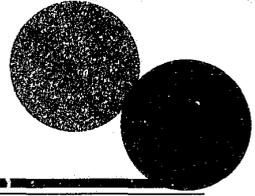


U.S. Department of Justice  
Office of Justice Programs  
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# Local Prosecution of Organized Crime: The Use of State RICO Statutes

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A BJS Discussion Paper

# **Local Prosecution of Organized Crime: The Use of State RICO Statutes**

**Donald J. Rebovich, Ph.D.,**  
*Director of Research*

**Kenneth R. Coyle, Program Analyst**

**John C. Schaaf, Program Analyst**

*American Prosecutors Research Institute*

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Lawrence A. Greenfeld  
Acting Director

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# **Local Prosecution of Organized Crime: The Use of State RICO Statutes**

## **Introduction**

Few enforcement weapons used to control organized and white-collar crime have aroused such interest and controversy as the Racketeer Influenced and Corrupt Organization Statute, (RICO, 18 U.S.C. 1961-1965). Since its enactment in 1970, RICO has been the subject of sharp exchanges between critics who urge restriction of its use and advocates who lament its underutilization. By making it a crime to acquire, receive income from, or operate an enterprise through a pattern of racketeering, RICO allows prosecutors to abandon a reliance on discrete statutes. Instead, they can prosecute patterns of criminal acts committed by direct and indirect participants in criminal enterprises. According to some observers, RICO is the most sweeping statute yet passed by Congress to attack the continuity required for organized crime activities. Prosecutors in the States have observed the statute evolving as a tool to dismantle organized crime groups. Seeking to emulate the Federal success with the statute,

to date, 29 States have adopted variations of the Federal RICO in their State criminal codes (see Figure 1).

Since early well-known RICO prosecutions against traditional organized crime operatives — like *U.S. v. Tieri* in 1980 — the scope of Federal RICO prosecutions has expanded to include publication of obscene materials, drug trafficking by street gangs, and police corruption.<sup>1</sup>

To date, only one empirical study has been completed on Federal RICO prosecutions<sup>2</sup> and only one on State civil RICO prosecutions.<sup>3</sup> However, BJS will release a new study of Federal RICO prosecutions, *Prosecuting Criminal Enterprises: Federal Offenses and Offenders*, in late 1993. Although the Bureau of Justice Assistance (BJA) and the National Association of Attorneys General (NAAG) have recently published information on developing and implementing State civil RICO statutes and enforcement programs,<sup>4</sup> little information is available on the experiences

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<sup>1</sup>Albanese, J. (1989). *Organized crime in America*. Cincinnati, OH: Anderson Publishing Company, 48-49, 131.

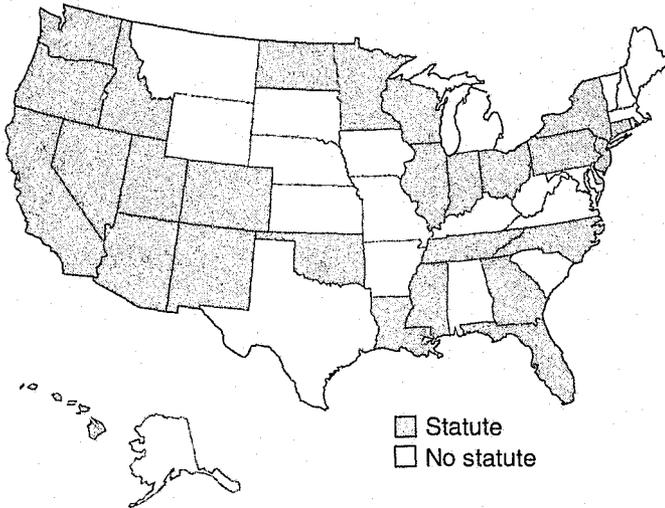
<sup>2</sup>Dombrink, J. and J. W. Meeker (1985). "Racketeering prosecution: The use and abuse of RICO." *Rutgers Law Journal*, 16(3/4): 639.

<sup>3</sup>Castillo, E. (1985). "Disrupting criminal organization activity: Use of conspiracy law and RICO statutes." *State laws and procedures affecting drug trafficking control: A national overview*. Washington, DC: The National Governors' Association and the National Criminal Justice Association, 93-118.

<sup>4</sup>Goldsmith, M. (1991). *Establishing a civil RICO unit within the Office of the Attorney General*. Washington, DC: Bureau of Justice Assistance (BJA) and National Association of Attorneys General (NAAG). Holmes, C. (1990). *Drafting a State civil RICO statute: A comparative analysis of five statutes*. Washington, DC: BJA and NAAG. Murray, F. (1992). *Prosecuting a civil RICO case*. Washington, DC: BJA and NAAG.

