

D. Boiler Plate/Drafting Tips

Every subpoena duces tecum should be drafted with the particular facts of the matter under investigation in mind. The first step in preparing a subpoena duces tecum should be to analyze the particular facts and necessary elements of the potential violation for use as a checklist and an outline for the subpoena. This section attempts to point out some of the potential pitfalls in the drafting of subpoenas and sets forth particular provisions which have been successfully used in the past.

1. Forms and pitfalls

a. Subpoena form--pitfalls

There are several pitfalls in the printed subpoena form itself which must be avoided. ("Subpoena" here means the printed form commanding appearance. The "Attachment" which is affixed to the subpoena form and which is used to demand documents will be discussed in the next section.)<sup>278</sup>

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<sup>278</sup>A sample subpoena (AO Form No. 110) is attached as Appendix III-3.

The subpoena must be directed to the appropriate person or entity. The correct name and address must be used. The subpoena may specify the custodian of the documents, especially in the case of a partnership or association. However, to avoid any doubt, it should be clearly spelled out in the heading that the individual specified is merely the custodian and not the subpoenaed party.

A reasonable time must be allowed for the document search.

The time for the document return must be specified as to time zone and/or daylight saving time.

The place (room number and building) for the document return must be clearly stated.

b. Attachment - pitfalls

While the grand jury subpoena form has space for a duces tecum ("and bring with you"), it is only a few lines and, accordingly, resort must usually be had to an "Attachment" to the form, noting on the form, "See Attachment," or words of similar purport.<sup>279</sup>

There are myriad substantive problems which arise in drafting an attachment, each of which will have its own peculiarities depending on the nature of the violation suspected, the

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<sup>279</sup>The same form is generally used for a grand jury subpoena ad testificandum. In some districts, however, trial subpoena forms, rather than grand jury forms, are used. In such districts, the forms must be converted to grand jury forms by interlineation and crossing out certain words.

industry, the past experience in this industry, the duration of the suspected conspiracy, etc. The following are general pitfalls to be avoided which are common to most types of attachments.

In preparing to draft the attachment, it is self-evident that the nature and scope of the investigation, as well as the primary purpose of the attachment, must be clear to the drafter. The primary purpose of the attachment is to obtain documentary evidence of the possible violation, together with other pertinent information, such as the names of persons and their responsibilities, to be used as the basis for subpoenaing them and other personal information to be used to obtain Criminal Division clearance if immunity becomes appropriate.

Assuming the staff has considered (and hopefully avoided) the pitfalls listed below (and undoubtedly many others), the staff should not agonize over the myriad of potential problems it cannot, at this stage, do anything about. Since the subpoena is usually prepared without knowledge of the filing system (or lack thereof) of the subpoenaed company or problems peculiar to its operations, the staff has to rely upon the subpoenaed party to present these problems for negotiation.<sup>280</sup> Attempting to draft a subpoena to cover every imaginable contingency could result in an overly long and complex subpoena which, at best, would be unsatisfactory and, at worst, unreasonable and unclear.

The general pitfalls that may be encountered and can be avoided are discussed in the paragraphs that follow.

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<sup>280</sup>The courts have demonstrated little patience for motions to quash based on problems which can obviously be worked out between the parties.

1) Time period. The time period for the attachment should be limited where possible so that practical compliance is not unnecessarily delayed and burdensomeness will not likely become an issue.<sup>281</sup> Paragraphs relating to the production of conspiratorial documents should be drafted with the statute of limitations in mind as a general guideline. Substantially longer time periods may be justified by the nature of the violation being investigated, the necessity for background documents and the continuing conspiracy doctrine.

2) Burdensomeness. While burdensomeness is a valid ground for quashing or modifying a subpoena attachment, it is often impossible when drafting a subpoena to determine the exact degree of burden which a particular paragraph may entail. The burdensomeness of a particular paragraph will vary depending upon the time period covered, the nature of the information requested, and the degree to which the documents are clearly described. When in doubt, it is usually advisable to request more documents than fewer with the idea of modifying the particular paragraph when opposing counsel substantiates the difficulty. If the initial subpoena is too narrowly drawn, a second subpoena with a longer time period or new demands can be issued.

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<sup>281</sup>Generally, the further back the time period, the more likely the search will involve dead and stored files -- and a ready excuse for compliance delay and closer court scrutiny of the subpoena. See § C.2.b 2)b), supra.

3) Relevancy. A subpoena attachment may be attacked on the ground that some or all of the documents requested are irrelevant. The principal pitfall here is that the subpoena requests documents which would not be indicative either of a violation of the antitrust laws in general or of those violations specified in the filed letters of authority. Thus, the scope of the letters of authority should be kept in mind as the subpoena attachment is being drafted.

4) Definitions. Two principal pitfalls arise in the definitions section. First, if terms of art or trade language are used in the subpoena, it is essential that their full meaning be known, or that they be carefully defined to include all of the related practices or activities under investigation. In the latter instance, there is a definite possibility that the person receiving the subpoena may continue to apply his or the industry meaning to the defined term rather than using the definition set forth in the subpoena attachment. Second, it is essential that if a common word is defined in the definitions that it not be used, in a different sense, in the body of the attachment. For instance, "team" was defined in a subpoena and later used in the subpoena attachment as a general term rather than as a defined term with a resultant unintended meaning.

5) Repetition. It is important to draft a subpoena attachment so that all of the documents necessary to establish the potential violation are requested. In drafting the attachment, however, care should be taken to avoid, where possible, requesting the same

documents in different paragraphs.<sup>282</sup> The danger of "missing" documents can be avoided to some extent by the use of a "catchall" paragraph which should be very general in scope but exclude all documents previously requested.

## 2. Typical general provisions

The following provisions were taken from various subpoena attachments and are illustrative of the various approaches taken.

### a. Definitions of "company" and "association"

"The Company" means the addressee of this subpoena and each of its predecessors, parents, subsidiaries (wholly-owned or otherwise), affiliates, and other entities controlled by it.

or

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<sup>282</sup>This warning refers to obvious redundancies. Some overlap is unavoidable because, inevitably, paragraphs with different purposes will sometimes require submission of the same document. Counsel will generally submit the document under one of the two paragraphs.

