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9-21.000 WITNESS PROTECTION

9-21.010 Introduction

The purpose of this chapter is to provide information and guidance to Department of Justice attorneys with respect to the Witness Security Reform Act of 1984, which is Part F of Chapter XII of the Comprehensive Crime Control Act of 1984 (Pub.L.No. 98-473) and repeals Title V of the Organized Crime Control Act of 1970. This chapter prescribes the procedures for establishing a person as a protected witness.

9-21.020 Scope

These procedures apply to all organizations within the Department of Justice.

The Witness Security Reform Act of 1984 continues the authority of the Attorney General to provide protection and security by means of relocation for witnesses, and their relatives and associates, in official proceedings brought against persons involved in organized criminal activity or other serious offenses if it is determined that an offense described in Chapter 73 (Obstruction of Justice) of Title 18 or a similar state or local offense involving a crime of violence directed at a witness is likely to occur.

Title 28 U.S.Code § 524 provides authority to use appropriations of the Department of Justice for the payment of "... compensation and expenses of witnesses and informants all at the rates authorized or approved by the Assistant Attorney General for Administration ..."

9-21.100 ELIGIBILITY

A witness may be considered for the Witness Security Program if the person is an essential witness in a specific case of the following types:

(A) Any offense defined in Title 18 U.S.C. § 1961(1) (organized crime and racketeering);

(B) Any drug trafficking offenses described in Title 21 U.S.C.;

(C) Any other serious federal felony for which a witness may provide testimony which may subject the witness to retaliation by violence or threats of violence;

(D) Any state offense that is similar in nature to those set forth above; and

(E) Certain civil and administrative proceedings in which testimony given by a witness may place the safety of that witness in jeopardy.

In order for the Office of Enforcement Operations, Criminal Division, to facilitate the processing of a request for entry of an individual into the

Witness Security Program, an application form has been designed to cover the information needed to support the request. This form includes a summary of the testimony to be provided by the witness and other information evidencing the witness' cooperation.

The Witness Security Reform Act of 1984 requires that the Attorney General obtain and evaluate all available information regarding the suitability of a witness for inclusion in the Witness Security Program. This information must include any criminal history and a psychological evaluation for each candidate for the Program and each adult (18 years and older) member of the household. Additionally, the Attorney General is required to make a written assessment of the risk the witness may present to his/her new community. Factors which must be evaluated in the risk assessment include, but are not limited to, the person's criminal record, alternatives other than protection which have been considered, and the possibility of securing the testimony from other sources. If it is determined that the need for prosecution of the case is outweighed by the danger that the witness would pose to the relocation community, the Attorney General is required to exclude the witness from the Program.

To avoid the necessity of making follow up calls, please note the following:

A. In order to make certain that each application for entry of a witness into the Program is both appropriate and timely, the witness should, prior to his/her acceptance into the Program, either appear and testify before the grand jury or in some other manner have committed himself/herself to providing this testimony at trial;

B. As you are aware, the Department is obligated to provide for the safety and welfare of the witness long after he/she has testified. The protection and possible relocation of the witness and his/her family are both expensive and complicated. It is imperative, therefore, that the entry of a witness into the Program be made only after it has been determined by the sponsoring attorney that the witness' testimony is credible, significant, and certain in coming.

Witness Security Program application forms and instructions are available from the Office of Enforcement Operations, Criminal Division, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600.

9-21.110 Informants

Informants are the responsibility of the investigative agency that the informant has assisted. An informant is not eligible for participation in the Witness Security Program unless he/she becomes a witness as defined in 18 U.S.C. 3521 *et seq.*

9-21.120 Utilization of Federal Prisoners in Investigations

All requests from investigative agencies to utilize federal prisoners (non-Witness Security participants) in investigations, when consensual monitoring devices, furloughs, or extraordinary transfers are necessary must be referred to the Office of Enforcement Operations for review and coordination with the Bureau of Prisons. This also applies to inmates in local halfway houses. The following information must be provided:

A. Name of prisoner and identifying data, including Bureau of Prisons register number, if known;

B. Location of the prisoner;

C. Necessity of utilizing the prisoner in the investigation;

D. Name(s) of target(s) of the investigation;

E. Nature of the activity requested;

F. Security measures to be taken to ensure the prisoner's safety, if necessary;

G. Length of time the prisoner will be needed in the investigation;

H. Whether the prisoner will be needed as a witness;

I. Whether the prisoner will have to be moved to another institution upon completion of the activity; and

J. Whether the prisoner will remain in the custody of the investigative agency or will be unguarded.

These requests must be endorsed by the appropriate investigative agency headquarters. Upon completion of the review, the Office of Enforcement Operations will make a recommendation to the Director, Bureau of Prisons. The requestor will be advised of the decision of the Bureau of Prisons by the Office of Enforcement Operations. The Bureau of Prisons will coordinate arrangements for the activity directly with the requestor.

Because of the gravity of the responsibility assumed by the Federal Bureau of Prisons when it consents to the use of its inmates by investigative agencies as informants, new guidelines for approval of such requests will be employed. Effective immediately, all requests for release of an inmate, from the custody of the Bureau of Prisons/United States Marshals Service to the custody of the investigative agency, must be requested by an Assistant Director of the agency. Similarly, all requests to use residents of halfway houses or community treatment centers, or to transfer an inmate from one institution to another to perform informant or undercover activities must also be requested by an Assistant Director. Other requests to use

inmates as informants, which do not require release or movement of such inmates may be submitted from the appropriate section chief.

Requests for utilization of federal prisoners in an undercover capacity should be addressed to the personal attention of the Director or the Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600.

In exigent circumstances, the Office of Enforcement Operations will accept requests and pertinent information by telephone. However, confirmation of the request and appropriate supporting information must be submitted as soon thereafter as possible. The information provided will be held in the strictest confidence, and no dissemination of the information will be made without prior approval from the appropriate agency or office.

9-21.130 Prisoner-Witnesses

Prisoners in a state or federal institution are eligible for participation in the Witness Security Program providing all other criteria are met. If the prisoner is in state custody, the state must agree to the prisoner serving his/her sentence in a federal institution. Application should be made as prescribed for other witnesses.

9-21.140 State and Local Witnesses

The Witness Security Reform Act of 1984 authorizes the Attorney General to provide protection to state and local witnesses if the state agrees to reimburse the United States for expenses incurred in providing protection, and enters into an agreement in which the state agrees to cooperate with the Attorney General in carrying out the provisions of the Witness Security Reform Act. The terms of the reimbursement agreements will be determined by the U.S. Marshals Service. Requests from local authorities should be directed to the U.S. Attorney or Strike Force Chief and should contain all of the information required in the Witness Security Program application. The U.S. Attorney or Strike Force Chief should review the application and furnish his/her recommendation to the Office of Enforcement Operations for consideration.

9-21.200 APPROVAL AUTHORITY

The Witness Security Reform Act provides that the Attorney General may delegate the authority to place individuals in the Witness Security Program to the Deputy Attorney General, the Associate Attorney General, the Assistant Attorneys General of the Criminal and Civil Rights Divisions, and one other person. By Order No. 1072-84, the Attorney General has specially designated those individuals named above and the Senior Associate Director of the Office of Enforcement Operations, Criminal Division, to authorize applications for witness or prospective witnesses to be ad-

mitted into the Witness Security Program. In the absence of the Senior Associate Director, Office of Enforcement Operations, the Director of the Office of Enforcement Operations is authorized to exercise this authority.

9-21.210 Approval Procedure

Approval of requests to use the Witness Security Program will be made by the Director or Senior Associate Director of the Office of Enforcement Operations. The approval will be conveyed to the Director, U.S. Marshals Service and/or the Director, Bureau of Prisons, by memorandum.

9-21.220 Emergency Authorization

Protection of a witness for whom relocation is being requested remains the responsibility of the investigative agency until such time as the Office of Enforcement Operations has reviewed the application and all other relevant information, including the results of the psychological examination, approved admission of the witness into the Program and the U.S. Marshals Service has had the opportunity to arrange the safe removal of the witness and his/her family.

If it is determined that a witness is in immediate danger and the investigative agency is not able to provide the necessary protection, temporary protection may be provided before making the written risk assessment or entering into the memorandum of understanding. However, the assessment and memorandum of understanding must be completed as soon as possible following the authorization for emergency protection.

9-21.300 REQUEST FOR PRE-ENTRY INTERVIEWS

The U.S. Marshals Service will interview prospective witnesses prior to their entry into the Program. This initial interview will serve two purposes; first, it will ensure that the prospective witness understands what can be expected from the Program; and second, it will allow the U.S. Marshals Service to evaluate potential problems with a view toward resolving them as quickly as possible.

Interviews will be arranged when a request for entry into the Program is received. It will, therefore, be necessary that the Office of Enforcement Operations be advised of the witness' likely entry into the Program as soon as it appears that the individual will be a witness, will be endangered, and will, therefore, need to enter the Witness Security Program.

9-21.310 Representations and Promises

Investigative agents and attorneys are not authorized to make representations to witnesses regarding funding, protection, or other Program services. These matters are for decision by authorized representatives of the

U.S. Marshals Service only. Representations or agreements made without authorization will not be honored by the U.S. Marshals Service.

9-21.320 Expenses

Any expenses incurred by investigative agencies or divisions for witnesses and/or their dependents prior to approval by the Office of Enforcement Operations are the responsibility of the concerned agency or division.

9-21.330 Psychological Testing and Evaluation

Before authorizing any witness to enter the Program, the Office of Enforcement Operations will arrange for psychological testing and evaluation for each prospective witness and the adult (18 years and older) members of his/her household. This testing will be done by psychologists from the Federal Bureau of Prisons, and will, to the extent possible, determine if the individuals may present a danger to their relocation communities. Since the reports of the psychologists may contain information which is discoverable as *Brady* material in the criminal prosecution in which the witness is testifying, all materials submitted by the psychologists will be forwarded to the appropriate U.S. Attorney's office. The consent form will be executed by each individual being evaluated. (*See* Forms, Section 9-21.1031.)

9-21.340 Polygraph Examinations for Prisoner-Witness Candidates

A polygraph examination is required of all Program candidates who are incarcerated in order to maintain the security of those individuals who are now, or will be housed in a Bureau of Prisons facility. Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to harm or disclose other protected witnesses or information obtained from such witnesses.

The Witness Security candidate will be expected to sign the polygraph examination form acknowledging his/her voluntary submission to the examination. It will be the responsibility of the prosecutor/agent to advise the Witness Security candidate of this requirement prior to submitting the application for the Program. In addition, depending on the location and other pertinent factors the prosecutor/agent or the Bureau of Prisons will be asked to disseminate the form to the prisoner. Copies of this form are available from the Office of Enforcement Operations upon request. (*See* Forms, Section 9-21.1032.)

9-21.400 PROCEDURES FOR SECURING PROTECTION

Requests for protection of witnesses must be made as soon as it appears likely the individual will be a witness and will need relocation. A witness

is *not* to be publicly disclosed, thereby endangering his/her life or that of his/her family, without the prior authorization of the Office of Enforcement Operations. It is incumbent upon each U.S. Attorney, his/her assistants, and the investigative agencies to present to the Office of Enforcement Operations at the earliest possible time during the investigative process the request for authorization to place an individual in the Witness Security Program. This will allow time for U.S. Marshals Service preliminary interview, psychological testing, appropriate review, and the actual preparation of assistance by the U.S. Marshals Service and/or the Bureau of Prisons, minimizing the disruption both to the witness and the concerned government agencies.

United States Attorneys and Division Attorneys should transmit requests by memorandum, telecopy, or teletype to the Office of Enforcement Operations. Communications should be addressed to the Director or Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600, or teletyped to the Office of Enforcement Operations, Criminal Division, (telecopy number: FTS 633-5143, (teletype code JCOEO). These requests must be signed by the U.S. Attorney or Criminal Division Field Office Chief. The request must include the following information:

A. *Identification of the Witness*—Name, address, date and place of birth, sex, race, citizenship, FBI or police numbers of witness. Attach copies of witness' record of arrests and convictions, if any;

B. *Significance of the Case(s)*—Importance of the case and names, locations and importance of prospective defendants. Describe illegal organization in which the defendants are participants and their respective roles. U.S. Attorney's case number must be included;

Defendant's arrest and conviction record must be attached. If applicable, whether case is or is not a Narcotic Task Force investigation;

C. *Expected Testimony of the Witness*—A summary of the testimony to be provided by the witness.

Copies of indictments, complaints, prosecutive memoranda, etc., must be attached fully describing the nature of the case. List all cases in which the witness is expected to testify. List all agencies which may make use of the witness' information;

D. *Trial Dates*—A realistic estimate of the trial date and trial completion (with respect to each trial in which the witness is expected to testify);

E. *Other Witnesses*—The names of individuals for whom witness protection has previously been approved in connection with the same case; also,

the names and locations of any other individuals connected with this case likely to be placed under the Witness Security Program;

F. *Threat*—A comprehensive recitation of the danger to the witness. List all individuals known or believed by the U.S. Attorney and investigative agent to pose a threat to the witness. Include complete names and addresses and request the investigative agency to forward photographs of each if available. If not available, so indicate. Include any individuals incarcerated who may pose a threat to the witness in prison and upon their release. Additionally, the investigative agency must submit a report concerning the danger to the witness to its Washington headquarters for review.

The headquarters will forward the report, along with its recommendation, to the Office of Enforcement Operations;

G. *Members of Witness' Household*—List by name, date and place of birth and relationship to the witness those persons recommended for relocation;

H. *Assets and Liabilities*—A complete recitation of the witness' financial posture to include real and personal property value, debts, alimony, support payments, mortgages, bank accounts, pensions, securities, income and information concerning monies which the witness receives or expects to receive from other state or federal agencies;

I. *Medical Problems*—A complete recitation of all medical problems experienced by the witness and members of his/her household, including any history of drug or alcohol abuse;

J. *Parole/Probation*—Indicate any parole or probation restrictions for the witness and members of his/her household. If the witness and/or any household members are on state parole or probation, supervision will be transferred to the Probation Division of the Administrative Office of the U.S. Courts. In order to effect the transfer, the appropriate state authorities must provide written consent to such supervision.

For those state parolees who are released from state institutions (rather than a federal institution) the following documents must be obtained by the requestor and forwarded to the Office of Enforcement Operations before relocation can occur:

1. Pre-sentence or background report detailing the circumstances of the instant offense and prior criminal conviction history;

2. A sentence data record indicating the type and length of sentence imposed by the state court;

3. A signed parole or release certificate; and

4. All available institutional materials such as progress reports and classification materials.

For state probationers, the following documents must be obtained:

1. Pre-sentence or background report providing a description of the instant offense and prior criminal conviction history;

2. The Order of Probation from the state court indicating the sentence or probation imposed;

3. Signed conditions of release and any other pertinent materials.

In addition, in order to comply with the provisions of the Witness Security Reform Act of 1984, the following information must be supplied for *all* witnesses:

K. The seriousness of the investigation or case;

L. The possible danger to other persons or property in the relocation area if the witness is placed in the Program;

M. What alternatives to Program use were considered and why they will not work;

N. Whether or not the prosecutor can secure similar testimony from other sources;

O. What the relative importance is of the witness' testimony; and

P. Whether or not the need for the witness' testimony outweighs the risk of danger to the public.

9-21.410 Illegal Aliens

Upon the submission of a Witness Security Program application for an illegal alien, the sponsoring attorney and/or investigative agency must obtain from the Immigration and Naturalization Service (INS) appropriate documents which authorize the prospective witness and family members to remain in the United States and facilitate relocation by the U.S. Marshals Service out of the state in which they registered. Witness Security candidates who are illegal aliens cannot be relocated by the U.S. Marshals Service until all INS requirements are satisfied and necessary documents have been provided to the Office of Enforcement Operations or U.S. Marshals Service. In cases where the INS procedure to legalize the alien status may require a lengthy time period, the sponsor or agent should secure from INS a letter of intent to change the witness' status as part of the requirements for relocation under the Witness Security Program.

9-21.500 RESPONSIBILITIES AND PREROGATIVES OF THE U.S. MARSHALS SERVICE

When it is determined that a witness is to enter the Program the witness and adult members of his/her family will be asked to sign a Memorandum of Understanding. The U.S. Marshals Service will be obligated to satisfy each

commitment documented and will not be required to provide amenities not included in the document.

9-21.510 Witness Services

The U.S. Marshals Service will be responsible for providing the witness with one reasonable job opportunity, and will provide a second opportunity when the witness has a persuasive reason for rejecting the first. The U.S. Marshals Service will also provide assistance in finding housing, will provide identity documents for witnesses and family members whose names are changed for security purposes, and will arrange for severely troubled witnesses and family members to receive counseling and advice by psychologists, psychiatrists, or social workers when requested.

In cases in which the Witness Security Program is used to protect government witnesses, sentencing judges should be made aware of the additional cost to the government for their consideration of fines. A report of the amount spent for each witness may be obtained from the U.S. Marshals Service Witness Security Inspector in the district.

Additional information may be obtained from the Office of Enforcement Operations, Criminal Division, FTS 633-3684

9-21.520 Subsistance Guidelines

The Director, U.S. Marshals Service, shall administer Witness Security Program funds. The Witness Security Division, U.S. Marshals Service, will supervise the administration of subsistence funds under guidelines set forth by the Director based upon Department of Labor cost of living indices.

Witnesses who are able to support themselves and their family and/or household members will not be furnished subsistence funding assistance.

The U.S. Marshals Service will make every effort to assure that protected persons pay debts for which the Department is furnishing funds and return loaned property provided by the government. If necessary, final subsistence allowances will be withheld until all such debts are cleared and loaned property recovered.

Maintenance allowance assistance will normally be provided until the protected witness has obtained employment or is self-sufficient by other means of income. Subsistence shall terminate not later than six months after the first payment, or once employment is secured, whichever is earlier. The prosecutor will be advised of the scheduled termination of a witness' funding and invited to comment.

An extension for no longer than 90 days may be authorized when circumstances beyond the control of the witness so dictate.

9-21.530 Employment of Protected Witnesses

Protected witnesses are expected to become self-sufficient as soon as possible after acceptance into the Program. The U.S. Marshals Service will endeavor to assist the witness to find employment but the witness himself is expected to aggressively seek employment. Under no circumstances will witnesses be considered ''entitled'' to subsistence payments until they have testified. Failure to aggressively seek employment or rejection of an employment opportunity will be grounds for discontinuance of subsistence payments.

9-21.600 PRISONER-WITNESSES

A. *Prosecutor's Responsibility*—The prosecutor handling a case, whether an Assistant U.S. Attorney or a division attorney, will be responsible for notifying the Office of Enforcement Operations when a prisoner witness or potential prisoner-witness is cooperating with the government, and from whom that person should be separated, whether or not the witness is formally in the Witness Security Program. The Office of Enforcement Operations will then coordinate the placement of the prisoner with the Bureau of Prisons, and in conjunction with the Bureau of Prisons, will monitor the movement of cooperating witnesses, including protected witnesses, when they are moved from one federal facility to another or back and forth from federal to state custody (on writs of habeas corpus ad testificandum or otherwise), to make sure that they are not housed even on a temporary basis in facilities where persons from whom they are to be separated are also housed.

The following information concerning prisoner-witnesses must be provided:

1. Name of offender;

2. Date of birth;

3. Race and Sex;

4. Whether state or federal prisoner (if state, reimbursable or nonreimbursable);

5. Current offense;

6. Current sentence (and Judge's name);

7. FBI rap sheet;

8. Outstanding warrants or detainers;

9. Names of all those from whom witness should be separated, FBI numbers and current locations;

10. Pre-sentence investigation and/or prison classification material;

11. Judgment and Commitment papers; and

12. Bail bond status.

From time to time, the U.S. Attorneys' office may be requested to assist the U.S. Marshals Service in securing appropriate documents for prisoner-witnesses. The U.S. Marshals Service Witness Security Inspector will assure that Judgment and Commitment papers in the prisoner-witness' *new name* will be delivered to the institution with the prisoner-witness. A second set of Judgment and Commitment papers in the witness' original name will be forwarded to Bureau of Prisons Headquarters in Washington, D.C.

B. *Bureau of Prisons*—Special prisoner designations will be made by the Bureau of Prisons as they deem necessary. U.S. Marshals Service involvement in these instances will be limited to insuring the proper security when it is necessary for the prisoner to be transported from one institution to another or back to the danger area for interview and/or trial. When the prisoner-witness is released from incarceration, relocation services will be provided if they are deemed necessary by the Office of Enforcement Operations. The Bureau of Prisons has advised that because of the extraordinary difficulty in determining the appropriate institution for the safe housing of a prisoner-witness, it is imperative that they be furnished the following information on all persons who have been identified as posing a threat to the witnesses and who are likely to come into federal custody:

1. Name;

2. Alias;

3. Date of birth;

4. FBI #;

5. Race;

6. Sex;

7. Ethnic origin;

8. Offense/Charge; and

9. State of appeal, fugitive escape, non-incarcerated, etc.

Compliance in providing this information is essential and will enable the Bureau of Prisons to adequately monitor the separation needs of protected prisoner-witnesses.

The information must be provided to the Office of Enforcement Operations at the time witness protection is being requested for a prisoner-witness in accordance with USAM 9-21.000, *infra.*

C. *Metropolitan Correctional Centers (MCC)* will be used primarily to house protected prisoner-witnesses during periods of debriefing, grand jury, and trial.

Ordinarily, prisoner-witnesses will not serve their sentences at an MCC. Requests to house prisoner witnesses at an MCC must be directed to the Office of Enforcement Operations for consideration.

D. *Interviews of Prisoner-Witnesses* must be arranged through the Office of Enforcement Operations. Requests must be submitted at least ten (10) working days in advance and must include all the information required for regular witnesses. The Office of Enforcement Operations will coordinate all requests with the U.S. Marshals Service and the Bureau of Prisons. The Bureau of Prisons will not allow prisoner-witnesses to be interviewed without prior authorization from the Office of Enforcement Operations.

9-21.700 REQUEST FOR WITNESS' RETURN TO DANGER AREA FOR COURT APPEARANCES

Attorneys should make requests for the appearance of a relocated witness for trial or pre-trial conferences to the U.S. Marshals Service Witness Security Specialist in their district at least TEN (10) WORKING DAYS in advance of the requested appearance date. Requests should include purpose, date, estimated duration of the appearance, place, time, and, if applicable, name of contact person (if other than the requestor).

Investigative agents should make requests for the appearance of a protected witness through the authorized agency channels to the Office of Enforcement Operations, Criminal Division, for approval. Requests should include purpose, date, and estimated duration of the appearance, and if applicable, other persons to be present in addition to the requestor. The Office of Enforcement Operations will forward approved requests to the Witness Security Division, U.S. Marshals Service or to the Inmate Monitoring Branch, Bureau of Prisons (whichever is appropriate). The Witness Security Division, U.S. Marshals Service, will determine the place for the meeting and advise the requestor.

Communications should be addressed to Director or Senior Associate Director, Office of Enforcement Operations, P.O. Box 7600, Benjamin Franklin Station, Washington, D.C. 20044-7600. In case of emergency, you may contact the office telephonically at FTS 633-3684. In order to conserve the U.S. Marshals Service's personnel resources however, emergency requests should be avoided. Prosecutors and investigators will be requested to conduct interviews in neutral sites which will substantially reduce the personnel requirements of the U.S. Marshals Service.

During the wintess' appearance in the danger area, it will be the responsibility of the prosecutor and the investigative agents to ensure that maximum use is made of the witness' time. In the interests of security and limiting the expense involved, the witness must be returned to the relocation area as soon as possible.

9-21.800 USE OF RELOCATED WITNESSES AS INFORMANTS

A witness, having entered the Witness Security Program, maintains a continuing and unique relationship with the Department. Even after subsistence allowances and other material support are terminated, the residual relationship requires that investigative agencies and attorneys observe certain restraints in dealing with witnesses insofar as investigations and/or new cases are concerned.

The consent of the Office of Enforcement Operations is required before a protected witness or anyone relocated because of a witness' cooperation may be used as an informant. The following list is representative of the type of issues the Office of Enforcement Operations deems important when evaluating requests to use relocated witnesses as informants:

A. Significance and/or scope of criminal activity and suspects;

B. Whether or not the witness is successfully relocated and living within Program guidelines; whether new informant activity will result in relocation, if so, whether agency will bear the expense; whether informant activity will require new Witness Security Program application and relocation;

C. Whether witness represents a poor risk (e.g. witness has caused problems in the past with his/her sponsoring attorney or agency);

D. Whether witness has been involved in subsequent criminal activity-making him/her less reliable;

E. Whether the requests center on witness' new criminal involvement and witness expects relief because of his/her informant role; how witness is aware of new criminal activity;

F. Whether informant activity will require witness to testify;

G. Whether witness has completed testimony for which he/she was placed in the Program;

H. Whether other agencies have used witness since relocation;

I. Whether witness is on probation or parole; whether U.S. Probation Office and U.S. Parole Commission should be notified;

J. Whether alternatives to informant activity were considered and why they will not work;

K. Whether witness is incarcerated; if so, whether prosecutor and/or judge should be advised; whether court order is necessary;

L. Whether witness will be endangered—security and protective measures to be undertaken by the agency;

M. Why witness will be effective in informant role;

N. Length of time required by agency for informant activity; and

O. Cost of the activity and how much money U.S. has expended on witness.

After a request has been granted, the Office of Enforcement Operations requires that status reports be filed with it after the first 45 days an informant is being utilized and thereafter quarterly.

9-21.900 MISCELLANEOUS

9-21.910 Dual Payments Prohibited

The U.S. Marshals Service is authorized to provide for the maintenance and housing of protected witnesses whenever they appear for trial, pretrial conferences or return to a danger area for other appearances approved by the Office of Enforcement Operations. The U.S. Marshals Service is authorized to pay for the costs of travel and other associated maintenance expenses. Attorneys should not prepare ''Fact Witness Certificates'' and Fact Witness fees and allowances should not be disbursed to protected witnesses who are under the protection and maintenance of the U.S. Marshals Service. (Witnesses who voluntarily withdraw from participation in the Witness Security Program are exempt from this restriction.)

9-21.920 Payments of Reward Monies

Payment of reward monies to Witness Security Program participants must be authorized by the Office of Enforcement Operations of the Criminal Division.

The appropriate investigative agency headquarters must make a written request to the Office of Enforcement Operations reflecting the reason(s) for the payment and the name of the contact for appropriate coordination with the U.S. Marshals Service and/or the Bureau of Prisons (whichever is applicable) for disbursement of the funds. The Office of Enforcement Operations will advise the requestor in writing (or telephonically depending on the circumstances) of the approval or denial of the request. Neutral site meetings for the sole purpose of disbursing funds to participants of the Witness Security Program are prohibited. Payments must be sent c/o Chief, Witness Security Division, U.S. Marshals Service, One Tysons Corner Center, McLean, Virginia 22102.

9-21.930 Use of Department of Defense Facilities

All requests to use Department of Defense facilities for protected witnesses must be made through the Office of Enforcement Operations.

9-21.940 Special Handling

All documents relating to a protected witness or an individual nominated for protection will be accorded special handling to ensure disclosure on a strict ''need to know'' basis. All documents should be marked with the security designation ''Sensitive Investigative Matter.''

9-21.950 Relocation Site

The area of relocation must not be known to the case attorney/agent or his/her staff since all contact with the witness should be through the Office of Enforcement Operations. The witness should be instructed to keep secret the area of his/her relocation and all associated matters.

9-21.960 Duty Officers

The U.S. Marshals Service can be reached after hours at (703) 285-1100.

The Office of Enforcement Operations duty officer may be reached at 202-633-3684 or 202-633-2000.

The Bureau of Prisons duty officer may be reached at 202-724-3036 or 202-633-2000 (after hours).

9-21.970 Other Requests

A. Requests by members of Congress or their staffs shall be forwarded to the Office of Legislative Affairs who in turn will refer the requests to the Office of Enforcement Operations for processing;

B. Requests by the news media or public should be referred to the Office of Public Information;

C. Other inquiries not covered in this Order should be referred to the Office of Enforcement Operations.

9-21.980 Training

The Marshals Service, Bureau of Prisons, and Criminal Division will coordinate special training about the Witness Security Program to be given to Deputy Marshals, Bureau of Prisons personnel, investigative agents, Assistant U.S. Attorneys, and Criminal Division attorneys.

9-21.990 Continuing Protection Responsibilities

Witnesses in the Program undertake the duty of providing testimony in criminal investigations and trials. Protection will be provided during

the performance of those duties. After the testimony is completed and any relocation is accomplished, the government will have no further obligations to the witness except that if there is clear evidence that the witness is in immediate jeopardy arising out of the former cooperation, through no fault of the witness, further protective services will be provided.

9-21.1000 Arrests of Relocated Witnesses

In accordance with 18 U.S.C. § 3521(b)(1)(H), the U.S. Marshals Service, the Federal Bureau of Investigation and the Office of Enforcement Operations have worked out a mechanism to, when warranted, securely disseminate protected witnesses' arrest records and information in response to legitimate law enforcement requests. It should be noted that no effort will be made to interfere with legitimate legal procedures.

9-21.1010 Results of Witnesses' Testimony

The Office of Enforcement Operations is required to submit a quarterly report to the Deputy Attorney General reflecting the results of the testimony provided by relocated witnesses. Prosecutors and agents will be asked to provide the following information on a monthly basis:

A. Name of Witness;

B. Name of case;

C. Jurisdiction;

D. Did the witness testify before grand jury? Trial? If the witness did not testify, why not?;

E. Status of witness in case;

1. Defendant
2. Unindicted co-conspirator
3. Prisoner
4. Victim
5. Other

F. Names of all defendants;

G. Statutory violations charged;

H. Date of indictment;

I. Date of conviction;

J. Disposition of the case as to each defendant;

K. If convicted, details of sentence imposed on each defendant, including fines levied, etc.;

L. Any information as to significant forfeitures or seizures accomplished because of assistance of witness; and

M. Any information as to contributions made by this witness to the law enforcement effort, federal, state, and local, in your district and elsewhere, for example, furnishing probable cause for Title III's, search warrants, locations of fugitives, etc.

9-21.1020 Victims Compensation Fund—(18 U.S.C. § 3525)

A fund has been established to compensate victims of crimes committed by participants in the Witness Security Program. In general, the fund will, up to a statutory limit, cover expenses for medical and/or funeral costs and lost wages that are not reimbursable from other sources. The fund does not apply to those crimes committed by participants who have been terminated from the Program by the U.S. Marshals Service. The Office of Enforcement Operations has been delegated the authority to administer the operations of the fund and should be contacted if information about the fund and the payment of claims is needed.

9-21.1030 Forms

9-21.1031 Psychological Evaluation Form

The Witness Security Reform Act of 1984 requires a psychological evaluation of each individual who is being considered for inclusion in the Witness Security Program.

The suitability of a witness for the Program must be determined before acceptance into the Program. One of the factors which must be considered in determining the suitability of the witness for the Program is the report of the psychological evaluation of the witness.

After a witness has been psychologically evaluated, the examining authority will prepare and submit a report to the Office of Enforcement Operations, Criminal Division, Department of Justice, so that a determination can be made as to the suitability of the witness for the Program.

I, _____, certify that I have read and understand the foregoing and that I voluntarily submit to this psychological evaluation. I also understand that my acceptance into the Witness Security Program is not solely dependent upon the results of this psychological evaluation.

I also certify that I have no objection if the contents of the report of my psychological evaluation are disclosed to others in connection with my consideration for the Witness Security Program.

_____ _____

(Date) (Signature)

_____

(Witness)

9-21.1032 Polygraph Examination Form

A polygraph examination is required of all Witness Security candidates who are incarcerated, in order to maintain the security of those individuals who are now, or who will be housed in protective custody units. Authorization for the Witness Security Program may be rescinded if the results of the polygraph examination reflect that the candidate intends to maim or disclose other protected witnesses or information obtained from such witnesses.

I, _____, acknowledge that I have read and understand the foregoing, and that I voluntarily submit to this polygraph examination. I further understand that my acceptance or rejection for placement in the Witness Security Program is not solely dependent upon the results of the polygraph examination.

_____ _____

(Date) (Signature)

_____

(Witness)

DETAILED
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9-22.000 PRE-TRIAL DIVERSION PROGRAM

Pre-trial diversion (PTD) is an alternative to prosecution which seeks to divert certain offenders from traditional criminal justice processing into a program of supervision and services administered by the U.S. Probation Service. In the majority of cases, offenders are diverted at the pre-charge stage. Participants who successfully complete the program will not be charged or, if charged, have the charges against them dismissed; unsuccessful participants are returned for prosecution.

The major objectives of pre-trial diversion are:

A. To prevent future criminal activity among certain offenders against whom prosecutable cases exist by diverting them from traditional processing into community supervision and services.

B. To save prosecutive and judicial resources for concentration on major, serious cases.

C. To provide, where appropriate, a vehicle for restitution to communities and victims of crime.

9-22.100 ELIGIBILITY CRITERIA

The U.S. Attorney, in his/her discretion, may divert any individual against whom a prosecutable case exists and who is not:

1. Accused of an offense which, under existing Department guidelines, should be diverted to the State for prosecution;

2. A person with two or more prior felony convictions;

3. An addict;

4. A public official or former public official accused of an offense arising out of an alleged violation of a public trust; or

5. Accused of an offense related to national security, foreign affairs or terrorism.

Cases which meet the above criteria but are violations of the statutes listed below require prior Division approval.

