"?

d. Was there any difference between the subject's questions concerning the employment of the husband and those concerning the employment of the wife? What were the subject's questions concerning this?

e. Did either husband or wife have any plans to change employment in the future? Was the husband asked about his plans for future employment? Was the wife asked about her plans for future employment? Was more information requested concerning

the wife's plan than the husband's? Was it suggested that the wife would be likely to stop working in the future?

f. Did the interviewee have children at the time of the application? If so, how many and what were their ages? Did the subject ask any questions about their plans to have children in the future? Did the subject ask whether they were practicing birth control or what kind of birth control practiced? (If the interviewee objects to these questions as too personal, please point out that we are requesting only information concerning the subject's questions, to determine whether discrimination has occurred.) If so, exactly what questions were asked? What, if any, reason did the subject give for requesting this information? Did the subject require assurances that the interviewees were not planning to have children as a prerequisite to counting the wife's income? If so, what assurances were required?

g. Did anyone ever indicate to the interviewee that there was a possibility that not all of the wife's income would be counted in determining their eligibility for the loan? If so, what was said and who said it? Was there any indication that the husband's income would be considered first, and the wife's would be considered only if his was insufficient to qualify alone? If so, obtain details.

h. To the interviewee's knowledge, did the subject contact both the husband's and the wife's employers to verify their employment? When were these contacts made?

i. When was the interviewee notified of the subject's action on their application? How was the notification made?

6. Please determine the name, address and phone number of any other persons whom the interviewee believes may have contacted the subject for a loan and been rejected, either formally and informally. Interview such persons for the information requested in this part H.

I. INTERVIEWING COMPLAINANTS

Complainants may be unsuccessful applicants, citizen groups, brokers, employees and former employees, neighborhood residents, or home sellers. If the complainant falls into any category for which a specific investigative outline has been provided, please conduct the investigation set forth therein. Otherwise, please interview the complainant and obtain

all details of any information which he or she may have with respect to the subject's loan policy or loan decision with respect to a particular applicant. Determine all bases of the interviewee's information including dates and identities, all persons who may be witnesses or have additional information, all potential victims, etc., and interview such persons.

If the complainant is a possible victim of discrimination or has information about a specific alleged incident, please contact the subject and obtain all details of the subject's version of the facts and obtain copies of all documents, letters, applications, and worksheets, etc., in the subject's file relating to the incident in question. Do not conduct the other aspects of the investigation with the subject unless so directed in the transmittal letter accompanying this request, or in a later transmittal letter.

J. INTERVIEWS WITH MINORITY-OWNED LENDERS

Attached to this part of the investigative request is the membership roster of the American Savings and Loan League, Inc. This is an organization of minority-managed savings and loan companies. Frequently, minority home-buyers obtain loans from such organizations after having been rejected or discouraged by other lenders. Please personally interview the president or chief operating officer of each institution listed on the membership roster, which is in the same city or vicinity as the subject and obtain the following information (please advise the interviewee of the purpose of the investigation and that his/her organization is not the subject of the investigation).

1. Please obtain the name, address, race and sex of the interviewee and a short description of his/her title and experience in real estate or lending.

2. Please determine whether the interviewee is aware of any instance (including possible experiences of persons who obtained loans through the interviewee) in which the subject refused to lend or discouraged an applicant, or refused to make a conventional loan in a racially mixed area, or predominantly minority occupied area or to a minority applicant. If so, obtain all details including who, when, and where.

3. Determine whether the interviewee believes that the subject has a policy of not lending in integrated areas or predominantly black or Spanish areas, or to minority applicants and if so, obtain all details of the basis for this belief.

4. Determine whether the interviewee has such a belief with respect to any lender in the area. Obtain all details.

5. Obtain the name of any real estate broker, appraiser or other lender or lender employee whom the interviewee believes may have information about the subject's racial policies or may know the identity of possible victims of discrimination.

6. Determine whether the interviewee's lender has made conventional loans in integrated areas or in areas which other lenders consider too risky. If so, determine whether the interviewee has experienced any great losses from loans in such areas. (Obtain the default and foreclosure rate for the institution.)

7. If possible, obtain from the interviewee a list of the neighborhoods and their boundaries which he or she believes that other conventional lenders consider "too risky." For each area, please ask the interviewee to estimate the racial composition and the general value range of the housing, or income range of the residents.

MEMBERSHIP ROSTER

Citizens Federal Savings & Loan
Birmingham, Alabama
Gulf Federal Savings & Loan
Mobile, Alabama
Tuskagee Federal Savings & Loan
Tuskagee, Alabama
Pan American Federal Savings & Loan
Tucson, Arizona
Broadway Federal Savings & Loan
Los Angeles, California
Camino Real Federal Savings & Loan
San Fernando, California
Chinatown Federal Savings & Loan
El Centro, California
Chula Vista Federal Savings & Loan
Chula Vista, California
City Center Federal Savings & Loan
Oakland, California
East West Federal Savings & Loan
Los Angeles, California
Enterprise Savings & Loan
Compton, California
Equity Savings & Loan
Denver, Colorado
Connecticut Savings & Loan
Hartford, Connecticut
Community Federal Savings & Loan
Washington, D.C.
Independence Federal Savings & Loan
Washington, D.C.
Community Federal Savings & Loan
Tampa, Florida
Washington Shores Federal Savings & Loan
Orlando, Florida
Mutual Federal Savings & Loan
Atlanta, Georgia
Illinois Federal Savings & Loan
Chicago, Illinois
Morgan Park Savings & Loan
Chicago, Illinois
Service Federal Savings & Loan
Chicago, Illinois
Coronado Federal Savings & Loan
Kansas City, Kansas

Family Savings & Loan
Los Angeles, California
Founders Savings & Loan
Los Angeles, California
Hacienda Federal Savings & Loan
Oznaid, California
Merit Savings & Loan
Los Angeles, California
Oakland Federal Savings & Loan
Oakland, California
Pacifica Federal Savings & Loan
Oakland, California
Pan American Federal Savings & Loan
San Francisco, California
Valley First Federal Savings & Loan
El Centro, California
State Mutual Federal Savings & Loan
Jackson, Mississippi
Coronado Savings & Loan
Albuquerque, New Mexico
De Vargas Savings & Loan
Santa Fe, New Mexico
Dona Ana Savings & Loan
Las Cruces, New Mexico
Allied Federal Savings & Loan
Jamaica, New York
Carver Federal Savings & Loan
New York, New York
Ponce de Leon Federal Savings & Loan
New York, New York
American Federal Savings & Loan
Greensboro, North Carolina
Mutual Savings & Loan
Durham, North Carolina
Major Industrial Federal Savings & Loan
Cincinnati, Ohio
Quincy Savings & Loan
Cleveland, Ohio
North Tulsa Savings & Loan
Tulsa, Oklahoma
Berean Savings & Loan
Philadelphia, Pennsylvania
Cosmopolitan Savings & Loan
Philadelphia, Pennsylvania
Louisville Mutual Savings & Loan
Louisville, Kentucky
First Federal Savings & Loan of Scotlandville
Baton Rouge, Louisiana
United Federal Savings & Loan
New Orleans, Louisiana
Advance Federal Savings & Loan
Baltimore, Maryland
Ideal Building & Loan
Baltimore, Maryland
Home Federal Savings & Loan
Detroit, Michigan
New Age Federal Savings & Loan
St. Louis, Missouri
Magnolia Federal Savings & Loan
Knoxville, Tennessee
Security Federal Savings & Loan
Chattanooga, Tennessee
El Centro Federal Savings & Loan
Dallas, Texas
Magic Valley Savings & Loan
Weslaco, Texas
Mission Federal Savings & Loan
San Antonio, Texas
Mission Federal Savings & Loan
El Paso, Texas
Padre Federal Savings & Loan
Corpus Christi, Texas
Pan American Savings & Loan
El Paso, Texas
Standard Savings & Loan
Houston, Texas
Tesoro Savings & Loan
Laredo, Texas
Barkley Citizens Mutual Savings & Loan
Norfolk, Virginia
Community Savings & Loan
Newport News, Virginia
Imperial Savings & Loan
Martinville, Virginia
Magic City Bldg. & Loan
Roanoke, Virginia
People's Bldg. & Loan
Hampton, Virginia

Dwelling House Savings & Loan
Pittsburgh, Pennsylvania
Community Federal Savings & Loan
Nashville, Tennessee
Union Mutual Savings & Loan
Richmond, Virginia
Columbia Savings Association
Milwaukee, Wisconsin

8-2.340 Relating to Discrimination Prohibited by the Equal Credit Opportunity Act

The form below is used by the Housing and Civil Enforcement Section for requesting investigations in cases involving discrimination in the extension of credit. The form should be attached to a forwarding memorandum to the Director of the Federal Bureau of Investigation indicating the alleged violation(s) to be investigated. The form should be modified to fit the requirements of a particular case.

The Equal Credit Opportunity Act presently prohibits discrimination in credit (Section 702(2) of the Act defines "credit" to be the "right granted by a creditor...to defer payment of a debt or to incur debt and defer its payment or to purchase property or services and defer payment therefor.") transactions on the basis of sex, marital status, race, color, religion, national origin, age, participation in a public assistance program, or because an applicant for credit has exercised rights under the Consumer Credit Protection Act.

Please conduct the following preliminary investigation by interviewing the alleged victim of credit discrimination, after explaining his or her rights under the Privacy Act, (You may advise the interviewee that all personal or financial information obtained will be communicated only to attorneys in the Civil Rights Division of the Department of Justice and will not be disclosed, except as necessary in connection with court proceedings in this matter.) to obtain the following information:

A. Full background of the alleged victim, including his/her address; telephone number (home and work); race; national origin; age; marital status (e.g., single, married, separated, divorced, widowed); occupation, place of employment; length of time employed there; occupation, income and place of employment of spouse; educational background; military status (including dates of past service); and record of arrests or convictions; types and amounts of income received on a regular basis (e.g., hourly wages, salary, alimony; child support; interest on bank accounts); major financial assets (e.g., house; investments); companies with whom he or she has credit (e.g., rental credit cards); current debts and monthly payments (including mortgage, credit cards, child support, alimony, etc.).

B. Please ascertain why the alleged victim believes he/she is a victim of credit discrimination, and obtain full details, including:

1. Name of the subject and office address;

2. Type of credit applied for (e.g., personal loan; installment account from a retailer; revolving bank account; car loan);

3. Amount of credit applied for;

4. Appropriate dates and locations of all dealings that he/she had with the subject or any of its agents including all oral or written communications with these persons (indicating whether the oral communication was in person or by telephone);

5. The nature of the alleged discriminatory act;

6. The names and the addresses of the persons who were involved, and the alleged victim's description of what was said or done.

Ascertain where the alleged victim acquired his or her credit application (e.g., at the subject's credit office) and ascertain, with as much detail as possible, the information requested on the application, and the information the alleged victim provided on the application, noting any information that was requested but not provided by the applicant (e.g., name of spouse). Determine what, if any reason(s) the subject or its agents gave for refusing to extend credit to the alleged victim, if this were the case. The alleged victim may not have been refused credit, but may have been otherwise treated less favorably than other applicants (e.g., spouse's signature required of women but not men). If the alleged victim's existing credit was canceled, or the terms changed, please also ascertain if and how the reason(s) were communicated to the complainant. Also ascertain how the refusal was communicated to the alleged victim (e.g., orally or in writing).

C. Obtain copies of any pertinent written materials or documents that the alleged victim may have in his/her possession, such as copies of a credit application form or correspondence between the subject and the alleged victim.

D. Obtain the details of any complaint which the alleged victim made with any local, state or federal agency concerning the same incident of credit discrimination, including the date of such complaint, and the

response received to date. If possible, obtain copies of any relevant correspondence.

E. Ascertain whether there has been any other occasion when the alleged victim or his/her spouse has been rejected for credit. If there has been, please ascertain the name and address of the creditor, the date of the application for credit, the date of the rejection, and the reason(s) given for rejection.

F. Obtain written permission to secure the alleged victim's credit report and the creditor's file on the alleged victim, and include a copy of the documents providing this permission. Obtain a copy of the victim's credit report, which should be available from the local credit reporting agency, and include it in your report. (A copy of the report should be obtained only if the victim's credit rejection or unfavorable treatment by the subject appears to have been related to the victim's credit status, e.g., his or her poor or insufficient credit background.) Do not attempt to obtain a copy of the alleged victim's credit file from the subject without further instructions.

G. If a secured loan is involved (such as for a car purchase), ascertain the purchase price, the amount of any down payment, the time in which the loan is to be repaid, the interest rate, the amount of the monthly payment, and the kind of security that was required. Ascertain whose, if any other, signature was required on the note and security agreement.

H. Ascertain if credit insurance was available (or required) through the subject at the time the alleged victim applied for credit. If so, obtain the details of the terms of the policy, and ascertain what information the alleged victim was (or would have been) required to provide if he or she applied for such insurance. If credit insurance was required, please ascertain what, if any, reason was given to the alleged victim for that requirement. Ascertain whether the subject gave the alleged victim any reason to believe that the alleged victim might not be eligible to obtain credit insurance. Ascertain the name of the company that was to provide the credit insurance, if known.

I. Determine the name, address and telephone number of any other persons who the alleged victim believes may have applied or attempted to apply for credit through the subject and have been rejected (or discouraged from applying), either formally or informally.

J. NOTE: This preliminary investigation does not include an interview of the subject or its agents. Following receipt of the results

of preliminary investigations, initial coverage questions concerning the alleged credit discrimination will be resolved by the Civil Rights Division, whereupon additional investigation may be necessary. This policy is established because of the need to gain experience in dealing with these cases, because, as of March 23, 1977, coverage under the Act became significantly broader, and because information may be available through other federal agencies concerning the subject that could enable us to narrow the scope of any investigation.

8-2.350 Relating to Steering and Blockbusting

The form below is used by the Housing and Civil Enforcement Section for requesting investigations in cases involving alleged racial steering or blockbusting. The form should be attached to a forwarding memorandum to the Director of the Federal Bureau of Investigation indicating the alleged violation(s) to be investigated. Especially in light of the potentially large expenditure of resources called for by the form, it should be utilized with care, and it should normally be modified to fit the requirement of a particular case. The General Litigation Section is available for consultation and assistance in formulating the appropriate modifications.

A. Introduction

The information requested in this Attachment will assist the Civil Rights Division to determine if the subject is engaged in a pattern or practice of resistance to certain rights granted by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3601, et seq., or if the subject has denied such rights to a group of persons and such denial raises an issue of general public importance. The Attorney General may institute suit for injunctive relief when either condition is satisfied.

Specifically, this request for investigation seeks to determine if the subject has "steered" prospective purchasers of dwellings on account of race, etc., a violation of §804(a), or if the subject has made representations to homeowners regarding the entry or prospective entry of persons of a particular race or color into a neighborhood in order to induce the homeowner to sell his or her home, a violation of §804(e); this is commonly known as "blockbusting" or "panic-peddling." Part B of the Attachment describes the provisions of the 1968 Act as they relate to "steering" and to "blockbusting" or "panic-peddling." Part B also contains, in general terms, the type of information which we seek, in order to determine if the subject has violated the Act. Parts C, D, and E

set forth the type of investigation requested, as appropriate, for the different types of violations.

The specific sections of these Parts which are to be utilized in each investigation are to be designated in the memorandum to which this Attachment is appended.

B. Statutory Language Steering and Refusal to Deal

Section 804(a) of the 1968 Act makes it unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

Two of the most common ways by which this section may be violated are by "steering" or by refusing to sell or rent. Steering is action by a real estate agent, etc., which makes dwellings unavailable because of the race, color, etc., of present residents in the neighborhood; it is the more common type of violation. In practice, blacks will be shown houses in black or integrated areas; whites will be shown houses in virtually all-white areas. The 1968 Act has been interpreted by the courts as prohibiting any action or practice on the part of a subject which has the purpose or effect of making selections of dwellings to be sold or rented on account of race or color. For example, the failure to tell black customers of available houses within their price range, etc., in white residential areas even though the black propsective purchaser did not ask to see such houses may constitute a violation. Brokers often assume that black persons would be more comfortable in black areas and acting on this assumption, they do not advise black persons of all available homes. Such action is prohibited. In addition, the making of any statement to discourage black persons from buying or renting dwellings in white areas is prohibited. Such statements have included the following types of phrases: "You won't be welcome there," "Your children won't like the schools there," and "The neighborhood isn't 'ready' yet." Because of the subtle ways which may constitute evidence of "steering," it is important that all details of a conversation, including any indications of significant inflections in voice, facial expressions etc., by real estate agents be ascertained during the course of the investigation.

Refusal to sell or rent is the failure of a subject to deal with black or other minority persons. While this practice is not as common as steering, it may constitute a part of the steering activity. The agent

may not wish to deal with minority persons unless they wish to live in certain residential areas.

1. Blockbusting

Section 804(e) of the Act prohibits so-called "blockbusting" or "panic-peddling" activity. This section makes it unlawful:

> For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

The persons protected by this section of the Act are the present homeowners in a neighborhood. The Act provides them with the right to be free from real estate brokers and their agents trying to obtain listings of houses to sell by telling the homeowners that black persons, or members of other minorities, are moving into the area in order to obtain a listing to sell the house. The making of "blockbusting" statements is often accompanied by "steering." The broker will steer his/her prospective black purchasers into the area where the blockbusting occurs as he/she sells houses in other areas of the city to the white people he/she induces to leave. In conjunction with this practice, the broker refuses or fails to tell the black people of houses in the areas to which the white people are moving--thus accelerating the racial transition of the area from which the white persons are moving, often at a financial reward to the broker.

Statements which violate the provisions of Section 804(e) need not specifically mention race (i.e., they need not specifically be as blatant as, "list your house with me, sell now, because black persons are moving in down the street"), but any statement which a reasonable person may construe to indicate that the inducement is based on the race or color of prospective new neighbors may be sufficient. For example, statements such as "list now, property values are going down" or "undesirables are moving in," when it was common knowledge that black persons were moving into an area, are prohibited.

2. General Investigative Goals Steering and Refusal to Deal

The purpose of an investigation concerning alleged violations of Section 804(a) is to determine if the subject, including his/her agents, failed to make dwellings available on account of race or

color, including the "steering" of prospective purchasers. Information from which such determinations may be made, includes:

a. Ascertaining the houses or other dwellings, with as much specificity as possible, which were made available or known to black prospects and to white prospects.

b. Ascertaining how each prospect initially became aware of the subject and the degree to which the prospect limited, or failed to limit, the area in which he/she wanted to purchase. For example, expressions to a real estate agent by a prospective purchaser that "any area is all right" or that he/she wanted to live "near my job" are significant.

c. Determining the houses which satisfied the needs of the prospect but which were not shown or otherwise made known to him/her. This may be accomplished by checking company records, by interviewing white and black persons who bought similar housing, by interviewing present or former sales agents, or by combinations of these methods.

d. Determining the policy and practice with regard to the handling and processing of prospective purchasers in addition to the victim. This may be accomplished by inspection of records, interviews of former and present sales agents, and by interviews of other victims whose identity is ascertained through records or other interviews.

e. Ascertaining the number of houses listed and sold, according to the race of the seller, the buyer, and the race of the inhabitants of the areas in which sales are made. This statistical evidence (i.e., only sales to black persons in black or transitional areas, only sales to white persons in all-white areas, or no sales to blacks when the subject maintains an office in an area in which blacks do business or live) may constitute a prima facie violation.

f. Ascertaining how and where the subject advertises dwellings for sale or rent. For example, the use of advertising media which is directed to the black community to advertise dwellings in black or transitional areas and the use of media directed to the white community to advertise housing in all-white areas may have the effect of making houses unavailable on account of race or color.

3. Blockbusting

The purpose of an investigation concerning alleged violations of Section 804(e) is to enable us to determine if the subject, including his/her agents, made representations of the type described above. Evidence from which such a determination may be made includes:

a. The exact language used by the real estate agent in attempting to obtain a listing from a homeowner. Because the representation may be racially oriented even if it does not explicitly mention race, background information concerning a neighborhood is often necessary to determine the context of solicitation statements.

b. The amount of solicitation activity, including mailed solicitation materials, in an area, even though it may be by companies other than the subject. This information is significant to show the context of statements (not as many or as overtly racial statements may be needed to constitute a "pattern or practice" in areas being subjected to very heavy solicitation), to determine if the subject is concentrating his or her solicitation activity in transitional areas to take advantage of the fears of homeowners, and to determine if the subject is engaged with other brokers in a "group pattern or practice" of resistance to rights secured by the Act. (In order to prevail at trial, the Department must show either a denial of rights to a group of persons or that a pattern and practice of resistance to rights granted by the Act exists. The "pattern and practice" requirement may be met by considering the activity of only one defendant or may be satisfied by considering the prohibited activity of several brokers, defendants and nondefendants, each of which may not have engaged in a separate pattern and practice, but whose combined activity may amount to a pattern or practice of resistance.)

c. The amount of solicitation activity in areas not undergoing a racial change. Thus, a greater increase in solicitation activity in an area undergoing racial change may constitute a violation of the Act if the residents of the area, using the "reasonable person" test, construe the solicitation to be a representation on account of race or color. Different types of solicitation may occur if a company sends letters to seek listings to homeowners in a racially changing area but does not send such letters, or sends different letters, to other areas, when the primary distinguishing factor between the two

neighborhoods is the race of the persons who recently moved into one of them.

Part C.

C. The investigation requested in Part B should be conducted in all instances, unless modified in the covering memorandum.

1. Interview the complainant, if other than the victim, for full details of his/her complaint, including the names of the subject, victim and any other persons with knowledge of alleged discriminatory acts.

2. Obtain details of all complaints with all local, state or federal agencies concerning the same subject. From each specific agency involved, please secure copies of all complaints about the subject, as well as the names of all obvious victims and complainants and the results of that agency's investigation and action taken on each complaint.

3. Please interview all witness to the alleged discriminatory incidents which involve the victims for full details of the incidents.

4. Interview appropriate representative(s) of the subject real estate company for the information set forth in the Appendix.

The information requested of the subject is set forth in the Appendix in the event the subject refuses to provide the information without obtaining the questions in writing. If the subject insists on the questions in writing, remove the Appendix and provide it to subject.

Note: In addition to providing the Appendix, also examine a representative number of records of the subject, see Part B.4.k. to determine if codes which indicate the race of customers or residents of residential areas are maintained on the subject's records. If so, inspect as many records as possible and obtain copies of a representative number.

5. Please interview two present salespersons (i.e., real estate agents) and five former salespersons of the subject including some salespersons who are black, if any, for the following information:

a. Please determine the length of time he or she has been engaged in the real estate business; the firms he/she has worked for; the dates of employment and reasons leaving each former job; the length of time he/she worked for the subject and the office or branch in which he or she worked.

b. Please determine the educational and other qualifications for each type of job with the subject, whether the firm has a training program for sales personnel, and if so, obtain details and a copy of any manual for use by such personnel.

c. Ascertain the details of the company's system of maintaining the names of prospective purchasers, that is, determine if a prospect card file or other system is used to record telephone contacts and maintain general information on each prospect. In this connection ascertain whether each salesperson maintains a list of prospective purchasers.

d. Ascertain the information obtained by the subject from prospective purchasers before selling a dwelling to him/her, such as financial qualifications, number of children, type of home and location desired, etc. Obtain a copy of forms used.

e. Determine if salespeople are instructed to show black prospective purchasers homes in white areas only if the prospect requests such areas. Determine the amount of discretion that sales agents have in selecting a home or areas they believe the prospect will be attracted to and the considerations utilized in reaching their decision (nearness to schools and work, racial composition of area, public transportation).

f. Determine whether the company assigns sales personnel to prospective purchasers on the basis of the race or color of the purchaser, seller, or residents of the area in which the listing is located.

g. Ascertain whether the company has sales meetings, and if so, the frequency and whether aspects of the Fair Housing Act of 1968 are discussed.

h. Please obtain a description of all restrictions placed on obtaining listings, including when or where sales agents may solicit listings.

i. If the interviewee admits prior discrimination but denies a present discriminatory policy, please determine the date and circumstances of the change in policy and the reason therefor. Determine if any affirmative steps have been taken to correct the effects of possible past discrimination, and obtain details, including copies of all pertinent documents.

j. Please determine whether the subject has ever, for any reason, disciplined, lectured, refused to pay a commission to, or fired an employee who arranged a sale to a black person. This would include any instance where the employee had arranged for a sale to a black persons who was "not financially sound," or who seemed to be a "potential troublemaker," or who was "unacceptable" to the builder, seller, or broker, or for any other reason. Please obtain full details, including name and address of purchaser, name and address of salesperson, date of incident, reasons for the company's action, and documents or statements made which are relevant to such an incident.

k. Obtain the names of all black prospects within the last three years who were shown a home in a white area and who did not buy the home. Please ascertain the interviewee's opinion of the reasons for the refusal by either the seller or the buyer. If the interviewee claims that such information is not readily available, please offer to assist him or her in inspecting his/her records and where appropriate, ask for the name of the agent(s) who handled the prospect; please obtain full details from the records or from the agent.

l. Please determine if the company ever had a policy of not selling to the first black purchaser in a white neighborhood and if such policy existed, please determine if it is still in existence and changes to it, if any. If the company had such a policy, determine if the selling to black persons was handled differently after other black persons lived in the neighborhood. If so, obtain details; if any of these policies changed, obtain details.

m. Ascertain whether the company accepts listings from white persons who indicated that they will not rent or sell to black persons or other minority persons. If so, determine whether these listings were made available to black persons, and if so, on what basis. If any such restrictions are in effect, or have been in effect in certain neighborhoods, please obtain details.

n. Ascertain the company's and interviewee's policy regarding requests by white persons to be shown homes in black or racially integrated areas. Determine how such requests are handled.

o. Please determine if any type of code was utilized on company records of any type to designate the race of the persons listing the house for sale, the race of other residents in a neighborhood (i.e., transitional areas) or the race of the purchaser. If so, obtain full details of any such notations or codes ("C," "N," "B," "X," etc.) and obtain copies of records containing such information.

p. Ascertain the details of the company's system of maintaining a list of dwellings which it has available for sale and for rent. Obtain a description of the forms utilized in maintaining the listing records, to include forms which may indicate which houses were shown to which prospective purchaser.

q. Ascertain the details of the company's (1) method of obtaining listings and (2) of its system of maintaining records which indicate the areas in which solicitation activities are conducted, the amount of solicitation, and the type of solicitation, (i.e., by telephone, mail, or door-to-door contact). In this regard, determine if different methods of obtaining listings are used in areas which are inhabited by black persons (including racially transitional areas) than are used in areas inhabited solely by white persons. Ascertain the contents of the "sales pitch" the interviewee has utilized in order to convince a homeowner to list a house for sale. For example, if in fact, black persons were moving, or had moved, into a neighborhood, how would the interviewee make this fact known to the homeowner. Determine if the "sales pitch" would be different if it was only rumored that black persons had moved, or were about to move, into an all-white area rather than actually having moved in.

r. Obtain a complete description of the subject's sales policies to minority group members, including whether the interviewee was instructed by representatives of the firm to show homes to blacks only in black or changing areas, and to whites in white areas; the extent of discriminatory practices by individual sales agents; whether he/she ever received instructions to treat black buyers or sellers differently from

white ones and, if so, from whom he/she received these instructions; whether the firm used a dual set of listing books for white and black buyers, and if so, secure details.

s. Please ascertain the name, address and race of each person the interviewee alleges to have been refused, or in any way not allowed, to purchase or rent a home on account of race or color.

t. Please obtain any information which the interviewee may have which would indicate, in any way, that the subject company does, or does not, discriminate on account of race, color, etc., in its business.

Part D.

D. In addition to the information requested in Part B, please conduct this investigation when the request for investigation is predicated on "steering" or "refusal to deal," Section 804(a) violations.

1. Please interview the victims (persons allegedly not shown dwellings on account of race, color, etc.) to obtain the following information:

a. Obtain full background, including his/her address, telephone number at home and at work, age, race, religion or national origin (as relevant to the allegations), occupation, place of employment, length of time employed there, family income, educational background, marital status and size of family living at home, and such other background data as may appear to be pertinent.

b. Please determine how each interviewee became aware of the subject and ascertain the dates of contact with the subject, the name and race of the agents with whom they spoke and the reason for going to the subject's firm.

c. Obtain full details of all dealings the victim has had with the subject's agents, including what the interviewee told the agent he/she wanted, all oral or written communications with these persons, the date, location, and time such communications were made, the nature of the alleged discriminatory act, the names and addresses of the persons who were involved and the victim's description of what was said or done.

d. Ascertain the exact limitations and criteria the interviewee informed the subject of concerning the type and size of house, location, etc., desired. For example, determine what the interviewee told the subject concerning number of rooms, number of floors, number of bathrooms, type of construction, location as to churches, schools, relatives, jobs, babysitters, subdivision or neighborhood in metropolitan area, purchase price, down-payment, monthly payments, type of financing, and all other factors which the interviewee told the subject should be considered in order to meet the interviewee's housing needs.

e. Specifically, ascertain the details of all conversations between the interviewee and the representative of the subject concerning all statements or comments by the representative about the availability of homes, the desirability of neighborhoods, problems in neighborhoods, etc. Determine if the agent said that homes were available all over the area through the M.L.S. or otherwise and the interviewee's response to the agent about that comment. Determine the exact address, if possible, or location of each home the representative made known to the interviewee and for each such house, please ascertain its approximate price, whether it met the interviewee's housing needs and if not, why, and the racial composition of the area in which it was located. Also determine which houses were shown to, or visited by, the interviewee and the comments of the real estate agent about each such house. Determine the location and a description of all homes which were not made known to or shown to the interviewee, in the interviewee's opinion, and the interviewee's understanding why each such home was not made known or shown.

f. Determine if the interviewee was shown a book, folder, etc., of listings and if so, obtain a description of it and determine whether the interviewee or the agent went through it and selected the houses. If the interviewee did not personally look through it, determine why.

g. Determine the financing offered to, and selected by, the interviewee. In this regard, determine if VA, FHA, or insured mortgages were offered, and if so by whom, and why the interviewee selected the type of financing he or she finally used.

h. Ascertain the names and addresses of all witnesses to the incident involving the victim.

i. Obtain copies of pertinent written materials or documents that the victim may have in his or her possession, such as application forms for the subject housing, applications for financing, advertising materials, and correspondence between the subject and the victim.

j. Obtain any information which the interviewee may have which indicates the subject is, or is not, conducting his or her business in compliance with the Fair Housing Act.

2. Obtain responsive interviews with ten white purchasers and ten black or other minority purchasers or renters, as appropriate, from the subject to obtain the information requested in Paragraph D.1 above (interview of victim).

Part E.

E. In addition to the information requested in Part C, conduct this investigation when the request for investigation is predicated on "blockbusting" Section 804(e) violations.

1. Interview the victims (persons to whom the alleged prohibited representations were made) to obtain the following information:

a. Obtain full background, including his or her address, telephone number at home and at work, age, race, religion, or national origin (as relevant to the allegations), occupation, educational background, and such other background data as may appear to be pertinent.

b. Obtain details on the length of time the interviewee has lived at the address where the alleged incident occurred, the original cost and estimated current value of that home, and whether he or she intends to remain in the neighborhood now, or if he or she has moved from the area in which the alleged illegal representation was made, the reason for moving.

c. Determine whether any black persons (or other minority group persons as pertinent) lived in the neighborhood which is the subject area of the investigation at the time of the alleged representation, and if so, obtain the number of such persons, their names and addresses, and the length of time they have

resided there. This should include the date on which the first black family moved into the neighborhood.

d. Ascertain whether there has been any opposition expressed by residents of the neighborhood to the presence of black or other minority persons, and the nature of any such opposition, such as special meetings of the local civic or other local organization, and threats to the real estate agents or new residents of the neighborhood.

e. Determine whether homes being offered for sale in the neighborhood are, or were, shown to both black and to white prospective customers.

f. Please obtain full details of all conversations, communications, either in person or by telephone, or other dealings the victim has had with each company and each of its agents. Obtain the date and time of such dealings, the names and addresses of the persons who were involved and the victim's description of what was said or done. Because the exact language used by the sales agent is significant, please determine exactly what was said in order to obtain a listing. If the interviewee indicates that the "salespitch" did not explicitly mention race or color, please determine the details of all language used by the sales agent which implied that it would be to the advantage of the interviewee to list and sell because of the race or color of people moving into the area. If such language was used, determine why the interviewee understood it to refer to race or color. This aspect of the investigation should include:

(1) The names of all companies whose agents solicited them;

(2) Who initiated the first contact with each company or its agent and when each such contact occurred;

(3) Who (the agent or the homeowner) first mentioned the race of people living in the neighborhood or about to move in;

(4) Whether the solicitation influenced their decision to sell or rent the house;

(5) Whether a real estate company or its agent is handling or has offered to handle the sale or rental of their home, or have offered to purchase the home;

(6) Whether the interviewee expects to make or lose money on the sale of his/her home. Obtain details, including FHA or VA appraisals; and

(7) The race of prospective purchasers or renters brought to inspect the interviewee's home by each subject.

g. Obtain copies of all mailings, calling cards, advertisements and other written materials which the interviewee may have in his/her possession relating to the solicitation activities of real estate agents.

h. Obtain the names of other persons known to the interviewee who have had conversations with, or received communications from, the subject or his/her agents of the same nature as the interviewee has described.

i. Obtain details of any complaint made by the complainant or interviewee with the subject company, any other company, the real estate board, or any local, state or federal agency concerning housing discrimination by the subject firm or any other firm.

2. Please interview no more than ten of the persons identified in paragraph 1.h. above (other persons to whom alleged illegal representations were made by the subject) for the information requested of the victims in Part E.1, above.

3. Please determine whether any of the immediate neighbors of the victim or of the other interviewees have placed their houses on the market for sale or rent since or immediately before the time the alleged blockbusting began. If so, interview no more than ten such persons to ascertain the information requested of the victim in Part E.1. above, as the information pertains to each real estate company with whom each dealt.

4. By observation and/or interview prepare a list which includes the name, addresses, and telephone numbers of all real estate firms who display signs in the immediate vicinity of the house involving the victim or in the subdivision involved with the alleged

blockbusting activity. Also obtain the addresses at which the signs are displayed.

5. Identify the first minority family to move into the neighborhood and interview the husband or wife to obtain the following information:

a. Obtain full background information, including his or her address, telephone number at home and at work, age, race, religion or national origin (as relevant to the allegations), educational background, and such other background data as may appear to be pertinent.

b. Please determine how the interviewee became aware of the company with whom he or she dealt and ascertain the dates of each contact with the company, the name and race of the agents with whom they spoke, and the reasons for going to the particular firm.

c. Obtain full details of all dealings the interviewee has had with the company or any of its agents, including what the interviewee told the agent he/she wanted, all oral or written communications with these persons, and the date, location, and times such communications were made.

d. Ascertain the exact limitations and criteria the interviewee informed the salesperson of, concerning the type of house, size of house, location, etc., desired. For example, determine what the interviewee told the salesperson concerning number of rooms, number of floors, number of bathrooms, type of construction, location as to churches, schools, relatives, jobs, baby-sitters, subdivision or neighborhood in the metropolitan area, purchase price, downpayment, monthly payments, type of financing, and all other factors which the interviewee suggested should be considered in order to meet the interviewee's housing needs.

e. Specifically ascertain the details of all conversations between the interviewee and the representative of the real estate company with whom the interviewee dealt concerning all statements or comments by the representative about the availability of homes, the desirability of neighborhoods, problems in neighborhoods, etc. Determine if the agent said that homes were available throughout the area through the M.L.S. or otherwise and the interviewee's response to the agent about

that comment. Determine the exact address, if possible, or location, of each home the representative made known to the interviewee and for each such house, please ascertain its approximate price, whether it met the interviewee's housing needs and if not, why, and the racial composition of the area in which it was located. Determine the location of each home the agent showed to the interviewee, including those which were viewed from a car, and the agent's comments about each such home. Determine the location and a description of all homes which were not made known to or shown to the interviewee, in the interviewee's opinion, and the interviewee's understanding why each such home was not made known or shown.

f. Ascertain if the interviewee had previously dealt with the real estate company from which he or she purchased his or her present home. For example, did the interviewee previously purchase homes from the company and, if so, obtain details. Also determine if the interviewee worked for the company; obtain details.

