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ANTICORRUPTION INVESTIGATION AND TRIAL GUIDE

TOOLS AND TECHNIQUES TO INVESTIGATE AND TRY THE
CORRUPTION CASE



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NOTE: This manual is not a procedural law volume. It is also not a legal compendium on the Law of Evidence. It is an investigation and tactical guide to exploring evidentiary avenues in a corruption case which lead to the discovery, compilation of material evidence, and effective means of presentation of that evidence to a court in order to ensure a just and favorable verdict.

It is suggested that the government attorney who is seeking procedural advice refer to reference guides such as the “Investigation and Prosecution Manual,” (2003), published by the Commission for the Investigation of Abuse of Authority (CIAA).

I.0 APPROACH TO A CASE

One may define corruption broadly, as it is generally defined in a number of countries and international agencies, as “the abuse of public office for private gain.”

“...[Corruption] encompasses unilateral abuses by government officials such as embezzlement and nepotism as well as abuses linking public and private actors, such as bribery, extortion, influence peddling, and fraud. Corruption arises in both political and bureaucratic offices and can be petty or grand, organized or unorganized...

Corruption is an act done with intent to give some advantage inconsistent with official duty and the rights of others. It is...the act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person contrary in duty and the rights of others.”

—*Black’s Law Dictionary*, Sixth Edition

The economic, political, and human costs of corruption can be devastating to developing democracies and the normal efficiency of economic markets. A country calls on its prosecutors¹ and investigators to investigate and successfully take legal action against corruption. The purpose of this manual is to provide prosecutors and investigators with some of the tools necessary in this important endeavor.

THE BEGINNING OF THE SUCCESSFUL CASE

It is important to closely examine the environment that generates corruption. The assessment of multiple factors, including the political climate, will contribute to the success of any legal process. In other words, is there a foundation of support for programs, including legal charges and court responses? Does the political climate support the executive response? Does the public? Is there a “push” to create clean government?

In implementing the investigation and court processes, it is important to assess the following:

- The presence of adequate legal framework, including:
 - Money laundering legislation and controls;
 - Assets declarations;
 - Income declarations for public employees and officials;
 - Criminal and civil statutes that cover the field of official corruption (e.g., laws that cover embezzlement, bribery, favor trading, procurement controls, and penalties);
 - Conflict of interest controls and penalties;
 - Comprehensive ethics practices and penalties for violations;
 - Agreements and enforcement of recognized international laws, treaties, and conventions (e.g., enforcement and monetary deposits);

¹ At times in this guide the word “prosecutor” is used. It always refers to a government attorney.

- Freedom of information and whistleblower laws; and
- Recognized accounting standards.
- Have there been recent licensing reviews and reforms? Are there regulation standards which are uniform and are being enforced uniformly?
- Are the government's expenditure controls adequate?
- Is there an adequate civil service that is based on meritocracy and is that merit system utilized?

Additional issues to consider when an investigation takes place, charges are filed (or rejected), and the case is brought to court: are these processes performed without favoritism and benefit to any group or class of individuals? Are the investigation and court actions free of political reprisal? Is the process transparent, open to question, and are enforcers held accountable for their actions? (For example, who polices the police?) Finally, if there is an adjudication, is the adjudication process itself rapid and without delay? Is it promptly enforced?

TYPES OF CORRUPTION

- **Grand Corruption:** Major abuse of power; “state capture,” where external elements exploit state processes and assets for private ends at the highest level
- **Petty Corruption:** Small amounts of money and “small favors” exchanged (i.e., administrative corruption)

In Nepal, the Anticorruption Act states that activities falling under/within its parameters are corruption by definition. It is also worth noting that an individual in Nepal is corrupt, within the meaning of the law, if they initiate the corrupt act (although this action may also fall within the definitions above).

DETECTING CORRUPTION

The two methods of detecting corruption are **proactive detection** and **reactive detection**. Proactive detection is when a law enforcement agency initiates an undercover investigation in order to pursue intelligence that has been received (generally, an anonymous tip or telephone interception). Reactive detection takes place when a formal complaint is submitted to the law enforcement agency. (Sources of these complaints can include community members, other government agencies, local councils, or private companies.) In some cases, disclosure and reporting requirements, audits, and inspections form the basis of an official complaint.

During a process of proactive detection, the investigations will many times be assisted by:

- Comparing disclosure and reporting requirements with what has been discovered and using any discrepancy to the advantage of the investigation. These requirements can also be useful for identifying conflicts of interest;
- Auditing records, physically inspecting premises and assets, and interviewing people who have relevant information;
- Maintaining adequate resources and expertise (as in accounting) so as to be familiar with regulations such as:
 - Right of access to bank accounts; and
 - Right to income tax reports; and

- Establishing a format for exchanging information with other investigative agencies.

Integrity testing can be valuable. This is when the department initiates measures to systematically or periodically run checks on their employees to make sure they have not obtained assets illegally (e.g., if a car or house has been purchased which does not correspond to their salary). At the extreme end of this testing is the use of techniques, such as lie detection, on employees (particularly those who have had complaints lodged against them or who are in very sensitive positions) to clarify financial posture or refute accusations against the employee or the department. These investigative processes may prove valuable, particularly in cases of petty corruption (such as police taking bribes in traffic situations).

Warning: Be aware of the **agent provocateur** situation, where the investigator, acting in an undercover capacity, suggests or proposes a criminal act of corruption be committed by another in order to snare that person. Whatever is done in this process must be seen to be fair and reasonable under the circumstances. For example, in a legitimate investigation, an investigator receives a complaint of corruption by an organization or individual about another organization or individual. The investigator may then be seen as having had a legitimate reason for initiating an undercover investigation.

- It is important to be aware. Failure of a subject to disclose or report inappropriate activities is sanctionable in most instances and may provide an alternative means of charging. Disclosure may reveal a serious conflict of interest, which may also conceal underlying corruption.
- Public audits and inspections may include accounting reviews of records and physical inspections of premises. Auditors should have the legal power to conduct regular audits of individuals or agencies with those entities being required to cooperate. Auditors should also have access to bank records.
- There must be opportunities to report corruption through safe channels, with guaranteed security against retribution. This is particularly important in the case of insider information, further suggesting the need for whistleblower legislation.
- There must be a free flow of information with other investigative agencies. These agencies include tax agencies, the Attorney General, the Auditor General, the National Vigilance Center, police, and agencies investigating money laundering, customs, other forms of corruption.

Offenses

Bribery: An official (or private person) who offers or solicits money, an “official” favor, such as company shares, inside information, sexual favors, entertainment, services, employment, or a future benefit (e.g., a post-retirement job) is committing bribery. The benefit of the bribe may be offered directly or indirectly (i.e., to a third party, a relative, an associate, a political party, or a private business).

Types of bribery include the following:

1. Corruption against the rule: a gift or payment provided to ensure that the giver (or another beneficiary) receives a benefit to which they are not entitled;
2. Corruption with the rule: a gift or payment made to ensure that a person receives a benefit to which they are lawfully entitled;
3. Offering improper gifts, gratuities, or favors. (i.e., tips or tickets to events);
4. Bribery to avoid liability (e.g., to evade taxes or to have evidence of illegal exporting overlooked);
5. Bribery in support of fraud (e.g., listing and paying for non-existent employees [ghost workers]);
6. Bribery to assist in unfair competition (for example, a kickback or secret commission within the public procurement process);

7. Private/public sector bribery (e.g., approving loans in a state owned bank which do not meet standard loan requirements on security);
8. Bribery to obtain confidential or “insider” information; and
9. Peddling influence (selling access to officials).

Embezzlement, Theft or Fraud: This includes misuse of funds by employees who have access to government accounts, such as the creation of artificial expenses (maintenance of nonexistent roads, false bills, etc.).

Property Deemed to be Acquired Illegally (Disproportionate Property): When a public servant acquires earnings or possessions which are materially disproportionate to his official or other legitimate earnings (and he cannot provide proof to the contrary), this is deemed disproportionate property

Extortion: The use of coercion, blackmail, or force to obtain something from someone.

Favoritism and Nepotism: These involve activities favoring an individual based on mutual friendship or family relationships

Improper Political Contributions: Such a contribution includes a political party giving political contributions to an official in return for official favors, such as government contracts

CASE SELECTION STRATEGIES

Criteria for case selection should include the following:

1. The seriousness and prevalence of the type of corruption;
2. The legal nature of the alleged corrupt activity (criminal or administrative);
3. Related cases in the past to establish precedent;
4. The probability of a satisfactory outcome;
5. The availability of financial, human, and/or technical resources to adequately investigate and prosecute;
6. The possibility of initiating action other than a corruption prosecution, if circumstances allow; and
7. The assessment of the target individual’s level of participation vis-à-vis policy guidelines to determine whether or not they are an appropriate subject for prosecution.

CASE MANAGEMENT

- The investigation team must be selected with care. They should have the necessary investigative skills, have proven integrity, and be willing to undertake this type of work.
- The team must be aware of the implications of the investigation, particularly when undercover work is to be conducted. Necessary skill areas include financial investigation, undercover investigation and surveillance, information technology, interviewing and witness preparation, and report writing.
- Forensic resources should be available to the team. The forensic examination of evidence can be an extremely essential area of the investigation. An opinion derived from a forensic test may help to obtain additional information or it may simply provide closure to other areas of the inquiry.

- Internal information related to the investigation should be made available to all necessary parties. This information should be retained in an easily accessible format so that it can be reviewed as needed. Written reports should contain as much detail as possible.

The following rules should always be followed:

1. The premises at which investigators base their work should be chosen so that access is controlled to keep out unauthorized personnel;
2. The personal security of all those who work in the environment must be guaranteed;
3. All documents should be stored in a safe environment; and
4. Attempts should be made to create as little disturbance as possible for other departments, businesses, or agencies.

Investigative Management Techniques

Investigations should be focused in terms of resources deployed and guidelines followed. This includes using staff in the most cost-effective manner and developing terms of reference that contain a comprehensive list of all the needed resources as (human, financial, or material) for a successful investigation. A policy document that includes a clear description of the facts that have given rise to the investigation and all decisions made during the investigation along with necessary justifications is also a useful tool for the investigation team.

DISPOSING OF CORRUPTION CASES

Cases where individuals are identified as participating in corruption can be dealt with in several ways. Potential actions include:

- Criminal and/or administrative prosecutions, leading to possible imprisonment, fines, restitution orders, etc.;
- Administrative disciplinary actions, leading to possible employment-related measures such as dismissal or demotion;
- Encouraging civil proceedings to seek recovery of proceeds from corruption or civil damages;
- Remedial steps, such as restructuring an operation to reduce or eliminate opportunities for corruption (without seeking discipline); and
- Enforcing that appropriate restitutions are made by the target individual after the possibility of prosecution is revealed (If restitution is made, under appropriate agreement safeguards, this would be followed by non-prosecution).

Criminal prosecutions may not be possible in the following circumstances:

- If the activity conducted does not constitute a crime, however unethical it may appear;
- If available evidence does not support a corruption prosecution (but, it may support prosecution of a different crime); or
- The prosecution may not be in the public interest.

INFORMANTS AND WITNESSES

When dealing with informants and witnesses, a comprehensive interviewing strategy should be developed. The following areas should be addressed:

1. Provisions should be in place for the protection of witnesses. Witnesses identity should remain confidential for as long as possible. Witness relocation or protection programs or a “new identity” program may be available. If the witness is in prison, provisions for a safe location in must be established. The appropriate policies need to be developed as soon as possible so as to be in place when the need arises.
2. It is advisable to reduce opportunities for the defense lawyer to attack the credibility of the witnesses (by having recorded statements, transcribed and signed or initialed by the witness).
3. Processes should be established to deal with lawyers who are either attached to the witnesses or to the potential defendants.
4. If the witness has a criminal background, it is important that they be open about prior criminal activity (particularly if it involves the defendants) and to ensure sure that this information is disclosed to the court prior to the witness undergoing examination.
5. Keeping witnesses informed of the criminal prosecution process will instill confidence in them and allay fear and apprehension.

Confidential informants are generally criminals. Unlike a cooperating witness, their personal information must be maintained as confidential. The motives of the informant may be revenge, financial gain, or personal protection (i.e., to avoid being sentenced to prison). It is important to note that confidential informants are almost never expected to testify in court.

Confidential sources are generally not criminals, but they provide information because of their position or employment. Attention must be given to safeguarding these sources’ income in order to prevent it from being jeopardized due to interaction with investigators.

Cooperating witnesses supply their information in a confidential manner, but they are expected to become witnesses. Remember the importance of protecting witnesses.

When using a source or witness, as described above, internal protocols and procedures need to be established as uniform policy. The following elements are important:

- Written agreements used to define the responsibilities of both the source and the law enforcement agency;
- A system of either code words or names established that will be used in files to prevent accidental disclosure;
- Original information kept separately from the general investigation files;
- Limited access to the source files for those within the investigative agency;
- Routinely audited financial records associated with source operations;
- A third party present when payments are made to a source and receipts obtained;
- Periodic reviews, at a managerial level, of the source files as an internal audit protection; and

- Any promises being made to the informant or witness cleared with the government agency or government attorney (It is good policy to have all promises in writing to protect the integrity of the investigator and the investigative process).

Protection of the Source/Witness

Threats to the source or witness should be anticipated before they actually occur, and the investigative team should be prepared to immediately respond. A threat assessment should always be performed for witnesses, and it must always be determined if the witness is fearful of an approach or an act against their person. There are two approaches to threats to witnesses:

- A reactive approach is the aggressive investigation of any threat or act of violence to a source. During this approach, no intimidation of any witness is tolerated;
- A proactive approach involves having witness assistance and witness protection programs available.