## 2 Local Prosecution of Organized Crime

**States with racketeering statutes**



**Year racketeering statutes were enacted:**

1970	Federal statute	1982	Connecticut
1970	Pennsylvania	1982	Illinois
1972	Hawaii	1983	California
1977	Florida	1983	Louisiana
1978	Arizona	1983	Nevada
1979	Rhode Island	1983	North Dakota
1980	Georgia	1984	Mississippi
1980	Indiana	1985	Washington
1980	New Mexico	1986	Delaware
1981	Colorado	1986	New York
1981	Idaho	1986	North Carolina
1981	New Jersey	1986	Ohio
1981	Oregon	1986	Tennessee
1981	Utah	1988	Oklahoma
1981	Wisconsin	1989	Minnesota

Source: Compiled by American Prosecutors Research Institute.

of local prosecutors using "little RICO" statutes in the 29 States that have enacted these laws.

The purpose of this report is to shed light on —

- the implementation of RICO prosecutions at the local level
- the extent of its use
- obstacles to effective use
- recommendations to solve problems of applying RICO to local prosecution.

Local prosecutors have the potential of filling a void created by the reallocation of Federal resources (for instance, into multijurisdictional task forces and specialized prosecution units). These local prosecutors, however, may continue to rely on traditional State criminal offense and conspiracy statutes to attack organized crime. This report can provide insight into ways "little RICO" statutes are being used to best advantage in local prosecutors' offices and what can be done to enhance their use.

## **RICO background**

Designed to combat organized crime, the Federal Racketeer Influenced and Corrupt Organizations Act was enacted as Title IX of the Organized Crime Control Act of 1970 (Pub. L. 91-452, 84 Stat. 922). The Act specifically prohibits any person from —

- using income received from a pattern of racketeering activity or through collection of an unlawful debt to acquire an interest in an enterprise affecting interstate commerce
- acquiring or maintaining through a pattern of racketeering activity or through collection of an unlawful

debt an interest in an enterprise affecting interstate commerce

- conducting or participating through a pattern of racketeering, racketeering activity or collection of an unlawful debt, the affairs of an enterprise affecting interstate commerce
- conspiring to participate in any of these activities (18 U.S.C., 1962 (a) [1988]).

Criminal sanctions for violations of the statute are frequently more punitive than sanctions that could be imposed for violations of the incorporated offenses. Any interest acquired by the defendant through RICO violations is subject to forfeiture under RICO. Furthermore, under RICO, courts can enter restraining orders before conviction to prevent transfer of potentially forfeitable property. The Government can also pursue a wide range of civil actions under RICO: These include divestiture, dissolution, reorganization, and treble damages to parties injured.

The key elements generally required for an indictment under RICO are that the defendant, through a commission of two or more acts constituting a "pattern of racketeering activity," directly or indirectly maintains an interest in or participates in an "enterprise." RICO complaints must allege that each predicate act is a "racketeering activity" as delineated by the RICO statute. Under RICO, the commission of at least two predicate acts is necessary to constitute a "pattern."

RICO has been criticized for introducing fresh legal concepts such as "enterprise" without specifically defining

them.<sup>5</sup> This lack of definition led to a case-by-case interpretation to clarify concepts, so that the tests and interpretations that evolved may be inconsistent among jurisdictions. Such inconsistency may have possibly dissuaded some people attempting RICO prosecutions.

Recent case law demonstrates that increased use of RICO by Federal prosecutors has begun to make inroads into areas of illicit business that before were virtually impenetrable.<sup>6</sup> Furthermore, prosecutors representing State attorneys general in the 29 "little RICO" States have begun to pursue State prosecutions under their respective RICO statutes.<sup>7</sup> Little attention has been paid, however, to the role of local prosecutors in RICO prosecutions, partly because of a presumption that local criminal activity covered under RICO is scarce, and partly because, when such racketeering activity is present, funds may be inadequate to proceed with such complex and costly litigation.

## Research methods

This study merges data from self-administered mailed questionnaires and from telephone interviews of local prosecutors. The sample for the mailed questionnaire survey was guided by methods used by BJS in its National Prosecutor Survey Program. The total population of prosecutors' offices representing local counties, districts,

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<sup>5</sup>U.S. Government Accounting Office (GAO), (1981). *Sharper Federal effort needed in fight against organized crime*, 26-34. Gaithersburg, MD: GAO.

<sup>6</sup>Van Houten, P., R.T. Murphy, and R. Johnson (1991). "Sixth survey of white-collar crime: RICO." *American Law Review*, 28(3), 637-677.

<sup>7</sup>Castillo (1985), 101.

and independent cities (n=2703) was grouped into six strata based on jurisdictional population size. A sample of local prosecutors' offices (n=379) was drawn from each stratum reflecting corresponding jurisdictional size proportions in the full population of local prosecutors' offices. APRI received 150 returned questionnaires, a 40% response rate.