Part F. Appendix

Information to be Obtained from the Subject of the Investigation

1. Please ascertain full details on the company, including form of business (corporation, partnership, sole proprietor), date and place of formation, addresses of the primary place of business and all branch offices. Please obtain the name, race and address of all individuals who have an ownership interest in, or who function as officers or managers of the company.

2. Please obtain the name, address, race, position and length of service of each salesperson, i.e., real estate agent, who is presently employed by the company, part or full-time, and of each such person employed by the company within the last four years.

3. Obtain a complete description of the business operation of the firm, including the location of each office and date each opened, the geographic territory covered by the firm, a list of each employee (not salespeople), including name, address, race, position held, dates of employment, and whether he or she is a full or part-time employee.

4. Obtain a copy of all current promotional materials (brochures, pamphlets, and the like) used in the marketing of housing

and determine under what circumstances these materials are distributed to home or apartment seekers.

5. Determine whether the subject firm is a member of any local or national real estate organization or participates in a multiple listing service. Obtain full details.

6. Ascertain the information required by the subject from prospective purchasers before selling a dwelling to him/her, such as financial qualifications, number of children, type of home, location desired, etc. Obtain a copy of all forms used.

7. Ascertain details of the company's system of maintaining the names of prospective purchasers; that is, determine if a prospect card file or other system is used to record telephone contacts and maintain general information on each prospect. In this connection, ascertain whether each salesperson maintains a list of prospective purchasers.

8. Obtain the name and race of the last 40 persons who have purchased a dwelling through the subject, the date of purchase, address of the dwelling, purchase price paid, the means of financing and the name of the agent who handled the transaction. Determine the name and present address of the previous owner. For each such purchaser, please identify the area or neighborhood of the house purchased and by interview with company officials, or otherwise, please determine the racial composition of the area (i.e., (a) all-white (b) all-black or (c) racially mixed or transitional). This information may be compiled on Appendix I A. (Because of the importance of the lists requested in these subparagraphs, if the persons interviewed should decline to compile it because of the alleged inconvenience or burden of doing so, please volunteer to assist in compiling it. If possible, please attempt to obtain, at least, the names and addresses of the last twenty white persons and the last twenty black persons who have purchased and who have listed a home through the subject. In any case, please accept whatever the interviewee will make available.)

9. Ascertain the details of the company's system of maintaining a list of dwellings which it has available for sale and for rent. Obtain a description of the forms utilized in maintaining the listing records, to include forms which may indicate which houses were shown to which prospective purchaser. In this regard, determine if the company handles the sale of homes for builders and contractors; if

so, obtain the name and address of each such company for whom the subject sold dwellings within the last two years.

10. Obtain the name, present or last known address, telephone number and race of the most recent 40 persons who listed a home through the subject, the date of listing, the address of the dwelling listed, the asking price, and the name of the agent who obtained the listing. This information may be compiled on Appendix I B. (Because of the importance of the lists requested in these subparagraphs, if the persons interviewed should decline to compile it because of the alleged inconvenience or burden of doing so, please volunteer to assist in compiling it. If possible, please attempt to obtain, at least, the names and addresses of the last twenty white persons and the last twenty black persons who have purchased and who have listed a home through the subject. In any case, please accept whatever the interviewee will make available.)

11. Please determine if any type of code is or was utilized on company records of any type to designate the race, etc., of the persons listing the house for sale, the race or other minority category of other residents in a neighborhood (i.e., transitional areas) or the race, etc., of the purchaser. If so, obtain full details of any such notations or codes ("C," "N," "B," "X," etc.) and obtain copies of records containing such information.

APPENDIX I-A

Name & Race of Seller	Name & Race of Buyer	Address of Home Purchased and Racial Composition Price of Area	Purchased Date	Selling Agent & Broker	Type of Financing Lending Institution

APPENDIX I-B

Name & Race of Persons Listing	Address of Home Listed & Racial Composition of Area	Description Number of Bedrooms, etc.	Listing Date	Listing Agent	Asking or Listing Price

12. Ascertain the details of the company's (a) method of obtaining listings and (b) of its system of maintaining records which indicate the areas in which solicitation activities are conducted, the amount of solicitation, and the type of solicitation (i.e., by telephone, mail or door-to-door contact). In this regard, determine if different methods of obtaining listings are used in areas which are inhabited by black persons (including racially transitional areas) than are used in areas inhabited solely by white persons.

13. Please obtain the names of all black or minority prospects, as appropriate, who, within the last three years, were shown a home in a white area and who did not buy the home. Please ascertain the interviewee's opinion or the reasons for the failure to buy or to sell each such house. If the interviewee claims that such information is not readily available, please offer to assist him/her in inspecting his/her records and where appropriate, ask for the name of the agent(s) who handled the prospect; please obtain full details from the records or from the agent.

14. Determine if salespersons are instructed to show black, etc., prospective purchasers homes in white areas only if the prospect requests such areas. Determine the amount of discretion that sales agents have in selecting a home or area they believe the prospect will be attracted to and the considerations utilized in reaching their decision (nearness to schools and work, racial composition of area, public transportation, etc.).

15. Determine whether the company assigns sales personnel to prospective purchasers on the basis of the race or color of the purchaser, seller, or residents of the area in which the listing is located. If so, determine the frequency of such practices.

16. Determine the advertising practices of the firm including the frequency of advertisements and media employed, such as newspaper, radio, etc. By inspection of company records, please obtain a description of the advertisements which were placed in local newspapers for the last 10 days, and determine the names of all newspapers used to advertise houses for rent or sale or to advertise that listings are wanted. For each such newspaper, please indicate the address of each dwelling advertised and from company officials, or otherwise, please indicate whether each such advertised dwelling is located in either (a) all-white, (b) all-black, or (c) racially transitional neighborhoods.

17. Please determine if the company ever had a policy of not selling, showing, or renting a house to the first black purchaser or

tenant in an all-white neighborhood and if such policy existed, please determine if it is still in existence and changes to it, if any. If the company had such a policy, determine if the selling or showing of dwellings to black persons was handled differently after other black persons lived in a neighborhood. If so, obtain details. If any of these policies changed, obtain details.

18. Ascertain whether the company accepts listings from white persons who indicate that they will not rent or sell to black persons or other minority persons. If so determine whether these listings were made available to black persons, and if so, on what basis.

19. Please determine whether the subject has ever, for any reason, disciplined, lectured, refused to pay a commission to, or fired an employee who arranged a sale or rental to a black person. This would include any instances where the employee had arranged for a sale or rental to a black person who was "not financially sound," who seemed to be a "potential trouble maker," or who was "unacceptable" to the builder, seller, or broker, or for any other reason. Please obtain full details including name and address of the prospective purchaser, name and address of the salesperson, the date of incident, reasons for the company's action, and documents or statements made which are relevant to such an incident.

20. If the interviewee admits prior discrimination but denies a present discriminatory policy, please determine the date and circumstances of the change in policy and the reason therefor. Determine if any affirmative steps have been taken to correct the effects of possible past discrimination, and obtain the details, including copies of all pertinent documents.

21. Ascertain whether the company has sales meetings, and if so, the frequency and whether aspects of the Fair Housing Act of 1968 are discussed.

22. Ascertain whether the subject owns or manages any apartment complexes and, if so, obtain the name, location, size, identity of resident managers and the racial composition of each such complex.

23. Determine whether the subject company participates in the construction or sale of federally assisted housing.

8-2.360 Relating to Revenue Sharing Acts

Standard preliminary investigations for violations of the Revenue Sharing Acts (see USAM 8-2.214, supra) are described below.

Upon receipt of an initial complaint covered under the Revenue Sharing Acts by an FBI Field Office, interview the complainant to determine the specifics of his/her complaint including the sources of his/her information and copies of any available documents that relate to the substance of his/her complaint. Submit the complaint to the Civil Rights Division of the Department for review prior to conducting any further investigation.

Whenever the Civil Rights Division transmits a request for a preliminary investigation under the Revenue Sharing Acts, interview the complainant, if any, to determine the specifics of his/her complaint including the sources of his/her information and obtain copies of any available documents relating to the substance of his/her complaint.

A. If the request relates to Section 122 of the State and Local Fiscal Assistance Act, as amended, and/or Section 518(c) or the Omnibus Crime Control Act of 1973, as amended, in addition to interviewing the complainant:

1. Obtain the last annual statistical report of the recipient agency; its policy and procedures manual and/or current directives.

2. Determine the amount of federal monies received by the recipient agency under either the State and Local Fiscal Assistance Act of 1972, as amended, or the Crime Control Act of 1973, as amended, including source, dates of approval and expiration, and grant number(s).

3. If the state or local recipient agency has received monies under either of the acts identified in paragraph 2, obtain a roster of all commissioned personnel, showing date hired, race, and sex, rank or job classification and a separate roster showing the same information for non-commissioned personnel.

4. Next, obtain from the recipient agency copies of available documents that set forth recruitment, hiring, and/or promotion policies and procedures including copies of any tests used.

5. Determine the nature of data stored in computer readable form and the kinds of printouts the particular recipient law

enforcement agency used on a regular basis, including personnel information, data on crime by districts, data on citizen complaints, and internal disciplinary action, and data on response to calls for police service.

6. Obtain a copy of the Equal Employment Opportunity Program required by 28 C.F.R. §§42.302 and 42.304.

B. If the request relates to Section 612 of the Comprehensive Employment and Training Act of 1973, in addition to interviewing the complainant:

1. Obtain from the recipient vendor a copy of all records pertaining to the complainant including any applications for public service employment or training filed by complainant. If complainant applied for a specific job, obtain a copy of the job description and advertisement of same. Also obtain copies of all tests administered and all other written procedures used by recipient to rank applicants.

2. Determine from the subject recipient vendor whether it has received any similar complaints or whether similar complaints have been filed with any other federal or state or local agency against it, and if so, the details, if known, including the date on which such complaint was filed, and the disposition, if any, which that agency has made.

C. If the request relates to Section 109 of the Housing and Community Development Act of 1974, in addition to interviewing the complainant ascertain from the subject recipient state or local government agency whether it has received any other complaints of discrimination concerning its programs which are funded with Housing and Community Development Act funds. If such complaints have been received please obtain the name of the complainant, the nature of the complaint, and the disposition of the complaint, if available.

D. If the request relates to Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, in addition to interviewing the complainant:

1. Obtain from the recipient a copy of the affirmative action program it is required to prepare and maintain under the Federal Railroad Administration Regulations, 49 C.F.R. §265.9.

2. Obtain a copy of any civil rights complaint reports and/or records kept by recipient pursuant to the requirement of the Federal Railroad Administration set out in 49 C.F.R. §265.9.

It is understood that if the situation warrants additional investigation beyond that described above, the Civil Rights Division will provide guidance by outlining the details of such investigation.

Copies of requests for investigations made by the Civil Rights Division will automatically be furnished to the appropriate U.S. Attorneys. Furnish copies of all complaints received by your Field Offices and copies of all reports and letterhead memoranda setting forth investigation in these matters to the local U.S. Attorneys. Unless otherwise indicated, complainants' identities should be held confidential.

DETAILED TABLE OF CONTENTS FOR CHAPTER 3

8-3.000 ENFORCEMENT OF CIVIL RIGHTS CRIMINAL STATUTES

The U.S. Attorney is responsible for the enforcement of criminal civil rights statutes in accordance with the procedures set forth below.

The Criminal Section oversees the enforcement of the criminal civil rights statutes administered by the Civil Rights Division. The principal statutes are 18 U.S.C. §241 (conspiracy to injure citizens in the exercise of federal rights); 18 U.S.C. §242 (willful deprivations of federal rights of inhabitants under color of law); 18 U.S.C. §245 (interference with federally protected activities); 42 U.S.C. §3631 (interference with fair housing activities); 18 U.S.C. §1581 (peonage); and 18 U.S.C. §1584 (involuntary servitude). A complete list of all federal statutes, the enforcement of which is administered by the Criminal Section, is found in USAM 8-1.000.

Criminal matters involving the alleged deprivation of rights of American Indians, formerly handled by the Office of Indian Rights, are now the responsibility of the Criminal Section.

For assistance in drafting jury instructions and for outlines of elements of the various criminal civil rights statutes with citations, see USAM 8-4.000, 8-5.000.

8-3.100 GENERAL PROCEDURES

The following procedures are generally applicable to the investigation of complaints and the prosecution and handling of violations of criminal civil rights statutes.

8-3.110 Preliminary Investigations

Preliminary investigations of violations of criminal civil rights statutes may be conducted by the FBI on its own initiative. U.S. Attorneys are authorized to request the FBI to institute a preliminary investigation. (This Division has devised standard preliminary investigations for alleged violations of 18 U.S.C. §242, 18 U.S.C.§245, and 42 U.S.C. §3631. See USAM 8-3.200.) A copy of the request should be forwarded to the Assistant Attorney General, Civil Rights Division, upon delivery of the request to the FBI by the U.S. Attorney.

When the FBI is requested to conduct an investigation by the Civil Rights Division, a copy of the request shall be forwarded to the U.S. Attorney of the District.

In matters involving actual and threatened civil disorders, such as riots, marches, parades, and major confrontations between local law enforcement officers and groups of persons, preliminary investigations may be requested and initiated only by the Attorney General of the United States. When such matters come to the U.S. Attorney's attention, the circumstances should be reported by telephone to the Assistant Attorney General, Civil Rights Division. When FBI investigations are initiated by the Attorney General, copies of such requests will be forwarded to the U.S. Attorney.

Upon receipt of information sufficient to justify initiation of a preliminary investigation (see USAM 8-3.110, and 8-3.200), an investigation should be conducted by the FBI regardless of the fact that a local or state investigation of the same incident is also being conducted. If, during the course of the FBI's investigation, state or local criminal charges arising out of the incident are filed against the subject(s), the FBI should be directed to suspend its investigation and the Civil Rights Division should be notified by the FBI of the nature of the criminal charges and the likely timetable for prosecution of such charges. In all other situations, the preliminary investigation should continue to completion. Exceptions to this policy may be necessary on infrequent occasions. Clearance should be obtained from the Criminal Section of the Civil Rights Division on such occasions before discontinuing the investigation in the absence of a local or state prosecution.

8-3.120 Evaluation and Recommendation

Upon completion of the preliminary investigation and receipt of the FBI's reports, the U.S. Attorney will review the reports promptly and render a prosecutive opinion to the FBI. Such opinion should be made without awaiting the conclusion of pending local or state investigations or proceedings. The FBI will forward a copy of the opinion to the Civil Rights Division. Likewise, a copy of any prosecutive opinion rendered by the Civil Rights Division will be forwarded by the Division to the U.S. Attorney.

While approval for prosecution may be obtained in many cases without a written submission from the U.S. Attorney (see USAM 8-3.130), in some cases the Civil Rights Division may request a written analysis and recommendation from the U.S. Attorney, particularly where the evidence is

unclear or novel issues of law are presented. In such cases, the following format is suggested:

TO: Assistant Attorney General
Civil Rights Division

Date:

FROM: United States Attorney

RE: Prosecutive Summary

Name of Subject:

Name of Victim:

Date of Offense:

Date Matter Received:

Statute of Limitations:

Venue:

Statute(s) Involved:

Summary of Case

One paragraph synopsizing the facts and the offense.

Recommendation of U.S. Attorney: (1 line)

Anticipated Defense: (1 line)

Special Fact Problems: (1 line)

Special Legal Problems: (1 line)

Development of Case

1. How we received case.

2. Investigations done by the FBI (how many).

3. Investigations done by the U.S. Attorney.

Analysis of Evidence

Set out testimonial and physical evidence to be presented. Discuss any special problems of introduction of physical evidence or conflicts of testimony and credibility of the witnesses. Also, state the disposition of any charges against the victim.

Analysis of Probable Defense

Set out the probable line of defense and the major postulates defense must establish.

Legal Principles Involved

Cite cases and discuss precedent pro and con.

Special Problems

Discuss potential legal difficulties and problems relating to jurisdiction, venue and forum.

Recommendation

Nature of prosecution, reason for electing particular statute if choice available (e.g., §37, instead of §241).

Draft Indictment or Information

Unless there are unusual circumstances, the written opinion should be submitted to the Civil Rights Division within thirty days of the request from the Civil Rights Division. The Civil Rights Division will respond to the written opinion within fifteen days.

Nothing herein shall diminish the authority of the Assistant Attorney General, Civil Rights Division, to prosecute those matters which the U.S. Attorney elects not to prosecute.

8-3.130 Authorizations for Grand Jury Proceedings, Arrests, and Indictments

The enforcement of federal criminal civil rights statutes may require the use of federal grand juries for investigation as well as for indictment. The U.S. Attorney need not obtain the approval of the Civil Rights Division to use a grand jury to investigate any alleged criminal civil rights violation. Prior to the grand jury proceeding, however, the U.S. Attorney must inform the Assistant Attorney General, Civil Rights Division, attention: Chief of the Criminal Section, of his/her intention to use a grand jury for investigative purposes. Notification may be made by telephone if necessary.

Generally, the U.S. Attorney need not obtain the approval of the Assistant Attorney General to present a civil rights matter to a grand jury for the purpose of obtaining an indictment under any of those criminal statutes listed in USAM 8-1.100, supra. The only exceptions are felony prosecutions under 18 U.S.C. §242, all prosecutions under 18 U.S.C. §241 and §245, and prosecutions under 18 U.S.C. §1001 in which the alleged false official statement relates to a civil rights matter. (Prosecutions under 18 U.S.C. §245 require prior written certification by the Attorney General or Deputy Attorney General that the prosecution is in the public interest and necessary to secure substantial justice.)

In cases in which authorization is not required, the U.S. Attorney must give the Chief of the Criminal Section advance notice of his/her intention to seek an indictment and must furnish him/her a copy of the indictment when it is returned by the grand jury. The Assistant Attorney General may require the U.S. Attorney to submit additional information (e.g., grand jury transcripts, copy of proposed indictment) necessary to review the case. If the Assistant Attorney General disagrees with the seeking of the indictment, he/she will furnish the U.S. Attorney the reasons for his/her disagreement together with his/her instructions for the disposition of the case. The Assistant Attorney General will use this review procedure judiciously and only in exceptional cases, e.g., those involving important public policy considerations or novel legal issues, or when necessary to ensure uniform application of the law.

No arrest should be made until prosecution is authorized, except where flight, destruction of evidence, or other emergency circumstances are expected and time does not permit prior consultation with the Civil Rights Division.

Nothing herein shall diminish the authority of the Assistant Attorney General, Civil Rights Division, to prosecute or decline to prosecute those cases within the Division's jurisdiction.

8-3.140 Proceeding by Information

In some cases, particularly under 18 U.S.C. §242, where the violation is a misdemeanor, the U.S. Attorney may proceed by information. This shall be done in accordance with the notice requirements set forth in USAM 8-3.130, supra. Generally, proceeding by information should be restricted to those cases where facts are clear, no further information is needed, and there are no substantial issues of credibility of witnesses.

8-3.150 Trials

A. The U.S. Attorney will be responsible for the trial of many criminal civil rights cases. In such cases, the Civil Rights Division will be available to render substantial assistance in the preparation of indictments, informations, and other legal documents. In addition, attorneys from the Criminal Section will be available to assist in the trial of these cases.

B. There are no precise rules for determining whether a criminal civil rights case is to be handled by the U.S. Attorney's office, by the Criminal Section, or jointly by attorneys from both offices. The decision will be made by the Assistant Attorney General of the Civil Rights Division, in consultation with the U.S. Attorney, on a case-by-case basis. Ordinarily the office that develops the case will try it. Other factors which determine who will try the case are as follows:

1. Whether the case raises issues of first impression on which there is no previous authority;

2. Whether the case raises issues of particular national, or local, importance;

3. Whether other cases involving the same or very similar issues have recently been handled by either the U.S. Attorney or the Division;

4. Whether the case presents relatively simple issues which would make it an ideal teaching vehicle for an inexperienced attorney;

5. Whether the case presents essentially factual questions;

6. Personnel shortages; and

7. Preference, if any, of the U.S. Attorney.

C. The Assistant Attorney General, or his/her designee, shall notify the U.S. Attorney of the assignment of trial responsibility. Regardless of whether the U.S. Attorney or the Division tries the case, each will take appropriate and complementary steps to fully protect the interest of the United States and to assure the successful prosecution of the case.

D. The Civil Rights Division has published a handbook for drafting jury instructions for use in criminal civil rights trials. This handbook is reproduced at USAM 8-4.000, 8-5.000. U.S. Attorneys are urged to consult this handbook when preparing jury instructions in criminal civil rights cases.

8-3.160 Appeals

Appeals in civil rights cases are supervised by the Appellate Section of the Civil Rights Division. For U.S. Attorneys' responsibilities in the handling of criminal appeals, see USAM 2-3.210.

8-3.170 Cooperation in State Prosecutions

Frequently, conduct which deprives persons of federally protected rights in violation of federal law also violates state law. For example, where a local official inflicts summary punishment on a person in connection with an arrest, such conduct might violate 18 U.S.C. §242 and might also constitute a criminal offense under state law. In such cases, where state and local authorities undertake vigorous prosecution in state courts, it is Department policy to cooperate fully with the local prosecutor.

Any release of reports of investigation should be in accordance with 28 C.F.R. Part 16 (see USAM 8-3.195, infra).

8-3.180 Subpoenas Issued to FBI Agents

Occasionally FBI agents are subpoenaed to appear to testify in local proceedings or even in federal proceedings to which the United States is not a party. Quite often the subpoena is issued on behalf of a state defendant in a criminal case seeking to obtain the results of an FBI investigation into alleged police mistreatment of the defendant. The Department's policy is to resist such subpoena except where the FBI agent can give eyewitness testimony like any other witness. See 28 C.F.R., Part 16, and USAM 8-3.195, infra.

8-3.190 Notification to Parties of Disposition of Criminal Civil Rights Matters

The Criminal Section has developed a procedure for the routine notification at the time a file is closed to victims, complainants and

subjects in all investigations of police misconduct. Form letters are sent to the various parties at the time the particular investigative file is closed by the Criminal Section. The automated word processing equipment does not produce copies of these letters; accordingly, U.S. Attorneys receive only the buff colored closing form when a matter is closed. Although copies of each letter are not sent to U.S. Attorneys, all U.S. Attorneys' offices have been sent sample copies of the letter.

Since these notification letters to victims, complainants and subjects are sent by the Civil Rights Division at the same time it sends the closing notice to U.S. Attorneys' offices, it is important that U.S. Attorneys advise the Criminal Section as soon as possible of any matters involving police misconduct which they believe may have prosecutive merit. In no event should such notification be delayed more than 30 days after receipt of the final FBI report in the matter. Notice letters will not be sent in any matter in which a U.S. Attorney's office has expressed an interest in prosecution or further investigation.

8-3.195 Production of Disclosure in Federal and State Proceedings of Material or Information Contained in Civil Rights Division Files

A. General procedures to be followed by Department of Justice employees in responding to demands for Department information in federal and state proceedings are contained in 28 C.F.R. Part 16 (45 Fed. Reg. 83208, Dec. 18, 1980). Pursuant to the provisions of 28 C.F.R. §§16.24(c) and 16.26(d), the Civil Rights Division has established the following procedures to be followed whenever a demand is made in federal or state proceedings for disclosure of any information collected, assembled, or prepared in connection with litigation or an investigation supervised and/or reviewed by the Civil Rights Division.

B. Whenever a demand is made upon an employee or former employee of the Department for the production of material or the disclosure of information pertaining to investigations supervised and/or reviewed by the Civil Rights Division, the employee shall immediately notify the U.S. Attorney from the district from which the demand has been issued. The U.S. Attorney shall immediately contact the Deputy Assistant Attorney General of the Civil Rights Division who shall refer the matter to the appropriate Section Chief for review of the information whose disclosure is sought. If the Section Chief approves a demand for the production of material or disclosure of information he/she shall so notify the U.S. Attorney and such other persons as circumstances may warrant.

C. If the Section Chief does not authorize the disclosure he/she shall notify the Assistant Attorney General of the Civil Rights Division or a designated Deputy Assistant Attorney General, who may:

1. Authorize personally the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment, is consistent with the factors specified in 28 C.F.R. §16.26(a) of this part and none of the factors specified in 28 C.F.R. §16.26(b) exists with respect to the demanded disclosure; or

2. Authorize negotiations and, if necessary, appropriate motions, to seek to limit the demand to matters, the disclosure of which would not be inconsistent with the considerations specified in 28 C.F.R. §16.26, and otherwise to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

3. If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter for final resolution to the Deputy or Associate Attorney General, as indicated in 28 C.F.R. §16.25.

8-3.200 STANDARD PRELIMINARY INVESTIGATIONS

8-3.210 Relating to Violations of 18 U.S.C. §242

The standard procedures to be followed by the Federal Bureau of Investigation when conducting investigations of complaints of violations of 18 U.S.C. §242 are as follows.

A. Initiating Investigations

An investigation should be initiated in the following circumstances:

1. Upon receipt of a request in writing from the Civil Rights Division.

2. Upon receipt of a request in writing from a U.S. Attorney, except for matters involving mass demonstrations, such as riots, marches, parades, student demonstrations, and major confrontations between local law enforcement officers and groups of persons. This

category of matters requires a request from the Assistant Attorney General, Civil Rights Division.

3. Upon receipt of a complaint from a complainant or victim, either in writing or in person. If the complainant's or victim's allegations are of a serious or substantial nature, conduct a preliminary investigation as outlined below. If the allegations are not of a serious or substantial nature, the investigation should be limited to an interview of the victim, to obtaining appropriate records from appropriate local officials, and to photographing any visible injuries. An important factor, but not the sole factor, in determining whether an allegation is serious or substantial, is whether the complainant or victim alleges that victim was injured.

4. Upon reading a newspaper article from the legitimate press which reports a matter of a serious or substantial nature.

B. Preliminary Investigations

A preliminary investigation shall consist of the following elements and procedures.

1. Interview the victim or victims. As a part of each interview, obtain a complete physical description of each victim, including victim's race. In addition, information should be obtained regarding place and date of birth, marital status, place of residence, occupation, place of employment, military service record, arrest and conviction record, and any physical handicaps and scars and marks.

2. Interview witnesses whose identities are furnished by victim or victims. If victim or victims cannot provide the names of such witnesses but can provide other identifying information, reasonable efforts should be made to locate and interview these witnesses. Interview all witnesses up to 5. If there are more than 5 but less than 12, interview at least 5. If there are 12 or more witnesses, interview a representative number. Obtain the names and addresses of all witnesses not interviewed as a part of the preliminary investigation. As a part of the interview with each witness, obtain the following observable information, such as: approximate age, race and obvious physical handicaps that might impair the witness's ability to observe and remember the incident.

3. Observe, describe and photograph in color any complaint-related injuries visible on each victim's body at the time

of interview. If victim's wounds are bandaged, determine whether the bandages can be removed so that the wounds can be photographed. If the bandages can be safely removed, photograph the unbandaged wounds. If the bandages cannot be safely removed, photograph the bandaged wounds in color only.

4. Obtain copies of any medical records relating to treatment received by each victim for injuries allegedly sustained at the hands of subject or subjects. Some hospitals and doctors may require a release signed by victim before making records available. If so, request each victim to execute the necessary release. If a hospital is involved, obtain the name of the person for whom a subpoena duces tecum should be issued if we ever need the original records.

5. Identify and interview all physicians and other medical and paramedical personnel who treated each victim for injuries allegedly sustained at the hands of subject or subjects; including the ambulance attendants who transported victim or victims to the hospital by ambulance; the hospital admission personnel dealing with victim (e.g., admission clerks, orderlies); and the nurses and other paramedical personnel involved in the treatment of victim or victims. In the interviews with the doctors and other medical personnel, determine, inter alia, the following type of information: the severity of victim's injuries; whether victim's injuries could have been caused the way he/she, or subjects, claim; whether victim appeared intoxicated (especially if subjects claim that the victim was); and whether the victim was belligerent or obstreperous (especially if subjects claim he/she was). (Do not limit your interview to the previous questions; other logical questions that are suggested by the investigation should be asked.)

6. Obtain copies of the criminal record (arrests and convictions) for each victim.

7. Identify and interview each subject. As a part of each interview obtain the following information: a complete physical description, including race; place and date of birth, marital status; length of time employed as a law enforcement officer; military service record; arrest and conviction record; and physical handicaps and scars and marks. If subject declines to be interviewed, obtain the foregoing background information about him/her from other sources.

8. Interview witnesses whose identities are furnished by subject or subjects. If subject or subjects can provide identifying

information but no names, reasonable efforts should be made to locate and interview these witnesses. Interview all witnesses up to 5. If there are 12 or more witnesses, interview a representative number. Obtain the names and addresses of all witnesses not interviewed as a part of the preliminary investigation. As a part of the interview with each witness, obtain the following observable information, such as: approximate age, race and obvious physical handicaps that might impair the witness's ability to observe and remember the incident.

9. Obtain copies of all police reports relevant to the incident under investigation. Care should be taken to avoid obtaining copies of statements by subjects which they were compelled to give under threat of disciplinary action during an internal investigation unless the subjects consent to making such statements available. In addition, determine what action has been taken by state and local authorities against (1) victim or victims, and (2) subject or subjects. Obtain copies of all relevant records of courts, Office of Personnel Management, and the like. If no action has been taken against victim or victims or against subject or subjects, determine from appropriate local authorities if any action is contemplated or planned. Please note that even if the police report contains a transcript or notes of interviews with witnesses or with victims, the interviews requested in this memorandum must still be conducted.

10. Obtain copies of the criminal record (arrests and convictions) for each subject.

11. (a) Where there are factual conflicts as to facts for which objective data can be obtained, obtain copies of records of such data. For example, if there is a conflict in time sequence, inspect and copy records that would help resolve the conflict, such as police logs, hospital admission records, and the like. (b) Describe the scene of the incident; where appropriate, supplement description with photographs or prepare a rough diagram of the place where the alleged incident occurred.

12. Advise the U.S. Attorney of the investigation's results and ask him/her if further investigation should be undertaken. Regardless of the U.S. Attorney's answer, submit an initial report. If he/she requests further investigation, conduct whatever investigation he/she requests. The results of this investigation should be furnished in a report supplementing the initial report. When the U.S. Attorney feels that the investigation is adequate, request that he/she furnish an opinion as to the prosecutive merit of the matter. Do not delay the submission of any report pending a prosecutive opinion by the U.S. Attorney. His/her prosecutive opinion can be furnished in a supplementary report.

13. (a) Provide descriptive data identifying other complaints against each subject which you have investigated. (b) Obtain from local authorities information regarding complaints made against each subject. This information should include the disposition of each complaint and the results of any prosecution or disciplinary action taken.

14. Miscellaneous:

a. A subject, a victim or other witness may refuse to be interviewed except in the presence of his/her attorney. If the investigation was instituted under paragraphs A-1 thru 4 above, contact this Division to determine whether subject, victim, or other witness should be interviewed in the presence of his/her lawyer. In any instance where subject, victim, or a witness refuses to be interviewed except in the presence of his/her attorney, determine the name, address and telephone number of the attorney.

b. The victim and each witness should be asked to give a signed statement and be told prior to giving it that it can be used in a court of law. Subject should likewise be asked to give a signed statement. An interview should be conducted even though a person declines to furnish a signed statement.

c. In a death case preliminary investigation, certain additional things should be done. Obtain, in addition to the records described in 4 above, copies of any autopsy or coroner's report. Interview the pathologist or medical examiner performing the autopsy. Obtain copies of the verdict or report of any coroner's jury, as well as a copy of the list of exhibits presented before the coroner's jury.

d. A copy of your report should be sent to the U.S. Attorney as well as to the Civil Rights Division.

e. In the reference paragraph of the covering memorandum of your report to the Civil Rights Division, please set forth the date of our request as well as the initials which appear under the date line of our request.

C. Monitoring Investigations

In certain sensitive matters (e.g., those involving massive conflicts or civil unrest) you may be requested to monitor the situation before

being requested to conduct a preliminary investigation. When requested to monitor the situation, please do the following:

1. Contact appropriate local officials and interview them for information about the situation. In addition, obtain copies of relevant reports and documents from these officials.

2. Contact intelligence and other established sources for relevant information.

3. Obtain copies of relevant articles from local newspapers.

4. Do not seek out and interview any witnesses unless specifically requested to do so.

Copies of your reports should be sent to the U.S. Attorney as well as to the Civil Rights Division. If the situation requires it, a telephonic report to the U.S. Attorney and the Civil Rights Division should precede a written report. It is our desire to keep fully informed as to the local situation without impairing in any way the carrying out of legitimate local law enforcement functions. Nevertheless, a situation may arise where swift action to decide whether to institute a preliminary investigation will be necessary.

8-3.220 Relating to Violations of 18 U.S.C. §245

A. The standard preliminary investigation for violations of 18 U.S.C. §245 is described below. The following types of fact situations should be investigated:

1. Incidents of force or threat of force where there is indication that the force or threat may have been because of the victim's activity as:

a. A voter, a person qualifying to vote, a candidate for elective office, a poll watcher, or as an election official in any election;

b. A participant in any program or facility administered by the United States;

c. An applicant for federal employment, or an employee of the federal government;

d. A juror or a prospective juror in a federal court;

e. A participant in any program or activity receiving federal financial assistance;

f. A student or applicant for admission to any public school or college;

g. A participant in any program or facility administered by a state or local government;

h. An applicant for private employment, or for state employment, or an employee of any private employer or of a state or local government;

i. A member of or applicant for membership in any labor organization or hiring hall;

j. An applicant for employment through any employment agency;

k. A patron of any public accommodation, including hotels, motels, restaurants, lunchrooms, bars, gas stations, motion picture houses, theaters, arenas, amusement parks or any other establishment which serves the public;

l. A juror or prospective juror in any state or local court; and

m. A traveler in interstate commerce, or a traveler using any facility of interstate commerce or using any vehicle, terminal, or facility of any common carrier by motor, rail, water or air.

2. Incidents involving interference with or threats against persons who are affording or have afforded others the opportunity to participate in any of the activities listed in this memorandum (for example, restaurant owners, school teachers and other school officials, or employers).

3. Incidents involving citizens who are aiding or have aided or encouraged other persons to participate in any of the activities listed in this memorandum, or who have been participating in speech or peaceful assembly opposing any denial of the opportunity to participate in any of the activities listed in this memorandum.