It is important to remember that most witnesses are frightened simply by being involved in a criminal process. These concerns need to be dealt with by the team.

FINANCIAL INVESTIGATIONS

Do the proper laws exist in the country to conduct financial investigations? Are bank accounts numbered, or are the depositors required to give their correct names and personal information? Are their financial limits on deposits which require reporting by the bank? Must suspicious accounts or deposits be reported?

These are some initial steps for a financial investigation:

1. Targets

- Once a particular suspect has been identified (or grounds for suspicion arise), the screening process should include persons with whom they have strong ties (family members, business associates, etc.). Bank accounts are often in the names of people trusted by a suspect, and land or stocks could be registered in another person's name.
- Assets for future forfeiture should be identified. It is important to have professional accountant available.

2. Indicators

- Tax returns, financial disclosure forms, employment records, and loan applications should be reviewed;
- Immediate superiors and fellow employees are good sources of information (Suspects have a way of revealing themselves and their processes to those they associate with on a daily basis);
- Public registers, credit card accounts, expensive parties and celebrations, school fees and support measures for children, foreign bank accounts, homes, and second houses and holiday homes should be located and assessed, as well as means of transport and servant salaries and perks;
- Experts should be on hand for consultation. A qualified expert is allowed to express an opinion (based on research and evidence presented to the court) on a case, while a witness is not². There is a

² See Evidence Law in Nepal (see Section 23 of the Evidence Act, 2031 B.S.). Note that "qualified" means that the expert has special skill (above that of a common person) in a particular subject. (see Nepal Law Bulletin 2031 BS, Number 12, p. 374).

variety of forensic experts who can be called on for assistance. Document examiners, for example, can testify on handwriting, signatures, paper and ink analysis and comparison, erasures or substitution of documents, and restoration of obliterated writing. There are also fingerprint experts, experts in computer and cyber crimes (E-commerce fraud, espionage, stenography analysis, data recovery, etc.) and experts in DNA testing (for intimate contact items, such as used stamps and envelopes).

In Nepal, these experts and their tests may not always be available. However, the nature of the case may be such (e.g., if large sums of money or a major public official is involved) that superiors will authorize expenditures to utilize such an expert, even if that expert resides in another country. Office procedures should allow for such exigencies.

ELECTRONIC SURVEILLANCE

Electronic surveillance involves covert activities such as video recording, wire tapping, and audio and video recorders and transmitters secreted on or used by cooperating witnesses and informants.

Covert Interceptions and Recordings

- Guidelines for the office's use of these techniques should be established. In many instances, a judicial order may be needed for this process to be utilized and overseers of the investigators who are using this process will need to be identified.
- A procedure should be in place for investigators to use when intercepting telephone conversations. A court order may be needed) as well as a review system by supervisors.
- If a court order application is approved, and a court order issued, the order must contain the identity of the person whose communications are to be intercepted, the nature and location of the communication facility, the type of communications authorized for interception, and the period of time for which the interception is ordered.
- All intercepted communications must be recorded.

Consensual Recording

If one party of the activity to be recorded provides consent, then the activity can be intercepted without a judicial order. If consent is provided, it should be obtained in writing.

UNDERCOVER OPERATIONS

Undercover operations mean that a secret investigation is being undertaken. An undercover agent is one whose identity, during the course of the operation, is disguised or kept secret.

1. Oversight must always be maintained of an undercover investigation, with established guidelines and review the proposed operation before it begins and after it terminates to ensure that the guidelines were followed. If the guidelines were not followed, explanations are to be obtained from those involved, in report format.
2. A clear delineation of prohibited conduct by any informant or investigator must be detailed (for example: do not use violence or participate in any acts of violence and do not use drugs).
3. It is always a good idea to consult a GA for support and guidance. For example, if an investigator wants to put a listening device on an informant to obtain a recording of a meeting with a major criminal. The

investigator is also thinking of supplying drugs to the informant to display to the criminal in order to establish the informant's credentials as a criminal. What is the investigator's legal and practical risk in a situation like this? The GA can answer this type of question.

4. The undercover agent must be properly trained, know the guidelines, be able to manage stress, etc.
5. Corroboration of all activities in which an operator is involved while acting in an undercover capacity is essential. Even a police officer needs to have his/her testimony reinforced and corroborated.

AN INTRODUCTION TO BASIC INVESTIGATION

Solving crimes is easy to do in most cases, but proving them is not always so simple. Trying a criminal case may, in a sense, be the most difficult of all the different types of lawsuits, because convicting a human being of a crime can result in dire consequences for that person. No one, not even the most severe of judges, wants to sentence someone to a prison sentence unless they are absolutely sure that the individual on trial is guilty. For that reason, in most countries, the criminal case has a stricter burden of proof than a civil case.

However, with good investigative techniques and a thorough knowledge of the law, if the person is guilty, it should be possible to prove it.

Reconstructing the Facts

1. The investigator is required to reconstruct events, substantiate witnesses' accounts, and breathe life into what could be regarded as dead facts. It is investigative team's responsibility to bring these facts to life for the judges.
2. It is not a requirement to reconstruct the entire event. That is impossible. But there are several approaches to take.
 - a. **The case should be regarded as a puzzle.** The pieces are put together until a picture emerges. The team might not have the whole face and body, but enough may emerge to declare, with assurance to the judges, that, not only was a crime committed, but that the defendant is the individual whose face emerges from the puzzle.
 - b. **It is important to think like the GA selected to try the case.** If the investigator believes that they are responsible for the final outcome, they will take the extra steps needed to create the best possible presentation for a case to be tried.
 - c. **It is important to think like a defense lawyer.** The defense lawyer has the responsibility to defend his client. This means exploiting any holes or defects in a prosecution in order to create doubt in the mind of a sitting judge that a defendant has committed the crime, or, at the least, generate the perception in the mind of the judge that a lesser crime has been committed by the defendant, rather than the higher level conviction the investigative team is seeking.
3. The investigative team should not be lazy and complacent. Evidence does not sit up and bark like a dog to inform someone that it is evidence. Investigators and government prosecutors must first develop the ability to find the evidence and have the skills; the trial lawyer persuade the court to consider and admit all relevant evidence.

Types of Evidence

Direct evidence is an event which is directly observed with no intervening events.

Example: The targeted individual is seen writing and signing a document which becomes a critical piece of evidence in a bank fraud. The witness can testify that the defendant was seen writing and signing the document

Circumstantial evidence is made up of those items from which one can infer events or derive conclusions. It is not that evidence which a witness saw or heard, but rather a fact which can be used to infer or deduce another fact. It implies something that occurred, but does not directly prove it. It is usually one fact in a chain of facts which we must prove to establish a person is guilty or not guilty.

Example: There is no witness to the defendant's writing or signing a document which becomes critical piece of evidence in a bank fraud. Therefore, there is no direct evidence (except for the document itself) against the defendant. However, a handwriting expert can compare a witnessed handwriting sample from the defendant with the document in question, and the expert can then testify whether or not they were made by the same individual. Thus, we can explain, circumstantially, that the defendant wrote the document.

Corruption cases are generally put together through a series of facts, like pieces of a chain, with direct evidence of small facts, but with the entire case made up of circumstances and partial events which, when put together, point to the conclusion of person's guilty

Thinking Like a Defense Attorney

Elements must be carefully examined in order to form the correct opinion or perception. The first question one could ask is, "Is this fact possible? If so, are there any circumstances that render it impossible or highly improbable?"

Example: A corruption case involves a complaint that a policeman demanded a sum of money from a driver of a vehicle instead of giving him a citation. The driver swears he gave the policeman the money. The policeman swears the driver gave him nothing and is making this statement because he is angry at the police officer. Who can be believed without all the facts? Are there any circumstances which would render the police officer's denial incorrect?

Perhaps the police officer was stopped just after the event by police inspectors who were acting on the driver's complaint. They obtained a statement from the police officer that he took no money from the driver. However, in a follow-up conversation with the driver, he states that he gave the officer two one-hundred rupee notes which he then saw the police officer place under his cap. When the police inspectors then search the traffic officer, they find the money under the officer's cap. There is now a reason to believe that the officer lied about not receiving money, and that his statement is incorrect.

The Investigation Mind-set

A reasoned approach to investigation must be taken. Reasoning and logic, based upon verifiable facts, form the basis for every sound investigation. A methodical approach is needed throughout the investigation, because the case must be built from solid evidence, just like a building, establishing a solid foundation on which to construct the case. This building must be as solid as possible, so that nothing can shake it apart. If this can be done, then a complete case exists.

However, an additional factor contributes to the mind-set of an investigation. Let us lightly touch on intuition or instinct. This is not something that can be taught. It often comes from experience and the unconscious recognition of facts that is impossible to articulate. Simply, one should not dismiss a feeling or hunch out of

hand, but follow it up on it as any other investigative paths. However, it is important to not let the hunch blind one to the facts.

Other Investigative Concepts

There are a few other evidentiary concepts which must be kept in mind before beginning a closer look at investigative techniques.

If the probative (proof) value of the evidentiary material outweighs any “side” effects or prejudicial weight of the evidence, then it is admissible. If this material goes toward proving a person has committed a crime or other fact and/or act related to the crime, then it is admissible.

Example: A high-level public figure is charged with the siphoning a large amount of money from a government project that he is supervising. He has a mistress that he is supporting, and he has bought her jewels, maybe a house and expensive designer clothes. He is also a married man with four children that he supports.

The fact that the man had a mistress may be too prejudicial be admitted; however, when coupled with the fact that he spent all the money on the mistress, these facts become admissible in illustrating that the man’s official income is insufficient support the mistress, and yet he still able to support her (to excess) while supporting a wife and children.

Thus, when a piece of evidence is introduced and if it can be used to connect the whole case, then it is admissible if it is relevant to prove a fact, such as:

- Motive;
- Opportunity;
- Intent;
- Preparation;
- Plan;
- Knowledge;
- Identity;
- Absence of mistake or accident; or
- Consent (or its absence) in some cases.

In the following areas, evidence can be admissible (particularly on cross-examination or when presenting rebuttal) in order to establish:

- Credibility of a witness;
- Ability of a witness to perceive or not perceive the existence of a fact;
- Bias or other interest;
- Consistency or inconsistency of statements;
- Existence or non-existence of a fact;
- Evidence of a defendant’s character or a trait (i.e., proof of them having lied under certain circumstances, particularly for financial gain);
- Rebutted evidence adduced by a defendant;
- Admissions of untruthfulness; and
- Attitude toward giving testimony.

AN ANALYTICAL TECHNIQUE

In an ideal investigation, an investigative team would be able to easily identify pertinent elements and pinpoint the links that would prove the case at hand. However, many cases depend on the investigators' ability to break away from preconceived notions and fully explore all possible analyses. This is usually difficult to do in an offhand way, an organizational tool (or tools) is needed. One of the main tools is the preparation of what is called a storyboard or logic path.

Cinematically, a method used to plan how a movie is to be shot is called a storyboard. Sequential drawings are created and laid out in order to establish the best way to present the story visually. A similar method must be used to convey the facts of a case in the courtroom.

The Judge as Spectator

It is important to remember the axiom, "Think like a trial attorney." During the investigation it necessary to collect evidence so that, in a trial court, so that the GA can easily present the case and obtain a conviction. After the investigation, the trial is a show that explains, edifies, and teaches the judges the facts of a case, while keeping them involved. An investigation should bear fruit in terms of both real evidence and demonstrative evidence.

- **Real evidence** is actual, tangible exhibits involved with the case (e.g. a computer hard drive from which evidence was recovered).
- **Demonstrative evidence** is not a real object, but a representation or illustration of it to corroborate the real thing (e.g., photos and diagrams).

Demonstrative evidence, by its nature, forces judges to keep their eyes and minds working, particularly if they are presented these items in a professional manner. Exhibits should not be boring and repetitive, and steps should be taken to anticipate ways in which the defense could attack and possibly use the prosecutor's exhibits to their advantage. A prosecutor does not want their own material turned against their case without being able to counter the arguments.

2.0 INVESTIGATING THE CORRUPTION CASE

Convincing a judge that a public official has committed a crime involving public corruption is a formidable task. Unlike other criminals, the corrupt public official will not display, to a court, the same aura of criminality as a gangster or a drug smuggler. Instead, the defendant in a corruption case brings to court the credibility built into the office he holds. Indeed, with elected defendants, many members of the venire may have voted for him.

The prosecutor should not be satisfied with merely developing witnesses to public corruption. Prosecutors must corroborate these witnesses in every possible way to overcome the very real presumption of innocence that a court will afford to a defendant/public official. When at a stage of the investigation where a covert probe is possible, an undercover investigation is often the best way to provide corroborated evidence of public corruption.

THE UNDERCOVER TECHNIQUE

An undercover investigation conducted by trained investigators allows the investigative team and the judge to literally see and hear the crime as it occurs. The undercover investigator's testimony, coupled with video and audiotape surveillance, is formidable; often, no real defense to the charges will even be possible when these techniques are used.

Preparing to Use the Undercover Technique

The undercover technique is a powerful tool of law enforcement. This technique should be used when there is a reasonable belief that a person or group is committing crimes (or that persons unknown are committing a crime) and that an undercover investigation is likely to acquire evidence of the crime and the criminal. This is especially important in the sensitive area of investigating public corruption.

Investigative Strategy

Undercover operations should not be conducted in a vacuum. The prosecutor should join with the investigators in formulating a strategy. In this regard, the following questions should be asked:

- What are the elements of the crime being investigating?
- What evidence of these elements exists in hand or could easily be developed?
- Of the evidence that needs to be obtained, what can be acquired through an undercover operation?

Only by analyzing the evidentiary benefits from going undercover, can the benefits of the operation be weighed against the risks.

