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The Selection, Analysis, and Approval of Federal RICO Prosecutions

Paul E. Coffey*

So much analysis exists in praise or condemnation of RICO¹ that it is becoming increasingly difficult to provide new insight into the subject. Still, the debate rages on, fueled recently by Justice Anthony Scalia's observation that a key component of RICO may be unconstitutionally vague.² Before discussing how the Department of Justice selects and authorizes RICO cases, it might be interesting, and even amusing, to summarize how intense the RICO debate has become.

First, there are the law review articles, the numbing labors of many law professors, practitioners, and untold legions of law students. A LEXIS search reveals the publication of at least 316 RICO articles and commentaries since 1981.³ Our host, the *Notre Dame Law Review*, has itself published a dozen RICO pieces during the last seven years,⁴ due no doubt to the influence of Professor G. Robert Blakey. Such articles reflect prodigious research, collectively run to tens of thousands of pages, and contain citations of legal authority that only a computer could track.⁵

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1 18 U.S.C. §§ 1961-1968 (1988).

2 *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2906-09 (1989) (Scalia, J., concurring). Subsequently, the Court of Appeals for the First Circuit has upheld RICO against the attack specifically invited by Justice Scalia. *United States v. Angiulo*, 897 F.2d 1169, 1179-80 (1st Cir.), cert. denied, 59 U.S.L.W. 3247 (1990).

3 As of October 30, 1990, the following search in LEXIS's Lawrev library, Lglind file, yielded 316 pieces: "Descriptors (RICO) and not descriptors (Puerto Rico) and date aft 1981."

4 See Blakey & Cessar, *Equitable Relief under Civil RICO: Reflections on Religious Technology Center v. Wollersheim: Will Civil RICO Be Effective Only Against White-Collar Crime*, 62 NOTRE DAME L. REV. 526 (1987); Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982). See also Note, *Who Should Pay when Federally Insured Pension Funds Go Broke?—A Strategy for Recovering from Wrongdoers*, 65 NOTRE DAME L. REV. 310 (1990); Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989); Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under the Comprehensive Forfeiture Act of 1984: If It Works, Don't Fix It*, 63 NOTRE DAME L. REV. 535 (1988); Note, *Reconsideration of Pattern in Civil RICO Offenses*, 62 NOTRE DAME L. REV. 83 (1987); Note, *A Uniform Limitations Period for Civil RICO*, 61 NOTRE DAME L. REV. 495 (1986); Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526 (1986); Note, *Civil RICO: Prior Criminal Conviction and Burden of Proof*, 60 NOTRE DAME L. REV. 566 (1985); Note, *The Availability of Equitable Relief in Civil Causes of Action in RICO*, 59 NOTRE DAME L. REV. 945 (1984); Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 NOTRE DAME L. REV. 382 (1982); and Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587 (1983).

5 Because RICO covers an extraordinary range of activities, the RICO debate has energized as has no other statute the fields of conspiracy, forfeiture, pre-trial restraints of liberty and property, attorney-client relationships and payment of fees, joinder of defendants or offenses, "mega-trials" and due process, torts, antitrust, bankruptcy, insurance, civil procedure, service of process, shareholder action, securities, binding arbitration, attorney sanctions, summary judgment, burdens of proof, insurance, the pro-choice movement, the pro-life movement, and free speech. RICO even appears to have breathed new life into the normally dormant Eighth Amendment.

The RICO library is much more than a collection of law review articles, however. RICO supports its own set of newsletters and reporters,⁶ its own American Bar Association Committee,⁷ its own special review unit within the Department of Justice,⁸ and its own set of guidelines and "blue sheets" that bind all federal prosecutors.⁹ There are also at least a half-dozen hard-bound (and expensive!) RICO manuals¹⁰ currently in publication, not to mention two "How-To" RICO manuals issued by the Department of Justice. There are probably more RICO seminars conducted around the country at any time than for any other single federal statute.

The RICO statute itself is *sui generis*: It consists of eight sections, one of which, section 1961, cites as predicate statutes fifty-two *other* federal statutes, five generic references to federal labor and securities laws, and nine state offenses of murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotics, and obscenity. RICO is itself cited, directly and indirectly, in at least ten other federal criminal statutes or regulations. One indication of RICO's complexity is reflected further in its numerous subsections and exceptions, such as: "Provided, however, . . ."¹¹ And, for those keeping count, RICO contains 5,960 words, not a few of which, such as "pattern" and "enterprise," have taken on lives of their own.

Since, in their own way, the media love controversy of any kind, they can be said to love RICO. Occasionally, an article or editorial will defend RICO, an event which occurs less often than one would expect in light of the fact that the statute has produced the federal government's most spectacular successes against organized crime.¹² Far more common are

6 See, e.g., Civ. RICO Lit. Rep. (Andrews); Civ. RICO Rep. (BNA); Organized Crime Dig.; RICO L. Rep. (Compuer Law Reporter); State Civ. RICO (published by the state Civil RICO Drug Enforcement Project of the National Association of Attorneys General, Washington, D.C.).

7 American Bar Association, Section of Criminal Justice, RICO Cases Committee. The Committee is expected soon to issue advice to lawyers on protecting legitimate legal fees from RICO forfeiture.

8 The Organized Crime and Racketeering Section's ("OCRS") review unit consists of one Assistant Chief and a number of trial attorneys.

9 The United States Attorneys' Manual governs uniform practice by the 94 United States Attorneys' offices nationwide. See CRIMINAL DIV., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL [hereinafter U.S.A.M.]. The guidelines covering RICO are contained in title 9 of the United States Attorneys' Manual. See U.S.A.M. §§ 9-110.100-.816 [hereinafter RICO Guidelines]. A "blue sheet" is an addition to the United States Attorney's Manual. Similar to the "pocket part" of a legal treatise, a blue sheet is a formal part of the U.S.A.M. upon adoption by the Executive Committee of United States Attorneys, as in the cases of the two recent RICO blue sheets. The first was adopted June 30, 1989 as U.S.A.M. § 9-110.414, regarding Temporary Restraining Orders Under 18 U.S.C. § 1063(d). The second was adopted July 14, 1989 as U.S.A.M. § 6-4.211(1), regarding Charging the Filing or Causing the Filing of False Income Tax Returns as Mail Fraud and/or as Mail Fraud Predicates to a RICO Charge.

For press comment, see, e.g., Eichenwald, *U.S. Moves to Limit Racketeering Law in Business Cases*, N.Y. Times, Oct. 24, 1989, at A1, col. 3.

10 See, e.g., P. BATISTA, CIVIL RICO PRACTICE MANUAL (1987); D. SMITH & T. REED, CIVIL RICO (1990); J. RAKOFF & H. GOLDSTEIN, CIVIL AND CRIMINAL LAW AND STRATEGY (1989); D. McCORMACK, RACKETEERING INFLUENCED CORRUPT ORGANIZATIONS, RICO: FEDERAL AND STATE CIVIL AND CRIMINAL RICO (1989).