A sample of 35 prosecutors' offices identified from the mail survey as having prosecuted cases using either State RICO statutes (criminal and/or civil), "RICO-like" statutes, or a combination of both (criminal and/or civil) were selected for telephone contact to supply more detailed information on use of the statute, obstacles to its use, and advantages of using it. The interview survey in mid-1992 inquired about —

- the type of cases in which RICO was used
- reasons for using the State RICO statute
- reasons for not using the State RICO statute
- alternatives used
- recommendations for improvement.

### **Extent of organized crime prosecutions**

The examination of local prosecutions using RICO statutes begins with a broad analysis of data on the extent of all organized crime prosecutions on the local level. Because local prosecutions of organized crime can be expected to exist outside of the use of RICO statutes, the survey attempted to identify all types of local prosecution of organized crime, including the use of what was defined for

the study as RICO alternatives<sup>8</sup> for 1989, 1990, and 1991. The primary goal was to find out how frequently RICO was used in relation to all prosecutions of organized crime.

Among all prosecutors offices surveyed, 47, or 31%, reported a prosecution against organized crime from 1989 to 1991 (table 1). More than half of these, 24, used both RICO and more traditional State statutes (RICO alternatives). About equal numbers used RICO only (13) or the alternatives only (10). Thirty-two (60%) of the 47 offices reporting prosecution of organized crime were from the two most populous strata of jurisdictions: 250,001 to

**Table 1. Local prosecutor's offices responding, by types of organized crime prosecution: 1989-91**

Population of jurisdiction	Total	Offices using		
		RICO only	RICO and RICO alternatives	RICO alter- natives only
0-20,000	3	2	0	1
20,001-50,000	4	1	1	2
50,001-100,000	4	1	3	0
100,001-250,000	4	1	2	1
250,001-500,000	13	2	7	4
500,000+	19	6	11	2
Total	47	13	24	10

<sup>8</sup>For the purpose of the present study, "RICO" crime is defined as "organized criminal activity" that involves a *pattern of continuing criminal activity by a group of individuals for financial gain*. "RICO alternatives" may include continuing criminal enterprise statutes, conspiracy statutes, drug forfeiture statutes, contraband forfeiture statutes, and other civil and criminal forfeiture statutes.

500,000 and over 500,000. Thirty-seven (79%) of the offices prosecuting organized crime cases used either RICO exclusively or RICO with alternatives.

### **RICO prosecutions: Offense categories and reasons for use**

The 37 local prosecutors' offices that reported RICO prosecutions for the 3-year study period indicated that a total of 174 cases were prosecuted using respective State RICO statutes. The plurality of these cases (27%) were categorized by respondents as drug cases in which the primary offense was trafficking/distribution. Gambling offenses accounted for 16% of the activity prosecuted using RICO statutes. In a 1988 study of Federal RICO prosecutions, extortion and mail fraud proved to be the dominant racketeering activities, while drug and gambling cases were much less frequently prosecuted. In the current study sample, 16% of the cases were classified as fraud (consumer fraud, investment fraud, and bank fraud) with consumer fraud being the most common type. Ten percent of the cases involved prosecution of fencing/provision of illegal goods, most of which involved prosecution of rings of automobile "chop-shops."

While the above information furnishes an enlightening picture of the kinds of racketeering for which local prosecutors used "little RICO's," it does not address why they were used instead of more conventional statutes.

During telephone interviews, local prosecutors offered various reasons for using RICO. They reported that the key attribute of RICO was its potential for penalties stiffer than those under traditional State statutes. They believed RICO permitted them to bring serious penalties to bear on what, as individual offenses, some may think of as

relatively minor criminal activities, but when aggregated, call for a more severe punishment. One prosecutor claimed that using RICO for certain white-collar offenses proved more productive than aggregating individual offenses. Another respondent said that under his State's RICO, escort services catering to prostitution rings were closed, funds forfeited, and the owners given significant sentences to incarceration. The respondent concluded that there was a strong likelihood that the offenders would have been allowed to return quickly to their unlawful behavior had prosecutors chosen to rely on local prostitution statutes.<sup>9</sup> Prosecutors extended use of RICO in prostitution/obscenity cases (9% in the sample) to target and shut down other nuisance offenders in the community such as so-called "adult" or peep-show theaters.

In general, local prosecutors who used them contended that State RICO statutes offered versatile sanctions to a wide variety of offenses, and that these sanctions were not available under other laws.<sup>10</sup> Some advantages they specified were that State RICO statutes could be used to obtain injunctions to prevent RICO violators from continuing to operate a business in which criminal activity

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<sup>9</sup>A similar use of a State RICO statute was reported by other prosecutors interviewed. In one State, RICO conviction for promotion of prostitution resulted in the forfeiting of the two buildings harboring the prostitution enterprise (worth \$260,000) and illegal profits totaling \$200,000.