Realistic Plan of Action

Before an investigator is sent undercover to obtain evidence, the cover story to be used should resemble a realistic scenario. The investigator's office will need to prosecute based on the results of the plan of action, and the investigator's role should realistically mirror what people do when dealing with crooked politicians. The plan should sound sensible to the judge.

The investigative plan should take into consideration the investigator's capabilities. For example, overly complex, sophisticated undercover plans that require posing as an undercover bond broker or road contractor may be so difficult to carry out that more time is spent perfecting the pose than in gathering evidence of corruption.

Certain risk factors may be present in a proposed undercover operation. The plan must be analyzed in detail to identify the risks that may apply. These risks should then be balanced against the contemplated evidentiary benefits, and a final decision made as to whether the undercover activity should go forward. These risks include:

- Harm to private individuals or undercover employees;
- Financial loss to private individuals and businesses.
- Harm to reputation;
- Harm to privileged or confidential relationships;
- Invasion of privacy;
- Entrapment; and
- Unsuitability of those employees or private individuals participating in the undercover operation.

Once a risk is identified, the plan should be adjusted to minimize the risk.

Involvement of the Prosecutor

The GA is an active participant in a successful undercover operation. The GA should work with other agencies and/or investigators from the inception of any investigation, with the goal of generating/creating an undercover operation. The investigator ought to have the benefit of the GA's analysis as to whether the proposed undercover operation is legal, ethical, and likely to produce needed evidence. The GA can also provide insight on whether the proposed undercover operation is a good idea, in light of any of the foreseeable risks.

The GA should not obtain all information about the operation secondhand, from the investigator or any other participant in the investigation. The GA should participate in the planning of strategy and tactics and attend important meetings concerning the investigation. This is time-consuming, but it is preferable to the pressure faced if the information is not reviewed until months after the formal charging of the defendant.

The GA must be familiar with the logistics of obtaining and maintaining tape-recorded evidence and have a detailed and timely knowledge of its content. A general rule to follow is that all conversations with non-governmental parties during the conduct of the operation should be recorded. This will increase the cost of the investigation through use of extra tapes, and it will produce some evidence not likely to be needed at trial. Such a policy, however, prevents the defense from charging that the government selectively taped favorable evidence only and ignored evidence showing the defendant's innocence. The policy also benefits the prosecution by preserving small but important pieces of evidence which could go unnoticed at the time of the conversation. This policy is especially important in initial contacts with individuals who are not yet predicated

as subjects. The initial conversation often offers an unrepeatable chance to establish a subject's predisposition to commit the crime under investigation.

Early in the investigation, the GA should review the procedures for maintaining custody and control of evidentiary tapes. Tapes made by informants should not remain for too long in their possession. If investigators from another office make tapes for the investigation, the originals should go to the office running the undercover operation, not to the home office of the transient investigator.

Both the GAs and investigators should review tapes, transcripts, and reports within a few days of creation in an undercover case. The GA does not have to listen to or watch all the recordings if the person obtaining the tapes is diligent in making transcripts. Whether or not transcripts are available, important tapes should be reviewed by the GA immediately, since judges will likely play these tapes for themselves. If the tapes reveal flaws in the evidence, a timely review will identify them and allow the undercover operatives a chance to fill in gaps during further investigation.

Informant Control

If at all possible, undercover informants are not to be used. Informants are not trained to detect crimes in accordance with the law. They are rarely motivated to fight crime, as are GAs or investigators. Their characters are often impeachable, and they lack the discipline of law enforcement. Before there is any covert investigation at all, the plan must be rigorously examined to ascertain whether a trained undercover investigator could obtain the same evidence as an informant. It has been claimed that no investigator can penetrate a criminal organization as effectively as an informant who is already part of that world. In conducting an undercover operation, however, the objective is to gather evidence, not to successfully become part of the underworld. With prior planning and the right introductions, any good investigator/operative should be able to supplant the role of the informant.

if the decision is made, however, to use undercover informants, the GAs and/or the investigators have a duty to monitor the activities of the informants involved in undercover activities, with both parties sharing in the difficult task of controlling informant behavior. Informants are often indispensable in providing detailed intelligence about the crimes under investigation. Often they can make the necessary introductions between the undercover operative and the subjects of the case. Note that use of informants beyond this capacity (i.e., as a co-undercover investigator) will likely bring sharply diminished returns.

The informant can be controlled through training and detailed planning to establish what the informant is allowed to do and say in the course of gathering evidence. The GA should personally ensure that a government official (usually an investigator) train the informant in what is allowable and expected and what is prohibited. Providing training throughout the course of the operation allows for changes to the plan as new situations develop. Instructions should be in writing and read and signed by the informant.

The GA and investigator can also control the information by minimizing the number of occasions that the informant is the sole witness to important evidence. One advantage of using the undercover technique is that the government can structure and control the investigative encounters that produce evidence. This advantage can be maximized by ensuring that an investigator, as well as the informant, is a witness to important conversations with subjects of the investigation. Another option would be to verify that a video or audiotape record is made of the conversation. Note that uncorroborated evidence given by an informant is unpersuasive to a court. Since the investigator will not always be in control of when a subject of the investigation contacts the informant, the informant must be equipped with the means to record unplanned contacts. Simply providing an informant with one or two cassette tapes to record home phone conversations is insufficient. Tapes fill up quickly, and, unless replaced, the informant will stop making the recordings or tape over previous conversations. Similarly, the GA and/or investigator should systematically debrief the informant as soon as is practical after they have talked with a subject. The investigator should include information gathered

from the debriefing in an investigative report. Such reports are useful if a defendant later challenges the government for failure to tape, a failure of the tape, or subsequent loss or destruction of the tape.

The importance of being prepared to tape should be emphasized to the informant. If taping is impossible, insist on a systematic debriefing and detailed investigative report as soon as practicable after the events. Where taping is possible, **all** telephone calls and **all** conversations with potential subjects must be recorded **in full**. An informant could bypass personal or unrelated business conversations, turning on the recording device only after conversation relating to the investigation begins. A judge may see this as “selective taping,” allowing doubt as to what conversation may have occurred when the tape device was not activated.

The initial encounter between informant, undercover operative, and/or prosecutor is often critical in regards to predicting and rebutting claims of entrapment. Entrapment is the process whereby a police officer, investigator, or prosecutor initiates the idea of committing a crime in the mind of the investigation’s subject. In essence, the concept of committing the crime did not originate with the criminal, but with the investigator, GA, etc. A judge who perceives entrapment will not look kindly on a prosecution, possibly viewing the initiators as the truly culpable parties and not the defendant (unless it is demonstrated that the government had substantial information that the defendant had been engaged in crime prior to the encounter).

Another means of controlling an informant is to monitor his activities when no investigator is with him. Under normal conditions, paranoia and suspicion of a member of one’s own investigative team are symptoms of trouble. However, unlike government operatives, investigators, and GAs, the informant’s skill at treachery is precisely what makes him valuable. It is important to be professionally suspicious of an informant. Prior to going operational, it is important to plan how to best keep track of the informant when he does not believe that he is being observed. It is a good idea to plan on obtaining telephone toll records through a register installed to track the informant’s outgoing telephone calls. Occasional spot surveillances may be appropriate to monitor any meetings. Measures such as these keep investigators and GAs apprised of any double dealing or use of the operation cover to commit other crimes.

Continuing Reassessment of the Undercover Operation

No matter how detailed an investigation plan is prior to the start of a covert investigation, almost assuredly, circumstances will change and force a reassessment during operation. The GA or investigator should not be a mere cheerleader for other government personnel involved in an undercover task. Rather, they should critically analyze each undercover foray to make sure it is producing the best evidence possible. This analysis should be provided to the undercover operative before and after an event. The government should participate in the planning of investigative encounters, and the investigators should be aware of the evidence and the quality of that evidence that the GA expects. For instance, when a police officer plans to meet a group of potential subjects for the first time, the investigator and/or operative should be reminded to identify each participant in the meeting.

Prosecutors should remind the undercover operative that he (the operative) has substantial control over the direction and content of conversations in which he is participating. If conversations with subjects are too ambiguous, the operative should be encouraged to make clear the illegal nature of the opportunity offered to the subject.

In corruption undercover operations, a recurring problem involves “bagmen,” or intermediaries. These intermediaries serve as a buffer between a bribe-giver and a bribe-taker. They not only broker corrupt deals, but also effectively prevent law enforcement from dealing directly with a public official who is on the take. These intermediaries deal unwittingly with the undercover operatives. Their behavior is beyond the control of the police and the prosecutor. It is important to take great care to ensure that any corrupt deal entered into with an intermediary actually involves the public officials under investigation. Intermediaries sometimes lie about their relationship with public officials or have their associates pose as public officials so that they can keep the entire amount of bribe. It is also important to be alert to the possibility that an intermediary has

fabricated his relationship with a public official in order to get something from the investigator or to fool him for some reason. In this case, it will be necessary to devise a strategy to ensure that the public official will get the money. The GA or investigator should remind the investigative team that when an intermediary claims that a public official is corrupt, it is not necessarily so.

Going Undercover in the Legislature

The undercover technique allows investigators to go virtually anywhere and meet with almost anyone to covertly gather evidence of a crime. When that crime is in the legislature, however, GAs and investigators must tailor the investigative plan to ensure that due deference is paid to the important institutions of the government. Behavior that may be appropriate in an investigation of drug smugglers would not be acceptable in an undercover penetration of suspected criminals in a local legislative committee.

Once an undercover investigation against a corrupt legislator has been determined to be necessary, it is important to keep intrusion into the legislative system to a minimum in order to obtain evidence against the subject. It is the GA and the investigator's responsibility to ensure that this is the case.

Prior to the operation's commencement, a high-level figure in the government should be informed as to which legislator or legislative process is to be investigated. This figure should be an individual who has a supervisory role of some kind in relation to the function under investigation. Strictly speaking, the formal "approval" of this person is not needed, but their agreement is unofficially necessary. If the supervisory official has any useful, pertinent suggestions, there should be attempts to incorporate them in the plan.

Legislatures make the laws which govern the country. When it is suspected that some of these laws are bought and paid for by bribery, an undercover operation is often the best way to gain evidence of the corruption. During the investigation, buying and paying for legislation affecting the lives of the citizenry is to be avoided. Often, bribes can be paid to obtain support for legislation that is never introduced. If a bill must be introduced, it should be narrow, special interest legislation, affecting no one except the entity providing cover for the investigator.

ADDITIONAL COVERT TECHNIQUES IN CORRUPTION INVESTIGATIONS

In addition to using informants and undercover operations, GAs and investigators should consider using other covert investigative techniques to obtain evidence in a public corruption investigation.

Telephone Data: Toll Records

Telephone toll records can provide valuable corroborative evidence in a corruption investigation and prosecution. Records of many telephone companies may enable a prosecutor to obtain (e.g., by subpoena), the **originating** telephone number of a long distance telephone call in one area simply by notifying the telephone company in that area of the **terminating** telephone number of the call in another area. This capability may vary among telephone companies and requires a timely request. This and similar capabilities should be explored by the investigator.

Telephone Data: Pen Registers (Automatic Logs)

The use of non-consensual pen registers and trap and trace devices in an investigation is tempered by the limited value of the information provided by them. Moreover, because trap and trace devices require considerable telephone company assistance, all applications for trap and trace technical assistance should contain specific language limiting the assistance to certain types of facilities and specific locations and hours of operation.

Mail Covers

Mail covers involve recording information contained on the outside of pieces of mail. This investigative technique has proved invaluable in providing leads and following the flow of money in many types of fraud investigations.

One problem with mail covers, however, is that the information is often recorded at the post office by the mail handler who is on duty, whose dedication to maintaining the covert nature of the investigation may be less than overwhelming. In practice, therefore, mail covers are a real but unquantifiable risk to the secrecy of the investigation.

Electronic Surveillance: Mobile Tracking Devices

When physical surveillance of a target becomes difficult due to counter-surveillance techniques or other factors, the installation of an electronic tracking device (“beeper”) can be invaluable.

Electronic Surveillance: Closed-Circuit Television (CCTV)

Videotaped evidence of a crime has enormous impact at trial, particularly in public corruption cases where the defendant’s criminal intent is often the principal issue.

In most cases, the decision whether or not to use CCTV is dictated by its technical feasibility rather than its evidentiary value. In all cases, a GA or investigator should work closely with the technical investigators to insure that the authorization to use such a technique covers the exigencies of the investigation.

Electronic Surveillance: Consensual Audio Recordings

Consensual tape recordings appear to be the perfect solution for the GA and investigator; easy to employ, they often provide irrefutable evidence of the crime. In public corruption cases, however, where the targets of the investigation are often highly intelligent and sophisticated, ill-advised or ill-timed consensual recordings can easily unravel months of fruitful investigation. Unless worn by an undercover investigator, the efficacy of a consensual wire often depends upon the performance of a “cooperating” witness, about whom the investigators may know very little. Such witnesses are often either frightened or they are career criminals, neither of which case makes for a participant who can be overly trusted to follow instructions or convince the target of their sincerity.

Thus, a GA or investigator should carefully consider a number of factors before seeking approval for a consensual recording. First, when the use of a body recorder is necessary, the situation may require that the operator turn the device on and off. Many seasoned prosecutors can recite a litany of anecdotes about frightened or confused operators who forgot to turn on the recorder, turned it off too soon, etc., thereby missing or calling into question an otherwise “smoking gun” conversation.

If the plan is to arrest a subject following a successful recording, the simultaneous use of a transmitter should be considered, so that a GA or investigator can be on the scene to hear the conversation and make an immediate and informed decision about the timing of the arrest. In any event, it is important to approach consensual recordings with caution, careful planning, and realistic expectations.