STATUTES

CRIMINAL DIVISION

Narcotics and Dangerous Drugs Section

21 U.S.C. §§ 848, 849

Organized Crime and Racketeering Section

12 U.S.C. § 25a

12 U.S.C. § 339

12 U.S.C. § 1730c

12 U.S.C. § 1829a

15 U.S.C. §§ 1171 to 1178

18 U.S.C. § 224

18 U.S.C. §§ 891 to 894

18 U.S.C. § 1301

18 U.S.C. §§ 1302 to 1306

18 U.S.C. § 1304

18 U.S.C. § 1511

18 U.S.C. §§ 1801 to 1804

18 U.S.C. § 1952

18 U.S.C. § 1953

18 U.S.C. § 1955

18 U.S.C. §§ 1961 to 1968

26 U.S.C. §§ 4401 to 4405

Organized Crime and Racketeering Section (Management-Labor Unit)

15 U.S.C. § 1281 (where labor matter involved)

18 U.S.C. § 664

18 U.S.C. § 1344(i) (where labor matter involved)

18 U.S.C. § 1027

18 U.S.C. § 1231

18 U.S.C. § 1951

18 U.S.C. § 1954

29 U.S.C. § 162

29 U.S.C. § 186

29 U.S.C. §§ 215, 216

29 U.S.C. § 308

29 U.S.C. § 439

29 U.S.C. § 463

29 U.S.C. § 501(c)

29 U.S.C. §§ 502 to 504

29 U.S.C. § 522

29 U.S.C. § 530

29 U.S.C. § 1111

29 U.S.C. § 1131

29 U.S.C. § 1141

45 U.S.C. § 152

45 U.S.C. §§ 181, 182

General Litigation and Legal Advice Section

18 U.S.C. § 970

18 U.S.C. §§ 1502 to 1510

18 U.S.C. §§ 1621 to 1623

18 U.S.C. §§ 2511, 2512

Terrorism and Violent Crime Section

18 U.S.C. § 112

18 U.S.C. § 878

18 U.S.C. § 1116

18 U.S.C. § 1201(a)(4)

18 U.S.C. § 1201(d)

18 U.S.C. § 1501

18 U.S.C. §§ 1512, 1513

Fraud Section

2 U.S.C. §§ 431 to 453

2 U.S.C. §§ 261 to 270

18 U.S.C. §§ 241, 242

18 U.S.C. §§ 591 to 612

18 U.S.C. § 1913

42 U.S.C. § 1973(i)(c)

TAX DIVISION

All statutes

CIVIL RIGHTS DIVISION

All statutes

9-22.200 PARTICIPATION

A. Divertees are initially selected by the U.S. Attorney based on the above eligibility criteria:

1. At the pre-charge stage; or

2. At any point (prior to trial) at which a PTD agreement is effected.

B. Participation in the program by the offender is voluntary:

1. The divertee must sign a contract agreeing to waive his/her rights to a speedy trial and presentment of his/her case within the statute of limitations;

2. The divertee must have advice of counsel, and if he/she cannot afford counsel, one will be appointed for him/her upon his/her application to the Chief Pretrial Services Officer (or Chief Probation Officer). Appointment of Counsel will be made through the U.S. Magistrate. Inquiries by magistrates should be directed to the Criminal Justice Act Division, Administrative Office of U.S. Courts (202) 633-6051, for expenditure authorizations.

C. All information obtained in the course of making the decision to divert an offender is confidential, except that written statements may be used for impeachment purposes.

9-22.300 SERVICES

A. Upon determining eligibility of an offender for PTD, the U.S. Attorney should refer the case along with the investigative agent's report to either the Chief Pretrial Services Officer or the Chief Probation Officer for a recommendation on the potential suitability of the offender for supervision. The Chief Pretrial Services Officer (or the Chief Probation Officer) may initiate preliminary recommendations to the U.S. Attorney. As part of the background investigation, Pretrial Services will arrange with the United States Marshal's Office to have the divertee fingerprinted and to have such fingerprints submitted to the FBI on card FD-249. At the

same time Pretrial Services should request notification of any prior record on the divertee from the FBI Identification Division Records.

B. Supervision should be tailored to the offender's needs and may include employment, counseling, education, job training, psychiatric care, etc. Many districts have successfully required restitution or forms of community service as part of the pre-trial program. Innovative approaches are strongly encouraged.

C. The program of supervision which is recommended is outlined in the PTD Agreement, agreed upon by all parties and administered by Pretrial Services.

9-22.400 PTD AGREEMENT

The diversion period begins upon execution of the Agreement. The Agreement (USA-Form 186) outlines the terms and conditions of supervision and is signed by the offender, his/her attorney, the prosecutor, and either the Chief Pretrial Services Officer or the Chief Probation Officer. The offender must acknowledge responsibility for his or her behavior but is not asked to admit guilt. The period of supervision is not to exceed 18 months but may be reduced. In the case of federal employees the PTD Agreement will not require the offender's resignation from federal service but will explicitly state that administrative action by the federal agency will not be precluded and need not be delayed by the prosecutor's disposition of the case through diversion. The PTD Agreement may require that the U.S. Attorney provide a copy of the Agreement to the federal agency by which the divertee is employed.

The Chief Pretrial Services Officer (or the Chief Probation Officer) shall submit an FBI Form I-12 ''Flash Notice'' indicating diversion and requesting notification if an arrest occurs.

9-22.500 TERMINATION

A. The U.S. Attorney will formally decline prosecution upon satisfactory completion of program requirements. Notice of satisfactory completion will be provided to the U.S. Attorney by either the Chief Pretrial Services Officer or the Chief Probation Officer. In addition, the Chief Pretrial Services Officer (or the Chief Probation Officer) will file an FBI Disposition Form R-84 so that the record indicates successful completion-charges dropped.

B. Upon breach of conditions of the Agreement by the divertee, the Chief Pretrial Services Officer (or the Chief Probation Officer) will so inform the U.S. Attorney, who, in his/her discretion, may initiate prosecution. When prosecution is resumed, the U.S. Attorney must furnish the offender with notice.

C. The decision to terminate an individual for breach of conditions rests exclusively with the U.S. Attorney with advice from either the Chief Pretrial Services Officer or the Chief Probation Officer.

9-22.600 FORMS

9-22.601 PTD Referral Letter to Chief Pretrial Services Officer (USA-Form 184)

Date:

Dear

Re: Proposed Pre-Trial Diversion of _____

I am recommending pre-trial diversion for the above-mentioned offender who has been reported to have violated Title ___, United States Code, Section ___.

Enclosed find a copy of the investigator's report which should give you the background information to conduct the necessary investigation to determine whether or not the offender is suitable for pre-trial diversion.

Please send me your recommendation as soon as the investigation is complete.

Sincerely yours,
BY: _____
Assistant U.S. Attorney

Enclosure
USA-Form 184

9-22.602 Letter to Offender (USA-Form 185)

Re: In the matter of: _____

Complaint No. _____

Dear _____:

The United States Attorney for _____ has information that you have committed an offense against the United States in violation of Title ___, United States Code, Section(s) ___. Description: _____

After reviewing your case, we have made a preliminary determination that you may be an appropriate person to participate in the Department's Pre-trial Diversion Program. Pre-trial diversion means that this office will not presently seek a conviction against you. Instead, if you qualify and are accepted, you will be placed in a pre-trial diversion program under certain specified conditions described in a written agreement between you and the government for a term to be determined by this office but not to exceed eighteen months. If you satisfactorily fulfill the conditions and

terms of your program, you will not be prosecuted, or, if you have already been charged, the charges against you will be dismissed. If you violate the conditions of the written agreement you may be removed from the pre-trial diversion program, in which case this office will resume prosecution.

Decision to seek acceptance into this program is one that must ultimately be made by you alone. Nevertheless, it is important that you immediately discuss this matter fully and completely with your attorney inasmuch as your participation in this program will constitute a waiver of certain rights afforded to you by the Constitution. Specifically, you must waive your right to a speedy trial and your right to have an indictment presented to a grand jury within the applicable statute of limitations. If you believe you are unable to afford an attorney, you should apply to the Chief Pretrial Services Officer (or the Chief Probation Officer) to have counsel appointed to represent you.

If you desire to be further considered for the pre-trial diversion program, please let us know at your earliest convenience.

Any information furnished in connection with your application for pre-trial diversion will be confidential and will not be admissible on the issue of guilt in subsequent criminal proceedings.

In order to ensure that appropriate procedures can be initiated as soon as possible, please respond promptly.

Very truly yours,

_____

United States Attorney

_____

Assistant United States Attorney

USA-Form 185

9-22.603 Agreement—(USA-Form 186)

UNITED STATES OF AMERICA

v.

_____

Name

_____

Street Address

_____

City and State

_____

File No.

_____

Telephone No.

AGREEMENT FOR PRE-TRIAL DIVERSION

It appearing that you are reported to have committed an offense against the United States on or about _____ in violation of Title __, United States Code, Section(s) __ in that you did: _____.

Upon accepting responsibility for your behavior and by your signature on this Agreement, it appearing, after an investigation of the offense, and your background, that the interest of the United States and your own interest and the interest of justice will be served by the following procedure; therefore

On the authority of the Attorney General of the United States, by _____, United States Attorney for the District of _____, prosecution in this District for this offense shall be deferred for the period of __ months from this date, provided you abide by the following conditions and the requirements of this Agreement set out below.

Should you violate the conditions of this Agreement, the United States Attorney may revoke or modify any conditions of this pre-trial diversion program or change the period of supervision, which shall in no case exceed eighteen months. The United States Attorney may release you from supervision at any time. The United States Attorney may at any time within the period of your supervision initiate prosecution for this offense should

you violate the conditions of this Agreement. In this case he/she will furnish you with notice specifying the conditions of the Agreement which you have violated.

After successfully completing your diversion program and fulfilling all the terms and conditions of the Agreement, no prosecution for the offense set out on page 1 of this Agreement will be instituted in this District, and the charges against you, if any, will be dismissed.

Neither this Agreement nor any other document filed with the United States Attorney as a result of your participation in the Pre-trial Diversion Program will be used against you, except for impeachment purposes, in connection with any prosecution for the above-described offense.

General Conditions of Pre-trial Diversion

(1) You shall not violate any law (federal, state and local). You shall immediately contact your pre-trial diversion supervisor if arrested and/or questioned by any law enforcement officer.

(2) You shall attend school or work regularly at a lawful occupation or otherwise comply with the terms of the special program described below. If you lose your job or are unable to attend school, you shall notify your pre-trial diversion supervisor at once. You shall consult him/her prior to job or school changes.

(3) You shall report to your supervisor as directed and keep him/her informed of your whereabouts.

(4) You shall follow the program and such special conditions as may be described below.

Special Conditions

Description of special program:

I assent and certify that I am aware of the fact that the Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. I also am aware that Rule 48(b) of the Federal Rules of Criminal Procedure provides that the Court may dismiss an indictment, information, or complaint for unnecessary delay in presenting a charge to the Grand Jury, filing an information or in bringing a defendant to trial. I hereby request the United States Attorney for the District of _____ to defer

such prosecution. I agree and consent that any delay from the date of this Agreement to the date of initiation of prosecution, as provided for in the terms expressed herein, shall be deemed to be a necessary delay at my request, and I waive any defense to such prosecution on the ground that such delay operated to deny my rights under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States to a speedy trial or to bar the prosecution by reason of the running of the statute of limitations for a period of months equal to the period of this agreement.

I hereby state that the above has been read and explained to me. I understand the conditions of my pre-trial diversion program and agree that I will comply with them.

Name of divertee	Date
Defense Attorney	Date
United States Attorney	Date
Chief Pretrial Services Officer (or Chief Probation Officer)	Date

USA-Form 46

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9-23.000 ''IMMUNITY''—COMPELLED TESTIMONY

The following are the Attorney General's guidelines, dated January 14, 1977, which fully supersede Criminal Division Memo No. 595 and its supplements.

The guidelines concern the utilization of the principal federal statutes pertaining to compulsion of witnesses to testify or provide other information, despite their assertion of the Fifth Amendment privilege against compulsory self-incrimination (18 U.S.C. §§ 6001-6003).

Similar provisions are set forth, redundantly, for drug cases in 21 U.S.C. § 884. The Department will rely upon the Title 18 provisions for all cases.

The statutes provide the government with an important and effective device for obtaining needed testimony, and they have, under appropriate circumstances, significant advantages over former ''transactional immunity'' statutes in that they provide no gratuity to a testifying witness, they encourage the giving of more complete testimony by proscribing use of everything the witness relates, and they still permit a prosecution of the witness in the rare case where it can be shown that the supporting evidence clearly was obtained only from independent sources.

While the Department encourages the use of these statutes, their use will be authorized only when it appears that the public interest may best be served thereby. In order to preclude misuse of orders to compel testimony, and to avoid jeopardizing prosecutions of defendants or potential defendants in on-going cases or investigations, these guidelines set forth uniform standards and procedures to be followed prior to filing motions for such orders.

9-23.100 AUTHORIZATION PROCEDURES

A. Summary: An attorney for the government may request authorization from the Assistant Attorney General for the Criminal Division or the Assistant Attorney General for the division with responsibility for the subject matter of the case to apply for an order, pursuant to 18 U.S.C. § 6003 and 28 C.F.R. § 0.175, compelling a person to testify or provide other information when, in his/her judgment, it may be necessary to the public interest to obtain such testimony or information and the person has refused or is likely to refuse to provide such testimony or information on the basis of the privilege against self-incrimination. The request for authorization shall contain sufficient information to permit the Assistant Attorney General, and the U.S. Attorney for the district in which the motion for the order is to be made, to make an independent judgment regarding the public interest and the likelihood of the refusal to testify.

B. Comment: 18 U.S.C. § 6003 makes it clear that a compulsion order should not be sought by the government without the judgment that two

conditions exist: first, that the testimony or information sought may be in the public interest, and second, that the person to whom the order will be directed has refused or is likely to refuse to provide the testimony or information on the basis of the privilege against self-incrimination. That judgment must first be made by the attorney for the government initiating the process to obtain the compulsion order, and must thereafter be concurred in by the appropriate Assistant Attorney General and the U.S. Attorney for the district in which the motion for the order is to be made.

Although motions to the court for compulsion orders under 18 U.S.C. § 6003 must be made by the U.S. Attorney for the district in which the court is sitting, requests for authorization to apply for such orders may be initiated by any Department of Justice attorney. A request ordinarily should be in writing, using the Departmental form developed for the purpose (Form OBD-111), but under exigent circumstances an oral request and oral justification may be submitted, with the written materials to follow as soon as possible.

9-23.101 Procedure Under Exigent Circumstances

It is recognized that, despite efforts to anticipate the invocation by a witness of the privilege against self-incrimination, there will be extraordinary instances necessitating the processing of a request for authorization to compel testimony more rapidly than the normal processing time of two weeks. Where the time within which the authorization decision must be made is one to three days, attorneys should submit their requests, labelled ''Emergency Request,'' to the Witness Records Unit via facsimile copier (FTS 633-1468). Where the time involved is less than one day, requests may be submitted by telephone to the attorney-in-charge of the Witness Records Unit at 633-5541. The attorney will assure that all available information is brought to the immediate attention of the appropriate Assistant Attorney General, as well as such other Departmental personnel as may be necessary. He/she will also assure the prompt communication of the authorization decision to the requesting attorney. After receiving authorization pursuant to an oral request, the requesting attorney should promptly send to the Witness Records Unit a confirmatory, written request for authorization on Form OBD-111.

9-23.110 Requests by Assistant U.S. Attorneys

Requests initiated by Assistant U.S. Attorneys must be approved either by the U.S. Attorney or, in his/her absence, by a senior supervisory Assistant, and should be sent to the appropriate Assistant Attorney General.

9-23.120 Requests by Legal Division Attorney; Approval of U.S. Attorney

Requests initiated by attorneys assigned to a litigating division of the Department should be sent to the appropriate Assistant Attorney General,

with a copy transmitted to the Witness Records Unit of the Criminal Division. The attorney initiating the request need not obtain the approval of the U.S. Attorney for the district in which the proceeding will be conducted prior to submitting the request. He/she must, however, send an informational copy of the request to the U.S. Attorney and take whatever other steps are necessary to facilitate review of the request by the U.S. Attorney. The U.S. Attorney, as soon as possible after receipt of this informational copy of a request for authorization, should inform the Witness Records Unit of the Criminal Division of any objection he/she may have to the approval of the request. This procedure is advisable since the U.S. Attorney must, under the statute, personally conclude that it is necessary and desirable to seek a compulsion order in his/her district. All division attorneys should allow for sufficient time and consultation as may be necessary for the U.S. Attorney to discharge his/her statutory responsibility.

9-23.130 Approval by Assistant Attorney General

The Assistant Attorney General in charge of the Criminal Division is authorized to approve requests for authorization in any cases and proceedings before a federal court or grand jury. 28 C.F.R. § 0.175. Assistant Attorneys General in charge of the Antitrust, Civil Rights, Land and Natural Resources, and Tax Divisions similarly have been authorized to approve requests with respect to cases and proceedings within the cognizance of their respective divisions, subject to the condition that no such authorization may be given unless the Criminal Division has first indicated that it has no objection to the proposed compulsion order. This condition is designed to minimize the danger of inadvertent interference with current criminal investigations or prosecutions, most of which fall within the jurisdiction of the Criminal Division. The Assistant Attorney General with jurisdiction of the prosecution, however, has the primary responsibility for approving the application. Upon receipt by the Criminal Division of a request for its acquiescence—or of a direct request for Assistant Attorney General authorization—the Witness Records Unit will request the Federal Bureau of Investigation, and such other federal law enforcement agencies as may be appropriate, to conduct a search of investigative files concerning the witness and to report thereon to the Criminal Division. Except in the most imperative circumstances, the Criminal Division will defer its approval until the Federal Bureau of Investigation has reported the results of its file search.

If a request for authorization is approved by the Assistant Attorney General, a written authorization will be sent to the attorney initiating the request or, when time is critical, a written authorization will be sent by a facsimile transmitter or by teletype or an oral authorization will be telephoned and confirmed by teletype.

It is expected that in particularly sensitive cases the Assistant Attorney General whose authorization is sought will consult with the Attorney General or Deputy Attorney General in the course of his/her reviewing of the request and its supporting documentation.

9-23.200 THE DECISION TO SEEK AUTHORIZATION

9-23.210 The Public Interest

In determining whether it may be necessary to the public interest to obtain testimony or other information from a person, the attorney for the government should weigh all relevant considerations, including:

A. The importance of the investigation or prosecution to effective enforcement of the criminal laws;

B. The value of the person's testimony or information to the investigation or prosecution;

C. The likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;

D. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted, and his/her history with respect to criminal activity;

E. The possibility of successfully prosecuting the person prior to compelling him/her to testify or produce information; and

F. The likelihood of adverse collateral consequences to the person if he/she testifies or provides information under a compulsion order.

The considerations listed above are not intended to be all-inclusive or to require a particular decision in a particular case. Rather, they are meant to focus the decision-makers' attention on factors which probably will be controlling in the vast majority of cases. Of course, the significance of the presence or absence of any one or more of these factors in a particular case is a matter to be determined by the decision-maker.

9-23.211 Close Family Relative Exception

Consideration should be given to whether the witness is a close family relative of the person against whom the testimony is sought. A close family relative is a spouse, parent, child, grandparent, grandchild or sibling of the witness. Absent specific justification, we will ordinarily avoid compelling the testimony of a witness who is a close family relative of the defendant on trial or of the person upon whose conduct grand jury scrutiny is focusing. Such justification exists, among other circumstances, where (i) the witness and the relative participated in a common business enterprise and the testimony to be elicited relates to that enterprise or its

activities; (ii) the testimony to be elicited relates to illegal conduct in which we have reason to believe that both the witness and the relative were active participants; or (iii) the testimony to be elicited relates to a crime involving overriding prosecutorial concerns.

9-23.212 Conviction Prior to Compulsion

Recognizing that it is preferable as a matter of policy that an offender formally incur liability for his/her criminal conduct, and recognizing the difficulty in prosecuting a witness for matters relating to compelled testimony, the attorney for the government should consider the possibility of securing the witness's conviction before asking the court to compel his/her testimony. In some situations there may be time to prosecute the witness before compelling his/her testimony; in other situations a witness may be willing to enter a plea of guilty to all or some of the charges in lieu of being prosecuted.

In a case in which the attorney for the government is considering the appropriateness of an agreement to terminate a prosecution against a potential witness in return for a guilty plea to fewer than all charges, in addition to weighing the considerations usually involved in deciding to accept a plea, the attorney for the government should also make a careful assessment of any offer of testimonial or other cooperation by the person with whom the agreement is to be made. A difficulty with any agreement involving the testimony of a witness is, of course, that the defense may argue to the jury that because the witness made a ''deal'' with the government his testimony is inherently suspect.

If the witness can be convicted as a result of prosecution or the entry of a plea of guilty prior to the time his/her testimony is needed, the witness may no longer have a Fifth Amendment privilege with respect to the testimony sought. In such a case it would be unnecessary to resort to the compulsion statutes in order to obtain his/her testimony. If some areas of the testimony sought still would be covered by a Fifth Amendment privilege, however, the compulsion statutes may be employed to obtain the necessary testimony.

It should be noted that conviction prior to compulsion will reduce the likelihood that the defense will seek to suggest to the jury that the compelled testimony is suspect because the witness has been ''granted immunity'' for his/her criminal acts. Such arguments should be countered in any case in which a compulsion order has been employed, but a particularly strong argument can be made if the witness already has been convicted for his/her criminal conduct.

9-23.213 Availability of the Privilege

In determining whether a person has refused or is likely to refuse to testify or provide other information on the basis of his/her privilege

against self-incrimination the attorney for the government shall make an independent judgment regarding the availability of the privilege under the circumstances and shall be prepared to contest the assertion of the privilege if it is believed to be unfounded.

9-23.214 Granting Immunity to Compel Testimony on Behalf of Defendant

The provisions of 18 U.S.C. §§ 6001-6003 are not to be used to compel testimony or production of other information on behalf of a defendant except in extraordinary circumstances where the defendant plainly would be deprived of a fair trial without such testimony or other information.

9-23.215 Immunity for the Act of Producing Records

The Supreme Court has held that the act of producing records pursuant to a subpoena may have testimonial aspects and an incriminating effect, even if the records themselves are not privileged. Thus, the Court held that the Fifth Amendment privilege against self-incrimination applies to the act of producing the business records of a sole proprietorship. *See United States v. Doe,* 465 U.S. 605 (1984).

The act of production concedes the existence and possession of the records called for by the subpoena as well as the respondent's belief that such records are those described in the subpoena. Such records cannot, therefore, be compelled without granting statutory use immunity under the general immunity statute, 18 U.S.C. § 6001 *et seq.*

The Court makes it clear that the privilege in such cases extends only to the act of production. ''Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.''

If immunity is sought for the limited purpose of obtaining records pursuant to *United States v. Doe, supra,* that fact should be clearly stated in the application for immunity. Examination of a witness who is compelled to produce records in such cases should be sufficient to determine whether there has been compliance with the subpoena, but care should be taken to limit inquiries to matters relevant to the act of producing the records since all such testimony, and leads therefrom, will not be usable against the witness. The contents of the records may, of course, be used for any purpose because they are not privileged.

9-23.300 PROCEDURE UPON RECEIPT OF AUTHORIZATION

9-23.310 Obtaining the Court Order

Upon receipt of authorization from an Assistant Attorney General, the U.S. Attorney for the district in which the order is to be issued may file a written motion pursuant to 18 U.S.C. § 6003 to obtain a compulsion order.

Any attempt by defense counsel or counsel for the witness to challenge the validity of a compulsion order should be vigorously opposed. In particular, government attorneys should oppose requests for affidavits concerning the authenticity of signatures on Department authorizations. Compliance with such requests would place an unnecessary burden on the Department in such cases and in other situations requiring approval by a Departmental official who is not present in the district. In any event, neither the compulsion statute nor the pertinent regulations require an Assistant Attorney General's authorization to be in writing.

Should the attorney for the government be confronted with a witness who, having previously testified pursuant to a court order, seeks to assert his/her privilege at a subsequent ancillary proceeding or at a second trial involving the same matter concerning which the witness had earlier testified, the U.S. Attorney may move for an additional compulsion order. The letter of authorization from the Assistant Attorney General will be sufficiently broad to constitute the requisite approval for the additional order, thereby eliminating any delay incident to litigating the availability of the privilege (*cf. Ellis v. United States*, 416 F.2d 791 (D.C.Cir. 1969)) or requesting additional authorization. Where more than six months have intervened since the date of the letter of authorization, an additional inquiry to the authorizing Assistant Attorney General and to the Witness Records Unit must be made to determine that during the interim no other matters pertaining to the witness have come to the Department's attention which would make the compulsion order undesirable. Similarly, any substantial change in the information contained in the original request for authorization should be brought to the attention of the Witness Records Unit.

9-23.320 Where Subject of Order is Awaiting Sentencing

In a case in which the person who is the subject of a compulsion order is awaiting sentencing, the attorney for the government should ensure that the substance of his/her compelled testimony not be made known to the sentencing judge.

This guideline is intended to forestall claims by witnesses who testified under compulsion that their sentences were adversely influenced by the substance of their compelled testimony. The safest way to avoid such a claim is to defer taking the compelled testimony until after the witness has been sentenced. If it is not possible or desirable to postpone the sentencing, the attorney for the government should attempt to ensure that the substance of the compelled testimony does not come to the attention of the sentencing judge before the imposition of sentence. This guideline does not apply, of course, if the witness requests that the substance of the compelled testimony be brought to the court's attention prior to sentencing.

9-23.330 Ensuring Integrity of Any Future Prosecution

In a case in which a person is to testify or provide other information pursuant to a compulsion order:

A. If it then appears that the public interest may warrant a future prosecution of the witness, on the basis of independent evidence for his past criminal conduct about which the witness is to be questioned, the attorney for the government shall:

1. Before the witness has testified or provided other information, prepare for the case file a signed and dated memorandum summarizing the evidence then known to exist concerning the witness, and designating its sources and date of receipt;

2. Ensure that all testimony given, or information provided, by the witness be recorded verbatim and that the recording or reporter's notes, together with any transcript thereof, be maintained in a secure location and that access thereto be documented; and

3. Maintain a record of the nature, source, and date of receipt of evidence concerning the witness' past criminal conduct that becomes available after he/she has testified or provided other information; or

B. If it appears that the public interest may not warrant a future prosecution of the witness, on the basis of independent evidence, for past criminal conduct about which the witness is to be questioned, the attorney for the government shall:

1. Ensure that all testimony, or information provided, by the witness be recorded verbatim and

2. Maintain a record of the nature, source, and date of receipt of evidence concerning the witness's past criminal conduct that becomes available after he/she has testified or provided other information.

These guidelines are intended to ensure the integrity of any future prosecution of a witness who is compelled by court order to testify or provide other information.

The provisions of paragraph A. should be followed when, on the basis of the information available at the time the testimony is to be given or the information is to be provided, it is anticipated that a future prosecution of the witness, for any prior offense about which the witness is to be questioned, may be in the public interest. In the event of future prosecution (except a perjury, false statement, or contempt prosecution based on the compelling of the testimony), the government must be in a position to demonstrate convincingly that its evidence was developed independently of the witness's compelled testimony or of information derived therefrom. The government will also have to show that it has made no ''non-evidentia-

ry'' use of the testimony or its fruits, such as a decision to focus on the witness as a potential defendant. For these reasons, it is essential that a record be maintained of all untainted evidence against a witness who is compelled to testify, that his/her compelled testimony be maintained in a secure place, and that access to such testimony be documented. Unless these steps are taken, it may prove impossible to establish the purity of the government's case in a future prosecution of the witness.

The provisions of paragraph B. should be followed when, on the basis of the information then available, it does not appear that a future prosecution would be in the public interest. The precautions are lessened to reflect the lesser likelihood of prosecution, but still help assure that a future prosecution could be initiated on the basis of demonstrably independent evidence.

9-23.340 Refusal of Witness to Comply With Order

The refusal of a witness to testify or to produce other information subsequent to the issuance of an order of compulsion under 18 U.S.C. § 6002 is punishable by contempt. *But see* USAM 9-23.341. The Supreme Court has admonished the district courts to consider first the feasibility of effecting compliance with compulsion orders through the imposition of civil contempt, under 28 U.S.C. § 1826. '' 'The judge should resort to criminal sanctions only after he/she determines, for good reason, that the civil remedy would be inappropriate.' '' *United States v. Wilson,* 421 U.S. 309, 317 n. 9 (1975), quoting *Shillitani v. United States,* 384 U.S. 364, 371 n. 9 (1966).

9-23.341 Ground for Refusal

Under *Gelbard v. United States,* 408 U.S. 41 (1972), a witness called before a grand jury may refuse to testify, pursuant to 18 U.S.C. ¶2515, despite a compulsion order, if the interrogation is based on the illegal electronic interception of the witness's communications.

9-23.342 Civil Contempt

Section 1826 of Title 28, a codification of existing practices, was enacted in 1970 to provide a statutory basis for the application of summary civil contempt powers to recalcitrant witnesses. The purpose of the statute is to secure the testimony or other evidence through the creation of an incentive for compliance, not to punish the witness by imprisonment. When the witness complies with the order, he/she must be released. Thus, confinement is limited to the life of the court proceeding or the term of the grand jury, but in no event may the confinement exceed eighteen months.

Section 1826(a) provides that, upon the refusal of a witness without just cause to testify or provide other information, as ordered, in any

proceeding before or ancillary to any court or grand jury of the United States, the court may order the witness confined summarily. However, Section 1826(a) cannot be invoked simply upon the refusal of a witness to testify before a grand jury; the witness in such a case must be brought before a judge and ordered to testify, and he/she must then refuse to comply with the order.

Section 1826(b) prohibits granting bail during the pendency of an appeal from an order of confinement if the appeal appears to be frivolous or taken for delay. An appeal from a confinement order under this section is to be disposed of ''as soon as practicable'' but not later than thirty days from the filing date. These provisions lend a certainty to the sanction consistent with the urgent public need to obtain testimony. *See United States v. Coplon,* 339 F.2d 192 (6th Cir.1964). Thus, the statute, itself, affords a sound predicate for government opposition to an application for bond pending appeal in such instances.

9-23.343 Criminal Contempt

Where it is appropriate to impose punishment upon a recalcitrant witness, the court may invoke the provisions of 18 U.S.C. § 401 and Rule 42 of the Federal Rules of Criminal Procedure. Rule 42(a) provides for summary punishment of the contempt ''if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court,'' while Rule 42(b) requires notice and a hearing for contempts not committed in the presence of the court.

In *United States v. Wilson, supra,* the Supreme Court upheld contempt convictions summarily imposed under Rule 42(a), in a case where two witnesses refused to testify during a bank robbery trial despite having been ordered by the trial court to do so pursuant to 18 U.S.C. § 6002. The Supreme Court distinguished the refusal of a witness to testify before a grand jury—where the proceeding may be interrupted while the witness is afforded notice and a hearing under Rule 42(b)—from refusal to testify at a trial. In the latter instance, the Court observed, there is a need for swift summary decision: ''The face-to-face refusal to comply with the court's order itself constituted an affront to the Court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to provide the recalcitrant witness with some incentive to testify.'' 421 U.S. at 316. ''Where time is not of the essence, however, the provisions of Rule 42(b) may be more appropriate to deal with contemptuous conduct.'' *Id.* at 319. *See also Harris v. United States,* 382 U.S. 162 (1965).

Criminal contempt is punishable under 18 U.S.C. § 401 by fine or imprisonment. Courts may not impose both a fine and imprisonment, nor a fine coupled with probation. *Mac Neil v. United States,* 236 F.2d 149 (1st Cir.1956), *cert. denied,* 352 U.S. 912 (1956). While caselaw limits summary

punishment under Rule 42(a) to imprisonment for six months, there is no maximum set for punishing criminal contempt after notice and hearing under Rule 42(b). *See, e.g., United States v. Sternmen,* 415 F.2d 1165 (6th Cir.1969), *cert. denied,* 397 U.S. 907 (1970) (three years imprisonment). Indeed, so that an adjudication of criminal contempt not be deprived of efficacy where the contumacious witness is already serving a sentence for another criminal offense, that sentence may be interrupted to compel the witness to serve an intervening contempt sentence. *See United States v. Liddy,* 510 F.2d 669, 672-673 (D.C.Cir.1974), *cert. denied,* 420 U.S. 980 (1975). However, *In re Liberatore,* 574 F.2d 669 (D.C.Cir.1978), the court held that a federal court does not have the authority to interrupt a pre-existing state imposed criminal sentence during the period of confinement to compel the witness to serve the contempt sentence.

Bail for a defendant found in criminal contempt of court is controlled by the provisions of Rule 46 of the Federal Rules of Criminal Procedure.

9-23.350 Defense Requests for Jury Instruction On Immunized Witnesses

A witness who is compelled to testify under 18 U.S.C. §§ 6001 to 6003 is not thereby provided with an inducement to testify. Nevertheless, it is not uncommon to encounter defense requests for jury instructions depicting such a witness as the recipient of a benefit, whose testimony may be colored by that benefit, and therefore must be weighed with special circumspection. Instructions suggesting that the compulsion of testimony under a use immunity order is a ''benefit'' to the witness should be resisted. Rather, the court should be urged to give a more balanced instruction, which describes the legal status of the witness whose testimony has been compelled under a use immunity order, and which explains in neutral terms that the testimony of a witness who is testifying in exchange for some benefit should be viewed with special care. The following instruction, taken from *United States v. Lea,* 618 F.2d 426, 432 n. 7 (7th Cir.), cert. denied, 449 U.S. 832 (1980), contains a sufficient reference to the possible benefits of immunity to satisfy courts that have expressed a preference for ''immunized witness'' instructions, without containing the misleading suggestion that a use immunity order, by itself, confers some benefit on the witness:

> The witnesses . . . testified under a grant of immunity, pursuant to a court order, after a petition by the government was filed requesting such an order. Under the law, none of the testimony during this trial can ever be used against them in any subsequent criminal proceeding. However, if any one of them testified untruthfully under the grant of immunity, he could be prosecuted for perjury or the making of a false statement even though he was testifying under a grant of immunity.
>
> The testimony of a witness who provides evidence against a defendant for immunity from prosecution, or for personal ad-

vantage 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 witness' testimony has been affected by interest, or by prejudice against the defendant.

9-23.400 PROSECUTION AFTER COMPULSION

After a person has given testimony or provided information pursuant to a compulsion order—except where immunity is approved for the limited purpose of obtaining records pursuant to *United States v. Doe,* 465 U.S. 605 (1984)—an attorney for the government shall not initiate or recommend prosecution of the person for an offense or offenses first disclosed in, or closely related to, such testimony or information without the express written authorization of the Attorney General.

In *Kastigar v. United States,* 406 U.S. 441 (1972), the Supreme Court stressed that the constitutionality of 18 U.S.C. §§ 6001 to 6003 was tied to a ''sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom'' against the witness—including use of an investigatory lead. *Id.* at 460. One appellate court has suggested that ''such use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy;'' *United States v. McDaniel*, 482 F.2d 305, 311 (8th cir.1973).

In seeking to prosecute a person who has been compelled to testify, the government has ''the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony;'' *Kastigar v. United States, supra.* As a matter of Departmental policy, in cases where the witness is to be charged with an offense either first disclosed in or closely related to his/her compelled testimony, prosecution shall not be initiated unless the Attorney General personally authorizes the prosecution. This requirement does not apply to cases where a defendant is being tried for an offense unrelated to his/her compelled testimony. In *United States v. Pantone,* 634 F.2d 716 (3d Cir. 1980), the court did not find cause for dismissal when the defendant was tried for an offense unrelated but analogous to his/her compelled testimony and the prosecuting attorney viewed his/her compelled testimony.

The attorney for the government should transmit the request for authorization through his/her supervisors to the appropriate Assistant Attorney General. In the memorandum requesting approval for prosecution of the witness, the attorney should indicate (a) the unusual circumstances which justify prosecution, (b) the method by which he/she will affirmatively establish either that all evidence necessary for a conviction was in the hands of the government prior to the date of the defendant's compelled

testimony or that it came from sources independent of the witness's testimony and was not the result of focusing an investigation on the witness because of compelled disclosures, and (c) how he/she will show affirmatively that no other ''non-evidentiary'' use has been or will be made of the compelled testimony in connection with the proposed prosecution (for example, by having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony).