The term "the Company" means the business entity to which this subpoena is addressed, its predecessors, successors, affiliates, subsidiaries, and its parent organization, if any.

or

"Company" means the corporation, partnership or individual proprietorship upon which this subpoena is served, its predecessor organizations, and its divisions and subsidiaries.

or

The term "the Company" means the corporation upon which this subpoena is served and its parents, subsidiaries, affiliates, divisions, and operating management and purchasing units or organizational entities, and the predecessors of any of them.

or

"Your company" means the corporation on which this subpoena is served, successors, parent organization, if any, and its affiliates and controlled subsidiaries and

wholly-owned subsidiaries engaged in the manufacture, sale, or distribution of \_\_\_\_\_  
—.

or

"Association" means      (name)      Association or any other affiliated or predecessor group of [describe members], whether formal or informal.

b. Definitions of documents

The term "documents" means originals unless otherwise specified, and copies when originals are not available, in the possession, custody, or control of the Company, or any officer, director, agent or employee thereof, including but not limited to the following: correspondence, mailing lists, envelopes, memoranda, notes, agenda of meetings, minutes of meetings, summaries, outlines, studies, surveys, reports, catalogs, drafts of agreements and contracts, agreements, contracts, microfilm, magnetic tapes, punch cards, recording discs, and any other instrument conveying information by mechanical, electronic, photographic, or other means. The term "documents" also includes copies which are not identical duplicates of the originals because of notes made upon the original or otherwise.

or

The term "documents" means all writings of every kind, including letters, telegrams, memoranda, reports, studies, calendar or diary entries, minutes, pamphlets, notes, charts, tabulations and records of meetings, conferences and telephone or other conversations or communications in the possession, custody or control of the company, or any of its officers, directors, employees, or agents, made, sent or received during the period from \_\_\_\_\_ to date of service of this subpoena. The term "documents" also includes reproductions or film impressions of any of the aforementioned writings as well as copies of documents which are not identical duplicates of the originals, and copies of documents of which the originals are not in the possession, custody or control of the company. The term "documents" further includes all punch cards or other cards, tapes, disks or recordings used in data processing, together with the programming instructions and other written material necessary to understand or use such punch cards, tapes, disks or other recordings.

c. Time period

Each paragraph of this subpoena (unless otherwise specified herein) covers the period from    date    up to and including the date of service hereof.

d. Claim of privilege by a subpoenaed party

While a subpoena duces tecum cannot compel the production of privileged documents, the staff may be able to require the identification of the documents which are claimed to be privileged by a subpoenaed party.<sup>283</sup> Different subpoena paragraphs seeking information with respect to documents which are alleged by the subpoenaed party to be privileged are set forth below:

Any documents withheld on a claim of privilege must be preserved. If any document is withheld under any such claim, the Company shall furnish an affidavit, signed by the person responsible for supervising the Company's compliance with this subpoena, identifying each document by: (i) the author(s), (ii) the addressee(s), (iii) each person to whom a copy was addressed, and all other persons to whom such document or its substance was disclosed, together with their job titles, (iv) the date and the subject matter of the document, (v) the number of pages, (vi) the current location of the

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<sup>283</sup>When the field offices have pressed for the identification of privileged documents in court, the parties have withdrawn the claim of privilege as to most of the allegedly privileged documents and, at the court's urging, supplied the requested information on the balance. In any event, the inclusion of such a provision is potentially valuable. See generally Sperry Rand Corp. v. International Business Mach. Corp., 45 F.R.D. 287 (D. Del. 1968) (identification of privileged documents ordered); Standard Pressed Steel Co. v. Astoria Plating Corp., 162 U.S.P.Q. (BNA) 441, 443 (N.D. Ohio 1969) (identification by interrogatory permitted); Stix Prods., Inc. v. United Merchants & Mfgs., Inc., 47 F.R.D. 334, 339 (S.D.N.Y. 1969) (identification held improper where court had inspected documents and agreed on privilege).

document, (vii) the basis on which the privilege is claimed, and (viii) the paragraph of the subpoena to which the document responds.

or

Your firm is required to bring and produce before the grand jury all of the foregoing documents, including any documents which your firm claims to be privileged. Your firm may assert such privilege before the grand jury. If your firm elects to comply with this subpoena in the manner set out in Note 1 (by mail), supra, please furnish a list identifying each document in respect to which a claim of privilege is made, and setting out for it the following information: date, sender, recipient, persons to whom copies were furnished, subject matter, and the bases on which privilege is claimed.

- e. Documents to be produced - articles of incorporation and by-laws -  
company identification

Such documents as will show the full Company name, home office address, formal organization, date and place of its formation, any changes in the Company's name or structure and any additional names used by the Company in the conduct of its business.

or

Such documents (or, in lieu thereof, a certified statement of the Company) as will show:

- (1) the full Company name, home office address, and form of organization (e.g., corporation, partnership or individual proprietorship); and
- (2) the names and addresses of all divisions, subsidiaries, regional offices or other subdivision of the Company responsible for the sale of [the product].

f. Documents to be produced--annual reports

Each annual report of the Company for the period from January 1, 1965 to the date of this subpoena.

Drafting Tip: The annual reports of public corporations may not always contain the detailed financial information which a thorough investigation may require. In such a case, the following paragraph might be necessary:

Each annual report of the Company and each annual financial statement (including, but not limited to, balance sheets, profit and loss statements, and income statements) of the Company for the period from January 1, 1980 to the date of this subpoena.

g. Documents to be Produced--Names and positions of people, officers and directors

(1) General

Such documents as will show:

The full name, current home and business addresses and telephone numbers, date of birth, social security number, the account number of each Company credit card, positions, dates of service in each position, duties and responsibilities in each position, termination date, if applicable, and the reasons for such termination, of each officer and director of the Company;

(2) Job Description

Such documents as will show the job description for each of the persons identified in documents demanded by [preceding paragraph].

(3) Certain Job Responsibilities

Such documents as will show the full name, current home and business addresses and telephone numbers, date of birth, social security number, the account number of each Company credit card, positions, dates of service in each position, duties and responsibilities in each position, annual salary and bonuses, termination date, if applicable, and the reasons for such termination, of each officer, employee or other representative of the Company whose duties and responsibilities have related, in whole or in part, to the marketing, pricing, sale or distribution of \_\_\_\_\_ products;

or

Such documents (or, in lieu thereof, a certified statement of the Company) as will show the names and addresses of the officers and directors and those general managers and sales managers whose responsibilities include selling [the

product] in the trading area, together with the dates of their service in their respective positions for the period of time covered by this subpoena.

or

Such documents as will show the name, current home and business addresses, date of birth, social security number, positions, dates of service in each position, termination date, if applicable, and the reasons for such termination, of each employee of the Company who served as a secretary to, or performed secretarial or stenographic services for, each of the persons identified in response to Demand 11(b) of this subpoena;

h. Documents to be produced--day books, expense vouchers

(1) Day Books, etc.<sup>284</sup>

All appointment books, desk calendars, and diaries, wherever located, of each person identified in documents demanded by paragraph \_\_\_\_ for the period from \_\_\_\_\_ to the date of this subpoena.

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<sup>284</sup>Personal calendars maintained by the chief executive of a company are corporate property subject to production in response to a subpoena duces tecum; the right against self-incrimination of the executive is not violated. See § C.2.c., infra.

or

All appointment records and books, reminders, note pads, telephone call books, calendars, diaries, and day books maintained and used in connection with Company business by each person named in response to paragraph \_\_\_\_ herein.

(2) Expense Vouchers

Such documents as will show the transportation, hotel, entertainment, and other expenses incurred on behalf of the Company by each person named in response to paragraph \_\_\_\_ herein.

The requests for day books and expense records may also be combined:

All appointment books and records, reminder pads, notepads, diaries, calendars, day books, telephone directories, telephone call logs and travel and expense records (together with the documents attached thereto or in support or explanation thereof) used by or maintained for, in whole or in part, by each person identified in response to Demand \_\_ of this subpoena.

i. Request for identification of documents

Please identify each document produced in response to this subpoena with the initials of the Company and number each document consecutively, commencing with number 1. These markings should appear in the lower right-hand corner of each document. It would also be appreciated if you would place the documents called for by each paragraph of this subpoena in a separate file folder or other enclosure, which should be marked with the name of your Company, date of the subpoena, and the paragraph of the subpoena.