Electronic Surveillance: Non-consensual Wiretaps

Authorized electronic surveillance (a wiretap) is the quintessential covert investigative technique. When properly utilized, a defendant literally convicts himself by his or her own mouth. A tape recording has no memory losses and cannot be murdered, bribed, or intimidated.

GAs and investigators who are considering the use of this extraordinary technique should also realize that they must devote months, even years, to working closely with the investigative agency at all stages of the investigation. In short, GAs or investigators should be prepared to work exclusively on a wiretap before, during, and after the operation. Hours must be spent examining the wiretap material so that items of proof are not lost due to inattention.

TERMINATION OF THE COVERT PHASE

A covert, undercover operation should not take on a life of its own. It should continue only as long as it produces the evidence needed for an investigation and does not cause unacceptable harm in its course.

An investigative team must know how much time is needed between the end of the covert phase and the beginning of the overt phase. In most cases, it makes little sense for an undercover operation to keep producing taped conversations up until the date of the formal charge, especially if no GA or investigator has time to review them. Investigators should complete their investigative reports and create any transcripts before the indictment. Time after indictment should not be spent wondering what the evidence will be.

Preferably, a covert undercover corruption investigation should not surface in an election season. If it does, some will accuse the government of attempting to manipulate the outcome of the election.

Since the decision to terminate an undercover corruption probe is an important event, the prosecutor should prepare a detailed legal and factual memorandum explaining and justifying the termination. This analysis helps to ensure that serious gaps in the evidence have not been overlooked.

Finally, it is imperative to not permit any leakage of information from the investigative team during in any phase in the process. Both intentional and inadvertent leakage can destroy the chances for a successful conclusion to the program.

BEGINNING THE OVERT STAGE

Transferring from a **covert** investigation to an **overt** investigation involves doing anything that may lead to disclosure of the investigation. In some cases, that means charging an individual or making an arrest. Often, though, it happens much earlier. For example, 1) a bank is subpoenaed and someone at the bank notifies its customers; 2) a government agency is subpoenaed and employees of the agency call a news reporter (or the subjects of the investigation, who may be their friends); or 3) the investigator conducts an interview and reveals that an investigation is underway.

“Going overt” should be an opportunity to further the investigation, not an impediment to it. Handling the disclosure improperly increases the risk of losing control of the investigation. An investigation in disarray often results in lost opportunities or mistakes. Asking a few short questions of the team (listed below) may help prevent this.

Are We Ready to Go Overt?

An attorney general involved in a case retains most of control over the pace of an investigation in the covert stage. Once an investigation goes overt, time demands and other pressures increase for the attorney general and their operatives. Again, the team should complete all investigative, logistical, and organizational tasks related to the covert phase of the investigation before going overt—because there may not be time to do so later. Organization of exhibits and review of transcribed recorded conversations should begin at this stage. The team should also finish researching evidentiary and other relevant legal issues before finalizing the covert stage.

Do We Have Everything We Can Get Before Going Overt?

As one of the last stages before going overt, the case should be taken through one last review and areas identified that may contain weak spots. At this point, any further testimonies, tapes, documents, or other evidence that might be useful, and that can be obtained without revealing the investigation, should be sought. To avoid compromising the investigation, sometimes questions or subpoenas can be worded broadly (e.g., by covering more individuals, entities and contracts than appear absolutely necessary). It is important to remember that documents which are not subpoenaed before a corruption investigation goes overt often disappear or are altered by a defendant.

How Do We Want the Subject to Learn About the Investigation?

Each focused records subpoena issued and each associate of the subject questioned may result in the subject receiving information about the case. It is important to understand this situation and exercise some control and discretion over the process.

In some cases, it may be desirable for a subject's first knowledge of the investigation to be a full scale interview/confrontation, with tape excerpts, surveillance photos, or other high-impact evidence. In this situation, a defendant is being forced to face up to the facts in order to obtain his cooperation or to admission of guilt.

In other cases, it may not be in the investigation's best interest for the subject to discover what is going on right away. Indeed, sometimes giving a subject the **wrong** idea about what is being investigated—through subpoenas, interviews, questions to witnesses, or other means—results in attempts on their part to obstruct the investigation. However, this should be carefully calculated and organized in such a manner that it furthers the investigation.

Are We Ready for the Subjects to Learn About the Investigation?

Controlling timing means controlling circumstances. If circumstances are being controlled by the investigation, the team can prepare for the likely results of any disclosure.

Securing Exhibits. Exhibits should now be secured before their importance (and the team's interest in them) becomes apparent to the subject and he or she has a chance to react. Further methods for obtaining any records not sought earlier for fear of compromising the investigation (e.g., by issuing subpoenas and search warrants) should now be pursued.

Meetings with Cooperating Individuals. In cases involving a cooperating individual, events relating to the case may naturally generate incriminating conversations (preferably, tape-recorded) with the subject. Questions by the cooperating individual about how to respond to subpoenas or interviews, or how to deal with certain facts, may give rise to discussions of past activities or planned obstruction of the investigation. In many corruption cases, the defendant's efforts to cover up their previous crimes become more serious and more readily provable than the original activities.

Surveillance. When additional parties are involved, subjects under investigation are likely to contact them upon first learning of the investigation. Pen registers, surveillance, and other techniques should be considered in anticipation of such disclosures.

GENERAL PRINCIPLES IN OVERT INVESTIGATIONS

Government attorneys, investigators, and the personnel they are working with should follow a number of general principles in overt investigations.

Follow the Leads

Creativity and persistence are critical to successful corruption investigations. Each witness should be viewed not only as a source of testimony, but also as a source of further individuals, entities, and records to subpoena and explore. Records and witness statements should be reviewed for further leads and then followed as appropriate.

Follow the Money

The investigation it should not be limited to the actual bribe transaction. Money can leave a trail coming and going, and should be followed in both directions. Checks may pass through several banks, each of which may reveal more evidence. Cash purchases can be traced and confirmed. In these ways, the generation or laundering of money can result in tax-related cases, the justifications for or dispersal of payoffs can result in fraud cases, etc.

Indeed, whereas the actual payoff may be a difficult one-on-one case, the resulting financial cases may be stronger, or easier, to prove.

Identify the Defendant's Stakeholders

The suspect under whose name the asset is likely to be controlled needs to be identified. Family members (such as spouses, children, parents, sisters, and brothers) who may be holding assets for the suspect need to be identified, as well as mistresses and/or other intimates who might be trusted by the suspect and may be knowledgeable about their assets. Other possible people to research are business associates and friends who may be maintaining assets for the suspect, and secretaries and clerical personnel, as they could also have a wealth of information.

Note that these individuals are identified through physical surveillance and/or technical surveillance in both covert and overt processes, as well as through interviews, which widen the circle of individuals to be contacted.

There is also the possibility that assets are held by persons who are paid specifically to hold assets for the suspect. (These include employees, accountants, lawyers, and debtors.)

Identifying Assets

There are a multitude of agencies and other sources which maintain records which may identify a suspect's assets. These include:

- The Land Registry (Malpot) and the Transport Management Office (Yatayat);
- The Department of Industries (Banijya Bibhag), to identify companies in which any of the possible sources/targets and associates have an interest;
- Trade exchanges (stocks, goods, etc.) where trading or purchases may have been made by identified parties of interest;
- Banks and loan institutions, as there may be accounts from which personal investments in funds, stocks, properties, payments overseas, etc. can be identified; and
- Stock brokerage companies.

With the appropriate legal means, account records, books, or documents can be obtained from the appropriate institutions or persons. Tax records are also available, as are locations of real property, i.e., jewelry, title deeds, computer records, and safe deposit boxes.

It is important to have a means to identify overseas assets and have the legal (and practical) steps established to obtain the cooperation of foreign law enforcement, courts, and governments in a program of mutual assistance. Legislation is necessary and treaties may be mandatory for international assistance in criminal matters for:

- Taking evidence;
- Searches and seizures;
- Production of material;
- Property freezing and enforcement of confiscation orders; and
- Service of documents.

Note that in all countries, there are shell corporations, secrecy laws, offshore jurisdictions, haven jurisdictions, trusts, etc., which may result in legal barriers to obtaining the information which is being sought.

Do Not Believe in Coincidence

Convicted corrupt officials often try to claim that the incident for which they were caught was an aberration—this is not to be believed in the investigation stage, and is certainly not to be believed in the sentencing stage.

For purposes of investigation, it should be assumed that the incident for which the team has information is not an example of coincidence. If patterns can be identified, they should be followed up, e.g., are other individuals or entities doing business in the same way; do similar public projects, contracts, or permits exist; were other unexplained valuable items obtained by the subject; are other public officials or close associates involved in similar activities?

Dealing with Perjury

As corruption investigations become more common, increased incidences of perjury are to be expected. Corrupt public officials often have been “living a lie” for so long that untruths come easily to them. Their associates may desire to protect the corrupt official, believing that the official can and will repay them after the prosecutors have left. Perjury cases can be difficult and time-consuming, but few ongoing corruption investigations can succeed without them, and setting the precedent is critically important.

To deal with perjury effectively, one must be prepared for it. Questioning should be prepared thoroughly. The session should begin with advice on any rights to which the subject being questioned is entitled. An agreement should be obtained from the witness to the effect that, if he does not understand any question that he will indicate so to the questioner. Questions should be in a short and clear format. Answers must be listed carefully to make sure they are responsive. At the end of the session, where appropriate, the witness should be given a chance to change answers to make sure they are correct. Finally, members of the investigation team should review the transcript as soon as possible to make sure it is clear and, if not, the witness should be brought back for further questioning.

Tape Cases

In cases involving secret tape recording, consider locking in the witness's testimony before the undercover taping becomes known by, for example, obtaining a statement under oath, if possible. In such a situation, if the subject chooses not to tell the truth, his false story can be "locked-in" before he can adapt it to the tapes. Questioning in such cases should include not only any tape-recorded activity ("Have you ever taken cash...?"), but also the discussions themselves ("Have you ever told anyone that ...?"). False statements regarding either the acts or the conversations may be perjury or possibly filed as "deliberately making a false statement," a crime in many jurisdictions.

OTHER OVERT INVESTIGATION TOOLS

Prosecutors should consider using other overt investigation tools such as executing search warrants and conducting interviews while simultaneously issuing subpoenas.

Search Warrants

Power to Search. Section 19(8) of the Commission for the Investigation of Abuse of Authority (CIAA) Act enables the commission with the right to search or authorize others to search any place and take control of any necessary object, document, or file or make a copy of such document or file, as necessary, pursuant to relevant Nepalese law.

A seizure which is carried out on the basis of a search which is anomalous and conducted by an unauthorized official will not be admissible as evidence against the defendant. (See Nepal Law Bulletin 2047 BS, Number 5, p. 416.)

It is imperative that the investigative team follow all requirements for the content, writing, serving, and filing of the return of the evidence and proof of service. It would be a calamity to recover important evidence in a case only to have the court refuse to hear it because of negligence or failure to follow the rules required for successfully completing a search pursuant to a warrant.

Situations to Consider. In certain situations, it is advisable to execute search warrants before the subjects have time to react upon learning about the investigation. These situations include the following:

- Where the bribe obtained by the public official is something other than cash, and search warrants have to be used to obtain photos and expert appraisals of the goods or services received (e.g., improvements made to the defendants' home, appliances and other objects [and their serial numbers], cars and their vehicle identification numbers);
- Where surveillance or other evidence has traced money or other material to a certain location; or
- Where there is reason to believe that records or other evidence relevant to the investigation may be (or in the process being) destroyed or altered.

Simultaneous Interviews/Subpoenas

Some corruption cases involve individuals who are in similar situations vis-à-vis the investigation (e.g., witnesses, victims, or subjects), who, in time, may conspire together to coordinate a false story. To address the prospect of such a conspiracy, consider organizing large-scale, simultaneous interviews, sometimes accompanied by subpoenas. The potential benefits of such an approach are many. The individuals, if caught unaware, may tell the truth, or some portion of it. If they choose to lie, it may be inconsistent with what others have said or with the evidence that has been gathered. Ensuing rumors about the progress of the investigation may further disturb interviewees and help to bring about the truth. Finally, the interviews and

subpoenas may encourage the involvement of lawyers—which may lead to discussions and truthful cooperation. Moreover, realization as to the large number of people involved can often stimulate mass cooperation.

Like everything else in corruptions cases, however, any large-scale interviews must be carefully planned. Possible questions should be discussed and written down, at least in outline form. If investigators other than the case investigator are involved, they should be provided with written and oral briefings on the facts and questioning strategy. If all of the interviews cannot be performed at once, a sequence should be worked out and not left to chance. Cooperation by an interviewee could lead to action (e.g., consensual monitoring), so there should be appropriate planning and preparation.

OBTAINING COOPERATION IN A PUBLIC CORRUPTION INVESTIGATION

Very few witnesses volunteer to cooperate in corruption investigations. Occasionally, an outraged victim of a shakedown will come forward to expose the corruption, but, more often than not, even those who are victims of extortion want to avoid involvement, either because of feared retaliation or to avoid the publicity associated with a corruption scandal. At the same time, few corruption cases would be successful without the cooperation and testimony of at least some of those involved in the crime.

No magic formula exists for obtaining cooperation in corruption investigations. In some cases, verbal persuasion (such as appealing to a witness' sense of civic duty) is successful. In other cases, simply serving a subpoena may work. And sometimes the witness would rather go silently to their grave than cooperate with investigators. In this situation, it may be necessary to consider using some of the other, less friendly techniques at the prosecutor's disposal.

The most effective approach in a particular case depends largely upon the witness' state of mind and the leverage available to the government. It also depends on what the prosecutor wants from the witness. For example, persuading a witness to confess or testify may be easier than getting him or her to wear a recording device.

