

T

HOUSE No. 5533

The Commonwealth of Massachusetts

LEGISLATIVE RESEARCH COUNCIL

Report Relative to

COMMERCIAL BRIBERY, House No 5533

FOR SUMMARY, SEE
TEXT IN BOLD FACE TYPE

February 26, 1975

29962

The Commonwealth of Massachusetts

ORDER AUTHORIZING STUDY

(House No. 6260 of 1974)

Ordered, That the Legislative Research Council make a study and investigation relative to state laws concerning commercial bribery, and that said Council shall report the results of its study and investigation by filing a copy of the same with the Clerk of the House of Representatives not later than the last Wednesday of February in the year One Thousand Nine Hundred and Seventy-five.

Adopted:

By the House of Representatives, June 11, 1974

By the Senate, in concurrence, August 1, 1974

6260

CONTENTS

Order Authorizing Study	3
Letter of Transmittal to the Senate and House of Representatives	5
Letter of Transmittal to the Legislative Research Council	6
Summary of Report	7
CHAPTER I. INTRODUCTION . . . . .	. 11
Origin and Scope of Study . . . . .	. 11
Economic and Social Consequences of Commercial Bribery . . . . .	. 11
Massachusetts Statutes Applicable to Commercial Bribery . . . . .	. 14
CHAPTER II. COMMERCIAL BRIBERY AND RELATED LAWS . . . . .	. 16
Federal Laws . . . . .	. 16
Scope of Jurisdiction . . . . .	. 17
Gift or Gratuity . . . . .	. 18
Relation to the Principal's Business . . . . .	. 19
Knowledge and Consent Clause-Business Customs . . . . .	. 19
Larceny Statutes . . . . .	. 22
Embezzlement Laws . . . . .	. 24
Swindling Statutes . . . . .	. 25
Commercial Bribery Under Civil Law . . . . .	. 26
CHAPTER III. PROSECUTION PROBLEMS . . . . .	. 28
Secrecy of the Crime . . . . .	. 28
The Matter of Evidence . . . . .	. 29
Jurisdiction . . . . .	. 31
Rejected Offers . . . . .	. 31
Indirect Payments . . . . .	. 32
Public Complacency . . . . .	. 32
CHAPTER IV. SUGGESTED DETERRENTS TO COMMERCIAL BRIBERY . . . . .	. 34
Jail Sentences . . . . .	. 35
Exemplary Damages . . . . .	. 36
State Licensing and Professional Association Sanctions . . . . .	. 36
Equalization of Commercial Bribery and Larceny Penalties . . . . .	. 38
APPENDIX	
STATE COMMERCIAL BRIBERY LAWS . . . . .	. 39

LETTER OF TRANSMITTAL TO THE SENATE AND HOUSE OF REPRESENTATIVES

To the Honorable Senate and House of Representatives:

LADIES AND GENTLEMEN:— The Legislative Research Council submits herewith a report prepared by the Legislative Research Bureau in response to House, No. 6260 of 1974. That order directed the Council to make a study and investigation relative to state laws concerning commercial bribery.

The Legislative Research Bureau is limited by statute to "statistical research and fact-finding." Therefore, this report contains only factual material without recommendations or legislative proposals by the Council or Bureau. It does not necessarily reflect the opinions of the undersigned members of the Council.

Respectfully submitted,

MEMBERS OF THE LEGISLATIVE RESEARCH COUNCIL

Sen. ANNA P. BUCKLEY of Plymouth, *Chairman*
 Rep. JOHN F. COFFEY of West Springfield, *House Chairman*
 Sen. JOSEPH B. WALSH of Suffolk
 Sen. JOHN F. PARKER of Bristol
 Sen. WILLIAM L. SALTONSTALL of Essex
 Rep. JAMES L. GRIMALDI of Springfield
 Rep. MICHAEL J. LOMBARDI of Cambridge
 Rep. RUDY CHMURA of Springfield
 Rep. SIDNEY Q. CURTISS of Sheffield
 Rep. ROBERT C. REYNOLDS of Northborough
 Rep. ALAN PAUL DANOVITCH of Norwood
 Rep. IRIS K. HOLLAND of Longmeadow

LETTER OF TRANSMITTAL TO THE
LEGISLATIVE RESEARCH COUNCIL

To the Members of the Legislative Research Council:

MADAM CHAIRMAN AND GENTLEMEN:— House, No. 6260 of 1974 directed the Legislative Research Council to make a study and investigation relative to state laws concerning commercial bribery.

The Legislative Research Bureau submits herewith a report in accordance with the above directive. Its scope and content are restricted to fact-finding data only, without recommendations or legislative proposals.