The general ban on use of compelled testimony of course does not apply to perjury or false statement prosecutions directed at false testimony given while testifying under compulsion, or to contempt prosecutions for failure to comply with the compulsion order. In *United States v. Apfelbaum,* 445 U.S. 115 (1980), the Supreme Court held that neither 18 U.S.C. § 6002 nor the Fifth Amendment prohibits the admission of compelled testimony into evidence in a subsequent prosecution for giving false statements. Such offenses are not prior events about which the witness is compelled to testify; rather they are new offenses arising out of the failure to comply with the compulsion order itself. Accordingly, Attorney General authorization is not required in such cases.

In weighing the public interest in prosecuting a person for an offense first disclosed in, or closely related to, his/her compelled testimony, the attorney for the government should take into account, *inter alia*, the importance of encouraging free and full disclosure by witnesses whose testimony is compelled. He/she should also take into account the extent to which the potential defendant had testified freely and fully in compliance with the order. Since a major advantage of the compulsion statutes as opposed to the old ''transaction immunity'' statutes is that they encourage more complete testimony (under the former the more information a witness reveals the more difficult it is for the government to prosecute a witness on the basis of demonstrably independent evidence, while under the latter a witness could reveal just enough to acquire blanket immunity against prosecution and then profess to remember no more), less than complete testimony should not appear to be rewarded by a declination of prosecution in a case where independent evidence clearly exists and the situation otherwise warrants prosecution.

9-23.700 INFORMAL IMMUNITY

See Principles of Federal Prosecution at 9-27.000.

9-23.600 to 9-23.800 [RESERVED]

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Office of the Attorney General
Washington, D. C. 20530

July 16, 1997

MEMORANDUM

TO: Holders of United States Attorneys' Manual Title 9*

FROM: Office of the Attorney General

Janet Reno
Attorney General

SUBJECT: Procedures for Requesting Special Confinement Conditions for Bureau of Prisons Inmates Whose Communications Pose a Substantial Risk of Death or Serious Bodily Injury to Persons.

Pursuant to 28 CFR 501.3, which became effective on May 17, 1996, the Attorney General may authorize the Director of the Bureau of Prisons (BOP) to implement "special administrative procedures" upon written notification to BOP "that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons." The regulation provides that such notification to BOP may be provided by the Attorney General, "or, at the Attorney General's direction by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community." The special administrative procedures that may be imposed "may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism."

Although 28 CFR § 501.3(a) allows notification to BOP by the Attorney General, the head of a federal law enforcement agency, or the head of a member agency of the intelligence community, that an inmate's ability to communicate with other persons may create a substantial risk of death or serious bodily injury, only the Attorney General is authorized to direct the BOP to implement the special administrative procedures with respect to an inmate.

* Creates new chapter Prisoner Confinement, 9-24.000, in Title 9 of USAM.

BS# 9.032

Accordingly, the following procedure will apply whenever a federal law enforcement agency, which for these purposes includes a United States Attorney's Office, or a member agency of the intelligence community (hereafter "requesting entity") believes that special confinement conditions are necessary to prevent an inmate from inciting or ordering persons (whether inside or outside a BOP facility) to commit crimes that entail the risk of death or serious bodily injury or substantial damage to property that would entail the risk of death or serious bodily injury to persons.

1. The requesting entity will submit a letter or memorandum to the Attorney General setting forth the request which must include:

-- A full and complete statement of the inmate's background and proclivity for violence or for ordering or inciting crimes of violence.

-- A discussion of why special procedures should be implemented.

-- A description of what special procedures (e.g., no visitors except attorneys, no contact with the news media) should be imposed with a justification for each.

2. The requesting agency's correspondence to the Attorney General will be sent to the Office of Enforcement Operations (OEO) in the Criminal Division for processing.

3. OEO will obtain from BOP, in writing if necessary, a summary of the inmate's current confinement conditions (e.g., a statement that the inmate is already in segregation for violation of BOP rules) any special needs of the inmate (e.g., special medical or religious requirements), and other information necessary to indicate clearly to the Attorney General how the inmate's confinement conditions would be altered by the imposition of the requested special administrative conditions.

4. If the requesting agency is a U.S. Attorney's Office, OEO will obtain from the FBI or other involved law enforcement agency a statement of concurrence with or objection to the proposed special administrative procedures. To facilitate the FBI's response, a U.S. Attorney's Office submitting a request for special confinement conditions should contact FBI field personnel likely to be familiar with the inmate to inform them of the pending request and to allow them to discuss the request with FBI headquarters.

5. OEO will prepare a decision memorandum from the Criminal Division to the Attorney General discussing the requesting

entity's request for special administrative procedures with a recommendation of action to be taken by the Attorney General.

6. In instances in which the Criminal Division recommends the Attorney General direct BOP to impose special administrative procedures, the Criminal Division will prepare a memorandum from the Attorney General to the BOP setting out the procedures to be implemented and the notification to be given the inmate. Normally, the inmate will be notified of all special conditions and the basis therefor at the time they are imposed. However, the regulation provides, in part 501(3)(b), that the reasons for imposing the special conditions "may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism."

Renewals. Section 501.3(c) provides that placement of the inmate in administrative detention or any limitation of privileges in accordance with the section may be imposed for up to a maximum of 120 days, but may be successively renewed in 120 day increments. Requests for renewal will be handled similarly to initial requests. I.e., the requesting entity will prepare a memorandum for the Attorney General referencing the earlier request and the Attorney General's decision to impose special conditions; the memorandum should state whether the circumstances identified in the last request to the Attorney General for special administrative procedures have changed and, if so, what changes are recommended either to tighten up or loosen the restrictions; the memorandum will be referred to OEO; and OEO will prepare a recommendation to the Attorney General and any required instructions from the Attorney General to BOP. Requests for renewal should be submitted to the Department at least 30 days prior to the expiration date of any previously imposed special conditions to allow the Criminal Division sufficient time to prepare another decision memorandum for the Attorney General and for the Attorney General's review.

Disclosure of Classified Information (28 CFR § 501.2). Although the provisions of this section, which allows the BOP to implement special administrative measures reasonably necessary to prevent disclosure of classified information by an inmate (typically a convicted spy or a person awaiting trial on a charge of espionage or similar offense), are similar to those in 28 CFR § 501.3, classified information cases are less susceptible of uniform processing. Moreover, special procedures to prevent the disclosure of classified information may only be implemented upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information will pose a threat to the national security, and that there is a danger that the inmate will disclose such information. When a member agency of the intelligence community wishes to request special administrative measures with respect to an inmate to prevent the

disclosure of classified information, the agency should contact the Executive Office for National Security for instructions on how to proceed.

Affect of BOP Policy. Conditions of confinement for all persons in BOP custody are set in accordance with various BOP policies. Any additional restrictions imposed pursuant to 28 CFR § 501.3 will not affect the implementation of BOP policies unless specifically set forth in the memorandum from the Attorney General directing the implementation of special administrative procedures. The Bureau of Prisons will continue to have authority to take any other measures with respect to an inmate subject to special administrative procedures deemed necessary to maintain the order, safety, security, and discipline of any BOP institution.

Office of the Attorney General

Washington, D.C. 20530

January 14, 1993

MEMORANDUM

TO: Holders of United States Attorneys' Manual, Title 9

FROM: Office of the Attorney General

William P. Barr
Attorney General

RE: Revised Principles of Federal Prosecution

NOTE:
1. This is issued pursuant to USAM 1-1.550
2. Distribute to Holders of Title 9
3. Insert in front of affected section

AFFECTS: 9-27.000

PURPOSE: The purpose of this bluesheet is to incorporate the Department's sentencing policy. It includes the Thornburgh memoranda on plea bargaining dated March 13, 1989 and June 16, 1989.

The following chapter replaces 9-27.000, Principles of Federal Prosecution, dated October 1, 1990, in your United States Attorneys' Manual.

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9-27.000 PRINCIPLES OF FEDERAL PROSECUTION

9-27.001 Preface

These Principles of Federal Prosecution provide to federal prosecutors a statement of sound prosecutorial policies and practices for particularly important areas of their work. As such, it should promote the reasoned exercise of prosecutorial authority, and contribute to the fair, evenhanded administration of the federal criminal laws.

The manner in which federal prosecutors exercise their decision-making authority has far-reaching implications both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances -- recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results. Other prosecutorial decisions can be equally significant. Decisions, for example, regarding the specific charges to be brought, or concerning plea dispositions, effectively determine the range of sanctions that may be imposed for criminal conduct. The rare decision to consent to pleas of nolo contendere may affect the success of related civil suits for recovery of damages. Also, the government's position during the sentencing process will help assure that the court imposes a sentence consistent with the Sentencing Reform Act.

These Principles of Federal Prosecution have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation, to prevent unwarranted disparity without sacrificing necessary flexibility.

The availability of this statement of Principles to federal law enforcement officials and to the public serves two important purposes: ensuring the fair and effective exercise of prosecutorial responsibility by attorneys for the government, and promoting confidence on the part of the public and individual defendants that important prosecutorial decisions will be made rationally and objectively on the merits of each case. The Principles provide convenient reference points for the process of making prosecutorial decisions; they facilitate the task of training new attorneys in the proper discharge of their duties; they contribute to more effective management of the government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of all United States Attorney's

offices and between their activities and the Department's law enforcement priorities; they make possible better coordination of investigative and prosecutorial activity by enhancing the understanding of investigating departments and agencies of the considerations underlying prosecutorial decisions by the Department; and they inform the public of the careful process by which prosecutorial decisions are made.

Important though these Principles are to the proper operation of our federal prosecutorial system, the success of that system must rely ultimately on the character, integrity, sensitivity, and competence of those men and women who are selected to represent the public interest in the federal criminal justice process. It is with their help that these principles have been prepared, and it is with their efforts that the purposes of these principles will be achieved.

These principles were originally promulgated by Attorney General Benjamin R. Civiletti on July 28, 1980. While they have since been updated to reflect changes in the law and current policy of the Department of Justice, the underlying message to federal prosecutors remains unchanged.

9-27.100 GENERAL PROVISIONS

9-27.110 Purpose

A. The principles of federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;

2. Selecting charges;

3. Entering into plea agreements;

4. Opposing offers to plead nolo contendere;

5. Entering into non-prosecution agreements in return for cooperation; and

6. Participating in sentencing.

B. Comment

Under the federal criminal justice system, the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law. The prosecutor's broad discretion in such areas as initiating or foregoing prosecutions, selecting or recommending specific charges, and terminating prosecutions by accepting guilty pleas has been

recognized on numerous occasions by the courts. See, e.g., Oyler v. Boles, 368 U.S. 448 (1962); Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); Powell v. Katzenbach, 359 F.2d 234 (D.C. Cir. 1965), cert. denied, 384 U.S. 906 (1966). This discretion exists by virtue of his/her status as a member of the Executive Branch, which is charged under the Constitution with ensuring that the laws of the United States be "faithfully executed." U.S. Const. art. II, §3. See Nader v. Saxbe, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974).

Since federal prosecutors have great latitude in making crucial decisions concerning enforcement of a nationwide system of criminal justice, it is desirable, in the interest of the fair and effective administration of justice in the federal system, that all federal prosecutors be guided by a general statement of principles that summarizes appropriate considerations to be weighed, and desirable practices to be followed, in discharging their prosecutorial responsibilities.

Although these principles deal with the specific situations indicated, they should be read in the broader context of the basic responsibilities of federal attorneys: making certain that the general purposes of the criminal law -- assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous offenders, and rehabilitation of offenders -- are adequately met, while making certain also that the rights of individuals are scrupulously protected.

9-27.120 Application

A. In carrying out criminal law enforcement responsibilities, each Department of Justice attorney should be guided by the principles set forth herein, and each U.S. Attorney and each Assistant Attorney General should ensure that such principles are communicated to the attorneys who exercise prosecutorial responsibility within his/her office or under his/her direction or supervision.

B. Comment

It is expected that each federal prosecutor will be guided by these principles in carrying out his/her criminal law enforcement responsibilities unless a modification of, or departure from, these principles has been authorized pursuant to USAM 9-27.140, infra. However, it is not intended that reference to these principles will require a particular prosecutorial decision in any given case. Rather, these principles are set forth solely for the purpose of assisting attorneys for the government in determining how best to exercise their authority in the performance of their duties.

9-27.130 Implementation

A. Each U.S. Attorney and responsible Assistant Attorney General should establish internal office procedures to ensure:

1. That prosecutorial decisions are made at an appropriate level of responsibility, and are made consistent with these principles; and

2. That serious, unjustified departures from the principles set forth herein are followed by such remedial action, including the imposition of disciplinary sanctions when warranted, as are deemed appropriate.

B. Comment

Each U.S. Attorney and each Assistant Attorney General responsible for the enforcement of federal criminal law should supplement the guidance provided by the principles set forth herein by establishing appropriate internal procedures for his/her office. One purpose of such procedures should be to ensure consistency in the decisions within each office by regularizing the decision making process so that decisions are made at the appropriate level of responsibility. A second purpose, equally important, is to provide appropriate remedies for serious, unjustified departures from sound prosecutorial principles. The U.S. Attorney or Assistant Attorney General may also wish to establish internal procedures for appropriate review and documentation of decisions.

9-27.140 Modifications or Departures

A. A U.S. Attorney may modify or depart from the principles set forth herein as necessary in the interests of fair and effective law enforcement within the district. Any significant modification or departure contemplated as a matter of policy or regular practice must be approved by the appropriate Assistant Attorney General and the Deputy Attorney General.

B. Comment

Although these materials are designed to promote consistency in the application of federal criminal laws, they are not intended to produce rigid uniformity among federal prosecutors in all areas of the country at the expense of the fair administration of justice. Different offices face different conditions and have different requirements. In recognition of these realities, and in order to maintain the flexibility necessary to respond fairly and effectively to local conditions, each U.S. Attorney is specifically authorized to modify or depart from the principles set forth herein, as necessary in the interests of fair and effective law

enforcement within the district. In situations in which a modification or departure is contemplated as a matter of policy or regular practice, the appropriate Assistant Attorney General and the Deputy Attorney General must approve the action before it is adopted.

9-27.150 Non-Litigability

A. The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

B. Comment

This statement of principles has been developed purely as a matter of internal Departmental policy and is being provided to federal prosecutors solely for their own guidance in performing their duties. Neither this statement of principles nor any internal procedures adopted by individual offices pursuant hereto creates any rights or benefits. By setting forth this fact explicitly, USAM 9-27.150, supra, is intended to foreclose efforts to litigate the validity of prosecutorial actions alleged to be at variance with these principles or not in compliance with internal office procedures that may be adopted pursuant hereto. In the event that an attempt is made to litigate any aspect of these principles, or to litigate any internal office procedures adopted pursuant to these materials, or to litigate the applicability of such principles or procedures to a particular case, the U.S. Attorney concerned should oppose the attempt and should notify the Department immediately.

9-27.200 INITIATING AND DECLINING PROSECUTION

9-27.210 Generally; Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;

2. Commence or recommend prosecution;

3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;

4. Decline prosecution and initiate or recommend pre-trial diversion or other non-criminal disposition; or

5. Decline prosecution without taking other action.

B. Comment

USAM 9-27.210 sets forth the courses of action available to the attorney for the government once he/she has probable cause to believe that a person has committed a federal offense within his/her jurisdiction. The probable cause standard is the same standard as that required for the issuance of an arrest warrant or a summons upon a complaint (see Rule 4(a), Federal Rules of Criminal Procedure), for a magistrate's decision to hold a defendant to answer in the district court (see Rule 5.1(a), Federal Rules of Criminal Procedure), and is the minimal requirement for indictment by a grand jury (see Branzburg v. Hayes, 408 U.S. 665, 686 (1972)). This is, of course, a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations, including those described in the following provisions, in deciding upon his/her course of action. On the other hand, failure to meet the minimal requirement of probable cause is an absolute bar to initiating a federal prosecution, and in some circumstances may preclude reference to other prosecuting authorities or recourse to non-criminal sanctions as well.

9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial federal interest would be served by prosecution;

2. The person is subject to effective prosecution in another jurisdiction; or

3. There exists an adequate non-criminal alternative to prosecution.

B. Comment

USAM 9-27.220 expresses the principle that, ordinarily, the attorney for the government should initiate or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction. Evidence sufficient to sustain a conviction is required under Rule 29(a), Federal Rules of Criminal Procedure, to avoid a judgment of

acquittal. Moreover, both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact. In this connection, it should be noted that, when deciding whether to prosecute, the government attorney need not have in hand all the evidence upon which he/she intends to rely at trial: it is sufficient that he/she have a reasonable belief that such evidence will be available and admissible at the time of trial. Thus, for example, it would be proper to commence a prosecution though a key witness is out of the country, so long as the witness's presence at trial could be expected with reasonable certainty.

The potential that -- despite the law and the facts that create a sound, prosecutable case -- the fact-finder is likely to acquit the defendant because of the unpopularity of some factor involved in the prosecution or because of the overwhelming popularity of the defendant or his/her cause, is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt -- viewed objectively by an unbiased factfinder -- would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

Merely because the attorney for the government believes that a person's conduct constitutes a federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution: USAM 9-27.220 notes three situations in which the prosecutor may properly decline to take action nonetheless: when no substantial federal interest would be served by prosecution, when the person is subject to effective prosecution in another jurisdiction; and when there exists an adequate non-criminal alternative to prosecution. It is left to the judgment of the attorney for the government whether such a situation exists. In exercising that judgment, the attorney for the government should consult USAM 9-27.230, 9-27.240, or 9-27.250, infra, as appropriate.

9-27.230 Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;

2. The nature and seriousness of the offense;

3. The deterrent effect of prosecution;

4. The person's culpability in connection with the offense;

5. The person's history with respect to criminal activity;

6. The person's willingness to cooperate in the investigation or prosecution of others; and

7. The probable sentence or other consequences if the person is convicted.

B. Comment

USAM 9-27.230 lists factors that may be relevant in determining whether prosecution should be declined because no substantial federal interest would be served by prosecution in a case in which the person is believed to have committed a federal offense and the admissible evidence is expected to be sufficient to obtain and sustain a conviction. The list of relevant considerations is not intended to be all-inclusive. Obviously, not all of the factors will be applicable to every case, and in any particular case one factor may deserve more weight than it might in another case.

1. Federal Law Enforcement Priorities

Federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources as to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level. In addition, individual U.S. Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

2. Nature and Seriousness of Offense

It is important that limited federal resources not be wasted in prosecuting inconsequential cases or cases in which the violation is only technical. Thus, in determining whether a substantial federal interest exists that requires prosecution, the attorney for the government should consider the nature and seriousness of the offense involved. A number of factors may be relevant. One factor that is obviously of primary importance is the actual or potential impact of the offense on the community and on the victim.

The impact of an offense on the community in which it is committed can be measured in several ways: in terms of economic harm done to community interests; in terms of physical danger to the citizens or damage to public property; and in terms of erosion of the inhabitants' peace of mind and sense of security. In assessing the seriousness of the offense in these terms, the prosecutor may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature, and what the public attitude is toward prosecution under the circumstances of the case. The public may be indifferent, or even opposed, to enforcement of the controlling statute, whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued. On the other hand, the nature and circumstances of the offense, the identity of the offender or the victim, or the attendant publicity, may be such as to create strong public sentiment in favor of prosecution. While public interest, or lack thereof, deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute, or to take other action, that cannot be supported on other grounds. Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.

Economic, physical, and psychological considerations are also important in assessing the impact of the offense on the victim. In this connection, it is appropriate for the prosecutor to take into account such matters as the victim's age or health, and whether full or partial restitution has been made. Care should be taken in weighing the matter of restitution, however, to ensure against contributing to an impression that an offender can escape prosecution merely by returning the spoils of his/her crime.

3. Deterrent Effect of Prosecution

Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some

offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.

4. The Person's Culpability

Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person's culpability in connection with the offense, both in the abstract and in comparison with any others involved in the offense. If, for example, the person was a relatively minor participant in a criminal enterprise conducted by others, or his/her motive was worthy, and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate.

5. The Person's Criminal History

If a person is known to have a prior conviction or is reasonably believed to have engaged in criminal activity at an earlier time, this should be considered in determining whether to initiate or recommend federal prosecution. In this connection, particular attention should be given to the nature of the person's prior criminal involvement, when it occurred, its relationship if any to the present offense, and whether he/she previously avoided prosecution as a result of an agreement not to prosecute in return for cooperation or as a result of an order compelling his/her testimony. By the same token, a person's lack of prior criminal involvement or his/her previous cooperation with the law enforcement officials should be given due consideration in appropriate cases.

6. The Person's Willingness to Cooperate

A person's willingness to cooperate in the investigation or prosecution of others is another appropriate consideration in the determination whether a federal prosecution should be undertaken. Generally speaking, a willingness to cooperate should not, by itself, relieve a person of criminal liability. There may be some cases, however, in which the value of a person's cooperation clearly outweighs the federal interest in prosecuting him/her. These matters are discussed more fully below, in connection with plea agreements and non-prosecution agreements in return for cooperation.

7. The Person's Personal Circumstances

In some cases, the personal circumstances of an accused may be relevant in determining whether to prosecute or to take other action. Some circumstances peculiar to the accused, such as extreme youth, advanced age, or mental or physical impairment, may suggest that prosecution is not the most appropriate response to

his/her offense; other circumstances, such as the fact that the accused occupied a position of trust or responsibility which he/she violated in committing the offense, might weigh in favor of prosecution.

8. The Probable Sentence

In assessing the strength of the federal interest in prosecution, the attorney for the government should consider the sentence, or other consequence, that is likely to be imposed if prosecution is successful, and whether such a sentence or other consequence would justify the time and effort of prosecution. If the offender is already subject to a substantial sentence or is already incarcerated, as a result of a conviction for another offense, the prosecutor should weigh the likelihood that another conviction will result in a meaningful addition to his/her sentence, might otherwise have a deterrent effect, or is necessary to ensure that the offender's record accurately reflects the extent of his/her criminal conduct. For example, it might be desirable to commence a bail-jumping prosecution against a person who already has been convicted of another offense so that law enforcement personnel and judicial officers who encounter him/her in the future will be aware of the risk of releasing him/her on bail. On the other hand, if the person is on probation or parole as a result of an earlier conviction, the prosecutor should consider whether the public interest might better be served by instituting a proceeding for violation of probation or revocation of parole, than by commencing a new prosecution. The prosecutor should also be alert to the desirability of instituting prosecution to prevent the running of the statute of limitations and to preserve the availability of a basis for an adequate sentence if there appears to be a chance that an offender's prior conviction may be reversed on appeal or collateral attack. Finally, if a person previously has been prosecuted in another jurisdiction for the same offense or a closely related offense, the attorney for the government should consult existing departmental policy statements on the subject of "successive prosecution" or "dual prosecution," depending on whether the earlier prosecution was federal or nonfederal (see USAM 9-2.142).

Just as there are factors that it is appropriate to consider in determining whether a substantial federal interest would be served by prosecution in a particular case, there are considerations that deserve no weight and should not influence the decision. These include the time and resources expended in federal investigation of the case. No amount of investigative effort warrants commencing a federal prosecution that is not fully justified on other grounds.

9-27.240 Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;

2. The other jurisdiction's ability and willingness to prosecute effectively; and

3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

B. Comment

In many instances, it may be possible to prosecute criminal conduct in more than one jurisdiction. Although there may be instances in which a federal prosecutor may wish to consider deferring to prosecution in another federal district, in most instances the choice will probably be between federal prosecution and prosecution by state or local authorities. USAM 9-27.240 sets forth three general considerations to be taken into account in determining whether a person is likely to be prosecuted effectively in another jurisdiction: the strength of the jurisdiction's interest in prosecution; its ability and willingness to prosecute effectively; and the probable sentence or other consequences if the person is convicted. As indicated with respect to the considerations listed in paragraph 3, these factors are illustrative only, and the attorney for the government should also consider any others that appear relevant to him/her in a particular case.

1. The Strength of the Jurisdiction's Interest

The attorney for the government should consider the relative federal and state characteristics of the criminal conduct involved. Some offenses, even though in violation of federal law, are of particularly strong interest to the authorities of the state or local jurisdiction in which they occur, either because of the nature of the offense, the identity of the offender or victim, the fact that the investigation was conducted primarily by state or local investigators, or some other circumstance. Whatever the reason, when it appears that the federal interest in prosecution is less substantial than the interest of state or local authorities, consideration should be given to referring the case to those authorities rather than commencing or recommending a federal prosecution.

2. Ability and Willingness to Prosecute Effectively

In assessing the likelihood of effective prosecution in another jurisdiction, the attorney for the government should also consider the intent of the authorities in that jurisdiction and whether that jurisdiction has the prosecutorial and judicial resources necessary to undertake prosecution promptly and effectively. Other relevant factors might be legal or evidentiary problems that might attend prosecution in the other jurisdiction. In addition, the federal prosecutor should be alert to any local conditions, attitudes, relationships, or other circumstances that might cast doubt on the likelihood of the state or local authorities conducting a thorough and successful prosecution.

3. Probable Sentence Upon Conviction

The ultimate measure of the potential for effective prosecution in another jurisdiction is the sentence, or other consequence, that is likely to be imposed if the person is convicted. In considering this factor, the attorney for the government should bear in mind not only the statutory penalties in the jurisdiction and sentencing patterns in similar cases, but also the particular characteristics of the offense or of the offender that might be relevant to sentencing. He/she should also be alert to the possibility that a conviction under state law may in some cases result in collateral consequences for the defendant, such as disbarment, that might not follow upon a conviction under federal law.

9-27.250 Non-Criminal Alternatives to Prosecution

A. In determining whether prosecution should be declined because there exists an adequate non-criminal alternative to prosecution, the attorney for the government should consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;

2. The likelihood that an effective sanction will be imposed; and

3. The effect of non-criminal disposition on federal law enforcement interests.

B. Comment

When a person has committed a federal offense, it is important that the law respond promptly, fairly, and effectively. This does not mean, however, that a criminal prosecution must be initiated. In recognition of the fact that resort to the criminal process is not necessarily the only appropriate response to serious forms of

antisocial activity, Congress and state legislatures have provided civil and administrative remedies for many types of conduct that may also be subject to criminal sanction. Examples of such non-criminal approaches include civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations. Another potentially useful alternative to prosecution in some cases is pre-trial diversion (see 9-22.000).

Attorneys for the government should familiarize themselves with these alternatives and should consider pursuing them if they are available in a particular case. Although on some occasions they should be pursued in addition to the criminal law procedures, on other occasions they can be expected to provide an effective substitute for criminal prosecution. In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on federal law enforcement interests. It should be noted that referrals for non-criminal disposition, other than to Civil Division attorneys or other attorneys for the government, may not include the transfer of grand jury material unless an order under Rule 6(e), Federal Rules of Criminal Procedure, has been obtained.

9-27.260 Impermissible Considerations

A. In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by:

1. The person's race, religion, sex, national origin, or political association, activities or beliefs;

2. The attorney's own personal feelings concerning the person, the person's associates, or the victim; or

3. The possible effect of the decision on the attorney's own professional or personal circumstances.

B. Comment

USAM 9-27.260 sets forth various matters that plainly should not influence the determination whether to initiate or recommend prosecution or take other action. They are listed here not because it is anticipated that any attorney for the government might allow them to affect his/her judgment, but in order to make clear that federal prosecutors will not be influenced by such improper considerations. Of course, in a case in which a particular characteristic listed in subparagraph (1) is pertinent to the offense (for example, in an immigration case the fact that the

offender is not a United States national, or in a civil rights case the fact that the victim and the offender are of different races), the provision would not prohibit the prosecutor from considering it for the purpose intended by the Congress.

9-27.270 Records of Prosecutions Declined

A. Whenever the attorney for the government declines to commence or recommend federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files.

B. Comment

USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up.

9-27.300 SELECTING CHARGES

9-27.310 Charging Most Serious Offenses

A. Except as hereafter provided, once the decision to prosecute has been made, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction. The "most serious" offense is generally that which yields the highest range under the sentencing guidelines. If mandatory minimum sentences are also involved, their effect must be considered, keeping in mind the fact that a mandatory minimum is statutory and generally overrules a guideline.

B. Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases,

considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribery provisions of 18 U.S.C. ¶ 201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. §1621 but not under 18 U.S.C. §1623.

As stated, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct.

USAM 9-27.310 expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is readily provable. Ordinarily, as noted above, this will be the offense for which the most severe penalty is provided by law and the guidelines. Where two crimes have the same statutory maximum and the same guideline range, but only one contains a mandatory minimum penalty, the one with the mandatory minimum is the more serious. This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320, infra), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

The exception noted at the beginning of USAM 9-27.310 refers to precharge plea agreements provided for in USAM 9-27.330, infra.

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. See, e.g., 21 U.S.C. §§

841 (b) (1)(A), (B), and (C), 848 (a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. §851.

Every prosecutor should regard the filing of an information under 21 U.S.C. §851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement; (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence; and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code §924(c).

9-27.320 Additional Charges

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgment, additional charges:

1. Are necessary to ensure that the information or indictment:

a. Adequately reflects the nature and extent of the criminal conduct involved; and

b. Provides the basis for an appropriate sentence under all the circumstances of the case; or

2. Will significantly enhance the strength of the government's case against the defendant or a codefendant.

B. Comment

It is important to the fair and efficient administration of justice in the federal system that the government bring as few charges as are necessary to ensure that justice is done. The bringing of unnecessary charges not only complicates and prolongs trials, it constitutes an excessive -- and potentially unfair -- exercise of power. To ensure appropriately limited exercises of the charging power, USAM 9-27.320 outlines three general situations in which additional charges may be brought: (1) when necessary adequately to reflect the nature and extent of the criminal conduct involved; (2) when necessary to provide the basis for an appropriate sentence under all the circumstances of the case; and (3) when an additional charge or charges would significantly strengthen the case against the defendant or a codefendant.

1. Nature and Extent of Criminal Conduct

Apart from evidentiary considerations, the prosecutor's initial concern should be to select charges that adequately reflect the nature and extent of the criminal conduct involved. This means that the charges selected should fairly describe both the kind and scope of unlawful activity, should be legally sufficient; should provide notice to the public of the seriousness of the conduct involved; and should negate any impression that, after committing one offense, an offender can commit others with impunity.

2. Basis for Sentencing

Proper charge selection also requires consideration of the end result of successful prosecution -- the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea). What is important is that the person be charged in such a manner that, if he/she is convicted, the court may impose an appropriate sentence. Under the sentencing guidelines, if the offense actually charged bears a true relationship with the defendant's conduct, an appropriate guideline sentence will follow. However, the prosecutor must take care to be sure that the charges brought allow the guidelines to operate properly. For instance,

charging a significant participant in a major drug conspiracy only with using a communication facility would result in a sentence which, even if it were the maximum possible under the charged offense, would be artificially low given the defendant's actual conduct.

3. Effect on Government's Case

When considering whether to include a particular charge in the indictment or information, the attorney for the government should bear in mind the possible effects of inclusion or exclusion of the charge on the government's case against the defendant or a codefendant. If the evidence is available, it is proper to consider the tactical advantages of bringing certain charges. For example, in a case in which a substantive offense was committed pursuant to an unlawful agreement, inclusion of a conspiracy count is permissible and may be desirable to ensure the introduction of all relevant evidence at trial. Similarly, it might be important to include a perjury or false statement count in an indictment charging other offenses, in order to give the jury a complete picture of the defendant's criminal conduct. Failure to include appropriate charges for which the proof is sufficient may not only result in the exclusion of relevant evidence, but may impair the prosecutor's ability to prove a coherent case, and lead to jury confusion as well. In this connection, it is important to remember that, in multi-defendant cases, the presence or absence of a particular charge against one defendant may affect the strength of the case against another defendant. In short, when the evidence exists, the charges should be structured so as to permit proof of the strongest case possible without undue burden on the administration of justice.

9-27.330 Pre-Charge Plea Agreements

A. Before filing or recommending charges pursuant to a pre-charge plea agreement, the attorney for the government should consult the plea agreement provisions of USAM 9-27.400, infra, and should give special attention to USAM 9-27.430, infra, thereof, relating to the selection of charges to which a defendant should be required to plead guilty.

9-27.400 ENTERING INTO PLEA AGREEMENTS

9-27.410 Plea Agreements Generally

A. The attorney for the government may, in an appropriate case, enter into an agreement with a defendant that, upon the defendant's plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, he/she will move for dismissal of other charges, take a certain position with respect to the sentence to be imposed, or take other action. Plea agreements, and the role of the courts in such agreements, are addressed in Chapter Six of the sentencing guidelines.

B. Comment

USAM 9-27.410 permits, in appropriate cases, the disposition of federal criminal charges pursuant to plea agreements between defendants and government attorneys. Such negotiated dispositions should be distinguished from situations in which a defendant pleads guilty or nolo contendere to fewer than all counts of an information or indictment in the absence of any agreement with the government. Only the former type of disposition is covered by the provisions of USAM 9-27.400.

Negotiated plea dispositions are explicitly sanctioned by Rule 11(e)(1), Federal Rules of Criminal Procedure, which provides that:

> The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) Move for dismissal of other charges; or
>
> (B) Make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) Agree that a specific sentence is the appropriate disposition of the case.

Three types of plea agreements are encompassed by the language of USAM 9-27.410, agreements whereby, in return for the defendant's plea to a charged offense or to a lesser or related offense, other charges are dismissed ("charge agreements"); agreements pursuant to which the government takes a certain position regarding the sentence to be imposed ("sentence agreements"); and agreements that combine a plea with a dismissal of charges and an undertaking by the prosecutor concerning the government's position at sentencing ("mixed agreements").

Once prosecutors have indicted, they should not find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Charge agreements envision dismissal of counts in exchange for a plea. As with the indictment decision, the prosecutor should seek a plea to the most serious readily provable offense charged. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he or she testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be documentation, however, in a case in which charges originally brought are dropped.

The language of USAM 9-27.410 with respect to "sentence agreements" is intended to cover the entire range of positions that the government might wish to take at the time of sentencing. Among the options are: taking no position regarding the sentence; not opposing the defendant's request; requesting a specific type of sentence (e.g., a fine or probation), a specific fine or term of imprisonment, or not more than a specific fine or term of imprisonment; and requesting concurrent rather than consecutive sentences. Agreement to any such option must be consistent with the guidelines.