<sup>10</sup>One case described involved the interstate "selling" of kitchen equipment in which the offender defrauded customers of deposits (\$90,000) on merchandise never delivered. Other cases reported included a moving company that stole moving rental trucks to transport its customers' possessions, a mortuary that illegally billed the State's Department of Social Services, and two telemarketing fraud cases accounting for \$600,000 in illegal gains.

was focused. (The injunction can be sought upon conviction or a civil finding.) RICO laws could also be used as prosecution "hammers" in criminal cases. For example, in one State the traditional applicable State statute on telemarketing fraud requires that a case must involve over \$15,000 of allegedly stolen funds in addition to other criteria. At the same time, the State's RICO statute permits the prosecutor, in the respondent's words, to "...pick a small number of transactions and get a bigger penalty." In terms of plea negotiations, the fact that a RICO violation in that State is a class 2 felony translates into more bargaining power for the local prosecutor, who can threaten to use RICO against a defendant to obtain a guilty plea to a lesser charge. According to one respondent, the threat of using RICO was so successful in achieving the outcome desired by the local prosecutor that actual RICO prosecutions were rarely followed through. Unfortunately, this situation left no documented record of the impact of State RICO laws.

One explanation offered by local prosecutors for their use of RICO in interstate criminal activity was the observation that Federal enforcement and prosecution authorities were failing to pursue complaints seriously in such areas as telemarketing fraud and other consumer fraud. This helps to explain the high percentage of consumer fraud cases in the sample. As one prosecutor stated:

*There is a huge gap in terms of Federal enforcement.... There is no system-wide enforcement of these types of consumer fraud cases. Since Federal entities turn away complaints, and keep no record of it, they are unable to detect a pattern of criminal activity in a particular area or case. These could be likely candidates for RICO prosecution... the complainants then turn to the local and State prosecutor for assistance.*

*Thus, these criminal enterprise cases are being handled by local prosecutors by default of Federal prosecutors.*

According to this respondent's account, criminals engaging in telephone or mail consumer fraud target out-of-State victims because they know that the State will refer the case to the "Feds" where there is "no real threat of enforcement."

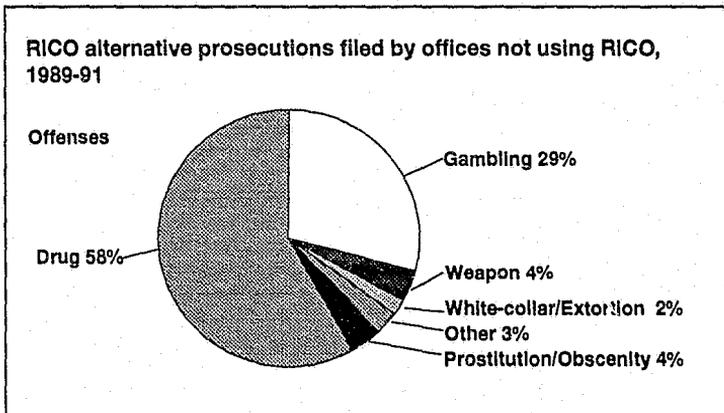
Finally, one prosecutor's office reported a high degree of satisfaction with his State's RICO statute because it enabled him to make significant inroads into eradicating street gang "turf wars."

### **Alternatives to RICO: Offense categories and reasons for RICO avoidance**

According to the above information, State RICO statutes have proven useful to some local prosecutors, particularly those in larger jurisdictions, over a wide spectrum of crime-specific racketeering activities. By inquiring into the types of alternatives typically used by local prosecutors to take the place of what ordinarily would be RICO prosecutions, the study probed the relative degree of reliance that local prosecutors put on State RICO statutes. This evidence of use of alternatives to RICO — in effect, the extent of RICO avoidance — can challenge conclusions that might be drawn from exclusive analysis of RICO prosecutions.

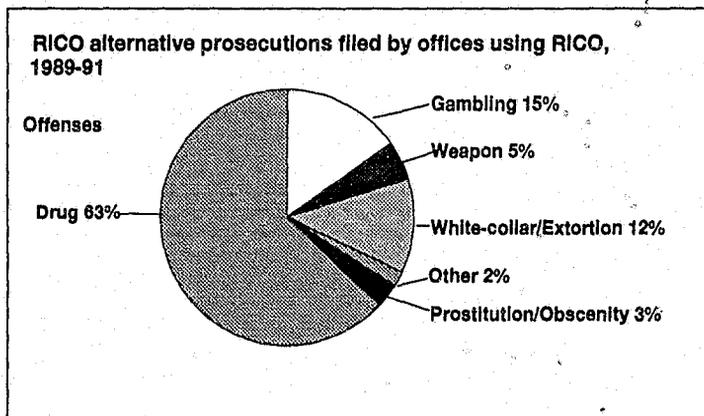
In telephone interviews, respondents were specifically asked if they had encountered situations in which they could have used RICO statutes to prosecute organized crime activities, but chose instead to use other State statutes. They were asked what categories of crimes these cases involved, and what alternatives they used instead

of State RICO statutes. In this way, it was possible to compare cumulative data on these cases against RICO prosecutions to get a picture of where RICO stood as a prosecution device compared to alternative statutes. The total number of cases prosecuted by offices stating they did not use RICO at all, but used only RICO alternatives, exceeds the number of RICO cases prosecuted by those who did use RICO for the same time period (199 compared to 174). For those offices not using RICO, the categories of drug offenses and gambling offenses made up significant portions of the total offenses prosecuted (58% and 29% respectively). This is a sharp departure from the earlier RICO prosecution distribution of 27% for drug prosecution and 16% for gambling prosecution, as well as a significant volume increase for both categories.