Consequently, before deciding which technique to use in order to obtain cooperation from a witness, it makes sense for the prosecutor to analyze why it is that this person has not stepped forward voluntarily to expose the corruption.

Reasons for a Witness' Unwillingness to Cooperate

Usually, the witness is unwilling to cooperate for one or more of the reasons detailed below.

Fear of Retaliation. The witness may be afraid that if he or she cooperates and their cooperation becomes known, the witness (or members of their family) will be killed, injured, threatened, or harassed. Examples of this type of retaliation appear most frequently in police and narcotics-related corruption cases and, to a lesser extent, in bribery, kickback, and payoff schemes where the personal stakes may be lower.

The Scandal Factor. The witness may be afraid of having his or her name appear in the newspaper as a cooperating witness. It is undesirable to be branded a cooperating witness. Having one's name associated with a high-visibility corruption case (in any role other than as prosecutor or judge) is unlikely to enhance one's reputation in legitimate business or government circles. This fear is obviously greatest when the targets of the investigation are high-level public officials and the case is likely to receive intense attention from the press.

Witnesses in corruption cases are also aware of the fact that visibility in the press can lead to other scrutiny (e.g., unwanted attention from local licensing boards, regulators, auditors, and even former spouses and business partners).

It is this fear of scandal and other collateral consequences that generates so much of the rampant perjury that prosecutors encounter in corruption investigations today. A cooperating witness runs a significant risk of appearing on the front page of the newspaper, and, thus, mired in scandal. As a result, lying is all too frequently the option of choice for corruption witnesses. Such witnesses sometimes view perjury, even with its risks, as preferable to the potential consequences of truthful cooperation—humiliation, ridicule, scandal, intimidation, and financial ruin.

Double Exposure. The witness may have some personal involvement in corrupt (or other illegal) activities and may be afraid to come forward for fear that, he, in turn, will be exposed. For example, a witness who has significant information about bribery by high-level officials may be afraid to testify for fear that the resulting criminal investigation may reveal his own prior involvement in kickbacks, tax evasion, or embezzlement. This sort of information can surface in several ways during a criminal investigation: the GA or investigator can pressure the witness to tell all he or she knows; enemies of the witness can provide evidence to the authorities; or defense counsel for the target can expose the witness's prior activities on cross-examination.

More often than not in corruption cases, the witness' own prior conduct keeps him from knocking on the GA's door. In many cases, however, the GA or the investigator will not be sure of the extent of the prior conduct until it is disclosed by an outside party. In one example of this, the owner of an architectural firm that had been paying off certain legislators to send business to his firm adamantly refused to cooperate, even in the face of compelling evidence of the bribes—until he found out that the investigator was aware that he had been involved in providing prostitutes to the elected officials. The witness was more afraid of his wife finding out about that than he was of going to jail.

Criminals Covering for One Another. Another phenomenon in corruption cases involves the problem of criminals who covering for one another. This attitude is based on the premise that one's friends will be around longer than the investigators—and that “if nobody talks, everybody walks.” Some individuals engaging in corruption assume that if they do their jail time quietly, they will be rewarded for their loyalty by their friends. Convincing such witnesses to cooperate can be a difficult and frustrating challenge. But, it can also be rewarding, because the more jail time the witness is willing to do, the bigger the secret he must be hiding.

General Approaches to Obtaining Cooperation

Several important steps can be taken by the GA or investigator to help create an atmosphere that encourages cooperation.

Reputation for Toughness It is important for the GA or investigator to demonstrate tough-minded leadership in promoting high standards for government officials. The sooner people begin to see that the GA or investigator is taking corruption seriously, the sooner public officials will fall in line. It may be necessary to educate the public (and any judges that are not already aware) that corruption is not a victimless crime. It is important to show the public, through the kinds of cases being brought forth, that the GA or investigator is not afraid to attack the power structure or challenge the self-serving assumptions of those on top. One option to be considered, in appropriate cases, is to bring indictments that describe in detail the scope of the corruption problem, to show the public exactly who has been victimized and who has profited at their expense. This same objective can also be achieved via sentencing memoranda filled with the court.

It is also important to treat corruption like the serious crime that it is and to use some of the more aggressive techniques, such as search warrants, arrest, and even detention where appropriate. The GA and the investigator's demonstrated strength may be a magnet towards which cooperating witnesses are drawn and a shield behind which they feel safe. It also sends a strong message to future witnesses who may not be inclined to cooperate, that the consequences can be severe.

Reputation for Persistence. The only way to break the code of silence is to maintain pursuit the criminals. It needs to be obvious that government's investigations are not going to go away.

Reputation for Confidentiality. In order for people to be willing to cooperate with the government, they must be able to trust it. It is very difficult for people to be trusting if they do not believe that their privacy and other interests will be appropriately protected. As a GA or investigator seeking to persuade people to do the right thing and cooperate, it must be demonstrated that their secrets will be kept. In practice, this means not making promises of non-disclosure that cannot be kept and controlling leaks from the investigating office. It also requires proving to people, on occasion, that the government is willing and able to alter the course of an investigation in order to accommodate their concerns. This can entail simply keeping a witness' name out of an indictment or press release, or it may require going before a judge, if possible, to restrict unnecessary disclosure of certain facts or witnesses.

Specific Approaches

When confronted with a particular witness who is refusing to cooperate, what can be done to change their mind?

Offering Protection. If the witness fears retaliation, there are forms of protection which can be offered, including witness security and relocation services.

Arguing the Benefits of Cooperation. If the threat perceived by a witness is financial, rather than physical or psychological, there is less that can be done. Protection of a person's business or reputation from ruin by vengeful competitors or public officials is not possible. In this situation, it is best to put forth the argument, that by cooperating, they may, in a sense, be affording themselves the best protection available. By making oneself more public, it may seem that a witness is exposing themselves for attack, but, if and when they are attacked, the motive and identity of those responsible will be more difficult to conceal. This fact in itself may create a disincentive for the witness' enemies to retaliate. This argument is based on the same principle that investigative agencies sometimes employ in dealing with alleged death threats to witnesses. A person is interviewed who allegedly made the threat or who was supposed to do the hit and it is revealed to them that the government knows that they have a motive and intent to harm the witness; if anything happens to the witness, they will be the primary suspect.

Challenging the Witness. During an investigation, it may be possible to persuade the witness that somebody has to stand up to the corruption, that if they shrink from the task because of fear or intimidation, the evil will continue to flourish and plague them and future generations.

Offering Confidentiality. In some investigations, it may be possible to provide the witness with some assurances that his or her cooperation will be kept confidential, that is, that the government will not disclose their cooperation to anyone unless required by law or ordered to do so by a court. This promise may be difficult to keep where the witness is to deal directly with the target or where the information provided by the witness leads to probable cause for search warrants or electronic surveillance. Witnesses, and especially defense attorneys, are rightfully skeptical about such promises.

On the other hand, a level of cooperation could be fashioned so as to limit the risk of witness exposure. For example, it may be possible to delay the timing of an interview so as not to reveal an individual's cooperation. It could also be possible to shield the cooperating witness' identity by creating the impression, when dealing with other witnesses, that there are multiple sources for the same information. Along this vein, prosecutors will occasionally attempt to disguise a particular witness' cooperation by having that person be formally served with a subpoena.

Pursuing the Witness. Sometimes the witness must be made to fear the power of the government, as well as the danger from the criminals. For example, in a recent police corruption case involving a police officer offering protection to local drug dealers in exchange for money, no one wanted to refuse to cooperate with the police. The witnesses from the local community, many of whom had criminal records themselves, were terrified of having to testify against a police officer who lived and worked in their neighborhood. A person with a record of narcotics possession and who is on parole or probation is extremely vulnerable to

intimidation by a corrupt police officer. Such a witness has fear of drugs being planted on them, charges being falsified, and cases being fixed, not to mention the possibility of physical violence. What can the GA or the investigator do to obtain the cooperation of a reluctant witness such as this who is deathly afraid to be seen anywhere near an investigator or government attorney?

It is not obvious to many people that there are people in the government who can help with a corrupt police officer. As a result, it may be necessary to convince the witness that there is a government employee whose job it is to prosecute anyone who violates the law, whether or not they carry a badge. Such witnesses also have to know that they will be pursued relentlessly by the government if they do not cooperate. This could mean tracking down the witness and escorting them to court or even arresting the witness for failure to appear. If the witness continues to be late or absent, it may be necessary to ask the case investigator to interview the witness' friends and neighbors concerning the individual's whereabouts. This can create a strong incentive for the witness to show up next time, so as to keep their involvement with the government more private. In certain cases, this may be the only effective way to compel the appearance of a reluctant witness.

Persuading the Witness. Another successful technique for obtaining the cooperation of a witness who is not eager to testify (especially when the fear is publicity or retaliation) is to explain that, with the present state of the evidence against the target, it seems highly probable that there will be a public trial, and that the only possible way that there will not be a trial is if the target pleads guilty to the crime—a situation which is unlikely to occur, given the uncorroborated nature of the witness testimony. The argument continues that, if the witness could be persuaded to provide the government with irrefutable evidence of the target's guilt—perhaps by recording a phone call or an incriminating talk with the target—then perhaps the necessity of a trial could be avoided. If the witness can be made to understand that the only way to avoid testifying is to help the government gather sufficient evidence, the witness' enthusiasm for wearing a wiretap or recording a phone call may increase dramatically.

Helping the Witness. Every GA or investigator has at his or her disposal a wide range of benefits that can be offered to encourage a witness—from an agreement to report the witness' cooperation to the court at the time of sentencing to an agreement to not to indict the witness at all. This package of benefits can also include an agreement allowing a witness to recant perjured testimony, an agreement to not press certain charges, or an agreement to not pursue certain targets. All of these promises, rewards, and inducements will, of course, have to be disclosed to the defendant and to the court at the appropriate time.

Confronting the Witness

Another proven technique for inducing cooperation involves a carefully orchestrated confrontation with a subject, during which they are shown some of the government's evidence against them and then given an opportunity to cooperate. This technique is most effective toward the end of a long-term undercover operation during which a cooperating witness has recorded incriminating conversations with numerous subjects, subsequently subpoenaed to testify in the grand jury, and who has denied any knowledge of corrupt activity. When the government wants some of these subjects to be witnesses as well as defendants, the prosecutor may consider calling on the subjects (or their attorneys, if represented by counsel) and scheduling a meeting at the GA or investigator's office. The subject should be informed of the investigation and of the fact that serious evidence has turned up relating to them, to be shown at the meeting. When dealing with a subject's lawyer, it must be insisted upon that the client be present, with reassurance that neither the client nor the lawyer will have to say a word, they need only listen.

During the confrontation meeting, the GA and the case investigator should present the evidence. Based on the scenario described above, the presentation would include: 1) the recording of the subject's admission to the cooperating witness of having received bribes; and 2) a transcript of the incriminating conversation, highlighting those portions where the most devastating admissions are made.

At this point in the confrontation (assuming that the witness and his or her lawyer have not left in anger), the government has the witness in a very vulnerable position. Enough information has been shared to convince a

reasonable person that a felony has been committed. It may be possible, at that point, to get the witness to agree to cooperate and plead to a charge (perjury, bribery, mail fraud, conspiracy, etc.), in exchange for a more lenient sentence later on. If the witness is to be asked to wear a listening device or perform some other service to the government, it may be appropriate to consider not indicting the witness at all in exchange for this cooperation. The choice for the client is difficult, but where the prosecutor has sufficient leverage, the decision is usually clear.

Testing the Witness. Although debate exists over whether investigators should use polygraph (lie detector) tests in anticorruption investigations, some believe, in certain cases, that they can be useful investigative tools.

Regardless of whether or not the use of the polygraph test is, an accurate means of ascertaining whether someone is telling the truth, the fact is that many subjects believe that it is. As a result, the psychological pressure created by taking a polygraph can be useful to obtaining cooperation. This is especially true where the witness, as a result of a plea agreement with the government, is required, upon request of the prosecutor, to submit to a polygraph examination on any aspect of his or her cooperation. Such a clause in a cooperation agreement can be useful in keeping certain witnesses honest when dealing with the government. Similarly, demands that a witness submit to a polygraph examination can be a means of putting pressure on lying or otherwise uncooperative witnesses to change their mind.

TRACKING CASH

Some of the most incriminating and persuasive evidence in a public corruption case is evidence that a public official benefited financially from his allegedly corrupt activity. For example, evidence that a public official or employee deposited large sums of cash into a bank account, purchased expensive items with cash, or spent significantly more money than can be attributed to legitimate sources of income is strong corroboration for the testimony of cooperating co-conspirators regarding their involvement in a bribery or payoff scheme with the defendant. Depending upon the thoroughness of the government's financial investigation, this type of evidence will be unimpeachable and unexplainable by the defendant. Moreover, this type of evidence will have strong court appeal, because the typical jurist will not have had financial experience of the corrupt public official, that is, dealing with large sums of money.

Thus, a court will be more inclined to believe the testimony of cooperating co-conspirator witnesses when the government presents financial evidence that demonstrates the defendant's ability to spend cash or engage in certain types of financial transactions, an ability that can be explained only by the defendant public official's corrupt activity.

The purpose of this section is threefold:

1. To present an overview of the types of financial evidence that are available in detecting and prosecuting bribery, payoff, or other types of cash generation schemes involving corrupt public officials;
2. To outline an investigative plan for attacking the typical corruption case in which a public official is allegedly accepting bribes or otherwise benefiting financially by corrupting a public office; and
3. To discuss the most effective manner in which to present financial evidence at the trial of a public official.