Experience has proven that this system of document control will insure the prompt return of the documents to you when they are no longer required.

j. Requests for related or attached documents

In an effort to ensure that all documents that relate to a responsive document are produced so as to put the demanded document in context, subpoenas may instruct the recipient that:

documents attached by staples, paper clips, tape or otherwise to each other should not be separated.

and that:

documents not otherwise responsive to the provisions of this subpoena shall be produced if such documents are or were attached to, or related to, documents which are called for by this subpoena, including, but not limited to, routing slips, transmittal memoranda or letters, comments, evaluations, or similar documents.<sup>285</sup>

All documents that respond, in whole or in part, to any paragraph of this subpoena shall be produced in their entirety. The documents submitted should be grouped according to the individual paragraph or sub-paragraph of this subpoena to which they are responsive. Documents that in their original condition were stapled, clipped or otherwise fastened together, shall be produced in such form. To facilitate the maintenance and return of documents, please mark each document (or the first page of the document if it consists of more than one page) with the letters \_\_\_\_\_. These should be placed so as not to obscure any information on the document.

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<sup>285</sup> Another technique to establish the context of demanded documents is to provide at the end of the "Document definition" paragraph of the subpoena that:

"Document" includes the file and folder tabs associated with each aforesaid original and copy.

Requests for identification of documents and for attached documents can be combined.

k. Optional means of supplying certain information

The staff may wish to offer the addressee the option of responding to certain demands with certified written statements rather than by producing documents. Demands that often lend themselves to this option include those relating to name, address, and organization of the Company and identification of the Company's products, facilities, sales areas, personnel, customers, and trade association affiliations. If this option is offered, it is important to preserve your right to production of the demanded document in the future. Accordingly, the subpoena may contain the following instruction:

In lieu of the documents called for in those paragraphs of this subpoena marked with an asterisk (\*), a written statement setting forth the information demanded, prepared by a duly authorized officer of the Company and certified by him to be truthful and accurate, may be submitted, provided that the documents demanded are maintained intact and available for possible later production under this subpoena.

l. Methods of compliance

Frequently, a party is given the option of producing subpoenaed materials before the grand jury by mail or in the office of the staff. Such an option is generally given in a letter to the

subpoenaed party.<sup>286</sup> However, the paragraphs set forth below have been used in subpoena attachments and apparently have not been questioned by subpoena recipients or by the court. Care should be taken to set forth the option in a separate section of the subpoena attachment and to provide, in substance and beyond any doubt that, if compliance is made by mail or in the office of the staff, such compliance is at the sole discretion of the subpoenaed party. Moreover, staff must ensure that they do not waive the right to call an appropriate witness before the grand jury to respond to questions concerning subpoena compliance if that should prove to be necessary.

Compliance with this subpoena may be by either of the following methods, the election of which shall be within addressee's sole discretion:

- (a) Compliance by the appearance of an authorized representative of Addressee before the grand jury at the time and place stated, who will bring with him all documents required to be produced by this subpoena, or
- (b) Compliance by delivery or mailing by certified mail all documents called for in this subpoena to:

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<sup>286</sup>See § B.4., *supra* and § E.1., *infra*.

[name and address]

This method of compliance may be used provided that: (a) notice of Addressee's election to comply by this method is received by the above office at least ten (10) days prior to the date for appearance before the grand jury; (b) the documents delivered or mailed are accompanied by a notarized affidavit in the form attached hereto; and (c) documents must be received at said office on or before the date for appearance before the grand jury. If this method of compliance is elected by Addressee, personal appearance before the grand jury at the time and place stated need not be made.

It is requested that the documents be numbered serially, each number to be preceded by at least three capital letters from the initial letters of the words composing the exact name of Addressee.

or

The subpoena attached hereto and legal procedures thereunder require Addressee (1) through an authorized knowledgeable representative, to appear before the grand jury at the time and place set; (2) to produce before the grand jury all documents of Addressee described in Appendix A of this subpoena (except that certain paragraphs

of Appendix A by their express terms permit Addressee at its sole election to submit a statement, certified by a proper official of Addressee, setting forth the information shown in the documents called for by those paragraphs, in lieu of production of the documents themselves); and (3) to identify and authenticate all documents so produced.

The representative of Addressee appearing before the grand jury will be questioned under oath regarding methods of compliance and whether all documents described in Appendix A have been produced. Under this method of compliance, all documents described in Appendix A should be brought before the grand jury, including any document with respect to which Addressee will claim privilege. Addressee may then assert any such privilege before the grand jury and withhold the specific documents involved or may waive its privilege and release such documents to the grand jury.

If compliance before the grand jury is elected, all documents should be numbered consecutively, with the symbol "\_\_\_" preceding all said numbers, prior to Addressee's appearance. Numbering in the suggested manner will properly identify the documents produced by Addressee, and will facilitate their handling and return.

The following optional method of compliance is extended to Addressee: At its sole election, and in lieu of a physical appearance and production of documents before the grand jury, Addressee may comply with the subpoena by mail (or other delivery), providing each of the following prerequisites are met:

(a) Notice is given to the Antitrust Division 10 days prior to the date Addressee is scheduled to appear before the grand jury;

(b) Documents called for (full compliance) must reach the Antitrust Division on or before the date Addressee is scheduled to appear before the grand jury (or on or before such other date agreed upon by Addressee and attorneys for the Antitrust Division);

(c) Documents produced by mail should be numbered in consecutive order with the symbol "\_\_\_" preceding all said numbers;

(d) Documents produced must be accompanied by a notarized affidavit of the official of Addressee responsible for the actual compliance with this subpoena by Addressee, identifying said documents by number and certifying that they are all the documents called for, that they constitute full compliance with the demands of the subpoena, and that no documents (except as provided in subparagraph (e) below) have been withheld;

(e) If Addressee withholds any document described in Appendix A under a claim of privilege, Addressee must furnish a list signed by the attorney for Addressee, listing the following information with respect to each document withheld upon the ground of privilege (furnishing the information required in this subparagraph will not be asserted by the Department of Justice to be in itself, a waiver by disclosure of any otherwise valid privilege):

(i) the place, approximate date, and manner of recording or otherwise preparing the document;

(ii) the name and title of sender; and the name and title of recipient of the document;

(iii) the name of each person or persons (other than stenographic or clerical assistants) participating in the preparation of the document;

(iv) the name and corporate position, if any, of each person to whom the contents of the document have heretofore been communicated by copy, exhibition, reading, or substantial summarization;

(v) a statement of the basis on which privilege is claimed and whether or not the subject matter of the contents of the document is limited to legal advice or information provided for the purpose of securing legal advice;

(vi) the paragraph number of Appendix A to which the document is responsive;

(vii) the identity and corporate position, if any, of the person or persons supplying the attorney with the information requested in subsections (i) through (vi) above.