Even more striking are the results of RICO alternative prosecutions reported by the original 37 offices reporting the use of RICO. Those offices that had earlier reported 174 RICO prosecutions during 1989, 1990, and 1991 also reported over 700 cases in which they rejected use of RICO in favor of the use of more traditional State statutes. Clearly the majority of these cases were for drug offenses (476, or 63%, more than 4 times the number

of drug-related prosecutions conducted by the same offices under RICO). Gambling offenses prosecuted using RICO alternatives followed a similar pattern (more than 3 times the number of RICO gambling prosecutions in the 37 offices).



The key question is why so many local prosecutors decided not to use RICO statutes in many instances — both in States where RICO was not used locally at all and in States where it was. When prosecutors gave their reasons for selecting alternatives in place of RICO, 44% cited either the possibility of failure (27%) or the legal complexity of the RICO statute (17%). Pessimism over obtaining RICO convictions was attributed to three problems:

- lack of familiarity with the statute by local prosecutors
- potential confusion for jurors
- potential confusion for judges.

Respondents in some cases underscored the impact that the embryonic nature of their State's RICO statute has on the selection of cases. Local prosecutors in these jurisdictions were especially discriminating about cases selected since

they perceived themselves as being part of the process of developing important case law. Consequently, only strong cases were selected as fitting rigid in-house criteria. Some argued that judges and jurors, as well as prosecutors, were intimidated by RICO. As one respondent put it:

*Many of my colleagues generally use several individual State statutes to address crimes that could be prosecuted wholly under the RICO statute. This is done out of fear of losing the case and fear that the jury would not adequately understand the elements of the RICO statute .... In instances where the prosecutor fears losing the case, charges may be slightly downgraded to avoid application of RICO provisions.*

For many drug offense cases, respective drug and forfeiture statutes were characterized as being simpler to present to juries while also carrying stiffer penalties. Seventeen percent of prosecutors cited light penalties as a reason for avoiding use of State RICO laws.

Several respondents provided contextual information on why local prosecutors in some RICO States reverted to statutes with better penalty structures. The sentencing guideline for RICO in one State was described as ranking RICO offenses as probationary offenses. This respondent observed that the guideline severely limited judicial discretion to administer strict sentences. Another prosecutor said his State's RICO penalties are no more punitive than sentences which are levied under traditional criminal statutes. According to this respondent, that fact, coupled with the perceived complexity of RICO, results in a strong disincentive to use the State's RICO. Instead, prosecutors turn to existing statutes covering drug offenses, habitual offenders, and continuing criminal enterprises. Another State's RICO statute focusing on leaders of criminal

enterprises was described as being useful only to prosecute drug organizations responsible for high levels of trafficking or distribution and criminals who had significant amounts of property and assets other than motor vehicles and cash. The latter would be more easily forfeited under State drug and forfeiture statutes.

Many local prosecutors distanced themselves from civil RICO statutes as a foundation for seizure of illegal funds and property. For drug-related forfeitures, local prosecutors surveyed in one State tended to rely on their uniform contraband forfeiture act because it was "simpler than civil RICO." Similarly, local prosecutors from another State concluded that their public nuisance law was more appropriately utilized than were the civil features of RICO for drug-related forfeitures.<sup>11</sup>

Remaining reasons cited for not using State RICO statutes included —

- "overbroad" RICO statute language that opened the door for constitutional attack
- unreasonably high standards of proof
- a perception by local prosecutors that judges would apply the statute narrowly, limiting practical applications of the statute to white-collar offenses.

In at least one instance a respondent admitted to a reluctance to use RICO for fear that its application might be

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<sup>11</sup>However, these respondents added that this could change in the near future. Their State legislature has recently passed a new forfeiture law — distinct from RICO civil provisions — which shifts burden of proof to the prosecutor and affords the defendant a right of continuance. This could motivate local prosecutors to gravitate to RICO's forfeiture power if the prosecutorial burden is less under RICO.

interpreted by the public and media as an unreasonable application of the statute to "non-organized" crime offenses.