4. Incidents involving persons who (although there may be no indication of their participation in any of the listed activities) may have been interfered with or threatened for the purpose of intimidating other persons.

B. When the Federal Bureau of Investigation receives direct complaints, or otherwise receives information regarding an incident which may constitute a violation of 18 U.S.C. §245, or when the Civil Rights Division, or a U.S. Attorney, requests a preliminary investigation of an incident involving a possible violation of 18 U.S.C. §245, and does not specify in detail the exact information needed, please conduct the following preliminary investigation:

1. Interview the victim or victims.

2. Interview other witnesses, up to a maximum of four, whose identities are furnished by the victim or victims.

3. Locate and preserve physical evidence and photograph any injuries to the person or damage to property.

4. Determine what complaints have been made to the local police regarding the act of interference and what, if any, action has been taken by the local police.

5. Identify, if possible, persons suspected of having committed the acts of interference or threats and interview such persons.

Note that prosecutions may be brought under 18 U.S.C. §245 whether or not the criminal acts involve a conspiracy. However, evidence indicating the possible existence of a conspiracy in violation of 18 U.S.C. §241 should be included in investigative reports submitted pursuant to this request.

Note also that 18 U.S.C. §245 investigations are applicable whether or not the subject acted under color of law.

Copies of the reports should be sent to both the Division and the appropriate U.S. Attorney's office.

8-3.230 Relating to Interference with Persons in the Exercise of Housing Rights

The procedures that should be followed in instituting preliminary investigations of complaints of coercion, intimidation, threats or interference with housing rights are described below. Note that preliminary investigations of matters under Section 817 of Title VIII, Civil Rights Act of 1968, do not differ in form from preliminary investigations under Title IX of the Act. It will be necessary, in investigating alleged violations of either statute, to proceed as if the investigation might lead to criminal charges, because even where an investigation is initially requested under the remedy section, Section 817, it is possible that force or threats of force may be found to have been involved, in which event a possibility would exist of proceeding under the criminal provision, Title IX.

A. The preliminary investigation set out below should be conducted:

1. When the Federal Bureau of Investigation receives direct complaints, or otherwise receives information regarding an incident which indicates a possible violation of Section 817, or of Title VIII, or Title IX of the Civil Rights Act of 1968, or

2. When the Civil Rights Division, or a U.S. Attorney, requests a preliminary investigation of an incident involving a possible violation of Section 817, or of Title IX, and does not specify in detail the exact information needed.

B. Upon receipt of such a complaint or request, the Federal Bureau of Investigation will conduct the following preliminary investigation:

1. Interview the complainant.

2. Obtain the address and a description of the type of housing which is the subject of the complaint, including any name by which such housing is known. If the housing is in an apartment development, determine the approximate number of units contained in the apartment or apartment complex. If the housing is a single-family house, determine whether the house is part of a multi-house development.

3. Interview other witnesses, up to a maximum of four, whose identities are furnished by the complainant.

4. Locate and preserve physical evidence, and photograph any injuries to the person or damage to property.

5. Determine what complaints have been made to the local police regarding the act or acts of interference and what, if any, action has been taken by the local police.

6. Identify, if possible, persons suspected of having committed the act or acts of interference or threats, and interview such persons.

DETAILED TABLE OF CONTENTS FOR CHAPTER 4

8-4.000 JURY INSTRUCTIONS--GENERAL

8-4.010 General Instructions on Procedure Designated in Rule 30, Fed. R. Crim. P.

A. Jury Instructions:

The procedure for instructing juries in criminal cases is set forth essentially in Rule 30 of the Federal Rules of Criminal Procedure. The Rule reads as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

B. Authority:

See generally Federal Jury Practice and Instructions, Devitt and Blackmar §7.01 (1977) (hereinafter cited as Devitt and Blackmar).

8-4.100 DUTY OF COURT AND JURY

8-4.101 Province of the Court

A. Instructions:

In the trial of this case the judge and the jury have separate functions. The judge is the superintendent of the trial and must preside

in such manner that proper and relevant evidence will be presented, and should instruct the jury on the law applicable to the case.

B. Authorities:

Seventh Circuit Judicial Conference Committee on Jury Instructions, 33 F.R.D. 523, 541 (1964) (hereinafter cited as 33 F.R.D.).

Sparf v. United States, 156 U.S. 51 (1895).

8-4.102 Province of the Jury

A. Instructions:

The function of the jury is to determine the facts. This should be done without prejudice, fear or favor, and solely from a fair consideration of the evidence. The determination of guilt or innocence is a question of fact; the law does not permit jurors to be governed by sympathy, prejudice or public opinion. The evidence should be considered and viewed by the jurors in the light of their own observations and experience in the affairs of life. If, during the trial, the court has intimated any opinion as to the facts, the jury is not bound by that opinion.

You, the jury, are the exclusive judges of the facts in this case. You have the sole power to determine the credibility of the witnesses, to determine who has testified the truth where there is some question in issue, to judge and determine the weight of the evidence, to find the facts and apply the law thereto, as it is outlined to you by the court, and then declare your result.

B. Authorities:

Devitt and Blackmar §11.03.

33 F.R.D. at 541.

Sparf v. United States, 156 U.S. 51 (1895).

8-4.103 Wisdom of the Law or Statute

A. Instructions:

You, the jury, have taken an oath to try this case according to the law and the evidence. Your responsibilities as jurors are great, as is my obligation and solemn duty in this case. Your oath includes, of course, the words, "according to law." My duty is to acquaint you with the law. My duty and responsibility is to instruct you as to the law that will govern you in reaching your verdict. It is your responsibility and duty, under your oaths, to accept this law as I shall state it to you.

It is the duty of the court to instruct you as to the law, and you are required to accept the law given you, without regard to any personal opinion you may have as to what the law is, or should be.

B. Authorities:

United States v. Friedberg, No. 5972CR (S.D. Ohio 1952), aff'd, 207 F.2d 777 (6th Cir. 1953), aff'd, 348 U.S. 142, 146 (1954).

Berra v. United States, 351 U.S. 131, 134 (1956).

Sparf v. United States, 156 U.S. 51 (1895).

8-4.104 Voir Dire Obligations

A. Instructions:

In determining the facts, the jury is reminded that before each member was accepted and sworn to act as juror, he/she was asked questions regarding his/her competency, qualifications, fairness and freedom from prejudice or sympathy. On the faith of those answers the juror was accepted by the parties. Therefore, those answers are as binding on each of the jurors now as they were then, and should remain so until the jury is discharged from consideration of this case.

B. Authorities:

33 F.R.D. at 541.

Sparf v. United States, 156 U.S. 51 (1895).

Cf. United States v. Perea, 413 F.2d 65 (10th Cir. 1969), cert. denied, 397 U.S. 945 (1970). (The Court is not required to specifically instruct the jury not to show prejudice against a person of a certain race even when the defense makes a request for this instruction.)

8-4.105 Instructions to be Considered as a Whole

A. Instructions:

I want to admonish you that the instructions are to be considered as a whole. Each part of phase of the instructions is to be considered and applied together with all other parts and phases of the instructions. In other words, you must not pick out some particular instruction or some particular thing I say and overemphasize it and apply it without considering and keeping in mind all of the other instructions given you as the whole law of the case. It is quite important that you understand that the charge as now given is to be treated as a whole, and everything covered therein is to be considered in applying the law as a whole. Your duty in the case is to determine the facts from the evidence presented to you, and to apply the law thereto. Therefore, you are to consider, determine, and interpret the facts in the light of and in conformity with, the instructions given you by the Court.

B. Authorities:

United States v. Beck, 59-2 U.S.T.C. 9486 (1959), aff'd in part and rev'd in part on other grounds, 298 F.2d 622 (9th Cir. 1962).

United States v. Shotwell Manufacturing Co., 287 F.2d 667 (7th Cir. 1961), aff'd, 371 U.S. 341 (1963).

Benatar v. United States, 209 F.2d 734, 743 (9th Cir.), cert. denied, 347 U.S. 974 (1954).

Sparf v. United States, 156 U.S. 51 (1895).

Berra v. United States, 351 U.S. 131 (1956).

Holland v. United States, 348 U.S. 121 (1954).

C. Comments:

The jury should follow the law as it is given by the judge in these instructions. All of the instructions should be considered together as a connected series and regarded as the law applicable to this case. The jury has no right to disregard, or to give special attention to any one of the instructions, or to question the wisdom of any rule of law.

D. Authorities:

Devitt and Blackmar §10.01.

33 F.R.D. at 541.

Bradley v. United States, 338 F.2d 493 (9th Cir. 1964).

8-4.106 Model Instructions

A. Instructions:

Members of the jury, now that you have heard the evidence in this case, and the argument of counsel, we have come to the point where the case is about to be entrusted into your hands.

In the trial of a case such as this, the attorneys, the judge, and the jury have separate functions.

The primary functions of the attorneys are to present the evidence and to argue to you their contentions and what they believe the evidence proves or fails to prove.

The judge is the superintendent of the trial, and must preside in such a manner that proper and relevant evidence will be presented, and instruct you with respect to the principles of law applicable to the case. It is your duty to follow the law as given in the instructions of the court, and all the instructions are to be considered together as a connected series and regarded as a law applicable to the case. You are not to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your solemn duty to base your verdict upon any view of the law other than that given in these instructions.

It is the function of the jury to determine the facts, and this should be done without prejudice, fear or favor, and solely from a fair consideration of all the evidence. The evidence should be considered and viewed by the jurors in light of their own observations and experience in the affairs of life. If, during the trial, the court has intimated any opinion as to the facts, the jury is not bound by that opinion. Neither is the jury bound by any statement of counsel during the course of the trial or argument as to the facts. Remember at all times that you, as jurors, are the sole and exclusive judge of the facts. In determining the facts, however, you are reminded that before you were accepted and sworn

to act a jurors in the case, you were ask certain questions regarding your qualifications, fairness, and freedom from prejudice or sympathy. On the faith of these answers you were accepted by the parties. Therefore, those answers are as binding on each of you now as they were then and should remain so until you have reached a verdict and have been discharged.

8-4.200 PERSONS CRIMINALLY LIABLE

8-4.201 Single Defendant--Principal

A. Instructions:

Every person who willfully participates in the commission of a crime may be guilty of that offense. A defendant need not personally perpetrate every act constituting the offense charged in order to be found guilty.

B. Authorities:

Devitt and Blackmar §12.01

33 F.R.D. at 544.

United States v. Jones, 308 F.2d 26, 32 (2d Cir. 1962).

See 18 U.S.C. §2:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

8-4.202 Multiple Defendants

A. Instructions:

Where two or more persons are charged with the commission of a crime, the guilt of one defendant may be established without proof that all the

defendants perpetrated every act constituting the offense charged. However, the jury must give separate consideration to each individual defendant, and to each separate charge against him/her. Each defendant is entitled to have his/her case determined from his/her own conduct and from the evidence which may be applicable to him/her.

B. Authorities:

Pereira v. United States, 347 U.S. 1 (1954).

Blumenthal v. United States, 322 U.S. 539 (1947).

Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969).

8-4.203 Multiple Defendants--Where Some Plead Guilty

A. Instructions:

The fact that a co-defendant pleads guilty is not evidence of the guilt of any other defendant, or that the crime charged in the indictment was committed. The guilt or innocence of the defendant still on trial must be determined by the jury solely by the evidence introduced in the trial of this case.

B. Authorities:

33 F.R.D. at 544.

Blumenthal v. United States, 332 U.S. 539 (1947).

United States v. Aronson, 319 F.2d 48 (2d Cir.), cert. denied, 375 U.S. 920 (1963).

Cf. United States v. Toner, 173 F.2d 140 (3d Cir. 1949).

8-4.204 Aider and Abettor

A. Instructions:

Whoever aids, abets, counsel, commands, induces or procures the commission of a crime is punishable as a principal. In order to aid or abet the commission of a crime a person must willfully associate

himself/herself with the criminal venture and willfully participate in it; that is, he/she must try to make it succeed.

However, being a knowing spectator of a criminal act is not sufficient. You must find beyond a reasonable doubt that defendant, by act or omission, was a participant.

B. Authorities:

Devitt and Blackmar §12.03

33 F.R.D. at 544.

Shuttlesworth v. Birmingham, 373 U.S. 262 (1963).

Nye & Nissen v. United States, 336 U.S. 613 (1949).

United States v. Varelli, 407 F.2d 735 (7th Cir. 1969).

Sewell v. United States, 406 F.2d 1289 (8th Cir. 1969).

King v. United States, 402 F.2d 289 (10th Cir. 1968).

United States v. Milby, 400 F.2d 702 (6th Cir. 1968).

See 18 U.S.C. §2(a); USAM 8-4.201, supra.

8-4.205 Accessory After the Fact

A. Instructions:

An accessory after the fact is one who with knowledge that an offense against the United States has been committed willfully receives, relieves, comforts or assists the offender in order to hinder or prevent the latter's apprehension, trial or punishment.

B. Authorities:

Devitt and Blackmar §21.03.

33 F.R.D. at 545.

United States v. Johnson, 319 U.S. 503 (1943).

United States v. Rux, 412 F.2d 331 (9th Cir. 1969).

United States v. Duke, 409 F.2d 669 (4th Cir. 1969), cert. denied, 397 U.S. 1062 (1970).

Morei v. United States, 127 F.2d 827 (6th Cir. 1942).

See 18 U.S.C. §3.

8-4.206 Acts Committed Through Agents

A. Instructions:

Whoever willfully causes an act to be done, which if directly performed by him/her or another would be an offense against the United States, is punishable as a principal. It is not necessary that the accused personally commit every act constituting the offense charged.

Whatever a person is legally capable of doing himself/herself he/she can do through another person by causing that person to do the act. If the acts of another are willfully ordered, directed, authorized or consented to by the defendant, he/she is responsible for such acts as though he/she personally committed them.

B. Authorities:

Devitt and Blackmar §12.07.

33 F.R.D. at 544.

United States v. Wise, 370 U.S. 405 (1962).

United States v. Illinois Cent. R. Co., 303 U.S. 239 (1938).

United States v. Paglia, 190 F.2d 445 (2d Cir. 1951).

See 18 U.S.C. §2(b); USAM 8-4.201, supra.

8-4.300 ELEMENTS OF THE CRIME

8-4.301 Act and Intent

A. Instructions:

To constitute a crime there must be the joint operation of two essential elements, an act forbidden by law and an intent to do the act.

Before a defendant can be found guilty of a crime the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions the defendant was forbidden to do the act charged in the indictment/information, and that he/she intentionally committed the act.

B. Authorities:

Devitt and Blackmar §13.04.

33 F.R.D. at 549.

Smith v. California, 361 U.S. 147 (1959).

Ellis v. United States, 206 U.S. 246 (1907).

Jones v. United States, 308 F.2d 307 (D.C. Cir. 1962).

8-4.302 Omission and Intent

A. Instructions:

To constitute a crime there must be the joint operation of two essential elements--the omission of a duty required by law and an intent to omit that duty.

Before a defendant can be found guilty of a crime the prosecution must establish beyond a reasonable doubt that under the statute defined in these instructions defendant was under a legal duty to perform certain acts, and that he/she intentionally failed to perform the duty.

B. Authorities:

See USAM 9-4.301, supra.

See also Schindler v. United States, 221 F.2d 743 (9th Cir. 1955), cert. denied, 350 U.S. 938 (1956).

United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

8-4.303 Specific Intent

A. Instructions:

The crime charged in this case requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, or knowingly failed to do an act which the law requires, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the cases as well as from similar prior crimes and transactions.

B. Authorities:

Devitt and Blackmar §14.03.

33 F.R.D. at 550.

United States v. A & P Trucking Co., 358 U.S. 121 (1958).

Morissette v. United States, 342 U.S. 246 (1952).

Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963).

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

C. Comments:

Under 18 U.S.C. §242 there must be a specific intent to willfully deprive the victim of a right made specific by the express terms of the Constitution, or laws of the United States or by decisions interpreting them.

Specific intent is determined by considering all of the attendant circumstances including the notice of the accused, the weapons used (if any), the character of the act, and the provocation (if any).

D. Authority:

Screws v. United States, 325 U.S. 91, 104, 107 (1945).

8-4.304 Motive

A. Instructions:

Intent and motive should never be confused. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted.

Personal advancement and financial gain are two well-recognized motives for much human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

B. Authorities:

Devitt and Blackmar §14.11.

Radio Officers' Union of the Commercial Telegraphers Union, A.F.L. v. National Labor Relations Board, 347 U.S. 17 (1954).

Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912).

8-4.305 Proof of Intent

A. Instructions:

Intent, like knowledge and the existence of an agreement or conspiracy may be proved by circumstantial evidence. Indeed, intent can rarely be established by any other means. While witnesses may see and hear and so be able to give direct evidence of what a defendant does or fails to do, of course there can be no eyewitness account of the state of mind with which acts were done or omitted. But what a defendant does, or fails to do, may indicate intent, or lack of intent, to commit the offense charged.

In deciding the issue of intent I charge you that it is reasonable to infer that a person ordinarily intends all the natural and probable consequences of acts knowingly done or knowingly omitted.

Unless otherwise instructed, in determining the issue of intent as regards an individual accused, the jury is entitled to consider any statements made and acts done or omitted by the accused as well as all facts and circumstances in evidence in the case which may aid determination of state of mind. For example, in determining whether the willful intent charged in this case was present you may consider the weapons used in the alleged assaults, if any, the character and duration of the provocation of the alleged assaults and the time and manner in which they were allegedly carried out.

But the jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

B. Authorities:

United States v. Denton, 336 F.2d 785 (6th Cir. 1964).

United States v. Releford, 352 F.2d 36 (6th Cir. 1965), cert. denied, 382 U.S. 984 (1966).

Apodaca v. United States, 188 F.2d 932 (10th Cir. 1951).

C. Comment:

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from surrounding circumstances. You may consider any statement made and done or omitted by the defendant, and all other facts and circumstances in evidence which indicate his/her state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

D. Authorities:

Devitt and Blackmar §14.13.

Cramer v. United States, 325 U.S. 1 (1945).

Cf. United States v. Denton, 336 F.2d 785 (6th Cir. 1945).

8-4.306 Evidence of Intent--Earlier Offense of Like Nature

A. Instructions:

The fact that the accused may have committed an offense at some time is not any evidence or proof whatever that, at a later time, the accused committed the offense charged in the indictment/information, even though both offenses are of a like nature. Evidence as to an alleged earlier offense of a like nature may not therefore be considered by the jury, in determining whether the accused did the act charged in the indictment/information. Nor may such evidence be considered for any other purpose whatever, unless the jury first finds that other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the act charged in the indictment/information.

If the jury should find beyond a reasonable doubt from the other evidence in the case that the accused did the act charged in the indictment/information, then the jury may consider evidence as to the alleged earlier offense of a like nature in determining the state of mind or intent with which the accused did the act charged in the indictment/information. And where all the elements of an alleged earlier offense of a like nature are established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw therefrom the inference and find that in doing the act charged in the indictment/information, the accused acted willfully and with specific intent, and not because of mistake or accident or other innocent reason.

B. Authorities:

Devitt and Blackmar §14.14.

Nye & Nissen v. United States, 336 U.S. 613 (1949).

Fernandez v. United States, 329 F.2d 899 (9th Cir.), cert. denied, 379 U.S. 832 (1964).

8-4.307 Evidence of Intent--Earlier Act of Like Nature

A. Instructions:

Evidence that an act was done at one time, or on one occasion, is not any evidence or proof whatever that a similar act was done at another time, or on another occasion. That is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered

by the jury, in determining whether the accused committed any act charged in the indictment/information.

Nor may evidence of an alleged earlier act of a like nature be considered for any other purpose whatever, unless the jury first finds that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the indictment/information then under deliberation.

If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature, in determining the state of mind or intent with which the accused did the act charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may, but is not obliged to, draw therefrom the inference and find that, in doing the act charged in the particular count under deliberation, the accused acted willfully and with specific intent, and not because of mistake or accident or other innocent reason.

A. Authorities:

Devitt and Blackmar §14.15.

Nye & Nissen v. United States, 336 U.S. 613 (1949).

Kreuter v. United States, 376 F.2d 654 (10th Cir. 1967), cert. denied, 390 U.S. 1015 (1968).

8-4.308 Knowingly--Act or Omission

A. Instructions:

The work "knowingly" as used in the crime charged means that the act (or omission) was done voluntarily and purposely, and not because of mistake or accident. Knowledge may be proven by defendant's conduct, and by all the facts and circumstances surrounding the case.

No person can intentionally avoid knowledge by closing his/her eyes to facts which are important and material to his/her conduct. Defendant may not escape punishment because of a conscious purpose to avoid enlightenment.

B. Authorities:

33 F.R.D. at 553.

Griego v. United States, 298 F.2d 845 (10th Cir. 1962).

United States v. Peeples, 377 F.2d 205 (2d Cir. 1967).

8-4.309 Unlawfully--Act or Omission

A. Instructions:

"Unlawfully" means contrary to law. So, to act (or fail to act) "unlawfully" means to do something which is contrary to law (or fail to do something which the law requires).

An act (or omission) is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

B. Authorities:

Devitt and Blackmar §§16.09, 16.10.

Hughes v. United States, 338 F.2d 651 (1st Cir. 1964).

Meurer Steel Barrel Co. v. Commissioner of Internal Revenue, 144 F.2d 282 (3d Cir.), cert. denied, 324 U.S. 860 (1944).

8-4.310 Willfully--Act or Omission

A. Instructions:

The word "willfully" as used in the crime charged means that the act (or omission) was committed (or omitted) by defendant voluntarily and knowingly, with the specific intent to violate the law. That is, he/she must have acted (or failed to act) with a purpose to disobey or disregard the law, and not by mistake, accident or in good faith.

B. Authorities:

Devitt and Blackmar §§14.06, 14.07.

33 F.R.D. at 553.

United States v. A & P Trucking Co., 358 U.S. 121 (1958).

Morissette v. United States, 342 U.S. 246 (1952).

C. Comment:

In determining whether the necessary willfulness was present, it is not necessary that the unlawful purpose be expressed. In most cases, willfulness has to be proved as an inference from all of the circumstances surrounding the incident with which you are concerned. In determining whether the alleged misconduct was willful, you may consider all of the circumstances: the malice of the defendant, if any, the character and duration of the alleged offense, and the other factors, if any.

D. Authorities:

Screws v. United States, 325 U.S. 91 (1945).

Crews v. United States, 160 F.2d 746 (5th Cir. 1947).

8-4.400 DEFENSES

8-4.401 Alibi

A. Instructions:

The defendant has introduced evidence that he/she was not present at the time and place the alleged crime was committed. This is a proper and legal defense known as "alibi."

If, after consideration of all the evidence in the case, you find that the prosecution had failed to prove beyond a reasonable doubt that the defendant was present at the time and place the alleged offense was committed, then you should find the defendant not guilty.

B. Authorities:

Devitt and Blackmar §13.08.

33 F.R.D. at 556.

United States v. De Palma, 414 F.2d 394 (9th Cir. 1969), cert. denied, 396 U.S. 1046 (1970).

Goodall v. United States, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987 (1950).

United States v. Marcus, 166 F.2d 497 (3d Cir. 1948).

8-4.402 Ignorance of the Law--General Intent

A. Instructions:

Defendant has offered evidence that he/she did not know that his/her conduct was unlawful. Unless outweighed by evidence to the contrary, the law presumes that every person knows what the law forbids and what the law requires to be done. Specific intent is an element of the crime charged in the indictment. Therefore, the evidence that defendant acted or failed to act because of ignorance of law is to be considered by the jury in determining whether or not the defendant acted or failed to act with the required specific intent.

B. Authorities:

33 F.R.D. at 565-66.

United States v. Murdock, 290 U.S. 389 (1933).

Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910).

Lambert v. California, 355 U.S. 225 (1957).

Abdul v. United States, 278 F.2d 234 (9th Cir.), cert. denied, 364 U.S. 832 (1960).

Finn v. United States, 219 F.2d 894 (9th Cir.), cert. denied, 349 U.S. 906 (1955).

United States v. Inciso, 292 F.2d 374 (7th Cir.), cert. denied, 368 U.S. 920 (1961).

8-4.403 Ignorance of the Law--Specific Intent

A. Instructions:

Defendant has offered evidence that he/she did not know that his/her conduct was unlawful. Unless outweighed by evidence to the contrary, the law presumes that every person knows what the law forbids and what the law requires to be done. The crime charged in the indictment does not involve specific intent. Therefore, the evidence that defendant acted or failed to act because of ignorance of the law does not constitute a defense.

B. Authorities:

33 F.R.D. at 565-66.

United States v. Murdock, 290 U.S. 389 (1933).

Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57 (1910).

Lambert v. California, 355 U.S. 225 (1957).

Abdul v. United States, 278 F.2d 234 (9th Cir.), cert. denied, 364 U.S. 832 (1960).

Finn v. United States, 219 F.2d 894 (9th Cir.), cert. denied, 349 U.S. 906 (1955).

United States v. Incisco, 292 F.2d 374 (7th Cir.), cert. denied, 368 U.S. 920 (1961).

8-4.500 EVALUATION OF EVIDENCE

8-4.501 Presumption of Innocence

A. Instructions:

A defendant in a criminal case is presumed by law to be innocent. This presumption alone would be sufficient to acquit defendant, unless the jurors are satisfied beyond a reasonable doubt of defendant's guilt after careful and impartial consideration of all the evidence in the case. This presumption of innocence remains with defendant throughout the trial.

B. Authorities:

Devitt and Blackmar §11.14.

33 F.R.D. at 567.

Holt v. United States, 218 U.S. 245 (1910).

Agnew v. United States, 165 U.S. 36 (1897).

United States ex rel. Marelia v. Burke, 197 F.2d 856 (3d Cir.), cert, denied, 344 U.S. 868 (1952).

8-4.502 Reasonable Doubt

A. Instructions:

Reasonable doubt means a real or substantial doubt arising from the evidence as to any of the elements that go to make up the charge. It is a doubt based upon reason or logic as distinguished from a doubt based upon some emotion such as a whim, fancy, caprice, or even a so-called hunch. To establish the elements of each count charged beyond a reasonable doubt means to establish them to a reasonable or moral certainty.

It is not required that the prosecution prove guilt beyond all possible doubt. The test is one of a reasonable doubt. A reasonable doubt is a doubt based on reason and common sense; it must be substantial rather than speculative. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.

B. Authorities:

Devitt and Blackmar §11.14.

33 F.R.D. at 567.

Holland v. United States, 348 U.S. 121 (1954).

Holt v. United States, 218 U.S. 245 (1910).

United States v. Senior, 274 F.2d 613 (7th Cir. 1960).

8-4.503 Burden of Proof

A. Instructions:

The burden of proving defendant guilty beyond a reasonable doubt rests upon the government. This burden never shifts throughout the trial. The law does not require a defendant to prove his/her innocence; defendant has no obligation or duty to call witnesses or produce any evidence. If the prosecution fails to prove defendant guilty beyond a reasonable doubt, then the jury must acquit him/her.

B. Authorities:

Devitt and Blackmar §11.14.

33 F.R.D. at 567.

United States v. Garguilo, 310 F.2d 249 (2d Cir. 1962).

United States v. Alaimo, 297 F.2d 604 (3d Cir. 1961), cert. denied, 369 U.S. 817 (1962).

Wolcher v. United States, 218 F.2d 505 (9th Cir. 1954), cert. denied, 350 U.S. 822 (1955).

8-4.504 Matters Deemed Evidence

A. Instructions:

The jury must consider only the evidence properly admitted in the case. Evidence includes the sworn testimony of witnesses, exhibits admitted into the record, facts stipulated by counsel, and facts judicially noticed by the court.

Any evidence as to which an objection was sustained by the court and any evidence ordered stricken by the court must be entirely disregarded.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

However, in your consideration of the evidence, you are not limited to the bald statements of the witnesses. In other words you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in the light of experience.

B. Authorities:

Devitt and Blackmar §11.11.

33 F.R.D. at 570.

United States v. Ramirez, 367 F.2d 813 (7th Cir.), cert. denied, 385 U.S. 988 (1966).

United States v. Schor, 418 F.2d 26 (2d Cir. 1969).

United States v. Senior, 274 F.2d 613 (7th Cir. 1960).

Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951).

Fahning v. United States, 299 F.2d 579 (5th Cir. 1962).

United States v. Schneiderman, 106 F. Supp. 906 (S.D. Cal. 1952).

United States v. Hephner, 410 F.2d 930 (7th Cir. 1969).

8-4.505 Direct and Circumstantial Evidence

A. Instructions:

There are two types of evidence from which a jury may properly find a defendant guilty of a crime. One is direct evidence--such as the testimony of an eyewitness. The other is circumstantial evidence--the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply required that, before convicting a defendant, the jury be satisfied of the defendant's guilt beyond a reasonable doubt from all the evidence in the case.

Note: The court may properly refuse defendant's requested instruction that where proof is based on circumstantial evidence, the proof must exclude every reasonable hypothesis other than that of guilt.

The court will now instruct the jury in greater detail as to the difference between direct and circumstantial evidence.

Direct evidence is evidence which, if believed, proves the existence of a fact in issue without any inference or presumption, while circumstantial evidence is evidence which does not directly prove the existence of a fact in issue, but gives rise to a reasonable inference that such fact exists.

Now to illustrate the difference between direct and circumstantial evidence, let us assume that the fact in issue in a case is whether Jack shot and killed Mary. If a witness testified that he/she personally saw Jack shoot Mary, then we would say we have direct evidence of that fact. On the other hand, if a witness testifies that an hour before Mary was shot, he/she sold Jack the pistol, which has been identified as the murder weapon, and it was found in the possession of Jack shortly after the murder, we would say that we have circumstantial evidence of the fact that Jack did shoot Mary. That is a simple illustration.

And, of course, you must be satisfied beyond a reasonable doubt from the evidence, whether it be direct or circumstantial, that the defendant in this case committed the crime set forth in the indictment, that is, every element of the crime that I have already described to you.

B. Authorities:

Holland v. United States, 348 U.S. 121 (1954).

Wall v. United States, 384 F.2d 758 (10th Cir. 1967).

Thurmond v. United States, 377 F.2d 448 (5th Cir. 1967).

United States v. Woodner, 317 F.2d 649 (2d Cir.), cert. denied, 375 U.S. 903 (1963).

8-4.506 Judicial Notice

A. Instructions:

The court may take judicial notice of public acts, places, facts and events which the court regards as matters of common knowledge. When the court states that it takes judicial notice of a particular fact, the jury must, unless otherwise instructed, regard that fact as included in the evidence and proven.

B. Authorities:

Devitt and Blackmar §11.11.

33 F.R.D. at 570.

United States v. Schneiderman, 106 F. Supp. 906 (S.D. Cal. 1952).

Cf. Olson v. United States, 292 U.S. 246 (1934).

8-4.507 Stipulations

A. Instructions:

A stipulation is an agreed statement of facts between the attorneys for the prosecution and the defendant, and the jury should regard such stipulated facts as undisputed evidence.

B. Authorities:

Devitt and Blackmar §11.11.

33 F.R.D. at 570.

United States v. Rodriguez, 241 F.2d 463 (7th Cir. 1957).

United States v. Schor, 418 F.2d 26 (2d Cir. 1969).

8-4.508 Indictment/Information

A. Instructions:

An indictment is merely the formal instrumentality or machinery provided by the law for bringing a person to trial; it is not evidence. Guilt can in no way be presumed to arise because of the indictment; guilt must be proved by competent evidence beyond a reasonable doubt. Therefore, in determining your verdict in this case, you must give no consideration whatever to the fact that the defendants have been indicted by a Grand Jury.

B. Authorities:

Devitt and Blackmar §13.02.

United States v. Beck, 59-2 U.S.T.C. 9486 (1959), aff'd in part and rev'd in part on other grounds, 298 F.2d 622 (9th Cir. 1962).

Gaunt v. United States, 184 F.2d 284, 292 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951).

Banks v. United States, 204 F.2d 666, 668 (8th Cir. 1953).

United States v. Senior, 274 F.2d 613 (7th Cir. 1960).

Garner v. United States, 244 F.2d 575 (6th Cir.), cert. denied, 355 U.S. 832 (1957).

8-4.509 Guilty Plea of Co-Defendant

A. Instructions:

The Court instructs the jury that the fact that a codefendant has pleaded guilty in a former indictment involving these defendants, and which indictment has been dismissed without prejudice, is not evidence of guilt on the part of those defendants still on trial, and you are instructed that such fact gives rise to no inference whatever against any of these defendants.

B. Authority:

Devitt and Blackmar §11.10.

8-4.510 Statements and Arguments of Counsel

A. Instructions:

Statements and arguments of counsel are not evidence. They are only intended to assist the jury in understanding the evidence and the contentions of the parties. During the course of the trial it often becomes the duty of counsel to make objections, and for the court to rule on them in accordance with the law. The jury should not consider or be influenced by the fact that such objections have been made.

B. Authorities:

33 F.R.D. at 571.

Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950), cert. denied, 340 U.S. 917 (1951).

United States v. Achilli, 234 F.2d 797 (7th Cir. 1956), aff'd, 353 U.S. 373 (1957).

8-4.511 Inadmissible and Stricken Evidence

A. Instructions:

At various times throughout the trial, the court has ordered answers or remarks made by certain witnesses to be stricken, and also certain other items of evidence or purported evidence have been stricken. You are instructed that any testimony, document or other matter which the court has ordered to be stricken is not to be considered by you in any way in your deliberations, since such matters do not constitute evidence in the case and can have no bearing upon the questions to be determined by you.

B. Authorities:

Devitt and Blackmar §11.11.

33 F.R.D. at 571.

United States v. Beck, 59-2 U.S.T.C. 9486 (1959), aff'd in part and rev'd in part on other grounds, 298 F.2d 622 (9th Cir. 1962).

Fahning v. United States, 299 F.2d 579 (5th Cir. 1962).

8-4.512 Comments of the Court on Evidence

A. Instructions:

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

B. Authorities:

Devitt and Blackmar §10.10.

United States v. Murdock, 290 U.S. 389 (1933).

Bacino v. United States, 316 F.2d 11 (10th Cir.), cert. denied, 375 U.S. 831 (1963).

Ray v. United States, 367 F.2d 258 (8th Cir. 1966), cert. denied, 386 U.S. 913 (1967).

8-4.513 Court's Questions to Witnesses

A. Instructions:

During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions may have related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

B. Authorities:

Devitt and Blackmar §10.11.

Bradley v. United States, 338 F.2d 493 (9th Cir. 1964).

United States v. Lewis, 338 F.2d 137 (6th Cir. 1964), cert. denied, 380 U.S. 978 (1965).

Ray v. United States, 412 F.2d 1052 (9th Cir. 1969).

8-4.514 Court's Comments to Counsel

A. Instructions:

It is the duty of the court to admonish an attorney who, out of zeal for his/her cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the court may have been addressed during the trial of this case.

B. Authorities:

Devitt and Blackmar §10.12.

Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

8-4.515 Conferences Between Court and Counsel

A. Instructions:

At many points in the trial, conferences have been held between counsel and the court in the courtroom but out of the hearing of the jury. This method has been employed for the purpose of sparing the jury the burden of making frequent exits from and re-entries into the courtroom to permit counsel and the court to discuss legal matters which could not properly be discussed within the hearing of the jury. Such conferences are entirely proper and are not to be construed as indicating that any matter whatever is being improperly withheld from the jury by either the government or the defense or by the court.