Overview of Financial Evidence

Depending on the nature of the allegations, the GA should develop and present different types of financial evidence in a public corruption case. Where an investigation focuses on a public official's receipt of bribes or otherwise unlawful financial enrichment, the GA should immediately begin to work with investigators experienced in gathering and analyzing financial evidence. The financial evidence developed will corroborate most charges that can be brought in an anticorruption case (e.g., bribery, fraud, racketeering, extortion, and

tax evasion). Additionally, a thorough financial investigation of the defendant provides for a more complete cross-examination of the defendant (as well as certain defense witnesses, including the defendant's business associates, if they are called to testify).

Methods of Proof

Methods of proving receipt of unlawful income include the following:

1. Specific Items

Whenever the government has a witness who will testify that he carried bribes to a public official on behalf of a third party (bagman) or paid the bribes directly to the official on behalf of himself (bribe-paying attorney, bribe-paying businessman), this evidence is “specific item” proof that will support a tax charge. Often, the evidence is used in conjunction with an indirect method of proof (net worth, total expenditures, and bank deposits) that utilizes circumstantial evidence to support a tax charge and provides corroboration for the various corruption charges.

Example: A public official has his girlfriend placed on the payroll of a private company. This official has enforcement power over business conducted by the private company. The girlfriend receives several thousands of dollars in “salary,” although she has never presented herself at work (i.e., she has not earned the money). The evidence shows that it was the public official who actually “earned” the money (the company paid the “salary” to curry favor with the official, who had arranged for the “ghost” payroll situation). Depending on the laws of the country involved, the public official is obligated to declare this specific item of income and the facts as presented show that he willfully omitted it from his declaration.

2. Net Worth

In a net worth tax case, the government tries to prove that a defendant has underreported income (i.e., there are discrepancies between an individual's income for a given period and their net worth).

First, the government establishes a defendant's opening net worth or total net assets at the beginning of the prosecution period, calculated by subtracting the amount of defendant's liabilities from his assets, including any accumulated cash.

Next, evidence of the increase in the defendant's net worth over the tax year is presented. The government must show that the increase in net worth is due to a likely taxable source, such as the receipt of bribes, or that there were no nontaxable sources of funds that account for the increase in net worth, such as loans, gifts, or inheritances.

Finally, the government must negate all reasonable nontaxable sources suggested by the defendant to explain the increase in net worth. The difference between the defendant's reported income and the increase in net worth for that year, after accounting for all nontaxable sources, is the unreported income that forms the basis for the particular tax charge (and, according to the government's theory, represents the bribe or otherwise unlawfully-derived income underlying corruption charges).

Example: A defendant underreported his income for a given year, as evidenced by an increase in the defendant's net worth in excess of reported income. In this situation, the net worth method was used in conjunction with the specific items method to show that the public official diverted campaign contributions to his personal use and willfully omitted this and other income from his tax return.

3. Expenditures Method

Total Expenditures: This method and a derivative method—the cash expenditure method—are the most useful methods of financial proof in a public corruption case. While the net worth method is most often used in situations where an individual invests ill-gotten gains in durable property (real estate, stocks, business

ventures), the expenditures method is primarily employed in the typical corruption case where an official spends bribes or unlawfully-derived cash on consumable items. Thus, a corrupt official might use bribe money on food, entertainment (restaurants, bars), clothing, travel, girlfriends (or boyfriends), or other items that are not as traceable (cashier's checks, money orders, traveler's check, etc.).

In the total expenditures method of proof, the government calculates a "starting point," reflecting how much cash a defendant had at the beginning of the tax year, through financial statements, loan applications, financing arrangements, economic disclosures statements, admissions made to investigators, or a review of their financial condition prior to the charging period.

Then, all of the defendant's expenditures for the given year are totaled (increases in cash deposited into the defendant's bank accounts, personal expenditures, checks written, cash purchases, third-party checks issued to the defendant but negotiated to another party, etc.).

The government next ascertains all of the defendant's nontaxable sources of funds, including loans, inheritances, gifts, checks, tax refunds, insurance settlements, nontaxable portion of assets disposed of during the tax year, and any prior accumulated cash. Where the defendant's total expenditures for a given year exceed his reported income, nontaxable sources of income, and available cash at the beginning of the year, the excess represents the amount of unreported income (bribes or otherwise unlawfully-derived financial gains) that forms the basis of the criminal conduct charged in the indictment.

Cash Expenditures. Another method of financial proof to support charges in public corruption is the cash expenditures method. This method is the most understandable and probative method of proof, where the charges involve a bribery pay-off or other type of unlawful cash generation scheme engaged in by a corrupt public official.

This type of financial analysis deals solely with the defendant's use of cash. For example, writing checks for cash, withdrawing cash from a bank account, cashing salary or third-party checks, or receiving cash gifts or loans.

By totaling all of the defendant's cash expenditures (such as deposits of cash into an account, items or services purchased with cash, and bills paid in cash) and subtracting all legitimate cash sources (e.g., checks to cash, withdrawing cash, cashing third-party checks or one's payroll checks, and prior accumulated cash), the government can determine the amount of cash expenditures made in excess of legitimate sources of cash for a given period. The amount of this excess cash represents the cash bribes, payoffs, or otherwise illegally-derived funds resulting from the defendant's criminal conduct.

The greater the excess of the defendant's cash expenditures, the more persuasive is the proof and the more difficult it will be for the defendant to devise a plausible explanation for the excess cash expenditures. Given the nature of the charged criminal conduct, a cash bribe, payoff or other type of unlawful cash generation scheme, this method—focused simply on the defendant's use of cash—is the simplest and most persuasive type of financial analysis that can be presented to a court. This method of proof has been used in various judicial corruption cases where the judges spent significantly more cash than was available to them.

4. Bank Deposits Method

This method of proof is normally used when a defendant makes regular deposits to a bank account while employed in or conducting an income-producing business. Often, this method results in an expenditure-type analysis as the investigation focuses on defendant's cash deposits and other expenditures made during the indictment period.

5. Disproportionate Income/Property/Asset Method

In many countries of the world, GAs use the disproportionate income/ asset method to create a prima facie case that the individual is corrupt, placing the burden on the defendant to explain how he obtained the assets. However, in Nepal, and a few other countries, having disproportionate property or income which is

“incompatible” or “unnatural,” or a public servant having an “incompatible or unsuitable lifestyle” is a crime in and of itself. It forces that public officials prove the sources from which they have acquired such property. A failure to prove that these assets are from legitimate sources “deem” that the property was acquired in an illegal manner. Hence, a crime has been committed and *no other substantive crime need be proved* (see the Nepal Prevention and Corruption Act, 2059 [2002 A.D.], Section 20.)

In Nepal, or in countries that do not make disproportionate property by itself a crime, it is also a system of proof to make a prima facie case on another (separate) substantive crime (other than the crime of disproportionate income). The burden shifts to the defendant, once the disproportionate income, property, or assets have been established by the state.

Note that when material possessions are of an amount or value so disproportionate to “official” or other earnings, a case is created which puts the burden on the suspect/defendant to explain how the assets were obtained.

- The explanation requirement is to for the defendant to describe he has a number of assets that are unreasonable and incommensurate under the circumstances.

Examples: An official’s standard of living is disproportionate to his or her official salary and benefits, or the official controls resources and property that are disproportionate to official income and benefits either past or present. It must be proved that those particular assets/properties are under the dominion and control of the suspect on the dates indicated in the charge.

- The defendant’s status as a government servant must be proved, or it must be proved that the individual is a private person who is aiding and abetting a public official in the corrupt activity.
- It must be proved that the defendant maintained a standard of living not commensurate with present or past official salary, or with benefits, during the charge period (expenditures and capital accretions could not be reasonably afforded out of official salary or benefits).

Note that this property control (or expenditure) and/or liabilities could be incurred not only by the suspect, but by their parents, children, agents, trustee, etc., on the suspect’s behalf

In summary, it is necessary to prove 1) the items of property that were under the defendant’s control at a specified date, 2) the amount of monetary resources and other assets which were in the defendant’s control at that date, 3) total payments made up to the same date, thus, 4) establishing the disproportion between the three.

It is important to establish the defendant’s standard of living, including all outgoing payments and capital accretions (both domestic and abroad). This includes:

- Goods and services acquired during the charged period;
- Running costs, expenses of repairs, or maintenance and outgoings, incurred during the charge period (and/or connected with the property acquired before the charge period);
- The value of any gifts given;
- The money spent by the defendant on another individual;
- The ability to obtain credit during the charge period;
- The value of services obtained on credit;
- Prepayments that were made during the charge period;

- Amount of salaries or hires paid during the period;
- Bills remaining unpaid for goods and services rendered during the period;
- Increase in the defendant's bank account between the beginning and end of the period being investigated;
- Deposits and investment made by or for the defendant, family, etc.;
- Payments made by third parties for the benefit of the defendant;
- Credit given for money received from sale of assets or goods before the charged period (if shown they come from an untainted source); and
- All sources of income, including things such as agricultural income that the target may have received from family members, etc.

Other Types of Financial Evidence

Whether or not tax charges accompany the substantive bribery, payoff, or other type of cash generation criminal conduct charged against the public official, various types of financial evidence should be developed and presented. In cases where the charged crime involves a motive of financial enrichment, a sudden increase in cash expenditures or other unusual circumstances in the defendant's handling of money may be probative.

Evidence that the defendant public official expended large sums of cash during the relevant time period or engaged in certain types of cash transactions (evidence of changed spending habits or lifestyle) corroborates the government's proof regarding the defendant's participation in the charged scheme. Examples of persuasive financial evidence in this context include those listed below.

1. No Checks for Cash

A review of the manner in which the defendant generates cash during the investigated period may demonstrate that the defendant had an unlawful cash source. The defendant's banking and check writing activity may reveal that, during the charge period, the defendant wrote only a few checks for cash and made few cash withdrawals while depositing almost all salary checks. Yet, prior to the time the defendant began accepting cash bribes and subsequent to the bribe period (usually, after the investigation began or once the defendant became aware of the investigation), the defendant wrote substantially more checks for cash, made more cash withdrawals, or cashed more paychecks. Charting this out is persuasive evidence that, during the relevant time period, the defendant did not have to write checks for cash or generate his own cash because he was receiving cash bribes or payoffs and, thus, deviated from normal spending or check writing habits.

Also, one should review the defendant's check writing activity to determine if the defendant wrote fewer non-sufficient funds checks during the charged period because his bank account was better funded during the period in which he is alleged to have received the cash bribes/payoffs.

2. No Loans

In many instances, corrupt public officials who receive bribes on a systematic or regular basis do not finance the purchase of items during the bribe period. Yet, if they frequently financed or secured loans outside the indictment period, this pattern is another factor probative of the claim that they benefited financially through the alleged criminal conduct.

3. Using Cash Instead of Checks

Evidence that during the indictment period, the defendant used cash to pay bills despite having maintained a checking account, is probative of the defendant's attempt to hide illegally-obtained cash. Thus, if it can be shown that the defendant purchased cashier's checks or money orders with cash and used these to pay bills

instead of depositing the cash into his checking account and writing a check, it can be argued that the defendant did not want to “surface” the cash bribes and, therefore, refrained from depositing the cash into his bank account. Rather, the defendant chose to use a method of payment which is more difficult to trace.

Securing information from a bank or financial institution that shows that the defendant frequently purchased cashier’s checks, money orders, or traveler’s checks with cash is strong corroboration for the government’s claim that the public official was involved in an unlawful cash generation scheme.

4. Unusual Use of Cash

Evidence of various types of cash expenditures made during the charged period may suggest that defendant had an alternative cash source which, the government can argue, involved the bribery/payoff/unlawful cash generation scheme alleged in the indictment. Thus, evidence of frequent cash deposits, the use of large bills (currency), unusually large cash expenditures made to purchase clothing, jewelry, cars, etc., is probative of the defendant’s receipt of cash and, hence, participation in the charged scheme.

The probative value of this type of evidence is enhanced, to the extent that the government can show that the defendant did not generate the cash for these expenditures through legitimate means (cashing salary checks, tax refund checks, dividend checks, etc., or writing checks for cash from an account that appears to be funded by legitimate sources).

5. No Checks or Credit Charges

Often, the absence of checks or credit charges during the suspect period is extremely probative of the claim that the defendant was spending sums of cash derived from unlawful conduct. Thus, where it can be shown that the defendant took trips or vacations (via an isolated hotel/restaurant bill paid by the defendant in another country, as evidenced by a credit card charge, personal check, or negotiation of a traveler’s check), there is a strong inference that while on these trips, the defendant spent cash (due to the fact that money is needed to travel, and traceable credit charges or checks few in number do not account for all expenditures likely to be incurred in the course of travel).

Similarly, where the defendant’s checking account and credit card slips reveal no expenditures for daily incurred living expenses (food, clothing, entertainment, etc.), it can be argued that the defendant spent his cash bribes/payoffs on the incidental expenses that everyone incurs in normal living. Also, where it can be shown that outside of the alleged bribed period, the defendant would normally charged gasoline, car repairs, restaurant expenses, etc., but similar charges do not appear during the indictment period, the government may argue that the defendant’s spending habits reflect an alternate cash source during the relevant period.

6. Safe Deposit Box Activity

Where it can be shown that a defendant had a safe deposit box, the government should review the activity concerning entries to the box both during and outside of the charged period. If the safe deposit entry records reflect frequent activity during the indictment period, this provides a strong basis for arguing that the defendant stored his cash bribes in the safe deposit box and withdrew the cash when needed.

Also, if the entry records show activity correlating with trips taken by the defendant or dates of large cash purchases, the government may argue that the cash bribes were concealed in the safe deposit box and were the source of the defendant’s personal cash expenditures. The absence of activity outside the period corroborates the claim that the defendant was involved in a bribery scheme during the charged period.