Only three respondents pointed out that RICO cases were being handled under the authority of State or Federal prosecutors — and only one attributed this to a lack of local resources. In this State, local prosecutors occasionally provided physical surveillance to the State attorney general's office on State RICO cases but rarely prosecuted them at the local level. According to a local prosecutor from that State:

*The State RICO statute is strong, but my office does not have the resources to conduct the investigation and the protracted litigation that these cases could entail .... They have the required manpower and time to devote to these cases, something a smaller local prosecutor's office — even a metropolitan local prosecutor's office — may not be able to supply .... We feel we'd operate under a handicap from the beginning, so we simply don't attempt it.*

## **Recommendations for improvement**

Recommendations for improvement offered by local prosecutors were clustered into three categories:

- RICO training for local prosecutors
- substantive changes in State RICO law
- cautious discretion in selection of RICO cases at the local level — in two cases advocating formal "in-house" criteria for this selection process.

For 23% of the prosecutors interviewed by telephone, training of local prosecutors in understanding when to use RICO and how to litigate under State RICO statutes was

seen as critical if these statutes are to be used effectively. According to these prosecutors, the nexus of the problem of local avoidance of RICO is that RICO training for district attorneys is either deficient or virtually nonexistent in their States. Respondents believed that a thorough understanding of the utility of RICO and a sensitivity to potential pitfalls could help overcome the fear of failure which makes local prosecutors hesitate to use it.

Telephone interviewees also advocated substantive changes in their respective RICO statutes to transform them into more useful tools for prosecuting cases so local prosecutors will employ them more frequently. Recommendations included:

- widening the scope of predicate offenses<sup>12</sup>
- simplifying language
- weakening provisions dealing with private claims of action to prevent use of the statute by private sector plaintiff attorneys.<sup>13</sup>

On the telephone, interviewees suggested the following specific modifications of their State RICO's to strengthen the statutes:

- Inclusion of specific procedural provisions to protect the statute from constitutional challenges and to provide the defendant with defined rights. Some respondents saw their

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<sup>12</sup>Specifically recommended by one interviewee to include *aggravated assault* because of the offense's association with violent street gang activities.

<sup>13</sup>The interviewees here explained that, currently, private parties file claims for damages under their State RICO and use it as a bargaining chip for settlement. Overuse of this provision was described as "lessening the credibility of RICO with judges and the public."

current State RICO statutes as vague about procedural protection. In one interviewee's jurisdiction, a recent court case (eventually settled out of court) highlighted the considerable discrepancy between the procedural safeguards contained in the State's drug asset forfeiture act with absence of similar protection in its RICO statute. The interviewee suggested that provisions on defendant notification, fair hearing rules, and more narrowly drawn language be included in a revised version of the statute. Also recommended was inclusion of early release provisions giving defendants 10 days to request that the court review the government's request for forfeiture.

- Separate conviction from the State's forfeiture proceedings. Under current law, in some States, a criminal conviction must first be obtained before a court will hear a forfeiture proceeding. This implicitly places a standard of *beyond a reasonable doubt* on the prosecutor seeking forfeiture. Respondents asserted that a lesser standard (that is, preponderance or probable cause) applicable to the forfeiture proceedings would be more effective from a prosecutorial standpoint.

- Replacement of current *in rem* forfeiture with *in personam* jurisdiction and substitute asset provisions. Currently, local prosecutors in some "little RICO" States can only "forfeit what [they] seize" (that is, an *in rem* standard); the prosecutor can only seek forfeiture on the assets that can be located. To replace this standard, it was suggested that States adopt the Federal RICO standard, *in personam*, and allow for substitute asset forfeiture. Respondents suggested this would permit local prosecutors to seek forfeiture of assets not directly linked to the

criminal activity if the direct proceeds of the crimes cannot be located.<sup>14</sup>

- Inclusion of administrative forfeiture provisions. These new provisions would permit local prosecutors the option of invoking administrative forfeitures if the State forfeiture claims are not contested by the defendant within a prescribed period of time. Interviewees argued that such provisions reduce the burden on the courts.

Twenty-three percent of the local prosecutors interviewed argued that State RICO statutes could be improved if local prosecutors were more circumspect about the types of cases in which they applied the statute. They feared that lack of judgment in selecting cases would lead to media and public backlash. They were concerned not only about inappropriate application of RICO to unlawful activities that fall outside the definition of organized crime, but also about the negative press coverage and public attention surrounding controversial instances of seizure or forfeiture. To foster caution in the application of RICO, several respondents suggested developing and using internal selection criteria and model indictments. Internal selection criteria suggested by local prosecutor interviewees included the following:

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<sup>14</sup> As explained by one respondent, for example, suppose a drug trafficker saved his income from legitimate employment but spent the proceeds derived from his criminal enterprise. If the prosecutor can show that his income from dealing drugs totaled \$50,000, the court can order that his bank account be forfeited even though the cash balance was obtained by saving legitimate paychecks. The defendant's illegal income was interchangeable and allowed him to accrue such a savings account. This kind of forfeiture maneuver would be permitted under the *in personam* and substitute asset standards.

- nature of offense
- extent of offense
- amount of criminal activity
- time span of criminal activity
- appropriateness of case to State RICO framework
- existence of criminal enterprise
- number and types of individuals involved
- evidentiary advantages possible (inclusion of predicate acts)
- budgetary constraints: staff requirements.