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified United States Sentencing Commission's guideline range. This means that when a guideline range is 18 to 24 months, the prosecutor has discretion to agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Such a plea does not require that the actual sentence range be determined in advance. The plea agreement may have wording to the effect that once the range is determined by the court, the United States will recommend a low point in that range. Similarly, the prosecutor may agree to recommend a downward adjustment for acceptance of responsibility if he or she concludes in good faith that the defendant is entitled to the adjustment. Second, the prosecutor may seek to depart from the guidelines. This is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for the court departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

Plea bargaining, both charge bargaining and sentence bargaining, must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system. For example, approvals to drop charges in a particular case might be given because the United States Attorney's office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would be significantly reduce the total number of cases disposed of by the office.

In Chapter 5, Part K of the guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Moreover, 5K2.0 recognizes that a sentencing court may consider a ground for departure that has not been adequately considered by the Commission. A departure requires approval by the

court. It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the existence of the departure and thereby afford the court an opportunity to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part K, approval of the United States Attorney or designated supervisory officials is required. This approval is required whether or not a case is resolved through a negotiated plea.

Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom of Information Act considerations may suggest that a separate form showing the final decision be maintained.

The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

The concession required by the government as part of a plea agreement, whether it be a "charge agreement," a "sentence agreement," or a "mixed agreement," should be weighed by the responsible government attorney in the light of the probable advantages and disadvantages of the plea disposition proposed in the particular case. Particular care should be exercised in considering whether to enter into a plea agreement pursuant to which the defendant will enter a nolo contendere plea. As discussed in USAM 9-27.500, infra. and USAM Section 9-16.000, there

are serious objections to such pleas and they should be opposed unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of such a plea would be in the public interest.

9-27.420 Considerations to be Weighed

A. In determining whether it would be appropriate to enter into a plea agreement, the attorney for the government should weigh all relevant considerations, including:

1. The defendant's willingness to cooperate in the investigation or prosecution of others;

2. The defendant's history with respect to criminal activity;

3. The nature and seriousness of the offense or offenses charged;

4. The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct;

5. The desirability of prompt and certain disposition of the case;

6. The likelihood of obtaining a conviction at trial;

7. The probable effect on witnesses;

8. The probable sentence or other consequences if the defendant is convicted;

9. The public interest in having the case tried rather than disposed of by a guilty plea;

10. The expense of trial and appeal;

11. The need to avoid delay in the disposition of other pending cases; and

12. The effect upon the victim's right to restitution.

B. Comment

USAM 9-27.420 sets forth some of the appropriate considerations to be weighed by the attorney for the government in deciding whether to enter into a plea agreement with a defendant pursuant to the provisions of Rule 11(e), Federal Rules of Criminal Procedure. The provision is not intended to suggest the desirability or lack of desirability of a plea agreement in any particular case or to be construed as a reflection on the merits of

any plea agreement that actually may be reached; its purpose is solely to assist attorneys for the government in exercising their judgment as to whether some sort of plea agreement would be appropriate in a particular case. Government attorneys should consult the investigating agency involved and the victim, if appropriate or required by law, in any case in which it would be helpful to have their views concerning the relevance of particular factors or the weight they deserve.

1. Defendant's Cooperation

The defendant's willingness to provide timely and useful cooperation as part of his/her plea agreement should be given serious consideration. The weight it deserves will vary, of course, depending on the nature and value of the cooperation offered and whether the same benefit can be obtained without having to make the charge or sentence concession that would be involved in a plea agreement. In many situations, for example, all necessary cooperation in the form of testimony can be obtained through a compulsion order under Title 18, U.S.C. ¶6001-6003. In such cases, that approach should be attempted unless, under the circumstances, it would seriously interfere with securing the person's conviction. If the defendant's cooperation is sufficiently substantial to justify the filing of a 5K1.1 Motion for a downward departure, the procedures set out in §9-27.410 (B) shall be followed.

2. Defendant's Criminal History

One of the principal arguments against the practice of plea-bargaining is that it results in leniency that reduces the deterrent impact of the law and leads to recidivism on the part of some offenders. Although this concern is probably most relevant in non-federal jurisdictions that must dispose of large volumes of routine cases with inadequate resources, nevertheless it should be kept in mind by federal prosecutors, especially when dealing with repeat offenders or "career criminals." Particular care should be taken in the case of a defendant with a prior criminal record to ensure that society's need for protection is not sacrificed in the process of arriving at a plea disposition. In this connection, it is proper for the government attorney to consider not only the defendant's past convictions, but also facts of other criminal involvement not resulting in conviction. By the same token, of course, it is also proper to consider a defendant's absence of past criminal involvement and his/her past cooperation with law enforcement officials. Note that Title 18, United States Code, Section 924(e), as well as Sections 4B1.1 and 4B1.4 address "career criminals" and "armed career criminals." The application of the provisions to a particular case may affect the plea negotiation posture of the parties.

3. Nature and Seriousness of Offense Charged

Important considerations in determining whether to enter into a plea agreement may be the nature and seriousness of the offense or offenses charged. In weighing these factors, the attorney for the government should bear in mind the interests sought to be protected by the statute defining the offense (e.g., the national defense, constitutional rights, the governmental process, personal safety, public welfare, or property), as well as nature and degree of harm caused or threatened to those interests and any attendant circumstances that aggravate or mitigate the seriousness of the offense in the particular case.

4. Defendant's Attitude

A defendant may demonstrate apparently genuine remorse or contrition, and a willingness to take responsibility for his/her criminal conduct by, for example, efforts to compensate the victim for injury or loss, or otherwise to ameliorate the consequences of his/her acts. These are factors that bear upon the likelihood of his/her repetition of the conduct involved and that may properly be considered in deciding whether a plea agreement would be appropriate. Section 3E1.1 of the Sentencing Guidelines allows for a downward adjustment upon acceptance of responsibility by the defendant. It is permissible for a prosecutor to enter a plea agreement which approves such an adjustment if the defendant otherwise meets the requirements of the section.

It is particularly important that the defendant not be permitted to enter a guilty plea under circumstances that will allow him/her later to proclaim lack of culpability or even complete innocence. Such consequences can be avoided only if the court and the public are adequately informed of the nature and scope of the illegal activity and of the defendant's complicity and culpability. To this end, the attorney for the government is strongly encouraged to enter into a plea agreement only with the defendant's assurance that he/she will admit the facts of the offense and of his/her culpable participation therein. A plea agreement may be entered into in the absence of such an assurance, but only if the defendant is willing to accept without contest a statement by the government in open court of the facts it could prove to demonstrate his/her guilt beyond a reasonable doubt. Except as provided in USAM 9-27.440, infra, the attorney for the government should not enter into a plea agreement with a defendant who admits his/her guilt but disputes an essential element of the government's case.

5. Prompt Disposition

In assessing the value of prompt disposition of a criminal case, the attorney for the government should consider the timing of a proffered plea. A plea offer by a defendant on the eve of trial

after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier. In addition, a last-minute plea adds to the difficulty of scheduling cases efficiently and may even result in wasting the prosecutorial and judicial time reserved for the aborted trial. For these reasons, governmental attorneys should make clear to defense counsel at an early stage in the proceedings that, if there are to be any plea discussions, they must be concluded prior to a certain date well in advance of the trial date. See Guideline Section 3E1.1(b)(1). However, avoidance of unnecessary trial preparation and scheduling disruptions are not the only benefits to be gained from prompt disposition of a case by means of a guilty plea. Such a disposition also saves the government and the court the time and expense of trial and appeal. In addition, a plea agreement facilitates prompt imposition of sentence, thereby promoting the overall goals of the criminal justice system. Thus, occasionally it may be appropriate to enter into a plea agreement even after the usual time for making such agreements has passed.

6. Likelihood of Conviction

The trial of a criminal case inevitably involves risks and uncertainties, both for the prosecution and for the defense. Many factors, not all of which can be anticipated, can affect the outcome. To the extent that these factors can be identified, they should be considered in deciding whether to accept a plea or go to trial. In this connection, the prosecutor should weigh the strength of the government's case relative to the anticipated defense case, bearing in mind legal and evidentiary problems that might be expected, as well as the importance of the credibility of witnesses. However, although it is proper to consider factors bearing upon the likelihood of conviction in deciding whether to enter into a plea agreement, it obviously is improper for the prosecutor to attempt to dispose of a case by means of a plea agreement if he/she is not satisfied that the legal standards for guilt are met.

7. Effect on Witnesses

Attorneys for the government should bear in mind that it is often burdensome for witnesses to appear at trial and that, sometimes, to do so may cause them serious embarrassment or even place them in jeopardy of physical or economic retaliation. The possibility of such adverse consequences to witnesses should not be overlooked in determining whether to go to trial or attempt to reach a plea agreement. Another possibility that may have to be considered is revealing the identity of informants. When an informant testifies at trial, his/her identity and relationship to the government become matters of public record. As a result, in addition to possible adverse consequences to the informant, there is a strong likelihood that the informant's usefulness in other

investigations will be seriously diminished or destroyed. These are considerations that should be discussed with the investigating agency involved, as well as with any other agencies known to have an interest in using the informant in their investigations.

8. Probable Sentence

In determining whether to enter into a plea agreement, the attorney for the government may properly consider the probable outcome of the prosecution in terms of the sentence or other consequences for the defendant in the event that a plea agreement is reached. If the proposed agreement is a "sentence agreement" or a "mixed agreement," the prosecutor should realize that the position he/she agrees to take with respect to sentencing may have a significant effect on the sentence that is actually imposed. If the proposed agreement is a "charge agreement," the prosecutor should bear in mind the extent to which a plea to fewer or lesser offenses may reduce the sentence that otherwise could be imposed. In either event, it is important that the attorney for the government be aware of the need to preserve the basis for an appropriate sentence under all the circumstances of the case. Thorough knowledge of the Sentencing Guidelines, any applicable statutory minimum sentences, and any applicable sentence enhancements is clearly necessary to allow the prosecutor to accurately and adequately evaluate the effect of any plea agreement.

9. Trial Rather Than Plea

There may be situations in which the public interest might better be served by having a case tried rather than by having it disposed of by means of a guilty plea. These include situations in which it is particularly important to permit a clear public understanding that "justice is done" through exposing the exact nature of the defendant's wrong-doing at trial, or in which a plea agreement might be misconstrued to the detriment of public confidence in the criminal justice system. For this reason, the prosecutor should be careful not to place undue emphasis on factors which favor disposition of a case pursuant to a plea agreement.

10. Expense of Trial and Appeal

In assessing the expense of trial and appeal that would be saved by a plea disposition, the attorney for the government should consider not only such monetary costs as juror and witness fees, but also the time spent by judges, prosecutors, and law enforcement personnel who may be needed to testify or provide other assistance at trial. In this connection, the prosecutor should bear in mind the complexity of the case, the number of trial days and witnesses required, and any extraordinary expenses that might be incurred such as the cost of sequestering the jury.

11. Prompt Disposition of Other Cases

A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined. This may occur simply because prosecutorial, judicial, or defense resources will become available for use in other cases, or because a plea by one of several defendants may have a ''domino effect,'' leading to pleas by other defendants. In weighing the importance of these possible consequences, the attorney for the government should consider the state of the criminal docket and the speedy trial requirements in the district, the desirability of handling a larger volume of criminal cases, and the workloads of prosecutors, judges, and defense attorneys in the district.

9-27.430 Selecting Plea Agreement Charges

A. If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges:

1. That is the most serious readily provable charge consistent with the nature and extent of his/her criminal conduct;

2. That has an adequate factual basis;

3. That makes likely the imposition of an appropriate sentence and order of restitution, if appropriate, under all the circumstances of the case; and

4. That does not adversely affect the investigation or prosecution of others.

B. Comment

USAM 9-27.430 sets forth the considerations that should be taken into account in selecting the charge or charges to which a defendant should be required to plead guilty once it has been decided to dispose of the case pursuant to a plea agreement. The considerations are essentially the same as those governing the selection of charges to be included in the original indictment or information.

1. Relationship to Criminal Conduct

The charge or charges to which a defendant pleads guilty should be consistent with the defendant's criminal conduct, both in nature and in scope. Except in unusual circumstances, this charge will be the most serious one, as defined in Section 9-27.310. This principle governs the number of counts to which a plea should be

required in cases involving different offenses, or in cases involving a series of similar offenses. Therefore the prosecutor must be familiar with the guideline rules applicable to grouping offenses (Section 3D) and to relevant conduct (Section 1B1.3) among others. In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct. With respect to the number of counts, the prosecutor should take care to assure that no impression is given that multiple offenses are likely to result in no greater a potential penalty that is a single offense. The requirement that a defendant plead to a charge that is consistent with the nature and extent of his/her criminal conduct is not inflexible. Although cooperation is usually acknowledged through a 5K1.1 filing, there may be situations involving cooperating defendants in which considerations such as those discussed in USAM 9-27.600, infra, take precedence. Such situations should be approached cautiously, however. Unless the government has strong corroboration for the cooperating defendant's testimony, his/her credibility may be subject to successful impeachment if he/she is permitted to plead to an offense that appears unrelated in seriousness or scope to the charges against the defendants on trial. It is also doubly important in such situations for the prosecutor to ensure that the public record of the plea demonstrates the full extent of the defendant's involvement in the criminal activity giving rise to the prosecution.

2. Factual Basis

The attorney for the government should also bear in mind the legal requirement that there be a factual basis for the charge or charges to which a guilty plea is entered. This requirement is intended to assure against conviction after a guilty plea of a person who is not in fact guilty. Moreover, under Rule 11(f), Federal Rules of Criminal Procedure, a court may not enter a judgment upon a guilty plea "without making such inquiry as shall satisfy it that there is a factual basis for the plea." For this reason, it is essential that the charge or charges selected as the subject of a plea agreement be such as could be prosecuted independently of the plea under these principles. However, as noted infra, in cases in which Alford or nolo contendere pleas are tendered, the attorney for the government may wish to make a stronger factual showing. In such cases there may remain some doubt as to the defendant's guilt even after the entry of his/her plea. Consequently, in order to avoid such a misleading impression, the government should ask leave of the court to make a proffer of the facts available to it that show the defendant's guilt beyond a reasonable doubt.

In addition, the Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or

she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, the prosecutor should object to the report or add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, Guideline Section 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of section 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence. Note that such information may still be used by the court in determining whether to depart from the guidelines and the extent of the departure. See 1B1.8.

3. Basis for Sentencing

In order to guard against inappropriate restriction of the court's sentencing options, the plea agreement should provide adequate scope for sentencing under all the circumstances of the case. To the extent that the plea agreement requires the government to take a position with respect to the sentence to be imposed, there should be little danger since the court will not be bound by the government's position. When a "charge agreement" is involved, however, the court will be limited to imposing the maximum term authorized by statute as well as the Guideline range for the offense to which the guilty plea is entered. Thus, as noted in Section 9-27.320, above, the prosecutor should take care to avoid a "charge agreement" that would unduly restrict the court's sentencing authority. In this connection, as in the initial selection of charges, the prosecutor should take into account the purposes of sentencing, the penalties provided in the applicable statutes (including mandatory minimum penalties), the gravity of the offense, any aggravating or mitigating factors, and any post conviction consequences to which the defendant may be subject. In addition, if restitution is appropriate under the circumstances of the case, the plea agreement should specify the amount of restitution. See 18 U.S.C. § 3663(a)(3); United States v. Arnold, 947 F.2d 1236, 1237-38 (5th Cir. 1991); U.S. Attorney's Manual 9-16.300.

4. Effect on Other Cases

In a multiple-defendant case, care must be taken to ensure that the disposition of the charges against one defendant does not adversely affect the investigation or prosecution of co-defendants. Among the possible adverse consequences to be avoided are the negative jury appeal that may result when relatively less culpable defendants are tried in the absence of a more culpable defendant or when a principal prosecution witness appears to be equally culpable as the defendants but has been permitted to plead to a significantly less serious offense; the possibility that one defendant's absence from the case will render useful evidence inadmissible at the trial of co-defendants; and the giving of questionable exculpatory testimony on behalf of the other defendants by the defendant who has pled guilty.

9-27.440 Plea Agreements When Defendant Denies Guilt

A. The attorney for the government should not, except with the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, enter into a plea agreement if the defendant maintains his/her innocence with respect to the charge or charges to which he/she offers to plead guilty. In a case in which the defendant tenders a plea of guilty but denies committing the offense to which he/she offers to plead guilty, the attorney for the government should make an offer of proof of all facts known to the government to support the conclusion that the defendant is in fact guilty.

B. Comment

USAM 9-27.440 concerns plea agreements involving "Alford" pleas -- guilty pleas entered by defendants who nevertheless claim to be innocent. In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court held that the Constitution does not prohibit a court from accepting a guilty plea from a defendant who simultaneously maintains his/her innocence, so long as the plea is entered voluntarily and intelligently and there is a strong factual basis for it. The Court reasoned that there is no material difference between a plea of nolo contendere, where the defendant does not expressly admit his/her guilt, and a plea of guilty by a defendant who affirmatively denies his/her guilt.

Despite the constitutional validity of Alford pleas, such pleas should be avoided except in the most unusual circumstances, even if no plea agreement is involved and the plea would cover all pending charges. Such pleas are particularly undesirable when entered as part of an agreement with the government. Involvement by attorneys for the government in the inducement of guilty pleas by defendants who protest their innocence may create an appearance of prosecutorial overreaching. As one court put it, "the public might well not understand or accept the fact that a defendant who

denied his guilt was nonetheless placed in a position of pleading guilty and going to jail." See United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971). Consequently, it is preferable to have a jury resolve the factual and legal dispute between the government and the defendant, rather than have government attorneys encourage defendants to plead guilty under circumstances that the public might regard as questionable or unfair. For this reason, government attorneys should not enter into Alford plea agreements without the approval of the responsible Assistant Attorney General. Apart from refusing to enter into a plea agreement, however, the degree to which the Department can express its opposition to Alford pleas may be limited. Although a court may accept a proffered plea of nolo contendere "only after due consideration of the views of the parties and the interest of the public in the effective administration of justice" (Rule 11(b), Federal Rules of Criminal Procedure), at least one court has concluded that it is abuse of discretion to refuse to accept a guilty plea "solely because the defendant does not admit the alleged facts of the crime." United States v. Gaskins, 485 F.2d 1046, 1048 (D.C. Cir. 1973); but see United States v. Bednarski, supra; United States v. Boscoe, 518 F.2d 95 (1st Cir. 1975). Nevertheless, government attorneys can and should discourage Alford pleas by refusing to agree to terminate prosecutions where an Alford plea is proffered to fewer than all of the charges pending. As is the case with guilty pleas generally, if such a plea to fewer than all the charges is tendered and accepted over the government's objection, the attorney for the government should proceed to trial on any remaining charges not barred on double jeopardy grounds unless the U.S. Attorney or, in cases handled by departmental attorneys, the responsible Assistant Attorney General, approves dismissal of those charges.

Government attorneys should also take full advantage of the opportunity afforded by Rule 11(f) of the Federal Rules of Criminal Procedure in an Alford case to thwart the defendant's efforts to project a public image of innocence. Under Rule 11(f) of the Federal Rules of Criminal Procedure, the court must be satisfied that there is "a factual basis" for a guilty plea. However, the Rule does not require that the factual basis for the plea be provided only by the defendant. See United States v. Navedo, 516 F.2d 293 (2d Cir. 1975); Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974); United States v. Davis, 516 F.2d 574 (7th Cir. 1975). Accordingly, attorneys for the government in Alford cases should endeavor to establish as strong a factual basis for the plea as possible not only to satisfy the requirement of Rule 11(f) of the Federal Rules of Criminal Procedure, but also to minimize the adverse effects of Alford pleas on public perceptions of the administration of justice.

9-27.450 Records of Plea Agreements

A. All negotiated plea agreements to felonies or to

misdemeanors negotiated from felonies shall be in writing and filed with the court.

B. Comment

USAM 9-17.450 is intended to facilitate compliance with Rule 11, Federal Rules of Criminal Procedure, and to provide a safeguard against misunderstandings that might arise concerning the terms of a plea agreement. See United States Attorneys' Manual 9-27.451. Rule 11(e)(2), Federal Rules of Criminal Procedure, requires that a plea agreement be disclosed in open court (except upon a showing of good cause, in which case disclosure may be made in camera), while Rule 11(e)(3), Federal Rules of Criminal Procedure, requires that the disposition provided for in the agreement be embodied in the judgment and sentence. Compliance with these requirements will be facilitated if the agreement has been reduced to writing in advance, and the defendant will be precluded from successfully contesting the terms of the agreement at the time he/she pleads guilty, or at the time of sentencing, or at a later date. Any time a defendant enters into a negotiated plea, that fact and the conditions of the agreement should also be maintained in the office case file. Written agreements will facilitate efforts by the Department or the Sentencing Commission to monitor compliance by prosecutors with Department policies and the guidelines. Documentation may include a copy of the court transcript at the time the plea is taken in open court.

There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas, including those set forth in the Thornburgh, Barr and Terwilliger memoranda. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

The plea approval process will be part of the office evaluation procedure.

The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

9-27.500 OPPOSING OFFERS TO PLEAD NOLO CONTENDERE

9-27.510 Opposition Except in Unusual Circumstances

A. The attorney for the government should oppose the acceptance of a plea of nolo contendere unless the Assistant Attorney General with supervisory responsibility over the subject matter concludes that the circumstances of the case are so unusual that acceptance of such a plea would be in the public interest. See USAM Section 9-16.010.

B. Comment

Rule 11(b), Federal Rules of Criminal Procedure, requires the court to consider "the views of the parties and the interest of the public in the effective administration of justice" before it accepts a plea of nolo contendere. Thus, it is clear that a criminal defendant has no absolute right to enter a nolo contendere plea. The Department has long attempted to discourage the disposition of criminal cases by means of nolo pleas. The basic objections to nolo pleas were expressed by Attorney General Herbert Brownell, Jr., in a departmental directive in 1953:

> One of the factors which has tended to breed contempt for federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are no deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in his denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.

For these reasons, government attorneys have been instructed for many years not to consent to nolo pleas except in the most unusual circumstances, and to do so then only with departmental approval. Federal prosecutors should oppose the acceptance of a nolo plea, unless the responsible Assistant Attorney General concludes that the circumstances are so unusual that acceptance of the plea would be in the public interest. Such a determination might be made, for example, in an unusually complex antitrust case if the only alternative to a protracted trial is acceptance of a nolo plea.

9-27.520 Offer of Proof

A. In any case in which a defendant seeks to enter a plea of nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged.

B. Comment

If a defendant seeks to avoid admitting guilt by offering to plead nolo contendere, the attorney for the government should make an offer of proof of the facts known to the government to support the conclusion that the defendant has in fact committed the offense charged. This should be done even in the rare case in which the government does not oppose the entry of a nolo plea. In addition, as is the case with respect to guilty pleas, the attorney for the government should urge the court to require the defendant to admit publicly the facts underlying the criminal charges. These precautions should minimize the effectiveness of any subsequent efforts by the defendant to portray himself/herself as technically liable perhaps, but not seriously culpable.

9-27.530 Argument in Opposition

A. If a plea of nolo contendere is offered over the government's objection, the attorney for the government should state for the record why acceptance of the plea would not be in the public interest; and should oppose the dismissal of any charges to which the defendant does not plead nolo contendere.

B. Comment

When a plea of nolo contendere is offered over the government's objection, the prosecutor should take full advantage of Rule 11(b), Federal Rules of Criminal Procedure, to state for the record why acceptance of the plea would not be in the public interest. In addition to reciting the facts that could be proved to show the defendant's guilt, the prosecutor should bring to the court's attention whatever arguments exist for rejecting the plea. At the very least, such a forceful presentation should make it

clear to the public that the government is unwilling to condone the entry of a special plea that may help the defendant avoid legitimate consequences of his/her guilt. If the nolo plea is offered to fewer than all charges, the prosecutor should also oppose the dismissal of the remaining charges.

9-27.600 ENTERING INTO NON-PROSECUTION AGREEMENTS IN RETURN FOR COOPERATION

9-27.610 Non-Prosecution Agreements Generally

A. Except as hereafter provided, the attorney for the government may, with supervisory approval, enter into a non-prosecution agreement in exchange for a person's cooperation when, in his/her judgment, the person's timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.

B. Comment

1. In many cases, it may be important to the success of an investigation or prosecution to obtain the testimonial or other cooperation of a person who is himself/herself implicated in the criminal conduct being investigated or prosecuted. However, because of his/her involvement, the person may refuse to cooperate on the basis of his/her Fifth Amendment privilege against compulsory self-incrimination. In this situation, there are several possible approaches the prosecutor can take to render the privilege inapplicable or to induce its waiver.

a. First, if time permits, the person may be charged, tried, and convicted before his/her cooperation is sought in the investigation or prosecution of others. Having already been convicted himself/herself, the person ordinarily will no longer have a valid privilege to refuse to testify, and will have a strong incentive to reveal the truth in order to induce the sentencing judge to impose a lesser sentence than that which otherwise might be found appropriate.

b. Second, the person may be willing to cooperate if the charges or potential charges against him/her are reduced in number or degree in return for his/her cooperation and his/her entry of a guilty plea to the remaining charges. An agreement to file a motion pursuant to Sentencing Guideline Section 5K1.1 or Rule 35 of the Federal Rules of Criminal Procedure after the defendant gives full and complete cooperation is the preferred method for securing such cooperation. Usually such a concession by the government will be all that is necessary, or warranted, to secure the cooperation sought. Since it is certainly desirable as a matter of policy that an offender be required to incur at least some liability for his/her criminal conduct, government

attorneys should attempt to secure this result in all appropriate cases, following the principles set forth in USAM 9-27.430, supra, to the extent practicable.

c. The third method for securing the cooperation of a potential defendant is by means of a court order under 18 U.S.C. ¶6001-6003. Those statutory provisions govern the conditions under which uncooperative witnesses may be compelled to testify or provide information notwithstanding their invocation of the privilege against compulsory self-incrimination. In brief, under the so-called ''use immunity'' provisions of those statutes, the court may order the person to testify or provide other information, but neither his/her testimony nor the information he/she provides may be used against him/her, directly or indirectly, in any criminal case except a prosecution for perjury or other failure to comply with the order. Ordinarily, these ''use immunity'' provisions should be relied on in cases in which attorneys for the government need to obtain sworn testimony or the production of information before a grand jury or at trial, and in which there is reason to believe that the person will refuse to testify or provide the information on the basis of his/her privilege against compulsory self-incrimination. (See USAM 9-23.000). Offers of immunity and immunity agreements should be in writing. Consideration should be given to documenting the evidence available prior to the immunity offer.

d. Finally, there may be cases in which it is impossible or impractical to employ the methods described above to secure the necessary information or other assistance, and in which the person is willing to cooperate only in return for an agreement that he/she will not be prosecuted at all for what he/she has done. The provisions set forth hereafter describe the conditions that should be met before such an agreement is made, as well as the procedures recommended for such cases.

It is important to note that these provisions apply only if the case involves an agreement with a person who might otherwise be prosecuted. If the person reasonably is viewed only as a potential witness rather than a potential defendant, and the person is willing to cooperate, there is no need to consult these provisions.

USAM 9-27.610 describes three circumstances that should exist before government attorneys enter into non-prosecution agreements in return for cooperation: the unavailability or ineffectiveness of other means of obtaining the desired cooperation; the apparent necessity of the cooperation to the public interest; and the approval of such a course of action by an appropriate supervisory official.

2. Unavailability or Ineffectiveness of Other Means

As indicated above, non-prosecution agreements are only one of several methods by which the prosecutor can obtain the cooperation of a person whose criminal involvement makes him/her a potential subject of prosecution. Each of the other methods -- seeking cooperation after trial and conviction, bargaining for cooperation as part of a plea agreement, and compelling cooperation under a "use immunity" order -- involves prosecuting the person or, at least, leaving open the possibility of prosecuting him/her on the basis of independently obtained evidence. Since these outcomes are clearly preferable to permitting an offender to avoid any liability for his/her conduct, the possible use of an alternative to a non-prosecution agreement should be given serious consideration in the first instance.

Another reason for using an alternative to a non-prosecution agreement to obtain cooperation concerns the practical advantage in terms of the person's credibility if he/she testifies at trial. If the person already has been convicted, either after trial or upon a guilty plea, for participating in the events about which he/she testifies, his/her testimony is apt to be far more credible than if it appears to the trier of fact that he/she is getting off "scot free". Similarly, if his/her testimony is compelled by a court order, he/she cannot properly be portrayed by the defense as a person who has made a "deal" with the government and whose testimony is, therefore, suspect; his/her testimony will have been forced from him/her, not bargained for.

In some cases, however, there may be no effective means of obtaining the person's timely cooperation short of entering into a non-prosecution agreement. The person may be unwilling to cooperate fully in return for a reduction of charges, the delay involved in bringing him/her to trial might prejudice the investigation or prosecution in connection with which his/her cooperation is sought, and it may be impossible or impractical to rely on the statutory provisions for compulsion of testimony or production of evidence. One example of the latter situation is a case in which the cooperation needed does not consist of testimony under oath or the production of information before a grand jury or at trial. Other examples are cases in which time is critical, as where use of the procedures of 18 U.S.C. §§6001-6003 would unreasonably disrupt the presentation of evidence to the grand jury or the expeditious development of an investigation, or where compliance with the statute of limitations or the Speedy Trial Act precludes timely application for a court order.

Only when it appears that the person's timely cooperation cannot be obtained by other means, or cannot be obtained effectively, should the attorney for the government consider entering into a non-prosecution agreement.

3. Public Interest

If he/she concludes that a non-prosecution agreement would be the only effective method for obtaining cooperation, the attorney for the government should consider whether, balancing the cost of foregoing prosecution against the potential benefit of the person's cooperation, the cooperation sought appears necessary the public interest. This "public interest" determination is one of the conditions precedent to an application under 18 U.S.C. §6003 for a court order compelling testimony. Like a compulsion order, a non-prosecution agreement limits the government's ability to undertake a subsequent prosecution of the witness. Accordingly, the same "public interest" test should be applied in this situation as well. Some of the considerations that may be relevant to the application of this test are set forth in USAM 9-27.620, infra.

4. Supervisory Approval

Finally, the prosecutor should secure supervisory approval before entering into a non-prosecution agreement. Prosecutors working under the direction of a U.S. Attorney must seek the approval of the U.S. Attorney or a supervisory Assistant U.S. Attorney. Departmental attorneys not supervised by a U.S. Attorney should obtain the approval of the appropriate Assistant Attorney General or his/her designee, and should notify the U.S. Attorney or Attorneys concerned. The requirement of approval by a superior is designed to provide review by an attorney experienced in such matters, and to ensure uniformity of policy and practice with respect to such agreements. This section should be read in conjunction with USAM 9-27.640, infra, concerning particular types of cases in which an Assistant Attorney General or his/her designee must concur in or approve an agreement not to prosecute in return for cooperation.

9-27.620 Considerations to be Weighed

A. In determining whether a person's cooperation may be necessary to the public interest, the attorney for the government, and those whose approval is necessary, should weigh all relevant considerations, including:

1. The importance of the investigation or prosecution to an effective program of law enforcement;

2. The value of the person's cooperation to the investigation or prosecution; and

3. The person's relative culpability in connection with the offense or offenses being investigated or prosecuted and his/her history with respect to criminal activity.

B. Comment

This paragraph is intended to assist federal prosecutors, and those whose approval they must secure, in deciding whether a person's cooperation appears to be necessary to the public interest. The considerations listed here are not intended to be all-inclusive or to require a particular decision in a particular case. Rather, they are meant to focus the decision-maker's attention on factors that probably will be controlling in the majority of cases.

1. Importance of Case

Since the primary function of a federal prosecutor is to enforce the criminal law, he/she should not routinely or indiscriminately enter into non-prosecution agreements, which are, in essence, agreements not to enforce the law under particular conditions. Rather, he/she should reserve the use of such agreements for cases in which the cooperation sought concerns the commission of a serious offense or in which successful prosecution is otherwise important in achieving effective enforcement of the criminal laws. The relative importance or unimportance of the contemplated case is therefore a significant threshold consideration.

2. Value of Cooperation

An agreement not to prosecute in return for a person's cooperation binds the government to the extent that the person carries out his/her part of the bargain. See Santobello v. New York, 404 U.S. 257 (1971); Wade v. United States, ___ U.S. ____, 112 S. Ct. 1840 (1992). Since such an agreement forecloses enforcement of the criminal law against a person who otherwise may be liable to prosecution, it should not be entered into without a clear understanding of the nature of the quid pro quo and a careful assessment of its probable value to the government. In order to be in a position adequately to assess the potential value of a person's cooperation, the prosecutor should insist on an "offer of proof" or its equivalent from the person or his/her attorney. The prosecutor can then weigh the offer in terms of the investigation or prosecution in connection with which the cooperation is sought. In doing so, he/she should consider such questions as whether the cooperation will in fact be forthcoming, whether the testimony or other information provided will be credible, whether it can be corroborated by other evidence, whether it will materially assist the investigation or prosecution, and whether substantially the same benefit can be obtained from someone else without an agreement not to prosecute. After assessing all of these factors, together with any others that may be relevant, the prosecutor can judge the strength of his/her case with and without the person's cooperation, and determine whether it may be in the public interest to agree to forego prosecution under the circumstances.

3. Relative Culpability and Criminal History

In determining whether it may be necessary to the public interest to agree to forego prosecution of a person who may have violated the law, in return for that person's cooperation, it is also important to consider the degree of his/her apparent culpability relative to others who are subjects of the investigation or prosecution as well as his/her history of criminal involvement. Of course, it would not be ordinarily in the public interest to forego prosecution of a high-ranking member of a criminal enterprise in exchange for his/her cooperation against one of his/her subordinates, nor would the public interest be served by bargaining away the opportunity to prosecute a person with a long history of serious criminal involvement in order to obtain the conviction of someone else on less serious charges. These are matters with regard to which the attorney for the government may find it helpful to consult with the investigating agency or with other prosecuting authorities who may have an interest in the person or his/her associates.

It is also important to consider whether the person has a background of cooperation with law enforcement officials, either as a witness or an informant, and whether he/she has previously been the subject of a compulsion order under 18 U.S.C. §§6001-6003 or has escaped prosecution by virtue of an agreement not to prosecute. The latter information may be available by telephone from the Witness Records Unit of the Criminal Division.

9-27.630 Limiting Scope of Commitment

A. In entering into a non-prosecution agreement, the attorney for the government should, if practicable, explicitly limit the scope of the government's commitment to:

1. Non-prosecution based directly or indirectly on the testimony or other information provided; or

2. Non-prosecution within his/her district with respect to a pending charge or to a specific offense then known to have been committed by the person.