(f) Documents produced under this optional method of compliance should be delivered or mailed to the following address: (address)<sup>287</sup>

m. Substantive provisions

Since the nature of antitrust grand jury investigations varies so greatly from matter to matter, it is not possible to cover the spectrum of substantive demands that would be applicable

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<sup>287</sup>When this form has been used, it has been physically attached to and numbered as part of the subpoena attachment, although the wording indicates it is not a part of the subpoena attachment.

in each conceivable type of matter. Examples of most types of demands are available in the Division files.<sup>288</sup>

Each demand should be tested for every conceivable interpretation, and care should be taken not to broaden the subpoena inadvertently to take in a multitude of unwanted documents. This most often occurs in asking for pricing or sales documents, and unwittingly covering all invoices, purchase orders, etc. If in doubt, it is better to err on the side of caution and inclusiveness, since private counsel will, in most cases, call unforeseeable problems to the staff's attention and they can be worked out at that time. If the subpoena is drawn too narrowly, it is unlikely that counsel will call the loopholes to the staff's attention, and it is likely that counsel will, if given the chance, employ an overly technical and narrow reading of the demand to exclude what he can from compliance.

Finally, where the staff has knowledge of specifically identifiable substantive or conspiracy-related documents, through prior investigation or otherwise, the broader demands of the subpoena should not be relied on exclusively for their production. Such documents should be identified clearly by date, description, addressor, addressee, etc., and demanded specifically, since it is not uncommon for defense counsel, in interpreting a subpoena, to find in broad generic type demands a vehicle for omitting production of crucial documents which do not fit four square into the broad demand.

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<sup>288</sup>An example of a "price-fixing" subpoena attachment is contained in Appendix III-4.

n. Document destruction provisions

(1) Document Destruction Practices

Such documents as will show the Company's practice, procedure or policy with respect to the destruction of documents, for the period from (date) to the date of this subpoena.

(2) Removal and Alteration Definitions

In the event that the paragraphs set out in (3) below are used, the following should be inserted in the "Definitions" Section:

"Removal" refers to the destruction or mutilation of documents previously in the possession, custody, or control of the Company, and/or the taking and carrying away, whether authorized or not, of documents from the possession, custody, or control of the Company.

"Alteration" refers to the alteration, modification, censorship, deletion, addition or the changing in any other manner of documents which are in the possession,

custody, or control of the Company, or which have been subject to removal (as defined above).

(3) Removal and Alteration

For the period from   (date)   to the date of this subpoena, all documents which relate to the removal (as defined herein) of documents falling within the description of any paragraph of this subpoena, including, but not limited to, the identity of the person or persons authorizing the removal, the identity of the person or persons participating in the decision to effect such removal, the date of each such decision, the date of each such removal, the identity of the persons carrying out such removal, the means used to accomplish such removal, and any other circumstances concerning the removal.

For the period from   (date)   to the date of this subpoena, all documents which refer or relate in any way to the alteration (as defined herein) of documents falling within the description of any paragraph of this subpoena including, but not limited to, the identity of the person or persons authorizing the alteration, the identity of the person or persons participating in the decision to effect such alteration, the date of each such alteration, the identity of the

persons carrying out such alteration, the means used to accomplish such alteration, and any other circumstances concerning the alteration.

For the period from     (date)     to the date of this subpoena, all documents which, but for alteration (as defined herein), would have been produced pursuant to any paragraph of this subpoena.<sup>289</sup>

Paragraphs relating to destruction of documents and paragraphs concerning the removal or alteration of documents may be combined.

All documents which refer or relate to any actual, suggested or contemplated policy, plan, procedure, instruction, direction or request concerning the retention, destruction, alteration, removal, secrecy or confidentiality of any documents or the non-commitment to writing of any type of information.

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<sup>289</sup>This small paragraph may prove to be particularly useful in obtaining documents that were altered to disguise the conspiracy.

E. Compliance

1. Methods of document production<sup>290</sup>

a. To grand jury

Technically, compliance with a subpoena duces tecum is made by the presentation of the documents called for by the subpoena to the grand jury at the place and time specified. Although there has been some relaxation in submission procedures, as set forth below, a subpoenaed party may insist that his documents be submitted only to the grand jury sitting as a whole.<sup>291</sup>

Some staffs prefer to have subpoenaed documents produced before the grand jury rather than in the office of the staff conducting the investigation. This is most likely to be appropriate if a small number of documents are involved. If the subpoenaed party is a prospective defendant or the representative of a prospective corporate defendant, he may be more impressed with the serious nature of the proceeding than would be the case if the

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<sup>290</sup>See also Ch. IV § E.3.

<sup>291</sup>In re Grand Jury Investigation (Gen. Motors Corp.), 1960 Trade Cas. (CCH) ¶ 69,796, at 77, 133 (S.D.N.Y.) (delivery to grand jury foreman, as a representative of grand jury, held invalid).

documents were produced either in person or by mail in the office of the staff. Further, the grand jury itself will have more of a feeling of involvement.

Additionally, the staff will have an immediate opportunity to ascertain by appropriate questioning whether complete subpoena compliance has been made and, where deficient, to learn the reasons therefor and request that such additional compliance be made as is appropriate. However, it is sometimes difficult to establish facts regarding the completeness of a search before the staff has had an opportunity to review the subpoenaed documents. Therefore, it may be more useful to save the questioning of the document custodian until after the staff has conducted its document review.

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

b. To staff

The preferred practice in the Division is to give the subpoenaed party the option of producing the documents before the grand jury or in the office of the staff conducting the

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

investigation.<sup>293</sup> If the latter procedure is followed, attorneys should request the subpoenaed party to number the documents and to submit an affidavit setting forth in substance:

- (a) the name of the person or persons who made the search of the company's files for the documents called for in the subpoena, and the location of the files searched;
- (b) that a complete and comprehensive search was made for the documents called for in the subpoena;
- (c) that all documents which are responsive to the subpoena are included in the company's return;
- (d) that the documents submitted are authentic and genuine; and
- (e) which documents are produced under each paragraph of the subpoena, and under which paragraphs of the subpoena no documents are produced.

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

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

Production of the required documents in the staff's office generally saves time, inconvenience, and expense -- both for the staff and the grand jury. This is particularly true where a large volume of documents is anticipated. On the other hand, if a second or follow-up subpoena is involved and staff has had compliance problems with the company with respect to the first subpoena, then it may be preferable to have the documents delivered to the grand jury and to take the testimony of the document custodian. But absent this type of situation or other misgivings by the staff which would call into question good faith subpoena compliance, it is usually more convenient and just as effective to permit the documents to be delivered to the staff's offices under an affidavit of search compliance.

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

If the documents are produced in the staff's office, the subpoenaed party will sometimes request a written statement that the documents will be treated the same as if they had been physically produced before the grand jury. There would seem to be no objection to such a limited commitment by the staff.

c. Tabulations or compilations in lieu of documents

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

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

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

properly to an unreasonable subpoena before complying in a manner designed to suit their convenience.<sup>295</sup>

d. File examination by Department

In lieu of production of subpoenaed documents before the grand jury or in the office of the staff, in some limited instances the staff may offer to make a search of the subpoena addressee's files to alleviate the burden of compliance. Two courts have refused to quash subpoenas as oppressive when the Government attorney offered to make (or have made) file searches in the offices of the addressee.<sup>296</sup> Depending upon the circumstances, the search may be made by the FBI or the staff assigned to the matter.<sup>297</sup>

e. Discretion of staff as to method

The preferred method of subpoena compliance depends upon the facts and circumstances of each grand jury investigation, including but not limited to the workload of the staff, the cost of travel to the site of the grand jury, the expense of convening the grand jury and

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<sup>295</sup>271 F. Supp. at 568.