B. Authority:

United States v. Beck, 59-2 U.S.T.C. 9486 (1959), aff'd in part and rev'd in part on other grounds, 298 F.2d 622 (9th Cir. 1962).

8-4.516 Publicity

A. Instructions:

The jury should decide this case solely on the evidence presented here in the courtroom. You must completely disregard any press, television or radio reports which you may have read, seen or heard. Such reports are not evidence; therefore, you should not be influenced in any manner whatever by such publicity.

B. Authorities:

33 F.R.D. at 603.

Marshall v. United States, 360 U.S. 310 (1959).

Richard v. United States, 315 F2d 331 (1st Cir. 1963).

C. Note: If there has been possible prejudicial publicity, the judge may be required to question the jury in addition to giving the above warning. See United States v. Rizzo, 409 F.2d 400 (7th Cir.), cert.

denied, 396 U.S. 911 (1969); Margoles v. United States, 407 F.2d 727 (7th Cir.), cert. denied, 396 U.S. 833 (1969).

8-4.517 Credibility of Witnesses-General

A. Instructions:

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness's ability to observe the matters as to which he/she has testified and whether he/she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, an innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

B. Authorities:

Devitt and Blackmar §17.01.

Aetna Life Ins. Co. v. Ward, 140 U.S. 76 (1891).

Farrell v. United States, 321 F.2d 409 (9th Cir. 1963), cert. denied, 375 U.S. 992 (1964).

United States v. Dichiarinte, 385 F.2d 333 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968).

Hoffa v. United States, 385 U.S. 293 (1966).

C. Instructions:

In determining the facts, you must of necessity depend a great deal upon the testimony of the witnesses; therefore, the law has made you also the judges of the weight and credibility to be attached to the evidence given by every witness. In considering the testimony of a witness, you may consider, among other things: his/her manner on the witness stand; the way in which he/she testified; his/her possible interest in the subject matter, or outcome of the case; his/her apparent candor and fairness, or lack thereof; the consistency or inconsistency of his/her statements; his/her bias or prejudice, if such is apparent; his/her intelligence; his/her opportunity of knowing the facts; whether or not his/her testimony is supported or contradicted by other witnesses; the reasonableness or unreasonableness of the story told by the witness; and finally, all the facts and circumstances which may reasonably aid you in judging the truth or falsity of the testimony of the witness.

D. Authorities:

United States v. Achilli, No. 53 CR 154 (N.D. Ill. 1955), aff'd, 234 F.2d 797 (7th Cir. 1956), aff'd, 353 U.S. 373 (1957).

Craig v. United States, 81 F.2d 816, 828 (9th Cir. 1936).

8-4.518 Interested Witnesses--General

A. Instructions:

Where a witness has a direct personal interest in the result of a case, the temptation is strong to color, pervert, or withhold the facts. The deep personal interest which he/she may have in the result of the case should be considered by the jury in weighing the evidence, and in determining how far, or to what extent, if at all, it is worthy of credit or belief.

B. Authority:

United States v. McClanahan, No. 15244 (N.D. Tex. 1959), aff'd, 292 F.2d 630 (5th Cir.), cert. denied, 368 U.S. 913 (1961).

8-4.519 Testimony of Informer

A. Instructions:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for a personal advantage, or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by his/her interest, or his/her prejudice against defendant.

B. Athorities:

Devitt and Blackmar §17.02.

33 F.R.D. at 579-80.

On Lee v. United States, 343 U.S. 747 (1952).

Hoffa v. United States, 385 U.S. 293 (1966).

United States v. Masino, 275 F.2d 129 (2d Cir. 1960).

Golliher v. United States, 362 F.2d 594 (8th Cir. 1966).

8-4.520 Testimony of Perjurer

A. Instructions:

The testimony of an admitted perjurer should always be considered with caution and weighed with great care.

B. Authorities:

Devitt and Blackmar §17.05.

United States v. Ross, 322 F.2d 306 (4th Cir. 1963), cert. denied, 375 U.S. 970 (1964).

8-4.521 Testimony of Accomplice

A. Instructions:

An accomplice is one who united with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the criminal act charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence. However, the jury should keep in mind that such testimony is to be received with caution and weighed with great care. You should not convict a defendant upon the unsupported testimony of an accomplice, unless you believe the unsupported testimony beyond all reasonable doubt.

B. Authorities:

Devitt and Blackmar §17.06.

On Lee v. United States, 343 U.S. 747 (1952).

Tillery v. United States, 411 F.2d 644 (5th Cir. 1969).

McMillen v. United States, 386 F.2d 29 (1st Cir. 1967), cert. denied, 390 U.S. 1031 (1968).

United States v. George, 319 F.2d 77 (6th Cir.), cert. denied, 375 U.S. 942 (1963).

8-4.522 Insignificance of Quantity of Witnesses

A. Instructions:

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. The jury should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. The jury may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

B. Authority:

33 F.R.D. at 574.

8-4.523 Defendant as a Witness

A. Instructions:

The court instructs the jury that the defendant is a competent witness in his/her own behalf, and his/her testimony should not be disbelieved merely because he/she is the defendant. However, in weighing his/her testimony, the jury should consider the fact that the defendant has a special interest in the outcome of his/her trial.

B. Authorities:

United States v. Sullivan, 329 F.2d 755 (2d Cir.), cert. denied, 377 U.S. 1005 (1964).

Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964), cert. denied, 380 U.S. 984 (1965).

C. Instructions:

The law does not compel a defendant in a criminal action to take the witness stand and testify. A defendant who wishes to testify, however, is a competent witness. In this case, the defendants testified. There was no obligation or compulsion of them to do so, when they take the stand and do testify, they are to be tested by the same rules and guides that any other witnesses are tested by. You know that, of course, the defendants are interested, vitally interested, in the outcome of their case. That is not to say that anyone who is interested in the case would fail to tell the truth, but it is a fact you must take into consideration. Persons who are interested in the outcome of their case might see things differently. Many people do it, sometimes consciously and sometimes subconsciously. We often see things differently when we are interested in or have participated in an event.

D. Authorities:

Raffel v. United States, 271 U.S. 494, 497 (1926).

Taylor v. United States, 390 F.2d 278, 284-85 (8th Cir.), cert. denied, 393 U.S. 869 (1968).

United States v. Sullivan, 329 F.2d 755, 756-57 (2d Cir.), cert. denied, 377 U.S. 1005 (1964).

8-4.524 Effect of a Conviction of a Felony

A. Instructions:

Evidence of a defendant's previous conviction of a felony is to be considered by the jury, only insofar as it may affect the credibility of the defendant as a witness, and must never be considered as evidence of guilt of the crime for which the defendant is on trial.

B. Authorities:

Devitt and Blackmar §17.13.

Michelson v. United States, 335 U.S. 469 (1948).

Spencer v. Texas, 385 U.S. 554 (1967).

8-4.525 Evidence Regarding Other Offenses and Other Trials

A. Instructions:

You have heard evidence regarding the shooting (assault) of (name) by the defendant. You are not, however, authorized to convict the defendant of the crime(s) of murder (manslaughter, assault, etc.) even if you believe beyond a reasonable doubt that he/she committed such crime(s). This evidence was admitted solely for the purpose of its tendency, if any, to prove the existence of the criminal acts alleged in the indictment (e.g., 18 U.S.C. §§241, 242, 245).

You have also heard evidence that the defendant has been tried and acquitted on a charge of first degree murder (manslaughter, assault, etc.). The crime of first degree murder (manslaughter, assault, etc.) raises issues of law and fact which are not at issue in this case, and are therefore not to be a part of your deliberations. Accordingly, I charge you that as sole judges of fact in this case you are in no way bound by this prior verdict in your deliberations as to the facts before you in this case.

B. Authorities:

Hoag v. New Jersey, 356 U.S. 464 (1958).

Serio v. United States, 203 F.2d 576 (5th Cir.), cert. denied, 346 U.S. 887 (1953).

United States v. Feinberg, 383 F.2d 60 (2d Cir. 1967).

Ferina v. United States, 340 F.2d 837 (8th Cir.), cert. denied, 381 U.S. 902 (1965).

8-4.526 Evidence of Defendant's Character and Reputation

A. Instructions:

Defendant has introduced evidence of his/her good reputation in his/her community prior to the indictment in this case. Such evidence may indicate to the jury that it is improbable that a person of good character would commit the crime charged. Therefore, the jury should consider this evidence along with all the other evidence in the case in determining the guilt or the innocence of the defendant.

The circumstances may be such that evidence of good character may alone create a reasonable doubt of defendant's guilt, although without it the other evidence would be convincing. However, evidence of good reputation should not constitute an excuse to acquit the defendant, if the jury, after weighing all the evidence, including the evidence of good character, is convinced beyond a reasonable doubt that defendant is guilty of the crime charged in the indictment.

B. Authorities:

33 F.R.D. at 583.

Edgington v. United States, 164 U.S. 361 (1896).

Michelson v. United States, 335 U.S. 469 (1948).

Cf. Black v. United States, 309 F.2d 331 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963).

8-4.527 Defendant's Failure to Testify

A. Instructions:

A defendant cannot be compelled to testify, and the jury must not draw a presumption of guilt or any inference against the defendant because he/she did not testify.

B. Authorities:

Devitt and Blackmar §17.14.

33 F.R.D. at 581.

Wilson v. United States, 149 U.S. 60 (1893).

8-4.528 Inconsistent Statements or Conduct

A. Instructions:

Evidence that at some other time a witness, other than the accused, has said or done something, or has failed to say or do something, which is inconsistent with the witness's testimony at the trial, may be considered by the jury for the sole purpose of judging the credibility of the witness; but may never be considered as evidence or proof of the truth of any such statement.

Where, however, the witness is a defendant on trial in the case and, by such statement or other conduct, the defendant admits some fact against his/her interest, then such statement or other conduct, if knowingly made or done, may be considered as evidence of the truth of the facts so admitted, as well as for the purpose of judging the credibility of the defendant as a witness.

B. Authority:

Devitt and Blackmar §17.16.

8-4.529 Extra-Judicial Statements--Confessions and Admissions--Voluntary

A. Instructions:

Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of court, and after a crime has been committed, should always be considered with caution and weighed with great care. And all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done.

A statement or act or omission is "knowingly" made or done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

In determining whether any statement or act or omission claimed to have been made by a defendant outside of court, and after a crime has been committed, was knowingly made or done, the jury should consider the age, sex, training, education, occupation, as well as the physical and mental condition of the defendant, his/her treatment while in custody or under interrogation, as shown by the evidence in the case, and all other circumstances in evidence surrounding the making of the statement or act or omission, including whether, before the statement or act or omission was made or done, the defendant had been told and understood: that he/she was not obligated or required to make or do the statement or act or omission claimed to have been made or done by him/her; that any statement or act or omission which he/she might make or do could be used against him/her in court; that he/she was entitled to the assistance of counsel before making any statement, either oral or in writing, or before doing any act or omission; and that if he/she was without money or means to retain counsel of his/her own choice, an attorney would be appointed to advise and represent him/her free of cost or obligation.

If the evidence in the case does not convince you beyond a reasonable doubt that a confession (admission) was made voluntarily and intentionally you should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that a confession (admission) was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the confession (admission).

B. Authorities:

Devitt and Blackmar §15.06.

Miranda v. Arizona, 384 U.S. 436 (1966).

Jackson v. Denno, 378 U.S. 368 (1964).

Opper v. United States, 348 U.S. 84 (1954).

Coyote v. United States, 380 F.2d 305 (10th Cir.), cert. denied, 389 U.S. 992 (1967).

8-4.530 Extra-Judicial Statements--Confessions and Admissions--Involuntary

A. Instructions:

If it appears from the evidence in the case that a confession (admission) would not have been made but for some threat of harm, or some offer or promise of immunity from prosecution, or leniency in punishment, or other reward, such a confession should not be considered as having been voluntarily made because of the danger that a person accused might be persuaded by the pressure of hope or fear to confess as facts things which are not true.

If the evidence in the case leaves the jury with a reasonable doubt as to whether a confession was voluntarily made, then the jury should disregard it entirely.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

B. Authorities:

Devitt and Blackmar §15.07.

Haynes v. Washington, 373 U.S. 503 (1963).

Miranda v. Arizona, 384 U.S. 436 (1966).

United States v. Moriarty, 375 F.2d 901 (7th Cir.), cert. denied, 388 U.S. 911 (1967).

8-4.531 Exculpatory Statements--Later Shown False

A. Instructions:

Conduct of a defendant, including statements knowingly made and acts knowingly done upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury, with all the other evidence in the case, in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his/her innocence, and this explanation or statement is later shown to be false, the jury may consider

whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his/her innocence.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within the province of the jury.

A statement or an act is "knowingly" made or done if made or done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

B. Authorities:

Devitt and Blackmar §15.12.

Opper v. United States, 348 U.S. 84 (1954).

Rizzo v. United States, 304 F.2d 810 (8th Cir.), cert. denied, 371 U.S. 890 (1962).

8-4.532 Accusatory Statements

A. Instructions:

Evidence has been presented that statements accusing the defendant of the crime charged in the indictment were made in his/her presence at a time when he/she was not under arrest or in custody and that such statements were neither denied nor objected to by him/her. If the jury finds that the defendant actually heard and understood the accusatory statements and that they were made under such circumstances that the defendant might be expected to have denied them if they were not true, then the jury should consider whether the defendant's silence was an admission of the truth of the statements.

However, once in custody, the law does not require a defendant to make any reply whatever to any accusatory statement made to him/her, or in his/her presence, either orally or in writing. So neither the accusatory

statement, nor any failure to make reply thereto, is evidence of any kind against the accused. That is to say, neither the accusatory statement, nor any failure to reply thereto, can create any presumption or permit any inference of guilt.

B. Authorities:

Devitt and Blackmar §§15.13, 15.14.

Sparf v. United States, 156 U.S. 51 (1895).

Arpan v. United States, 260 F.2d 649 (8th Cir. 1958).

Osborne v. United States, 371 F.2d 913 (9th Cir.), cert. denied, 387 U.S. 946 (1967).

8-4.533 Confessions and Admissions of Co-Defendant

A. Instructions:

A voluntary confession, admission or incriminatory statement made, or act done by one defendant may be used as evidence only against that defendant. Such acts or statements may not be considered as evidence against a co-defendant who was not present and so did not see the act done or hear the statement made.

B. Authorities:

Devitt and Blackmar §§15.16, 15.17.

33 F.R.D. at 590.

Bruton v. United States, 391 U.S. 123 (1968).

8-4.534 Expert Witnesses

A. Instructions:

In this case you have heard the testimony of expert witnesses based upon their analyses of certain books and records which have been introduced in evidence. This class of testimony is proper and competent evidence concerning matters involving knowledge, skill or experience in a subject which is not within the realm of ordinary evidence of humankind

and which requires special training or study to understand. The law allows those skilled in special fields to express opinions and to say whether or not, according to their knowledge and experience, a fact may or may not exist.

Nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound by the testimony of experts, and the testimony of such experts is to be canvassed and weighed as that of any other witness. Just so far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called as an expert, and gives opinions upon a particular point, does not necessarily obligate the jury to accept his/her opinions as to what the facts are.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for that opinion.

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

B. Authorities:

33 F.R.D. at 595.

Salem v. United States Lines Co., 370 U.S. 31 (1962).

United States v. Johnson, 319 U.S. 503 (1943).

Sears, Roebuck & Co. v. Penn Central Co., 420 F.2d 560, 564 (1st Cir. 1970).

Jenkins v. United States, 307 F.2d 637 (D.C. Cir. 1962).

C. Instructions:

The court instructs the jury that in weighing expert testimony, it is important that you should consider whether the expert is in any way biased or prejudiced as shown by the evidence. You should also consider what skill, learning, education, experience and qualification in his/her profession the expert is shown to have.

D. Authorities:

United States v. Johnson, 319 U.S. 503 (1943).

Cave v. United States, 159 F.2d 464 (8th Cir.), cert. denied, 331 U.S. 847 (1947).

Gendelman v. United States, 191 F.2d 993 (9th Cir. 1951), cert. denied, 342 U.S. 909 (1952).

United States v. Skidmore, 123 F.2d 604, 609 (7th Cir. 1941), cert. denied, 315 U.S. 800 (1942).

Gleckman v. United States, 80 F.2d 394, 400 (8th Cir. 1935), cert. denied, 297 U.S. 709 (1936).

8-4.535 Summaries and Charts

A. Instructions:

Certain exhibits have been introduced and admitted in evidence; you are to consider them in the same manner as other evidence in the case. However, exhibits offered as evidence and not admitted by the court are not to be considered by you at all.

In this connection I charge you that there have been admitted in evidence certain exhibits variously referred to as schedules or summaries. Strictly speaking, these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they were admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose you are entitled to consider them.

B. Authorities:

United States v. Bernard, 287 F.2d 715 (7th Cir.), cert. denied, 366 U.S. 961 (1961).

Flemister v. United States, 260 F.2d 513, 516-517 (5th Cir. 1958).

Elder v. United States, 213 F.2d 876, 881 n.7 (5th Cir.), cert. denied, 348 U.S. 901 (1954).

8-4.536 Government Not Bound by Testimony of Witnesses

A. Instructions:

You are instructed that the government is not bound by the testimony of witnesses which it calls to the stand in a criminal case. The government is not always in a position to choose its witnesses.

The government may properly strive to prove that the truth is the opposite of what its witness says. The government may offer part of what a witness says as the truth and contend against a part that it does not consider true. Similarly you, Members of the Jury, may accept a part of what a witness says, and you may reject another part of what a witness says. The demeanor of a witness--that is, his/her appearance--may be taken into account by you in determining where the truth lies in a witness' testimony. By demeanor is meant such things as whether a witness appeared to be hostile, reluctant, evasive, obtuse, timid, or deceitful, or on the contrary, appeared to be impartial, straightforward, unconcealing, intelligent, confident, or guileless.

B. Authorities:

United States v. Allied Stevedoring Corp., 241 F.2d 925, 932-934 (2d Cir. 1957).

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

London Guarantee & Accident Co. v. Woelfle, 83 F.2d 325 (8th Cir. 1936).

United States v. Palese, 133 F.2d 600 (3d Cir. 1943).

United States v. Reginelli, 133 F.2d 595 (3d Cir.), cert. denied, 318 U.S. 783 (1943).

United States v. Gordon, 242 F.2d 122, 126 (3d Cir.), cert. denied, 354 U.S. 921 (1957).

United States v. Lefkowitz, 173 F. Supp. 932, 934 (E.D. Pa. 1959).

8-4.537 Impeachment--Inconsistent Statements--Prior Felony

A. Instructions:

The court instructs the jury that the testimony of a witness may be discredited or impeached by showing that he/she previously made statements which are inconsistent with his/her present testimony. The earlier contradictory statements are admissible only to impeach the credibility of the witness and not to establish the truth of these statements. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has been impeached.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness, or give it such credibility as you may think it deserves.

And, you are further instructed that the testimony of a witness may be discredited or impeached by showing that he/she has been convicted of a felony. Prior conviction does not render a witness incompetent to testify, it merely reflects on his/her credibility. It is the province of the jury to determine what weight, if any, would be given to such prior conviction as impeachment.

B. Authorities:

Devitt and Blackmar §§17.08, 17.09.

United States v. Kahn, 381 F.2d 824 (7th Cir.), cert. denied, 389 U.S. 1015 (1967).

United States v. Santos, 372 F.2d 177 (2d Cir. 1967).

Medina v. United States, 254 F.2d 228 (9th Cir.), cert. denied, 358 U.S. 846 (1958).

Pinkney v. United States, 380 F.2d 882 (5th Cir. 1967), cert. denied, 390 U.S. 908 (1968).

United States v. Barnes, 319 F.2d 290 (6th Cir. 1963).

C. Instructions:

A witness may be discredited or impeached by evidence that the general reputation of the witness for truth and veracity is bad in the community where the witness now resides or has recently resided.

When an attempt is made to impeach a witness on the basis of truth and veracity the jury should consider such evidence along with all evidence of good reputation as to those traits of character.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

Evidence that the witness' reputation for truth and veracity has not been discussed or, if discussed, those traits of the witness' character have not been questioned, may be sufficient to warrant an inference of good reputation as to those traits of character.

D. Authorities:

Devitt and Blackmar §§17.10, 17.11.

Michelson v. United States, 335 U.S. 469 (1948).

United States v. Barnes, 319 F.2d 290 (6th Cir. 1963).

Black v. United States, 309 F.2d 331 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963).

Cf. Greer v. United States, 245 U.S. 559 (1918).

8-4.600 MECHANICS OF VERDICT

8-4.601 Deliberations--Jury's Responsibility--Verdict

A. Instructions:

Upon retiring to the jury room you will select one of your number as foreperson who will preside over your deliberations. During the course of

your deliberations you should assume the attitude of judges of the facts rather than that of partisans or advocates. Your highest contribution to the administration of justice is to ascertain the true facts in this case and return a verdict accordingly.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for himself/herself but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

There is nothing peculiarly different in the way a jury should consider the evidence in a criminal case, from that in which all reasonable persons treat any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence in the case for only those purposes for which it has been admitted, and give it a reasonable and fair construction, in the light of your common knowledge of the natural tendencies and inclinations of human beings.

If the accused is proved guilty beyond reasonable doubt, say so. If not so proved guilty, say so.

Keep constantly in mind that it would be a violation of your sworn duty to base a verdict of guilty upon anything other than the evidence in the case; and remember as well that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

Remember also that the question before you can never be: Will the government win or lose the case? The government always wins when justice is done, regardless of whether the verdict is guilty or not guilty.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

B. Authorities:

Devitt and Blackmar §§18.01, 18.03.

33 F.R.D. at 605.

United States v. Teresa, 420 F.2d 13 (4th Cir. 1969), cert. denied, 397 U.S. 1063 (1970).

Shepard v. United States, 160 F. 584 (8th Cir. 1908).

Cf. Egan v. United States, 5 F.2d 267 (D.C. Cir. 1925).

8-4.602 Punishment Not to Be Considered

A. Instructions:

In determining the guilt or innocence of the defendant the jury should not give any consideration to the matter of punishment, for this question is exclusively the responsibility of the judge.

B. Authorities:

33 F.R.D. at 608.

Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958).

McClanahan v. United States, 292 F.2d 630 (5th Cir.), cert. denied, 368 U.S. 913 (1961).

8-4.603 Verdict as to Accused Only

A. Instructions:

You are here to determine the guilt or innocence of the accused from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the accused, you should so find, even though you may believe one or more other persons are also guilty. But if any reasonable doubt remains in your mind after impartial consideration of all the evidence in the case, you should acquit the accused.

B. Authorities:

Devitt and Blackmar §11.06.

Grell v. United States, 112 F.2d 861 (8th Cir. 1940).

Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938).

8-4.604 Verdict--Consider Each Defendant Separately

A. Instructions:

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants. Each defendant is entitled to have his/her case determined from evidence as to his/her own acts and statements and conduct, and any other evidence in the case which may be applicable to him/her.

B. Authority:

Devitt and Blackmar §11.09.

8-4.605 Verdict--Single Defendant, Single Count

A. Instructions:

The indictment charges the defendant with the crime of _____ _____, which has been defined in these instructions. The defendant is on trial only for the crime charged in the indictment, and the jury must decide whether the government has proven that he/she is guilty, beyond a reasonable doubt, of that crime alone.

B. Authority:

33 F.R.D. at 606.

8-4.606 Verdict--Single Defendant, Multiple Count

A. Instructions:

The defendant is charged with a separate crime in each count of the indictment. Each crime and the evidence pertaining to it should be

considered separately by the jury, and a separate verdict should be returned as to each count. Defendant's guilt or innocence of the crime charged in one count should not affect the jury's verdict on any other count.

B. Authorities:

Devitt and Blackmar §11.07.

33 F.R.D. at 606.

United States v. Nichols, 322 F.2d 681 (7th Cir. 1963), cert. denied, 375 U.S. 967 (1964).

Glenn v. United States, 406 F.2d 658 (D.C. Cir. 1968).

8-4.607 Verdict--Multiple Defendant, Multiple Count

A. Instructions:

Defendants have been charged with separate crimes in the various counts of the indictment. The jury should give separate consideration and render separate verdicts with respect to each defendant and to each count. Each defendant is entitled to have his/her guilt or innocence as to each of the crimes charged determined from his/her own conduct and from the evidence which applies to him/her as if he/she were being tried alone. If the jury finds that a defendant is guilty beyond a reasonable doubt of any one of the crimes charged in the indictment a verdict of guilty should be returned as to him/her. The guilt or innocence of any one defendant of any of the crimes charged should not influence the jury's verdict regarding the other defendants. The jury may find any one or more of the defendants guilty or not guilty.

B. Authorities:

Devitt and Blackmar §11.08.

33 F.R.D. at 606-07.

Blumenthal v. United States, 332 U.S. 539 (1947).

United States v. Agueci, 310 F.2d 817 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963).

8-4.608 Allen Charge--Disagreement Among Jurors

A. Instructions:

In a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusions of others, you should examine the questions submitted with proper regard and deference for the opinions of each other, and you should listen to each other's opinions with a disposition to be convinced. It is your duty to decide the case if you can conscientiously do so. If a much larger number of jurors favor conviction, a dissenting juror should consider the reasonableness of his/her doubt when it makes no impression upon the mind of other jurors who are equally intelligent and impartial and who have heard the same evidence. If on the other hand, the majority favors acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of their judgment.

If you should fail to agree on a verdict the case must be retried. Any future jury must be selected in the same manner and from the source as you have been chosen, and there is no reason to believe that the case would ever be submitted to twelve persons more competent to decide it, or that the case can be tried any better or more exhaustively than it has been here, or that more or clearer evidence could be produced on behalf of either side.

You may now retire and reconsider the evidence in the light of the Court's instructions.

B. Authorities:

Devitt and Blackmar §18.14.

33 F.R.D. at 611-12.

Allen v. United States, 164 U.S. 492 (1896).

Green v. United States, 309 F.2d 852 (5th Cir. 1962).

Breeze v. United States, 398 F.2d 178 (10th Cir. 1968).

DETAILED TABLE OF CONTENTS FOR CHAPTER 5

8-5.000 JURY INSTRUCTIONS SPECIFIC

8-5.100 CONSPIRACY AGAINST RIGHTS OF CITIZENS--18 U.S.C. §241

8-5.101 Pertinent Portion of Statute

A. Instructions:

The defendant(s) in this case (is/are) charged in Count _____ of the Indictment with having violated 18 U.S.C. §241, a statute enacted many years ago to help secure the rights guaranteed by the Constitution and laws of the United States.

The words of this statute that are pertinent to this case read as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States [they shall be guilty of a crime against the United States].

B. Authority:

18 U.S.C. §241.

8-5.102 Elements of Offense

A. The offense described by 18 U.S.C. §241 has four elements:

1. Two or more persons must conspire, that is, there must be a conspiracy.

2. The purpose of their conspiracy must be to injure, oppress, threaten or intimidate one or more persons.

3. One or more of the intended victims must be a citizen of the United States.

4. The conspiracy must be directed at the free exercise or enjoyment by such a United States citizen of a right or privilege secured by the Constitution or laws of the United States.

If you find from the evidence beyond a reasonable doubt that these four elements have been established, then proof of the conspiracy charged in Count One of the Indictment is complete. I will now undertake to explain these elements in more detail.

B. Authorities:

United States v. Guest, 383 U.S. 745 (1966).

Unites States v. Price, 383 U.S. 787 (1966).

Wilkins v. United States, 376 F.2d 552, 562 (5th Cir.), cert. denied, 389 U.S. 964 (1967).

8-5.103 Definition of Conspiracy

A. Instructions:

The first element of this offense requires proof of the existence of a conspiracy. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus, a conspiracy might be called a kind of partnership for criminal purposes in which each member becomes the agent of every other member. The gist of the offense is the combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they have associated with each other, and they have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

What the evidence must show to establish that a conspiracy did exist is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

However, the evidence need not show that the members of an alleged comspiracy entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by

which the object or purpose was to be achieved. Ordinarily only the results of a conspiracy rather than the agreement are observable.

Proof of a conspiracy is almost a matter of inference deduced from the acts of the persons accused which are done in pursuance of an apparent criminal purpose. If the evidence establishes beyond a reasonable doubt that two or more persons did pursue by their acts the same object by the same or similar means, one performing one part of the act and the other another part of the act, so as to complete it with a view of attaining the object or objects they are pursuing, this is sufficient to constitute proof of a conspiracy.

B. Authorities:

Devitt and Blackmar §27.04.

United States v. General Motors Corp., 384 U.S. 127 (1966).

Pereira v. United States, 347 U.S. 1 (1954).

United States v. Morado, 454 F.2d 167,175 (5th Cir.), cert. denied, 406 U.S. 917 (1972).

United States v. Warner, 441 F.2d 821, 830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

United States v. Varelli, 407 F.2d 735, 741-44 (7th Cir. 1969).

United States v. Perez, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

Rodriguez v. United States, 373 F.2d 17 (5th Cir. 1967).

8-5.104 Membership in Conspiracy

A. Instructions:

A person may become a member of a conspiracy without full knowledge of all the details of the conspiracy. It need not be shown that a person knew all of (his/her) co-conspirators in order to prove that (he/she) became a member of the conspiracy. Nor need it be shown that each conspirator joined the conspiracy at the time of its formation. One who knowingly and willfully joins an existing conspiracy is charged with the same responsibility as if (he/she) had been one of the instigators of the conspiracy. On the other hand, a person who had no knowledge of a

conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, became a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids, or fail to do some act the law requires to be done. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, then (he/she) thereby becomes a knowing and willful participant and a co-conspirator.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury members are not to consider what others may have done or said. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to (his/her) own conduct, what (he himself/she herself) said or did, or what (he himself/she herself) failed to do or say.

B. Authorities:

Devitt and Blackmar §27.05.

United States v. Falcone, 311 U.S. 205, 210 (1940).

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

Blumenthal v. United States, 332 U.S. 539 (1947).

United States v. Warner, 441 F.2d 821, 830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

United States v. McGann, 431 F.2d 1104, 1107 (5th Cir. 1970), cert. denied, 401 U.S. 919 (1971).

Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969).

8-5.105 Membership in Conspiracy by Acquiescence

A. Instructions:

The mere passive acquiescence of the defendant in the misconduct of another does not in itself make the defendant a co-conspirator. On the other hand, the defendant's acquiescence in the misconduct of another may indicate the defendant's intent to become a party to the conspiracy. If you find here that a defendant acquiesced in the misconduct of another, and if you further find that he/she knew in a general way of the conspiracy, then you may infer that defendant aided the conspiracy and that he/she entered into an express or implied agreement with the conspirator.

B. Authorities:

Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957)

Luteran v. United States, 93 F.2d 395, 400 (8th Cir. 1937), cert. denied, 303 U.S. 644 (1938).

Burkhardt v. United States, 13 F.2d 841, 842 (6th Cir. 1926).

8-5.106 Responsibility for Acts of Co-Conspirator

A. Instructions:

If and when it appears from the evidence, beyond a reasonable doubt, that a conspiracy did exist and that a defendant was one of the members of the conspiracy, then the acts thereafter knowingly done, and the statements thereafter knowingly made, by any person also found to be a member of the conspiracy may be considered by the jury as evidence in the case as to every defendant found to have been a member of the conspiracy, even though those acts and statements may have occurred in the absence, and even without the knowledge, of the defendant, provided these acts or statements were knowingly made and done during the continuance or the life of the conspiracy and in furtherance of an object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and did not hear the statement made.

B. Authorities:

Devitt and Blackmar §27.06.

Lutwak v. United States, 344 U.S. 604, 615-20 (1953).

Krulewitch v. United States, 336 U.S. 440, 443-44 (1949).

United State v. Perez, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

United States v. Blanchette, 453 F.2d 859, 860 (5th Cir.), cert. denied, 417 U.S. 959 (1972).

United States v. Warner, 441 F.2d 821,830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

United States v. Harrell, 436 F.2d 606, 613-14 (5th Cir. 1970), cert. denied, 409 U.S. 849 (1972).

8-5.107 Purpose of Conspiracy

A. Instructions:

The second element of the offense is that the plan of the conspirators be to injure, oppress, threaten or intimidate one or more citizens of the United States. The words "injure," "oppress," "threaten" or "intimidate" are not used in any technical sense, but may cover a variety of conduct intended to harm, frighten or inhibit the free action of other persons. The words embrace whatever overcomes the will of the person against whom the alleged intimidation or oppression is directed and induces that person to do what he/she does not wish to do. To threaten or intimidate does not require a threat of physical force or the intimidation of physical fear.

Suffice it to say that the type of conduct described in the Indictment here, (describe) would constitute behavior which was injurious, oppressive, threatening or intimidating.

Thus, if it was a part of the plan of the conspiracy that such means as described in the Indictment be used in accomplishing its purpose, then the conspiracy was one to injure, oppress, threaten or intimidate within the meaning of the statute.

B. Authorities:

Posey v. United States, 416 F.2d 545 (5th Cir. 1969), cert. denied, 397 U.S. 946 (1970).

United States v. Guest, 383 U.S. 745 (1966).

8-5.108 Citizenship

The third element of the offense is present if one or more of the individuals against whom the conspiracy was directed was a United States citizen. Citizens of the United States include all persons born or naturalized in the United States, and subject to the jurisdiction thereof.

The statute and the Indictment do not mean, however, that the defendants must have had in mind a particular named individual whom they knew to be a citizen. It is sufficient if the conspiracy was aimed at (name or class), whom the defendants knew may have been a citizen.

Authorities:

Baldwin v. United States, 120 U.S. 678 (1887).

Powe v. United States, 109 F. 2d 147 (5th Cir.), cert. denied, 309 U.S. 679 (1940).

8-5.109 Rights and Privileges Protected

A. Instructions:

If you find (1) the existence of a conspiracy (2) whose plan was to injure, oppress, threaten or intimidate, (3) one or more American citizens, then you must consider the fourth element of the offense, the element of protected rights. This element requires proof that the conspiracy be directed toward the exercise or enjoyment of rights secured and protected by the Constitution or laws of the United States.

Count One of the Indictment charges that the named defendants and others conspired to injure, oppress, threaten or intimidate (name), in the exercise and enjoyment of his/her right secured by the Constitution and laws of the United States (right). Such conduct violates the (appropriate clause) of the United States Constitution.

If you find that the defendants, or any of them, (while acting under color of law), agreed or conspired with one another or with any other person with the specific intent to deprive (name) of (his/her) right (define) _____, then said conspiracy was directed at the free exercise or enjoyment of a right secured by the Constitution and laws of the United States.

In order for this element of the offense to be complete, you must find that a defendant, if and when he/she formed or joined the conspiracy, did so with the intent that the victim be deprived of (his/her) right (define) ____. It is not necessary, however, for you to find the alleged conspirators, the defendants, were thinking in constitutional or legal terms in order to find that they had the purpose to interfere with a right secured by the Constitution or laws of the United States. It is only necessary that the alleged conspirators had a purpose to interfere with a right which is in fact protected or secured by the Constitution or laws of the United States as I have previously instructed you. Furthermore, it is not necessary that the alleged conspirators knew that the rights they intended to interfere with were so secured, nor does the government have to prove that the sole purpose of the conspiracy was to interfere with the right as described in the Indictment. It is, however, necessary that the evidence establish beyond a reasonable doubt that it was part of the plan and purpose of the conspiracy that its members, in order to promote their objectives, would interfere with the rights accorded to the alleged victim.