This report was the primary responsibility of James T. Forhan of the Research Bureau staff.

Respectfully submitted,

DANIEL M. O'SULLIVAN
Director, Legislative Research Bureau.

The Commonwealth of Massachusetts

COMMERCIAL BRIBERY

SUMMARY OF REPORT

Scope of Report

This report discusses the crime of commercial bribery and the laws which are applicable to it. In addition, the report examines prosecution problems relative to this offense and recommendations made by legal scholars and social scientists regarding ways of strengthening the deterrent effects of the commercial bribery statutes.

Economic Consequences of Commercial Bribery

Several developments in the modern business community have increased the opportunities for and the incidence of commercial bribery. Product shortages, slumping sales accompanied by fierce competition and increasing reliance upon business agents influence these trends.

Authorities estimate that white collar crime now costs the American economy between ten and thirty billion dollars a year and kickbacks alone exceed five billion dollars annually.

These costs are ultimately paid by the consumer. Likewise, the bribee's principal and the briber's rivals suffer economic losses as a result of commercial bribery.

Massachusetts Statutes

Massachusetts currently has two statutes dealing with commercial bribery (G.L., c. 271, s. 39, a general commercial bribery law and G.L., c. 266, s. 30(4), a section of the larceny statute which deals with the sale of secret business information or processes). The former was placed on the books in 1904 and was last amended in 1912.

To secure a conviction under the statute, it must be shown that a gift or gratuity was corruptly solicited or corruptly given. Penal

sanctions include a maximum fine of five hundred dollars or a fine (minimum ten dollars) and imprisonment up to a year. A participant in the bribery who testifies against another participant may not be prosecuted either criminally or civilly as the result of his testimony.

There have been no criminal prosecutions under the commercial bribery law.

Federal Action

The Federal statutes deal with bribes to specific groups of employees only — those employed by railroads, alcoholic beverage industries, and labor unions. A proposal calling for a commercial bribery law passed the House of Representatives in 1922 but the Senate failed to act on the matter.

In addition, the Federal Trade Commission regards commercial bribery as an unfair business practice and issues cease and desist orders against the practice.

State Statutes

Commercial bribery statutes have been legislated in eighteen states, with Hawaii being the last state to do so.

These states usually prohibit the offering of any gift or gratuity to the agent, employee, or servant of another. The courts have decided that in this context gift or gratuity includes anything which might prompt an agent to be disloyal to his employer. For a violation to occur the gift must be offered with the intent to influence the agent's behavior in relation to his principal's business.

In five states, any gift given with the knowledge and consent of the employer is exempt from the provisions of the statute (La., Neb., N.J., N.Y., and Va.). In five other jurisdictions there is no violation of the statute unless the gift is offered corruptly (Conn., Mass., R.I., S.C., and Wis.). These provisions allow customary business practices involving gratuities to continue. In the remaining eight states even these customary gifts are prohibited (Hawaii, Iowa, Mich., Miss., Nev., N.C., Pa., and Wash.). Officials in some of these states are concerned that their statutes may be too restrictive since they may outlaw even such widespread practices as tipping in restaurants.

In the remaining thirty-two states which have no general commercial bribery statutes some bribery transactions may be subject

to prosecution under larceny or swindling statutes. However, it is very difficult to achieve a successful prosecution under these laws since elements such as felonious intent, divesture of title permanently, fraud, or theft must be proved.

In all fifty states commercial bribery is recognized as actionable under the non-criminal civil laws. By far, litigation involving commercial bribery is pursued through civil suits. If successful in such a proceeding against either the briber or bribee, the principal may recover the full amount of the bribe and any damages which he has sustained as the result of the transaction.

Prosecution Problems

The main problem encountered in prosecuting the offense of commercial bribery is the secret nature of the crime. Quite often only the participants in the episode know that it occurred and they have a vested interest in seeing that the crime remains undetected. Even if others become aware that the crime has been committed the evidence needed to gain a conviction is almost always in the possession of the defendants. For this reason ten states have added immunity provisions to their commercial bribery statutes. In exchange for immunity from prosecution a defendant may be forced to give evidence against the other participants in the bribery transaction.

These immunity provisions are of two types. One automatically grants immunity to the first participant who offers to testify (La., Mich., and N.J.). The other gives the prosecutor authority to grant or withhold immunity to either party (Conn., Iowa, Mass., Mich., N.Y., N.C., R.I., and Va.).

A second obstacle to prosecution of commercial bribery is the question of jurisdiction. This problem will probably continue until the passage of a federal law or uniform state statutes. Neither appears likely in the near future.