<sup>296</sup>United States v. Linen Serv. Council, 141 F. Supp. 511 (D.N.J. 1956); In re Grand Jury Investigation, 33 F. Supp. 367 (M.D.N.C. 1940).

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

the cost of transcripts, the attitude of the party subpoenaed, the nature and amount of material subpoenaed, etc. The staff should take all pertinent factors into consideration and arrive at a decision based on the exercise of its sound discretion.

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

Any deviations from the usual manner of compliance before the grand jury, any changes in the time and place of compliance shown on the face of the subpoena, and any modifications of the subpoena attachment, should normally be covered in writing. A letter setting forth the arrangements, to which there is no objection, is generally sufficient for this purpose.

## 2. Government's right to original documents

Corporate counsel often submit or offer to submit copies of documents rather than the originals in compliance with a subpoena duces tecum. The practice is usually the result of a prior agreement between corporate and Government attorneys or a recognition that the demand

for originals, after copies have been supplied, necessarily entails a delay in the grand jury investigation.

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

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

The staff should exercise its discretion as to whether it will demand originals or accept copies.<sup>298</sup> Generally, original documents should be required in the absence of a strong showing by the subpoenaed party for the necessity of submitting copies. If the staff determines that

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

originals rather than copies should be submitted, the subpoena duces tecum must unambiguously call for the originals (either as a separate note or within the definition of "documents"). Then, if copies are submitted to the grand jury, the Government attorneys should immediately demand the originals.<sup>299</sup>

In In re Grand Jury Proceedings, 1972 Trade Cas. (CCH) ¶ 73,826, at 91, 483 (S.D. Ohio), the court upheld the Government's right to the original documents based on Fed. R. Crim. P. 17(c). The rule states generally that the Government is entitled to the books, records, etc., requested. Therefore, the specific items must be produced if the demand calls for originals. The court stated:

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

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

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

- (1) That the subpoenaed party will keep, maintain, and otherwise preserve the originals, and, upon request, will submit such originals to Government counsel at any time during the course of the investigation or in connection with any subsequent legal proceedings to which the United States is a party arising from said investigation;
- (2) That the copies are authentic and genuine copies of original documents in the files of the subpoenaed party; and
- (3) That the subpoenaed party will at no time in legal proceedings brought by the United States contest or deny the authenticity and genuineness of such copies and will waive the "best evidence" rules as to such copies.

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

### 3. Government's right to entire documents

Where the subpoena is reasonable, and the particular document called for by the subpoena is relevant to the grand jury investigation, then the entire document must be produced.<sup>300</sup> A subpoenaed party cannot require "a line-by-line justification for the production of a generally relevant document."<sup>301</sup> Thus, it follows that even if the excised material pertains to trade secrets or confidential corporate information, it must be produced.<sup>302</sup>

### 4. Production in original files

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

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

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

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

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

. . . . The documents submitted should be grouped according to the individual paragraph or sub-paragraph of this subpoena to which they are responsive and should be subdivided and marked so as to identify the file from which the documents were obtained.

5. Costs of production are borne by subpoena recipient

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

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

6. Production by document custodian

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

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

It was the duty and responsibility of the president as chief executive officer of the corporation either to present himself or to send such officer or responsible representative of the corporation who could respond to the requirements of the subpoena, and he or the one selected by him should have attended the session of the Grand Jury on the date fixed by the subpoena and awaited questioning, dismissal or other action by that body.

. . .

A corporation only can act or respond by and through its responsible executives and certainly not through a messenger when a subpoena calls for attendance and testimony.

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

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

F. Motions to Quash

1. Grounds

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

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

Courts have applied the 4th and 5th Amendments and Fed. R. Crim. P. 17(c), to limit subpoenas duces tecum. Assuming the 4th Amendment is applicable to grand jury subpoenas,<sup>305</sup> the principal limitation is the prohibition against "unreasonable searches and seizures" which is applicable to corporations as well as individuals. The 5th Amendment's prohibitions against self-incrimination generally protect only individuals and, to a limited extent, sole proprietorships. Sole proprietorships are entitled to 5th Amendment protection only for purely private or personal, as opposed to business, interests. Officers of a corporation, including closely-held corporations, may not object to the disclosure of corporate records, even if the act of production might prove to be personally incriminating.<sup>306</sup> Rule 17(c), which provides that a court "on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive," can also be used to limit subpoenas duces tecum.

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

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<sup>305</sup>See § C.2.b., supra.

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

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

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

time.<sup>309</sup> The documents requested must be described with sufficient definiteness so that the entity subpoenaed may know what is wanted.<sup>310</sup> The burden of complying with the subpoena must not be too great.<sup>311</sup> The subpoenas may not be used to secure privileged communications.<sup>312</sup> Trade secrets may be obtained because the rules of secrecy of grand jury proceedings will protect the confidentiality of such secrets.<sup>313</sup> In rare instances, a subpoena may be quashed because it was being used to harass or intimidate the subpoena recipient or because of other Government misconduct.<sup>314</sup>

Subpoena recipients have unsuccessfully asserted several other arguments in an attempt to avoid compliance. In In re Dymo Industries Inc., 300 F. Supp. 532 (N.D. Cal. 1969), aff'd, 418 F.2d 500 (9th Cir.), cert. denied, 397 U.S. 937 (1970), the grand jury subpoena was attacked because it was issued by the Antitrust Division. The court held that an investigation

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

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

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

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

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

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

conducted at the initiative of the Department of Justice is and always has been a proper function of the grand jury. Grand jury subpoenas also have been attacked without success on the ground that no probable cause existed supporting the demand.<sup>315</sup> A grand jury is authorized to investigate prior to a determination of probable cause, and, in fact, in order to make this finding.<sup>316</sup>

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

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<sup>315</sup>300 F. Supp. at 534.

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

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

## 2. Costs of compliance

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

## 3. Burdens of the parties

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

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

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

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

Once a motion to quash has been made, at least some courts may require that the Government initially demonstrate the relevance of the subpoenaed documents to a legitimate grand jury investigation. In the Third Circuit, the Government's initial burden may be met by the Government's submission of a "Schofield" affidavit containing a very brief description of the nature and/or purpose of the grand jury investigation and the general relevance of the subpoenaed documents to the investigation.<sup>321</sup> The "Schofield" affidavit should be submitted to the court in camera. Most other circuits do not require such an initial showing of relevancy and have either declined to follow Schofield or have distinguished it.<sup>322</sup>

The Third Circuit's affidavit requirement may no longer be valid or may be severely limited in light of the Supreme Court's recent decision in United States v. R. Enterprises, Inc., \_\_ U.S. \_\_ (1991). Under R. Enterprises, the Government would, at most, have to reveal the general

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

<sup>322</sup>Declined to follow: In re Pantojas, 628 F.2d 701 (1st Cir. 1980); In re Grand Jury Investigation (McLean), 565 F.2d 318 (5th Cir. 1977); In re Grand Jury Proceedings (Hellman), 756 F.2d 428 (6th Cir. 1985); In re Grand Jury Proceedings (85 Misc. 140), 791 F.2d 663 (8th Cir. 1986); In re Grand Jury Proceedings (Bowe), 694 F.2d 1256 (11th Cir. 1982). Distinguished: United States v. Santucci, 674 F.2d 624 (7th Cir. 1982), cert. denied, 459 U.S. 1109 (1983); United States v. Skipworth, 697 F.2d 281 (10th Cir. 1983).

subject of the grand jury's investigation before requiring the challenging party to carry its burden of persuasion.<sup>323</sup>

#### 4. Time for filing

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

#### 5. Appeals

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

One to whom a grand jury subpoena is directed may generally not appeal the denial of a motion to quash the subpoena, but must either comply or refuse to comply with the subpoena. If he refuses to comply, he may contest the validity of the subpoena on appeal, if he is

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<sup>323</sup> \_\_ U.S. at \_\_; see also § A.2.a.