Therefore, if you find beyond a reasonable doubt that the defendants agreed or conspired with one another or with any other person with specific intent to deprive ___(name)___ of the right ___(define)___ then the conspiracy was directed at the exercise or enjoyment of a right secured by the Constitution and laws of the United States, and the offense would be complete.

B. Authorities:

United States v. Price, 383 U.S. 787 (1966).

Anderson v. United States, 417 U.S. 211 (1974).

United States v. Ellis, 595 F.2d 154 (3rd Cir.), cert. denied, 444 U.S. 838 (1979).

8-5.110 Right to Liberty

A. Instructions:

You are instructed that the victim in this case, (name), in common with the defendants and all other persons, including each and every one of you, living under the protection of our Constitution, has the legal right at all times not to be deprived of any liberty secured or protected by the Constitution without due process of law.

One of the "liberties" secured to the victim involved in this case by the Constitution is the liberty to be free from unlawful attacks upon (his/her) person. It has always been the policy of the law to protect the physical integrity of every person from unauthorized violence.

"Liberty" thus includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state. Accordingly, a person in the custody of arresting state officials, such as police officers, has a constitutional right to be reasonably secure in (his/her) person and free from unwarranted physical mistreatment by such officers.

(Name) had been arrested and had thus been deprived of certain of (his/her) liberties, namely, the liberty to be free of arrest and to come and go without restraint. Nevertheless, (name) retained other liberties protected by the Constitution among which was the liberty to be free from unlawful attacks upon the physical integrity of (his/her) person. That right or liberty belongs to every arrestee, protecting (him/her) against physical assaults or beatings that are unlawful, that is, beyond the lawful authority of the officer to prevent the arrestee's escape or to protect (himself/herself) and others from injury.

B. Authorities:

Screws v. United States, 325 U.S. 91 (1945).

Logan v. United States, 144 U.S. 163 (1892).

Koehler v. United States, 189 F.2d 711 (5th Cir.), cert. denied, 342 U.S. 852 (1951).

Lynch v. United States, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

United States v. Price, 383 U.S. 787 (1966).

8-5.111 Color of Law

A. Instructions:

The term "color of law" means a power possessed by an officer by virtue of law, which invests (him/her) with authority to act. However, "color of law" means under pretense of law as well as under actual legal authority. If a police officer misuses the power invested in (him/her) by the law to deprive someone of (his/her) rights, (his/her) misconduct is "under color of law," even if the law forbids what (he/she) has done. Misconduct made possible because the police officer is clothed with the authority of the law is action "under color of law."

Consequently, I charge you that if you find that, at the time of the alleged incident, the defendant was a police officer in the (name) _____ Police Department and acted or purported to act as a police officer, then (name) _____ was acting under color of law as described in the Indictment.

I also charge you that if you find that (name) _____ acted as a willful participant in joint activity with the other defendant then (he/she) too was acting under color of law as described in the Indictment.

B. Authorities:

United States v. Classic, 313 U.S. 299, 326 (1941).

Screws v. United States, 325 U.S. 91, 107-13 (1945).

Williams v. United States, 341 U.S. 97, 99-100 (1951).

Monroe v. Pape, 365 U.S. 167, 172 (1961), overruled on other grounds, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

Crews v. United States, 160 F.2d 746, 750 (5th Cir. 1947).

United States v. Ramey, 336 F.2d 512, 514 (4th Cir. 1964), cert. denied, 379 U.S. 972 (1965).

United States v. Price, 383 U.S. 787, 794 (1966).

8-5.112 Death Resulting

A. Instructions:

In addition to the four elements of the offense which I have just instructed you on, there is an additional element alleged which the prosecution must prove. The Indictment alleges that _____(name)_____ died as a result of the acts committed by the defendants. In order for you to find the defendants guilty as charged in Count _____ of the Indictment you must find that the victim did in fact die as a result of the conspiracy of the defendants, if such a conspiracy existed.

It is not necessary for the prosecution to prove that the defendants intended _____(name)_____ to die as a result of their acts. Thus, if you find beyond a reasonable doubt that the defendants were engaged in a conspiracy to willfully deprive _____(name)_____ of a right secured by the Constitution or laws of the United States, and if you find that _____(name)_____ died as a result of the conspiracy, then the defendants would be guilty as charged in Count _____.

It is not necessary that you find that the defendants or any one of them committed any one of the overt acts alleged in the Indictment, but if you find that any acts by one or more of the defendants contributed to, or hastened the death of _____(name)_____, even if those acts alone would not have caused (his/her) death, then you may find the defendants guilty.

B. Authorities:

United States v. Hayes, 589 F.2d 811 (5th Cir.), cert. denied, 444 U.S. 847 (1979).

United States v. Guillette, 547 F.2d 743, 749 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977).

Rice v. State of Wisconsin, 424 F.2d 12, 14 (7th Cir.), cert. denied, 400 U.S. 836 (1970).

United States v. Hamilton, 182 F. Supp. 548, 550-51 (D. D.C. 1960).

United States v. McMahon, 339 F. Supp. 1092, 1093 (S.D. Tex. 1971).

8-5.113 Unnamed Conspirators

A. Instructions:

Count _____ of the Indictment charges a conspiracy among the defendants _____ (names) _____. A person cannot conspire with (himself/herself) and therefore you cannot find any defendant guilty unless you find beyond a reasonable doubt that (he/she) participated in a conspiracy as charged with at least one other person, whether a defendant or not, and whether named in the indictment or not. With this qualification, you may find any or all of the defendants guilty or not guilty, all on accordance with these instructions and the facts you find.

B. Authorities:

Worthington v. United States, 64 F.2d 936, 939 (7th Cir. 1933).

Pomerantz v. United States, 51 F.2d 911, 913 (3d Cir. 1931).

8-5.200 DEPRIVATION OF RIGHTS UNDER COLOR OF LAW--18 U.S.C. §242

8-5.201 Pertinent Portion of Statute and Background

A. Instructions:

The Indictment charges the defendant with having violated a statute of the United States--18 U.S.C. §242. I will read the pertinent part of that statute to you.

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of

the United States [shall be guilty of an offense against the United States].

This law was passed by Congress many years ago in order to carry into effect certain provisions of the Constitution of the United States.

This federal statutory provision was designed to insure that no person in the United States would be deprived of his/her liberty without due process of law by officers acting under color of any law, statute, ordinance, regulation or custom. It guarantees to every person the right not to be deprived of personal security, except in accordance with due process of law. It is a protection against encroachment by the state or federal governments, and their authorized officers and agents, upon the rights of any person under the Constitution and laws of the United States. In other words, Congress intended to provide that no agency of a government, no officer or agent by whom its powers are asserted and carried into execution, should deprive any person of rights guaranteed by the Constitution and laws of the United States.

Accordingly, a person is not only entitled to be tried and punished in the same manner that others accused of a crime are tried and punished, but (he/she) is entitled to, and has the right to protection from injury from the officers in charge of (him/her).

B. Authorities:

Monroe v. Pape, 365 U.S. 167, 171 (1961), overruled on other grounds, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

Williams v. United States, 341 U.S. 97 (1951).

Screws v. United States, 325 U.S. 91 (1945).

Koehler v. United States, 189 F.2d 711 (5th Cir.), cert. denied, 342 U.S. 852 (1951).

United States v. Lynch, 94 F. Supp. 1011 (N.D. Ga. 1950), aff'd, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).

United States v. Georvassilis, 498 F.2d 883 (6th Cir. 1974).

United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

8-5.202 Elements of Offense

A. Four essential elements are required to be proved in order to establish the offense charged in Count _____ of the Indictment:

1. The person upon whom the alleged acts were committed, must have been an inhabitant of a state, district or territory of the United States, here the State of _____(name)_____.

2. The defendant must have been acting under color of the law, that is, while using or misusing power possessed by reason of the law. For example, a police officer, performing or purporting to perform official functions, such as making arrests, is acting under color of law.

Private citizens jointly engaged with state officials, who are themselves acting under color of law, in prohibited activity, are acting under color of law for purposes of this statute.

3. The conduct of the defendant must have deprived the victim, _____(name)_____, of some right secured or protected by the Constitution of the United States. One of the rights secured and protected by the Constitution of the United States is that no person acting under color of law shall deprive any person of liberty without due process of law. Liberty includes the right to be free from unreasonable, unnecessary or unprovoked assaults or abuse by officers acting under color of law.

4. There must have been an intent on the part of the defendant willfully to subject the victim to the deprivation of the right described above.

B. Authorities:

United States v. Price, 383 U.S. 787, 794 (1966).

Williams v. United States, 341 U.S. 97 (1951).

Screws v. United States, 325 U.S. 91 (1945).

United States v. Classic, 313 U.S. 299, 327-29 (1941).

Apodaca v. United States, 188 F.2d 932, 937 (10th Cir. 1951).

Catlette v. United States, 132 F.2d 902, 905 (4th Cir. 1943).

United States v. Stokes, 506 F.2d 771, 774-77 (5th Cir. 1975).

United States v. Senak, 477 F.2d 304, 306 (7th Cir.), cert. denied, 414 U.S. 856 (1973).

United States v. Georvassilis, 498 F.2d 883, 885-86 (7th Cir. 1974).

8-5.203 Inhabitancy

A. Instructions:

With regard to the first element of the offense, I charge you that if you find that _____(name)_____ was in fact a resident of the State of _____(name)_____ at the time of the incident charged in the Indictment, then (he/she) was an inhabitant of a state within the meaning of the statute.

B. Authorities:

Miller v. United States, 404 F.2d 611, 612 (5th Cir. 1968), cert. denied, 394 U.S. 963 (1969).

United States v. Jackson, 235 F.2d 925, 929 (8th Cir. 1956).

Screws v. United States, 325 U.S. 91, 99 n.7 (1945).

United States v. Classic, 313 U.S. 299, 327 n.10 (1941).

8-5.204 Color of Law

A. Instructions:

With regard to the second element, color of law, the term "color of law" means a power possessed by an officer by virtue of law, which invests (him/her) with authority to act. However, "color of law" means under pretense of law as well as under actual legal authority. If a police officer misuses the power invested in (him/her) by the law to deprive someone of (his/her) rights, (his/her) misconduct is "under color of law," even if the law forbids what (he/she) has done. Misconduct made possible

because the police officer is clothed with the authority of the law is action "under color of law."

Consequently, I charge you that if you find that, at the time of the alleged incident, the defendant was a police officer in the (name) Police Department and acted or purported to act as a police officer, (name) was acting under color of law as described in the Indictment.

[I also charge you, that if you find that (name) acted as a willful participant in joint activity with the other defendant then (he/she) too was acting under color of law as described in the Indictment.]

B. Authorities:

United States v. Classic, 313 U.S. 299, 326 (1941).

Screws v. United States, 325 U.S. 91, 107-13 (1945).

Williams v. United States, 341 U.S. 97, 99-100 (1951).

Monroe v. Pape, 365 U.S. 167, 172 (1961), overruled on other grounds, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

Crews v. United States, 160 F.2d 746, 750 (5th Cir. 1947).

United States v. Ramey, 336 F.2d 512, 514 (4th Cir. 1964), cert. denied, 379 U.S. 972 (1965).

United States v. Price, 383 U.S. 787, 794 (1966).

8-5.205 Right to Liberty

A. Instructions:

The third element to be proved is that the conduct of the defendant must have deprived (name) of a right secured or protected by the Constitution or laws of the United States. You are instructed that the victim in this case, (name), in common with the defendant and all other persons, including each and every one of you, living under the protection of our Constitution, has the legal right at all times not to be

deprived of any liberty secured or protected by the Constitution without due process of law.

One of the "liberties" secured to the victim involved in this case by the Constitution is the liberty to be free from unlawful attacks upon (his/her) person. It has always been the policy of the law to protect the physical integrity of every person from unauthorized violence.

"Liberty" thus includes the principle that no person may ever be physically assaulted, intimidated, or otherwise abused intentionally and without justification by a person acting under the color of the laws of any state. Accordingly, a person in the custody of arresting state officials, such as police officers, has a constitutional right to be reasonably secure in (his/her) person and free from unwarranted physical mistreatment by such officers.

(Name) had been arrested and had thus been deprived of certain of (his/her) liberties, namely, the liberty to be free of arrest and to come and go without restraint. Nevertheless, (name) retained other liberties protected by the Constitution, among which was the liberty to be free from unlawful attacks upon the physical integrity of (his/her) person. That right or liberty belongs to every arrestee, protecting (him/her) against physical assaults or beatings that are unlawful, that is, beyond the lawful authority of the officer to prevent the arrestee's escape or to protect (himself/herself) and others from injury.

B. Authorities:

Screws v. United States, 325 U.S. 91 (1945).

Logan v. United States, 144 U.S. 263 (1892).

Koehler v. United States, 189 F.2d 711 (5th Cir.), cert. denied, 342 U.S. 852 (1951).

Lynch v. United States, 189 F.2d 476 (5th Cir.), cert. denied, 342 U.S. 831 (1951).

Crews v. United States, 160 F.2d 746 (5th Cir. 1947).

United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

United States v. Price, 383 U.S. 787 (1966).

8-5.206 Willfulness

A. Instructions:

With regard to the fourth element, willfulness, I instruct you that an act is done willfully if it is done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is, with bad purpose to disobey or disregard the law. In the case of the statute involved here, it means with a specific intent to deprive ____(name)____ of liberty without due process of law.

With regard to specific intent, you are instructed that intent is a state of mind and can be proven by circumstantial evidence. Indeed, it can rarely be established by any other means. In determining whether this element of specific intent was present you may consider all the attendant circumstances of the case.

I charge you that you may infer that a person ordinarily intends all the natural and probable consequences of an act knowingly done. In other words, you may in this case infer and find that the defendant intended all the consequences that a person, standing in like circumstances and possessing like knowledge, should have expected to result from (his/her) act or acts knowingly done.

It is not necessary to show or prove that the defendant was thinking in constitutional terms at the time of the incident, for a reckless disregard for a person's consitutional rights is clear evidence of specific intent to deprive that person of those rights. You may find that the defendant acted with requisite specific intent even if you find that (he/she) had no real familiarity with the Constitution or with the particular constitutional right involved, provided that you find that the defendant willfully and consciously did the act which deprived the victim of (his/her) constitutional rights. Nor does it matter that the defendant may have also been motivated by hatred or revenge or some other emotion, provided the intent which I have described to you is present.

If you find that the defendant knew what (he/she) was doing and that (he/she) intended to do what (he/she) was doing, and if you find that what (he/she) did constituted a deprivation of a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victim of that constitutional right.

B. Authorities:

Devitt and Blackmar §§14.06, 14.07.

Sandstrom v. Montana, 442 U.S. 510 (1979).

Screws v. United States, 325 U.S. 91 (1945).

United States v. Ragsdale, 438 F.2d 21, 26 (5th Cir.), cert. denied, 403 U.S. 919 (1971).

United States v. Ramey, 336 F.2d 512 (4th Cir. 1964), cert. denied, 379 U.S. 972 (1965).

Crews v. United States, 160 F.2d 746 (5th Cir. 1947).

United States v. Stokes, 506 F.2d 771 (5th Cir. 1975).

United States v. O'Dell, 462 F.2d 224, 232 n.10 (6th Cir. 1972).

8-5.207 Use of Force

A. Instructions:

One factor which you may consider in your determination of whether the defendant had the requisite specific intent to deprive the victim of a right is the nature and degree of force used by the defendant.

A police officer is justified in the use of any force which (he/she) reasonably believes to be necessary to effect an arrest and of any force which (he/she) reasonably believes to be necessary to defend (himself/herself) or another from bodily harm while making an arrest.

If the force used by the defendant was greater than the force that would appear reasonably necessary to an ordinary, reasonable and prudent person, you may consider that excessive force as evidence that the defendant acted with the requisite specific intent, that is, that (he/she) specifically intended to do that which the law forbids.

B. Authorities:

Monroe v. Pape, 365 U.S. 167, 187 (1961), overruled on other grounds, Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978).

Williams v. United States, 341 U.S. 97 (1951).

Screws v. United States, 325 U.S. 91 (1945).

Logan v. United States, 144 U.S. 263 (1892).

United States v. Ragsdale, 438 F.2d 21, 26 (5th Cir.), cert. denied, 403 U.S. 919 (1971).

8-5.208 Death Resulting

A. Instructions:

In addition to the four elements of the offense which I have just instructed you on, there is an additional element alleged which the prosecution must prove. The Indictment alleges that ____(name)____ died as a result of the acts committed by the defendant. In order for you to find the defendant guilty as charged in Count ____ of the Indictment you must find that the victim did in fact die as a result of the acts of the defendant ____(name)____.

It is not necessary for the prosecution to prove that the defendant intended ____(name)____ to die as a result of (his/her) acts. Thus, if you find beyond a reasonable doubt that the defendant did willfully deprive ____(name)____ of a right secured or protected by the Constitution or laws of the United States, and if you find that ____(name)____ died as a result of that deprivation, then the defendant would be guilty as charged in Count ____.

If you find that the acts of the defendant contributed to or hastened the death of ____(name)____, even if those acts alone would not have caused (his/her) death, then you may find the defendant guilty.

B. Authorities:

United States v. Hayes, 589 F.2d 811 (5th Cir.), cert. denied, 444 U.S. 847 (1979).

United States v. Guillette, 547 F.2d 743 (2d Cir. 1976), cert. denied, 434 U.S. 839 (1977).

Rice v. State of Wisconsin, 424 F.2d 12 (7th Cir.), cert. denied, 400 U.S. 836 (1970).

United States v. Hamilton, 182 F. Supp. 548 (D. D.C. 1960).

United States v. McMahon, 339 F. Supp. 1092, 1093 (S.D. Tex. 1971).

8-5.209 Aiding and Abetting

A. Instructions:

You will note that Defendant ____(name)____ is charged in Count _____ of the Indictment with aiding and abetting Defendant ____(name)____ to violate 18 U.S.C. §242.

18 U.S.C. §2 provides in pertinent part:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

In order to aid and abet another to commit a crime, it is necessary that a defendant willfully associate (himself/herself) in some way with a criminal venture, and willfully participate in it as (he/she) would in something (he/she) wishes to bring about. That is to say, that (he/she) willfully seek by some act or omission to make the criminal venture succeed.

In other words, a defendant need not personally perpetrate every act constituting an offense to be found guilty, as long as (he/she) willfully participates in the commission of the offense.

An act is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.

You of course may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant participated in its commission.

B. Authorities:

Devitt and Blackmar §§12.01, 12.03.

33 F.R.D. 523, 544 §§12.01, 12.03.

United States v. Jones, 308 F.2d 26, 32 (2d Cir. 1962).

Shuttlesworth v. Birmingham, 373 U.S. 262, 265 (1963).

Nye & Nissen v. United States, 336 U.S. 613 (1949).

United States v. Varelli, 407 F.2d 735, 742 (7th Cir. 1969).

Sewell v. United States, 406 F.2d 1289, 1293 n.3 (8th Cir. 1969).

King v. United States, 402 F.2d 289, 290 (10th Cir. 1968).

United States v. Milby, 400 F.2d 702 (6th Cir. 1968).

8-5.300 CONSPIRACY TO COMMIT OFFENSE AGAINST THE UNITED STATES--18 U.S.C. §371

8-5.301 Pertinent Portion of Statute

A. Instructions:

Count _____ of the Indictment charges the defendant, _____(name)_____, with violating 18 U.S.C. §371, entitled "Conspiracy to commit offense or to defraud the United States." 18 U.S.C. §371 reads as follows in pertinent part:

> If two or more persons conspire... to commit any offense against the United States... and one or more of such persons do any act to effect the object of the conspiracy, each [shall be guilty of an offense against the United States].

B. Authority:

18 U.S.C. §371.

8-5.302 Elements of Offense

A. Instructions:

Four essential elements are required to be proved in order to establish the offense of conspiracy charged in Count _____ of the Indictment:

1. That the conspiracy described in the Indictment was willfully formed and was existing at or about the time alleged;

2. That the accused willfully became a member of the conspiracy;

3. That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the Indictment at or about the time and place alleged; and

4. That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If the jury should find beyond a reasonable doubt from the evidence in the case that the existence of the conspiracy charged in the Indictment has been proved and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy offense charged is complete; and it is complete as to every person found by the jury to have been willfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators did the overt act.

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

B. Authorities:

Devitt and Blackmar §27.08.

United States v. Perez, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

United States v. Warner, 441 F.2d 821, 830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

Bradford v. United States, 413 F.2d 467, 470 (5th Cir. 1969).

8-5.303 Existence of Conspiracy

A. Instructions:

The first element of this offense requires proof of the existence of a conspiracy. A conspiracy is a combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus, a conspiracy might be called a kind of partnership for criminal purposes, in which each member becomes the agent of every other member. The gist of the offense is the combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they have associated with each other, and they have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

What the evidence must show to establish that a conspiracy did exist is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

However, the evidence need not show that the members of an alleged conspiracy entered into any express or formal agreement, or that they directly, by words spoken or written, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. Ordinarily only the results of a conspiracy rather than the agreement are observable.

Proof of a conspiracy is almost always a matter of inference deduced from the acts of the persons accused which are done in pursuance of an apparent criminal purpose. If the evidence establishes beyond a reasonable doubt that two or more persons did pursue by their acts the same object by the same or similar means, one performing one part of the act and the other another part of the act, so as to complete it with a view of attaining the object or objects they are pursuing, this is sufficient to constitute proof of a conspiracy.

B. Authorities:

Devitt and Blackmar §§55.07 and 27.04.

United States v. General Motors Corp., 384 U.S. 127 (1966).

Pereira v. United States, 347 U.S. 1 (1954).

United States v. Morado, 454 F.2d 167, 175 (5th Cir.), cert. denied, 406 U.S. 917 (1972).

United States v. Warner, 441 F.2d 821, 830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

United States v. Varelli, 407 F.2d 735, 741-44 (7th Cir. 1969).

United States v. Perez, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

Rodriguez v. United States, 373 F.2d 17 (5th Cir. 1967).

8-5.304 Membership in Conspiracy

A. Instructions:

The second element is the membership of each defendant in the conspiracy. A person may become a member of a conspiracy without full knowledge of all the details of the conspiracy. It need not be shown that a person knew all of (his/her) co-conspirators in order to prove that (he/she) became a member of the conspiracy. Nor need it be shown that each conspirator joined the conspiracy at the time of its formation. One who knowingly and willfully joins an existing conspiracy is charged with the same responsibility as if (he/she) had been one of the instigators of the conspiracy. On the other hand, a person who had no knowledge of a conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy does not thereby become a conspirator.

Before the jury may find that a defendant, or any other person, became a member of a conspiracy, the evidence must show that the conspiracy was formed, and that the defendant, or other person who is claimed to have been a member, knowingly and willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To participate knowingly and willfully means to participate voluntarily and understandingly and with specific intent to do some act the law forbids, or fail to do some act the law requires to be done. So if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, then (he/she) thereby becomes a knowing and willful participant and a co-conspirator.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, the jury members are not to consider what others may have done or said. That is to say, the membership of a defendant, or any other person, in a conspiracy must be established by evidence as to (his/her) own conduct, what (he himself/she herself) said or did, or what (he himself/she herself) failed to do or say.

B. Authorities:

Devitt and Blackmar §27.05.

United States v. Falcone, 311 U.S. 205, 210 (1940).

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

Blumenthal v. United States, 332 U.S. 539 (1947).

United States v. Warner, 441 F.2d 821, 830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

United States v. McGann, 431 F.2d 1104, 1107 (5th Cir. 1970), cert. denied, 401 U.S. 919 (1971).

Roberts v. United States, 416 F.2d 1216 (5th Cir. 1969).

8-5.305 Membership in Conspiracy by Acquiescence

A. Instructions:

The mere passive acquiescence of the defendant in the misconduct of another does not in itself make the defendant a co-conspirator. On the other hand, the defendant's acquiescence in the misconduct of another may indicate that defendant's intent to become a party to the conspiracy. If you find here that a defendant acquiesced in the misconduct of another, and if you further find that (he/she) knew in a general way of the conspiracy, then you may infer that defendant aided the conspiracy and that (he/she) entered into an express or implied agreement with the conspirator.

B. Authorities:

Sandstrom v. Montana, 442 U.S. 510 (1979).

Poliafico v. United States, 237 F.2d 97, 104 (6th Cir. 1956), cert. denied, 352 U.S. 1025 (1957).

Luteran v. United States, 93 F.2d 395, 400 (8th Cir. 1937), cert. denied, 303 U.S. 644 (1938).

Burkhardt v. United States, 13 F.2d 841, 842 (6th Cir. 1926).

8-5.306 Responsibility for Acts of Co-conspirator

A. Instructions:

If and when it appears from the evidence, beyond a reasonable doubt, that a conspiracy did exist and that a defendant was one of the members of the conspiracy, then the acts thereafter knowingly done and the statements thereafter knowingly made by any person also found to be a member of the conspiracy may be considered by the jury as evidence in the case as to every defendant found to have been a member of the conspiracy, even though those acts and statements may have occurred in the absence and even without the knowledge of the defendant, provided these acts or statements were knowingly made and done during the continuance or the life of the conspiracy and furtherance of an object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of court, by one person, may not be considered as evidence against any person who was not present and did not hear the statement made.

B. Authorities:

Devitt and Blackmar §27.06.

Lutwak v. United States, 344 U.S. 604, 615-20 (1953).

Krulewitch v. United States, 336 U.S. 440, 443-44 (1949).

United States v. Perez, 489 F.2d 51, 61 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974).

United States v. Blanchette, 453 F.2d 859, 860 (5th Cir.), cert. denied, 406 U.S. 959 (1972).

United States v. Warner, 441 F.2d 821, 830 (5th Cir.), cert. denied, 404 U.S. 829 (1971).

United States v. Harrell, 436 F.2d 606, 613-14 (5th Cir. 1970), cert. denied, 409 U.S. 846 (1972).

8-5.307 Overt Act

A. Instructions:

Finally, as to the third and fourth elements of this count, if it appears beyond a reasonable doubt from the evidence in the case that the conspiracy alleged in the Indictment was willfully formed, and that one or more defendants willfully became members of the conspiracy either at its inception or afterwards, and that thereafter one or more of the conspirators knowingly committed one or more of the overt acts charged in furtherance of some object or purpose of the conspiracy, then there may be a conviction even though the conspirators may not have succeeded in accomplishing their common object or purpose and in fact may have failed in so doing.

The extent of any defendant's participation, moreover, is not determinative of (his/her) guilt or innocence. A defendant may be convicted as a conspirator even though (he/she) may have played only a minor part in the conspiracy. The government does not have to establish performance of all the overt acts as set out in the Indictment. Proof beyond reasonable doubt of one such act by any one of the conspirators is sufficient. Furthermore, the government is not limited to proving the overt acts alleged in the Indictment but can show any act of the conspirators occurring during the life of the conspiracy for the purpose of proving it.

An "overt act" is any act knowingly committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separately and apart from the conspiracy. It may be as innocent as the act of a person walking across the street, or driving an automobile, or using a telephone. It must, however, be an act which follows and tends toward accomplishment of the plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the Indictment.

B. Authorities:

Devitt and Blackmar §27.07.

United States v. Morado, 454 F.2d 167, 174-75 (5th Cir.), cert. denied, 406 U.S. 917 (1972).

Reese v. United States, 353 F.2d 732, 734 (5th Cir. 1965).

Mount v. United States, 333 F.2d 39 (5th Cir.), cert. denied, 379 U.S. 900 (1964).

Kolbrenner v. United States, 11 F.2d 754, 756 (5th Cir.), cert. denied, 271 U.S. 677 (1926).

8-5.308 Unnamed Conspirators

A. Instructions:

Count _____ of the Indictment charges a conspiracy among the defendants ____(names)____. A person cannot conspire with himself/herself and therefore you cannot find any defendant guilty unless you find beyond a reasonable doubt that (he/she) participated in a conspiracy as charged with at least one other person, whether a defendant or not, and whether named in the Indictment or not. With this qualification, you may find any or all of the defendants guilty or not guilty, all in accordance with these instructions and the facts you find.

B. Authorities:

Worthington v. United States, 64 F.2d 936, 939 (7th Cir. 1933).

Pomerantz v. United States, 51 F.2d 911, 913 (3d Cir. 1931).

8-5.400 OBSTRUCTION OF CRIMINAL INVESTIGATIONS--18 U.S.C. §1510

9-5.401 Pertinent Portions of Statute

A. Instructions:

Count _____ of the Indictment charges the defendant, ____(name)____, with violating 18 U.S.C. §1510, entitled "Obstruction of Criminal Investigations." 18 U.S.C. §1510 reads as follows, in pertinent part:

> Whoever willfully endeavors by means of bribery, misrepresentation, intimidation, or force of threats

> thereof to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator [shall be guilty of an offense against the United States].

The statute further provides that the term "criminal investigator" means

> Any individual duly authorized by a department, [or] agency... of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

B. Authority:

18 U.S.C. §1510.

8-5.402 Elements of Offense

A. Instructions:

Three elements must be proved beyond a reasonable doubt in order to establish a violation of the offense charged in Count _____ of the Indictment.

1. The defendant must have acted willfully to endeavor by means of intimidation, bribery, threats of force or misrepresentation to prevent the communication of information relating to a violation of federal law.

2. The defendant must have acted to prevent the communication of such information to someone duly authorized to conduct investigations or prosecutions of violations of federal statutes.

3. The defendant must have had knowledge that the intended recipient of such information was a criminal investigator as defined by the statute.

B. Authorities:

United States v. San Martin, 515 F.2d 317 (5th Cir. 1975).

United States v. Williams, 470 F.2d 1339 (8th Cir.), cert. denied, 411 U.S. 936 (1973).

United States v. Cameron, 460 F.2d 1394, 1401 (5th Cir. 1972).

United States v. Kozak, 438 F.2d 1062 (3d Cir.), cert. denied, 402 U.S. 996 (1971).

8-5.403 Willfulness

A. Instructions:

The first element requires that the defendant acted willfully to endeavor by means of either bribery, misrepresentation, intimidation or threat of force to prevent the communication of information relating to a violation of federal criminal law.

The word "willfully" means that the act was committed by the defendant voluntarily and knowingly, with the specific intent to violate the law. That is, (he/she) must have acted with a purpose to disobey or disregard the law and not by mistake, accident or in good faith.

In determining whether the necessary willfulness was present, it is not necessary that the unlawful purpose be expressed. In most cases, willfulness has to be proved as an inference from all of the circumstances with which you are concerned. In determining whether the alleged misconduct was willful, you may consider all of the circumstances.

B. Authorities:

Devitt and Blackmar §§14.06, 14.07.

Screws v. United States, 325 U.S. 91, 101-07 (1945).

8-5.404 Endeavor

A. Instructions:

"Endeavor" means any effort or essay to accomplish the evil purpose that the statute is designed to prevent.

It does not matter whether the endeavor succeeded or failed to prevent the communication of information.

B. Authorities:

United States v. Cioffi, 493 F.2d 1111, 1118 (2d Cir. 1974).

United States v. Russell, 255 U.S. 138, 143 (1921).

Knight v. United States, 310 F.2d 305, 307 (5th Cir. 1962).

United States v. Carzoli, 447 F.2d 774, 778 (7th Cir. 1971), cert. denied, 404 U.S. 1015 (1972).

8-5.405 Threat of Force

A. Instructions:

"Threat of force" means precisely what the term implies, namely, a threat, either by words or gesture, to inflict some harm (physical, mental or emotional) upon another person. Threat of force falls short of actual violence, and ordinarily signifies the expression of one person's intention to act against another or to do some sort of harm.

The words bribery, intimidation and misrepresentation--as used in this statute--have no technical meaning, and are to be understood in their ordinary meaning. To intimidate is defined by the dictionary as "to force into or deter from some action by inducing fear." To bribe is defined as giving or promising something to persuade or induce. To misrepresent is, of course, to represent something falsely, that is, to make a false statement.

In order to prove this first element of 18 U.S.C. §1510, the government does not have to prove that a defendant used all of the above means to endeavor to impede a communication, only that (he/she) used any one of them, either bribery, threat of force, misrepresentation or intimidation.

B. Authorities:

United States v. Price, 464 F.2d 1217 (8th Cir.), cert. denied, 409 U.S. 1040 (1972).

United States v. Hearod, Crim. No. 73-580 (E.D. La. Nov. 27, 1973) (unreported opinion).

Arellanes v. United States, 302 F.2d 603, 609 (9th Cir.), cert. denied, 371 U.S. 930 (1962).

United States v. Lee, 422 F.2d 1049, 1052 (5th Cir. 1970).

8-5.406 Communication of Misrepresentation

A. Instructions:

In order to prove the misrepresentation alleged in the Indictment, the government must show that the defendant, (name), endeavored to have (witness' name) misrepresent the true facts of the incident to a federal criminal investigator. It is not necessary for the government to show that any misrepresentation was made to (witness' name).

B. Authority:

United States v. St. Clair, 552 F.2d 57 (2d Cir.), cert. denied, 433 U.S. 909 (1977).

8-5.407 Prevention of Communication

A. Instructions:

The second element which must be proved beyond a reasonable doubt in Count _____ is that the defendant action must have been taken to prevent the communication of information relating to a violation of federal criminal statutes to an individual duly authorized to conduct investigations of or a prosecution for such violations.

I instruct you that as a matter of law, information relating to the incidents described in Count _____ of this Indictment, that is, information about the (acts), is information relating to a violation of federal criminal statutes, regardless of whether or not you find any defendant guilty of the offense charged in those counts.

I further instruct you that, as a matter of law, Special Agents of the Federal Bureau of Investigation are individuals duly authorized to conduct investigations of violations of federal criminal statutes.

B. Authorities:

18 U.S.C. §1510.

United States v. San Martin, 515 F.2d 317, 320 (5th Cir. 1975).

United States v. Williams, 470 F.2d 1339, 1342-43 (8th Cir.), cert. denied, 411 U.S. 936 (1973).

28 U.S.C. §§501, 503, 509, 510, 516, 531, 533.

28 C.F.R. §0.85(a) and (b).

8-5.408 Necessity for Investigation

A. Instructions:

In order to find the defendant guilty on this count of the Indictment it is not necessary that an investigation be underway at the time of the alleged endeavor to prevent communication to a criminal investigator.

B. Authority:

United States v. Lippman, 492 F.2d 314, 317 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975).

8-5.409 Identity of Investigator

A. Instructions:

The third element which must be proved in Count ___ is that the defendant knew that the intended or potential recipients of information relating to a violation of federal law were authorized to investigate or prosecute violations of federal law.

It is not necessary that the defendant knew the personal identity of any individual authorized to investigate or prosecute, only that the defendant knew or had reason to believe that the interested or potential recipients of the information were federal investigators.

B. Authorities:

United States v. Williams, 470 F.2d 1339 (8th Cir.), cert. denied, 411 U.S. 936 (1973).

United States v. Kozak, 438 F.2d 1062 (3d Cir.), cert. denied, 402 U.S. 996 (1971).

8-5.410 Success of Endeavor

A. Instructions:

In order to find the defendant guilty on this count you need to find that the defendant, or any one of them, had a reasonable belief that _____ (name) _____ would communicate information relating to an offense to a criminal investigator. It is not necessary for the government to show that _____ (name) _____ intended to communicate such information. Nor is it necessary to prove that the defendant was successful in (his/her) endeavor.