11 18 U.S.C. § 1963(d)(1)(B)(ii) (1988).

12 Articles in this category include: *RICO Racket in the Senate*, N.Y. Times, Feb. 1, 1990, at A22, col. 1; Anderson and Van Atta, *Don't Gut RICO*, Wash. Post, Apr. 30, 1989, at C7, col.4; *Refine RICO, Don't "Reform" It*, N.Y. Times, Aug. 27, 1989, § 4, at 18, col. 1; *Save RICO from "Reform"*, *id.*, Oct. 6,

the attacks on RICO, or on its perceived misuse. The Wall Street Journal has been particularly critical of RICO, often in an amusing fashion.¹³ These articles, for better or worse, have significantly contributed to the legal environment in which current RICO legislation is being considered.¹⁴

RICO has also come under fire recently from judges in and out of the courtroom. Chief Justice Rehnquist was reportedly concerned about the number of RICO cases on the federal docket.¹⁵ Judge David B. Sentelle, of the United States Court of Appeals for the District of Columbia, gave a luncheon address last year titled "RICO: The Monster That Ate Jurisprudence" and equated RICO's creator with Dr. Frankenstein.¹⁶ Even four justices of the Supreme Court have expressed doubts about the clarity of the term "pattern of racketeering."¹⁷

1988, at A30, col. 1; *Massachusetts Needs RICO*, Boston Globe, Jan. 4, 1988, at 15, col. 2; *Fixing RICO: Beware of Solutions to Nonexistent Problems*, Philadelphia Inquirer, Sept. 1, 1989, at A18, col. 1 (final ed.).

13 Prior to 1988, The Wall Street Journal (the *Journal*) only occasionally editorialized on RICO, only once in 1987, for example: Shell, *Keep Broker-Client Disputes Out of Court*, Mar. 3, 1987, at A32, col. 3. In 1988, the *Journal* ran the following articles or editorials, among others: *Captain Ahab Prosecutors*, Dec. 29, 1988, at A6, col. 1; *RICO's Nuclear Meltdown*, Dec. 9, 1988, at A22, col. 1; *The Queen's Justice*, Dec. 9, 1988, at A22, col. 1; "RICO, What a Racket", Aug. 23, 1988, at A26, col. 1.

In 1989, choice selections included: Crovitz, *RICO Needs No Stinkin' Badges*, Oct. 4, 1989, at A30, col. 3; "It's Time to Rescind RICO", Aug. 22, 1989, at A14, col. 4; Sawyer, *RICO's Taxing Problem*, Aug. 22, 1989, at A14, col. 3; *Ham Sandwich RICO*, Aug. 11, 1989, at A12, col. 1; *RICO Hits the Pits*, Aug. 3, 1989, at A10, col. 1; *Second Thoughts on RICO*, May 19, 1989, at A14, col. 1; Rehnquist, C.J., *Get RICO Cases Out of My Court*, May 19, 1989, at A14, col. 4; *RICO Backfires*, Mar. 2., 1989, at A16, col. 1; *Lights Out for RICO*, Feb. 17, 1989, at A14, col. 1; Glasser, *RICO Chickens Come Home to Roost*, Feb. 17, 1989, at A14, col. 4; *RICO's Broken Commandments*, Jan. 26, 1989, at A14, col. 3.

In 1990, the *Journal* ran, among others: Crovitz, *Mother of Mercy, Will Drexel be the End of RICO?*, Feb. 21, 1990 at A15, col 3; and Crovitz, *Two Cheers for this Bill to Reform RICO*, June 27, 1990, at A13, col. 3. Headline favorites in other newspapers are: *RICO—Assault With a Deadly Weapon?* N.Y. Times, Jan. 30, 1989, at A16, col. 1; Safire, *The End of RICO*, N.Y. Times, Jan. 30, 1989, at A17, col. 5; Nocera, *Drexel: Hanged Without a Trial*, N.Y. Times, Dec. 30, 1988, at A31, col. 1; Safire, *RICO: A Legal Monstrosity That is Running Amok*, Chicago Tribune, Jan. 31, 1989, § 1, at 15, col. 1.

14 See, e.g., S. 438, 101st Cong., 1st Sess. (1989) and H.R. 1046, 101st Cong., 1st Sess., 135 CONG. REC. H368 (daily ed. Feb. 22, 1989) (bills pending in 101st Congress that would limit recovery of treble damages to government plaintiffs or private plaintiffs where the defendant has previously been convicted of related conduct); S. 1523, 100th Cong., 1st Sess., 121 CONG. REC. S10498 (1987) (bill in 100th Congress using the prior-conviction approach to limit recovery of treble damages); H.R. 4920, 100th Cong., 1st Sess. (1987) (bill in 100th Congress that would sharply restrict government equitable suits involving labor unions and that would restrict private actions by subject matter); H.R. 2943, 99th Cong., 1st Sess. (1985) (bill introduced in 1985 adopting the prior-conviction approach).

15 Rehnquist, *supra* note 12.

16 D. Sentelle, *RICO: The Monster That Ate Jurisprudence* (delivered on Oct. 18, 1989, at RICO, Rights, and the Constitution, Cato Institute Seminar, Washington, D.C., copy available from the Cato Institute). Judge Sentelle curiously declined to reveal his belief regarding the identity of "Dr. Frankenstein":

Since the time for this speech is limited, I will not go into who I would cast as the well-meaning but bumbling scientist who released the monster on the world and in spite of the cries and whispers of throngs of people, does little or nothing to recall, restrain, or reform his creation.

Id. at 3. For further comment, see Sentelle, *Wounding the RICO Beast*, Wash. Times, Nov. 27, 1989, at F2, col. 1.

17 "No constitutional challenge to [RICO] has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when the challenge is presented." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2909 (1989) (Scalia, J., concurring, joined by Rehnquist, C.J., and O'Connor and Kennedy, J.J.), *rev'g*, 829 F.2d 648 (8th Cir. 1987). The Criminal Division, pursuant to 28 U.S.C. § 2403 (1988), the statute dealing with constitutional challenges

Within the eye of this storm, the Department of Justice continues to bring RICO charges against organized crime figures, corrupt public officials, and businessmen who corrupt the marketplace.¹⁸ This Article focuses on the Criminal Division's mechanism for selecting and prosecuting these cases as effectively as possible.