B. Comment

The attorney for the government should exercise extreme caution to ensure that his/her non-prosecution agreement does not confer "blanket" immunity on the witness. To this end, he/she should, in the first instance, attempt to limit his/her agreement to non-prosecution based on the testimony or information provided. Such an "informal use immunity" agreement has two advantages over an agreement not to prosecute the person in connection with a particular transaction: first, it preserves the prosecutor's option to prosecute on the basis of independently obtained evidence if it

later appears that the person's criminal involvement was more serious than it originally appeared to be; second, it encourages the witness to be as forthright as possible since the more he/she reveals the more protection he/she will have against a future prosecution. To further encourage full disclosure by the witness, it should be made clear in the agreement that the government's forbearance from prosecution is conditioned upon the witness's testimony or production of information being complete and truthful, and that failure to testify truthfully may result in a perjury prosecution.

Even if it is not practicable to obtain the desired cooperation pursuant to an "informal use immunity" agreement, the attorney for the government should attempt to limit the scope of the agreement in terms of the testimony and transactions covered, bearing in mind the possible effect of his/her agreement on prosecutions in other districts.

It is important that non-prosecution agreements be drawn in terms that will not bind other federal prosecutors without their consent. Thus, if practicable, the attorney for the government should explicitly limit the scope of his/her agreement to non-prosecution within his/her district. If such a limitation is not practicable and it can reasonably be anticipated that the agreement may affect prosecution of the person in other districts, the attorney for the government contemplating such an agreement shall communicate the relevant facts to the Assistant Attorney General with supervisory responsibility for the subject matter.

Finally, the attorney for the government should make it clear that his/her agreement relates only to non-prosecution and that he/she has no independent authority to promise that the witness will be admitted into the Department's Witness Security program or that the Marshal's Service will provide any benefits to the witness in exchange for his/her cooperation. This does not mean, of course, that the prosecutor should not cooperate in making arrangements with the Marshal's Service necessary for the protection of the witness in appropriate cases. The procedures to be followed in such cases are set forth in USAM 9-21.000, supra.

9-27.640 Agreements Requiring Assistant Attorney General Approval

A The attorney for the government should not enter into a non-prosecution agreement in exchange for a person's cooperation without first obtaining the approval of the Assistant Attorney General with supervisory responsibility over the subject matter, or his/her designee, when:

1. Prior consultation or approval would be required by a statute or by Departmental policy for a declination of prosecution or dismissal of a charge with regard to which the agreement is to be made; or

2. The person is:

a. A high-level federal, state, or local official;

b. An official or agent of a federal investigative or law enforcement agency; or

c. A person who otherwise is, or is likely to become, of major public interest.

B. Comment

USAM 9-27.640 sets forth special cases that require approval of non-prosecution agreements by the responsible Assistant Attorney General or his/her designee. Subparagraph (1) covers cases in which existing statutory provisions and departmental policies require that, with respect to certain types of offenses, the Attorney General or an Assistant Attorney General be consulted or give his/her approval before prosecution is declined or charges are dismissed. See USAM 6-4.245 (tax offenses); USAM 9-2.111 (bankruptcy frauds); USAM 9-2.111 (internal security offenses); and USAM 9-2.145, 9-2.134 (air piracy). An agreement not to prosecute resembles a declination of prosecution or the dismissal of a charge in that the end result in each case is similar: a person who has engaged in criminal activity is not prosecuted or is not prosecuted fully for his/her offense. Accordingly, attorneys for the government should obtain the approval of the appropriate Assistant Attorney General, or his/her designee, before agreeing not to prosecute in any case in which consultation or approval would be required for a declination of prosecution or dismissal of a charge.

Subparagraph (2) sets forth other situations in which the attorney for the government should obtain the approval of an Assistant Attorney General, or his/her designee, of a proposed agreement not to prosecute in exchange for cooperation. Generally speaking, the situations described will be cases of an exceptional or extremely sensitive nature, or cases involving individuals or matters of major public interest. In a case covered by this provision that appears to be of an especially sensitive nature, the Assistant Attorney General should, in turn, consider whether it would be appropriate to notify the Attorney General or the Deputy Attorney General.

9-27.641 Multi-District (Global) Agreement Requests

No district or division shall make any agreement, including any agreement not to prosecute, which purports to bind any other district(s) or division without the express written approval of the U.S. Attorney(s) in each affected district(s) and/or the Assistant Attorney General of the Criminal Division.

The requesting district/division shall make known to any other affected district(s)/division the following information:

(1) The specific crimes allegedly committed in the affected district(s) as disclosed by the defendant. (No agreement should be made as to any crime(s) not disclosed by the defendant.)

(2) Identification of victims of crimes committed by the defendant in any affected district, insofar as possible.

(3) The proposed agreement to be made with the defendant and the applicable sentencing guideline range.

See also USAM 9-16-500.

9-27.650 Records of Non-Prosecution Agreements

A. In a case in which a non-prosecution agreement is reached in return for a person's cooperation, the attorney for the government should ensure that the case file contains a memorandum or other written record setting forth the terms of the agreement. The memorandum or record should be signed or initialed by the person with whom the agreement is made or his/her attorney, and a copy should be forwarded to the Witness Records Unit in the Criminal Division.

B. Comment

The provisions of this section are intended to serve two purposes. First, it is important to have a written record in the event that questions arise concerning the nature or scope of the agreement. Such questions are certain to arise during cross-examination of the witness, particularly if the existence of the agreement has been disclosed to defense counsel pursuant to the requirements of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972). The exact terms of the agreement may also become relevant if the government attempts to prosecute the witness for some offense in the future. Second, such a record will facilitate identification by government attorneys (in the course of weighing future agreements not to prosecute, plea agreements, pre-trial diversion, and other discretionary actions) of persons whom the government has agreed not to prosecute.

The principal requirements of the written record are that it be sufficiently detailed that it leaves no doubt as to the obligations of the parties to the agreement, and that it be signed or initialed by the person with whom the agreement is made and his/her attorney, or at least by one of them.

A copy of each non-prosecution agreement should be sent to the Criminal Division's Witness Records Unit. The Witness Records Unit

will then be able to identify persons who have been the subject of such agreements, as well as to provide federal prosecutors, on request, with copies of the types of agreements used in the past.

9-27.700 PARTICIPATING IN SENTENCING

9-27.710 Participation Generally

A. During the sentencing phase of a federal criminal case, the attorney for the government should assist the sentencing court by:

1. Attempting to ensure that the relevant facts are brought to the court's attention fully and accurately; and

2. Making sentencing recommendations in appropriate cases.

B. Comment

Sentencing in federal criminal cases is primarily the function and responsibility of the court. This does not mean, however, that the prosecutor's responsibility in connection with a criminal case ceases upon the return of a guilty verdict or the entry of a guilty plea; to the contrary, the attorney for the government has a continuing obligation to assist the court in its determination of the sentence to be imposed. The prosecutor must be familiar with the guidelines generally and with the specific guideline provisions applicable to his or her case. In discharging these duties, the attorney for the government should, as provided in USAM 9-27.720 and 9-27.760, infra, endeavor to ensure the accuracy and completeness of the information upon which the sentencing decisions will be based. In addition, as provided in USAM 9-27.730 and 9-27.760, infra, in appropriate cases the prosecutor should offer recommendations with respect to the sentence to be imposed.

9-27.720 Establishing Factual Basis for Sentence

A. In order to ensure that the relevant facts are brought to the attention of the sentencing court fully and accurately, the attorney for the government should:

1. Cooperate with the Probation Service in its preparation of the presentence investigation report;

2. Review material in the presentence investigation report;

3. Make a factual presentation to the court when:

a. Sentence is imposed without a presentence investigation and report;

b. It is necessary to supplement or correct the presentence investigation report;

c. It is necessary in light of the defense presentation to the court; or

d. It is requested by the court; and

4. Be prepared to substantiate significant factual allegations disputed by the defense.

B. Comment

1. Cooperation with Probation Service

To begin with, if sentence is to be imposed following a presentence investigation and report, the prosecutor should cooperate with the Probation Service in its preparation of the presentence report for the court. Under Rule 32(c)(2), Federal Rules of Criminal Procedure, the report should contain "information about the history and characteristics of the defendant, including prior criminal record, if any, financial condition, and any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant." While much of this information may be available to the Probation Service from sources other than the government, some of it may be obtainable only from prosecutorial or investigative files to which probation officers do not have access. For this reason, it is important that the attorney for the government respond promptly to Probation Service requests by providing the requested information whenever possible. The attorney for the government should also recognize the occasional desirability of volunteering information to the Probation Service, especially in a district where the Probation Office is overburdened. Doing so may be the best way to ensure that important facts about the defendant come to its attention. In addition, the prosecutor should be particularly alert to the need to volunteer relevant information to the Probation Service in complex cases, since it cannot be expected that probation officers will obtain a full understanding of the facts of such cases simply by questioning the prosecutor or examining his/her files.

The relevant information can be communicated orally, or by making portions of the case file available to the probation officer, or by submitting a sentencing memorandum or other written presentation for inclusion in the presentence report. Whatever method he/she uses, however, the attorney for the government should bear in mind that since the report will be shown to the defendant and defense counsel, care should be taken to prevent disclosures that might be harmful to law enforcement interests.

2. Review of Presentence Report

Before the sentencing hearing, the prosecutor should always review the presentence report, which is prepared pursuant to Rule 32, Federal Rules of Criminal Procedure. Not only must the prosecutor be satisfied that the report is factually accurate, he or she must also pay attention to the initial determination of the base offense level. Further, the prosecutor must also consider all adjustments reflected in the report, as well as any recommendations for departure made by the probation office. These adjustments and potential departures can have a profound effect on the defendant's sentence. As advocates for the United States, prosecutors should be prepared to argue concerning those adjustments (and, if necessary, departures allowed by the guidelines) in order to arrive at a final result which adequately and accurately describes the defendant's conduct of offense, criminal history, and other factors related to sentencing.

3. Factual Presentation to Court

In addition to assisting the Probation Service with its presentence investigation and reviewing the portions of the presentence report disclosed to the defense, the attorney for the government may find it necessary in some cases to make a factual presentation directly to the court. Such a presentation is authorized by Rule 32(a)(1), Federal Rules of Criminal Procedure, which requires the court to "afford the counsel for the defendant and the attorney for the government an opportunity to comment upon the probation officer's determination and on other matters relating to the appropriate sentence."

The need to address the court concerning the facts relevant to sentencing may arise in four situations: (a) when sentence is imposed without a presentence investigation and report; (b) when necessary to correct or supplement the presentence report; (c) when necessary in light of the defense presentation to the court; and (d) when requested by the court.

a. Furnishing Information in Absence of Presentence Report

Rule 32(c)(1), Federal Rules of Criminal Procedure, authorizes the imposition of sentence without a presentence investigation and report, if the court finds that the record contains sufficient information to permit the meaningful exercise of sentencing discretion. Imposition of sentence pursuant to this provision usually occurs when the defendant has been found guilty by the court after a non-jury trial, when the case is relatively simple and straightforward, when the defendant has taken the stand and has been cross-examined, and when it is the court's intention not to impose a prison sentence. In such cases, and any others in which sentence is to be imposed without benefit of a presentence

investigation and report (such as where a report on the defendant has recently been prepared in connection with another case), it may be particularly important that the attorney for the government take advantage of the opportunity afforded by Rule 32(a)(1), Federal Rules of Criminal Procedure, to address the court, since there will be no later opportunity to correct or supplement the record. Moreover, even if government counsel is satisfied that all facts relevant to the sentencing decision are already before the court, he/she may wish to make a factual presentation for the record that makes clear the government's view of the defendant, the offense, or both.

b. Correcting or Supplementing Presentence Report

The attorney for the government should bring any significant inaccuracies or omissions to the Court's attention at the sentencing hearing, together with the correct or complete information.

c. Responding to Defense Assertions

Having read the presentence report before the sentencing hearing, the defendant or his/her attorney may dispute specific factual statements made therein. More likely, without directly challenging the accuracy of the report, the defense presentation at the hearing may omit reference to the derogatory information in the report while stressing any favorable information and drawing all inference beneficial to the defendant. Some degree of selectivity in the defense presentation is probably to be expected, and will be recognized by the court. There may be instances, however, in which the defense presentation, if not challenged, will leave the court with a view of the defendant or of the offense significantly different from that appearing in the presentence report. If this appears to be a possibility, the attorney for the government may respond by correcting factual errors in the defense presentation, pointing out facts and inferences ignored by the defense, and generally reinforcing the objective view of the defendant and his/her offense as expressed in the Presentence report.

d. Responding to Court's Requests

There may be occasions when the court will request specific information from government counsel at the sentencing hearing (as opposed to asking generally whether the government wishes to be heard). When this occurs, the attorney for the government should, of course, furnish the requested information if it is readily available and no prejudice to law enforcement interests is likely to result from its disclosure.

4. Substantiation of Disputed Facts

In addition to providing the court with relevant factual material at the sentencing hearing when necessary, the attorney for the government should be prepared to substantiate significant factual allegations disputed by the defense. This can be done by making the source of the information available for cross-examination or, if there is good cause for nondisclosure of his/her identity, by presenting the information as hearsay and providing other guarantees of its reliability, such as corroborating testimony by others. See United States v. Fatico, 579 F.2d 707, 713 (2d Cir. 1978).

9-27.730 Conditions for Making Sentencing Recommendations

A. The attorney for the government should make a recommendation with respect to the sentence to be imposed when:

1. The terms of a plea agreement so require it;

2. The public interest warrants an expression of the government's view concerning the appropriate sentence.

B. Comment

USAM 9-27.730 describes two situations in which an attorney for the government should make a recommendation with respect to the sentence to be imposed: when the terms of a plea agreement require it, and when the public interest warrants an expression of the government's view concerning the appropriate sentence. The phrase "make a recommendation with respect to the sentence to be imposed" is intended to cover tacit recommendations (i.e., agreeing to the defendant's request or not opposing the defendant's request) as well as explicit recommendations for a specific type of sentence (e.g., probation or a fine), for a specific condition of probation, a specific fine, or a specific term of imprisonment; and for concurrent or consecutive sentences.

The attorney for the government should be guided by the circumstances of the case and the wishes of the court concerning the manner and form in which sentencing recommendations are made. If the government's position with respect to the sentence to be imposed is related to a plea agreement with the defendant, that position must be made known to the court at the time the plea is entered. In other situations, the government's position might be conveyed to the probation officer, orally or in writing, during the presentence investigation; to the court in the form of a sentencing memorandum filed in advance of the sentencing hearing; or to the court orally at the time of the hearing.

1. Recommendations Required by Plea Agreement

Rule 11(e)(1), Federal Rules of Criminal Procedure, authorizing plea negotiations, implicitly permits the prosecutor, pursuant to a plea agreement, to make a sentence recommendation, agree not to oppose the defendant's request for a specific sentence, or agree that a specific sentence is the appropriate disposition of the case. If the prosecutor has entered into a plea agreement calling for the government to take a certain position with respect to the sentence to be imposed, and the defendant has entered a guilty plea in accordance with the terms of the agreement, the prosecutor must perform his/her part of the bargain or risk having the plea invalidated. See Machibroda v. United States, 368 U.S. 487, 493 (1962); Santobello v. United States, 404 U.S. 257, 262 (1971).

2. Recommendations reflecting defendant's cooperation.

Section 5K1.1 of the Sentencing Guidelines provides that, upon motion by the government, a court may depart below the guidelines.

3. Recommendations Warranted by the Public Interest

From time to time, unusual cases may arise in which the public interest warrants an expression of the government's view concerning the appropriate sentence, irrespective of the absence of a plea agreement. In some such cases, the court may invite or request a recommendation by the prosecutor, while in others the court may not wish to have a sentencing recommendation from the government. In either event, whether the public interest requires an expression of the government's view concerning the appropriate sentence in a particular case is a matter to be determined with care, preferably after consultation between the prosecutor handling the case and his/her supervisor, the U.S. Attorney or a supervisory Assistant U.S. Attorney, or the responsible Assistant Attorney General or his/her designee.

The prosecutor should bear in mind the attitude of the court toward sentencing recommendations by the government, and should weigh the desirability of maintaining a clear separation of judicial and prosecutorial responsibilities against the likely consequences of making no recommendation. If the prosecutor has good reason to anticipate the imposition of a sanction that would be unfair to the defendant or inadequate in terms of society's needs, he/she may conclude that it would be in the public interest to attempt to avert such an outcome by offering a sentencing recommendation. For example, if the case is one in which the imposition of a term of imprisonment plainly would be inappropriate, and the court has requested the government's view, the prosecutor should not hesitate to recommend or agree to the imposition of probation. On the other hand, if the responsible government attorney believes that a term of imprisonment is plainly

warranted and that, under all the circumstances the public interest would be served by making a recommendation to that effect, he/she should make such a recommendation even though the court has not invited it. Recognizing, however, that the primary responsibility for sentencing lies with the judiciary, government attorneys should avoid routinely taking positions with respect to sentencing, reserving their recommendations instead for those unusual cases in which the public interest warrants an expression of the government's view.

In connection with sentencing recommendations, the prosecutor should also bear in mind the potential value in some cases of the imposition of innovative conditions of probation if consistent with the Sentencing Guidelines. For example, in a case in which a sentencing recommendation would be appropriate and in which it can be anticipated that a term of probation will be imposed, the responsible government attorney may conclude that it would be appropriate to recommend, as a specific condition of probation, that the defendant make full restitution for actual damage or loss caused by the offense of which he/she was convicted, that the defendant participate in community service activities, or that he/she desist from engaging in a particular type of business.

9-27.740 Considerations to be Weighed in Determining Sentencing Recommendations

a. (1) If the prosecutor makes a recommendation as to the sentence to be imposed within the applicable guideline range determined by the court, the prosecutor should consider the various purposes of sentencing, as noted below.

(2) If the prosecutor makes a recommendation as to a sentence to be imposed after the court grants a motion for downward departure under section 5K1.1, the prosecutor should also consider the timeliness of the cooperation, the results of the cooperation, and the nature and extent of the cooperation when compared to other defendants in the same or similar cases in that district.

B. Comment

The Sentencing Reform Act was enacted to eliminate unwarranted disparity in sentencing. Both judicial discretion and the scope of prosecutorial recommendations have been limited, in those cases in which no departure is made from the applicable guideline range. The prosecutor, however, still has a significant role to play in making appropriate recommendations in cases involving either a sentence within the applicable range or a departure. In making a sentencing recommendation, the prosecutor should bear in mind that, by offering a recommendation, he/she shares with the court the responsibility for avoiding unwarranted sentence disparities among defendants with similar backgrounds who have been found guilty of similar conduct.

1. Applicable Sentencing Purposes

The attorney for the government should consider the seriousness of the defendant's conduct, and his/her background and personal circumstances, in light of the four purposes or objectives of the imposition of criminal sanctions:

a. To deter the defendant and others from committing crime;

b. To protect the public from further offenses by the defendant;

c. To assure just punishment for the defendant's conduct; and

d. To promote the correction and rehabilitation of the defendant.

The attorney for the government should recognize that not all of these objectives may be relevant in every case and that, for a particular offense committed by a particular offender, one of the purposes, or a combination of purposes, may be of overriding importance. For example, in the case of a young first offender who commits a non-violent offense, the primary or sole purpose of sentencing might be rehabilitation. On the other hand, the primary purpose of sentencing a repeat violent offender might be to protect the public, and the perpetrator of a massive fraud might be sentenced primarily to deter others from engaging in similar conduct.

9-27.745 Unwarranted Sentencing Departures By The Court

A. If the court is considering a departure for a reason not allowed by the guidelines, the prosecutor should resist.

B. Comment

The prosecutor, with Departmental approval, may appeal a sentence which is unlawful or in violation of the Sentencing Guidelines. Title 18, United States Code, Section 3742(b). If a sentence is imposed in violation of the guidelines, the appellate section of the Department of Justice Criminal Division should be notified so that an appeal can be considered.

9-27.750 Disclosing Factual Material to Defense

A. The attorney for the government should disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court.

B. Comment

Due process requires that the sentence in a criminal case be based on accurate information. See, e.g., Moore v. United States, 571 F.2d 179, 182-84 (3d Cir. 1978). Accordingly, the defense should have access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered. See, e.g., United States v. Perri, 513 F.2d 572, 575 (9th Cir. 1975); United States v. Rosner, 485 F.2d 1213, 1229-30 (2d Cir.), cert. denied, 417 U.S. 950 (1974); United States v. Robin, 545 F.2d 775 (2d Cir. 1976). USAM 9-27.750 is intended to facilitate satisfaction of these requirements by providing the defendant with notice of information not contained in the presentence report that the government plans to bring to the attention of the sentencing court.

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General — *Washington, D.C. 20530*

February 7, 1992

To: Holders of United States Attorneys' Manual Title 9

From: Office of the Deputy Attorney General

George J. Terwilliger, III
Acting Deputy Attorney General

Re: Indictment and Plea Procedures Under Guideline Sentencing

Affects: 9-27.451

Purpose: This bluesheet sets out procedures to be followed in making charging decisions, drafting indictments, and negotiating plea agreements in cases which come under the Sentencing Guidelines.

The following is a new section:

On March 13, 1989, United States Attorney General Dick Thornburgh issued a Memorandum to all Federal prosecutors, entitled "Plea Bargaining Under The Sentencing Reform Act." On June 16, 1989, he issued a second Memorandum entitled "Plea Bargaining in Cases Involving Firearms." This bluesheet is a clarification of the procedures outlined in those memoranda, which remain in full force. Copies of these two memoranda, known as Thornburgh I and Thornburgh II, are attached.

1. General Plea Procedures

The following procedures shall be adopted as to all pleas of guilty:

A. All negotiated plea agreements to felonies or misdemeanors negotiated from felonies shall be in writing and filed with the court. Thus any time a defendant enters into a negotiated plea, that fact and the conditions thereof will be memorialized and a copy of the plea agreement maintained in the office case file or elsewhere.

B. There shall be within each office a formal system for approval of negotiated pleas. The approval authority shall be vested in at least a supervisory criminal Assistant United States Attorney, or a supervisory attorney of a litigating division in the Department of Justice, who will have the responsibility of assessing the appropriateness of the plea agreement under the policies of the Department of Justice pertaining to pleas, including those set forth in the Thornburgh Memos. Where certain predictable fact situations arise with great frequency and are given identical treatment, the approval requirement may be met by a written instruction from the appropriate supervisor which describes with particularity the standard plea procedure to be followed, so long as that procedure is otherwise within Departmental guidelines. An example would be a border district which routinely deals with a high volume of illegal alien cases daily.

C. The plea approval process will be part of the office evaluation procedure.

D. The United States Attorney in each district, or a supervisory representative, should, if feasible, meet regularly with a representative of the district's Probation Office for the purpose of discussing guideline cases.

2. Substantial Assistance Pleadings

A. Authority to File. Section 5K1.1 of the Sentencing Guidelines allows the United States to file a pleading with the sentencing court which permits the court to depart below the indicated guideline, on the basis that the defendant provided substantial assistance in the investigation or prosecution of another. Authority to approve such pleadings is limited to the United States Attorney, the Chief Assistant United States Attorney, and supervisory criminal Assistant United States Attorneys, or a committee including at least one of these individuals. Similarly, for Department of Justice attorneys, approval authority should be vested in a Section Chief or Office Director, or such official's deputy, or in a committee which includes at least one of these individuals.

B. Recordkeeping. Every United States Attorney or Department of Justice Section Chief or Office Director shall maintain documentation of the facts behind and justification for each substantial assistance pleading. The repository or repositories of this documentation need not be the case file itself. Freedom Of Information Act considerations may suggest that a separate form showing the final decision be maintained.

C. Rule 35(b) Motions. The procedures described above shall also apply to Motions filed pursuant to Rule 35(b), Federal Rules of Criminal Procedure, where the sentence of a cooperating defendant is reduced after sentencing on Motion of the United States. Such a filing is deemed for sentencing purposes to be the equivalent of a substantial assistance pleading.

3. Enhancements of Drug Penalties Based on Prior Convictions

Current drug laws provide for increased maximum, and in some cases minimum, penalties for many offenses on the basis of a defendant's prior criminal convictions. See, e.g., 21 U.S.C. §§ 841 (b)(1)(A), (B), and (C), 848 (a), 960 (b)(1), (2), and (3), and 962. However, a court may not impose such an increased penalty unless the United States Attorney has filed an information with the court, before trial or before entry of a plea of guilty, setting forth the previous convictions to be relied upon. 21 U.S.C. §851.

For the purposes of applying the rules of the Thornburgh memoranda, every prosecutor should regard the filing of an information under 21 U.S.C. §851 concerning prior convictions as equivalent to the filing of charges. Just as a prosecutor must file a readily provable charge, he or she must file an information under 21 U.S.C. §851 regarding prior convictions that are readily provable and that are known to the prosecutor prior to the beginning of trial or entry of plea. The only exceptions to this requirement are those found in Thornburgh I. Such exceptions to the requirements that enhancement pleadings be filed are where: (1) the failure to file or the dismissal of such pleadings would not affect the applicable guideline range from which a sentence may be imposed; or (2) in the context of a negotiated plea, the United States Attorney, the Chief Assistant United States Attorney, the senior supervisory Criminal Assistant United States Attorney, or, within the Department of Justice, a Section Chief or Office Director has approved the negotiated agreement. The reasons for such an agreement must be set forth in writing as required by paragraph 2B, above. Consistent with Thornburgh I, such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office. The permissible agreements within this context include: (1) not filing an enhancement, (2) filing an enhancement which does not allege all relevant prior convictions, thereby only partially enhancing a defendant's potential sentence, and (3) dismissing a previously filed enhancement.

A negotiated plea which uses any of the options described in this section must be made known to the sentencing court. In addition, the sentence which can be imposed through the negotiated plea must adequately reflect the seriousness of the offense.

4. Firearm charges pursuant to Title 18 United States Code §924(c).

Prosecutors are reminded that when a defendant commits an armed bank robbery or other crime of violence or drug trafficking crime, appropriate charges include Title 18, United States Code §924(c).

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Office of the Attorney General
Washington, D. C. 20530

March 13, 1989

MEMORANDUM

TO: Federal Prosecutors

FROM: Dick Thornburgh
Attorney General

SUBJECT: Plea Bargaining Under The Sentencing Reform Act

In January, the Supreme Court decided Mistretta v. United States and upheld the sentencing guidelines promulgated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984. The Act was strongly supported by the Department of Justice, and the Department has defended the guidelines since they took effect on November 1, 1987. Under these guidelines, it is now possible for federal prosecutors to respond to three problems that plagued sentencing prior to their adoption: 1) sentencing disparity; 2) misleading sentences which were shorter than they appeared as a result of parole and unduly generous "good time" allowances; and 3) inadequate sentences in critical areas, such as crimes of violence, white collar crime, drug trafficking and environmental offenses. It is vitally important that federal prosecutors understand these guidelines and make them work. Prosecutors who do not understand the guidelines or who seek to circumvent them will undermine their deterrent and punitive force and will recreate the very problems that the guidelines are expected to solve.

This memorandum cannot convey all that federal prosecutors need or should want to know about how to use the guidelines, and it is not intended to invalidate more specific policies which are consistent with this statement of principles and may have been adopted by some litigating divisions to govern particular offenses. This memorandum does, however, set forth basic departmental policies to which all of you will be expected to adhere. The Department consistently articulated these policies during the drafting of the guidelines and the period in which their constitutionality was tested. Compliance with these policies is essential if federal criminal law is to be an effective deterrent and those who violate the law are to be justly punished.

Plea Bargaining

Charge Bargaining

Charge bargaining takes place in two settings, before and after indictment. Consistent with the Principles of Federal Prosecution in Chapter 27 of Title 9 of the United States Attorneys' Manual, a federal prosecutor should initially charge the most serious, readily provable offense or offenses consistent with the defendant's conduct. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned in an effort to arrive at a bargain that fails to reflect the seriousness of the defendant's conduct

Whether bargaining takes place before or after indictment, the Department policy is the same: any departure from the guidelines should be openly identified rather than hidden between the lines of a plea agreement. It is inevitable that in some cases it will be difficult for anyone other than the prosecutor and the defendant to know whether, prior to indictment, the prosecutor bargained in conformity with the Department's policy. The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.

Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

Sentence Bargaining

There are only two types of sentence bargains. Both are permissible, but one is more complicated than the other. First, prosecutors may bargain for a sentence that is within the specified guideline range. This means that when a guideline range is 18-24 months, you have discretion to agree to recommend a sentence of 18 or 20 months rather than to argue for a sentence at the top of the range. Similarly, you may agree to recommend a downward adjustment of two levels for acceptance of responsibility if you conclude in good faith that the defendant is entitled to the adjustment.

Second, you may seek to depart from the guidelines. This type of sentence bargain always involves a departure and is more complicated than a bargain involving a sentence within a guideline range. Departures are discussed more generally below.

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions.

Readily Provable Charges

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability readily to prove a charge for legal or evidentiary reasons. It would serve no purpose here to seek to further define "readily provable." The policy is to bring cases that the government should win if there were a trial. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. It is important for you to know whether dropping a charge may affect a sentence. For example, the multiple offense rules in Part D of Chapter 3 of the guidelines and recent changes to the relevant conduct standard set forth in 1B1.3(a)(2) will mean that certain dropped charges will be counted for purposes of determining the sentence, subject to the statutory maximum for the offense or offenses of conviction. It is vital that federal prosecutors understand when conduct that is not charged in an indictment or conduct that is alleged in counts that are to be dismissed pursuant to a bargain may be counted for sentencing purposes and when it may not be. For example, in the case of a defendant who could be charged with five bank robberies, a decision to charge only one or to dismiss four counts pursuant to a bargain precludes any consideration of the four uncharged or dismissed robberies in determining a guideline range, unless the plea agreement included a stipulation as to the other robberies. In contrast, in the case of a defendant who could be charged with five counts of

fraud, the total amount of money involved in a fraudulent scheme will be considered in determining a guideline range even if the defendant pleads guilty to a single count and there is no stipulation as to the other counts.

Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the federal criminal justice system. For example, approval to drop charges in a particular case might be given because the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

To make guidelines work, it is likely that the Department and the Sentencing Commission will monitor cases in which charges are dropped. It is important, therefore, that federal prosecutors keep records justifying their decisions not to go forward with readily provable offenses.

Departures Generally

In Chapter 5, Part K of the guidelines, the Commission has listed departures that may be considered by a court in imposing a sentence. Some depart upwards and others downwards. Moreover, 5K2.0 recognizes that a sentencing court may consider a departure that has not been adequately considered by the Commission. A departure requires approval by the court. It violates the spirit of the guidelines and Department policy for prosecutors to enter into a plea bargain which is based upon the prosecutor's and the defendant's agreement that a departure is warranted, but that does not reveal to the court the departure and afford an opportunity for the court to reject it.

The Commission has recognized those bases for departure that are commonly justified. Accordingly, before the government may seek a departure based on a factor other than one set forth in Chapter 5, Part K, approval of United States Attorneys or designated supervisory officials is required, after consultation with the concerned litigating Division. This approval is required whether or not a case is resolved through a negotiated plea.

Substantial Assistance

The most important departure is for substantial assistance by a defendant in the investigation or prosecution of another person. Section 5K1.1 provides that, upon motion by the government, a court may depart from the guidelines and may impose a non-guideline sentence. This

departure provides federal prosecutors with an enormous range of options in the course of plea negotiations. Although this departure, like all others, requires court approval, prosecutors who bargain in good faith and who state reasons for recommending a departure should find that judges are receptive to their recommendations.

Stipulations of Fact

The Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. Stipulations to untrue facts are unethical. If a prosecutor has insufficient facts to contest a defendant's effort to seek a downward departure or to claim an adjustment, the prosecutor can say so. If the presentence report states facts that are inconsistent with a stipulation in which a prosecutor has joined, it is desirable for the prosecutor to object to the report or to add a statement explaining the prosecutor's understanding of the facts or the reason for the stipulation.

Recounting the true nature of the defendant's involvement in a case will not always lead to a higher sentence. Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others and the government agrees that self-incriminating information so provided will not be used against the defendant, section 1B1.8 provides that the information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. The existence of an agreement not to use information should be clearly reflected in the case file, the applicability of section 1B1.8 should be documented, and the incriminating information must be disclosed to the court or the probation officer, even though it may not be used in determining a guideline sentence.

Written Plea Agreements

In most felony cases, plea agreements should be in writing. If they are not in writing, they always should be formally stated on the record. Written agreements will facilitate efforts by the Department and the Sentencing Commission to monitor compliance by federal prosecutors with Department policies and the guidelines. Such agreements also avoid misunderstandings as to the terms that the parties have accepted in particular cases.

Understanding the Options

A commitment to guideline sentencing in the context of plea bargaining may have the temporary effect of increasing the proportion of cases that go to trial, until defense counsel and defendants understand that the Department is committed to the statutory sentencing goals and procedures. Prosecutors should understand, and defense counsel will soon learn, that there is sufficient flexibility in the guidelines to permit effective plea bargaining which does not undermine the statutory scheme.

For example, when a prosecutor recommends a two level downward adjustment for acceptance of responsibility (e.g., from level 20 to level 18), judicial acceptance of this adjustment will reduce a sentence by approximately 25%. If a comparison is made between the top of one level (e.g., level 20) and the bottom of the relevant level following the reduction (e.g., level 18). it would show a difference of approximately 35%. At low levels, the reduction is greater. In short, a two level reduction does not mean two months. Moreover, the adjustment for acceptance of responsibility is substantial, and should be attractive to defendants against whom the government has strong cases. The prosecutor may also cooperate with the defendant by recommending a sentence at the low end of a guideline range, which will further reduce the sentence.

It is important for prosecutors to recognize while bargaining that they must be careful to make all appropriate Chapter Three adjustments -- e.g., victim related adjustments and adjustments for role in the offense.

Conclusion

With all available options in mind, and with full knowledge of the availability of a substantial assistance departure, federal prosecutors have the tools necessary to handle their caseloads and to arrive at appropriate dispositions in the process. Honest application of the guidelines will make sentences under the Sentencing Reform Act fair, honest, and appropriate.

Office of the Attorney General
Washington, D. C. 20530

June 16, 1989

MEMORANDUM

TO: Federal Prosecutors

FROM: Dick Thornburgh
Attorney General

SUBJECT: Plea Bargaining in Cases Involving Firearms

On May 15, 1989, the President outlined a comprehensive program to combat violent crime. In it he noted that to ensure the objective that those who commit violent crimes are held fully accountable, plea bargaining procedures must be uniformly and strictly applied. Accordingly, he has directed me to issue and fully implement guidelines for federal prosecutors under the Sentencing Reform Act to ensure that federal charges always reflect both the seriousness of the defendant's conduct and the Department's commitment to statutory sentencing goals and procedures. This means that, in all but exceptional cases such as those in which the defendant has provided substantial assistance to the government in the investigation or prosecution of crimes by others, federal prosecutors will seek convictions for any offense involving the unlawful use of a firearm which is readily provable. This will implement the congressional mandate that mandatory minimum penalties be imposed by the courts upon violent and dangerous felons.