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

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

subsequently cited for contempt.<sup>326</sup> Appellate review may be appropriate in a limited class of cases where denial of immediate review would render impossible any review at all.<sup>327</sup> For example, in Perlman v. United States, 247 U.S. 7 (1918), immediate review of an order directing a third party to produce documents that were Perlman's property was allowed because it was unlikely that the third party would risk contempt to vindicate Perlman's rights.<sup>328</sup>

#### G. Enforcement of Subpoenas

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

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

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

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

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

1. What constitutes contempt

Contempt by refusing or failing to comply with a subpoena may be either criminal or civil in nature. Its constituent elements are found in Fed. R. Crim. P. 17(g) and 42;<sup>330</sup> 18 U.S.C. § 401,<sup>331</sup> and 28 U.S.C. § 1826 (Organized Crime Control Act).<sup>332</sup>

Simply stated, contempt is committed if a person is properly subpoenaed and willfully fails to produce records which are in existence and under his control at the time the subpoena is

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<sup>330</sup>Fed. R. Crim. P. 17(g):

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

See also § G.4., infra.

<sup>331</sup>18 U.S.C. § 401:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

<sup>332</sup>28 U.S.C. § 1826:

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

issued.<sup>333</sup> Failure to appear is sufficient in itself to constitute contempt. A witness who appears but refuses to produce the documents demanded is not yet in contempt of court (unless an order to testify or produce is secured in advance from the court, as for example, with an immunity order). The act of contempt does not occur until the witness refuses to obey a direct order of the court.<sup>334</sup> This means that the recalcitrant witness must be presented before the court, a proper foundation must be established and the court must issue a direct order to the witness to produce.

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

- (1) There must be valid service of the subpoena;
- (2) The recipient must fail to make production of the documents requested after a court order has directed him to do so;
- (3) In the case of criminal contempt, the recipient's failure must be the result of his willful acts;<sup>335</sup>

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

<sup>334</sup>Brown v. United States, 359 U.S. 41 (1959); United States v. Chandler, 380 F.2d 993 (2d Cir. 1967).

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

- (4) The documents must be in existence at the time; and
- (5) The recipient must have control of the requested documents.

## 2. Distinction between civil and criminal contempt

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

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<sup>335</sup>(...continued)  
denied, 479 U.S. 852 (1986).

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

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

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

The Supreme Court, in Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966), held that a sentence for criminal contempt in excess of six months requires a jury trial.<sup>339</sup> Of course, the Government cannot know in advance what penalty will be imposed. Nevertheless, the Government should not press for imprisonment in excess of six months, and should be certain the court is aware of the Cheff rule.

### 3. Proof

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

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

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

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

(3) If necessary, the affidavit or testimony of the clerk or a deputy clerk showing that issuance of the subpoena was in conformity with Fed. R. Crim. P. 17;

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

(a) The defendant did not appear, or

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

(c) Appeared and refused or failed to produce all the documents ordered by the subpoena.

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

(5) The testimony of the recipient or the appropriate representative of a corporate recipient before the grand jury, as revealed by the transcript. This testimony would be admissible through the foreperson, or the court reporter, or counsel for the Government by affidavit<sup>340</sup> and;

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

#### 4. Procedure and forms

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

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

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

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

Rule 42(b) Disposition Upon Notice And Hearing. A criminal contempt, except as provided in subdivision (a) of this rule, shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt, the court shall enter an order fixing the punishment.

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

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

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

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

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

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

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

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

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

2) Indictment. An alternative procedure which may be followed in pursuing criminal contempt occurring before the grand jury (after direct order of the court) is for the grand jury to return an indictment for violation of 18 U.S.C. § 401.<sup>349</sup>

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

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

<sup>348</sup>See §§ A.1.a. and F.3., *supra*.

<sup>349</sup>See United States v. Sternman, 415 F.2d 1165 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970).

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

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

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

## 5. Defenses

### a. 4th Amendment

The 4th Amendment's prohibition against unreasonable searches and seizures has been applied to grand jury subpoenas but only to the extent that a subpoena that is unnecessarily broad in scope will be held unreasonable.<sup>351</sup> A subpoena duces tecum is thus subject only to the general 4th Amendment requirement of reasonableness, and need not be based on probable cause.

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

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

b. 5th Amendment

A corporation has no 5th Amendment privilege against self-incrimination.<sup>352</sup> This rule has been extended to include all corporations, no matter how small, and most other "artificial entities", such as partnerships.<sup>353</sup> Moreover, a corporation must produce its records even though their contents or the act of production itself may incriminate the custodian of the records or other corporate officials.<sup>354</sup>

Records required to be made or kept by the business, kept by employees within the business, submitted to the business from time-to-time, or kept on the business premises and used in day-to-day transactions of the business are considered business records for purposes of the 5th Amendment.<sup>355</sup> Appointment calendars and diaries kept by employees of the business generally

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

<sup>353</sup>Bellis v. United States, 417 U.S. 85 (1974).

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

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

are considered business records, even when they contain personal as well as business-related notations.<sup>356</sup>

c. Illegal wiretaps

A grand jury witness is entitled, by reason of 18 U.S.C. §§ 2515 and 3504, to refuse to respond to questions based on illegal interception of oral or wire communications.<sup>357</sup> However, a grand jury witness does not have standing to suppress evidence before a grand jury. He merely has the right not to testify in response to questions based on the illegal interception of his communications.<sup>358</sup>

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

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

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

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

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

d. Improper Government motive

A subpoena recipient need not comply with a subpoena if it is issued for an improper motive, for example, to obtain information for use at trial or for use in a civil investigation or to harass or intimidate the subpoena recipient. The subpoena recipient has a heavy burden to justify non-compliance on these grounds.<sup>360</sup>

e. Fear of retaliation

Fear of retaliation and for the physical safety of the witness does not constitute just cause to refuse to testify or produce documents.<sup>361</sup> Even where fears are shown to be legitimate, courts have refused to excuse the witness from testifying.<sup>362</sup> A few courts have recognized the

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<sup>359</sup>For a discussion as to what documents are necessary to prove a valid intercept, see U.S.A.M. 9-7.110 and 7.113.