I. The Selection of RICO Prosecutions

Most RICO prosecutions begin as FBI investigations; of all federal agencies, the Bureau has the most agents, the most resources, and the broadest investigatory authority devoted to priority cases. The Bureau contributes roughly 55% of the case inventory of the Department's twenty-one Organized Crime Strike Force Units, which have specialized for years in RICO prosecutions. Thus, almost all of the major RICO indictments against La Cosa Nostra families (called "family RICOs") were initiated by these Units¹⁹ and the FBI, to the point where FBI agents have even qualified at trial as expert witnesses regarding the structure, rules, and operation of crime families.²⁰

In the law enforcement community, the hierarchy and continuing activities of crime families are usually well known, even though mob bosses are difficult to convict due to their insulation from crimes committed by their underlings. The trick (from the mob boss' perspective) is to confine prosecutions to the hapless soldiers manning the walls of the fort. Conversely, the government's task is to penetrate the mob's outer defenses in order to get at its leaders. Much like a siege, the parties spend considerable time staring at each other or exchanging non-lethal blows. RICO is a powerful weapon for the government in this battle.

A RICO campaign against a well-entrenched crime family begins with several advantages. First, the targets of the investigation, their daily routines, their methods of operation, and their means of contact are

to any Act of Congress, has received 14 notices of constitutional attack on RICO at the district court level since *H.J. Inc.* was decided in June 1989. The government maintains that the constitutional attacks against the RICO statute's requirement of a "pattern of racketeering activity" are without merit for a variety of reasons: (1) except where first amendment rights are implicated, a defendant may not challenge successfully a criminal statute on its face on the ground that it conceivably may be unconstitutionally vague as applied to other situations not before the court; (2) under the rationale of *Fort Wayne Books, Inc. v. Indiana*, 109 S. Ct. 916 (1989), if the RICO predicates are not vague, then the statute itself should not be disturbed; moreover, proof requiring "knowing" and willful" acts on a defendant's part vitiates vagueness arguments; (3) it is highly significant that the courts of appeals have uniformly held that RICO is not vague in a variety of circumstances. See generally Note, "Mother of Mercy—Is This the End of Rico?"—*Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO Pattern*, 65 NOTRE DAME L. REV. 1106 (1990).

18 In 1989, the Criminal Division's Organized Crime and Racketeering Section, which reviews all proposed federal RICO prosecutions, authorized 111 RICO indictments, which reflects an average number.

19 *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), cert. denied, 110 S. Ct. 1138, 2175, 2564 (1990); *United States v. Salerno*, 868 F.2d 524 (2d Cir.), cert. denied, 109 S. Ct. 3192 (1989) and 110 S. Ct. 56 (1989); *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States v. Milano*, No. 87-439 (C.D. Cal. 1987); *United States v. Civella*, No. 84-32-5 (W.D. Mo. 1984); *United States v. Scarfo*, 711 F. Supp. 1315 (E.D. Pa. 1989); *United States v. Angiulo*, No. 83-235-N (D. Mass. 1983).

20 See *United States v. Daly*, 842 F.2d 1380, 1387-89 (2d Cir.), cert. denied, 109 S. Ct. 66 (1988). For RICO purposes, the term "enterprise" encompasses both legitimate and illegitimate enterprises, including crime families. *United States v. Turkette*, 452 U.S. 576 (1981).

often well known to law enforcement even before the investigation begins. It is a law enforcement axiom that the larger the crime family is, the more likely that its lines of communication involve informants or loose-lipped soldiers. Thus, while making a RICO case against the leaders of a mob family is a difficult task, making a case against the family itself is much easier if the requisite dedication of investigative resources is made. Second, a RICO case of this type is attractive to prosecutors and agents alike because the work is challenging, the targets are significant, and the potential rewards are great in terms of convictions and forfeitures. With hard work and a little luck, prosecutors and agents know that they now have a reasonable chance of taking out all or most of a mob family's leadership with a single RICO verdict.²¹ Third, the RICO statute was, after all, designed with the mob in mind. Consequently, RICO's most important features work best in an organized crime setting. The degree of judicial acceptance of RICO is noticeably higher in that context than in the white-collar criminal and civil arenas.

All of the above is by way of saying that RICO is an essential component of the government's strategy of attacking organized crime. To be sure, RICO indictments of mob families can reach a size and complexity that challenges the trial judge's ability to control the courtroom.²² But the post-indictment problems associated with RICO "mega-trials" are not likely to change how the government conducts RICO investigations. These days crime families are like magnets in attracting the attention of big city federal agents and prosecutors with extensive experience in RICO investigations and trials. The era of piecemeal mob prosecutions is over: the government will continue to pursue major RICO cases in such traditional mob strongholds as Boston, Philadelphia, Chicago, New York City, Newark, Los Angeles, Detroit, Buffalo, Miami, and Cleveland.²³

Another form of legal warfare is the investigation of public corruption and other forms of so-called white-collar criminality, in which the results under RICO can be just as spectacular (or controversial, depending on one's perspective) as in mob cases. Perhaps in the halcyon days of Tammany Hall, where corruption was so open and notorious, prosecutors could have targeted corrupt officials much like mob figures are targeted today, i.e., with the expectation that their criminal ways would continue more or less uninterrupted. Today, however, public corruption cases are usually reactive in nature. Having learned that a particular public official *has* accepted bribes, a federal agent or prosecutor usually be-

21 See, e.g., *United States v. Pungitore*, 910 F.2d 1084, 1097 (3d Cir. 1990) ("These consolidated appeals are the latest saga in the government's dismantling of the Philadelphia branch [the Nicodemo Scarfo crime family] of La Cosa Nostra").

22 One district court upheld joinder in theory, but granted severance because of the unmanageable complexity of trial. *United States v. Gallo*, 668 F. Supp. 736, 754-58 (E.D.N.Y. 1987). However, the Second Circuit recently ruled that joint trial of 21 defendants for more than 17 months, with thousands of exhibits and more than 275 witnesses, did not violate due process as overly complex and massive. *United States v. Casamento*, 887 F.2d 1141, 1149-53 (2d Cir. 1989).

23 The ten cities in which a RICO prosecution is most likely to occur (based on the period 1984 to 1989) are Chicago, New York, Philadelphia, Boston, Miami, Newark, Tampa, Los Angeles, Detroit, and Washington, D.C. This might help explain, moreover, why so much that is written by the courts about § 1962 emanates from the First (Boston), Second (New York City), Third (Newark), and Seventh (Chicago) Circuit Courts of Appeals.

gins, after the fact, to look for proof of those bribes. Statutorily, these investigations are usually predicated under the Hobbs Act or mail fraud statutes. Of course, given the right circumstances (such as the covert cooperation of the bribe payor), the corruption investigation might begin to look like a mob case. But the tactical advantages of using RICO in a mob case are not as evident in the early stages of corruption cases; consequently, the investigations are usually shorter in duration, more confined in scope, and more overt in execution. For these and related reasons, corruption indictments, even when they contain RICO counts, generally charge far fewer defendants than mob prosecutions, and often are limited to one generic activity (such as bribe-taking). Nonetheless, RICO is an effective weapon against corrupt public officials. Between 1984 and 1989, for example, public corruption was the underlying criminal conduct in twenty-six percent of all approved RICO prosecutions. In 1989, of the 111 RICOs approved by the Organized Crime and Racketeering Section, twenty-nine involved some form of public corruption.