B. Authorities:

United States v. Kozak, 438 F.2d 1062, 1065-66 (3d Cir.), cert. denied, 402 U.S. 996 (1971).

United States v. Carzoli, 447 F.2d 774, 774-78 (7th Cir. 1971), cert. denied, 404 U.S. 1015 (1972).

8-5.411 Reasonable Doubt

A. Instructions:

Count _____ of the Indictment alleges that defendant urged __(name)__ to respond to inquiries from the Federal Bureau of Investigation by misrepresenting __(facts)__.

You are charged that, if you find beyond a reasonable doubt that the defendant endeavored to misrepresent a communication of information relating to a federal violation of a criminal investigator--as I have defined those terms--then you may find the defendant guilty.

As long as you are satisfied that the elements of obstructing a criminal investigation, as I have explained them to you, are proved beyond a reasonable doubt concerning the communication from any one person mentioned in Count _____, then you may find the defendant guilty.

B. Authority:

Arena v. United States, 226 F.2d 227, 236 (9th Cir. 1955), cert. denied, 350 U.S. 954 (1956).

8-5.500 INTERFERENCE WITH FEDERALLY PROTECTED ACTIVITIES--18 U.S.C. §245

8-5.501 Pertinent Portion of Statute

A. Instructions:

The Indictment charges the defendant, ____(name)____, with violating a statute of the United States--18 U.S.C. §245. I will read the pertinent part of that statute to you.

[Enter here pertinent statutory language]

This law was passed by Congress to deter and punish interference with certain activities protected by the Constitution or federal law and specifically set out in the statute. Particularly, the statute seeks to punish interference on the part of any person, by force or threat of force, with those activities covered within its scope.

B. Authority:

1968 U.S. Code Cong. & Ad. News, at 1837.

8-5.502 Elements of Offense

A. Instructions:

There are four essential elements that are required to be proved beyond a reasonable doubt in order to establish the offense charged in the Indictment.

1. The defendant must have acted with force or threat of force.

2. The defendant must have injured, intimidated, or interfered with or attempted to injure, intimidate, or interfere with __(name)__.

3. [If the offense is charged under 18 U.S.C. §245(b)(1), use the following]:

a. The defendant must have acted because (name) was participating in [describe the specific protected activity as set out in (A) through (E) of 18 U.S.C. §245(b)(1)] or the defendant must have acted in order to intimidate (name) from participating in [protected activity].

b. [If the offense is charged under 18 U.S.C. §245(b)(2), use the following]:

The defendant must have acted because of (name)'s race, color, religion, or national origin and because (name) was participating or engaged in [describe the specific protected activity as set out in (A) through (F) of 18 U.S.C. §245(b)(2)].

4. The defendant must have acted willfully. [The defendant must have willfully aided or abetted those who actually committed the offense.]

B. Authorities:

United States v. Price, Criminal No. S-71-CR-15 (E.D. Mo. Nov. 4, 1971), aff'd, 464 F.2d 1217 (8th Cir. 1972).

United States v. Mills, Criminal No. 1714 (M.D. Ga. Jan. 20, 1972) (unreported opinion).

United States v. Miles, Criminal No. 47, 379 (E.D. Mich. Oct. 19, 1973) (unreported opinion).

United States v. Hearod, Criminal No. 73-580 (E.D. La. Nov. 27, 1973) (unreported opinion).

8-5.503 Force or Threat of Force

A. Instructions:

The term "force" includes the exercise and application of physical power other than the power of oral or written speech. In common parlance, force means power, violence, compulsion, or restraint exerted upon or against a person or thing. Thus, if you find that (name) assaulted, struck, beat, or kicked (name), or committed any other form of violence upon (him/her) you must conclude that force was used against (name), as that term is used in the statute.

"Threat of force" means precisely what the term implies--namely, a threat, either by words or gestures, to inflict some harm (physical, mental or emotional) upon another person. While "force" itself requires some physical manifestation of violence, "threat of force" falls short of actual violence, and ordinarily signifies the expression of one person's intention to act against another or to do some sort of harm. Thus, if you find that no force was used by the defendant, you should consider whether threats of force were made. In this connection you may consider any words used, any physical gestures made, fear or apprehension of victim and any surrounding circumstances to determine if such a threat was conveyed. If you find that the defendant used language or made gestures toward (name) which would ordinarily be understood as threats of force, even though you find that the defendant did not strike or physically assault (name) then you may find that a threat of force was made, within the terms of the statute.

B. Authorities:

United States v. Price, Criminal No. S-71-CR-15 (E.D. Mo. Nov. 4, 1971), aff'd, 464 F.2d 1217 (8th Cir. 1972).

United States v. Mills, Criminal No. 1714 (M.D. Ga. Jan. 20, 1972) (unreported opinion).

United States v. Miles, Criminal No. 47, 379 (E.D. Mich. Oct. 19, 1973) (unreported opinion).

United States v. Hearod, Criminal No. 73-580 (E.D. La. Nov. 27, 1973) (unreported opinion).

8-5.504 Purpose of the Interference

A. Instructions:

The defendant must have injured, intimidated and interfered with (name of victim), a (name of race), because of (his/her) race and because (he/she) was enjoying the goods and services of the (name of restaurant or lounge), a facility which serves the public and which is primarily engaged in selling food or beverages for consumption on the premises.

The words "injure," "intimidate," and "interfere with"--as used in this statute--have no technical meaning, and are to be understood in their

ordinary meaning, and cover a variety of conduct intended to harm or frighten other persons.

If you find that the (name of lounge or restaurant) is a facility which serves the public and is principally engaged in selling (name) for consumption on the premises and if you find that at the time of the incident charged here, (name of victim) was enjoying the goods and services of the (name of restaurant or lounge), and if you find that the defendant injured, intimidated, or interfered with (name of victim) because of (his/her) race and because (he/she) was enjoying such facility, then this element of the offense would be complete.

B. Authority:

United States v. Hearod, Criminal No. 73-580 (E.D. La. Nov. 27, 1973) (unreported opinion).

C. Instructions (school):

The injury, intimidation, or interference must have been because (name) was, or had been, participating in a facility receiving federal financial assistance.

Thus, if you find that (name) was principal of (name) School, and that the school was receiving financial assistance from the federal government, and you further find that the assault or other violence, if it occurred, was for the purpose of intimidating or interfering with (name) because (he/she) occupied that position, or because of the manner in which (he/she) conducted (himself/herself) in that position, then this element is complete.

It is not necessary that the government prove that any defendant had knowledge that the school was receiving federal funds, or that they intended that the use of these funds be impaired or interrupted. However, the government must show that the purpose of the defendant was to injure, intimidate or interfere with (name) because of (his/her) position as principal, or because of the manner in which (he/she) was discharging (his/her) responsibilities as principal.

D. Authority:

United States v. Miles, Criminal No. 47,379 (E.D. Mich. Oct. 19, 1973) (unreported opinion).

8-5.600 PEONAGE AND INVOLUNTARY SERVITUDE--18 U.S.C. §§1581, 1584

8-5.601 Pertinent Portion of Statutes

A. Instructions:

The defendant, ____(name)____, is charged with having violated 18 U.S.C. §1581. I will read the pertinent part of the statute to you.

> Whoever holds... any person to a condition of peonage [shall be guilty of a crime].

This statute was passed by Congress to give effect to the 13th Amendment of the United States Constitution which abolished slavery and involuntary servitude throughout the United States, except as a punishment for crime.

The defendant, ____(name)____, is charged with having violated 18 U.S.C. §1584. I will read the pertinent part of that statute to you.

> Whoever knowingly and willfully holds to involuntary servitude... any other person for any term [shall be guilty of a crime].

This statute was passed by Congress to give effect to the 13th Amendment of the United States Constitution which abolished slavery and involuntary servitude throughout the United States, except as punishment for crime.

B. Authorities:

Clyatt v. United States, 197 U.S. 207 (1905).

United States v. Gaskin, 320 U.S. 527 (1944).

Pollock v. Williams, 322 U.S. 4 (1944).

United States v. Shackney, 333 F.2d 475 (2d Cir. 1964).

8-5.602 Elements of Offenses

Three [Four] essential elements must be proven in order to establish the offense charged in the Indictment.

1. The defendant must have held the victim in a state of compulsory service.

2. The defendant must have held the victim in a state of compulsory service for a period of time.

3. The defendant must have acted knowingly and willfully.

4. [Fourth (for 18 U.S.C. §1581 offense only): the compulsory service must have been based on a real or claimed indebtedness.]

B. Authorities:

Pollock v. Williams, 322 U.S. 4 (1944).

United States v. Reynolds, 235 U.S. 133 (1914).

Bailey v. Alabama, 219 U.S. 219 (1911).

Clyatt v. United States, 197 U.S. 207 (1905).

Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945).

Bernal v. United States, 241 F. 339 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918).

Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

8-5.603 State of Compulsory Service

A. Instructions:

The first element is that the victim be held in a state of compulsory service. The means used to compel a person to perform service are immaterial. In considering whether the defendants held certain persons in a condition of compulsory service you may consider the evidence presented of force, threats, intimidation, legal processes or other means of complusion. In this respect you are instructed that you may find that not all persons are of like courage and firmness. You may consider the situation of the parties, the relative inferiority or inequality between the persons contracting to perform the service and the persons exercising the force or influence to compel its performance. You must determine, in

view of all the circumstances, whether the service was compulsory. In considering whether the service was in fact compulsory, you are instructed that it makes no difference whether or not the person initially agreed voluntarily to work. If a person desires to withdraw, and then is forced to remain and perform services against (his/her) will, then (his/her) service is certainly compulsory.

B. Authorities:

Pollock v. Williams, 322 U.S. 4 (1944).

United States v. Reynolds, 235 U.S. 133 (1914).

Bailey v. Alabama, 219 U.S. 219 (1911).

Clyatt v. United States, 197 U.S. 207 (1905).

Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945).

Bernal v. United States, 241 F. 339 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918).

Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

United States v. Shackney, 333 F.2d 475 (2d Cir. 1964).

8-5.604 Period of Time

A. Instructions:

The second element that the government is required to prove is that the victim was held "for a term." In that respect, I advise you that it is not necessary for the government to prove as a necessary element any given specific term of an appreciable length of time. If any person was held for any term, regardless of how short such term may be, it would come within the provisions of the statute.

B. Authorities:

Pollock v. Williams, 322 U.S. 4 (1944).

United States v. Reynolds, 235 U.S. 133 (1914).

Bailey v. Alabama, 219 U.S. 219 (1911).

Clyatt v. United States, 197 U.S. 207 (1905).

Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945).

Bernal v. United States, 241 F. 339 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918).

Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

8-5.605 Indebtedness

A. Instructions:

The final element which the government is required to prove is that the compulsory service was based on a real or claimed indebtedness of (name of victim) to (name of defendant). [This element required only under 18 U.S.C. §1581.]

B. Authorities:

Pollock v. Williams, 322 U.S. 4 (1944).

United States v. Reynolds, 235 U.S. 133 (1914).

Bailey v. Alabama, 219 U.S. 219 (1911).

Clyatt v. United States, 197 U.S. 207 (1905).

Pierce v. United States, 146 F.2d 84 (5th Cir. 1944), cert. denied, 324 U.S. 873 (1945).

Bernal v. United States, 241 F. 339 (5th Cir. 1917), cert. denied, 245 U.S. 672 (1918).

Peonage Cases, 123 F. 671 (M.D. Ala. 1903).

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8-6.000 HANDBOOK FOR THE INVESTIGATION AND TRIAL OF TITLE II CASES

The Housing and Civil Enforcement Section of the Civil Rights Division has the responsibility for enforcing the provisions of Title II (Public Accommodations) of the Civil Rights Act of 1964. The Attorney General has approved a plan which calls for the turning over of the initial responsibility for enforcing Title II to the U.S. Attorneys. The Civil Rights Division will retain review authority over public accommodation matters consistent with its general supervisory responsibility for civil rights matters (see USAM 8-1.000).

Detailed guidelines for effectuating this changeover have been sent to each U.S. Attorney's office. A handbook on public accommodations was also prepared, and sent to each U.S. Attorney's office. The handbook contains a revised standard FBI investigation for all categories of public accommodations covered by the Act, sample pleadings, and suggested instructions on preparing for and litigating public accommodation cases. U.S. Attorneys are urged to consult this handbook for guidance in handling Title II cases. Portions of the handbook are reproduced below for the convenience of the U.S. Attorneys. The Housing and Civil Enforcement Section will furnish U.S. Attorneys additional sample pleadings upon request.

8-6.100 INTRODUCTION

The overall objective of our public accommodations program is to ensure that all members of the general public have equal access to places of public accommodation through aggressive enforcement of Title II of the Civil Rights Act of 1964.

Title II bars discrimination or segregation on the grounds of race, color, religion, or national origin in places of public accommodation. A place of public accommodation is defined to include inns, hotels, and other establishments that provide lodging for transient guests in buildings with more than 5 rooms for rent; facilities principally engaged in selling food for consumption on the premises; gas stations; motion picture houses, concert halls, stadia and other places of exhibition or entertainment (42 U.S.C. §2000a).

This statute is based on the Interstate Commerce Clause and each of the above kinds of establishments is covered by Title II if its operations affect commerce in the manner set forth in the statute. The statute also provides that the establishment would be covered if the discrimination or segregation is supported by state action.

The statute provides that:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to ensure the full enjoyment of the rights herein described.

The statute also permits the Attorney General to intervene in private suits brought under Title II.

The constitutionality of Title II is no longer open to question, although on occasion some defendants still challenge the court's jurisdiction. Although such challenges should not be completely ignored, a brief citation to case law will be sufficient.

The enactment of Title II is a valid exercise of Congress' regulatory power under the Commerce Clause, based on the finding of overwhelming evidence that racial discrimination by hotels and motels impedes interstate travel and has a disruptive effect on commercial intercourse. Congress' power to promote interstate commerce includes the power to enact legislation regarding purely local activities in places of public accommodation which might have a substantial and harmful effect on that commerce. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

It is unnecessary to introduce direct evidence that discriminatory service at a particular restaurant affects the flow of interstate food if a substantial portion of the food served at the restaurant has moved in interstate commerce. Congress could consider the nationwide scope of racial discrimination and its far-reaching effects on commerce if left unchecked, and adopt a rational scheme to protect and foster commerce by

prohibiting racial discrimination in places of public accommodation. See Katzenbach v. McClung, 379 U.S. 294 (1964). If at a particular restaurant the amount of food served which has traveled in interstate commerce is not de minimus, it is considered to be a "substantial portion" of the food served and confers coverage under Title II. See Fazzio Real Estate Co. v. Adams, 396 F.2d 146 (5th Cir. 1968). Coverage is also conferred if a restaurant is located in such a manner as to make it probable that it will have interstate patrons. See Gregory v. Meyer, 376 F.2d 509 (5th Cir. 1967).

The rational basis which Congress had for enacting Title II also applies to places of entertainment. See United States v. Gulf-State Theaters, Inc., 256 F. Supp. 549 (N.D. Miss. 1966). Any establishment which presents a performance for the amusement or interest of a viewing public is a place of entertainment, including an ice skating rink where people assemble to watch skaters (the source of entertainment) who have moved between states. See Miller v. Amusement Enterprises, Inc., 394 F.2d 342 (5th Cir. 1968).

Because the overriding purpose of Title II is to remove the daily affront and humiliation involved in discriminatory denials of access to facilities, the statutory language "place of entertainment" should be given full effect to include establishments which offer their patrons mechanical devices and other equipment as sources of entertainment. The patrons' direct participation is the "entertainment." Thus, a park which offers its patrons boats and a juke box, all of which have traveled in commerce, is a place of entertainment under Title II. See Daniel v. Paul, 395 U.S. 298 (1969). And although Title II was not designed to cover all establishments, a liberal interpretation must be given to the statutory language so as to give full effect to Congress' overriding purpose in enacting Title II rather than limiting the source of entertainment to those things enumerated in the statute. A neighborhood bar which serves no food is therefore a place of entertainment if it offers its customers a juke box, shuffle board, pool table or similar entertainment devices which were manufactured out-of-state. See United States v. DeRosier, 473 F.2d 749 (5th Cir. 1973).

Also covered are similar establishments such as lounges and night clubs which serve no food but present entertainers who are from out-of-state. And they would be covered if they used recording equipment including records and tapes which originated from out-of-state.

The exemption from coverage under Title II for private clubs applies only to those establishments which have fulfilled their burden of proving, by objective criteria, that they are a genuine private club not open to

the public, i.e., their exclusivity. Such factors include the ease and cost of gaining membership, the strictness with and standards by which membership is granted, and rules and regulations governing members. See United States v. Richberg, 398 F.2d 523 (5th Cir. 1968). See USAM 8-6.150 for memorandum on private clubs.

Once discrimination and coverage are proven, a court must order the defendant to take such action as will be adequate to prevent future violations. See United States v. Gramer, 418 F.2d 692 (5th Cir. 1969). In following Gramer, a defendant restaurateur was required to cease offering his two racially utilized dining rooms as alternative eating facilities and was ordered to either use the rooms to offer distinctly different types of service available to persons of all races, or, alternatively, to knock out the wall between the rooms; in either case he was required to post signs indicating a nondiscriminatory policy of service (the court had previously found that use of the two previously segregated rooms had continued on a racial basis after the defendant ceased to enforce the policy of segregation, and that such continued customary use was a violation of Title II). See United States v. Boyd, 327 F. Supp. 998 (S.D. Ga. 1970).

A. Enforcement Program

1. Larger Places of Public Accommodation

Practically all of the larger places of public accommodation specifically mentioned in the Act, such as hotels, motels, restaurants, gasoline stations, motion picture houses, theaters, concert halls, sports arenas and stadia, have discontinued practicing overt racial discrimination, either voluntarily or under court order. However, we have found that some of these larger places, usually motels and hotels, have resorted to subtle forms of discrimination, such as charging minorities higher prices for the same accommodations, maintaining certain areas or rooms for use only by certain minorities, holding out that the establishment is booked up if the minority patron has no advance reservations, and providing discourteous service. Generally, in these circumstances, the cooperation of non-management employees is necessary to make a successful case. See USAM 8-6.110, infra.

2. Smaller Places of Public Accommodation

There is still widespread racial segregation and discrimination among smaller establishments located in small towns and rural areas, mostly in the South. Overt discrimination is still being practiced

by many of these smaller establishments while others, claiming that they do not discriminate, continue to maintain separate facilities for blacks and whites which are a continuation of practices and customs which existed and were enforced prior to the passage of the 1964 Civil Rights Act. These practices and customs tend to perpetuate segregation whether enforced or not and it is our policy to seek a court injunction against the continuations of such practices.

3. Present Goals

Increasingly, we are focusing on the private club type organizations and the subtle discrimination being practiced by establishments which are clearly covered under the Act. As to private clubs, there are those which are purely sham and organized for the exclusive purpose of keeping out blacks, Hispanics and other minorities. Such establishments as restaurants, bars, night clubs, etc., present no real problems as it is easy to show that they are open to the general public. Others, such as country clubs, including golf courses, etc., present the more difficult issues. If you follow the guidelines set out in the private club memorandum, see USAM 8-6.150, infra, you should have no trouble in determining whether a club is private or not.

Mention should be made of other recreational facilities which in many instances will claim the private club exemption. These include athletic fields owned by organizations which promote athletic programs for youths, health spas, swimming pools, parks, playgrounds and other similar facilities. In some cases, the owners of the facilities may actually be private clubs and not within the coverage of Title II. However, the recreational facility will in most cases be independently covered by virtue of being open to the general public. See United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474 (E.D. La. 1974).

Although the major focus of our present program is directed against so-called private clubs, we also plan to seek out and bring into compliance as many as possible of the smaller establishments which still refuse service to minorities or maintain separate facilities. In this regard, we do not view the task as easy. Because of the smaller number of complaints we now receive, we lack both the knowledge of the location of these establishments and the resources necessary to seek them out. However, since you are on the local scene and in a position to be in contact with local leaders, you are better equipped to assess the racial conditions in places of

public accommodation in your district. Certainly, it should not be a drain on your resources to meet with leaders among the minority and ethnic communities and gain their assistance in locating noncomplying establishments. Additionally, we believe that a well-planned public relations program carried out through the news media would be beneficial by putting all places of public accommodation on notice that if they violate the law, they will be sued.

Finally, notice should be taken that some places of public accommodation are not subject to Title II, such as laundromats (we receive numerous complaints involving these facilities), barber shops or beauty parlors (unless located in a covered establishment), funeral homes and cemeteries.

4. Complaints from Native Americans

The Civil Rights Division no longer has a separate unit to deal exclusively with Indian rights. Complaints from Native Americans should be handled in the same way as complaints from any other minority group.

B. Procedures

1. Complaints

With few exceptions, all complaints which allege a violation of Title II should be investigated. A standard preliminary investigation is set out in USAM 8-6.110, infra. This standard request should be used for all initial investigations. Unless the matter to be investigated raises issues outside the scope of the standard investigation, it will be sufficient to simply ask for a preliminary investigation. If additional information is desired, please request such information in detail as an addition to the standard investigation.

Examples of establishments which are not covered by Title II include barbershops, beauty parlors and laundromats, unless they fall within Section 201(b)(4) of Title II. If the complaint is not clear as to whether the facility is covered by subsection (b)(4), a letter or phone call to the complainant rather than a formal investigation will be sufficient to obtain this information.

Title II does not apply to private clubs or other establishments "not in fact open to the public." 42 U.S.C. §2000a(e). However, you should be cautioned that many bona fide private clubs operate facilities which are open to the public and would qualify as public accommodations. Accordingly, where the complaint involves a facility

owned or operated by a so-called private club, you should request an investigation to determine whether the facility is covered.

All so-called private country clubs should be investigated unless the particular club has been determined by a federal court to be private.

2. The Investigation

Generally, the preliminary investigation will disclose sufficient facts to determine whether the establishment is covered by the Act and whether a violation has occurred. However, where the facts are not sufficient to make such determinations, a follow-up investigation should be requested.

Since in most cases it will take at least thirty days or more for an investigation to be completed, if the matter is of sufficient importance, you should request that the investigation be expedited.

In some instances, individuals or groups will conduct testing or surveys of many establishments and the complaint will be against more than one. In all cases, where more than one establishment is involved, prepare a separate investigative request for each establishment, but send all such requests to the FBI in one package to eliminate the necessity of having to make several trips to the same place.

With respect to lounges, night clubs, discotheques or other similar establishments, particular care should be taken in investigating complaints of discrimination where the complainant alleges that while some minorities are admitted, others are turned away with excuses such as, a) must be a member, b) must have advance reservations, c) must pay an unusually high coverage charge, or d) the place is too crowded. We have found that these establishments maintain a quota system whereby the number of blacks, Hispanics or other minorities is held to a certain limit. In reviewing the results of a standard investigation of such complaints it may appear on the surface that no discrimination is involved. Therefore, your investigation should be designed to uncover any such quota system. You will also find that many of these places hire off duty police officers. These officers should be identified and interviewed as to the establishment's policy.

With respect to the request for a preliminary investigation, please indicate in the request what category the facility falls under. See USAM 8-6.110, infra. It is possible for the facility to fall under more than one category.

3. Determination as to Whether to Sue

During the early years of our enforcement of Title II, we adopted a policy of negotiating out-of-court settlements. During the course of the FBI investigation, if the owner indicated a willingness to comply with Title II in the future, we usually sent a letter together with a "Statement of Intent to Comply." If the owner signed the Statement of Intent, we closed out files without litigation and notified the victims of the owner's new policy. However, after much experience with this procedure, we came to the conclusion that it would not work. In some cases, the owners did not return the signed statements and in others we found that a vast majority simply did not live up to their promises. Since the Statement of Intent was not legally binding, we were required to file suit. This necessitated reopening matters which had grown stale and requesting follow-up investigations. Since these matters number in the hundreds, the task became almost insurmountable. Accordingly, we decided to discontinue seeking out of court settlements except under very limited circumstances. The present policy is to sue in every instance where the facts tend to show a pattern and practice of resistance to rights afforded under Title II. A pattern and practice is usually established upon a refusal of service to members of the protected class unless such refusal is based on considerations other than race, color, religion or national origin.

> The words "pattern and practice" within this section authorizing the Attorney General to seek equitable relief against persons responsible for pattern and practice of resistance to full enjoyment of rights secured by the public accommodations provisions of this subchapter are not terms of art to be applied in a formalistic manner to sets of predetermined activities and programs but have a generic meaning and are to be applied in each case to determine whether proven racial discrimination is a general program of defendant.

(United States v. Slidell Youth Football Ass'n, supra, at 474.)

One incident of refusal of service is sufficient to establish a pattern and practice if the incident is based upon race, color, religion or national origin and is the general policy of the establishment.

In the very infrequent cases where we would agree to an out of court settlement, the owner must have taken affirmative action, prior to suit, to eliminate all vestiges of discrimination or segregation. Such affirmative action includes closing any separate facilities customarily used by minorities and posting notices or otherwise informing the general public that minorities will be served on an equal basis with non-minorities.

In the absence of an out-of-court settlement as mentioned above, if a suit is to be filed, the next step is to prepare a justification memorandum from the assistant handling the case to you setting forth sufficient facts to authorize suit. No particular form is required and you may follow whatever procedure you presently use. (A sample justification memorandum is at USAM 8-6.120, infra.) If you approve the filing of a suit, a memorandum to the Attorney General recommending suit and the complaint should be prepared. The complete package which is to be forwarded to the Attorney General will include a copy of the justification memorandum, the memorandum to the Attorney General (see USAM 8-6.130, infra, for sample copy) and the signed complaint which must have a signature line for the Attorney General. This package should be sent through the Chief, Housing and Civil Enforcement Section for record-keeping purposes. Two additional copies should be included, one for our files and one for the Office of Public Affairs.

4. Negotiation Prior to Suit

Following previous policy, the Attorney General has requested that we make a bona fide effort to settle our cases before filing suit. In the area of public accommodation, the term "settle" means attempting to obtain voluntary consent judgments to be filed simultaneously with the complaint. This permits cases to be settled as expeditiously and inexpensively as is consistent with federal law. Accordingly, where the prospective defendant indicates a willingness to comply with the law, we try to negotiate a consent judgment to be filed with the complaint. (Copies of a sample letter and consent decree are in USAM 8-6.160 and 8-6.170, infra.)

Where, however, the prospective defendant is adamant in his/her refusal to serve members of minority groups on an equal basis, we file suit without any attempt to negotiate a consent decree. In these instances, we have concluded, based upon experience, that negotiation is a waste of time and results in your case growing stale. When the complaint is returned to you for filing, you must notify the Office of Public Affairs on the same day that the complaint is filed so that it may issue an appropriate press release.

The Chief of the Housing and Civil Enforcement Section should also be notified of each filing by sending a stamped copy of the complaint. The same procedure is to be followed whenever a consent decree is entered into prior to trial.

You should advise the Office of Public Affairs if local rules of court prohibit publication of complaints prior to service on defendants.

5. Pre-trial Discovery

Interrogatories and admissions are good procedures for bringing a case to summary judgment without prolonged discovery. However, unless the defendants are candid, this procedure may prove to be practically worthless. Unless the interrogatories and admissions prove your case, you should continue with full discovery.

It has been our experience that a majority of defendants will not concede until after discovery has been completed or almost completed. The defendants will usually agree to a consent decree following the pre-trial hearing. The cases most likely to proceed to trial are the private club cases and those defendants who would rather close than comply. These are in a minority. In most instances, a consent decree will be obtained prior to trial.

Care should be taken not to rely solely upon the testimony of FBI agents. Unless you have a signed statement, many witnesses will deny having made a particular statement to Bureau agents. Depositions should be freely used if you have any doubts about your witnesses.

If the government's only witness is the victim and the proprietor denies having discriminated, the case will be decided on credibility. It is unusual for a victim to complain of discrimination unless the act actually happened. In some cases, the proprietor will maintain that the victim was drunk or disorderly and the refusal of service was based only upon his/her conduct. This is a common excuse which experience has shown is usually without merit. Therefore, it is to our advantage to turn up witnesses who know the establishment's reputation in the community. If the Bureau's investigation is insufficient in this respect, you should attempt to develop your witnesses on your own by interviewing members of the appropriate minority community. Generally, leaders among the minority communities will assist you in this undertaking.

Finally, if the case involves difficult issues, it is suggested that pre-trial memoranda be prepared. This is beneficial in educating the court as to the prevailing law on difficult issues.

There will be occasions when a particular matter may fall under both Titles II and III. In these circumstances you should allege violations of both Titles. The most common examples are privately run facilities located within the premises of a public building and, less frequently, facilities such as golf courses, pools, parks and playgrounds which are publicly owned but leased to private individuals or organizations. Whether a public accommodation also qualifies as a public facility depends upon the degree of state action involved. Some cases in point are: Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Gilmore v. City of Montgomery, 417 U.S. 556, 573 (1974); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), cert. denied, 371 U.S. 911 (1962); Wimbish v. Pinellas County, Fla., 342 F.2d 804 (5th Cir. 1965).

You should be aware that there are procedural prerequisites before a violation of Title III may be alleged. They include receipt of a complaint in writing signed by an individual who is a victim of the alleged violation; and a certification by the Attorney General that he/she believes the complaint to be meritorious and that the signers of the complaint are unable to initiate and maintain an appropriate legal action. (See section 301, Civil Rights Act of 1964, 42 U.S.C. §2000b.)

With respect to costs, it has been our policy not to seek costs if the defendants agree to a consent decree to be filed with the complaint. In all other cases which end short of trial, you may use your own judgment as to whether to insist on the payment of costs depending upon the time and expense expended prior to the consent decree.

6. Post-trial Compliance

From thirty to sixty days after a decree has been entered, you should request the FBI to conduct a compliance investigation to ensure that the defendants are in compliance with the decree.

In preparing compliance investigation requests, please outline specifically what you would like the Bureau to do and to whom they should speak in determining whether the defendant in a particular case is complying with the decree. An example of such a request is set out at USAM 8-6.180, infra.

If an establishment is determined to be in noncompliance with a consent decree, it may be necessary to initiate civil contempt proceedings. Copies of civil contempt pleadings in Title II cases are contained in the Title II handbook that has been distributed to all U.S. Attorneys and may also be obtained from the Housing and Civil Enfocement Section.

7. Appeals

In every case decided adversely to the United States or in which the court fails to grant the relief we requested, the U.S. Attorney should make a recommendation to the Appellate Section of the Civil Rights Division regarding whether an appeal should be taken. A short memorandum should be sent within 5 working days after receipt of the court's opinion and should include:

a. The date of entry of judgment;

b. Whether the U.S. Attorney believes an appeal should be taken, and why; and

c. The reasons, if any, for giving original responsibility for the handling of the appeal to the U.S. Attorney rather than the Appellate Section.

The appeal memorandum shall be accompanied by:

a. The district court's opinion and judgment; and

b. The government's filing in the district court which most fully discusses the questions at issue (e.g., post-trial brief, proposed findings and conclusions, memorandum in opposition to motion to dismiss).

Within 5 working days after the filing of a notice of appeal in a case decided favorable to the United States, the U.S. Attorney must submit a memorandum to the Appellate Section containing the items listed above. In such cases, of course, no appeal recommendation is required. Sample forms to accompany the recommendation for appeal or reporting an appeal are contained in USAM 2-3.221 and 2-3.222.

8-6.110 Instructions For Standard Preliminary Investigations

Section 201(b) of the 1964 Civil Rights Act sets forth four categories of establishments which are subject to coverage under Title II. The request for a preliminary investigation should indicate the category of the establishment involved. The investigation to be conducted for each category of establishment is set out below.

A. Category (1) Any inn, hotel, motel, or other establishment which provides lodging to transient guests.

1. If it is initially determined that the establishment has no more than five rooms and a portion of the establishment is actually occupied by the proprietor, it is not covered under the Act. However, prior to terminating the investigation, determine whether category (4) applies and, if so, follow the instructions listed under that category. Otherwise proceed as follows:

2. If the complaint alleges a refusal of accommodations because of race, color, religion or national origin. [Throughout this request, the words "blacks and Hispanics" are used. When appropriate, these words should be read to refer to whatever race, color, religion or national origin is alleged to be the basis of discrimination.]

a. Interview the victim or victims and any witnesses for specific details.

b. Interview the manager or proprietor concerning the present policy of renting rooms to blacks, Hispanics, etc., and ascertain the number and type of accommodations, if any, which were available at the approximate time of the victim's arrival. Please note the type of records used to record and retrieve this information and, if permitted, personally check the records for confirmation. (It is a common practice to hold non-guaranteed reservations only until 6:00 p.m. or shortly thereafter. Accordingly, rooms may be available after 6:00 p.m.) Determine if it is a policy to notify prospective guests of this information and whether the victim was so notified.

c. If it is determined that vacancies were available, interview the desk clerk who was on duty at the time and ascertain the reason the victim was not given accommodations.

d. Determine whether the subject establishment has ever followed, for any reason, a custom or policy of refusing accommodations to blacks, Hispanics, etc. If so, ascertain the approximate period of such custom or policy and the reasons therefore.

e. Interview a representative number of non-management employees, minority and non-minority, preferably away from the establishment, as to their knowledge of a practice of refusing accommodations to blacks, Hispanics, etc.

f. Note the presence and location of any discriminatory signs and photograph some.

g. Ascertain the name and address of the owner or owners of the establishment. If the owner is a corporation, ascertain the name and registered address of the corporation and the names and addresses of the officers and directors.

3. If the complaint alleges discriminatory practices by the establishment, such as charging higher rates to blacks, Hispanics or other minorities, setting aside certain rooms or sections for the accommodation of blacks, Hispanics, etc., or discourteous treatment or service by employees,

a. Interview the victim and any witnesses for specific details.

b. Interview the employee or employees involved.

c. Interview the proprietor or manager as to his/her knowledge of the incident of discourteous treatment or service. Also, determine his/her knowledge of any other discriminatory practices and ascertain who is responsible for the existence of such discriminatory practices.

d. Interview a representative number of employees, particularly hotel employees, preferably away from the establishment, as to their knowledge of such discriminatory practices, whether the management is aware of such practices, how long they have been occurring, and whether they occur frequently.

B. Category (2) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling

food for consumption on the premises, including, but not limited to, any such facility located on the premises of a retail establishment.