Rejected offers constitute a prosecution problem because no extrinsic evidence exists.

Several states prohibit bribes paid indirectly to an agent through a third party. In those states which do not, the practice is difficult to prosecute.

Finally, more commercial bribery transactions are not uncovered and prosecuted because the general public is relatively unconcerned about the practice. It is not a crime of violence and since its economic

effects are difficult to trace the public assigns a very low priority to the crime.

Suggested Deterrents to Commercial Bribery

Social scientists and legal scholars have suggested four modifications of the commercial bribery statutes to increase their deterrent effects:

1. Increased use of jail sentences because white collar offenders respond better to this form of punishment.
2. Exemplary damages to equalize potential gains and losses.
3. Revocations of state licenses and sanctions by professional organizations for individuals convicted of such offenses.
4. Equalization of commercial bribery and larceny penalties because the effects are identical.

The Commonwealth of Massachusetts

COMMERCIAL BRIBERY

CHAPTER I. INTRODUCTION

Origin and Scope of Study

This report is required by a legislative order, House, No. 6260 of 1974, printed on the inside of the cover page of this document, which was adopted by the House of Representatives on June 11, 1974 and by the Senate, in concurrence, on August 1, 1974. The study order was sponsored by Representative John F. Coffey of West Springfield, House Chairman of the Legislative Research Council.

This report is concerned with the crime of commercial bribery and the laws which are applicable to it. Commercial bribery has been judicially defined as "the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers."¹

Also discussed are the prosecution problems associated with this crime which appear responsible for the lack of any effective action against this offense. Finally, this report examines several recommendations made by legal scholars and social scientists regarding ways of strengthening the deterrent effects of the commercial bribery statutes.

Economic and Social Consequences of Commercial Bribery

While the increasing reliance upon agents necessitated by modern business organization has increased the opportunities for commercial bribery, it is not a new crime. In fact, some type of commercial bribery has probably existed and been outlawed since the beginning of commerce itself. One of the earliest references to the practice is found in the Old Testament in the Mosaic command, "thou shalt take no gift, for the gift bindeth the wise and pervereth the words of the righteous", and the parable of the unjust steward relates one method of commercial bribery.²

The complexity of the modern business community has increased both the opportunities for and the methods of commercial bribery. For many years commercial bribery of employees has been a

¹*American Distilling Co. v. Wisconsin Liquor Co.*, 104 F. 2d 582 (7th Cir. 1939).

²*Commercial and Financial Chronicle*, Sept. 4, 1920, p.931.

widespread and common practice in many industries.¹ Kickbacks, rebates and "rake-offs" are just a few of the methods currently employed. Money, stocks, bonds, merchandise, free meals, travel and just about anything else of value has been used to bribe employees who are in a position which could benefit rival business concerns. It is the opinion of Norman Jaspan, the head of a New York based firm which specializes in the detection and prevention of white collar crime, that "never have kickbacks, bribes, and conflicts of interest been such a dominant factor in U.S. society."²

Herbert Robinson, an attorney who handles many cases involving white collar crimes, estimates that the annual cost of all types of white collar crimes exceeds one per cent of the gross national product or approximately ten billion dollars. He also states that many of the business executives that he deals with believe that his estimate is much too conservative; they indicate that the actual total would be closer to twenty or thirty billion dollars a year. Other authorities estimate that the amount paid by businesses for kickbacks alone exceeds five billion dollars a year.³

While it is impossible to obtain a completely accurate and reliable figure as to the actual dollar amount of commercial bribes, knowledgeable sources agree that the total amount is extremely large and it is growing. Recent shortages of various products have greatly increased the opportunities for kickbacks to the salesmen of these products and fierce competition among sellers of various other products has reached the point where rebates, both legal and illegal, are common.

The economic effects of the increasing prevalence of commercial bribery are apparent. In each commercial bribery transaction two parties benefit and three groups suffer. The briber and the bribee are unfairly enriched and the briber's rivals, the bribee's principal and the customers of all the companies involved are unjustly impoverished.

In an open competitive market products compete on the basis of their relative quality and price. Under ideal conditions the manufacturer or retailer who offers goods or services of the highest quality at the lowest price will prosper and other companies will have

¹See Special report on Commercial Bribery -- House Doc. No. 1107, 65th Cong. 2nd Sess.: Hearings before Select House Committee on U.S. Shipping Board Operations, H. R. 66th Cong. 2nd Sess., pp. 1833-71, 5089. Hearings before Committee on the Merchant Marine and Fisheries, to prohibit the payment of gratuities to the master of vessels, H. R. 66th Cong. 3rd Sess., Serial 23 and 69th Cong. 2nd Sess. Serial 24; Report of the United States Tariff Commission, 1918, pp. 24-25.