Moreover, the absence of entries prior to the charged period will help negate any defense that the defendant had a prior accumulated cash hoard which, the defendant may later attempt to argue, explains his expenditures during the charged period.

7. Use of Third Parties in Financial Transactions

Evidence of cash or check deposits into third-party/nominee accounts that result in checks issued from the third-party account to the defendant suggests an attempt to launder otherwise unlawfully-derived money. Attempts to conceal the payment of money to a public official (through the use of nominees, trust accounts, etc.) are indicative of an unlawful, illegitimate transaction.

There may be circumstances in which the government will not want to introduce financial evidence in its case-in-chief but would rather use the evidence for purposes of cross-examining a defendant. For example, where there are several defendants and the investigation has uncovered useful financial evidence with respect to only one or two of them (particularly if the financial information is only moderately persuasive), it may be wiser simply to use the evidence for purposes of cross-examination. Otherwise, if the government highlights such evidence in its case-in-chief against some of the defendants, the other defendants may argue that they are innocent because had they been accepting bribes, the government would be in a position to present financial evidence of their bribe-taking.

CONDUCTING THE FINANCIAL INVESTIGATION

In conducting an investigation designed to uncover financial evidence of a defendant's receipt of cash bribes, payoffs, kickbacks, or otherwise unlawfully-derived money, it is important, if possible, to secure the defendant's tax returns for the period in which the alleged unlawful conduct took place. If the defendant made money in another country, it is possible that tax returns were generated there. The returns should be reviewed to determine the defendant's income sources, deductions, banks (identified via the listed interest expense or interest income), and other financial information presented on the return. Next, the defendant's payroll checks should be subpoenaed and determinations should be made as where these checks were cashed or deposited. All records of the defendant's financial transactions and relationship with these financial institutions should be subpoenaed as necessary. A standard attachment should accompany every subpoena issued to a financial institution asking for all records pertaining to the defendant, the defendant's spouse, or anyone else whose financial affairs may be intertwined with the defendant, that would reflect any type of a financial relationship between the defendant (or family members) and the bank. This should include records of a checking account, savings account, certificates of deposit, signature card, monthly statements and correspondence, deposit slips, deposited items, cancelled checks, wire transfers, cashier's checks, money orders, traveler's checks, withdrawal slips, and loan files (including financial statements, credit reports, loan applications, safe deposit information, trust accounts, records of investment, documents relating to any credit card or credit-extending account, and any other financial information involving the defendant).

Bank information from all banks/financial institutions in the areas where the defendant works, lives, or has a vacation home should be subpoenaed. It may be that the defendant has accounts at banks separate from those where legitimate sources of income are deposited.

Copies of the defendant's cancelled checks or the original cancelled checks from the defendant should be subpoenaed. These will provide leads to other financial institutions, business ventures, brokerage houses, travel agencies, credit card companies, girlfriends, boyfriends, flower shops (obtaining messages indicating the existence of a girlfriend or boyfriend), and stores and restaurants frequented by the defendant.

Interviews should be conducted of proprietors of businesses, stores, and restaurants suggested by the review of the cancelled checks to determine the extent of any expenditures made by the defendant, cash or otherwise.

The payees of checks should be interviewed to determine the extent of their financial relationship with the defendant and to preclude any later fabricated testimony that there were nontaxable sources of funds for the defendant (cashed checks for the defendant, made cash gifts or loans to the defendant, etc.).

It is important to secure copies of the defendant's deposit slips, as they will reflect if the deposit was made in cash and may reflect teller notations as to the types of bills used by the defendant when making cash deposits.

The financial statements contained in loan files (that list the defendant's assets, including cash on hand, and liabilities) will be helpful in establishing a "starting point" and in developing leads to other financial information. A review of credit reports will reflect all instances in which a defendant applied for credit cards (banks, charge companies, car dealers, etc.). Records should be subpoenaed from these entities and it should then be determined whether the defendant paid his credit card bills in cash. The underlying credit card slips will be useful to determine where the charges were incurred.

If the credit card slips reflect the names of rental car companies, the underlying rental agreement should be subpoenaed; this will reflect where the defendant stayed while traveling. Hotel records should also be subpoenaed to determine the manner in which the defendant paid the bill and any local phone calls made by the defendant (these could lead to other expenditures).

Subpoenaing the defendant's passport will reflect foreign entry and exit records and relevant Customs Service records (currency and monetary instrument reports that are required whenever an individual transports currency over a certain amount in or out of the country).

If the defendant is a member of any professional organizations or has access to any campaign funds, records of this relationship should be secured in order to prevent and/or rebut any subsequent claim that the defendant obtained cash from these sources as reimbursement for personal expense and used this cash during the charged period.

Any statements of economic interest or other disclosure statements that the public official is required to file with the state or any public regulatory agency regarding loans, gifts, lists of creditors, etc. should be obtained. This will commit the defendant to a financial position and limit their ability to provide bogus nontaxable sources of cash later at trial. Reviews should be made of public probate records (inheritances), insurance records (loans against insurance policies, insurance settlements), and any other leads to nontaxable sources.

An attempt should be made to interview the defendant early in the overt stage of the financial investigation. This may lead to admissions regarding the lack of accumulated cash, disclosure of financial information, and, possibly, false exculpatory statements (in an attempt to explain the source of various cash expenditures).

Also, interviews should be conducted with the defendant's documents preparer (i.e., accountant), if any exist. This individual may be in a position to provide leads to financial institutions, the names of defendant's business associates, and handwritten notes and memos submitted by the defendant to the tax preparer.

Additional investigative leads include instituting a mail cover on the defendant's mail. This will produce the names and addresses of financial institutions and businesses that may have a financial relationship with the defendant.

Defendant's telephone records should be subpoenaed disclosing calls (toll records) that involve business ventures, banks, and, where available, travel agencies, brokerage firms, real estate offices, and financial institutions.

Government records concerning all vehicles registered to the defendant or members of his family should be reviewed to determine the vehicles owned by the defendant and the dealership that sold the vehicles to the defendant. The dealership's records should be subpoenaed to ascertain the manner in which the defendant purchased the car.

If a financial institution does not keep a listing of the individuals who purchase cashier's checks, money orders, or traveler's checks, a manual search of such instruments purchased at defendant's bank should be conducted.

Example: In one judicial corruption case, a manual search of the cashier's checks sold at the defendant's bank produced a record of thousands of dollars in cashier's checks that had been purchased by the defendant. Because the bank did not keep records of how cashier's checks were paid for, a manual review of all deposited items on the day of the purchase of cashier's checks was performed in order to preclude the possibility that the defendant negotiated any instrument to purchase the checks. Because it was determined that the defendant had used no instruments (including personal checks) to buy the cashier's checks, the obvious inference (argued to the court) was that the defendant used cash derived from bribe-taking activities to make the purchase.

The government should obtain any business-related notes, diaries, appointment books, desk calendars, or other records maintained by the defendant or co-conspirators. Where the defendant made entries in these records with regularity at or near the time of the described event, these records may provide evidence of the defendant's meetings with co-conspirators, relevant telephone numbers, vacation schedules, travel, leads to expenditures (restaurants, businesses), and names of business associates.

Also, where the bribe-payer is a government witness (e.g., an attorney who paid off a judge, a businessman who paid off a public official), attempts should be made to secure any notes or records of that individual's payment of bribes to a public official that may corroborate his testimony (for example, a diary kept by a bribe-paying businessman that contains notations of bribe payments to corrupt officials).

In summary, it is very important to get every available piece of financial information on a defendant in order to have a complete picture of his financial affairs. If this is done, one can present persuasive financial evidence without it being impeached or otherwise explained by the defendant.

Once all of this data is amassed, the investigators should prepare summary charts that organize the information in the most effective form. This would include charts showing the defendant's total expenditures, nontaxable sources of income, excess of expenditures over nontaxable sources, excess of cash expenditures over legitimate cash sources, pattern evidence (checks written for cash and spending habits during and outside payoff period), cash deposits and large cash expenditures during the bribe period, and any other prejudicial financial information that needs to be highlighted.

Prior to the charge being filed, the government should consider delivering a letter to the defendant's attorney indicating that the defendant is under investigation for violations concerning the unlawful receipt of money for the years in question. The purpose of this letter is to invite the defendant to provide the government with leads to any nontaxable sources of funds that were available to the defendant during the years in question. Given the government's obligation to negate nontaxable sources of income, the government should attempt to verify the accuracy of any leads provided by the defendant. If such leads turn out to be bogus, the government has strong evidence of false exculpatory statements made by or on behalf of the defendant. If the defendant fails to provide any leads, the government has demonstrated the thoroughness of its investigation and the reasonableness of its conclusions as to its method of proof of unreported income.

The government should lock in the testimony of any key financial witnesses. Failure to do so may result in less favorable testimony (concerning money laundering, possession or expenditure of large amounts of cash, use of large bills, etc., on the part of the defendant) at trial because of a witness's reluctance to testify against a public official. Also, one should anticipate possible defense witnesses who may be identified as nontaxable sources of funds of the defendant (friends or associates of the defendant who claim to have they given or lent money to the defendant). The prosecutor should attempt to limit their testimony as much as possible by locking in their testimony before trial (preventing witnesses from fabricating a story later on which could prove more beneficial to the defendant) and securing any useful information regarding the defendant.

Finally, there may be situations in which a cooperating government witness is in a position to consensually monitor incriminating, financially-related conversations with a corrupt public official. Although these situations are rare, a potential defendant may attempt to contact a co-conspirator (who may be cooperating with the government unbeknownst to the defendant) and try to secure their silence. The cooperating witness

may be able to discuss prior cash bribe/payoff transactions with the defendant utilizing various scenarios (“My lawyer tells me that I may be subpoenaed, and I’m worried that the government may be able to trace the cash I paid you”; “You didn’t deposit any of the cash I gave you, did you?”; or “What should I say about the cash I paid you if the government grants me immunity?”).

Where the government has undertaken a complete financial investigation, a potential defendant may feel compelled to react to this investigation (and the resulting exposure of large cash expenditures or changed spending habits during the alleged bribe period) by attempting to manufacture false evidence (e.g., provide phony nontaxable sources of funds). Thus, interviewing and subpoenaing certain associates of the defendant may result in an individual’s admission that the defendant approached him and requested that he testify to events that are false. In any event, the government will be in a better position to expose the untruth of any explanations later offered by the defendant, if it has performed a thorough investigation of the defendant’s financial affairs.

3.0 THE TRIAL OF THE CORRUPTION CASE

In the trial of a corruption case, government attorneys should carefully consider their charging decisions, trial tactics, and possible defenses the defendant will raise.

CHARGING DECISIONS

During the course of public corruption investigations, GAs and investigators make many charging decisions. Specifically, they must decide who will be charged, how the charge will be drafted, what will be charged, and when the charge will be made. The purpose of this section is to provide suggestions to GAs to assist them in making these difficult charging decisions.

Who Will Be Charged

Throughout the course of a public corruption investigation, investigators and GAs are called upon to make decisions about who will be charged. During the early phases of the investigation, charging decisions are made when the GA decides whether to grant immunity to a subject of an investigation. Before granting immunity, the GA should evaluate the request by answering the following questions:

1. What is the culpability of the subject?
2. What is the level of evidence against the subject and the likelihood that continued investigation will uncover additional evidence?
3. What is the value of the information that will be obtained from the subject, can it be corroborated, and can the information be obtained elsewhere?
4. What will be the credibility of the subject at trial if he or she testifies under a grant of immunity?
5. What is the likelihood the subject would agree to a plea bargain and cooperate in return for a plea to a lesser criminal offense?
6. What has been the general progress of the investigation?

Requests for immunity should always be critically evaluated. Such requests made during the early states of a public corruption investigation should usually be denied as being premature. Often, the best long-term interests of the investigation are served by a decision not to grant immunity until the investigation can no longer advance by any other investigative means. While this approach may initially slow the investigation, in the long run, it can result in the development of a better case.

At the conclusion of the investigative phase of the case, the GA and investigator should consider problems of proof in deciding who should be indicted.

How the Charge Will Be Drafted

Before discussing the appropriateness of specific charges, a general discussion of complaint drafting is appropriate.

First, the charge sheet must be legally sufficient. The GA should insure that the charges are written in the language of the statute, that judicially imposed elements are included, and that the charge sheet is tailored to the facts of the case.

Second, the charge sheet should be drafted in language that can be understood by the court.

Third, the charge sheet should be drafted with sufficient latitude to allow the GA to make adjustments during trial. Statutes usually set out different means by which criminal conduct can occur. The complaint should charge a violation of the statute by as many different means as the proof will reasonably support.

Fourth, the complaint should not include every factual detail, only the most important facts. In every trial, proof will vary in some way from what the GA anticipated. If the complaint includes unnecessary factual details that are not proved during the trial, the defense will use the opportunity to argue to the court that the prosecution failed to prove what it alleged in the charging document.

What Will Be Charged

Public corruption cases chiefly involve a public official's receipt of money or property in return for the performance of an official act or an act in violation of the public official's lawful duties. The GA's decision regarding how to frame the charges in a public corruption document will usually require consideration of various statutes.

TRIAL TACTICS

The tactics utilized by GAs during the trial phase of a public corruption case are as varied as their personalities, style, and experience, and the effectiveness of certain tactics may vary by district and geographical area. Nevertheless, certain basic rules are generally applicable.

Government Attorney Behavior

The creation and maintenance of a professional, fair atmosphere in and outside the courtroom, is an absolute prerequisite to a successful verdict.