1. Determination of Discrimination or Segregation

a. Interview the victim or victims and any witnesses for specific details.

b. Identify and interview the employee or other person involved in the particular incident as to his/her version of what occurred. Ascertain if the employee is under any instructions as to providing service to blacks, Hispanics, etc., or whether it is a custom or practice of the establishment to refuse service to blacks, Hispanics, etc., or to provide discriminatory service such as maintaining separate areas for blacks, Hispanics, etc., or providing carry out service only.

c. Interview other employees of the establishment as to the custom or practice of providing service to blacks, Hispanics, etc., and what instructions they are under regarding same.

d. Interview the owner, manager, or proprietor regarding his/her knowledge of the incident. Ascertain what the present policy of the establishment is with respect to serving blacks, Hispanics, etc. Determine how long the policy has been in effect and the details of any previous policy different from the present.

e. Determine whether the establishment maintains separate serving areas customarily used by minorities. If so, prepare a simple diagram of the establishment showing the location of the separate area with respect to the main area, the location of any separate entrance, separate washroom facilities and any signs designating the area for use by minorities. Photograph the exterior and interior of both the main and the separate area and any signs.

f. Interview a representative number of minority patrons who utilize the separate area and ascertain:

(1) How long have they patronized the establishment;

(2) Have they at any time sought or received service in the main area;

(3) Have they ever sought and been refused service in the main area;

(4) Have they ever observed or know of other minorities who have either requested or have been denied service in the main area;

(5) What is their understanding of the establishment's policy with respect to serving minorities in the main area;

(6) What is their reason for utilizing the separate area, i.e., do they feel they would be refused service in the main area, treated discourteously, or charged different prices for the same services; and

(7) If the utilization of the separate area is a carry over from past segregation laws or customs which existed prior to the passage of the Civil Rights Act of 1964, have they at any time since 1964 been notified by the establishment that they could be served in the main area.

g. Where there are no dual facilities and the only witness is the victim, if the owner or proprietor denies any policy of discrimination, interview a representative number of black residents in the community and other minorities, if appropriate, as to their knowledge of a discriminatory policy at the establishment.

2. Coverage

a. Any establishment under this category located on an Interstate or United States Highway is automatically covered and no further investigation on coverage is required.

b. Any establishment which is adjacent to an airport, bus terminal or train station is automatically covered.

c. Any establishment which is in the immediate vicinity of an airport, bus terminal, or train station is, in most cases, automatically covered. However, it is necessary to show that these establishments service or offer to serve travelers who use these facilities. Coverage would be established if the establishment acknowledges that they serve or offer to serve travelers using these facilities. The management of such an

establishment should be questioned concerning their policy. If the response is negative or equivocal, then complete the following investigation on coverage which applies to all establishments in this category not mentioned above.

d. Obtain from the owner or manager, a dollar amount of his/her expenditures for each of three months preceding the investigation. From this statement, identify the most costly items purchased, such as meats, poultry, seafoods, dairy products and produce. Obtain the names and addresses of the suppliers of these products and interview them as to the source (in-state or out of state) of these products. In most instances, the immediate supplier will be able to furnish this information. If not it will be necessary to follow through on the immediate suppliers' source until it can definitely be established whether the goods moved in interstate commerce. Copies of records of purchases from suppliers should be made if it appears that the records will not be maintained for at least six months from the date of the investigation.

e. If any facility under this category claims to be a private club, unless otherwise indicated, it will be sufficient to obtain information to show whether membership is open to the general public, except blacks, Hispanics, etc., whether members have any voice in the operation of the facility including passing on new members and whether the facility is actually owned by others than the members. If there is a membership requirement, how are members selected.

C. Category (3) Any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment:

1. Determination of Discrimination or Segregation

a. Interview the victim or victims and any witnesses for specific details.

b. Interview the owner, manager, or proprietor regarding his/her knowledge of the incident. Ascertain the facility's present policy with respect to admitting blacks, Hispanics, etc., or permitting blacks, Hispanics, etc., to participate in any functions conducted by or held within the premises of the facility, or whether to the knowledge of the employee, it is a policy, practice, or custom to refuse equal service to blacks, Hispanics, etc.

c. Identify and interview the employee or other person involved in the incident as to his/her version of what occurred. Ascertain if the employee is under any instructions as to admitting blacks, Hispanics, etc., or permitting blacks Hispanics, etc., to participate in functions conducted by or held within the premises of the facility, or whether to the knowledge of the employee, it is a policy, practice, or custom to refuse equal service to blacks, Hispanics, etc.

d. Interview other employees of the facility as to the practice, policy or custom of admitting blacks, Hispanics, etc., to the facility or permitting blacks, Hispanics, etc., to participate in any functions conducted by or held within the premises of the facility, or to refuse equal service to blacks, Hispanics, etc.

2. Coverage

a. With respect to theaters which commonly present motion picture films, determine the name of the distributor of the films presented. Interview the distributor and ascertain the out-of-state source of all films shown within the past six months.

b. With respect to theaters and concert halls which commonly present entertainment other than motion picture films, determine the type of entertainment which is commonly presented. Ascertain the particular event which was being presented at the time of the incident and the name of the person or group who was performing and whether they were from out of state. Also ascertain a description of all performances which were presented within the past six months, the name of the person or group and whether they were from out of state. As to all performances presented within the past six months, obtain the name and the address of the agency which booked the performance.

c. With respect to bars, lounges or other similar facilities:

(1) Ascertain if any live entertainment is presented and, if so, obtain the information requested in b. above.

(2) Identify any mechanical sources of entertainment (e.g., pool tables and related equipment, pin ball machines, juke boxes or other devices providing music).

(3) Determine the name and address of the manufacturer and supplier of such sources of entertainment. If readily ascertainable, determine the manfuacturer's serial number of any such source of entertainment.

(4) If any facility under this category serves food, ascertain the dollar amount of purchases from all sources for the past three months. From this amount, determine the dollar amount which represents food purchases. Obtain the names and addresses of the principle suppliers of food products and interview the suppliers to determine the dollar amount of such purchases which originated from out of state.

d. With respect to all other places of exhibition or entertainment, such as athletic fields, parks, playgrounds, swimming pools, beaches or lakes:

(1) Ascertain whether such facilities present events which are engaged in, utilized by, or available to persons from out of state.

(2) Ascertain whether the facility utilizes equipment of any kind, (e.g., golf carts or equipment, roller or ice skates, automatic bowling pin setters or bowling pins, boats, ramps, boating equipment, diving boards or other swimming equipment) or any other type of recreational devices or equipment which originated from out of state.

(3) Determine the name and address of the manufacturer and supplier of all such entertainment devices or equipment.

(4) Determine what facilities (e.g., benches, seats or other designated areas) exist for patrons either to watch any entertainment presented or to observe any other patrons entertaining themselves by use of such recreational devices or equipment.

(5) If any facility under this category serves food, ascertain the dollar amount of purchases from all sources for the past three months. From this amount, determine the dollar amount which represents food purchases. Obtain the names and addresses of the principle suppliers of food

products and interview the suppliers to determine the dollar amount of such purchases which originated from out of state.

e. In many instances, athletic and sporting events are provided for local groups such as Little League, Babe Ruth and other such groups or teams, youth and adult. In these circumstances, it will be necessary to identify and interview the sponsors of the teams and ascertain their policy with respect to participation by blacks, Hispanics, etc.

f. In the event any of the above facilities under this category of groups, teams, etc., utilizing such facilities claim to be private clubs, conduct the additional investigation listed below under "private clubs," unless otherwise requested.

D. Category (4) Any establishment which is physically located within the premises of any establishment otherwise covered by this statute or within the premises of which is physically located any such covered establishment and which holds itself out as serving patrons of such covered establishment.

1. In most cases, this category will involve covered establishments such as hotels and motels, which have located on or within their premises other establishments which would not otherwise be covered, such as barbershops, beauty parlors, and bars. In such circumstances, the principal establishment is automatically covered. As to the other facilities, it is only necessary to show that they serve or offer to serve patrons of the covered establishment. Some facilities such as bars or lounges will maintain that they are private clubs. However, if patrons or guests of the principal establishment are freely offered membership or service in the other establishment, it may be assumed without further investigation that such facilities are covered.

2. Private Clubs

a. Obtain, if available, a copy of the club's bylaws or charter.

b. Determine the legal entities involved in the ownership of the property and management of the club (e.g., corporation, partnership, unincorporated association, sole proprietorship) and the names, address and races of the persons involved (e.g., partners); determine the present club officers and methods by which they were selected.

c. Determine whether any numerical limit is set upon membership in the club.

d. Determine whether payment of any dues, annual or lifetime, is required in connection with membership in the club, and, if so, in what amount.

e. Obtain a copy of any membership list that is maintained.

f. Ascertain the number of members of the club and whether there are any non-white members; if there are, obtain their names and addresses.

g. Determine all details of the procedures by which a person or family makes an application for membership in, and is admitted to, the club.

h. Ascertain what qualifications, if any, a prospective member must meet to be eligible for membership and what items, if any, disqualify him/her.

i. Determine whether the recommendations of existing members are required from prospective members.

j. Determine what control, if any, existing members have over the admission applicants for membership, (e.g., whether there is a membership committee selected by the members to represent them), if such a membership committee exists, obtain the names and addresses of its members, whether there is a blackball system by which one or more individual members can reject an applicant even though he/she might have been recommended by another member or members, whether notice of pending applications is given to existing members, whether existing members are notified after an applicant has been admitted.

k. Ascertain whether the members exercise control over the financial operations of the establishment and to what extent (e.g., do they own any of the property, do they determine how the revenues from the establishment's operations are used, are these revenues retained by the establishment's manager).

l. Ascertain whether the club advertises in any manner and, if possible, obtain copies of all advertisements. If copies cannot be obtained, please describe the advertisements, including whether such advertising indicates in any way that the subject establishment is a private club not open to the general public.

m. If the subject establishment is listed in the local telephone directory, determine whether its listing can be distinguished from any other restaurant or other place of public accommodation and whether it is designated as a private club.

n. Determine the established procedures, if any, for permitting non-members or guests of members to use the subject establishment's facilities (e.g., whether non-members can rent the facilities of the club).

o. Determine whether the establishment has ever been operated on some basis other than a private club. If so, please obtain all details, including the date of, and reasons for, the purported change to a private club.

3. Private Club Facilities

This group will involve bona fide private clubs which operate facilities which may be open to the public. Such groups will include organizations which are clearly private, such as fraternal or military organizations (e.g., Elks and Moose Lodges, the VFW and the American Legion). In order to determine whether the facilities they operate are open to the public and are therefore within the coverage of Title II, conduct the following investigation:

a. Ascertain what precise policy is followed in admitting guests to the facility.

b. May non-members of the club be admitted who are not invited by members.

c. What procedure is followed in determining whether a non-member is authorized to be admitted.

d. If any customers are present on the premises, interview a representative number and ascertain if they are members or guests of members. If they are neither, ascertain under what circumstances they were permitted to enter, whether they were

ever permitted to enter, whether and how often they have patronized the establishment in the past, and whether they were ever asked to show whether they were guests of members. If they claim to be guests of members, determine the procedure they are required to follow in order to be admitted (e.g., required to sign a guest book or required to be accompanied by the member, etc.).

8-6.120 Sample Justification Memorandum

TO: Chief
Public Accommodations and
Facilities Section

DATE:

LCB:WHM:bpm

FROM: Attorney
Public Accommodations
and Facilities Section

DJ 167-17M-435

SUBJECT: Proposed Title II Action Against
Homer L. and Janet D. Wilson, d/b/a
Norm's Inn, Norman P. Arthur, Lessor,
St. Petersburg, Florida

We are prepared to file the attached complaint against the owners and operators and lessor of the establishment named above.

FACTS

Norm's Inn, also known as Norm's Inn Club, is a bar located at 1000 Ninth Street South, St. Petersburg, Florida. Norman P. Arthur operated the bar for approximately twelve years until February of 1975, when he sold the business to Mr. and Mrs. Homer L. Wilson. Arthur still owns the building housing the bar, and has leased the premises to the Wilsons for a five-year period. Arthur says he has nothing to do with the operation of the bar now.

Arthur says that he chartered the bar as a private club, but he was unable to provide the FBI with any of the papers relating to the alleged private club status of Norm's Inn. Arthur says that he originally built up his clientele by selling membership cards to whites for one dollar, which entitled them to membership for a period of one year.

Norm's Inn serves approximately $300.00 worth of food on its premises monthly in addition to monthly sales of alcoholic beverages totalling

around $2,000.00. The establishment contains a bar, juke box, bowling machine, and a pool table.

DISCRIMINATION

Sometime in July of 1975, James B. Ivery, Gerald Holmes, Harold McRae and Rickie Holmes, all black males, entered Norm's Inn and ordered a quart of beer. After Ivery paid for the beer, he allegedly was told by the bartender "you can't stay here and drink it." The four blacks did not leave the premises, but shot pool and drank beer until two uniformed officers, apparently summoned by the bartender, arrived and asked them to leave since they did not have membership cards, suggesting that they take their complaint to the state's attorney. The group thereupon left. Ivery told the FBI that until the policemen came, no mention had been made by anyone of membership cards. The other three members of the group substantiate Ivery's story.

On July 26, 1975, Ivery led a parade of nine demonstrators to Norm's Inn, protesting what they called segregation at the bar. Ivery is president of the then two-month old St. Petersburg chapter of the Southern Christian Leadership Conference (S.C.L.C.). (Ivery was dishonorably discharged from the Air Force in 1971; he has been arrested at least three times, the latest in May of 1974 for two counts of breaking and entering (disposition unknown).) Other S.C.L.C. members included Rickie Holmes (vice-president) and Harold McRae.

Norman Arthur readily admitted to the FBI that when he ran Norm's Inn, he would make package sales to blacks, but would not allow them to drink on the premises. He also stated that if he was approached by a black to purchase a membership for the bar, he would simply say that the membership has been closed and that he had no memberships available. It is Arthur's understanding that the Wilsons will not permit blacks to be served on the bar's premises. He advised that if blacks were required to be served, he would probably have to take his business back, and that before he would operate a bar and have to serve blacks, he would simply change the business into a package store. (For this reason, and because Arthur still owns the building housing Norm's Inn, among other reasons, Arthur is named as a defendant.)

Mr. Wilson states that when he purchased the business, it had an established clientele which included no blacks, and since purchasing it he has sold no membership cards to blacks. He said that many blacks purchase beer and wine from him on a "to go" basis, but as a rule they never consume these beverages on the premises. Mrs. Wilson confirmed what her husband stated and said that blacks are not permitted to drink on the

premises of Norm's Inn. She says that Ivery and McRae are troublemakers and that these two have pressed felony assault charges against her brother.

LAW AND COVERAGE

The bar contains a Wurlitzer juke box, which in our experience we know to have been manufactured in North Tonawanda, New York. It contains an American Shuffleboard pool table, which in our experience we know to have been manufactured in Union City, New Jersey. There is also a Chicago Dynamic Industries, Inc., bowling machine, which was presumably manufactured outside the State of Florida. It is also likely that most of the beer and wine served at the bar has travelled in interstate commerce.

The courts have made it clear that the presence, in a bar, of entertainment devices which have travelled in interstate commerce denotes a place of public accommodation within the meaning of Section 2000a of the Civil Rights Act of 1964. See United States v. DeRosier, 473 F.2d 749 (5th Cir. 1973); United States v. Deyorio, 473 F.2d 1041 (5th Cir. 1973); United States v. Deetjen, 356 F. Supp. 688 (S.D. Fla. 1973). Since Norm's Inn contains entertainment devices which have travelled in interstate commerce, we have Title II coverage.

It is likely that as a defense to this action, the defendants will maintain that Norm's Inn Club is a "private club" within the meaning of 42 U.S.C. §2000a(e), which it certainly is not. In the light of the intent of Title II and subsequent case law, Norm's Inn Club is no more than a "sham" club as far as Title II coverage is concerned. Other than the payment of one dollar, the club demands nothing else of a member than that he or she be white. Norm's Inn "Club" has none of the requisite characteristics of a private club as enumerated in Daniel v. Paul, 395 U.S. 298 (1969); Nesmith v. YMCA of Raleigh, 397 F.2d 96 (4th Cir. 1968); United States v. Richberg, 398 F.2d 523 (5th Cir. 1968); Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970); United States v. Jack Sabin's Private Club, 265 F. Supp. 90 (E.D. LA. 1967); United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966).

The fact that Norm's Inn has a liquor license as a "private club" does not mean that it comes within the private club exemption provided for in 42 U.S.C. §2000a(e). See Wright v. Cork Club, supra, at 1153-1154.

CONCLUSION AND RECOMMENDATION

I recommend that we file the attached complaint. There may be some personal animosities between the complainants and the Wilsons, and our

main complainant, Mr. Ivery, may have an unsavory arrest record, but these facts certainly do not impose any reason why we should not file a Title II action. Mr. Arthur and the Wilsons have clearly admitted that they will not serve blacks alcoholic beverages for consumption upon the premises, and this is in violation of the public accommodations section of Title II.

8-6.130 Sample Attorney General Memorandum

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: United States v. Donald Franklin Fairbanks, d/b/a Elaine's Lounge, (E.D. Tex.)(Public Accommodations)

Please authorize me to file the attached complaint alleging that the owner of a restaurant in a small town in eastern Texas violated the public accommodations title of the 1964 Civil Rights Act by refusing to serve black patrons except on a take out basis.

This is a routine case. If you approve, please sign the complaint and return it to me.

United States Attorney
Eastern District of Texas

8-6.140 Sample Complaint

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CIVIL ACTION NO.
ROGER LAMAR WOODS, JANE WOODS	)	
d/b/a HOLLY SPRINGS MOTEL:	)	
RUTH ANN LUTHER, Manager,	)	COMPLAINT
	)	
Defendants.	)	

The United States of America alleges:

1. This action is brought by the Attorney General on behalf of the United States pursuant to the provisions of 42 U.S.C. §2000a-5(a).

2. This Court has jurisdiction of this action under 42 U.S.C. §2000a-6(a) and 28 U.S.C. §1345.

3. Defendants Roger Lamar Woods and Jane Woods own and operate an establishment known as the Holly Springs Motel, located in Holly Springs, Mississippi, within the Northern District of Mississippi. Defendant Ruth Ann Luther manages this facility. All defendants reside within the Northern District of Mississippi.

4. Holly Springs Motel is an establishment which provides lodging to transient guests and contains more than five rooms for rent.

5. Holly Springs Motel is a place of public accommodation within the meaning of 42 U.S.C. §2000a-(b)(1). Its operations affect commerce within the meaning of 42 U.S.C. §2000a-(c)(1).

6. The defendants follow a pattern and practice of denying to blacks, on the basis of their race, the use and enjoyment of the facilities and services of Holly Springs Motel on the same basis as such facilities are provided to white members of the general public.

7. Pursuant to the pattern and practice described in paragraph 6, the defendants charge a higher room rate for blacks than whites for similar accommodations.

8. Pursuant to the pattern and practice described in paragraph 6 the defendants have designated certain units in the motel for whites and certain units for blacks, and their policy is to place whites and blacks in these units only.

9. The acts and practices described in paragraphs 6, 7, and 8 constitute a pattern and practice of resistance to the full and equal enjoyment by blacks of rights secured to them by 42 U.S.C. §2000a et seq. This pattern and practice is of such nature and intent as to deny the full exercise by blacks of such rights.

10. Unless restrained by order of this Court, the defendants will continue to refuse to provide blacks with the full and equal enjoyment of rights secured to them by 42 U.S.C. §2000a et seq.

WHEREFORE, plaintiff prays that this Court enter an order permanently enjoining the defendants, together with their agents, employees, successors in interest, and all those in active concert or participation with them in the operation of Holly Springs Motel from:

(a) Charging blacks more than whites for similar accommodations;

(b) Designating rooms on a racial basis and assigning guests to rooms on a racial basis;

(c) Failing or refusing to serve blacks upon the same conditions as white members of the general public are served;

(d) Failing or refusing to insure that all of the goods, services, facilities, privileges, advantages, and accommodations of Holly Springs Motel are made available to and used by blacks upon the same basis and under the same conditions as they are made available to and used by white patrons; and

(e) Engaging in any act or practice which deprives, directly or indirectly, any person of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of Holly Springs Motel or any other place of public accommodation owned or operated by the defendants, on the basis of race or color.

Plaintiff further prays that this Court enter an order directing the defendants to take such affirmative steps as may be necessary to eliminate the effects of their past racial discrimination and to post appropriate notice or otherwise inform the general public that all accommodations and services offered at Holly Springs Motel are available to all members of the general public without regard to race or color.

Plaintiff further prays that this Court grant such additional relief as the needs of justice may require, including the costs and disbursements of this action.

Edward H. Levi
Attorney General

Assistant Attorney General

United States Attorney

Attorney
Department of Justice
Washington, D.C. 20530

Attorney
Department of Justice
Washington, D.C. 20530
(202) 739-4726

8-6.150 Memorandum Regarding Private Club

[Note: footnotes in the original memorandum have been inserted into the text in brackets.]

TO: Chief
Public Accommodations and
Facilities Section

DATE: April 18, 1976

JHC:LCB:lrs

FROM: Attorney
Public Accommodations and
Facilities Section

SUBJECT: "Private Club" Exemption set forth at §201(e) of the Civil Rights Act of 1964

The Civil Rights Act of 1964, after describing the types of establishments covered under Title II, sets forth the following exemption at §201(e), 42 U.S.C. §2000a(e).

Private Establishments

(e) The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section.

What actually constitutes a "private club or other establishment not in fact open to the public" is a question not answered by resort to any one single test. The courts are evenly divided as to whether such a determination is to be made as a question of law or a question of fact. The one area of agreement is that the burden of proof rests on the one claiming the private club exemption to substantiate his/her claim, [see United States v. Richberg, 398 F.2d 523, 529 (5th Cir. 1968); Nesmith v. YMCA of Raleigh, 397 F.2d 96, 101 (4th Cir. 1968)], although coverage under Title II appears to require an affirmative showing that an establishment "serves the public."

There are certain recurrent criteria and tests of private club status which appear in the cases dealing with 42 U.S.C §2000a(e). These factors can be placed in three rather arbitrary categories: selectivity, exclusivity and the ownership and control of club resources by members. To avoid being considered a sham club, an organization must be one "whose membership is genuinely selective on some reasonable basis." Any organization not in fact open to the public must somehow exclude mere members of the public. And finally, it is evident that there is a distinction between what is in fact an ordinary commercial proprietorship, and an organization whose assets are owned and controlled by the members for the good of the membership.

Some of the criteria and factual tests which may be isolated from the cases dealing with private clubs include: [Much of the following has been taken from a memorandum dated December 9, 1971, by Thomas R. Sheran and from 8 ALR Fed 363, "Private Clubs."]

A. SELECTIVITY

1. Formalities

a. Are there any other than nominal qualifications for membership, and if so, have they been articulated in some formal pronouncement of the members of the organization?

b. Have formal procedures been established for processing membership applications?

(1) Do the members themselves participate in the selection of new members? If there is a membership committee, has it been selected by the members to represent them?

(2) Are existing members notified when applications are pending or when applicants have been accepted as new members?

(3) Are applicants investigated in any way prior to admission, or are they interviewed by a membership committee or representatives of the membership; are recommendations or references required?

(4) Is there a "blackball" system whereby existing members may reject an applicant?

c. Have formal procedures been established for revoking existing memberships? If so, do other members play a role in the process?

d. Are there initiation fees or dues, apart from usage fees, and are they more than nominal?

e. Are there any state limitations on the size of the organization or geographic or other restrictions?

2. Practices

a. Do organization members actually participate in the process of selecting new members in the manner suggested in the by-laws or elsewhere? Do membership committees actually meet and discuss applications, or do they act as a "rubber stamp"?

b. How are new members solicited? Does the organization advertise in any manner for new members or patrons or encourage members of the public to join or visit its facilities?

c. How much time is devoted to processing membership applications?

d. If there are limitations on the size of the organization, are they of a type which reflect a purpose of exclusiveness, or are they merely reflective of the capacity of the organization's physical facilities? Does the size of the membership allow for full member participation and ensure that all members share a common associational bond?

e. What is the total number of applicants rejected as compared to the total accepted? Have any white applicants ever been rejected?

B. EXCLUSIVITY

1. Formalities

a. Are the organization's patrons identifiable by "membership" status or otherwise? Is a list of members kept?

b. Do the organization's rules or by-laws provide for the exclusive use of its facilities by members and families and legitimate guests or for certain rights or privileges not available to the general public?

c. Has the organization qualified for special zoning or licensing provisions for private clubs, and has it been able to take advantage of special tax provisions for such groups?

2. Practices

a. Are the procedures for excluding non-members designed to be effective and are they consistently employed? If only membership cards or the like are required for admission, are they easily transferrable?

C. CONTROL BY MEMBERSHIP

The basic test seems to be whether or not the entity is, in fact, an ordinary commercial proprietorship operated for the profit of one person or a small group, as opposed to a group having as a stated purpose for existing, some civic, fraternal or social reason. Some of the tests that may be applied are:

1. Formalities

a. Who actually has title or interest in the assets of the organization?

b. Does the revenue of the organization inure to the benefit of one or a few individuals rather than the membership as a whole?

c. Is there a formal declaration of rules and regulations and by-laws for the operation of the organization giving the members final say as to the operation of the organization and as to the selection of its operating officers and personnel?

d. Is the organization obviously a "sham" created to evade the Civil Rights Act of 1964?

2. Practices

a. How were the organization's assets originally acquired?

b. If the organization has acquired assets from a previously "public" facility, has there been any change in the management or mode of operation since?

c. Does the organization receive any public funds or does it lease any public property?

A. SELECTIVITY

The selectivity test can be thought of as embodying the requirement that an organization seeking exemption justify its non-public status on some grounds other than race prejudice. The test derives from the remark of Senator Humphrey that 42 U.S.C. §2000a(e) would protect only those organizations "whose membership is genuinely selective on some reasonable basis." [110 Cong. Rec. 13,697 (1964)]

1. Formalities

a. Articulated Qualifications for Membership Other Than Nominal

The most probative inquiry with regard to selectivity is in the area of membership qualifications. The courts have uniformly denied the 42 U.S.C. §2000a(e) exemption to organizations which require no qualifications for membership, [Daniel v. Paul. 395 U.S. 298, 302 (1969) (Over 100,000 white persons were routinely provided "membership" cards each season at the Lake Nixon Club); United States v. Jack Sabin's Private Club, 265 F. Supp. 90, 92, 94 (E.D. La. 1967) (Although the

by-laws provided for issuance of membership cards to applicants approved by the board of trustees, whites were either served without cards or issued cards without meeting any standards and without being passed on by the board of trustees); United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151, 153 (W.D. La. 1966) (Restaurant owners "offered and issed membership cards . . . to any white customer without any requirements or conditions whatsoever"); United States v. Clarksdale King & Anderson Co., 288 F. Supp. 792, 795 (N.D. Miss. 1965) ("[T]he only stated qualifications for membership in the Regency Club are an application blank, $2.00, and white skin, for the officers who passed on membership could define these qualifications no more exactly than that")], or which set their standards so low as to allow any member of the white public to qualify. [Smith v. YMCA of Montgomery, 462 F.2d 634, 637 (5th Cir. 1972) (Membership open to the general public, the only qualifications being that the applicant be of "good moral character," in sympathy with the aims and purpose of the organization, and a citizen of Montgomery); United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474, 485 (E.D. La. 1974) (The court stated that the primary test of private club status was whether members were selected on any genuine basis. Here they were not: all 2,000 white applicants had been accepted, no interview or recommendation was required, and there was no limit placed on the number of youth participants. Slidell is interesting because it involves an organization with two levels of membership, adult (voting) and youth (non-voting)); Nesmith v. YMCA of Raleigh, 397 F.2d 96, 101 (4th Cir. 1968) ("Application is available to 'any person of good moral character who subscribes to the Association's purposes'"); United States v. Jordan, 302 F. Supp. 370, 377 (E.D. La. 1969) ("The only qualification for membership, other than race, is that a person not be a known troublemaker").] In Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973), the Supreme Court stated in refusing the exemption, as it had in Sullivan v. Little Hunting Park, 396 U.S. 229 (1969), that the defendant organization had "no plan or purpose of exclusiveness" and that membership "is open to every white person within the geographic area, there being no selective element other than race." Tillman, supra, at 438. The Wheaton-Haven Recreation Association had a stated maximum number of memberships, and applications were required to have formal board or membership approval.

In Bell v. Kenwood Golf and Country Club, Inc., 312 F. Supp. 753 (D. Md. 1970), the court refused an exemption to an

organization which had implemented admissions policies never agreed upon, and not subject to change by the membership. The court did not require the organization to prove that reasonable admission standards had been laid down by the membership, but it did find that where admission standards, specifically racially discriminatory standards, are in fact being implemented, then the membership must have participated in their making before any claim or private club status could be made.

b. Formalities for Processing Applications for Membership

(1) Do members participate?

(2) Are members notified?

(3) Are applicants investigated?

(4) May members "blackball" an applicant?

It is characteristic of organizations to have formalized procedures for the processing of applications for membership. The absence of such mitigates against private club status. Even with the requisite formalities, the courts find organizations to fail the selectivity test unless the formalities actually involve the members in the process of selecting new members. [In Nesmith v. YMCA of Raleigh, supra, at 101, the court pointedly observed that, "[a]lthough there is a membership committee it is admitted that there are no prescribed or regularly used qualifications for membership and no particular rules or regulations governing the committee activities." In United States v. Richberg, 398 F.2d 523, 527 (5th Cir. 1968), the court noted that control over membership in the Dixie Diner Club was vested in one man and went on to find that [s]everal avowed members . . . were ignorant not only of the manner in which new members were selected, but of the very name of the club itself." In Bradshaw v. Whigam, 11 Race Rel. L. Rep. 934, 936 (S.D. Fla. 1966), the court observed:

> [A] private club customarily consists of individuals who, through committee action or membership action or both, approve and select their membership. Here the individual defendants exercised exclusive control over the selection and admittance of new members, and the existing members have no voice.

See also United States v. Jack Sabin's Private Club, supra, at 92 (Lack of genuinely collective action in the choice of new members); United States v. Jordan, supra, at 377 ("Existing members have no control over the admission of applicants for membership").] If an organization's members are afforded a vote on membership actions, then the inquiry, as far as formalities is concerned, can probably be ended. Be wary, however, lest an ostensible "club" have all of the formalities, but no true membership control over admission of new members.

Some of the usual indicia of membership control over the acceptance of new members are whether existing members are notified when applications are pending or when applicants have been accepted as new members [United States v. Richberg, supra, at 527; United States v. Jordan, supra, at 375]; whether applicants are investigated or interviewed by a membership committee or representatives of the membership [Stout v. YMCA of Bessemer, 404 F.2d 687 (5th Cir. 1968), (in which the court noted that three weeks after two black applicants were rejected, a white patron was rented a room for $1.50 plus a 50 cent membership without having to submit a formal application); Nesmith v. YMCA of Raleigh, supra, at 102 ("Where there is a large membership or a policy of admission without any kind of investigation of the applicant, the logical conclusion is that membership is not selective")]; whether references are required [United States v. Slidell Youth Football Ass'n, supra, at 485 (No interview, recommendation or evaluation of applicant required.) The courts have usually recognized that in truly private clubs recommendations of existing members are generally required. In United States v. Northwest Louisiana Restaurant Club, supra, the court noted specifically that prospective members did not have to be approved by anyone other than the "club's" owner]; and whether there is any "blackball" system whereby existing members may reject an applicant. [Bell v. Kenwood Golf and Country Club, supra, at 756 ("With respect to the admission of new members, existing members have no right to vote or blackball"); United States v. Jordan, supra.]

c. May Members Revoke Existing Memberships?

As with admissions of new members, the courts have held that it is essential that the members of a truly private club have the right to make their own rules upon the subject of exclusion of existing members, and the sole right to exercise it. [Smith v. YMCA of Montgomery, supra, at 637 (". . . no rules or regulations govern or define the rights and responsibilities of the members vis-a-vis the organization. For

example, the by-laws do not authorize the YMCA to discipline or expel its members"); Bell v. Kenwood Golf and Country Club, supra, at 756 ("Existing members are given no notice as to the proposed expulsion of a member, and have no vote on expulsion"); Bradshaw v. Whigam, 11 Race Rel. L. Rep. 934 (S.D. Fla. 1966) (although the by-laws stated that a member could be expelled only after notice and a hearing, Mr. Whigam [the proprietor] expelled two persons from club membership on his own authority and without notice or a meeting).]

d. Dues Other Than Usage Fees

Courts frequently notice the ready availability of membership upon payment of nominal fees, in apparent contrast to the substantial membership costs normally associated with private clubs. [See, e.g., Stout v. YMCA of Bessemer, supra, at 688 (50 cents membership fee); Williams v. Rescue Fire Co., 254 F. Supp. 556 (D. Md. 1966) (25 cents annual dues); United States v. Clarksdale Kiwanis & Anderson Co., supra, ($2 fee for admission); Bradshaw v. Whigam, supra, (10 cents admission fee, "good for life"; no dues). But see Bell v. Kenwood Golf and Country Club, Inc., supra (Exemption denied in spite of initiation fees from $600 to $1500, and dues from $28 to $38 per month).] Merely nominal fees may indirectly establish the lack of rights and privileges incident to membership, particularly when the "club" derives the bulk of its revenue from per-use charges. [In Daniel v. Paul, supra, the Supreme Court not only noted that the seasonal membership fee for the Lake Side Amusement area was a mere 25 cents, but also cited the additional fees required for use of swimming, boating, and miniature golf facilities. See also Williams v. Rescue Fire Co., supra, at 556 (Having paid only 75 cents annual dues, "[t]he club 'members' merely have the right of admission upon paying the schedules fees (which are many times the annual 'dues'), against which members are afforded no credit".) In United States v. Jack Sabin's Private Club, supra, at 94, the court noted that "no member has ever been charged either a membership fee or dues of any kind," but went on to find that, "prices charged for food and services are comparable to other public restaurants of the same quality as Jack Sabin's," and "unless a 'member' has established credit and has been issued a credit card, the member must pay cash for food and services at Jack Sabin's." See also United States v. Jordan, supra, at 378 (With one exception members "are not entitled to credit in using the 'club's' facilities").] Even under such circumstances, the

entire inquiry may be more properly addressed to the commercial orientation of the club rather than its exclusivity. [See discussion in Section C. herein.] In any case, care should be taken to avoid the implication that the converse of nominal admission costs, i.e., substantial fees and dues necessarily proves bona fide private club status. [See Bell v. Kenwood Gold and Country Club, Inc., supra.]

e. Limitations on Size of Organization

An organization which requires membership for the use of its facilities will, nevertheless, not be accorded an exemption if its membership is entirely open-ended. [In Nesmith v. YMCA of Raleigh, supra, at 102, the court stated that in determining whether an establishment is in fact a private club, "[t]he first factor is the size of the organization and the open-ended character of its membership rolls." The Raleigh YMCA in Nesmith had a membership of 2,696. In Smith v. YMCA of Montgomery, supra, at 637, the Montgomery YMCA had 18,000 members, of whom only 285 were eligible to vote for the Board of Directors (the Board, in turn, annually selected the "voting members"). The court held that the YMCA was too obviously unselective in its membership policies to be a private club. In Bradshaw v. Whigam, supra, at 936, the court observed that "[m]ost private clubs have limited memberships. The defendant's membership is unlimited and has exceeded 21,000 members in one year of operation." See United States v. Jack Sabin's private Club, supra (12,000 "membership" cards issued); United States v. Slidell Youth Football Ass'n, supra (2,000 members and no stated limit).] Even a formal statement limiting the size of an organization is not enough, if in fact the membership lacks exclusivity. [In Tillman v. Wheaton-Haven Recreation Assoc., supra, even a stated limit of 325 families did not lead to exemption as a private club. In Olzman v. Lake Hills Swim Club, Inc., 495 F.2d 1333 (2d Cir. 1974), the defendant club argued that because its swimming club was open to only 110 area residents and their families out of 2,300-odd homeowners in the community, it was exempted by 42 U.S.C. §2000a(e). The court disagreed, noting that applicants who had purchased their homes from former members automatically became members upon paying their membership fees, without ever having to progress through the waiting list. Citing Sullivan v. Little Hunting Park, supra, the court simply said that "there was no plan or purpose of exclusiveness." The court stated that "if limitation on the number of users were the test, every restaurant or night club

limited by law or fire regulations to a given number of occupants at a given time would be magically transformed into a 'private club.'" Olzman, supra, at 1136.]