Why the emphasis on RICO? First, prosecuting corrupt public officials is a high priority of the Department of Justice. Such officials do just as much harm to the quality of life in a community as do organized crime figures, in whose beds they are often found.

Second, RICO often covers conduct that is beyond the reach of other favorite anti-corruption statutes, such as the Hobbs Act,²⁴ mail fraud statute,²⁵ and the Travel Act ("ITAR").²⁶ Under RICO, for example, the prosecution can be reasonably confident that the court will permit proof that a corrupt judge fixed a number of cases, even though those cases are unrelated to each other and even if some of the bribes occurred more than five years prior to the date of indictment. So long as the bribes constitute a pattern, the "normal" rules of joinder and computation of the statute of limitations do not apply.²⁷ In police corruption cases, it is also possible to join in one case seemingly independent shake-downs by various defendants if the proof establishes that the defendants acted in concert by first creating and then capitalizing on a city-wide atmosphere of fear.²⁸ Of course, the prosecution must prove that each defendant joined or was associated with a RICO enterprise, endorsed its criminal objectives, and committed or agreed to the commission of a pat-

24 18 U.S.C. § 1951 (1988).

25 18 U.S.C. § 1341 (1988).

26 18 U.S.C. § 1952 (1988).

27 The normal federal statute of limitations is five years. 18 U.S.C. § 1952 (1988). Accordingly, RICO requires that the most recent predicate act alleged occur within five years of the date of indictment. However, as to the next prior act in the chain, it must only have occurred within 10 years of the most recent act. Although this 10-year span appears to give the prosecution an unfair advantage by forcing the defendant to defend against ancient allegations, the prosecutor must always prove that all of the crimes are part of a pattern.

28 See, e.g., *United States v. De Peri*, 778 F.2d 963 (3d Cir. 1985), cert. denied, 475 U.S. 1110, 1159 (1986).

tern of crimes.²⁹ Still, where such proof is available, RICO is far and away the most effective attack against such systemic corruption.³⁰

RICO-corruption cases, like RICO-mob cases, are most likely to emanate from United States Attorneys' offices with extensive RICO expertise in this area, most particularly Chicago, New York City, and Boston. By the same token, federal judges in those metropolitan areas are more likely to be familiar with, and hence more receptive to, the RICO-corruption approach. In smaller districts without much RICO exposure, corruption cases are more likely to be indicted under the Hobbs Act, mail fraud, or ITAR offenses.³¹ This is fine, if it gets the job done. Whether to use RICO is a local call. Non-RICO statutes bring their own burdens to a prosecution. The Hobbs Act statute requires proof (in the corruption context) of extortion affecting interstate commerce and the coercive use of office ("color of official right"³²). The mail fraud statute requires, of course, use of the mails. The ITAR statute requires interstate travel or the use of the mails and an act *thereafter* to further the corrupt activity. Whether to address a series of bribes or extortions solely under the "predicate" statutes of Hobbs Act or mail fraud or under RICO involves many factors, including the number of defendants and their interrelationships, the number of bribes or extortions, and the length of criminality. Although the Organized Crime and Racketeering Section (OCRS) considers RICO to be a powerful weapon against corrupt officials, it does

29 The circuits are split over whether a defendant in a RICO conspiracy count must personally agree to commit two or more predicate crimes, or if he can be held liable when he only agreed to the commission of two or more predicate crimes by other conspirators. The First and Second Circuit Courts of Appeals require personal agreement to commit two acts. See *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983). In seven circuits, however, the defendant need only reach a general agreement with other conspirators that two acts will be committed pursuant to the conspiracy, not necessarily by any particular conspirator. The most recent adherent to this view is *United States v. Pryba*, 900 F.2d 748, 760 (4th Cir. 1990) (citing decisions from six other circuits), *cert. denied*, 59 U.S.L.W. 3292 (U.S. Oct. 15, 1990). At least one circuit has expressly left the question open. See *United States v. Killip*, 819 F.2d 1542 (10th Cir.), *cert. denied*, 484 U.S. 865 (1987). Perhaps the most thorough analysis of this issue to date is contained in *United States v. Neapolitan*, 791 F.2d 489 (7th Cir.), *cert. denied*, 479 U.S. 939, 940 (1986).

30 An outstanding example is the GREYLRD project in Chicago. Since 1983, federal prosecutors investigating corruption within the Cook County judicial system have secured 84 convictions, including 13 judges, 47 lawyers, 18 police officers, and four court officials. When the early GREYLRD cases were indicted as RICOs, critics charged that the Department of Justice had overreacted and had unfairly labelled Cook County as a "racketeering enterprise." Some critics even felt that cleaning up whatever corruption existed should have been left to state authorities. While those arguments presumably remain, it is hard to imagine that the salutary impact of GREYLRD could have been accomplished under any other approach. Using RICO, federal prosecutors were able to present the full range of a defendant's corrupt acts in one case, often under the alternate theories of Hobbs Act extortion, mail fraud, and state law bribery. See, e.g., *United States v. Yonan*, 800 F.2d 164 (7th Cir. 1986); *United States v. McDonnell*, 699 F. Supp. 1348 (N.D. Ill. 1988); *United States v. Reynolds*, No. 85 CR 812, 1986 WL 4089 (N.D. Ill. Mar. 19, 1986) (WESTLAW, Federal library, DCTU file).

The GREYLRD approach has been successfully duplicated against public corruption of appalling venality in Boston (*United States v. Boylan*, 898 F.2d 230 (1st Cir.), *cert. denied*, 111 S. Ct. 139 (1990)), Philadelphia (*United States v. De Peri*, 778 F.2d 963 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986) and *United States v. Wilson*, 712 F.2d 826 (3d Cir. 1983)), and Key West (*United States v. Casamayor*, 837 F.2d 1509 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 813 (1989)).

31 See *supra* notes 24-26.

32 18 U.S.C. § 1951(b)(2) (1988).

not consider RICO to be a good idea if, for some reason, the local United States Attorney's Office is not comfortable with it.

Finally, there are the financial or "business" RICO cases. Again, in the large metropolitan areas such as Manhattan or Chicago, RICO is a familiar tool. Early into a significant fraud case, prosecutors may be thinking of RICO. Unlike the mob cases, however, the decision to use RICO may be made very late in the process,³³ often when the possibility of forfeiture becomes evident: if the investigation reveals that the defendant defrauded multiple victims out of huge amounts of money, RICO offers a unified solution for prosecuting the defendant and retrieving his illegal proceeds.