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

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

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

possibility that duress or coercion may be a defense to a contempt charge, but have found the defense inapplicable to the facts presented.<sup>363</sup>

6. Successive contempt citations

If sanctions have been imposed on a witness found in contempt of the grand jury, that witness may not be called before a second grand jury without prior approval from the Assistant Attorney General, Criminal Division.<sup>364</sup> Although language in Shillitani v. United States, 384 U.S. 364, 371 n.8 (1966), may authorize successive contempts, the Department has taken a more restrictive stance.

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

<sup>364</sup>See U.S.A.M. 9-11.160.

## 7. Appeals

Contempt adjudications are appealable as final decisions under 28 U.S.C. § 1291.<sup>365</sup> A contempt adjudication is not final for purposes of appeal under § 1291 until a sentence or sanction has been imposed.<sup>366</sup> An application for a show-cause order for criminal contempt is a "criminal case" within the meaning of the Criminal Appeals Act, 18 U.S.C. § 3731, and a Government appeal of the denial of a criminal contempt order is thus subject to the requirements of that provision.<sup>367</sup>

## 8. Refusal to testify or refusal to answer certain questions

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

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

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

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

<sup>368</sup>See Ch. V.

## H. Forthwith Subpoenas

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

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

### 1. Efficacy of forthwith subpoenas

When considering whether to issue a forthwith subpoena, attorneys should be aware that even in the extreme circumstances that would justify issuing it, a recipient's efforts to quash a forthwith subpoena may sufficiently delay appearance or production so that the efforts

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<sup>369</sup>See U.S.A.M. 9-11.140.

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

successfully thwart the goals of the "forthwith" nature of the subpoena. This, combined with the efforts necessary to respond to motions to quash, may, in most circumstances, make other means of compelling appearance or production (such as a subpoena with a longer return time, a material witness arrest warrant, or a search warrant) more effective means of securing witness appearances or minimizing document destruction.

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

A particular circumstance in which a forthwith subpoena is appropriate arises when the grand jury is in session, and attorneys become aware of evidence (for example, through other presentations before the grand jury, proffered evidence, witness interviews, or otherwise) that the grand jury must consider during its session, and that such evidence would not likely be available for a subsequent grand jury session. An attorney will have little time to secure a search warrant

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

from a court, thus, a forthwith subpoena may be the only way to put the necessary evidence before the grand jury.

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

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

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

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

more notice and thus more time to consult with counsel; 5) whether the documents were burdensome in quantity; and 6) whether the subpoena was sufficiently specific.

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

### 3. 4th Amendment questions raised by forthwith subpoenas

Courts have been concerned with the misuse of forthwith subpoenas to effect warrantless searches. The 4th Amendment protects against unreasonable "constructive" searches and seizures,<sup>373</sup> and the grand jury's power to issue forthwith subpoenas does not authorize the server of a subpoena either to seize items that the subpoena requires, or to demand that such items immediately be turned over to him. If the subpoena server coerces compliance with the subpoena, the subpoena takes on the nature of a search warrant. The subpoena can never be the

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

basis of a valid search because it will not be issued as the result of a direct court order.<sup>374</sup> Misuse of a forthwith subpoena to effect a warrantless search or arrest may lead a court to exclude at trial the evidence, the witness' testimony, or the fruits of either sought by the forthwith subpoena, even if the subpoena recipient initially complied with the subpoena.<sup>375</sup>

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

Subpoena recipients may consent to a search by the server of the subpoena.<sup>376</sup> Servers of subpoenas, however, must immediately leave the recipient's premises if a recipient asks them to do so.<sup>377</sup> In cases where consent to search is given, the authority for the search is not the subpoena, but, instead, the consent to the search by the owner or the person in control of the subject of the subpoena.<sup>378</sup> In such cases, acquiescence, not knowing and informed consent are

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

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

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

<sup>377</sup>Id. at 774.

<sup>378</sup>Id.

sufficient.<sup>379</sup> Questions of consent to search and authority to give consent are often difficult. Accordingly, the best practice is for servers of forthwith subpoenas to promptly leave a recipient's premises after service of the subpoena. Further, in anticipation of any 4th Amendment questions, at least two persons should serve a forthwith subpoena. If necessary, one server may appear as a witness, should the recipient try to quash the subpoena on the grounds that the servers attempted to use the subpoena to effect a warrantless search.

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

#### 4. Alternatives to forthwith subpoenas

##### a. Subpoenas with longer return times

A subpoena with a "normal" return time that would be "reasonable" if there were no question of a witness' appearance or document destruction, would have the same effect as a forthwith subpoena of putting a witness on notice that the grand jury requires his appearance or

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

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

his documents. Noncompliance with the subpoena is still enforceable by contempt. Yet, enforcement of the subpoena may, on the whole, be more certain, since its longer return time would likely contribute to a court holding that it was, on the whole, reasonable. As discussed above, after a court hears a motion to quash a forthwith subpoena, the time between service of and compliance with a forthwith subpoena, and that between service and compliance with a subpoena with a longer return time, may end up being identical.

b. Material witness arrest warrants to assure witness appearances

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

c. Search warrants to curtail document destruction, concealment or fabrication

A search warrant is, in most cases, preferable to a subpoena where there is a reasonable likelihood that documents will be destroyed, concealed or fabricated. A search warrant allows a direct search for documents, while a subpoena depends on the recipient or its agents to conduct the search and to produce the documents before the grand jury. Given that the

basis for issuing the warrant would be the likelihood of document destruction, concealment or fabrication, a direct, warranted search is more likely to achieve the desired result of safeguarding documents than merely relying on the subpoena recipient to produce the documents himself.

## I. Search Warrants

### 1. Factors to consider in using warrants

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

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<sup>381</sup>A grand jury may issue subpoenas for evidence to discover whether there exists probable cause to believe that a crime has been committed. By contrast, before a search warrant may issue, the Government must establish probable cause to believe that an offense has been committed.

which helps prove that offense can be found at a specified location. In antitrust investigations, the former situation is the more likely one in which a search warrant would be sought.

Where the prosecuting attorney can establish that the recipient of a grand jury subpoena duces tecum has not complied fully with the subpoena, either by deliberately withholding responsive documents or by recklessly searching for responsive materials, the prosecutor could proceed either by search warrant or by follow-up subpoena. The search warrant may be the superior alternative, for the following reasons.

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

Second, a search warrant is executed by law enforcement officers without any participation by the owner or custodian of the seized property. Thus, the owner or custodian is not being compelled to do anything which might be deemed "testimonial" and, for that reason, he

has no right to assert a 5th Amendment privilege to block execution of the warrant. On the other hand, the courts have held under some circumstances that if the act of producing documents in response to a subpoena can, itself (i.e., independent of the content of the documents), be said to establish an element of a criminal offense,<sup>382</sup> the act of production is deemed "testimonial," and 5th Amendment self-incrimination interests are implicated.<sup>383</sup>

If an attorney conducting a grand jury investigation has a substantial reason to suspect that the recipient of a subpoena duces tecum has withheld documents, use of a search warrant should be considered. Some indicia of possible withholding of documents are: chronological gaps in a company's production (particularly if those gaps coincide with significant events in the case, such as bid opening dates, etc.); significant differences between the relative quantities of documents produced by different offices of the same company; the existence of documents prepared by, e.g., Company A in Company B's submission, where no counterpart documents were submitted by Company A; and testimony by grand jury witnesses that a particular individual prepared and kept a certain type of record (e.g., a diary or notebook of his activities) and the absence of such records in his company's submission. To establish the requisite probable cause to obtain a warrant, it may be necessary to systematically question grand jury witnesses from the suspect company about the existence or destruction of subpoenaed documents. Staffs

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

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

should be cautious as, on occasion, such questioning may prematurely alert a company to our suspicions and lead to further destruction of documents prior to the search.