A pivotal goal suggested by interviewees for improved RICO prosecution was meaningful collaboration between local prosecutors and their Federal counterparts. Some interviewees lamented the perceived lack of coordination between local prosecutors' offices and offices of the U.S. attorneys regarding RICO prosecutions. One respondent supported involvement of Federal prosecutors at the planning stages of RICO prosecutions to help ensure that the possible disparities between Federal and local investigative, legal, and procedural rules are considered (for instance, differing search warrant standards and procedures) and to help promote improved interagency spirit. Another declared that a central ingredient to overcoming local prosecutor reluctance in prosecuting RICO cases is the inclusion of local prosecutorial involvement at the earliest possible stages of the local investigation. This respondent said that earlier involvement from the local prosecutor would —

- provide better legal guidance for what is a complicated offense category
- improve evidence collection procedures
- generally enhance the case because the local prosecutor could use investigative information and evidence collected

by law enforcement officers. To emphasize his point, the respondent offered the following example:

*This particular case involved a drug organization that operated a "buy" house, a "stash" house and several inconspicuous "pick-up" locations along with sophisticated communications and delivery networks .... The purchaser paid for the drugs at one house, a call was made to the stash house indicating how much to courier to the pick-up house and the buyer would then go to the pick-up rendezvous point to receive the drugs .... This operation was charged under RICO as an ongoing criminal enterprise with significant assets .... In this instance local law enforcement had made a number of smaller "buy-busts" outside the house, but failed to conduct a phone toll analysis or several other investigative procedures that eventually revealed the organizational infrastructure .... The prosecutor had a better knowledge of what types of information and evidence would best support a RICO prosecution and conveyed this knowledge to the law enforcement officers involved in the investigative process.*

### **Examining State RICO statutes within the local prosecution context: Uncovering hidden and unexpected impact**

This report has tried to describe local prosecutors' experiences with recently enacted State RICO statutes, factors that have inhibited use of those statutes, and suggestions for improving them. This knowledge can be used to promote effective RICO application on a local level and to measure the potential for wide-scale RICO use by local prosecutors. The study delves beyond a singular process evaluation of the use of "little RICO's" by local

prosecutors. To accomplish this, a quantitative analysis of the frequency of local RICO prosecutions was deliberately blended with a qualitative explanation of activities by those key practitioners participating in these activities — local prosecutors. This context-specific approach to the utilization of newly enacted laws puts criminal justice practitioners front and center. It strives to explain the extent of use of RICO laws by finding out why criminal justice practitioners turn toward them or away from them. This approach is useful for measuring the impact of new laws like RICO that implicitly alter roles of practitioners or introduce new and complex legal concepts.<sup>15</sup> In the case of the examination of local prosecutors and State RICO statutes, our analysis has allowed us to confirm some expectations about the local application of “little RICO” statutes (for instance, a concentration of use in larger jurisdictions and a predominance of use in drug and gambling cases). We have also learned reasons for application of these statutes (for instance, availability of more punitive sentences). Yet, this method of analysis has also helped to shed light on unanticipated reasons for use (compensation for lack of Federal attention to specific types of consumer fraud), unanticipated reasons for lack of use (fear of failure, fear of public/media reaction) and hidden impact that would ordinarily go undetected through context-free analysis (for instance, using RICO as a threat during plea negotiations). Looking at State RICO statutes from the perspective of district attorneys helps us to understand the real impact of RICO.

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<sup>15</sup>Berk, R., H. Brackman, and S. Lesser (1977). *A measure of justice: An empirical study of change in the California penal code, 1955-77*. New York: Academic Press, 13-14.

## **State RICO application and the local prosecution dichotomy: Experimentation versus avoidance**

The study found that certain local prosecutors' offices have been willing to experiment creatively with this relatively new approach to organized crime prosecutions. The types of central offenses prosecuted under RICO were diverse, dispelling the notion that State RICO would be reserved solely for the more traditional examples of organized crime. Yet in spite of this diversity of application, local prosecutors — in both jurisdictions that tended to employ State RICO statutes and those that did not — overwhelmingly selected traditional State statute alternatives over RICO statutes in many instances, particularly in cases involving the prosecution of drug and gambling offenses. One reason for this is that local prosecutors believe that more traditional State statutes — and in some cases, newly enacted statutes that pre-dated RICO enactments — carried tougher penalties and/or provided greater latitude in asset forfeiture proceedings. A second and more basic reason goes to the core of RICO avoidance by local prosecutors. They doubt the likelihood of successfully carrying RICO prosecutions to conviction.

Local prosecutors also believe the RICO laws have substantive weaknesses. In many instances, prosecutors continue to rely on more familiar statutes they believe are tougher on organized crime or that they see as allowing wider discretion in the forfeiting of assets. To correct these problems, a sizable number of interviewed prosecutors recommended substantive changes to their State's RICO laws. These changes ranged from expanding the definitional scope of predicate offenses to dramatically enhancing asset forfeiture provisions so they equal or exceed capabilities available under traditional State asset

forfeiture laws. The overriding issues to be addressed are the validity of these perceptions and, if valid, the identification of contributing factors and channels for instituting change.