There is no framework for putting together white-collar RICOs; it is common to find at the investigation's conclusion that the targets are a hodgepodge of businesses and individuals.³⁴ The relationship between these potential defendants and their interplay with criminal acts can be particularly tough to allege in a clear fashion. If a RICO theory cannot be clearly applied in a case, RICO ought not to be used. And, despite the volume of the criticism attacking white-collar RICOs—as if the legal world was exploding from their numbers—fraud cases are uncommon RICOs. This is arguably in contrast with the private civil RICO situation, where, even though the number of § 1964(c) (civil RICO) filings are less than 1% of the total civil cases filed in federal court,³⁵ horror stories abound.³⁶

It should be clear, however, that RICO is an appropriate response to business activities if they are sufficiently egregious. For example, the integrity of our securities markets must be preserved. So, too, the medical and legal professions.³⁷ And, on the federal level, fraud in the defense

33 As noted earlier, the Department of Justice usually brings about 100-110 RICO prosecutions a year. On average, 39% of RICO prosecutions involve only white-collar businessmen. This is a very small percentage of the total federal prosecutions brought.

34 *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

35 According to the Administrative Office of the United States Courts, out of 240,000 federal cases filed from July 1, 1987 to June 30, 1988, fewer than 1,000 were civil RICO cases—less than one-half of one percent of the federal docket. Some critics argue that these figures are too low because of the manner in which the cover sheets filed with the courts are completed.

36 *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358 (5th Cir. 1986) (plaintiff received mortgage loan from bank; because bank was required by law to keep only 5% of its total deposits in cash, plaintiff alleged that his loan was only a loan of 5% of the stated value; also alleged that 7% interest rate was usurious); *Powers v. Lightner*, 752 F.2d 1251 (7th Cir. 1985) (two federal officials sued under RICO for alleged injury arising out of FBI undercover operations), *cert. denied*, 484 U.S. 1078 (1988); *Marconi v. White Sox*, No. 83 C 7015 (N.D. Ill. Mar. 31, 1986) (LEXIS, Genfed library, Dist file) (plaintiff sued White Sox under RICO because security guards confiscated baseball tickets which plaintiff was scalping); and *King v. Lasher*, 572 F. Supp. 1377 (S.D.N.Y. 1983) (dispute over disposition of assets in an estate).

37 On August 2, 1989, 46 brokers and traders on Chicago's 2 commodity markets were indicted by a grand jury. Specifically, the indictments named brokers and traders on the Chicago Board of Trade's soybean and Treasury bond pits, and the Chicago Mercantile Exchange's Swiss franc and Japanese yen pits. *United States v. Dempsey*, No. 89 CR 666 (N.D. Ill., filed Aug. 2, 1989) (soybean pits); *United States v. Mosky*, No. 89 CR 669 (N.D. Ill., filed Aug. 2, 1989) (Swiss franc pit); *United States v. Bailin*, No. 89 CR 668 (N.D. Ill., filed Aug. 2, 1989) (yen pit). See also *United States v. Elliott*, 711 F. Supp. 425 (N.D. Ill. 1989) (law firm partner convicted of RICO for engaging in securities fraud by using non-public client information in connection with personal stock holdings), *later proceedings* 714 F. Supp. 380 (N.D. Ill. 1989), 727 F. Supp. 1126 (N.D. Ill. 1989), and 727 F. Supp. 1131 (N.D. Ill. 1989); *United States v. Regan*, 726 F. Supp. 447 (S.D.N.Y. 1989) (best known as the

procurement and banking industries, where tens of millions of dollars are stolen annually, puts at risk the competition to secure government contracts and may ruin the integrity of government programs or the quality of procured equipment. Nothing is likely to occur during the ongoing public debate over civil RICO to cause the government to reconsider RICO as a priority in these areas. To the contrary, when crimes of great magnitude are uncovered, one thinks of RICO as Lincoln observed of Ulysses S. Grant: "I can't spare this man—he fights!"³⁸

II. The Analysis of RICO Prosecutions

All RICO prosecutions (and civil RICO complaints) brought by the Department of Justice must first be reviewed and approved for filing by the Criminal Division's Organized Crime and Racketeering Section (OCRS).³⁹ In turn, OCRS requires a would-be RICO prosecutor to submit a prosecutive memorandum ("pros memo") and a proposed indictment. Often, OCRS will know a good deal about a case even before the RICO pros memo arrives in Washington, D.C., especially if the request is sent by an Organized Crime Strike Force Unit of the United States Attorney's Office. There are other times when OCRS's first knowledge of a potential RICO comes from review of the pros memo itself. In either scenario, a well-prepared pros memo serves an important role.

First and foremost, the memo will quickly reflect whether the nature of the underlying crimes falls within the Criminal Division's general RICO policies. The easiest RICO to review involves the commission of crimes of violence or narcotics trafficking by organized crime groups.⁴⁰ The toughest involves frauds committed by businessmen with no identi-

Princeton/Newport case; defendants were found guilty for their participation in illegal tax trades and market manipulation). The penalties for securities violations were changed last year and now subject securities firms to substantial penalties and treble damages liability to private parties for failure to prevent insider trading. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988).

38 Quoted in C. SANDBURG, ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS 289 (1-volume ed. 1954).

39 RICO Guidelines, *supra* note 9, § 9-110.800-.816.

40 For crimes of violence occurring after Congress enacted the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, tit. VII, §§ 7053(a), 7058(a), 102 Stat. 4902, 4903, on November 18, 1988, it may not be necessary to use RICO at all. The Act, in part, redesignated the former 18 U.S.C. § 1952A "Murder for Hire" statute as 18 U.S.C. § 1958 (1988), making it a new RICO predicate; redesignated the former 18 U.S.C. § 1952B "Violent Crimes" statute as 18 U.S.C. § 1959 (1988); and increased the penalties for violation of these statutes and certain narcotics offenses. The "Murder for Hire" statute, 18 U.S.C. § 1958 (1988), also a RICO predicate offense, makes it a crime to travel or use facilities in interstate commerce with intent to commit murder for money or other pecuniary compensation. The maximum penalty varies with the severity of the conduct and ranges from \$10,000 and five years to life imprisonment and \$50,000. The "Violent Crimes" statute, 18 U.S.C. § 1959 (1988), makes it a crime to commit any of a list of violent crimes in return for pecuniary gain from an enterprise engaged in racketeering activity, or for the purpose of joining, remaining with, or advancing in such an enterprise. The listed crimes may be violations of state or federal law. The maximum penalty varies with the particular crime involved, ranging from \$3,000 and three years to \$50,000 and life imprisonment. 1988 amendments to the narcotics statute regarding continuing criminal enterprises, 21 U.S.C. § 848, have increased minimum penalties to 20 years and maximum penalties to include the possibility of life imprisonment or the death penalty. See 21 U.S.C. § 848(a)(2) (1988). If defendants committed a series of homicides, only one of which occurred after November 18, 1988, RICO may, however, be necessary to ensure that the full scope of the criminal conduct be charged in one prosecution.