## 2. Legal standards

The 4th Amendment of the Constitution states:

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

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

a. Probable cause

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

Probable cause exists where "the facts and circumstances within their [the officers'] knowledge, and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.<sup>384</sup>

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

In a typical criminal antitrust case, probable cause will have to be shown as to three things to obtain a search warrant: (1) that a crime has been committed, (2) that documents (or

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

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

other items) evidencing the crime exist,<sup>386</sup> and (3) that the items to be seized are located at a specific location.

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

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

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

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

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

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

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

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

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

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

<sup>390</sup>Id. at 230.

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

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

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

(continued...)

information.<sup>394</sup> In an antitrust investigation, the basis for probable cause is likely to be an informer's grand jury testimony. The fact that the information is obtained while the informer was under oath, and, therefore, subject to criminal liability for perjury if the information is false, is a factor indicating that the information is reliable.<sup>395</sup>

b. Particularity

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

A description of items to be seized is sufficiently particular if it supplies guidelines to the searching officer so that he can reasonably ascertain and identify those items.<sup>397</sup> This

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<sup>393</sup>(...continued)  
(1972).

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

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

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

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

requirement is applied "with a practical margin of flexibility, depending on the type of property to be seized, and . . . a description of property will be acceptable if it is as specific as the circumstances and nature of activity under investigation permit."<sup>398</sup> A warrant describing "corporate books and records evidencing a violation of 15 U.S.C. § 1" is not sufficiently particular to meet the 4th Amendment's particularity requirement.<sup>399</sup> The warrant must provide specific guidelines by identifying the documents sought,<sup>400</sup> but the degree of specificity required will depend on the circumstances of the case.<sup>401</sup> It is permissible to inspect voluminous files in search of documents sought under the search warrant.<sup>402</sup>

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

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<sup>398</sup>Id. at 1349.

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

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

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

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

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

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

### 3. Mechanics of obtaining a search warrant

Rule 41 of the Federal Rules of Criminal Procedure sets forth the procedure for obtaining a search warrant. Application for a warrant can be made to either a federal magistrate or a state court judge within the district where the warrant is to be executed. The application consists of an affidavit, which states the grounds for seeking the warrant, and the original warrant for the magistrate to sign.

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

The warrant must include: a description of the property<sup>405</sup> to be seized (often as a schedule attached to the warrant); a statement that the property is evidence of a stated criminal offense (e.g., Sherman Act, 15 U.S.C. § 1; obstruction of justice, 18 U.S.C. § 1503); an exact description of the location to be searched; the period of time during which the search is to be executed (which under Rule 41(c)(1) cannot exceed ten days after issuance of the warrant); and whether the search is to be conducted in the daytime (6:00 a.m. to 10:00 p.m., as defined by the Rule) or at any time in the day or night. A search warrant must be executed in the daytime unless a showing has been made by the applicant that there is reasonable cause for it to be

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<sup>405</sup>"Property" is defined in Rule 41(h) to "include documents, books, papers and any other tangible objects."

executed at night. Warrants sought by the Antitrust Division are not likely to necessitate execution at night.

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

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

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

There are no legally required procedures for obtaining internal clearance to seek a search warrant within the Antitrust Division. However, the practice within the Division is for the section or field office seeking the warrant to obtain the approval of the Office of Operations

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<sup>406</sup>See § I.2.a., *supra*.

by sending a memorandum to the Director of Operations explaining the need to obtain the warrant and the grounds on which it is being sought, along with a draft of the warrant and affidavit to be presented to the magistrate. In emergency situations, the section or field office chief may call the Director of Operations, explain the circumstances requiring the warrant, and obtain oral approval for seeking the warrant.

#### 4. Execution of the search warrant

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

Prior to the search, the staff should brief all the agents who are to conduct the search, providing them with a copy of the warrant and affidavit, explaining the background facts giving rise to the search, reviewing the description of the property or documents to be seized, providing

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

any other information that will assist them in conducting the search, and answering any questions the agents may have.

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

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

with the inventory is then returned promptly to the issuing magistrate, who files them with the clerk of the court.

5. Use of seized items/chain of custody

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

One possible procedure is to make a paralegal (if one was present at the search, preferably that person) custodian of the documents. An attorney should not be the custodian, as the custodian may be required to testify in any litigation in which we seek to admit the documents as evidence. Always follow the standard procedures used by the FBI to establish chain of custody. Documents must be kept in a locked room or secure file cabinet to which only

the custodian has access (i.e., the room or file locks must be secure against building and office master keys). Until the documents are marked and numbered by the custodian or in some way identified in such a manner as to insure that the custodian can testify that they are the documents that were seized, any review, copying, or microfilming of the documents must be done in the presence and under the direct observation of the custodian. Once the materials are adequately identified, the custodian may check in and out specific documents to others for use or review. It is recommended that the chain of custody forms used by the FBI be used for this procedure.<sup>408</sup>

## 6. Challenges

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

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

Under Rule 41(e), a motion for return of the seized property may be made at any time after the seizure. If the motion is granted, the property must be returned and may not be used as evidence at any hearing or trial, just as if it had been suppressed under a Rule 12(b) motion.

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

After an indictment has been returned, a Rule 41(e) motion for return of property will be treated as a Rule 12(b) motion to suppress.

The bases for challenges are the same under Rule 12 and Rule 41. Challenges to the validity of a search warrant are of three general types: (1) that there was no probable cause for the issuance of a warrant<sup>409</sup> (2) that the items to be seized or the location to be searched were not described with sufficient particularity in the warrant<sup>410</sup> and (3) that the affiant deliberately provided false information or exhibited a reckless disregard for the truth.<sup>411</sup> The seizure of property may also be challenged on the ground that the warrant was not properly executed. For example, a warrant would be improperly executed if the property were seized at a location other than the one described in the warrant or if the property seized were not the property described in the warrant.

In determining whether there was probable cause to justify issuing the warrant, the court should examine the supporting affidavits in camera. Prior to indictment, the movant should not be provided access to the supporting affidavits because to do so would jeopardize grand jury secrecy and could impede the effective completion of the ongoing investigation.<sup>412</sup> Orders denying motions to suppress or return seized evidence, whether before or after indictment, are interlocutory and, therefore, not appealable by defendants so long as a criminal

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<sup>409</sup>See discussion of probable cause, § 2.a., *supra*.

<sup>410</sup>See discussion of particularity, § 2.b., *supra*.

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

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

prosecution or investigation is in progress.<sup>413</sup> Thus, if a grand jury investigation is under way, an order denying such a motion is not appealable.<sup>414</sup> An order denying a motion to return or suppress property is appealable only if it "is in no way tied to a criminal prosecution" in progress.<sup>415</sup>

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

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

<sup>414</sup>Id.

<sup>415</sup>Id. at 131-32.

<sup>416</sup>18 U.S.C. § 3731.