## **Local prosecutors and State RICO forfeiture provisions**

Some local prosecutors interviewed for this study contended that RICO forfeiture provisions are now too narrow in scope to provide sufficient prosecutorial access to ill-gotten gains. One problem that has caused considerable distress at the Federal level is the untraceable disbursement or dissipation of assets that can typically occur in organized crime cases.<sup>16</sup> State RICO cases may be brought against groups of individuals who do not demonstrate apparent forfeitable interest except income from their racketeering activities. Since this income is often disbursed in an untraceable manner, it can prove an insurmountable task for prosecutors to document the connection to legitimate businesses or other assets. In States with RICO statutes that do not allow the substitution of so-called clean assets or the forfeiture of assets transferred to third parties, savvy offenders can evade forfeiture by transferring ownership to others before indictment. Since significant numbers of local organized crime cases will involve cash assets, some local prosecutors recommended modification of State RICO statutes to include authorization to substitute other assets for those transferred to third parties.

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<sup>16</sup>GAO, 1981, 26-34.

## **Assessing the "fit" between legislator intent and local prosecutor expectations**

State legislatures may find it necessary to redefine the policy goals of RICO laws. The substantive revisions in some "little RICO" statutes suggested by prosecutors would indicate the need for a reexamination of the RICO enactment processes. Included in that reexamination would be comparisons between original intent and current laws and comparisons between State RICO statutes and traditionally available alternatives.

This reanalysis could be critical to attracting expanded use of State RICO statutes by local prosecutors. This study has uncovered some evidence that the "fit" between what State legislators were trying to accomplish and the hopes of local prosecutors was not always exact. State legislators may have had the long-term goals of dismantling organized crime enterprises and deterring criminal infiltration of legitimate businesses, while local prosecutors had more immediate goals such as increasing punishment for crimes. How removed local prosecutors were from the legislative evolution of the State RICO statutes is unclear, but the separation between policy creators and policy implementors is not uncommon in the enactment of new criminal laws. This phenomenon can end in laws that do not necessarily correspond to mandates of the agencies responsible for implementation, unintentionally steering these agencies toward the use of alternative means.<sup>17</sup>

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<sup>17</sup>Berk, Brackman, and Lesser (1977), 279-289.

## **Raising local prosecutor confidence in the application of State RICO statutes**

Besides a separation between policymakers and implementors in the enactment of new law, policy drafters may fail to recognize the limitations inherent in carrying out the law. Further, in the time between enactment and implementation of the law, education for practitioners on the statute may not be provided. Local prosecutors may have been furnished the basic tools to progressively prosecute organized crime offenses through "little RICO" enactment, but were not always given enough training to fully appreciate the rationale behind the statute, proven methods of application, likely defense strategies, and common pitfalls. This appears to contribute to an understandable timidity on the part of local prosecutors to risk experimentation with a radically different approach to organized crime prosecution. They are afraid this new approach may result in losing cases because of their inexperience. They further fear the public criticism raised by inappropriate application of the statute to the offense. These potential costs to RICO prosecutions can easily outweigh potential benefits for a local prosecutor uncomfortable with the degree of guidance provided on effective RICO use.

Besides the obvious call for effective training, the prosecutors interviewed suggested the development of internal criteria to be used to direct prosecutors in RICO application. Intra-office consensus on such criteria — based on an analysis of the case characteristics of successful RICO prosecutions — may prove an invaluable tool to help local prosecutors overcome their natural reluctance to use new and complex legislation.

## **Implications of the study's findings**

The enactment of "little RICO" laws has introduced concepts far removed from the ordinary legal world of the local prosecutor in that — as put by Hutter (1989)<sup>18</sup> — it leaves the "crime" to other laws and addresses the idea of being "organized." It does this by defining necessary elements of "enterprise," "pattern," and "racketeering" activity. Because these laws are in their infancy and courts have interpreted these terms — and the scope of the statutes — on a case-by-case basis, local prosecutors may not yet have a feel for the aim of these laws.

Despite this drawback, some of this study's findings are encouraging. Scarcity of resources did not appear to be a major reason for avoidance of RICO prosecutions, indicating that this may not be as much of a problem as expected. If this is true, news of success experienced with RICO laws through pioneering efforts by local prosecutors in larger jurisdictions may well prompt greater experimentation with these laws by prosecutors in smaller jurisdictions. But this capitalizing on gains made by State RICO on the local level will come only when an expanded awareness of RICO use is matched by expanded efforts to educate local prosecutors in an organized way about the most effective and innovative ways to take advantage of these progressive new laws.

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<sup>18</sup>Hutter, R. (1989). "The gestalt of RICO." *Defense Counsel Journal*, 7/89, 295-305.

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