fied ties to traditional organized crime. Even though the Supreme Court has recently reaffirmed RICO's applicability outside the organized crime arena,⁴¹ the use of RICO against "white-collar" crime remains controversial in some quarters⁴² and invariably involves additional complicating factors.⁴³ In the early 1980s, for example, public corruption RICOs were somewhat controversial. While corrupt officials deserve little sympathy, the notion that police departments or municipal offices could be "racketeering" enterprises annoyed RICO critics. There was even a time when RICO prosecutions of bank robbers, murderers or arsonists were controversial, for example, where the defendants were masquerading as legitimate political or religious groups.⁴⁴ Even though these defendants richly deserved their convictions, the decision to use RICO was not easy because of the danger that RICO would be perceived as an attack on First Amendment activity.⁴⁵

These days, the two most controversial types of RICO cases involve obscenity and securities. In the former, critics have charged that RICO restraining and forfeiture orders constitute a threat against constitutionally protected speech.⁴⁶ In the latter, critics charge that RICO has unfairly changed the rules defining acceptable behavior on Wall Street.⁴⁷ While the Criminal Division obviously takes a different view,⁴⁸ these cases are controversial whether the government likes it or not; consequently, OCRS must carefully screen them.

Moreover, even where RICO clearly fits, indeed even where the mob's traditional activities are involved, RICO is not automatically a good idea. For example, OCRS ordinarily discourages RICO prosecutions where the pattern of crimes consists entirely of narcotics trafficking,

41 *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2903 (1989).

42 *See supra* note 13.

43 *See infra* notes 50-55 and accompanying text.

44 *United States v. Ellison*, 793 F.2d 943 (8th Cir.) (the Covenant, the Sword, and the Arm of the Lord—white supremacist group), *cert. denied*, 479 U.S. 937 (1988); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983) (Croatian terrorist group); *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983) (Croatian separatist/terrorist organization); *United States v. Dickens*, 695 F.2d 765 (3d Cir. 1982) (the "New World" Black Muslim organization alleging "chilled" First Amendment rights), *cert. denied*, 460 U.S. 1092 (1983).

45 *Cf. Olsen v. Drug Enforcement Administration*, 878 F.2d 1458 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1926 (1990).

46 *United States v. Pryba*, 674 F. Supp. 1504 (E.D. Va. 1987), *aff'd*, 900 F.2d 748 (4th Cir. 1990); *United States v. Sturman*, No. CR-5-87-278-LDG (D. Nev. 2d superseding indictment filed Feb. 25, 1989).

47 *United States v. Milken*, No. S 89 Cr. 41 [KBW] (S.D.N.Y. indictment filed Mar. 29, 1989) (98-count indictment for violating RICO in a wide-ranging securities fraud scheme; Drexel Burnham Lambert previously agreed to plead guilty to six criminal counts and pay \$650 million in fines); *see cases cited supra* note 37.

48 It is not the purpose of this paper to defend the underlying merits of obscenity and securities RICOs. Suffice it to say that RICO does not independently criminalize conduct; it simply increases the punishment for certain other crimes when committed in a pattern in connection to an enterprise. While the threat of RICO forfeiture might cause some pornography dealers and stock manipulators to fear that they will lose their criminally acquired assets, that fear is more the price of crime than the price of RICO. If critics could demonstrate that the government was regularly losing RICO counts in these prosecutions, the criticism that RICO is being abused might be justified. Nevertheless, the record demonstrates that jurors are unimpressed with this criticism. *See, e.g., Regan, Elliott, Pryba*, and the 16 plea agreements negotiated thus far in the Chicago commodities cases. *See supra* notes 30, 37 and 45.

extortionate debt collection, or gambling. OCRS's reluctance to approve these cases as RICO is quite simple: these activities are already addressed by less complicated federal statutes.⁴⁹ In such cases, RICO is more likely to be a handicap than an advantage at the trial because it introduces into the fray the somewhat foreign concepts of enterprise, racketeering, and pattern. Moreover, as every experienced appellate attorney knows, bad facts make bad law. Were the government to make a practice of stretching RICO in cases where less complicated statutes would suffice, restrictive RICO case law would soon develop. One of OCRS's most important roles, therefore, is to weed out potentially risky, albeit legally adequate, RICOs.

More specifically, a pros memo and proposed indictment will alert OCRS to issues particular to the case at hand. Since every RICO prosecution carries the potential for developing new (and adverse) judicial interpretations of such terms as "enterprise" or "pattern of racketeering," an OCRS review will check off the following points, among others:

- A. Identification of "single episodes."⁵⁰ A substantial percentage of all proposed RICO indictments are amended to some extent during OCRS's review to comport with the single episode policy;
- B. Identification of *Persico* statute of limitation issues;⁵¹
- C. Identification of *Pinkerton* issues⁵² arising from a RICO conspiracy count;

49 21 U.S.C. §§ 841, 846, 848 (1988) and 18 U.S.C. § 894 (1988).

50 For example, if a defendant is charged with both importation and possession with intent to distribute, with respect to the same load of narcotics, the question arises, whether this conduct can give rise to the two acts of racketeering activity that form a RICO pattern. Generally, the answer is no, because a proposed RICO count that contains more than one predicate act arising from a single criminal episode will not be approved. ORGANIZED CRIME AND RACKETEERING SECTION, CRIM. DIV., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS at 52 (2d rev. ed. Aug. 1988) [hereinafter CRIM. RICO MANUAL]. This policy is also reflected in the Guidelines, *supra* note 9, § 9-110.340: "No indictment shall be brought charging a violation of 18 U.S.C. § 1962(c) based upon a pattern of racketeering activity growing out of a single criminal episode or transaction."

51 *United States v. Persico*, 832 F.2d 705, 713-14 (2d Cir. 1987) (discussing whether appellants' RICO conspiracy convictions must be overturned on statute of limitations grounds), *cert. denied*, 485 U.S. 1007 (1988). It is now the policy of OCRS to approve RICO conspiracy counts in appropriate circumstances when some defendants have not committed or agreed to commit any racketeering acts in the last five years but when those defendants remained in the conspiracy within the five-year statute of limitations. CRIM. RICO MANUAL, *supra* note 50, at 148.

52 *Pinkerton v. United States*, 328 U.S. 640, 644 (1946) ("A conspiracy is a partnership in crime"). It is hornbook law that a defendant remains responsible for crimes committed by co-conspirators as long as those crimes were foreseeable objects of the conspiracy and were committed during the defendant's membership in the conspiracy. *La Cosa Nostra* (LCN) cases present interesting wrinkles in this rule. Some LCN families have 50 or 100 members who are subdivided into crews, and each crew usually has its own "turf" or sphere of influence. Generally, each crew is aware of the activities of the other crews, and presumably endorses these activities as part of the overall objectives of the crime family. Is a member of Crew A, which specializes in narcotics, liable under the *Pinkerton* rule for a hijacking committed by Crew D, a specific crime of which Crew A members were completely unaware? Suppose the chief of Crew A, which is located in New York City, retires to Florida but remains an LCN member and even occasionally keeps in touch with his comrades. If Crew C kills a suspected informant, one who could have testified as an enterprise witness against the "family," is the relocated chief of Crew A who had no foreknowledge of the "hit" liable for homicide because the retaliation against witnesses is standard operating procedure in *La Cosa Nostra*?