²U.S. News & World Report, *Kickbacks as a Way of Life: How Widespread in U.S.*, Oct. 29, 1973, p. 38.

³*Ibid.*

to either improve their quality and/or lower their price in order to compete and maintain their share of the market. This pattern benefits the more efficient producers and the consumers. In an industry where commercial bribery is prevalent, however, the tendency is to exclude competition for the business of the concern whose employees are bribed. When the decision making power regarding purchases is in the hands of a bribed employee he will prefer to do business with the company of the briber irregardless of relative prices and quality. "The almost invariable result of such a situation as the foregoing is that though perhaps originating with only one concern, bribery rapidly becomes the practice of the entire industry. No matter how superior the quality of his goods and no matter how low his prices, any producer will none the less find it extremely difficult, if not impossible, to sell in competition with concerns employing bribery."¹

Thus, it is apparent that the more efficient firms are seriously injured by the practice of commercial bribery. Instead of prospering and growing they are forced to compete with corrupt firms by offering larger bribes. "While there are sometimes a few companies that will not resort to bribery, despite the employment of this method by their competitors, such concerns are generally few in number and more frequently perhaps are non-existent. The alternative of failure to bribe is loss of business, and it is scarcely to be expected that any considerable portion of the industry will be able to resist the pressure."²

While it is apparent that a briber's competitors are hurt by his actions, it is less obvious that two other groups, his customers and their customers, are also injured by his corruption. The customers that the briber gains by means of his corrupt practices suffer because they are forced to pay his higher prices. In addition, they and not the briber are usually forced to absorb the cost of the bribe:

"It goes without saying that when a bribe is paid to an employee the bribe is added on to the purchase price, and not only this but it is usually added on two or threefold, because it is easy to get any price that you wish when you have a friend on the inside who can not use anybody's goods but yours."³

The employee who is accepting bribes from another firm becomes,

¹W. H. S. Stevens, *Some Economic Consequences of Commercial Bribery*, Harvard Business Review, Vol. 7, 1928-29, pp. 156-169.

²Evidence of Commercial Bribery collected by the Federal Trade Commission in unfair competition cases and transmitted to Senator Duncan U. Fletcher. Printed for use of the Senate Committee on Judiciary, 65th Cong. 2nd Sess.

³*Ibid.* Letter to Chamber of Commerce of the United States, June 22, 1917.

in effect, the protector of that company. Not only will he advocate paying their inflated prices but if he is in a position to do so he will prohibit his fellow employees from voicing any complaints about their products. If there is anything wrong with the materials the briber sends, the bribee will try to hide the defect and use them up anyway because he knows that if his employer curtails his relations with the briber's firm then his own extra income will end.

The bribee also has a strong motivation to tolerate, even encourage, waste of products that he receives a "rake-off" on. There is documentation of cases where employees deliberately dumped or otherwise destroyed products so that they could requisition additional supplies and get their "rake-off."¹

The cost of all this waste, inefficiency and corruption places a heavy burden on the bribee's firm. However, in the final analysis it is the consumer who pays for it. All these additional expenses, the cost of the bribe, extra material, higher prices, will eventually be included in the operating expenses of the bribee's firm and will determine the final cost of the product. Thus the consumer ends up paying a highly inflated price. He pays for all this inefficiency and corruption, in exchange for which he receives absolutely nothing. If the bribes were not given, the consumer would be able to purchase the goods of identical quality at a lower price.

Massachusetts Statutes Applicable to Commercial Bribery

Massachusetts currently has two laws on the statute books which prohibit commercial bribery. The first of these passed in 1904 and amended in 1909 and 1912 outlaws the practice in general:

Whoever corruptly gives, offers or promises to an agent, employee or servant any gift or gratuity whatever, with intent to influence his action in relation to the business of his principal, employer or master; or an agent, employee or servant who corruptly requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to the business of his principal, employer or master; or an agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his

¹*Ibid.*, Letter to Commission, August 24, 1917, p. 15.

principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be punished by a fine of not less than ten nor more than five hundred dollars or by such fine and by imprisonment for not more than one year; except that if the person who commits the said offence acts as agent or officer of any person, to employ persons as clerks, laborers or otherwise, the offence shall be punished by a fine of not less than twenty-five nor more than five hundred dollars or by imprisonment in the state prison for not more than three years. The district attorneys in their respective districts shall prosecute all violations of this section. No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and documents before any court or in obedience to the subpoena of any court having jurisdiction of the offence described herein on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said court or in obedience to its subpoena or in any such case or proceeding (G.L. c. 271, s. 39).