As you recall, in my March 13, 1989 memorandum to all federal prosecutors on the subject of plea bargaining, I stated (at pp. 2-3):

> *** The Department will monitor, together with the Sentencing Commission, plea bargaining, and the Department will expect plea bargains to support, not undermine, the guidelines.
>
> Once prosecutors have indicted, they should find themselves bargaining about charges which they have determined are readily provable and reflect the seriousness of the defendant's conduct. Should a prosecutor determine in good faith after indictment that, as a result of a change in the evidence or for another reason (e.g., a need has arisen to protect

the identity of a particular witness until he testifies against a more significant defendant), a charge is not readily provable or that an indictment exaggerates the seriousness of an offense or offenses, a plea bargain may reflect the prosecutor's reassessment. There should be a record, however, in a case in which charges originally brought are dropped.

* * * *

Department policy requires honesty in sentencing; federal prosecutors are expected to identify for U.S. District Courts departures when they agree to support them. For example, it would be improper for a prosecutor to agree that a departure is in order, but to conceal the agreement in a charge bargain that is presented to a court as a fait accompli so that there is neither a record of nor judicial review of the departure.

In sum, plea bargaining, both charge bargaining and sentence bargaining, is legitimate. But, such bargaining must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions. (Emphasis added.)

On the subject of minimum mandatory penalties for violent firearms offenses, the Department's November 1, 1987 Prosecutors Handbook on Sentencing Guidelines provides (at p. 50):

> ... in no event is a ... 18 U.S.C. 924(c) [minimum mandatory firearms] charge not to be pursued unless it cannot be readily proven or unless absolutely necessary to enable imposition of an appropriate sentence on someone who has rendered substantial assistance to the government, and then only with the consent of ... the United States Attorney as to 18 U.S.C. 924(c) charges.

The specific affirmation of these policies by the President requires that you be especially vigilant about their full implementation in your district. Any questions about these matters will continue to be handled by the appropriate Assistant Attorney General.

* U.S. G.P.O.:1992-312-344:60082

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9-34.000 PREPARATION OF REPORTS ON CONVICTED PRISONERS FOR THE PAROLE COMMISSION

All U.S. Attorneys, Assistant U.S. Attorneys, and Criminal Division Attorneys are *required* to prepare a Form 792 ''Report on Convicted Prisoners by United States Attorney'' in all cases in which a defendant has been sentenced to a prison term in excess of one year for an offense committed prior to November 1, 1987. Defendants who commit offenses on or after that date are to be sentenced pursuant to the sentencing guidelines promulgated by the United States Sentencing Commission and are not eligible for parole.

As soon as the defendant has been sentenced, the completed Form 792 should be submitted to the Chief Executive Officer of the institution to which the defendant will be committed.

9-34.100 CONTENTS OF FORM 792

The Parole Commission needs to be fully informed of aggravating and mitigating factors surrounding each offense. To accomplish that end observe the following when preparing Form 792.

A. Describe the details of the offense itself. Include the dollar amounts involved in the crime; this is important to the Parole Commission when it rates the severity of an offense, particularly in income tax, fraud, embezzlement, drug and theft cases. In drug cases, provide information on the quantity and purity of the drugs.

B. Explain the prisoner's role in the offense. The Parole Commission should be told of the nature and severity of the prisoner's involvement relative to that of his/her codefendants; this will prevent unjust disparity in the treatment among codefendants and help the Parole Commission to compare the prison terms of principals and accessories.

C. Outline related charges dismissed upon entry of a guilty plea or not proved at trial. Whatever the government was prepared to prove should be reported fully, because the Parole Commission is entitled to consider unadjudicated charges so long as the prisoner has notice of them.

D. Provide investigative information concerning the prior history of the prisoner and/or the offense. The Parole Commission needs specific data on the magnitude and duration of the criminal behavior; it considers the amount of sophistication and/or planning of the offense and the degree to which the offense was part of a large-scale criminal conspiracy or a continuing criminal enterprise. The prisoner's criminal reputation should also be reported so that a determination can be made whether or not to treat his/her case under the original jurisdiction procedure. *See* C.F.R. § 217.

Absent permission from the General Litigation and Legal Advice Section of the Criminal Division, prosecuting attorneys are not to stipulate to

facts in a manner that precludes the Commission from considering actual factors surrounding an offense.

The Parole Commission must disclose to the prisoner all reports and documents used in parole release decision-making; if materials are considered which fall within the three broad exemptions of 18 U.S.C. § 4208(c), the Parole Commission need only furnish the prisoner with a summary of the exempted material. It is not necessary, however, to reveal or justify the precise exemption chosen. As a standard precaution, the name of the preparing attorney can be deleted from the disclosable copy of the report.

Summaries of exempted material should be typewritten on a separate page with the heading SUMMARY OF INFORMATION WITHHELD, and should be attached to the copy Form 792 which has been excised for disclosure to the prisoner. The original and excised copy should be sent to the institution in which the prisoner is confined. If investigative reports are included with the prosecuting attorney's report, the responsible agency should be requested to provide summaries of any material it deems exempt from disclosure.

9-34.200 FORM 792

A copy of the current Form USA-792 follows. All previous editions of the form are obsolete and should be destroyed.

9-34.300 PAROLE COMMISSION GUIDELINES

All prosecuting attorneys should take into consideration the Parole Commission's guidelines (contained in 28 C.F.R. § 2.20), both in plea negotiations and in completing the Form 792.

Report On Convicted Prisoner By United States Attorney

NAME _____

CONVICTED OF _____

TERM IMPOSED _____

CRIMINAL CASE NO. _____

U.S.C. _____

DISTRICT _____

NOTE: This report must be completed for the use of the U.S. Parole Commission in all cases in which the defendant has received a prison term of more than one year. It is an essential source of information for parole decision-making. Submit the report as soon as the defendant has been sentenced.

I. DESCRIPTION OF THE OFFENSE: Give a full account of the offense and describe any mitigating or aggravating circumstances. Be specific about such matters as total dollar amounts or property values involved, drug quantities and purities, the number of victims and extent of injury, and the overall extent of any joint or on-going criminal conduct. Estimate relative culpability if the offense involved co-defendants.

PREVIOUS EDITIONS OBSOLETE FORM USA-792
SEP 81

(SEE REVERSE SIDE)

II. CORROBORATING EVIDENCE: If there are aggravating circumstances not established by the conviction, explain what evidence supports the Government's version.

III. COOPERATION: Was the defendant of assistance to the Government? The Parole Commission will consider substantial cooperation otherwise unrewarded as a possible circumstance in mitigation of punishment.

IV. RECOMMENDATION RELATIVE TO PAROLE: This section is optional. (*See* the paroling policy guidelines at 28 CFR § 2.20)

DISCLOSURE INSTRUCTIONS (to institution staff):

_____ This report may be disclosed to the prisoner.

_____ Do not disclose this report under any circumstances and retain it in a secure file. A disclosable copy of this report with deletions, and a summary of deleted material pursuant to 18 U.S.C. 4208(c) is attached for disclosure to the prisoner. The original is to be shown to the Parole Commission.

NOTIFICATION REQUEST:

_____ I wish to be notified of the date and place set for this prisoner's parole hearing.

_____ I wish to be notified of the Commissioner's decision in this case.

For the United States Attorney

_____
DATE

Signed: _____
Assistant U.S. Attorney

Disposition of copies: This form is to be completed in triplicate. The original and one copy are to be sent to the Chief Executive Officer of the institution to which the prisoner is committed and a copy retained by the U.S. Attorney. The institution copies should be given to the Bureau of Prisons' Community Program offices for delivery with the prisoner. If not possible, they should be mailed to the institution as soon as possible after sentence is imposed. The CPO will be able to advise of the institution to which the defendant was committed (The U.S. Marshal can put you in contact with your local CPO.)

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9-37.000 HABEAS CORPUS

9-37.001 Availability of Writ

A federal prisoner may contest the legality of his/her custody (conditions of confinement, duration of sentence) by petitioning the district court for a writ of habeas corpus. (28 U.S.C. § 2241). Such petition must be directed to the court of the judicial district in which the prisoner's custodian (usually a warden or jailer) may be reached by service of process. 28 U.S.C. § 2243. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494-495 (1973). The Attorney General, the Director of the Bureau of Prisons and the Chairman of the Parole Commission in Washington, D.C. are usually not the custodians of the petitioning prisoner. *See McCoy* v. *U.S. Board of Parole*, 537 F.2d 962, 964-965 (8th Cir. 1976).

When a petition is followed by an order to respond and show cause why the writ should not be granted, and the identical issue or issues were all disposed of on a previous application for a writ, the U.S. Attorney should file a motion to dismiss on that ground in conjunction with the government's return or answer. *See* 28 U.S.C. § 2244; *Sanders* v. *United States*, 373 U.S. 1 (1963).

In addition, the defenses set forth in the following USAM sections should be considered in filing a return to a habeas corpus action.

9-37.100 DEFENSE OF FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

9-37.110 Military Remedies

As a general rule, federal courts will not entertain habeas petitions from a person in military custody unless all available military remedies have been exhausted. *Gusik* v. *Schilder*, 340 U.S. 128 (1950); *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975).

A. Conscientious Objector Claims

With regard to conscientious objector claims, the military decisions normally will be deemed ripe for judicial review upon final administrative action by the *Air Force*: The Director, Secretary of the Air Force/Personnel Council (SAF/PC), in the case of officers, or, in the case of enlisted personnel, action by Chief of Operations Programs, Enlisted Separation Branch (MPC/MPCAKE); *Army*: Conscientious Objector Review Board, Department of the Army, as delegate of the Secretary of the Army; *Coast Guard*: Chief, Office of Personnel, as delegate of the Commandant of the Coast Guard; *Marine Corps*: Commandant of the Marine Corps; and *Navy*: Commander, Naval Military Personnel Command, Department of the Navy.

In *Parisi* v. *Davidson*, 405 U.S. 34 (1972), the Supreme Court held that a pending court-martial proceeding had no bearing on the availability of

habeas corpus relief for a serviceman seeking discharge as a conscientious objector because the relief sought, an honorable discharge, could not be granted by the military court. *Parisi* did not significantly erode the exhaustion doctrine, it merely held that the court-martial proceedings should not interfere with the adjudication of an antedated and independent habeas petition challenging an administrative denial of a conscientious objector claim. Because the military courts could not adjudicate Parisi's conscientious objector application with promptness and certainty and since a favorable resolution of that issue would be dispositive of the court-martial charges, no cogent basis existed for application of the exhaustion doctrine. If, however, in the context of a court-martial proceeding, appropriate relief can be granted to a member of the armed services claiming conscientious objector status, exhaustion is required. *See Apple* v. *Greer*, 554 F.2d 105 (3d Cir.1977). Moreover, if there is no connection between the court-martial charge and the conscientious objector claim, the district court, even though upholding the claim, could condition its order of discharge on completion of the court-martial proceeding and any lawful sentence imposed. *Conrad* v. *Schlesinger*, 507 F.2d 867 (9th Cir.1974).

B. Boards for Correction of Military Records

Pursuant to 10 U.S.C. § 1552, each military service has established civilian Boards for the Correction of Military Records. While application to these Boards is available to aggrieved members of the armed services, exhaustion of this remedy is not a statutorily mandated prerequisite to federal court jurisdiction. An application to these military boards is deemed to be an extraordinary remedy. While such procedures remain available, exhaustion of such a remedy should not be insisted on by the government as a precondition to judicial review. *See Montgomery* v. *Rumsfeld*, 572 F.2d 250, 254 (9th Cir.1978); *Hayes* v. *Secretary of Defense*, 515 F.2d 668, 675 (D.C.Cir.1975); *Ludium* v. *Resor*, 507 F.2d 398, 400 (1st Cir.1974).

9-37.120 Bureau of Prisons Administrative Remedy Procedure

The Bureau of Prisons has established a comprehensive administrative procedure to review prisoner complaints which relate to all aspects of imprisonment. *See* 28 C.F.R. § 542.10. *et seq*. A prisoner ordinarily must exhaust these administrative procedures before seeking habeas corpus relief. *See Bradshaw v. Carlson*, 682 F.2d 1050, 1052 (3d Cir.1981); *Kyle* v. *Hanberry*, 677 F.2d 1386, 1391-1392 (11th Cir.1982). Some circuits excuse the lack of exhaustion where constitutional violations are alleged.

9-37.130 Parole Commission Administrative Appeal Procedure

The U.S. Parole Commission has established comprehensive administrative review procedures. *See* 28 C.F.R. §§ 2.24, 2.26 through 2.28. A prisoner must exhaust these administrative remedies before seeking habeas

corpus relief. *See Ruviwat v. Smith*, 701 F.2d 844, 845 (9th Cir.1983); *Guida v. Nelson*, 603 F.2d 261, 262 (2d Cir.1979).

9-37.200 DEFENSE OF LACK OF PROPER JURISDICTION/VENUE

9-37.210 Jurisdiction

The jurisdiction of the district court is dependent on the ability of the court issuing the writ to exercise personal jurisdiction over the custodian. *See* 28 U.S.C. § 2241(a); *Braden v. 30th Judicial Circuit Court*, *supra*.

9-37.220 District for Venue Purposes

A. The most appropriate district for habeas venue purposes is the one in which the prisoner is confined or where his/her current custodian is located, rather than the original sentencing court.

B. The warden, not the Parole Commission, is usually the ''custodian'' in a habeas corpus case, and venue is best placed in the district where the prisoner is confined. *See Starnes v. Mcquire*, 512 F.2d 918, 932 (D.C.Cir. 1974); *Billiteri v. Board of Parole*, 541 F.2d 938, 948 (2d Cir.1976).

9-37.300 DEFENSE OF MOOTNESS

A. Prisons: *Preiser v. Newkirk*, 422 U.S. 395 (1975).

B. Parole: *Weinstein v. Bradford*, 423 U.S. 147 (1975) (*per curiam*).

9-37.400 DEFENSE THAT FEDERAL COURTS SHOULD NOT REVIEW BUREAU OF PRISONS AND PAROLE COMMISSION DECISIONS ABSENT ALLEGATIONS OF A CLEAR ABUSE OF DISCRETION

A. Prisons: *Sellers v. Ciccone*, 530 F.2d 199, 201-202 (8th Cir.1976).

B. Parole: *Solomon v. Elsea*, 676 F.2d 282, 290 (7th Cir.1982) (*per curiam*); *Zannino v. Arnold*, 531 F.2d 687, 690 (3d Cir.1976).

9-37.500 DEFENSE TO PETITION ATTACKING IMPOSITION OF SENTENCE

A prisoner may attack the legality of the imposition of sentence (as opposed to the legality of the execution of sentence) by filing a motion under 28 U.S.C. § 2255 to vacate, correct or set aside the sentence. Such a motion should be made in the district court which imposed the sentence. Habeas corpus relief shall not be entertained unless it appears that the statutory remedy accorded by Section 2255 is inadequate or ineffective.

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9-39.000 CONTEMPT OF COURT

9-39.010 General Definition of Contempt

Contempt of court may be generally defined as an act of disobedience or disrespect towards the judicial branch of the government, or an interference with its orderly process. It is an offense against a court of justice or a person to whom the judicial functions of the sovereignty have been delegated.

9-39.100 CRIMINAL VERSUS CIVIL CONTEMPT

Since different substantive and procedural rules have been held to apply to civil and criminal contempts, distinctions between the two forms of contempt must be noted. *The role of the U.S. Attorney in prosecuting criminal contempt cases is discussed at USAM 9-39.318, infra.*

9-39.110 Tests for Distinguishing

9-39.111 Nature of the Relief Sought

A contempt is criminal where punishment by way of fine or imprisonment is deemed imperative to vindicate the authority of the court. In contrast, civil contempt is remedial, rather than punitive, serves only the purpose of the party litigant, and is intended to coerce compliance with an order of the court or to compensate for losses or damages caused by noncompliance. *See Shillitani v. United States*, 384 U.S. 364, 368-70 (1966); *Nye v. United States*, 313 U.S. 33, 42 (1941); *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418, 442 (1911); *Carlson Fuel Co. v. United Mine Workers*, 517 F.2d 1348, 1349 (4th Cir.1975); *In re Rumaker*, 646 F.2d 870 (5th Cir.1980); *United States v. Powers*, 629 F.2d 619 (9th Cir.1980); *United States v. North*, 621 F.2d 1255 (2d Cir.1980), *cert. denied*, 449 U.S. 866 (1981); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir.1983).

9-39.112 Mechanical Distinction

A proceeding in criminal contempt is a separate and independent proceeding at law from the main cause, with the public on one side and the defendant on the other. Proceedings in civil contempt are usually between the original parties and are instituted and tried as part of the main cause or as a supplemental proceeding thereto. *See Bray v. United States*, 423 U.S. 73 (1975); *Gompers, supra*, at 444-45.

9-39.113 Purging (doing those acts, whether of a negative or affirmative nature, which were required by the court.)

The general rule is that purging of contempt is not a complete defense in a criminal contempt action. This is for the reason that the primary aim of a criminal contempt action is vindication of the authority of the court and

punishment for disobedience already accomplished. Consequently, a person found guilty of criminal contempt may be sentenced to a fixed and definite term of imprisonment, or be required to pay an unconditional fine. *See United States v. Shipp*, 203 U.S. 563 (1906); *Skinner v. White*, 505 F.2d 685, 689 (5th Cir.1974).

In a civil contempt action, the issue of purging is determined by whether the action is coercive or compensatory in nature. A ''coercive civil'' contempt action is one wherein the principal object is respondent's compliance with the court decree. This is to be contrasted with a ''compensatory civil'' contempt action wherein the principal object is the receipt of an award or compensation. The contemnor in a coercive civil contempt action possesses the ''keys to his own cell'' since he may not be sentenced to a fixed or definite term of imprisonment or subjected to an unconditional fine. *See Penfield Co. v. SEC*, 330 U.S. 585, 595 (1947); *Gompers, supra*, at 441-42; *Duell v. Duell*, 178 F.2d 683, 685 (D.C.Cir. 1949); *Parker v. United States*, 153 F.2d at 70 (1st Cir.1946). An unconditional award or fine may, however, be imposed in a compensatory civil contempt action. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947); *Backo v. Local 281, United Brothers of Carpenters and Joiners*, 438 F.2d 176, 182 (2d Cir.1970), *cert. denied*, 404 U.S. 858 (1971).

9-39.120 Characterization of the Action When Both Criminal and Civil Contempt Elements Are Present

When a contempt action is not clearly specified as criminal or civil and a single order is entered granting both punitive and remedial relief, the criminal feature of the order is dominant and fixes its character for purposes of review. *See Penfield Co., supra*, at 591; *Union Tool Co. v. Wilson*, 259 U.S. 107, 110 (1922); *Falstaff Brewing Corp., supra*, at 778.

9-39.200 INDIRECT VERSUS DIRECT CONTEMPT

A contempt is indirect when it occurs out of the presence of the court, thereby requiring the court to rely on the testimony of third parties for proof of the offense. It is direct when it occurs under the court's own eye and within its own hearing. *See United States v. Peterson*, 456 F.2d 1135, 1139 (10th Cir.1972); *Matter of Heathcock*, 696 F.2d 1362, 1365 (11th Cir.1983). The requirement that direct contempt be committed in the presence of the court does not limit direct contempts to those which take place in the courtroom, but some degree of formality usually found in the courtroom setting must accompany an exercise of the judicial function for the proceedings to be in the actual presence of the court. *Matter of Jaffree*, 741 F.2d 133 (7th Cir.1984).

9-39.300 INDIRECT CRIMINAL CONTEMPT

9.39.310 Institution of the Action

9-39.311 Federal Jurisdiction and Venue

Although the courts possess an inherent power to enforce obedience to their orders so that they may properly perform their functions, *Myers v. United States*, 264 U.S. 95, 103 (1924), the federal courts' contempt power is limited by statute (18 U.S.C. § 401) and by Rule 42, Federal Rules of Criminal Procedure. *See Nye, supra*, at 45; *United States v. Wilson*, 421 U.S. 309, 315 n. 6 (1975). Accordingly, all forms of contempt, whether they be criminal, civil, indirect or direct, must fall within one of the three categories of misbehavior described in 18 U.S.C. § 401. Indirect contempts come within 18 U.S.C. § 401(2) or (3), and the ''so near thereto clause'' of 18 U.S.C. § 401(1). Direct contempts are confined to the ''in presence'' clause of 18 U.S.C. § 401(1).

The court wherein proper venue on federal jurisdiction exists in an 18 U.S.C. § 401 proceeding has been generally agreed to be the court which rendered the decree and not the court located in the district where the violation occurred. *See Myers, surpa*, at 101; *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir.1963).

9-39.312 Notice Under Rule 42(b) of the Federal Rules of Criminal Procedure

An indirect criminal contempt action must be instituted pursuant to the notice requirements set forth in Rule 42(b) of the Federal Rules of Criminal Procedure. It need not be instituted by a criminal indictment, *Green v. United States*, 356 U.S. 165 (1958); consequently, the sufficiency of a criminal contempt petition filed under Rule 42(b) is not to be tested by the more stringent standards set for an indictment. *See Bullock v. United States*, 265 F.2d 683, 691-92 (6th Cir.), *cert. denied*, 360 U.S. 909 (1959). Furthermore, notice under Rule 42(b) need not be as precise or as detailed as the certificate which the judge is required to prepare in a summary contempt proceeding under Rule 42(a). *See United States v. Robinson*, 449 F.2d 925, 930 n. 8 (9th Cir.1971). Formal notice is not required where the defendant has actual knowledge of the nature of the contempt proceedings. *In re Sadin*, 509 F.2d 1252 (2d Cir.1975); *United States v. Handler*, 476 F.2d 709 (2d Cir.1973). However, rather than risk the possibility of misunderstanding, the notice requirements of Rule 42(b) should be strictly followed. *See Universal City Studios v. N.Y. Broadway International Corp.*, 705 F.2d 94 (2d Cir.1983). *Cf. United States v. North*, 621 F.2d 1255, n. 7 (3d Cir.1980), *cert. denied*, 449 U.S. 866 (1981).

In the event a defendant deems the charges made in the criminal contempt petition to be too indefinite, his/her remedy is to move the court for a

bill of particulars. *See Fox v. United States*, 77 F.2d 210 (4th Cir.1935), *cert. denied*, 298 U.S. 642 (1936).

The petition under Rule 42(b) must satisfy the basic requirements of ''fair notice.'' *United Mine Workers of America, supra*, at 298-300. It must also state the ''essential facts'' constituting the criminal contempt charged. *See United States v. J. Myers Schine*, 260 F.2d 552, 557 (2d Cir.1958), *cert. denied*, 358 U.S. 934 (1959); *Carlson v. United States*, 209 F.2d 209, 218 (1st Cir.1954). The words ''criminal contempt'' need not be used in the petition or rule to show cause, so long as the contemnor realizes that a criminal contempt prosecution is contemplated. *See United States v. Joyce*, 498 F.2d 592, 595 (7th Cir.1974).

Although verification of the petition may be based upon information and belief, *United Mine Workers of America, supra*, at 296, it is considered good practice for the government to file an affidavit with the petition. *See National Labor Relations Board v. Arcade-Sunshine Co.*, 122 F.2d 964, 965 (D.C.Cir.1941).

Rule 42(b) of the Fed.R.Cr.P. requires that the notice allow a ''reasonable time for the preparation of a defense.'' A ''reasonable time'' will vary according to the circumstances of each case, but in no event can the time be reduced below the minimum needed adequately to prepare a defense. Nevertheless, a short time can be sufficient time. *See United States v. Hutchinson*, 633 F.2d 754 (9th Cir.1980); *United States v. Hawkins*, 501 F.2d 1029 (9th Cir.) *cert. denied*, 419 U.S. 1079 (1974); *In re Sadin, supra, In re Lewis*, 501 F.2d 418 (9th Cir.1974); *United States v. Alter*, 482 F.2d 1016, 1023 (9th Cir.1973).

When the contemnor's defenses raise complex legal issues or there is an indication that an evidentiary hearing may be required to resolve factual issues, the five-day notice period prescribed by Rule 45(d) of the Fed.R.Cr.P. should be adopted as the standard, absent a showing by the government of some compelling need to shorten time and absent a showing by the contemnor of some reason why a longer time is needed to prepare a defense. Compelling need for reducing time is not shown by the fact alone that the alleged contemnor is a witness in a pending grand jury investigation. *In re Vigil*, 524 F.2d 209 (10th Cir.1975); *Alter, supra*.

9-39.313 Probable Cause of a Willful Violation

It is unclear as to whether probable cause that a willful violation has occurred is a condition precedent to the commencement of a criminal contempt action. Initially, it should be noted that the vast majority of criminal contempt decisions make no mention of such a requirement. However, in *United States v. Kelsey-Hayes Co.*, 476 F.2d 265 (6th Cir.1973), the court dismissed the case prior to trial on the basis of its determination that there was a lack of probable cause that a willful violation had

occurred. In *In re United Corporation*, 166 F.Supp. 343 (D.Del.1958), it was held to be within the court's discretion to require a showing of probable cause before appointing an attorney to prosecute a criminal contempt action which was initiated by a private party, as opposed to the United States.

9-39.314 Necessity of a Demand for Compliance With the Decree

The prevailing view is that the petitioner is not required to attempt to obtain compliance with the decree before filing a criminal contempt action for the reason that an act of criminal contempt once committed may not be purged. *In re Curtis' petition*, 240 F.Supp. 475, 483 (E.D.Mo.1965), *aff'd.*, 362 F.2d 999 (8th Cir.), *cert. denied*, 386 U.S. 914 (1966). Accordingly, a court may punish a party for criminal contempt even though the party eventually complies with the order. *Gompers, supra*, at 452. However, in *Kelsey-Hayes Co., supra*, the court noted, in the course of granting a motion to dismiss prior to trial, that its decision was prompted in part by what it contended to be the lack of fairness emanating from the failure of the government to attempt to obtain compliance with the decree prior to commencing the criminal proceeding.

9-39.315 Use of a Single Petition to Institute Both a Civil and Criminal Contempt Action

Although a single petition may be used to institute both a civil and a criminal contempt action directed at the same transaction or series of transactions, it has been held that the better practice is to file the petitions for such actions separately. *Monroe Body Co. v. Herzog*, 13 F.2d 705 (6th Cir.1926), *modified*, 18 F.2d 578 (1927). The petition, in the event the civil and criminal contempt actions are filed together, must satisfy the requirements of Rule 42(b) of the Federal Rules of Criminal Procedure.

9-39.316 Role of the Grand Jury

In *Green, supra*, at 187, the Supreme Court held that criminal contempt actions need not be instituted by an indictment within the meaning of the Fifth Amendment of the United States Constitution. Although an indictment by a grand jury is not imperative in order to institute a criminal contempt action, such an action may be instituted by an indictment. *United States v. Snyder*, 428 F.2d 520, 522 (9th Cir.1970), *cert. denied*, 400 U.S. 903 (1970), *United States v. Bukowski*, 435 F.2d 1094, 1103 (7th Cir.1970), *cert. denied*, 401 U.S. 911 (1971); *Carlson v. United States, supra*, 209 F.2d at 218 (1st Cir.); *United States v. Goldfarb*, 167 F.2d 735 (2d Cir. 1948). In such a case, however, the indictment must comply with the notice requirements of Rule 42(b) of the Federal Rules of Criminal Procedure. *United States v. Mensik*, 440 F.2d 1232 (4th Cir.1971); *In re Amalgamated*

Meat Cutters and Butcher Workmen of N. America, 402 F.Supp. 725 (E.D.Wis. 1975). Cases have indicated that it may be objectionable to proceed by way of indictment because the interjection of an independent body into the contempt process might interfere with or impede judicial disposition of such matters. *United States v. Levya*, 513 F.2d 774, 775 (5th Cir.1975).

9-39.317 Persons Against Whom the Action May Be Commenced

To be held in criminal contempt for violation of a court order, the defendant must be an original party, one legally identified with an original party, or an aider and abettor of one of the above enumerated persons. *Backo v. Local 281, United Brothers of Carpenters and Joiners*, 438 F.2d 176, 180-81 (2d Cir.1970), *cert. denied*, 404 U.S. 858 (1971). *Reich v. United States*, 239 F.2d 134, 137 (1st Cir.1956), *cert. denied*, 352 U.S. 1004 (1957). *But see, Manness v. Meyers*, 419 U.S. 449 (1975) (attorney giving good faith legal advice not to be found in contempt).

9-39.318 Role of the Prosecutor

Prosecutive participation is ordinarily necessary to assist the court in the presentation of a criminal contempt case. The procedural requirements of Rule 42(b) of the Federal Rules of Criminal Procedure, and those such as trial by jury imposed judicially under due process considerations, give rise to the need for presentation of the evidence by an officer of the court appointed for prosecutive purposes. The U.S. Attorney naturally assumes the role of prosecutor when he/she initiates an application for a show cause order under Rule 42(b). However, in a number of circumstances involving the disobedience of judicial authority outside the presence of the court, contempt proceedings are initiated *sua sponte* by the court or by private litigants for whose benefit such orders have issued. In the great majority of cases the dedication of the executive branch to the preservation of respect for judicial authority makes the acceptance by the U.S. Attorney of the court's request to prosecute a mere formality; however, there may be sound reasons in a given case for the U.S. Attorney to decline participation in the proceedings and for the prosecution to be conducted on behalf of the court by private counsel appointed by the court for this purpose. On a case-by-case basis, the U.S. Attorney should evaluate not only the propriety of his/her participation in 18 U.S.C. § 401 proceedings, but also the interest of the government as a litigant vis-a-vis the clear duty of the U.S. Attorney to preserve respect for the authority of the federal court upon which most clearly successful law enforcement relies.

9-39.320 Defenses

9-39.321 Negation of Essential Elements

A. Lack of requisite intent.

It is generally agreed that some kind of wrongful intent is required to sustain a criminal contempt conviction. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *see also Falstaff Brewing Corp., supra*, at 782-783. There must be a willful, contumacious, or reckless state of mind to warrant conviction for criminal contempt. *In re Joyce*, 506 F.2d 373 (5th Cir.1975). In many cases it has been held that general criminal intent is all that is required to satisfy the scienter element in a criminal contempt action. *See United States v. Fidanean*, 465 F.2d 755 (5th Cir.), *cert. denied*, 409 U.S. 1054 (1972); *United States v. Custer Channel Wing Corporation*, 376 F.2d 675, 680 (4th Cir.1967), *cert. denied*, 389 U.S. 850. That the acts were volitional and done with an awareness that they were unlawful shows a sufficient degree of intent, regardless of motive. *See United States v. Patrick*, 542 F.2d 381, 389 (7th Cir.1976), *cert. denied*, 430 U.S. 931 (1977). On the other hand, authority exists for the proposition that a specific or flagrant intent to violate a decree is essential to a criminal contempt action. *See United States v. Kelsey-Hayes Company, supra; In re Floersheim*, 316 F.2d 423, 428 (9th Cir.1963).

B. Lack of knowledge with respect to (1) decree's existence, or (2) the occurrence of conduct violative of the decree.

The lack of knowledge of the decree's existence at the time he/she acted contrary thereto, or the lack of knowledge with respect to the occurrence of the violative acts, ordinarily exonerates the defendant of criminal liability. *In re Joyce, supra; Yates v. United States*, 316 F.2d 718, 723 (10th Cir.1963). It is doubtful, however, whether either of these defenses could be successfully employed if the defendant were an original party, as opposed to an aider and abettor, or if knowledge of a violation of the decree could have been obtained through an exercise of reasonable diligence.

C. Lack of knowledge with respect to the proscribed conduct.

If the decree is ambiguous, the defendant may assert as a defense that there was a lack of fair notice with respect to the proscribed conduct. *See United States v. Wefers*, 435 F.2d 826, 830 (1st Cir.1970). The ''mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible.'' *United States v. Greyhound Corp.*, 508 F.2d 529, 532 (7th Cir.1974).

9-39.322 Statute of Limitations

Section 3282 of Title 18 applies a five-year statute of limitations to all criminal contempt actions encompassed by 18 U.S.C. § 401. If, however, the contemptuous act constitutes also a criminal offense under any statute of the United States or under the laws of any state in which the act was committed, then the contempt must be prosecuted under 18 U.S.C. § 402. By reason of 18 U.S.C. § 3285, a one-year statute of limitations applies to

contempt actions brought under 18 U.S.C. § 402. It should be noted, however, that 18 U.S.C. § 402 is inapplicable to ''contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.''

The ''continuing act'' concept is applicable to criminal contempt actions. *J. Myer Schine, supra*, at 555-56.

9-39.323 Good Faith Reliance Upon the Advice of Counsel

According to the majority view, acting in good faith upon the advice of counsel is not a defense to an action for criminal contempt. *See United States v. Seavers*, 472 F.2d 607 (6th Cir.1973); *United States v. Dimauro*, 441 F.2d 428 (8th Cir.1971); *United States v. Snyder*, 428 F.2d 520, 522 (9th Cir.1970), *cert. denied*, 400 U.S. 903 (1970); *Goldfarb, supra*, at 735. Good faith reliance upon the advice of counsel may, however, be considered in mitigation of punishment. *United States v. Custer Channel Wing Corp.*, 247 F.Supp. 481, 503 (D.Md.1965), *aff'd*, 376 F.2d 675 (4th Cir.), *cert. denied*, 389 U.S. 850 (1967).

Some decisions have held that good faith reliance upon the advice of counsel is a complete defense in a criminal contempt action. *In re Eskay*, 122 F.2d 819 (3d Cir.1941).

9-39.324 Purging

(*See* USAM 9-39.113).

9-39.325 Failure to Attempt to Obtain Compliance Prior to Filing

(*See* USAM 9-39.314).

9-39.326 Violation of an Invalid Decree

A decree which has been erroneously rendered must nonetheless be obeyed until overturned, and violators thereof may be punished for criminal contempt. *United Mine Workers of America, supra*, at 293; *J. Myer Schine, supra*, at 551. A possible exception exists where the order is ''transparently'' unlawful. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967). *See also Maness v. Meyers*, 419 U.S. 449 (1975) (lawyer may not be held in contempt for good faith advice to client to invoke Fifth Amendment).

A contempt proceeding does not open to reconsideration the legal or factual basis of the underlying order; the proceeding is not a retrial of the original controversy. *See Maggio v. Zietz*, 333 U.S. 56, 69 (1948); *United States v. First State Bank*, 691 F.2d 332 (7th Cir.1982). Thus, an issue that could have been raised when the decree was entered cannot be

raised for the first time in a contempt proceeding. *See generally, United States v. Rylander,* 460 U.S. 752 (1983).