D. Review of the statutory citations set out in the alleged acts of racketeering;⁵³

E. Removal of language that violates established judicial interpretation of RICO or OCRS policy;⁵⁴ and

F. Analysis of the "enterprise." In public corruption and securities cases in particular, alternative approaches are drafted if only to see whether, under the law of the relevant circuit, the nexus between the enterprise and predicate acts becomes stronger or weaker.⁵⁵

III. The Approval of RICO Cases

Clearly, de minimis RICO proposals rarely get past the first reading at OCRS; some don't get past the first telephone conversation about the case between the field and OCRS prior to formal submission. Even when a RICO request does get past first base, even to third base, there are still ninety important feet to travel, so to speak, before reaching home.⁵⁶

First, OCRS must see a final draft of the indictment. This is important because prosecutors often redesign their charges and add or drop predicate crimes at the last minute.

Second, if the prosecutor requests a RICO restraining order, OCRS approval will be withheld pending an assessment of the likely impact that a restraint will have upon the defendant, his business, his employees, or

⁵³ Occasionally, a proposed RICO count will cite offenses that are not found in § 1961 or which were not included in § 1961 at the time the criminal activity occurred.

⁵⁴ For example, prosecutors often submit proposed indictments alleging that the pattern of racketeering activity "includes, but is not limited to," a list of specified acts. OCRS policy requires that prosecutors modify such language to allege that the pattern "consists of" the list of specified acts, thus obligating prosecutors to prove a pattern of activity based on criminal acts specifically alleged in the indictment as opposed to unspecified crimes of which the defendant lacks notice (although unspecified acts may be admissible for other purposes, such as proving the existence or manner of operation of the enterprise). See *United States v. Neapolitan*, 791 F.2d 489, 501 (7th Cir. 1986), cert. denied, 107 S. Ct. 1327 (1987), where the Seventh Circuit observed:

[C]rimes allegedly committed by or agreed to by Neapolitan that do not appear in the indictment cannot serve as predicate acts for purposes of RICO. While these acts would be admissible as circumstantial evidence that Neapolitan was a member of a conspiracy, they are actions outside the scope of the specific RICO conspiracy charged in this case and are thus irrelevant to establishing that Neapolitan agreed to the commission of a pattern of racketeering activity as defined by the present indictment.

(Emphasis in original).

⁵⁵ If it is a corporation, labor union, or business entity having a legal identity, chances are that no major hurdles exist, assuming the predicate crimes are sufficiently connected thereto. If the enterprise is a court system or political entity, OCRS carefully scrutinizes the need to formulate the enterprise in that manner. Unlike mob businesses, municipal policy cannot, by definition, be corrupt. In some cases, it may be necessary to allege a court system as a racketeering enterprise because the alleged predicate crimes specifically accuse defendants of corrupt public acts. Nonetheless, one can easily see how such allegations could be perceived in some quarters as an unfair attack upon the institution itself rather than upon the bad apples within. Most RICO enterprises are alleged, however, as "associations-in-fact." A La Cosa Nostra crew is a typical example. In one sense, analyzing this type of enterprise is easy because federal prosecutors cope every day with issues associated with conspiracies and criminal joint ventures. Most of these groups qualify as *Turkette* enterprises simply by the way they operate. But in another sense, "association-in-fact" RICOs are more difficult to analyze because the nexus between the individual defendants, their crimes, and their organization is often amorphous; legal concepts such as chains, spokes, wheels, and rims creep into view.

⁵⁶ In 1989, a typical "RICO year" by OCRS standards, OCRS approved 111 RICO indictments and five civil RICO complaints. On average (1984-1989), the government authorizes around 100-110 RICO prosecutions a year, although the actual filings may be fewer due to guilty pleas and other field decisions.

upon third parties. Although the percentage of restraining orders will probably increase as more and more white-collar RICO indictments are brought, it is likely in the foreseeable future that such requests will continue to be the exception rather than the rule.

Third, if the prosecutor seeks forfeiture, OCRS will determine, as best it can, whether the requested forfeiture is proportionate.⁵⁷ Of course, this is easier said than done, especially in advance of trial. However, since a successful forfeiture verdict will eventually be reviewed by a trial and appellate court anyway, it makes sense for OCRS to identify and resolve potential trouble spots before the case is indicted. It is not uncommon for OCRS to scale back a forfeiture request—even one that technically fits within section 1963(a)(2)—if the extent of the forfeiture would appear to the court or to the public as disproportionate to the defendants' crimes. Occasionally, however, the defendant's ownership of a business might be so outrageous that his presence must be exorcised, even if doing so requires forfeiture of all of his business assets, both legitimate and illegitimate.⁵⁸ The RICO approval process is designed to analyze these issues whether or not they are raised by defense counsel.

Fourth, OCRS will usually provide the defendant's attorney an opportunity to discuss the RICO recommendation if so requested.⁵⁹ OCRS conducted at least twelve pre-indictment RICO conferences in 1989. At these conferences, which are conducted informally, OCRS will usually

57 At the pre-trial stage, figuring the probability of success on the merits is never a precise calculation. Any pre-indictment review of the propriety of a forfeiture allegation must assume the credibility of some evidence. To that end, OCRS undertakes an evaluation of all the relevant evidence to gauge its sufficiency and to ensure that it comports with the principles of proportionality as outlined in the case law. See *United States v. Horak*, 833 F.2d 1235 (7th Cir. 1987), which held, while the "government's construction of § 1962(a)(2) [was] certainly persuasive," it was not "sufficiently 'indisputable' to demand a writ of mandamus" compelling the defendant to forfeit \$8 million of his stock as "punishment for acts of racketeering that won the enterprise (or Horak) some \$12,000 in bribe payments." *Id.* at 1250-51. The government had contended that defendant's § 1962(c) conviction mandated forfeiture of any "interest in or security of an enterprise," regardless of whether the government had shown that the interest had "afforded [the defendant] any influence over" the enterprise. *Id.* at 1249-50. The court stated in dicta that it was "highly unlikely that proper forfeiture orders entered under [§ 1963] (a)(1) reaching proceeds of racketeering activity could constitute cruel and unusual punishment violating the Eighth Amendment." *Id.* at 1241 n.4.