2. Practices

a. Do the Organization's Members In Practice Participate in the Selection of New Members?

It is not clear from the cases whether, or under what circumstances, an organization seeking exemption can meet its burden of going forward with the evidence by merely showing the proper formal prerequisites to membership. [In United States v. Richberg, supra, at 527, the court expressed the view that, "[a] cafe cannot, by drafting itself a set of by-laws, become an exempt club." That an exempt club must undertake affirmative proof of practices corresponding to what the by-laws preach is implicit in this observation of the court in Wright v. Cork Club. 315 F. Supp. 1143, 1153 (S.D. Tex. 1970):

> The Cork Club does not carefully screen applications for membership and, although it does have a permanent machinery set forth in the by-laws to select or reject new members, such machinery is not used in any real sense that would involve a careful selection process. Approval of the applications by the membership committee is a pro forma activity . . . . There is no evidence of any interviews with prospective members by the membership committee, nor of any efforts or procedures for checking the "good character" of the applicant, which is said to be required.]

Most of the cases denying the exemption despite formal prerequisites to membership involve affirmative proof that the defendant has not complied with its own rules and regulations. [Wright v. Cork Club, supra (By-laws set forth permanent machinery to select or reject new members, but in more than a quarter of situations examined, membership cards were sent to applicants without prior screening by the membership committee); United States v. Clarksdale King & Anderson Co., supra, at 795 (Despite the existence of a membership committee which presumably passed on club applications, the desk clerk's distribution of applications to whites of good demeanor was

found to be determinative); United States v. Richberg, supra, at 527 (Membership cards "are apparently issued upon request (with little or no investigation) by any one of several individuals, even though the by-laws require unanimous approval by the Board of Directors").]

b. Manner of Solicitation of New "Members"

There is frequent reference to advertising and publicity as an indication of non-selectivity. [In Daniel v. Paul, supra, at 304, the Supreme Court, in determining whether the Lake Nixon Club served or offered to serve interstate travelers, noted that the "club" sought a broad-based patronage (which in fact numbered over 100,000 patrons annually) by advertising in a magazine, a newspaper, and over two area radio stations. In Bradshaw v. Whigam, supra, at 936, the court observed that "[p]rivate clubs do not customarily advertise for additional members".] It should be noted that the manner in which an organization holds itself out to the public reflects upon the intention or self-image of an organization, and is only indirectly probative as to its actual practices. Moreover, one should be aware of the distinction between advertising which solicits membership [United States v. Slidell Youth Football Ass'n, supra, (The football league relied upon annual newspaper ads to solicit youth participants; the court stated that this demonstrated that the league was inviting all white youths in the community to participate); Wright v. Cork Club, supra, at 1154 (The court found evidence of non-selectivity from "wholesale solicitation of applications from groups such as teachers and the sending of form letters to other individuals soliciting applications"); United States v. Jack Sabin's Private Club, supra, at 93 ("[a]dvertising by billboard and newspaper clearly invites the public to dine at this establishment")] and publicity which merely informs the public of an organization's existence. [In Bradshaw v. Whigam, supra, at 936, the court noted that the defendant Miles Private Restaurant, Inc., was listed in the Greater Miami Telephone classified Directory as a "Restaurant", although the directory had a separate listing for "Private Clubs." And see Williams v. Rescue Fire Co., supra, where an arena and swimming pool, which claimed to be a private club, was listed under the heading of "Civic Institutions" in the city directory.] The latter would appear to be less probative of nonselectivity. Both types of advertising are relevant to a finding of a commercial orientation, as opposed to a truly private club. [In Wright v. Cork Club, supra, at 1156,

the ccurt specifically stated that it considered television and newspaper advertising an invitation to the public, "[f]urther illustrating the commercial nature of the Cork Club . . . ."]

c. Time Devoted to Processing Applications

Courts consider the amount of time that an organization takes to process its applicants. Organizations which require no more than the filling out of an application form prior to use of its facilities seemingly face an almost impossible task of proving selectivity; even a delay in processing does not necessarily indicate that there is a genuine selection procedure being followed. [See, e.g., Wright v. Cork Club, supra, at 1154 (Approval by membership committee found to be pro forma proceeding, in part because, "[o]n two occasions membership cards were mailed to applicants on the same day the applications were received"); Bradshaw v. Whigam, supra, at 935-936 ("Some applications were approved in a matter of a few minutes; other applicants were advised on occasion that it would take from one to two weeks for their applications to be investigated and approved"); United States v. Jordan, supra, at 377 ("There is often a one or two week delay between application for membership and acceptance, but this is due to the fact that the typist who prepares the membership cards only comes in once every one or two weeks").]

d. Genuine Associational Bond Among Members

Assuming that there is a limitation on the size of an organization, one has to determine if it is really one which reflects a purpose of exclusiveness, or whether it merely reflects the capacity of a club's facilities [see, e.g., Bell v. Kenwood Golf and Country Club, Inc., supra, at 756 ("Such numerical limitations as exist on the number of members of the various classes are based only upon the capacity of the club's facilities"); United States v. Jordan, supra, at 377 (There are no limits on the size of the membership other than the physical capacity of the Club itself)], or is one of merely a geographic nature which is too broad to reflect a "purpose of exclusivity." [In Sullivan v. Little Hunting Park, supra, the Supreme Court found "no plan or purpose of exclusiveness," where a recreation facility was "open to every white person" residing in an area of Fairfax County, Virginia. See Nesmith v. YMCA of Raleigh, supra, at 102 ("Serving or offering to serve all the members of the white population within a defined geographic area is

certainly inconsistent with the nature of a truly private club").] It can be argued that in order to be truly selective, an organization's membership must be limited to a size which allows full member participation, and insures a common associational bond. ["Where there is a large membership or a policy of admission without investigation of the applicant the logical conclusion is that membership is not selective." Nesmith v. YMCA of Raleigh, supra, at 102. In Williams v. Rescue Fire Co., supra, at 560, the court found that most of the members were under 18 years of age, that 1,270 members were residents of the City of Cambridge, Maryland, and that "according to the 1960 census, this figure represents three-fourths of the entire white population of Cambridge within that age bracket".]

e. Who Has Been Rejected?

A measure of selectivity that the courts look to is the total number of applicants rejected as compared to the number accepted, and what percentage of the black applicants are rejected. [Stout v. YMCA of Bessemer, supra, at 688 (Of 3070 membership applications in 1966 all but four were accepted); Bell v. Kenwood Golf and Country Club, supra, at 759 (Club having a membership of 2,729 accepted a "substantial majority" of applicants); United States v. Jordan, supra, at 377 ("In the first year and few months of operation not one of the 2,400 applicants for membership was rejected"); Smith v. YMCA of Montgomery, supra, (Though membership in 1969 totaled almost 18,000, nearly all of those who applied were admitted); United States v. Clarksdale King & Anderson Co., supra, at 795 (Three of the officers of the "club" on depositions could recall no instance of an applicant being turned down); Williams v. Rescue Fire Co., supra, at 561 ("Although the committee may refuse to extend membership to those it terms 'undesirable,' there have been very few occasions where persons have been denied membership on this ground. The fact that in 1965 there were 2,323 applications and 2,327 members indicates that there were no rejected applicants"); Nesmith v. YMCA of Raleigh, supra, at 101 ("Of 1300 applications from August 1965, to September, 1966, only five were rejected. Over 99% of the white applicants were accepted; 100% of the blacks were rejected. No white has ever been rejected as 'insincere' as the Negro plaintiff was").]

B. EXCLUSIVITY

1. Formalities

a. Identification of Members

From the plain language of the statute itself, it is clear that the exemption applies only when an establishment is found to be "not in fact open to the public." The courts have uniformly required that those organizations seeking exemption somehow establish that their patrons are distinguished from members of the public. Club membership is the most obvious device for accomplishing this differentation and every reported case has involved the use of this device in one form or another. However, it should be noted that the exemption applies to "a private club or other establishment not in fact open to the public." Thus the exemption is not necessarily limited to membership clubs.

There is little chance of a "private" club claiming that its facilities are used exclusively by members if it is unable to account for its own membership by official lists or other records. [In Kyles v. Paul, 263 F. Supp. 412, 417 (E.D. Ark. 1967), aff'd sub nom. Daniel v. Paul, 395 U.S. 298 (1969), the court emphasized that "[t]here are no membership lists. The Pauls [the owners] do not know how many people are 'members' of the Lake Nixon Club." The "club" in this case lacked limitations as well as membership lists.]

b. Exclusive Use of Facilities by Members

Any organization seeking exemption will, of course, be engaged in providing one or more of the "public accommodations" described in §201(b), 42 U.S.C. §2000a(b). The cases uniformly require proof that the membership be afforded the exclusive right to use these facilities. [In Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974), guests of certain hotels were automatically entitled to play golf at the defendant club, and members of the public apparently could play the course by paying greens fees. The court held that so long as the golf course was made available to the public in this manner, no distictions were to be made on the basis of race in granting such access. See, e.g., United States v. Jack Sabin's Private Club, supra (White non-members allowed to use restaurant and lounge as a matter of course); United States v. Northwest Louisiana Restaurant Club, supra, at 153 (Restaurant owners "served white customers without regard to whether they were

members of the Northwest Louisiana Restaurant Club"); Sutton v. Capitol Club, Inc., 10 Race Rel. L. Rep. 791 (E.D. Ark. 1965) (Access to cafeteria in State Capitol Building not limited to club members and their guests).] A rule limiting use of facilities to members and their families is presumably sufficient. Any broader rule is suspect. [In Williams v. Rescue Fire Co., supra, at 560, the Court found significance in the fact that "[a] member may bring as many guests as he desires, paying only the standard skate or swim charge for the privilege." Moreover, while membership had fallen for the year 1965, "[t]he income from skating, skate rentals, and swimming fees has increased from previous years, showing use over and above membership. . . ." In Wright v. Cork Club, supra, at 1155, the court noted the "extension of guest card privileges on a 'cash only' basis to large groups of people attending conventions in Houston," and found that the "practice of admitting people as guests of McCarthy [the president] is obviously a sham device used to hide the fact that the Cork Club is generally open to people who are not bona fide guests." See also Bell v. Kenwood Golf and Country Club, Inc., supra, at 755 ("The meeting room and guest rooms are used not only by members and their guests, but to a large extent by organizations 'sponsored' by members, for various kinds of gatherings.") A practice such as admitting all ladies free on Friday evenings, for example, would certainly mitigate against any claim of exclusiveness.]

c. Zoning, Taxes and Licenses

Certain federal, state and local provisions are made for truly private clubs, such as special licenses. [However, in states such as Texas, which precludes "open saloons," the fact that an organization undertakes and succeeds in being licensed as a "private club" in order to serve liquor by-the-drink in compliance with liquor control laws, should not be persuasive of actual private club status. See Wright v. Cork Club, supra, at 1153], income tax breaks, [see, e.g., Bradshaw v. Whigam, supra. at 936. The federal tax exemption, §501(c)(7), I.R.C. 1954, 26 U.S.C. §501(e)(7), requires that qualifying clubs be formed for non-profitable purposes, and so confine their operations. Further commingling of members must be a material part of its activities. See Regs. §1.501(c)(7)-1; Rev. Rule 58-589 1958-2 CB 266. However, even where a club has been exempted as a "social club," the district director's determination does not bind the court concerning its status and §201(c) of the 1964

Act. See Wright v. Cork Club, supra, at 1153. See Williams v. Rescue Fire Co., supra, at 558] and zoning regulations. [State court interpretations of the meaning of "private club" in zoning ordinances have emphasized non-commercial purpose, and the absence of profit motive. See, e.g., Waco Federation of Women's Clubs v. Goddard, 275 S.W.2d 541 (Tex. Civ. App. 1955); Montgomery County v. Merlands Club, 202 Md. 279, 96 A.2d 261 (1953).]

2. Practices

a. Are the Procedures for Excluding Non-Members Effective and Consistently Applied?

Proof of an occasional isolated departure from a rule of exclusive member use should not be fatal to an exemption claim. However, in any given instance it would seem to be the burden of the defendant organization to show affirmatively that there are procedures to exclude non-members, and that they are effective. Absent this showing, proof of even occasional departures from a supposed rule of exclusivity would seemingly be fatal to an exemption claim. [In In the Matter of Holdiay Sands, Inc., 9 Race Rel. L. Rep. 2025, 2027 (Ohio Civil Rights Commission 1964) the hearing examiner was told that the management was familiar with all the members, but noted that the procedures supposedly relied upon would not give complete coverage on busy days.]

C. OWNERSHIP AND CONTROL BY MEMBERSHIP

When the Supreme Court held in Daniel v. Paul, 395 U.S. 298, 301 (1969) that an exempt establishment does not include "a business operated for a profit with none of the attributes of self-government and member-ownership traditionally associated with private clubs," it gave its imprimatur to the notion that a purely commercial organization is not eligible for exemption.

Unfortunately, Daniel v. Paul involved an organization which was totally wanting with respect to selectivity and exclusiveness. In fact, the determination by the lower courts that Lake Nixon was not a private club was not being challenged before the Supreme Court. Thus the holding, by itself, does not compel the conclusion that the exemption applies only to non-profit, non-proprietary establishments. The cases following Daniel have not clarified the matter. [In Wright v. Cork Club, supra at 1151, the court, after citing Daniel v. Paul and Sullivan v. Little Hunting Park, supra, concluded "[t]hus, the Supreme Court decisions indicate that

a private club is non-profit, member-owned and controlled, and selective as to membership and use of club facilities." However, the court in Bell v. Kenwood Golf and Country Club, Inc., supra, at 758, did not "read Daniel v. Paul or any other decision as holding that the absence of either self-government or member-ownership is necessarily fatal to a claim that an establishment is a private club irrespective of the total facts." However, the court in Bell itself used the criteria of no member ownership of assets, and reservation of important aspects of government by a profit-making corporation in finding under the totality of facts that the Kenwood Golf and Country Club was not a private club.] However, the fact that the court chose to emphasize these criteria in the face of alternatives is itself pervasive evidence that the test was thought to be essential.

1. Formalities

a. Ownership of Assets by Members

In addition to Daniel there are a number of prior and subsequent lower court cases denying the exemption while acknowledging, by factual findings, the relevance of a broad range of financial characteristics normally associated with commercial ventures. With regard to member-ownership, the cases endorse the relevance of current ownership distribution. [In United States v. Richberg, supra, at 529, the court announced the general rule that "[a] club is a pluralistic enterprise. . . It cannot be one man's principality or domain." See also Bell v. Kenwood Golf and Country Club, Inc., supra, at 758 ("in this case the corporation, not the members, owns the property and operates the club for a profit"); United States v. Jordan, supra, at 378 ("The members do not own any of the 'club's' property. It is owned by the Landrys [proprietors] through the corporation.") See Smith v. YMCA of Montgomery, supra, at 910 (Citing lack of member-ownership of a non-profit club).]

b. Revenue Distribution

The courts are careful to check that an organization's revenue inures to the benefit of the membership as a whole, rather than one or a few individuals. [In Bradshaw v. Whigam, supra, at 936, the court stated that "[i]n most . . . private clubs, the net income belongs to the members and the managers are paid a salary . . . . [T]he defendants reported all income for 1964 on [their] . . . personal income tax returns." See, e.g., United States v. Jordan, supra, at 378 ("The 'club' is

operated for a profit and all profits are retained by the Landrys [proprietors]); United States v. Jack Sabin's Private Club, supra (Establishment operated as an ordinary restaurant with all profits retained by the owners); Bell v. Kenwood Golf and Country Club, Inc., supra, at 755 ("The corporation is run for profit, makes a profit, and pays substantial federal and state income taxes, as well as substantial salaries").]

c. Formal Provisions for Member Control

Member control over general, as opposed to admissions, policies (discussed above) has a two-fold relevance. In the case of a commercial proprietorship masquerading as a private club [Once again the court's observation in United States v. Richbery, supra, at 529, that "a club is a pluralistic enterprise and must have substance; it cannot be one man's principality or domain or his alter ego," is appropriate. In Wright v. Cork Club, supra, at 1155, the court found that the owner "held" a 15 year contract which entitled the owner to $15,000 per year without specifying the owners duties, in spite of the fact that the brother of the owner actually managed the club. The court concluded that despite regular meetings of class "A" members, operation of the club was in the control of the president for the president's own profit. See also Bell v. Kenwood Golf and Country Club Inc., supra, at 758 ("The members through the Board of Governors and the various standing committees have some share in the government of the Club and its activities, but important aspects of the government and activities of the Club are reserved to the Corporation," through which a few individuals owned the facilities)], the lack of equity interest in the membership will generally be reflected in a lack of control over the operations of the business. [One test is whether or not the alleged private club has its accounts or books commingled with those of an individual or some commercial enterprise. It stands to reason that a private club would have separate books. See, e.g., Bradswaw v. Whigam, supra. There the court observed that although member assessments were not subject to the state's sales tax, such assessments were not differentiated in the "club's" books from general revenue.]

However, lack of control over, or concern with club policies may also be relevant in the case of a non-profit organization. [United States v. Slidell Youth Football Ass'n, supra, at 486 n.3 ("The participants for whom the sole existence of SYFA is founded are relegated to a non-voting status and have

no input into the organization governing process, the acceptance or rejection of other members nor the expenditure of funds"); Smith v. YMCA of Montgomery, supra, at 637 (The general membership never meets together as an official group and never votes on any of the organization's policy decisions. The "Board of Directors' annually select the "voting members" (less than two percent of the total membership) who in turn select the new Board); Nesmith v. YMCA of Raleigh, supra, at 102 (An organization can "hardly . . . be a private association where the members do not meet together").]

Of course, all of the formalities of organization in the world are meaningless if, in practice, they are not followed, as far as member control of an organization is concerned. In many cases the club may simply constitute a device for affecting a group purchase of certain material benefits or services. A lack of involvement once membership has been obtained reflects the fact that the benefits of membership do not involve the associational preferences of the members.

d. The Organization as a "Sham"

Neither the wording of the exemption nor its legislative history expressly authorize judicial probing of the purposes of an organization seeking to avoid coverage. Indeed, there is evidence in the legislative history to indicate that an organization's purposes, at least the motives of the organizers, are expressly removed from the range of legitimate judicial scrutiny. [The reference to the legislative history in Nesmith v. YMCA of Raleigh, supra, at 101, was apparently intended to head off the argument that evasive purpose is necessary to denial of the exemption. However, in Wright v. Cork Club, supra, at 1151 n.17, the court, citing Nesmith, stated that "[C]ongress intended that courts in applying the private club exemption not consider the reasons for the club's formation, if it were in fact not open to the public".] Nevertheless, there are several cases which have highlighted the evasive purposes of the organizers of an alleged "private club." [In Daniel v. Paul, supra, at 302, the Supreme Court noted that the "membership device seems no more than a subterfuge designed to avoid coverage of the 1964 Act" engaged in out of "fear that integration would 'ruin' the 'business'." In United States v. Northwest Louisiana Restaurant Club, supra, at 153, the court stated:

> The natural consequence of the formation and operation of the Northwest Louisiana Restaurant Club has been to discourage and deter Negroes from attempting to obtain service at the member restaurants, and it was the intent and purpose of the members of the Club to accomplish such discouragement and deterrence.

In United States v. Johnson Lake, Inc., 312 F. Supp. 1376 (S.D. Ala. 1970), the court stated, without further elaboration, that "[a] club formed for the primary purpose of excluding Negroes on account of their race is not a private club or establishment within the meaning of Section 201(e) of the Civil Rights Act of 1964, 42 U.S.C. §2000a(e)." In United States v. Jordan, supra, at 379, the court took the view that proof of evasive intent would be relevant to non-private club status, while proof of evasive consequences naturally incident to private club formation would be relevant to whether the organization had engaged in a pattern or practice of discrimination.]

While this practice may be justified on policy grounds, it should be noted that the cases citing evasive intent all involve situations where selectivity is totally lacking. Indeed, such nonselectivity amongst whites would appear to be a natural attribute of a club formed solely to exclude blacks. Thus it is not clear whether a separate "non-evasive purpose test" may be said to have been established, nor is it clear that such a test would add anything to those already discussed.

1. Practices

a. Initial Acquisition of Assets

The manner in which an organization initially obtained its assets and the manner in which it pays for them is an indication of how independently an organization is operated by its members. [In United States v. Jordan, supra, at 373, the former proprietor of a restaurant, who with his wife held a 99 percent interest in a private club corporation, subleased the restaurant premises to the new club corporation and held promissory notes for the facilities and supplies, as well as money advances to the corporation. The court, id. at 378, found it "significant that no payments on principal or interest have been made on the notes . . . ." See also United States v. Clarksdale King &

Anderson Co., supra (Corporation which leased facilities to club took rent fixed at the amount which it had previously realized as profit in operating the facility); United States v. Jack Sabin's Private Club, supra, at 92 (Former proprietor furnished all facilities as well as employees in return for "all profits derived from the operation of Jack Sabin's Private Club").]

b. A Former Public Facility

In the event that an alleged private club has acquired its assets from a previously public facility, the courts are apt to inquire whether there has been any change in management. [See, e.g., United States v. Jordan, supra (The incorporators and directors of the club were owners and employees of a restaurant occupying the same premises) United States v. Jack Sabin's Private Club, supra (Former owner of restaurant who furnished all facilities and labor also established prices and set wages at the "club")], or mode of operation, [In United States v. Richberg, supra, at 527, the court observed:

> [A]ssuming for the sake of argument that the club was genuine, we would not expect to find, as the record conclusively shows, that the club has maintained the same food, menu, prices and serving personnel as formerly characterized the operations of Richberg's Cafe, and as still characterize the cafe's operations today. In plain words, the clubroom is identical to the cafe in all matters pertaining to food and service.

See also United States v. Jack Sabin's Private Club, supra, at 92-93 ("The monthly expenditure for food, beverages, and other products has remained substantially the same; the hours of operation are substantially the same; the number of persons employed by Jack Sabin has been substantially the same; and the amount and nature of advertising has been substantially the same"). It should be noted that similiarity of operations has also been cited in cases involving non-profit organizations, (see, e.g., Williams v. Rescue Fire Co., supra, at 561) ("The Committee is the same committee that operated the public arena and pool before it became 'The RFC Arena Pool Club.' There is little difference between the manner of operation now and that prior to . . . the decision . . . to operate on a 'club' basis")] subsequent to "private club" designation.

c. "State Action" and Public Support

Once the courts have found significant "state action" [Williams v. Rescue Fire Co., supra (Facilities of alleged private club exempted from city, county and state taxation and city had provided various assistance in the construction of facilities, including payment of 13 1/2 per cent of the construction cost); Wesley v. City of Savannah, Georgia, 294 F. Supp. 698 (S.D. Ga. 1969) (If a private golf association was to hold an annual tournament billed as the city championship at a municipal golf course, it would have to allow blacks to participate); but see Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), where the Supreme Court held that the mere granting of a liquor license by the State does not sufficiently implicate the State in discriminatory guest practices to make those practices "state action," and Solomon v. Miami Woman's Club, 359 F. Supp. 41 (S.D. Fla. 1973), where the court upheld a "private club" exemption to the Florida Federation of Women's Clubs despite the fact that the Federation leased the property upon which its state headquarters were constructed for 1 cent a year for 99 years. However, the Federation was required to pay state or county taxes or assessments on the property, and to erect a building on the property within two years of the commencement of the lease which would revert to the city upon termination or cancellation of the lease], or substantial public support in some facet of an organization's operations, the private club exemption will fail. [In United States v. Slidell Youth Football Ass'n, supra, at 486 n.4, the court noted that at one time the defendant organization utilized public property for its activities, as well as substantial financial contributions from the local municipality. In addition, it noted that revenue from the general public continued to provide a substantial portion of its operating funds. The court found such public support "inconsistent with an assertion that [the] organization is a private club." In Smith v. YMCA of Montgomery, supra, the Montgomery YMCA was found not to be a private club or other establishment "not in fact open to the public" partly because it was neither owned nor governed by its members, enjoyed a substantial amount of revenue from the general public, and operated as a quasi-public agency.]

D. LEGISLATIVE HISTORY [From Thomas R. Sheran's memorandum dated December 9, 1971, on private clubs.]

The administration bill as it was presented to both houses of Congress afforded the exemption to "a bona fide private club or other establishment not open to the public." [The entire administration bill was introduced in the House as H.R. 7152, where it was referred to the Judiciary Committee. In the Senate, the entire bill, S.7131, was introduced and referred to the Judiciary Committee, while a separate bill, S. 7132, covering only Title II, was introduced and referred to the Commerce Committee.] The bill passed the House of Representatives [H.R. 7152, 88th Cong., 1st Sess. (1963)], and was reported out of committee in the Senate without modification of this exemption. None of the relevant committee reports contain any comment concerning the meaning of the phrase "or other establishment." [See H.R. Rep. No. 914, 88th Cong., 1st. Sess. (1963); S. Rep. No. 118, 88th Cong., 2d Sess. (1964); S. Rep. No. 812, 88th Cong., 2d Sess. (1964).]

However the legislative history does contain important evidence of what Congress conceived to be the purpose for the exemption. The idea that private clubs should not be subjected to the proscriptions of Title II arose out of deference to the rights of association and privacy which the Supreme Court has declared to fall within the penumbra of the First Amendment.

During the debates which took place before the House Judiciary Committee, southern leaders emphasized the right of privacy by defending a social organization's privilege to choose its own members by whatever means it considered proper. [H.R. Rep. No. 914, supra, at 2.] With reference to this argument, Representative McCullock replied:

> Moreover, where freedom of association might logically come into play as in the case of private organizations, Title II quite properly exempts bona fide private clubs and other establishments. [H.R. Rep. No. 914, supra, at 9.]

The exemption's language was modified to its present form pursuant to a House-Senate compromise involving the following deletion and insertion:

> (e) The provisions of this title shall not apply to a private club or other establishment not (in fact) open to the public . . . ." [See Comparative Analysis of Civil Rights Bill H.R. 7152 as Passed by the House of Representatives and by the Senate, 110 Cong. Rec. 15,999 (1964) (prepared at the request and under the supervision of Representative McCullock of Ohio).]

Because this modification was effected informally, there are no regular or conference reports, and the floor debate in the Senate provides the only relevant legislative history. The purpose of the amendment as explained by its proponent, Senator Long of Louisiana, was to insure that the spirit or intention behind the organization of a club would not be examined in determining whether it qualified for the exemption. ["Its [the alteration's] purpose is to make it clear that the test of whether a private club . . . is exempt from Title II, relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It [the test] does not relate to whatever purpose or animus the organizers may have had when they . . . brought the organization . . . into existence." 100 Cong. Rec. 13,697 (1964) (remarks of Senator Long).] However, in the course of the same discussion, Senator Humphrey added that the new provision would not permit a sham club to evade the law. ["The test as to whether a private club is really a private club or whether it is an establishment really not open to the public is a factual one. . . . It is not our intention to permit this section to be used to evade the prohibitions of the title by the creation of sham establishments which are in fact open to all the white public and not to Negroes." 110 Cong. Rec. 13,697 (1964) (remarks of Senator Humphrey).] Confusion over the relevance of an organization's purposes is understandable in light of those conflicting instructions.

Commenting on the final version of the exemption, Senator Humphrey also stressed the fact that it would protect only "the genuine privacy of private clubs or other establishments whose membership is genuinely selective on some reasonable basis." These remarks clearly mandate judicial probing of the actual as well as formal admissions policies or organizations claiming the exemption, and further indicate that bona fides should be found lacking where an organization is not genuinely selective, or when the selection process does not involve the organization's membership. In the latter respect, Senator Humphrey's view echoes that of Senator Magnusen, who in prior hearings on the Act observed that:

> The clubs exempted by section 201(e) are bona fide social, fraternal, civic, and other organizations which select their own members. No doubt attempts at subterfuge or camouflage may be made to give a place of public accommodation the appearance of a private organization, but there would seem to be no difficulty in showing a lack of bona fides in those cases.

TABLE OF CASES CITED

United States v. Northwest Louisiana Restaurant Club, 256 F. Supp. 151 (W.D. La. 1966).

United States v. Richberg, 398 F.2d 523 (5th Cir. 1968).

United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474 (E.D. La. 1974).

Waco Federation of Women's Clubs v. Goddard, 275 S.W.2d 541 (Tex. Civ. App. 1955).

Wesley v. City of Savannah, Georgia, 294 F. Supp. 698 (S.D. Ga. 1969).

Williams v. Rescue Fire Co., 254 F. Supp. 556 (D. Md. 1966).

Wright v. Cork Club, 315 F. Supp. 1143 (S.D. Tex. 1970).

8-6.160 Sample Consent Decree

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF LOUISIANA

ALEXANDRIA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MARVIN HOMER SPEER, d/b/a REYNAUD'S BAR, Defendant.	CIVIL ACTION NO. 770530 CONSENT DECREE

The Plaintiff, United States of America, having filed its complaint herein and the plaintiff and defendant having stipulated and agreed that:

1. The defendant, Marvin Homer Speer, owns and operates an establishment know as Reynaud's Bar, located in Marksville, Louisiana. The defendant resides within the Western District of Louisiana.

2. Reynaud's Bar is an establishment where members of the public are amused and entertained by listening to a juke box, by utilizing other mechanical entertainment devices, by purchasing and consuming alcoholic beverages, and by conversing and associating with one another. The bar customarily presents sources of entertainment which move in interstate commerce.

3. Raynaud's Bar is a place of public accommodation within the meaning of 42 U.S.C. §2000a-(b)(3). Its operations affect commerce within the meaning of 42 U.S.C. §2000a-(c)(3).

4. Plaintiff has alleged that the defendant follows a pattern and practice of discrimination against blacks by denying to them, on the basis of race, the use and enjoyment of the facilities and services of Reynaud's Bar on the same basis as such facilities are provided to white members of the general public.

5. The defendant has agreed that he will comply with Title II of the Civil Rights Act of 1964, 43 U.S.C. §2000a et seq., in the operation of all facilities offered at his establishment, and the plaintiff and the defendant have agreed to the entry of this final order.

NOW THEREFORE, without trial upon the merits and upon consent of the parties, it is hereby ORDERED, ADJUDGED, and DECREED that the defendant, Marvin Homer Speer, together with his agents, employees, and all persons in active concert and participation with him is hereby enjoined from:

a. Failing or refusing to admit and serve blacks at Reynaud's Bar upon the same conditions as whites are admitted and served;

b. Failing or refusing to insure that all of the goods, services, facilities, advantages, and accommodations of Reynaud's Bar are made available to and used by blacks upon the same basis and under the same conditions as they are made available to and used by white patrons;

c. Engaging in any act or practice which deprives, directly or indirectly any person of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of Reynaud's Bar, or any other place of public accommodation owned or operated by the defendant, on the basis of race or color.

IT IS FURTHER ORDERED that the defendant shall within ten (10) days of service of a copy of this order, post and keep posted, notices in prominent locations near each customer entrance of Reynaud's Bar in full view of potential patrons and customers. The said notices shall be printed in one-inch block letters and shall read:

ALL PERSONS ARE WELCOME AT THIS ESTABLISHMENT.

The Clerk shall mail a copy of this order by certified mail to defendant Marvin Homer Speer.

ORDERED this _____ day of _____, 1977.

_____
United States District Judge

The undersigned agree to the entry of this order.

_____ _____
Defendant United States Attorney

_____ _____
Attorney for Defendant Attorney
Department of Justice
Washington, D.C. 20530

8-6.170 Sample Cover Letter to Consent Decree

Mr. & Mrs. Arthur Wilcox
3 North New River Drive West
Ft. Lauderdale, Florida 33301

Dear Mr. and Mrs. Wilcox:

This is to advise you that on August 25, 1972, the United States plans to file a suit in the United States District Court for the Southern District of Miami to obtain injunctive relief to bring the operations of

Jackie's Tavern into compliance with the nondiscrimination provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a et seq. The decision to bring this suit has been made by the Attorney General, based upon an investigation conducted by the Federal Bureau of Investigation, which gives him/her reasonable grounds to believe you have engaged in a pattern and practice of racial discrimination in operating Jackie's Tavern, in violation of the Civil Rights Act, and that it is necessary to obtain judicial relief against continued violations of the Act's provisions. A copy of the complaint approved by the Attorney General is attached.

It is the policy of the Department of Justice to obtain compliance with federal law, whenever possible, in a manner which will avoid all unnecessary delays and expenses occasioned by active litigation. Our purpose in advising you of our decision to seek judicial relief against the discriminatory policies and practices operative at your establishment is to allow you to settle this matter in a manner which will provide us a court order to insure future compliance with Title II and at the same time avoid any unnecessary delays and undue expenses which might be caused by active litigation of this matter.

We have attached a proposed consent judgment which we believe would achieve these ends. The entry of the judgment would allow for an expedited resolution of the case to be filed, and would avoid the necessity for having the Court assess costs against the losing party.

We recognize that you may want to consult with a private attorney of your choice for advice as to whether to enter into this consent judgment. However, after you have made your decision, please contact Assistant United States Attorney _____ of this office (telephone _____) as to whether the entry of this consent judgment is acceptable to you and if so, to work out details as to its signing and filing, along with the complaint.

If you or your attorney would like to discuss this matter, please do not hesitate to contact the undersigned.

Sincerely,

_____
United States Attorney

By:

_____
Assistant United States Attorney

8-6.180 Sample Request for Compliance Investigation

TO: Director
Federal Bureau of Investigation

DATE:

JSP:JHQ:LCH:eh:jfb

FROM: Assistant Attorney General
Civil Rights Division

DJ 167-41-440

SUBJECT: U.S. v. John D. Lingo,
d/b/a Paul's Drive-In
Columbus, Mississippi;
Willie T. Sadler - Victim
Public Accommodations
CIVIL RIGHTS ACT of 1964

Attached are three copies of a Consent Decree filed by the Court on January 30, 1976, in the case of United States v. John D. Lingo, d/b/a Paul's Drive-In.

In order to determine whether the subject establishment is in compliance with the Consent Decree, please observe Paul's Drive-In and ascertain whether the requirements of the Court Order have been fully implemented, i.e., whether defendants now provide all accommodations and services on the premises of Paul's Drive-In to black patrons under the same conditions as they do to white patrons, and whether the signs have been posted as ordered. Please photograph any and all signs showing the content of the signs, their size, and location.

If no signs have been posted, then please conduct the following additional investigation:

> Observe the defendant's establishment during peak business hours and determine whether or not black customers are being served and allowed to consume their food on the premises of Paul's Drive-In.

If during your observations no blacks are observed consuming their food on the premises, then please interview at least five blacks living in the vicinity of and who may have some familiarity with Paul's Drive-In, and five persons who avail themselves of the "take-out service," and determine if, in their opinion, blacks would be allowed to consume food on the premises of Paul's Drive-In, and if they know any blacks who have

consumed food on the premises or who have been told they would be served on a take-out basis only. Interview any individuals so identified, if possible. If no signs are posted, also interview the defendant and determine what plans he has to posting the signs ordered to be posted.

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☆U.S. GOVERNMENT PRINTING OFFICE: 1986-491-518-46610