GAs and investigators are "on stage" throughout the trial. Judges closely observe expressions and behavior of government counsel and investigators at all times and places. Professional behavior and speech must be used in the elevators, corridors, cafeterias, etc. of the courthouse and surrounding areas during the course of a trial, in addition to in the courtroom itself.

If judges have the impression that GA or investigators are unfair, unprofessional, disagree among themselves, or possess arrogant personalities, a not-guilty verdict could be handed down, no matter how strong the evidence.

Attempts by defendants (public corruption defendants are usually master manipulation artists) and defense counsel to be friendly or "buddy-buddy" with GAs or investigators must be avoided—whether in the courtroom or in other public areas.

No matter what occurs during a trial, judges must always be treated professionally and with respect. GAs should never show displeasure or disgust, no matter how inappropriate or erroneous the rulings from a judge may be.

Memoranda of Law

Short, concise memoranda of law concerning legal issues that are anticipated to arise during the trial should be prepared as needed. One member of the trial team should be assigned this responsibility and that person should also utilize other attorneys in the office.

Opening Statements

When appropriate, government counsel should make an opening statement which addresses:

1. The elements of each charge in the indictment and what “the government of Nepal anticipates the evidence will be”;
2. Any potential surprises to the court (e.g., “You will hear evidence that...”), by covering and explaining weak points in the government’s case (witnesses testifying with immunity, as felons, as accomplices, etc.); and
3. Such anticipated government evidence as necessary to counter any anticipated theory of defense.

Many government prosecutors prefer to give the court as much detail as possible concerning facts that they are sure will be introduced into evidence. Others do not.

Visual Aides and Audio Transcripts

The use of visual aides (e.g., graphics and charts) needs prior court approval, and the blackboard is frequently helpful in catching and maintaining the judges’ attention and explaining and emphasizing important aspects of the government’s case.

The effective presentation and introduction of visual evidence is essential in public corruption cases. Examples of subject matter include: 1) a money trail; 2) using telephone records; 3) comparisons of a defendant’s inconsistent statements; and 4) comparisons of handwriting samples and fingerprints.

Cases with tape recorded conversations require detailed pretrial preparation. GAs must 1) have an accurate transcript prepared with an audibility hearing held prior to trial to eliminate trial objections and 2) prepare a single composite tape and a notebook containing a complete set of transcripts.

Cross-examination of the Defendant

The cross-examination of a public corruption defendant must be planned from the first day of an investigation.

The personality and preferences of the GA doing cross-examination will dictate many of the tactics used. The GA should never scream at a defendant who is a good witness. Rather, a restrained GA, appearing as the epitome of professionalism and fairness, will always set up a defendant for subsequent destruction in the government’s rebuttal case.

The introduction of the defendant’s executed oath of office should be introduced through the defendant.

Witness Preparation

Witness preparation for examination is even more crucial in a public corruption case than in the routine criminal trial.

With the exception of investigators and authorized records custodians, many witnesses are present because of their prior involvement in unethical, if not illegal, activity. This is an important fact to remember. Nothing should be said to any witness, by a GA or investigator, which would not be totally acceptable if heard by a judge.

In the investigative stage of any complex case, small mistakes are made. When investigators testify, they should readily admit that they are human and that they were not perfect. No court expects perfection and courts like honest people who admit mistakes. Investigator witnesses must be told this and encouraged not to be hostile in words or body language and not to be evasive during cross examination by defense counsel.

During trial, the GA must maintain distance from non-police officer witnesses, especially informants. A GA does not want an accomplice, in a courtroom, to address them by their first names or shake their hands after leaving the witness stand. Finally, witnesses should be told as little as possible as to what GAs and investigators is actually know.

COMMON DEFENSES

The purpose of this section is to alert GAs and witnesses to some of the innovative defenses to public corruption cases and to provide suggestions on how to counter these defenses.

The “It Did not Happen” Defense

The most commonly used defense in public corruption cases is the defense that the crime in question never happened. Using this defense, the public official denies that the payoff occurred and attacks the government witnesses. For this defense to be effectively advanced, the defense must develop a motive for the cooperating government witnesses to have lied. Public corruption prosecutions typically feature the testimony of a cooperating government witness who testifies that he paid a bribe to a public official in return for an official act for the benefit of the cooperating witness. Usually the witness agrees to cooperate with the government **only** after becoming the subject of a criminal investigation. The cooperating witness’s potential exposure to criminal prosecution makes him vulnerable to defense attacks on his credibility.

If a case rests on the uncorroborated testimony of a bribe payer, it will probably be lost. Because payoffs are made in secret, usually with only the cooperating witness and the public official present, meaningful corroboration may be difficult. To effectively rebut the this defense, the GA or investigator must move aggressively during the investigative phase of the case to seek corroboration of the cooperating witness.

A good starting point for developing effective corroboration is to establish how the bribe payer obtained the payoff money. As discussed previously, the source and amount of the payoff funds can often be established through bank records, loan documents, or corporate records. It is even more important to trace the bribe money after it has been delivered to the public official. For example, in some cases, proof can be obtained that credit card obligations or other debts were satisfied or large capital expenditures were incurred after the payoff. All of these potential sources of corroboration of the payoff must be explored prior to seeking indictment.

The GA or investigator should also corroborate all contacts between the cooperating witness and the public official. Telephone toll records, visitors’ logs, appointment books, and personal diaries can provide valuable proof of communication between the witness and the defendant. Communication also may be established through interviews of secretaries, co-workers, and other business associates.

In some cases, there may be proof that the cooperating witness showed the payoff money to a third person or told a third person about the payoff before the criminal investigation had been initiated. GAs or investigators should prepare that person to testify because their testimony would be admissible at trial if the defense argues that the cooperating witness recently fabricated testimony to gain favorable treatment by the government.

Another way for the government attorney to rebut the “it did not happen” defense is through appropriate treatment of the cooperating witness. The cooperating witness should not be perceived by the court as having escaped punishment for a crime because he agreed to inculcate the defendant. That perception, if accepted by the court, will cause the complete rejection of the cooperating witness’s testimony and may, therefore, result in the acquittal of the defendant. Generally, a cooperating witness, if criminally culpable, should be required to plead guilty to some crime. As a person who has pleaded guilty to a crime relating to the matter about which he is testifying, a cooperating witness’s credibility before the jury will be greatly enhanced.

Another tactic that sometimes accompanies the this defense is to call businessmen to testify that they dealt successfully with the public official without being extorted by him. The purpose of the defense is to establish that the defendant as a matter of practice did not request bribes. A rebuttal to this defense tactic is to request that the court rule that testimony about other lawful conduct is not relevant. Evidence of non-criminal conduct to negate the inference of criminal conduct is generally irrelevant. For example, if a man is on trial for robbing a bank, evidence that he visited three other banks without robbing any of them is not relevant to the determination of whether he is guilty of the bank robbery in question.

The “I Got the Money, But I Was Legally Entitled to It” Defense

Another defense frequently advance by public officials is the “I got the money, but I was legally entitled to it” defense. Under this defense, the public official admits receipt of a financial benefit, but denies any connection between the financial benefit and any improper use of his office. Common formulations of this defense are:

1. The money delivered to the public official was payment for services rendered that were unrelated to his public office;
2. The money delivered to the spouse (or other relative) of the public official was payment for services rendered by the spouse that are unrelated to the defendant’s public office;
3. The financial benefit received by the public official was profit from a business investment that is unrelated to his public office;
4. The money that was delivered to the public official by a personal friend is a loan unrelated to the public official’s office (e.g., because of their friendship, no loan papers were prepared; however, the parties intended that the loan would be repaid with interest); and
5. The money received by the public official was a campaign contribution, not a bribe.

A corollary to these defenses is that any official act performed by the public official for the provider of the money was a customary constituent service or some other government entitlement for which the citizen qualified. The object of all of these defenses is to disassociate the payment from the public official’s office. These defenses can be very difficult to overcome if the public official has a plausible explanation of how he or his relative legally earned the payment.

The best rebuttal to these defenses is evidence that the defendant received the money in return for a specific official act. Absent direct evidence, the GA should develop evidence that suggests that the purpose of the payment must have been to bribe the public official. For example, evidence that establishes the temporal relationship between the payment of the money and an official act is effective. Evidence that the public official or his relative performed no legitimate service or that the payment is disproportionate to the services rendered is also effective. The defense may be rebutted further by evidence that the public official changed his position on the official action or undertook extraordinary efforts on behalf of the bribe payer. Another effective rebuttal to this defense is evidence that the money paid to the public official was transferred through dummy transactions or otherwise mischaracterized or concealed.

If the defense contends that the payment was a campaign contribution, an effective rebuttal can be made by proof that the payment was never reported as a campaign contribution to the appropriate election authority, that the payment exceeded campaign contribution limits, or that the payment violated election law.

Defenses Deployed Against Undercover Investigations

The extensive use of undercover operations to investigate public corruption cases has given rise to standard undercover investigation defenses.

The “Cheat” Defense. As discussed previously, an essential component of many undercover investigations is an informant or other cooperating individual who provides information, makes introductions and sometimes sets up meetings between public officials and agents posing as bribe payers. Individuals who perform these intermediary functions often are motivated by money (paid informants) or by the hope of lenient treatment (individuals with criminal exposure who have agreed to cooperate with the government). A standard defense tactic is to attack the intermediary as a “cheat” who tricked the defendant into acting in a way that allowed his innocent conduct to be misconstrued by the GA as criminal conduct.

This defense is often employed in cases in which the defendant’s conversations have been recorded. It is a standard defense tactic to contend that the intermediary had unrecorded meetings with the defendant outside the presence of government investigators. The defense will contend that during those unrecorded meetings, the “cheat” tricked the defendant into making statements or acting in a way that appears consistent with the defendant’s guilt. After the “cheat” had the defendant properly programmed, they brought the unwitting defendant into a recorded meeting to perform. The motive for the intermediary’s conduct is established by receipt of substantial informant payments or by his own exposure to criminal prosecution. This defense is difficult to rebut if the investigation has not been structured with these potential defenses in mind.

To adequately rebut the “cheat” defense, the conduct of the intermediary’s role must be carefully controlled and substantially limited. All contacts between the intermediary or anyone acting on his behalf (spouse, employee, etc.) and the defendant should be monitored and recorded. To the greatest extent practicable, the role of the intermediary should be reduced and an undercover agent should be insinuated into the operation. At trial, if at all possible, the intermediary is not to be called as a witness. Instead, the tapes should be introduced and the agents used as witnesses. If it is essential that the intermediary be called to testify, do not rely on any aspect of his testimony that cannot be corroborated by independent evidence.

As discussed previously, an operative should be inserted into the operation so that he/she can be present when the payoff occurs. Furthermore, all conversations with the defendant about the payoff should be recorded, and it should be stated in straightforward terms that the payment is for a specific act. It is much more difficult for the defendant to advance a credible “cheat” defense if the recorded conversations discuss the payoff in clear, understandable language.

Finally, the treatment given to the intermediary by the government must not be perceived by judges as unduly lenient or otherwise an inducement to lie. If the intermediary has substantial criminal exposure, he should be required to plead to a serious offense. If the intermediary is entitled to payment as an informant, payments should be reasonable in amount and duration. Needless to say, this fact must be revealed to the defense.

The “Outrageous Government Conduct” Defense. Another common defense used in cases developed through undercover investigations is the “outrageous government conduct” defense. In asserting this defense, the public official contends that the government improperly targeted him. The public official will claim that he was targeted by the administration because he is a political enemy of the administration or a member of some group or organization deemed to be “undesirable” by the administration. An outrageous government conduct defense is usually expressed as a due process defense, or some combination of that and one of the other defenses indicated in this section. The due process defense focuses on the objective nature of the government’s conduct.

The best protection from outrageous government conduct allegations comes from following the guidelines on undercover investigations as previously discussed. It is also sometimes helpful to point out to the court that the defendant's allegation of prosecution misconduct is a mere smokescreen for illegal misconduct of extortion and greed.

The “I Was Conducting My Own Investigation” Defense. A third defense advanced by public officials (particularly by officials associated in some way with law enforcement) in undercover cases is to contend that the public official's intention was to undertake his own investigation of an attempted bribe by playing along and accepting the payoff money.

A rebuttal to this defense should establish the following points: 1) the public official's job did not include investigating this type of crime; 2) no steps were taken by the official to notify the law enforcement agency properly charged with investigation of this type of crime of the official's investigation; and 3) no investigative steps were in fact taken by the public official. Most importantly, the government must obtain the return of the bribe currency paid to the public official. Return of the currency usually can be achieved by sending a demand letter to the defendant's counsel. If this tactic fails, a court order should be obtained or a subpoena issued for return of the currency. An examination of the serial numbers on the returned currency often reveals that some of the serial numbers do not match the serial numbers that were recorded from the payoff currency. The public official's inability to return all of the original currency allows the GA to argue that the public official's claim on an independent “undercover investigation” is a sham, in that the official would have retained all of the currency as evidence had he been conducting an authentic investigation.

The “Attorney Advice” Defense

A public corruption defendant may assert the defense that the acts committed that were based on the advice given by an attorney.

For the attorney advice defense to be properly raised, a defendant would have provided the attorney with the full facts, would have believed the advice to be accurate, and would have sought the advice in order to comply with the law. The assertion of the attorney advice defense should act as a waiver of any attorney/client privilege that may exist with the attorney on whom the defendant claims reliance. Therefore, upon notification that the defendant intends to assert the attorney advice defense, the prosecutor should interview the attorney. Usually, an interview with the attorney will establish that either the attorney did not render legal advice as claimed by the defendant or that the legal advice was based on the defendant's misrepresentation of the operative facts. In either circumstance, the attorney should be called as a government witness to rebut the defendant's claim of advice of counsel.

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