See also *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.) (holding that funds derived from the operation of the enterprise and properties acquired with tainted profits were forfeitable to the extent of contribution from the offending companies in the enterprise, while also holding that the lower court should have considered the extent of defendant's interest in the acquired properties that he would not have acquired but for the scheme), *cert. denied* 110 S. Ct. 53 (1989); *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987) (holding that forfeiture of the defendant's interest in the corporation could be so grossly disproportionate to the offense as to violate the Eighth Amendment); and *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979) (rejecting defendant's Eighth Amendment arguments and ruling that forfeiture measures are constitutional when "keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO"). The forfeiture guidelines are set out at RICO Guidelines, *supra* note 9, §§ 9-110.410-.414.

58 It is beyond debate that Congress passed RICO in order to remove organized crime figures from otherwise legitimate businesses. A mob boss who has acquired a trucking company through extortion should forfeit his entire ownership interest even if, at the time of conviction, his initial investment has legitimately increased tenfold.

59 OCRS does not volunteer to a defense attorney that a RICO count has been recommended against his client. In many white-collar RICO investigations, however, the defendant's attorney learns or correctly surmises that RICO is on the table and requests a Washington conference. The request for a conference will be approved only if notification that an indictment is being considered will not create a risk of the defendant's flight, destruction of evidence, or intimidation of witnesses.

summarize the theory of prosecution, the nature and approximate extent of the predicate criminal activity, the nature of the alleged enterprise and whether forfeiture will be sought; OCRS will not reveal—nor normally confirm—the identity of prosecution witnesses or key pieces of evidence. It is then the defendant's attorney's burden to demonstrate why the inclusion of a RICO count, or a RICO forfeiture, would be legally deficient or otherwise inappropriate.

Defense attorneys often argue that they know too little about the government's evidence to make a fair presentation. Nonetheless, as a practical matter, defense attorneys invariably know, coming into a conference, the nature and extent of the RICO proposal. In fact, it is very common at these conferences for the defense to name and attack the credibility of the prosecution's key witnesses. Of course, as experienced RICO defense attorneys well know, the mere fact that a RICO conference is being held at OCRS implicitly acknowledges that the RICO request has at least passed preliminary muster. Another hurdle for the defense is that the Criminal Division will not as a rule second-guess the prosecution's assessment of witness credibility. In fact, the conference proceeds with a view of the evidence that is most favorable to the prosecution. If the defense attack on the evidence is unusually persuasive and if the success of the RICO foreseeably rests on such evidence, the Criminal Division, in a rare case, will evaluate the credibility of witnesses or look behind the evidence upon which the RICO theory is predicated.⁶⁰

At some point during a typical conference, the issue of forfeiture arises. OCRS will confirm if forfeiture is under review and will normally specify the nature and extent of the forfeiture request.⁶¹ The forfeiture issue is one area where a defense attorney, who presumably is the most knowledgeable in the room of the putative defendant's business affairs, often discloses concerns of which OCRS is theretofore unaware. Although the defense is always at risk that factual disclosures to the government will come back to haunt the client, defense candor in discussing forfeiture is more likely to achieve some success than in any other area generally covered in these pre-indictment RICO conferences.⁶² Armed with the concerns raised by the government itself with respect to the pro-

60 It is an even rarer conference when defense counsel reveals *its* key witnesses or pieces of evidence. For obvious reasons, defense counsel are reluctant to disclose to OCRS prosecutors evidence that counsel have not already disclosed to the local United States Attorney's staff.

61 See 18 U.S.C. 1963(a)(1) (1988) (dealing with any interest in an enterprise in violation of 18 U.S.C. § 1962); 18 U.S.C. § 1963(a)(2) (1988) (dealing with any interest affording a source of influence over any enterprise in violation of § 1962); and 18 U.S.C. § 1963(a)(3) (1988) (dealing with proceeds). Recently, the First Circuit's decision in *United States v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990) contributed some uncertainty to forfeiture analysis by holding that only proceeds acquired by a defendant after he committed his second racketeering act are forfeitable. *Id.* at 1213-14. The First Circuit's analysis leaves much to be desired. For example, assume a group of defendants robbed two banks as part of their pattern of racketeering. It would strain RICO's language to argue that the government could forfeit the proceeds of bank robbery number two, but not the proceeds of bank robbery number one, especially since Congress has mandated that RICO be liberally construed. Organized Crime Control Act of 1970, Title IX, § 904(c), Pub. L. No. 91-452 (1970) (enacting RICO).

62 This is true not because OCRS is less attentive to defense arguments on the proof of the putative defendant's guilt but because RICO proposals that are noticeably weak on the merits rarely get as far as the RICO conference in the first place.

priety of forfeiture,⁶³ and by the courts with respect to restraining orders⁶⁴ and proportionality,⁶⁵ a defense attorney has a considerable opportunity to influence the prosecution's decision as to when and how to seek forfeiture. There is one caveat: In almost every instance where RICO is otherwise appropriate, OCRS will approve the full forfeiture of criminal *proceeds*, although even that course of action is tempered where attorneys' fees are jeopardized.⁶⁶

After the conference concludes, issues may remain for discussion between OCRS and the prosecution before the RICO decision can be made. If those issues are resolved favorably, RICO will be approved. In most cases where OCRS has met with defense counsel concerning the use of RICO, a decision to go forward will be communicated to defense counsel as a courtesy prior to indictment. It is of no concern to OCRS, however, whether or not plea negotiations are underway in lieu of a RICO indictment.⁶⁷ The Criminal Division makes the RICO decision independent of that consideration.

IV. Conclusion

RICO prosecutions are still a hot topic in the legal and business communities. Although their actual impact on federal courts and jurisprudence is undoubtedly exaggerated, the perception that RICO has changed the face of criminal conspiracy cases or that RICO prosecutions threaten the livelihood of legitimate businessmen is real enough that Washington review and approval of federal RICO prosecutions is a wise precaution. Eventually, even the RICO controversy will evaporate, as courts and the Congress continue to refine its parameters, especially regarding the procedural rules for restraint and forfeiture of assets. Meanwhile RICO remains the single most effective device for prosecuting systematic, organized criminal activity.

⁶³ See RICO Guidelines, *supra* note 9, § 9-110.414 (blue sheet regarding temporary restraining orders).

⁶⁴ *United States v. Regan*, 726 F. Supp. 447 (S.D.N.Y. 1989).

⁶⁵ See *supra* note 57.

⁶⁶ See generally *Caplin & Drysdale, Chartered v. United States*, 109 S. Ct. 2646 (1989); *United States v. Monsanto*, 109 S. Ct. 2657 (1989). As a general proposition, no defendant should ever be allowed to retain money or assets that constitute the proceeds of criminal acts.

⁶⁷ RICO counts may not, however, be used in a prosecution to gain plea bargaining advantages. In addition to the Guidelines, the use of RICO is also governed by the PRINCIPLES OF FEDERAL PROSECUTION (July 1980), and "[i]nclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the *Principles of Federal Prosecution*." RICO Guidelines, *supra* note 9, § 9-110.321.