9-39.327 Inability Versus Refusal to Comply

The good faith inability to comply with a decree, as contrasted with the refusal to do so, is a complete defense to a criminal contempt action. *Joyce, supra,* at 596; *J. Myer Schine, supra,* at 555. But the defendant bears the burden, at least after some initial showing, of demonstrating an inability to comply, and defendant cannot invoke the Fifth Amendment as a justification for not meeting the burden. *See United States v. Rylander, supra; United States v. Hankins,* 565 F.2d 1344 (5th Cir.), opinion clarified and *rehearing denied,* 581 F.2d 431 (1978), *cert. denied,* 440 U.S. 909 (1979).

9-39.330 Consolidation for Trial of Issues in Civil and Criminal Contempt Proceedings

Consolidation for trial of issues germane to civil and criminal actions involving the same transaction or series of transactions is permitted where the parties stipulate to such. In addition, consolidation without stipulation is generally allowed and appellate courts have not reversed except where there has been substantial prejudice. *See United Mine Workers of America, supra,* at 298-300; *Mitchell v. Fiore,* 470 F.2d 1149, 1153 (3d Cir.1972), *cert. denied,* 411 U.S. 938 (1973).

9-39.340 Right to Counsel

A person in criminal or civil contempt may not be sentenced to a term of imprisonment unless he was afforded the right to counsel at the contempt proceeding. *See Argensinger v. Hamlin,* 407 U.S. 25 (1972); *In re Rosahn,* 671 F.2d 690, 697 (2d Cir.1982); *In re Di Bella,* 518 F.2d 955 (2d Cir.1975); *In re Kilgo,* 484 F.2d 1215 (4th Cir.1973); *Henkel v. Bradshaw,* 483 F.2d 1386 (9th Cir.1973).

9-39.350 *Privilege Against Self-Incrimination*

The privilege against self-incrimination contained in the Fifth Amendment to the United States Constitution is available in criminal contempt cases. *See Bloom v. Illinois,* 391 U.S. 194, 205 (1968); *Gompers, supra,* at 444. A corporation or partnership charged with criminal contempt, however, has no privilege against self-incrimination within the meaning of the Fifth Amendment. *See United States v. Kordel,* 397 U.S. 1, 7 (1970); *Bellis v. United States,* 417 U.S. 85 (1974).

9-39.360 Burden of Proof

In a criminal contempt action the United States had the burden of proving each of the elements of the offense beyond a reasonable doubt. *See*

Bloom v. Illinois, supra at 205; *Gompers, supra,* at 444; *Falstaff Brewing Corp. v. Miller Brewing Co., supra* at 770 n. 1; *United States v. Columbia Broadcasting System,* 497 F.2d 107 (5th Cir.1974); *Peterson, supra,* at 1135.

9-39.400 DIRECT CONTEMPT

9-39.410 Witness's Refusal to Obey Court Order to Testify at Trial Versus Witness's Refusal to Obey Court Order to Testify Before a Grand Jury

A witness who refuses to testify at trial after having been granted immunity from prosecution may be summarily convicted of direct criminal contempt under Rule 42(a), Federal Rules of Criminal Procedure. Such refusals to testify are contemptuous of judicial authority because they are intentional obstructions of court proceedings that literally disrupt the progress of the trial and hence the orderly administration of justice. ''Rule 42(a) was never intended to be limited to situations where a witness uses scurrilous language, or threatens or creates overt physical disorder and thereby disrupts a trial. All that is necessary is that the judge certify that he 'saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court.' '' *See United States v. Wilson,* 421 U.S. 309, 315 (1975), *Howell v. Jones,* 516 F.2d 53, (5th Cir.), *cert. denied,* 424 U.S. 916 (1976).

In contrast, a witness who refuses to testify before a grand jury on the ground of the privilege against self-incrimination after having been granted immunity from prosecution and ordered to do so by a court, may only be prosecuted for criminal contempt according to the procedures applicable to indirect contempts under Rule 42(b) of the Federal Rules of Criminal Procedure. The witness may not be brought before the court, asked the same questions as were asked by the grand jury and then found in summary criminal contempt for refusing to answer these questions. *See Harris v. United States,* 382 U.S. 162 (1965); *United States v. DiMauro, supra.* According to the majority view, when a witness is to be held in civil, as opposed to criminal, contempt for refusing to testify or to produce evidence before a grand jury, the procedures of Rule 42(b) must likewise be followed. *Sadin, supra; Vigil, supra,* at 218-19; *United States v. Hawkins,* 501 F.2d 1029, 1031 (9th Cir.1974), *cert. denied,* 419 U.S. 1079 (1974). *In re Mintzer,* 511 F.2d 471, 472 n. 1 (1st Cir.1974). Title 28, United States Code, Section 1826(a), which provides for summary civil contempt proceedings whenever a witness refuses without just cause to comply with a court order to testify before a grand jury, therefore, ''has no effect upon the procedural ground rules the [Supreme] Court had laid in cases anteceding ... enactment of the statute—rules which expressly forbade summary proceedings for such contempts.'' *Alter, supra,* at 1022.

9-39.420 Necessity of Warning of Contemptuous Conduct

When the defendant's conduct is clearly contemptuous, *United States v. Schiffer,* 351 F.2d 91 (6th Cir.1965), *cert. denied,* 384 U.S. 1003 (1966), or where he/she is aware of the character of his conduct, *United States v. Seale,* 461 F.2d 345 (7th Cir.1972), the court need not warn the defendant of the fact that his/her conduct is contemptuous prior to summarily holding him/her in criminal contempt although such a warning may be appropriate. *United States v. Abascal,* 509 F.2d 752, 755 (9th Cir.), *cert. denied,* 421 U.S. 1027 (1975).

9-39.430 *Summary Punishment at the End of Trial—Judicial Bias*

''[T]here are two policies which may justify summary contempt proceedings before the trial judge. First, it may be necessary to preserve order in the courtroom in order to protect the authority of the court and the integrity of the trial process—the policy of preserving order. Second, there is a notion that when contemptuous conduct has occurred before the judge in open court, it would be a useless formality and a waste of resources to indulge in a full hearing because the judge, having witnessed the conduct, is competent to interpret the facts and apply the law—the waste of resources justification.'' *United States v. Meyer,* 462 F.2d 827, 831 (D.C.Cir.1972); *Cooke v. United States,* 267 U.S. 517, 534 (1925). When a summary contempt proceeding is conducted at the end of a trial, the policy of preserving order in the courtroom is inapplicable since the trial has already been terminated. If the judge is biased against contemnor, then the waste of resources justification is absent since the judge will be unable to competently interpret the facts and apply the law. Bias arises when the judge becomes ''personally embroiled'' with the contemnor, *Offutt v. United States,* 348 U.S. 11, 17 (1954), when he/she necessarily becomes embroiled in a running controversy with the contemnor so that he/she might naturally be expected to harbor ''marked personal feelings,'' *Mayberry v. Pennsylvania,* 400 U.S. 455, 464 (1971); *Taylor v. Hayes,* 418 U.S. 488, 503 (1974), or when he/she is in adversary posture with the contemnor, even if he/she has not been personally attacked. *Johnson v. Mississippi,* 403 U.S. 212, 215-216 (1971). It should be noted that it is not the contemnor's conduct alone which determines whether there exists bias, but rather the character of the judge's response to such conduct. *Taylor, supra,* at 503 n. 10.

During the course of a trial, a judge may impose immediate summary punishment upon a contemnor even if he/she is biased. The policy of preserving order in the courtroom outweighs the waste of resources justification. *Mayberry, supra,* at 463; *Seale, supra,* at 351. Where the judge chooses to act summarily at the end of the trial, when the policy of preserving order in the courtroom is inapplicable, he/she may do so only in the absence of bias. Where bias is present, the judge must disqualify himself/herself and permit another judge to conduct the contempt proceed-

ing pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. Compare *Taylor, supra; Mayberry, supra; Offutt, supra; Meyer, supra; In re Dellinger,* 461 F.2d 389 (7th Cir.1972); and *Seale, supra,* with *Sacher v. United States,* 343 U.S. 1 (1952); *Weiss v. Burr,* 484 F.2d 973 (9th Cir. 1973), *cert. denied,* 414 U.S. 1161 (1974); *Schiffer, supra; United States v. Galante,* 298 F.2d 72 (2d Cir.1962). In the absence of bias, the preferred procedure is for the judge to act summarily at the end of the trial rather than during the trial where the contemnor is an attorney. Such a procedure minimizes the prejudice to the attorney's client which arises from the contempt action. *Taylor, supra,* at 498; *Mayberry, supra,* at 463 (policy is not present where defendant is proceeding *pro se*); *Sacher, supra.*

When a contemnor is to be summarily held in criminal contempt at the end of trial, the person should be given ''an opportunity to speak in his/her own behalf in the nature of right of allocution.'' *Groppi v. Leslie,* 404 U.S. 496, 504 (1972); *Taylor, supra,* at 498; *Weiss v. Burr, supra.*

9-39.440 *Certification of Judge Under Rule 42(a) of the Federal Rules of Criminal Procedure*

Under Rule 42(a) of the Federal Rules of Criminal Procedure, the judge in a summary criminal contempt action must certify that ''the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.'' The conduct described in the certificate must in itself constitute contempt. *See Hallinan v. United States,* 182 F.2d 880 (9th Cir.1950), *cert. denied,* 341 U.S. 952 (1951). This is because ''the function of the certificate is not to give notice to the defendant or to frame an issue to be tried, but solely to permit an appellate court to review the judge's action.'' *United States v. Marshall,* 451 F.2d 372, 377 (9th Cir.1971); *In re Williams,* 509 F.2d 949 (2d Cir.1975); *United States v. Schrismsher,* 493 F.2d 842 (5th Cir.1974). The certificate must recite the specific factual findings upon which the charges are based. Conclusory allegations are not sufficient. *In re Williams, supra; Schrismsher, supra.* The certificate does not meet the requirements of Rule 42(a) if it incorporates the entire trial transcript by general reference, rather than recite specific facts. *In re Williams, supra; United States v. Marshall, supra.* A judge's failure to make the required certificate does not necessarily call for reversal of the contempt conviction. A remand of the cause to permit an opportunity for the necessary certificate may be a sufficient remedy. *See United States v. Mars,* 551 F.2d 771, *affirmed after remand,* 553 F.2d 508 (6th Cir.1977).

9-39.500 LEAST POSSIBLE POWER RULE

In a contempt proceeding, the court must exercise the least possible power to obtain the desired result. This rule requires that the trial judge

expressly consider the feasibility of obtaining acceptable relief through the imposition of civil contempt before resorting to criminal contempt. Although such a consideration is required, the judge need not in fact impose civil penalties prior to the imposition of criminal penalties. *See United States v. Wilson,* 421 U.S. 309 (1975); *Shillitani, supra; Baker v. Eisenstadt,* 456 F.2d 382 (1st Cir.), *cert. denied,* 409 U.S. 846 (1972).

Furthermore, this rule requires that summary punishment be reserved for ''exceptional circumstances.'' *Harris, supra,* at 164. *But see, United States v. Wilson, supra.*

9-39.600 TRIAL

9-39.610 Jury Trial

The Supreme Court has adopted the standard of 18 U.S.C. § 1(3), defining a ''petty offense,'' insofar as it has ruled that imprisonment for longer than six months for contempt is constitutionally impermissible without a jury trial, *Taylor, supra. See also Frank v. United States,* 395 U.S. 147 (1969) (sentence of three years probation permissible without jury trial). However, the Court has declined to rule that contempt proceedings, at least as to organizations, resulting in fines of greater than the amount set out in 18 U.S.C. § 1(3) are automatically entitled to jury trials. *See Muniz v. Hoffman,* 422 U.S. 454, 477 (1975).

A court may, during the course of a trial, impose successive summary contempt orders resulting in an aggregate sentence of imprisonment of more than six months in the absence of a jury trial. Such sentencing is permissible so long as no one contempt order carries a sentence of greater than six months. If, however, the court chooses to impose a single finding of contempt at the termination of the trial, imprisonment for longer than six months is constitutionally impermissible without a jury trial, even if the judge calculates the sentence of imprisonment for each contempt at six months or less. *See Codispoti v. Pennsylvania,* 418 U.S. 506 (1974).

If the contempt falls within the purview of 18 U.S.C. § 402, contempts constituting crimes, then the contemnor is automatically entitled to a jury trial by reason of 18 U.S.C. § 3691.

9-39.620 Public Trial

The Sixth Amendment right to a public trial attaches to contempt proceedings. *Mayberry, supra; Bloom v. Illinois, supra; Sacher, supra; In re Oliver,* 333 U.S. 257 (1948); *In re Rosahn,* 671 F.2d 690 (2d Cir.1982). The public may, however, be excluded from the courtroom during that portion of the proceeding in which the minutes of a grand jury are read into the record in a contempt action involving the refusal to testify before a grand jury. *See Levine v. United States,* 362 U.S. 610 (1960); *In re DiBella, supra.*

9-39.700 DOUBLE JEOPARDY

Summary punishment for contempt of court under Rule 42(a) of the Federal Rules of Criminal Procedure will not bar a subsequent prosecution for the same act as an independent statutory offense. *See United States v. Rollerson,* 449 F.2d 1000 (D.C.Cir.1971) (hurling a water pitcher at prosecutor in open court held punishable both as contempt and assault); *United States v. Mirra,* 220 F.Supp. 361 (S.D.N.Y.1963).

The court of appeals in *Rollerson* declined to decide whether the double jeopardy clause would bar a criminal prosecution following a separate contempt hearing pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure. *Rollerson, supra,* at 1005 n. 13. But *see United States v. Lederer,* 140 F.2d 136, 138 (7th Cir.1944); which ruled that the power of the Attorney General to subsequently prosecute for an independent regulatory violation does not preclude the right of the court to protect the dignity of its injunction through a contempt prosecution on notice and hearing.

Contumacious refusals by an individual to testify in successive trials can properly be charged as two counts of criminal contempt without subjecting the defendant to double jeopardy or a multitudinous indictment. *See United States v. Smith,* 532 F.2d 158 (10th Cir.1976).

9-39.800 SENTENCING

9-39.810 Effect of 18 U.S.C. § 401 on the Appropriate Fine or Imprisonment

Section 401 of Title 18 provides that a court may not both fine and imprison a contemnor for a single act of criminal contempt. *In re Bradley,* 318 U.S. 50, 51 (1943); *United States v. Hilburn,* 625 F.2d 1177 (6th Cir.1980); *United States v. DiGirlomo,* 548 F.2d 252 (8th Cir.1977); *MacNeil v. United States,* 236 F.2d 149, 154 (1st Cir.), *cert. denied,* 352 U.S. 912 (1956). This, however, does not prohibit the imposition of a fine and a term of imprisonment when both civil and criminal contempt actions are commenced in regard to the same transaction, *Penfield Co., supra,* at 594, with one serving as a punitive exaction and the other as a coercive or compensatory sanction. *Mitchell v. Fiore, supra,* at 1154. *See* Sentencing Guidelines § 2J1.1.

9-39.820 Discretion with Respect to the Appropriate Fine or Imprisonment

Courts have broad discretion in setting the appropriate fine or imprisonment following a criminal contempt proceeding. *See Frank v. United States,* 395 U.S. 147, 149 (1969); *United Mine Workers of America, supra,* at 303; *United States v. Ray,* 683 F.2d 1116 (6th Cir.1982), *cert. denied,* 163 S.Ct. 578 (1983); *Greyhound Corp., supra,* at 541 (7th Cir.1974); *Moore v. United States,* 150 F.2d 323, 325 (10th Cir.1945), *cert. denied,* 326 U.S. 740 (1945); *Brooks v. United States,* 119 F.2d 636, 646 (9th Cir.), *cert.*

denied, 313 U.S. 594 (1941). However, the sentence imposed in a criminal contempt is subject to appellate review and modification. *Green v. United States*, 356 U.S. 165 (1958); *United States v. Bukowski*, 435 F.2d 1094 (7th Cir.), *cert. denied*, 401 U.S. 911 (1971).

9-39.900 APPEAL

Section 3731 of Title 18 has been construed to permit appeals by the United States in criminal contempt actions wherein a district court enters what is tantamount to a dismissal of an indictment or an information. *United States v. Sanders*, 196 F.2d 895, 897 (10th Cir.), *cert. denied*, 344 U.S. 829 (1952).

The conviction in a criminal contempt action is a final judgment and is immediately appealable. It is stated to be the settled rule that an order which fines or imprisons the contemnor in a civil contempt proceeding is reviewable only on appeal from the final judgment of the main cause of action because a civil contempt proceeding is in effect a continuation of the main proceeding. *Carbon Fuel Co. v. United Mine Workers*, 517 F.2d 1348 (4th Cir.1975). However, an order of confinement under 28 U.S.C. § 1826 for refusing without just cause to testify or produce other information in response to a court order is immediately appealable.

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9-40.000 BANKING FRAUDS

The Criminal Division's Fraud Section has supervisory authority over the bank fraud statutes. Prior approval from the Fraud Section for an indictment under these statutes is not required.

9-40.100 EMBEZZLEMENT, ABSTRACTION, PURLOINING OR WILLFUL MISAPPLICATION, 18 U.S.C. §§ 656, 657

These sections differ mainly in the types of financial institutions to which they apply. 18 U.S.C. § 656 applies to Federal Reserve banks, member banks, national banks and banks whose deposits are insured by the Federal Deposit Insurance Corporation. 18 U.S.C. § 657, insofar as it concerns the banking industry (it also concerns various governmental and quasi-governmental agencies) applies to financial institutions insured by the Federal Savings and Loan Insurance Corporation and the Administrator of the National Credit Union Administration. The following applies to both statutes.

9-40.110 Applicability

The purpose of these statutes is to preserve and protect the assets of banks having a federal relationship. *See United States v. Garrett,* 396 F.2d 489 (5th Cir.), *cert. denied,* 393 U.S. 952 (1968).

However, they apply only to a particular class of individuals, *i.e.*, officers, directors, agents, employees or whoever is connected in any capacity with any of the designated institutions. *See United States v. Cooper* 464 F.2d 648 (10th Cir.1972), *cert. denied,* 409 U.S. 1107, *reh'g denied*, 410 U.S. 959 (1973).

The term ''connected in any capacity'' is necessarily broad to include any person who has such a relationship to the institution that he/she could injure it by committing one or more of the criminal offenses set out in 18 U.S.C. § 656 and § 657. In the *Garrett* case, the defendants, who were held to be ''connected in any capacity,'' had purchased a controlling interest in a bank, had exercised control through naming employees and associates to the board of directors, and were active in the affairs of the bank through increasing deposits. In *United States v. Edick,* 432 F.2d 350 (4th Cir. 1970), the defendant was the employee of a corporation which handled the proofing and bookkeeping for several banks controlled by a holding company. Because of the defendant's position, the defendant was able to divert bank funds. The defendant's relation to the bank was held to be the same as if the defendant had been a bank employee doing this essential bookkeeping work the court held that he was ''connected in any capacity'' with the victim banks. Similarly, in *United States v. Fulton*, 640 F.2d 1104, 1105 (9th Cir.1981), the defendant-embezzler was covered under the statute even

though she worked for a mortgage company which was a wholly-owned subsidiary of a federally insured bank.

9-40.120 Actions Proscribed

The term ''embezzlement'' means the unlawful taking or conversion by a person to his/her own use of the monies, funds or credits which came into his/her custody or possession lawfully by virtue of his/her office or employment. *See United States v. Northway,* 120 U.S. 327 (1887). If embezzlement is charged, the conversion alleged may not be to some third party other than the embezzler himself/herself. *See United States v. Williams,* 478 F.2d 369 (4th Cir.1973). Rather abstraction or misapplication should be charged where there is a third-party beneficiary. But it is a jury question whether or not the defendant had sole access to the funds so as to support a charge of embezzlement. *See United States v. Walker,* 677 F.2d 1014, 1016 (4th Cir.1982).

Abstraction is the act of wrongfully taking or withdrawing monies, funds or credits with the intent to injure or defraud the bank or some other person, and without the bank's knowledge or consent, or that of its board of directors, and converting them to the use of oneself or some other person or entity other than the bank. *United States v. Breese,* 131 F. 915 (W.D.N.C. 1904), *rev'd on other grounds,* 142 F. 250 (4th Cir.1906). The word ''abstract'' has long been a term of certain, simple and unambiguous meaning. *See United States v. Archambaulat,* 441 F.2d 281 (10th Cir.1971); *Northway* 120 U.S. at 335.

There has apparently been only one case which discussed ''purloining'' in the context of 18 U.S.C. § 656, and the court therein accepted the definition which has applied to other criminal statutes, *Archambaulat,* 441 F.2d at 282. ''Purloining'' is a species of larceny which fills the gap between the sometimes doubtful common law definition of larceny and the modern criminal code definition of larceny. *See Archambaulat,* 441 F.2d at 283 *citing, United States v. Handler,* 142 F.2d 351 (2d Cir.1944); *Crabb v. Zerbst,* 99 F.2d (5th Cir.1938).

The term ''misapplication'' means a willful and unlawful misuse of monies, funds or credit of the bank made with intent to injure or defraud the bank. *See Hernandez v. United States,* 608 F.2d 1361 (10th Cir.1979); *United States v. Welliver,* 601 F.2d 203 (5th Cir.1979); *Garrett,* 396 F.2d at 491. *See also United States v. Moraites,* 456 F.2d 435, 441 (3d Cir. 1972).

''The misapplication of funds proscribed by 18 U.S.C. § 656 occurs when funds are distributed under a record which misrepresents the true state of the record with the intent that bank officials, bank examiners or the Federal Deposit Insurance Corporation will be deceived.'' *United States*

v. Twiford, 600 F.2d 1339 (10th Cir.1979) *quoting, United States v. Kennedy*, 564 F.2d 1329, 1339 (9th Cir.1977).

Recently, a majority of the U.S. Supreme Court held that the Federal Bank Robbery Act, which proscribes the ''taking and carrying away'' of bank property with an intent to steal, 18 U.S.C. § 2113(b), is not limited in its application to common-law larcenies and that the statute can also be applied to some instances of obtaining money under false pretenses. *See Bell v. United States*, 103 S.Ct. 2398 (1983). The majority was careful to point out, however, that the statute would not apply to a false pretenses case where there is no taking and carrying away.

9-40.130 Examples of Misapplications

The following fact patterns are examples of misapplication, but not an exhaustive list of possible schemes. *See* USAM 9-40.131; 9-40.132; 9-40.135; 9-40.136, *infra*.

9-40.131 Bad Loans

The bad loan is probably the most obvious type of misapplication but it should be noted that a bad loan in and of itself might be mere maladministration as opposed to criminal misapplication. *See United States v. Giragosian*, 349 F.2d 166 (1st Cir.1965); *United States v. Williams*, 478 F.2d at 373; *Hernandez, supra* at 1364; *United States v. King*, 484 F.2d 924 (10th Cir.1973). It can occur by either granting an unsecured loan to a person who is not financially able to repay or by granting a loan on knowingly inadequate or valueless collateral. *See Mulloney v. United States*, 79 F.2d 566 (1st Cir.1935), *cert. denied*, 296 U.S. 658 (1936). The bad loan is often correlated with an interest of a bank officer or employee. *See Hargreaves v. United States*, 75 F.2d 68 (9th Cir.1935). The bad loan can be a misapplication, however, without any showing that the bank officer personally benefited from the transaction, if it can be shown that the officer acted in reckless disregard of the bank's interest. *See Logsdon v. United States*, 253 F.2d 12 (6th Cir.1958).

9-40.132 Dummy Loans

A misapplication occurs where an officer of a bank knowingly lends money to fictitious or financially insecure borrowers, where the loans are for his/her own benefit and his/her interest in said loans is concealed from the bank. *See United States v. Fortunato*, 402 F.2d 79 (2d Cir.1968) *cert. denied*, 394 U.S. 933 (1969), *United States v. Cooper*, 464 F.2d 650 (10th Cir.1972), *United States v. Kernodle*, 367 F.Supp. 844 (M.D.N.C.1973). However, when the nominee borrower is financially able to repay the loan or was at the time the loan was made, it may be difficult to establish the requisite intent to injure and defraud the bank. *See United States v. Gens*, 493 F.2d 216 (1st Cir.1974).

Subsequent to *Gens*, the Ninth Circuit in *United States v. Dreitzler*, 577 F.2d 539 (9th Cir.1978) and the Tenth Circuit in *Twiford*, 600 F.2d at 1341 specifically rejected the *Gens* decision. Although the Third Circuit in *United States v. Gallagher*, 576 F.2d 1028 (3d Cir.1978) initially accepted the *Gens* rationale, the court rejected the loan-reloan approach in circumstances where the nominee borrower was turning the proceeds of the loan over to the bank officer and found that there was misapplication in such circumstances. *United States v. Krepps*, 605 F.2d 101 (3d Cir.1979). The Eighth Circuit has followed the Third Circuit's lead in the *Krepps* case and found a violation of the misapplication statute where the proceeds of the loan were not turned over to a true third party but are turned over to the bank officer. *See United States v. Steffen*, 641 F.2d 591, 597 (8th Cir.) *cert. denied*, 452 U.S. 943 (1981).

Mere undisclosed self-dealing on the part of the loan officer may not be enough for misapplication. There must be some false pretense or false statement accompanying the transaction. *See United States v. Schoenhut*, 576 F.2d 1010, 1025 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978). Nonetheless self-dealing usually generates some false statement or active deception. For example, in *United States v. Foster*, 566 F.2d 1045, 1050 (6th Cir.1977), *cert. denied*, 439 U.S. 917 (1978), the deception was the granting of a loan for a greater amount than was required for the stated purpose in order to fund the loan officer's own contribution to the partnership which received the loan.

In addition to 18 U.S.C. § 656 and § 657, consideration should also be given to other statutes in connection with third-party loans for the benefit of bank officials. An officer of a national or FDIC insured bank can be prosecuted for receiving directly any benefit from a loan transaction under 18 U.S.C. § 215 and an officer of a savings and loan association or credit institution can be prosecuted under 18 U.S.C. § 1006 for participation, directly or indirectly in any loan. Further, if a banking regulation is violated, the participants in the scheme might be prosecuted on the theory of a conspiracy to defraud the United States through a deliberate circumvention of a regulatory program. Finally, consideration may be given to a violation of 18 U.S.C. § 1014 if the borrower, even if financially responsible, falsifies the loan application as to the purpose of the loan.

9-40.133, 9-40.134 [Reserved]

9-40.135 Check Kiting

The check kite can be prosecuted as a bank fraud under 18 U.S.C. § 1344 if all or part of the activity occurred after October 12, 1984. Check kites also can be prosecuted as a misapplication under 18 U.S.C. § 656. *See United States v. Giordano*, 489 F.2d 327 (2d Cir.1973). The courts have held that the knowing use of funds and credits of a bank to further an illegal and

fraudulent check kite is a misapplication as that term is used in the statute. *See United States v. Rades*, 495 F.2d 1166 (3d Cir.1974); *Giordano*, 489 F.2d at 332. Of course, there must be a guilty party within the designated class. To preclude an acquittal on the basis that there was not a guilty principal, it is suggested that there should also be a charge under the mail or wire fraud statute, 18 U.S.C. §§ 1341 or 1343, or, for activity occurring after October 12, 1984, under the recently enacted bank fraud statute, 18 U.S.C. § 1344. If a bank officer, director, agent or employee is involved, a check kiting scheme might come within the scope of 18 U.S.C. § 1005. There is also the possibility of charging a violation of interstate transportation of property obtained by fraud under 28 U.S.C. § 2314 if it can be shown that the property taken by fraud was so transported.

In *United States v. Ness*, 665 F.2d 248 (8th Cir.1981), the defendant bank officer was convicted of misapplication for ''check rolling'' which occurred when he arranged, in violation of bank procedure, for insufficient checks to be paid out of the bank's funds rather than charged to the drawer's account or returned without payment.

9-40.136 Compensating Balances

Misuse of correspondent bank balances can be a misapplication where the facts show a detriment to the bank and a benefit to its officers. In such a scheme, bank officers utilized correspondent accounts of their banks for the purpose of compensating lending banks for loans granted to those officials or their associates. By using these accounts in this manner, the official may be able to obtain a loan at the preferential rate or circumvent other statutes and administrative regulations. Since the borrower maintains these balances as a condition of the loan, the borrower is able to utilize the funds and credits of his/her bank for his/her own benefit. *See United States v. Mann*, 517 F.2d 259 (5th Cir.1975), and *United States v. Brookshire*, 514 F.2d 786 (10th Cir.1975).

9-40.140 Elements

The essential elements of the crime are as follows: (1) the accused must be of the designated class of persons (2) of a particular type of federally-connected institution, and (3) he/she must have willfully misapplied monies, funds or credits of such institution or entrusted to its custody (4) with the intent to injure or defraud the institution. *See United States v. Vanatta*, 189 F.Supp. 939 (D.Hawaii 1960).

The general rule is that since the words ''willful misapplication'' have no settled technical meaning, there must be averments to show how the misapplication was made and that it was an unlawful one. *See United States v. Britton*, 107 U.S. 655, 669 (1882). *See also Mulloney*, 79 F.2d at 581. The court in the *Britton* case distinguished misapplication from maladministration. The honest exercise of official discretion in good faith,

without fraud, for the advantage, or supposed advantage of the association is not punishable; but if official action is taken, not in the honest exercise of discretion, in bad faith, for personal advantage and with fraudulent intent, it is punishable. For evidence sufficient to support a finding that the bank president and an attorney acted with sufficient knowledge and intent, *see United States v. Fusaro*, 708 F.2d 17 (1st Cir.), *cert. denied*, U.S. 104 S.Ct. 524 (1983).

The various circuit courts do not agree on the required averments to allege misapplication. For instance, it is generally necessary to allege that the monies, funds or credits were converted to the use of the accused or to some party other than the bank; however, in the Tenth Circuit if the total charge was embezzlement, abstraction, purloining or misapplication, it was held inherent in the indictment that appellant stood accused of misapplication. *See United States v. Archambaulat*, 441 F.2d 281 (10th Cir.1971). Misapplication, as distinguished from embezzlement, does not require a showing of prior lawful possession. *United States v. Hazeem*, 679 F.2d 770 (9th Cir.), *cert. denied*, 459 U.S. 848 (1982).

An essential element of the crime is that the defendant must be shown to have an intent to injure or defraud the bank. The language ''intent to injure or defraud'' was omitted from the 1948 revision of 18 U.S.C. § 656 because it was thought to be redundant. *See United States v. Logsdon*, 132 F.Supp. 3 (W.D.Ky.1955), *aff'd.*, 253 F.2d 12 (6th Cir.1958). However, the reviser's note specifically states that the language changes were not intended to affect the substantive law.

It has been held that allegation that a defendant willfully misapplied the monies of a bank is sufficient to charge the necessary fraudulent intent since such intent is inherent in the term ''willful misapplication.'' *Logsdon* 132 F.Supp. at 4. This position seems to have been adopted by the Ninth Circuit when the rest of the indictment makes clear the existence of fraudulent intent. *See Ramirez v. United States*, 318 F.2d 155 (9th Cir.1963). There is an indication in Judge Learned Hand's dictum in *United States v. Mattot*, 146 F.2d 197 (3d Cir.1944), that willful misapplication presupposes fraudulent intent. However, it is suggested that an indictment expressly allege that the willful misapplication ''was with intent to injure or defraud'' the bank or institution. In this regard, *see United States v. Adamson*, 700 F.2d 953 (5th Cir.1983) (*en banc*), *cert. denied*, U.S. 104 S.Ct. 116 (1983), which overruled *United States v. Wellliver*, 601 F.2d 203 (5th Cir.1979). In the *Adamson* case, the court in its decision stated that:

> [W]e conclude that the appropriate mens rea standard for § 656 is knowledge. . .. The trier of the fact may infer the required intent, i.e., knowledge, from the defendant's reckless disregard of the interest of the bank; however, jury instructions should not equate recklessness with intent to injure or de-

> fraud. . .. Accordingly, we overrule that portion of *United States v. Welliver*, 601 F.2d 203 (5th Cir.1979), which held that the proper mens rea standard for § 656 was a reckless disregard of the interests of the bank. 700 F.2d at 965.

9-40.150 Loss to the Bank

A necessary element of misapplication is a conversion of funds to the use of the defendant or some other person. However, it is not a defense that there was in fact no loss to the institution. *See United States v. Fortunato*, 402 F.2d 79 (2d Cir.1968), *cert. denied*, 394 U.S. 933 (1969). *United States v. Acree*, 466 F.2d 1114 (10th Cir.1972), *cert. denied*, 410 U.S. 913 (1973). The offense is committed if possession, control or use is lost even though it be only momentary, *Rakes*, 169 F.2d at 743; *Matsinger*, 191 F.2d at 1018; 367 F.Supp. at 850; subsequent return of the funds is no defense, *Acree*, 466 F.2d. It is not necessary for funds to actually leave the bank, as most banking transactions consist of bookkeeping entries rather than actual transfers of cash. *See United States v. Rickert*, 459 F.2d 352 (5th Cir.1972). *But see contra, Johnson v. United States*, 95 F.2d 813 (4th Cir.1938). In short, it is not necessary for the government to allege or to prove that the bank actually suffered any loss as a result of the defendant's actions. A review of the cases establishes that the requisite intent may be established if the defendant's acts created the ''possibility that the bank would suffer injury.'' *See United States v. Larson*, 581 F.2d 664, 668 (7th Cir.1978).

It has also been held that the possibility that the bank may benefit from misuse of its funds does not negate the intent to injure and defraud since the wrongdoing was complete at the time the alleged bribe payments were made. *See United States v. Caldwell*, 544 F.2d 691 (4th Cir.1976). However, the same court held in *United States v. Arthur*, 544 F.2d 720 (4th Cir.1976) that the illegal use of bank funds must be for a specific purpose and not merely to create good will. *See also United States v. Beran*, 546 F.2d 1316, *cert. denied*, 97 S.Ct. 1330 (1976), where it was held that only probability of loss to the bank is necessary to establish intent to defraud, that neither a possibility to future benefit to the bank nor restitution are defenses to the charge of misapplication. However, *see United States v. Kiley*, 550 F.2d 233 (5th Cir.1977) where it was held that intent to injure and defraud is an essential element and evidence to disprove this element may not be excluded.

9-40.160 Bank Funds

The funds of a wholly-owned subsidiary belong to the parent bank within the meaning of 18 U.S.C. § 657 and there may be a prosecution for misapplication as long as the parent corporation is a federally insured bank or

lender. *See United States v. Cartwright*, 632 F.2d 1290, 1292 (5th Cir. 1980).

9-40.170 Duplicity in Indictments

The problem of duplicity or multiplicity frequently arises where there has been a series of acts of embezzlement or misapplication. There is then an inclination to combine these violations in one count, setting forth the time period during which they occurred and the total amount embezzled or misapplied, rather than a separate count for each violation, particularly where each violation involves a relatively small amount. Since the courts have not extensively considered this problem in connection with banking violations, reliance must be placed on the general rule that duplicity must be resolved by the test of whether each offense requires proof of an additional fact that the others do not. (*See USAM* 9-42.220 for a general discussion of duplicity.)

Court considerations of the problem in banking cases are: (1) *United States v. Martindale*, 146 F. 280, 288-289 (D.Kan. 1903), where the court held that where a sum of a bank's money was fraudulently applied to the payment of three separate notes, the misapplications should be charged in separate counts. The court also strongly disapproved of the ''general'' or ''comprehensive'' type of count which alleged only that between two dates a total sum of money, funds or credits were abstracted or misapplied from a bank; (2) *United States v. Matsinger*, supra at 1018, where the court held when two checks are part of one transaction and one misapplication, it is not necessary to have separate counts for each check; and (3) *United States v. Hale*, 468 F.2d 435 (5th Cir. 1972), *reh'g denied*, 475 F.2d 1404 (1973), where the defendant objected to being sentenced on each of six counts of misapplication, the court held that where each count required proof that the others did not, conviction and punishment on each count was proper.

The rule, in the absence of judicial determination to the contrary, appears to be that when a bank officer or employee is moved to embezzle, misapply or abstract bank funds or money, this impulse, even if it results in a series of transactions, constitutes a separate violation and should be charged in a separate count. Each successive impulse, no matter how much it is in common with previous ones, must be the subject of individual counts.

9-40.180 Aiding and Abetting

Since 18 U.S.C. § 656 and § 657 are class statutes, it is essential that the indictment contain a sufficient factual allegation that the bank official violated the statute, whether or not that official is actually charged in the indictment, if an aider and abettor is to be charged. The mere statement of a conclusion that the bank official violated the statute is not sufficient. *See United States v. Tornabene*, 222 F.2d 875 (2d Cir. 1955). The guilt of the bank official is essential to the crime of aiding

and abetting a violation of 18 U.S.C. § 656 or § 657. *See United States v. Pyle*, 279 F. 290 (S.D.Cal.1921); *United States v. Giordano*, 489 F.2d at 330. While it is necessary to prove the guilt of a principal within the designated class, *Giragosian*, 349 F.2d at 168, guilt of the aider and abettor may be established without an actual conviction of the principal. *See United States v. Tokoph*, 514 F.2d 597 (10th Cir.1975). In the *Tokoph* case, the principal pleaded guilty to one count of the indictment, and the remaining counts were dismissed. The conviction of the aider and abettor on the counts that were dismissed as to the principal was upheld, as there was a showing of the principal's guilt as to those counts, even though the principal was not actually convicted on them. Thus, the lack of a conviction of the principal is not fatal, so long as the principal is not actually acquitted.

Another necessary element of aiding and abetting is that the defendant was in some manner associated with the venture, participated in it as in something the defendant wished to bring about and sought by the defendant's action to make it succeed. *See United States v. Lurenberg*, 374 F.2d 241 (6th Cir.1967). The defendant need not know the modus operandi of the principal, so long as the defendant shared the principal's criminal purpose to injure and defraud the bank. *See Benchwick v. United States*, 297 F.2d 330 (9th Cir.1961). To support a conviction, the aider and abettor must be shown to have knowledge that the officer intended to effect a conversion. *See United States v. Docherty*, 468 F.2d 989 (2d Cir.1972). Knowledge that the bank employee was giving the aider and abettor embezzled funds is an essential element, that may be inferred from all the facts and circumstances. *See United States v. Johnson*, 447 F.2d 31 (7th Cir.1971).

9-40.200 FALSE STATEMENTS-18 U.S.C. § 1014

This section covers the knowing making of false statements or willfully overvaluing any property or security for the purpose of influencing in any way the action of the enumerated agencies and organizations.

Venue is governed by the general rule under the various false statement and false claim statutes. *See United States v. Blecker*, 657 F.2d 629, 632 (4th Cir.1981), *cert. denied*, 454 U.S. 1150 (1982) (false claim statute). A violation of section 1014 is indictable either in the district where the false statement is prepared and mailed, or where the statement is received. *See United States v. Wuagneux*, 683 F.2d 1343, 1356 (11th Cir.1982), *cert. denied*, U.S. 104 S.Ct. 69 (1983).

Generally, the making of a number of false statements to a lending institution in a single document constitutes only one criminal violation under section 1014. *See United States v. Sue*, 586 F.2d 70, 71 (8th Cir. 1978). *See also United States v. Thibadeau*, 671 F.2d 75, 79 (2d Cir.1982). However, in *Bins v. United States*, 331 F.2d 390 (5th Cir.), *cert. denied*, 379 U.S. 880 (1964), the court of appeals found duplicity in an indictment

that charged the defendant in each count with making false statements on two different FHA forms. In *United States v. Canas*, 595 F.2d 73, 78 (5th Cir.1979), the court of appeals distinguished *Bins* and found that an indictment can properly charge in a *single* count false statements made on *different* documents as long as the documents were necessary parts of a loan package meant to obtain a single loan.

9-40.210 Elements of Offense

The elements of the offense are: (1) making a false statement or willfully overvaluing property or security knowing same to be false, (2) for the purpose of influencing in any way the action, (3) of the enumerated agencies and organizations. Actual damage of reliance is not an essential element of the offense. *See Kay v. United States*, 303 U.S. 1 (1938); *United States v. Sabatino*, 495 F.2d 540 (2d Cir.1973), *cert. denied*, 415 U.S. 948 (1974); *Kernodle*, 367 F.2d at 852; *United States v. Goberman*, 458 F.2d 226 (3d Cir.1972); *United States v. Trexler*, 474 F.2d 369 (5th Cir.) *cert. denied*, 412 U.S. 929 (1973). In the *Kay* case, the court held that it was no defense that the false statements inflating the amount of the mortgage claim were not influential in securing favorable action; the important fact was that the false statements were made for the purpose of influencing action. Furthermore, it is irrelevant whether or not the person making the false statement was to receive or intended to receive the fruits of the misstatement. *United States v. Kay* 101 F.2d 270 (2d Cir.1939), *cert. denied*, 306 U.S. 660 (1939).

In addition, the statement made must be capable of influencing the enumerated agency or organization. *See United States v. Simmons*, 503 F.2d 831 (5th Cir.1974).

Reliance on the false statement is not an element of a 18 U.S.C. § 1014 prosecution. *See Tokoph*, 514 F.2d at 603. Furthermore, there need not be any actual defrauding of the bank. *See United States v. Kennedy*, 564 F.2d 1329 (9th Cir.1977), *cert. denied*, 435 U.S. 944 (1978). Rather, the statute required that all statements supplied to lending institutions which have the *capacity to influence* them be accurate or at least not knowingly false. *Goberman*, 458 F.2d at 229. In this regard the false statement may have the requisite capacity to influence not only at inception but also over the life of the loan with respect to extending the loan, deferring action upon it or modifying it. The statute does not require that the information be furnished before the debt is incurred. *See United States v. Gardner*, 681 F.2d 733 (11th Cir.1982). A false statement under section 1014 includes a statement that a particular party is to be a borrower on a loan when in fact that party is never intended to receive the loan proceeds or have any liability on the loan. *United States v. Adamson*, 665 F.2d 649, 659 (5th Cir.1982), *reversed on other grounds*, 700 F.2d 953 (5th Cir.1983) (en banc), *cert. denied*, U.S. 104 S.Ct. 116 (1983).

9-40.220 Check Kite Cases

The United States Supreme Court has held, that depositing ''bad checks'' in federally insured banks was not proscribed by 18 U.S.C. § 1014. *United States v. Williams*, 458 U.S. 279 (1982). Accordingly, check kites cannot be prosecuted under this statute. These cases should be prosecuted under 18 U.S.C. § 1344 or, in appropriate cases, under 18 U.S.C. § 656.

9-40.300 FALSE ENTRIES—18 U.S.C. § 1005 and § 1006

Sections 1005 and 1006 of Title 18 prohibit false entries and are correlative to 18 U.S.C. § 656 and § 657. The banks involved in 18 U.S.C. § 1005 are the Federal Reserve banks, member banks, national banks or insured banks. The institutions enumerated in 18 U.S.C. § 1006 are any credit unions, savings and loan corporations or associations authorized or acting under the laws of the United States, or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or the National Credit Union Administration. Both 18 U.S.C. § 1005 and § 1006 include offenses for making false entries and the unauthorized issuing of obligations; 18 U.S.C. § 1006 also makes it an offense to participate in any way, with intent to defraud, in a transaction or loan of an institution referred to in this section. The individuals to whom 18 U.S.C. § 1005 and § 1006 applies will be discussed in the following applicability section.

A violation of one of 18 U.S.C. § 1005 and § 1006 is usually involved when there is a violation of 18 U.S.C. § 656 or § 657 since a false entry typically is necessary to cover up such violation.

9-40.310 Applicability

The individuals included in the first paragraph of 18 U.S.C. § 1005 are officers, directors, agents or employees of an insured bank. The term ''connected in any capacity'' does not appear in this section. In 18 U.S.C. § 1006 the described individuals are officers, agents, employees or those connected in any capacity of a savings and loan association or other described institution. While 18 U.S.C. § 1006 in its entirety is a class statute, 18 U.S.C. § 1005 has a class limitation only in its first paragraph. *See Edick v. United States*, 432 F.2d 350 (4th Cir.1970). In *Edick*, the court held that the third clause of 18 U.S.C. § 1005 was not limited to the class of persons enumerated in the first clause. The court stated that in looking at comparable statutes when the Congress intended class limitation to carry through to subsequent clauses or paragraphs, it has repeated them.

9-40.311 Banking Holding Companies

Officers, directors, agents and employees of bank holding companies or one bank holding company are subject to the same penalties for false

entries as are bank officers, directors, agents and employees under 18 U.S.C. § 1005 and 12 U.S.C. § 1847.

9-40.320 Actions Proscribed

9-40.321 False Entries

Both 18 U.S.C. § 1005 and § 1006 prohibit the making of false entries in any book, report, or statement with the intent to defraud the institution or other person or to deceive any officer of the bank, examiner or agent appointed to examine the institution.

The elements of the offense are (1) making a false entry, (2) with intent to defraud or deceive. A false entry includes any entry on the books of the bank which is intentionally made to represent what is not true or does not exist. *See Agnew v. United States*, 165 U.S. 36, 52 (1897). Any entry in which that which has been done by the officers or agents of the bank is correctly set forth in detail is not a false entry. *See Coffin v. United States*, 156 U.S. 432 (1895). If ostensible borrowers are not liable to the bank on their notes, an entry on the bank's books showing liability could be a false entry under the holding and rationale of *United States v. Darby*, 289 U.S. 224 (1933). *See United States v. Forthay*, 399 F.2d 106 (3d Cir.). In *United States v. Biggerstaff*, 383 F.2d [illegible] (4th Cir.1967), *cert. denied*, 390 U.S. 958 (1963), various individuals had signed the necessary papers for an installment loan. Among these papers was a note for which they received nothing. The court held that this was a false entry since there was in reality no substance to the transaction, and the court stated that this was true even though the individuals might possibly have been liable on the note under state law. The court in *Biggerstaff* distinguished the *Coffin* case on the ground that the *Coffin* case involved a true entry of a transaction which was authorized, *i.e.*, that checks of an insolvent were honored and carried on the books as an extension of credit.

Not only does the statute cover the making of the entry or directing someone to make it, but it also covers an entry which the person caused to be made. *See United States v. Giles*, 300 U.S. 41 (1937) in which the defendant withheld deposit tickets which in the ordinary course would have been recorded by the bookkeeper.

The crime of making false entries includes entries on books of a bank which are intentionally made to represent what is not true with intent to deceive banks' officers or defraud the association. *See Hargreaves v. United States*, 75 F.2d 68 (9th Cir.1935).

9-40.322 Book, Report, or Statement

It has been held that an FDIC questionnaire signed by a bank officer is a report of the bank within the scope of the false entry statute, and a false

answer thereto would constitute a false entry. *See Crenshaw v. United States*, 116 F.2d 737 (6th Cir.1940), *cert. denied*, 312 U.S. 703 (1941), *cert. dismissed*, 314 U.S. 702 (1941). The statute is violated if a bank officer causes minutes of a fictitious meeting to be entered into the bank's records. *See United States v. Steffen*, 641 F.2d 591 (8th Cir.), *cert. denied*, 452 U.S. 943 (1981). Also, minute books of an ostensible committee of the board of directors are books as contemplated by the statute and a false entry indicating that loans had been approved is punishable. *See Lewis v. United States*, 22 F.2d 760 (8th Cir.1927). Also it is a violation of 18 U.S.C. § 1005 to document a loan for one party when in fact the proceeds of the loan went to another party. *See United States v. Luke*, 701 F.2d 1104, 1108 (4th Cir.1983).

Acts which fall within the prohibitions of 18 U.S.C. § 1001 and 18 U.S.C. § 1005 should be charged under the latter, more specific statute. *United States v. Beer*, 518 F.2d 168 (5th Cir.1975).

9-40.323 Intent

Section 1005 of Title 18 requires a specific intent to defraud as an element of the offense. *See United States v. Pollack*, 503 F.2d 87, 91 (9th Cir.1974). *See also Contra Harrison v. United States*, 279 F.2d 19, 23 (5th Cir.) *cert. denied*, 364 U.S. 864 (1960). It is not essential, however, that the indictment allege a specific intent to defraud as long as it tracks the statutory language. *See United States v. Fusaro*, 708 F.2d 17, 23 (1st Cir.), *cert. denied*, U.S. 104 S.Ct. 524 (1983). However, a showing of ''recklessness'' alone is not a sufficient showing of intent. *United States v. Adamson*, 665 F.2d 640, 657 (5th Cir.1982), *reversed on other grounds*, 700 F.2d 953 (5th Cir.1983) (en banc), *cert. denied*, U.S. 104 S.Ct. 116 (1983).

Three criminal intents are expressed disjunctively in 18 U.S.C. § 1005 and § 1006: the intent to injure, the intent to defraud or the intent to deceive. In dismissing the argument that the government must prove an intent to injure or defraud and also the intent to deceive, the court in *McKnight v. United States*, 97 F.2d 208 (6th Cir.1899), stated that several intents expressed in the statute are set forth disjunctively; therefore, it is sufficient to prove any one of the intents though all are cumulatively charged in the indictment. *See also Billingsley v. United States*, 178 F.2d 652 (8th Cir.1910).

It is not necessary that actual damages be shown in order to constitute fraud. *See Baiocchi v. United States*, 333 F.2d 32 (5th Cir.1964); *Harrison v. United States*, 279 F.2d 19 (5th Cir.) *cert. denied*, 364 U.S. 864, (1960). The fact that a false entry was made is prima facie evidence of intent to defraud. *See Phillips v. United States*, 218 F.2d 385 (9th Cir.1935).

9-40.324 [Reserved]

9-40.325 Participation

The third criminal act in 18 U.S.C. § 1006 is not mentioned in 18 U.S.C. § 1005. This is the participation to any extent in the proceeds or benefits from any loan or transaction with the institution. The statute is intended to do much more than forbid unsophisticated embezzlement, larceny or theft; it is a typical conflict of interest prohibition. *See Beaudine v. United States*, 368 F.2d 417 (6th Cir.1966).

This particular crime with respect to national and FDIC insured banks is partially covered by the bribery statute, 18 U.S.C. § 215. There can be no doubt that Congress intended by the enactment of this statute to remove from the path of officials the temptation to enrich themselves at the expense of the borrowers or the bank, and also to prevent improvident loans. *See Ryan v. United States*, 278 F.2d 836 (9th Cir.1960).

Participation in reference to indicated bank officials usually constitutes a misapplication under 18 U.S.C. § 656. *See Garrett v. United States*, 396 F.2d 489 (5th Cir.1968) *cert. denied*, 393 U.S. 952 (1968). In the *Garrett* case, the defendants received a fee for causing a bank which they owned to purchase certain mortgages. Participation is analogous to misapplication cases involving loans made for the benefit of the officer.

Intent to defraud is needed to convict under this section. Loss to the institution need not be shown, only that the defendant acted with intent to deceive or cheat, to cause financial loss to another or to bring about financial gain to himself/herself. *See Beaudine*, 368 F.2d at 420. *United States v. Weaver*, 360 F.2d 305 (7th Cir.), *cert. denied*, 385 U.S. 825 (1966).

9-40.400 BANK FRAUD - 18 U.S.C. § 1344

Part G of Chapter XI of the Comprehensive Crime Control Act of 1984, Pub.L. No. 98-473, 98 Stat. 2147 (1984), signed into law October 12, 1984, created a new general bank fraud offense, codified at 18 U.S.C. § 1344. The new law supplements the existing criminal provisions relating to fraud against federally insured financial institutions.

9-40.410 Applicability

This statute covers any scheme to defraud which is occurring on or after October 12, 1984. The statutory language is modeled directly on the mail fraud statute. It proscribes the use of a scheme or artifice either to defraud a federally chartered or insured financial institution or to obtain any of the monies, funds, credits, assets, securities, or other property owned by, or under the control of, such an institution. The institutions protected by the statute are those chartered under the laws of

the United States or insured by the Federal Deposit Insurance Corporation, the Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration.

The new statute was requested by the Department of Justice to correct numerous deficiencies existing in federal criminal banking statutes. Among these deficiencies were the following:

The felony bank fraud statutes, 18 U.S.C. §§ 656, 657, 1005, and 1006, are class-limited statutes which apply only to persons associated with the financial institution in ownership or operational capacities. This class limitation has, on some occasions, caused prosecutive problems in cases involving aggravated conduct by persons who had no acknowledged affiliation with the institution. The new bank fraud statute has no such class limitation.

The misapplication statutes, 18 U.S.C. §§ 656 and 657, were subject to differing interpretations in the courts of appeals, particularly as they applied to nominee loan cases in which the nominee borrower had the financial capacity to repay the loan.

The new provision should cure this split among the circuits.

Following the Supreme Court's decision in *Williams v. United States*, 458 U.S. 279 (1982), which held that 18 U.S.C. § 1014—the bank false statement statute—did not apply to check kiting cases, there has been no comprehensive criminal provisions available to prosecute check kiting cases because the industry practice of using courier services in the clearing process precluded the use of the mail fraud statute. The legislative history makes it clear that the new bank fraud statute is intended to apply to check kiting cases. *See* S.Rep. No. 98-225, at 378. Similarly, the legislative history makes it clear that the new statute is intended to supplement 18 U.S.C. § 2113 when financial institution property is obtained by false pretenses in the absence of common law ''taking and carrying away'' of the property. *Id.*

In cases involving the victimization of an insured financial institution by the use of a shell or ''bogus'' offshore bank, the legislative history again specifically asserts congressional intention that the bank fraud provisions have extra-territorial reach and that the offender may be prosecuted if present within the United States, even if the fraudulent conduct took place outside the borders of the United States. Id. at 379.

The general bank fraud statute should be viewed as a supplement to, rather than a substitute for, existing criminal provisions relating to frauds perpetrated on insured financial institutions. The choice of offenses to be charged should be made on the basis of the facts of individual cases.

Prosecutions under section 1344 may be analogized to the traditional use of the mail fraud statute to prosecute fraudulent conduct not otherwise the

subject of specific criminal statutes. It should be noted, however, that unlike the mail fraud statute, the bank fraud statute is not included as a predicate offense under RICO (18 U.S.C. § 1962).

9-40.411 [Reserved]

9-40.412 The Unit of Prosecution

When multiple defalcations occur pursuant to a single fraudulent scheme or when multiple instances of check kiting occur in a single scheme against two or more banks, prosecutors have wondered whether the statute was violated once, because of a single scheme, or multiple times based upon discrete events or withdrawals in execution of the scheme. The statute proscribes the ''execut[ion] of a scheme and artifice to defraud,'' just as the mail fraud statute proscribes each separate use of the mails for the purpose of executing a scheme to defraud. It should be argued, for example, that the defendant ''executes'' a check kiting scheme each time he succeeds in withdrawing funds on uncollected deposits, regardless of the number of withdrawals and banks involved in the scheme. This is the finding in *United States v. Jones*, 648 F.Supp. 241, 243 (S.D.N.Y.1986). In *Jones* the defendants executed the scheme multiple times by having one or more victims make withdrawals from their bank accounts. All of the victims were deceived by a single ''pigeon drop'' scheme.

It is advisable to limit prosecution to only those discrete events which result in the culmination of the scheme—namely, those specific events whereby the defendant obtains custody or control of funds or credits from a bank. Similarly, if the scheme is never consummated, and the prosecutor is charging an ''attempted'' execution of the scheme under section 1344, the unit of prosecution should be the last discrete act leading up to the attempted execution.

9-40.413, 9-40.414 [Reserved]

9-40.415 Use of Section 1344 Where Banks Are Not Victims

In *United States v. Jones*, 648 F.Supp. 225 (S.D.N.Y.1986), *appeal docketed*, the defendants were successfully charged with section 1344 violations in a ''pigeon drop'' scheme in which victims withdrew funds from their bank accounts. The banks in question were not victimized and were not liable to their customers. Nonetheless, the district court held that the defendants executed a scheme to obtain money ''in the custody and control'' of a federally insured bank under false pretenses.

9-40.500 BANK BRIBERY—18 U.S.C. § 215

9-40.510 Investigative Jurisdiction

Violations of 18 U.S.C. § 215 are within the investigative jurisdiction of the Federal Bureau of Investigation.

9-40.520 Supervising Section

Criminal Fraud Section.

9-40.530 Discussion of the Offense

9-40.531 General

On August 4, 1986, the President signed the Bank Bribery Amendments Act of 1985, Pub.L. No. 99-370, which significantly changed the bank bribery statute, 18 U.S.C. § 215.[1] Less than two years earlier, Congress had upgraded the statute to a felony with the passage of the Comprehensive Crime Control Act of 1984. Shortly after the 1984 enactment, however, representatives of federally insured financial institutions criticized the bank bribery statute as overly broad. Bankers argued that the 1984 law made commonly accepted practices, such as the business luncheon, potentially criminal. The amendments have been enacted in response to this criticism.

When passed as part of the Comprehensive Crime Control Act of 1984, the bank bribery statute made it a crime for anyone ''in connection with bank business'' to offer or give to a bank official or to any third party (or for the bank official to solicit or receive for himself or a third party) ''anything of value'' other than what is given or offered to the bank itself.[2] With the amendments, the statute now provides that the thing of value must be either offered or received ''corruptly'' with the intent to ''influence or reward'' a bank employee in connection with bank business. The recent amendments also provide that the bank regulatory agencies ''shall ... establish ... guidelines ... to assist'' bank employees to comply with the statute.

9-40.532 Bribe Offerer or Payer—18 U.S.C. § 215(a)(1)

New subsection 215(a) prohibits any person from corruptly giving, offering, or promising anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution. Section 215(a) fills a major gap in the pre-October 12, 1984, statute which did not directly cover the offerer or payer of the bribe. The thing of value can be for the benefit of the official or any other persons or entity (other than the financial institution).

[1] Signed by the President on August 4, 1986, the Bill did not go into effect until thirty days after enactment. Therefore, the operative date for the use of the statute is September 3, 1986.

[2] In this portion of the Manual dealing with section 215, the term ''bank'' is used generically to cover all federally regulated financial institutions protected under the statute. Also the terms ''employee'' or ''officer'' are meant to cover all individuals affiliated with the protected institutions as recognized by the statute.

9-40.533 Corrupt Bank Officer—18 U.S.C. § 215(a)(2)

New subsection 215(a) prohibits any officer, director, employee, agent, or attorney of a financial institution intending to be influenced or rewarded in connection with any business or transaction of such institution, from corruptly soliciting or demanding for the benefit of any person, or corruptly accepting or agreeing to accept, anything of value from any person. The thing of value can be for the benefit of the official or of any other persons or entity (other than the financial institution). Subsection 215(c) states that the salaries, fees or expenses paid or reimbursed, in the usual course of business, are not within the provisions of subsection 215(a) or (b).

9-40.534 Definitions—18 U.S.C. § 215(b)

Subsection (b) contains the definitions for ''financial institution.'' ''Financial institutions'' includes FDIC and FSLIC insured institutions, credit unions insured by the National Credit Union Administration, and other federally regulated financial institutions such as small business investment companies, defined in the Small Business Investment Act of 1958, any Federal Home Loan bank, and any Federal land bank, intermediate credit bank, bank for cooperatives, production credit association, and Federal land bank association. The term also includes any bank holding company and savings and loan holding company, defined by federal law.[3]

It should be noted that ''financial institution'' as defined in subsection (b) does not include a Federal Reserve Bank. Therefore, bribery of a Federal Reserve Bank officer or employee cannot be prosecuted under section 215. But a Federal Reserve Bank officer or employee is a ''public official'' under 18 U.S.C. § 201 and can be prosecuted for bribery under that statute. *See United States v. Hollingshead*, 672 F.2d 751, 754 (9th Cir.1982).

9-40.535 The Elements of the Offense

There are four basic elements of the offense proscribed by section 215. In the case of subsection 215(a)(1), the government must prove (1) an act of giving or offering something of value to a person, (2) done knowingly, willfully and corruptly, (3) with intent to influence or reward a bank officer or employee of a financial institution, and (4) in connection with any business or transaction of such institution.

In the case of subsection 215(a)(2), the government must prove (1) an act of soliciting or accepting something of value by an officer or employee

3 Although members of the Federal Reserve System are not expressly covered, any state bank, which handles deposits as part of its normal services and which is a member of the Federal Reserve System, will be insured by the FDIC and, therefore, will be a ''financial institution'' within the meaning of section 215(b). Similarly, ''financial institution'' does not expressly cover a ''national bank,'' but every national bank is insured by the FDIC.

of a financial institution, (2) done knowingly, willfully, and corruptly, (3) with the intent to be influenced or rewarded, and (4) in connection with any business or transaction of such institution.

9-40.536 Intent of the Parties

The statute requires that the act be done ''corruptly'' and with ''the intent to influence or reward'' or the intent ''to be influenced or rewarded.''

''Corruptly'' is not new to the criminal code. Its most common use occurs with those statutes proscribing public employee bribery, 18 U.S.C. § 201(b) and (c), and obstruction of justice, 18 U.S.C. §§ 1503 and 1505. ''Corruptly'' also occurs in the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 & 78dd-2. While ''corruptly'' denotes a specific intent to do the proscribed act, it signifies, generally, nothing more than one acting ''with bad purpose'' to achieve some unlawful end. For example, the standard Devitt and Blackmar jury instruction for public employee bribery, 18 U.S.C. §§ 201(b) and (c), provides as follows:

> An act is ''corruptly'' done, if done voluntarily and intentionally, and with the bad purpose of accomplishing either an unlawful end of result, or a lawful end or result by some unlawful method or means.
>
> So, a person acts ''corruptly'' whenever he makes a willful attempt to persuade or influence the official action of a public official, by an offer of money or anything of value.
>
> The motive to act ''corruptly'' is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another.[4]

While the disjunctive phrase ''to influence or reward'' appears to be new to the criminal code, the concept of either influencing or rewarding an individual in connection with one's official activity goes back to 1962 when Congress, concerned about public employee corruption, proscribed illegal gratuities as well as simple bribery. In essence, a bribe requires a *quid pro quo*, a gratuity does not. More often than not, receiving a gratuity is a lesser included offense of receiving a bribe.

The public employee bribery statutes provide a useful analogy. 18 U.S.C. §§ 201(b) and (c), which prohibit the offering or soliciting of bribes to or by federal officials, require a showing of an intended *quid pro quo*. 18 U.S.C. § 201(f) and (g), on the other hand, prohibit the giving or receipt of unlawful gratuities. Section (201(f) and (g) do not require proof of a *quid pro quo* or unlawful influence. Subsections (f) and (g)

4 *Devitt E. and Blackmar C.*, 2 *Federal Jury Practice and Instructions* § 34.08 (1977), at 110.

require the government to prove merely that something of value was given to a public official for or because of an official act that the official performed or will perform. *See United States v. Niederberger*, 580 F.2d 63, 68-69 (3rd Cir.1978); *United States v. Evans*, 572 F.2d 455, 481 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978); *United States v. Brewster*, 165 U.S.App. D.C. 1, 21, 506 F.2d 62, 82 (1974). In essence, a gratuity is given either before or after the fact, not to influence a decision but to reward a person for making or having made a decision that would have been made in any event. *See United States v. Previte*, 648 F.2d 73, 82 (1st Cir.1981).

In the banking context, a bribery occurs when a loan officer solicits something of value for himself with the impression that favorable treatment is conditioned upon an actual or promised receipt of the bribe. A gratuity occurs when the loan officer accepts something of value from the borrower, knowing that the borrower has given him the thing of value, not out of friendship or disinterested generosity, but primarily as a form of compensation or reward for what he has done or will do as a loan officer. Generally, all payments to influence are also payments to reward, but not all payments to reward are payments to influence.

Therefore, while Congress intended to limit the statute to ''corrupt'' transactions, it did not choose to limit the statute to the simple *quid pro quo* bribe. If a gratuity is a corrupt reward, either given, offered or solicited in connection with bank business, then the statute is violated.

9-40.538 Penalties

Under either subsection 215(a) or (b), if the item offered or given is greater than $100 in value, the offense is a felony punishable by up to 5 years imprisonment and/or fine of $5,000 or three times the value of the bribe or gratuity, whichever is greater. If the thing of value is $100 or less, the offense is a misdemeanor punishable by imprisonment of up to one year and/or a fine of $1,000. It should be noted that under the provisions of the Criminal Fine Enforcement Act of 1984 (Pub.L. No. 98-596, Oct. 30, 1984), a higher fine may be imposed for offenses committed after December 31, 1984. Pursuant to 18 U.S.C. § 3623, (1) an individual may be fined up to $250,000 for a felony and up to $100,000 for a misdemeanor which is punishable by imprisonment up to six months and (2) a corporation may be fined up to $500,000 for a felony and up to $100,000 for a misdemeanor.

Prosecutive Policy With Respect to Individual Cases

The purpose of 18 U.S.C. § 215 is to deter the payment of bribes or gratuities to officials of financial institutions and thereby protect the integrity of such institutions and their transactions. *See* S.Rep. No. 98-225, at 375, 376 (1984). The bribery statute recognizes that officers and employees of federally insured or regulated institutions owe a fiduciary duty of honest services to their employer.

The accordance with section 215's legislative purpose of protecting against corruption in the banking and savings and loan industry, it is the Department of Justice's policy that cases prosecuted under this provision entail breaches of fiduciary duty or dishonest efforts to undermine bank transactions. Because section 215 is intended to reach acts of corruption in the banking industry, it should not be used to prosecute inconsequential conduct. For example, in the banking industry as in other industries, situations can arise that involve insignificant gift giving or entertaining that plainly do not involve a breach of a fiduciary duty or dishonesty. Typical of such situations are the occasional receipt of meals, entertainment, or other gifts of modest or nominal value where the conduct is either authorized by or disclosed to bank management. Moreover, these are situations where the size of the benefit, either offered or received, in relationship to the bank transaction or business either sought or discussed by the customer is inconsequential. Such inconsequential conduct should not form the basis for prosecution under section 215.

The following should be considered in assessing whether there is a defense to a bribery or gratuity allegation or whether the conduct is at most insignificant and does not warrant prosecution.

A. The Applicability of a Bank's Own Standard of Conduct

Various banks on their own initiative have established, and may be expected to establish, certain guidelines or standards of conduct regarding their employees' receipt of benefits such as meals, entertainment, and gifts from bank customers. By adopting such standards a bank implicitly recognizes that a certain amount of entertainment does not amount to a corrupting influence on the bank's transactions. Consequently, a bank officer's compliance with reasonable standards of conduct of his/her own bank would constitute a formidable barrier to successful prosecution if the officer's conduct is ever challenged.

Senior management, however, cannot avoid the bribery statute by simply adopting for itself loose and uninhibited standards of conduct even when full disclosure is made to the bank's board of directors. The issue is one of ''reasonableness.'' A ''reasonable'' standard of conduct is one which permits an employee to receive the normal amenities that facilitate the discussion of bank business, such as a business luncheon, but which excludes the receipt of those benefits which serve no demonstrable business purpose, such as a weekend hunting or fishing expedition or the receipt of scarce or expensive tickets to athletic or theatrical events. Clearly, conduct that falls squarely within reasonable standards of behavior presents no corrupting threat and is inappropriate for prosecution.

B. Social and Family Ties of the Banker

It is not uncommon for bankers to have close social or family ties with some of those with whom they do business. Where these ties exist, gifts and

entertainment may have more to do with social and family ties than with bank business. Accordingly, prosecutors shall closely examine the relationship between the bank customer and bank officer. For an analogy regarding federal employees and their social family ties, *see* 28 C.F.R. § 45.735-14(c)(1) to (4).

C. Regulatory Guidelines

The 1986 amendments provide that the bank supervisory agencies ''shall . . . establish . . . guidelines . . . to assist'' bank officials to comply with the statute. The bank supervisory agencies have recently completed work on a set of guidelines for the bank bribery statute. The guidelines were promulgated for initial comment in May 1987. For the Comptroller of the Currency guidelines, *see* 52 Fed.Reg. 16015 (May 1, 1987).

The guidelines indicate that the agencies have encouraged banks to adopt their own codes of conduct which specify certain exceptions to the general prohibition that bank officials may not accept something of value in connection with bank business. The agency guidelines list specific instances where a bank official, without risk of corruption or breach of trust, may accept something of value, such as the business luncheon, from one doing or seeking to do business with the bank. In general, there is no threat of violation of the statute if the acceptance is based on a family or personal relationship existing independent of any business of the institution; if the benefit is available to the general public under the same conditions it is available to the bank official; or if the benefit would be paid for by another party.

In issuing guidelines under the statute in the area of business purpose entertainment or gifts, the bank supervisory agencies have not established rules about what is reasonable or normal in fixed dollar terms. What is reasonable in dollar terms in one part of the country for a large financial institution may appear lavish in another part of the country for a smaller institution. Therefore, the supervisory agencies have recommended that each bank establish its own range of dollar values that covers the various benefits that its officials may receive from those doing or seeking to do business with the bank.

The guidelines developed by the agencies are not a substitute for the legal standards set forth in the statute. Nonetheless, in adopting its own prosecutive policy under the bank bribery statute, the Department of Justice will take into account the bank supervisory agency's expertise and judgment in defining those activities or practices that the agency believes do not undermine an official's fiduciary duty to the financial institution.

Obviously, evidence that a bank official complies with the bank's own code of conduct supports the argument that there has been no breach of trust. Moreover, when a bank official operates on the basis of full

disclosure, this too dispels the notion of corrupt intent. But a bank official's full disclosure to management evidences good faith only when such disclosure is made in the context of properly exercised supervision and control. Thus, the prohibitions of the bribery statute cannot be avoided by simply reporting to management the acceptance of various gifts or business opportunities received from bank customers unless management reviews the disclosures and determines that what is accepted is reasonable and does not pose a threat to the bank's integrity.