The second Massachusetts statute which applies to commercial bribery is section four of the larceny statute which was approved December 26, 1967. This section relates to the specific practice of buying or stealing trade secrets.

Whoever steals, or with intent to defraud obtains by a false pretense, or who ever unlawfully, and with intent to steal or embezzle, converts, secretes, unlawfully takes, carries away, conceals or copies with intent to convert any trade secret of another, regardless of value, whether such trade secret is or is not in his possession at the time of such conversion or

secretary, shall be guilty of larceny, and shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than six hundred dollars and imprisonment in jail for not more than two years. The term "trade secret" as used in this paragraph means and includes anything tangible which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production, or management information, design, process, procedure, formula, invention or improvement. (G.L. c. 266, s. 30).

There have been no criminal prosecutions in this state under the general commercial bribery law.

CHAPTER II. COMMERCIAL BRIBERY AND RELATED LAWS

There are basically two types of commercial bribery cases, (1) common law civil suits and (2) criminal prosecutions brought under various Federal and State laws.

Federal Laws

There are three Federal statutes which prohibit bribes to specific groups of employees. One outlaws any payment to an employee of a railroad for purposes of influencing his decision "... with respect to the supply, distribution, or movement of cars . . ." ¹ The second statute prohibits bribery of anyone employed in the alcoholic beverage industry ² and the third covers labor union representatives. ³

In addition to these three statutes, the Federal Trade Commission (FTC) has designated commercial bribery an unfair method of competition and thereby prohibits it in any industry which engages in interstate commerce. ⁴

The FTC prohibition, however, is severely limited by three factors. First there is the jurisdictional problem of proving that the acts were done in the course of interstate commerce. Second, the FTC can only deal with the bribe giver; it cannot proceed against the recipient even if that party initiated the bribe. In fact, the FTC cannot affect him

¹Interstate Commerce Act, Sec. 1; 54 Stat. 913 (1940), 49 U.S.C., Sec. 1(17) (b) (1958).

²Federal Alcohol Administration Act, 49 Stat. 982 (1935), 27 U.S.C., Sec. 205(e) (1952).

³Labor Management Relations Act (Taft-Hartley Act), Sec. 302, 61 Stat. 157 (1947), 29 U.S.C., Sec. 186(a) (1958).

⁴Federal Trade Commission Act, 52 Stat. 982 (1935), 15 U.S.C. Sec. 45(a) (b) (1958).

directly even if he should continue to solicit bribes. Finally, the Commission has only one remedy available to it, the issuance of a cease and desist order. This is an entirely preventative remedy, it has no effect on the bribe already given, it is not compensative. While the FTC might be useful in preventing further bribery it cannot alter the existing situation if bribery has already taken place.

Over the years there have been a number of proposals to either increase the FTC's power in relation to commercial bribery or to enact a separate Federal statute outlawing the practice. In the 1920's Congress held extensive hearings on such a bill. In 1922 a bill incorporating the best features of existing state legislation passed the House of Representatives but was never reported out of the Senate Committee. The bill was resubmitted throughout the 1920's but never came to a vote again. ¹

In the absence of an effective Federal statute to cover bribery in all businesses, eighteen states have passed some form of a general commercial bribery statute. ² The following text examines the general provisions of these state statutes.

Scope of Jurisdiction

Most existing statutes forbid bribery of the agents, employees and servants of another. The authors of the Model Penal Code believe that this wording falls short of the desired objective. They advocate changing this wording to read:

- (a) agent or employee of another;
- (b) trustee, guardian, or other fiduciary;
- (c) lawyer, physician, accountant, appraiser or other professional advisor or informant;
- (d) officer, director, partner, manager or other participant in the direction of the affairs of an incorporated or unincorporated association; or
- (e) arbitrator or other purportedly disinterested adjudicator or referee. ³

The wording of the Model Penal Code has the advantage of

¹See Note, 28 Columbia Law Review, pp. 799, 804-05 (1928).

²Conn. Rev. Gen. Stat. 53-266; Hawaii Penal Code, s. 880; Iowa Crim. Law, c. 741; La. Rev. Stat. 14:73; Mass. General Laws, c.271, s. 39; Mich. Stat. Ann. 750.125; Miss. Code Ann. 2027-28; Neb. Rev. Stat. 28-710; Nev. Rev. Stat. 613-110; N.J. Rev. Stat., Sub S §12, t. 9. 2A:170-88; N.Y. Penal Law 439; N.C. Gen. Stat. 14-353; Pa. Stat. Ann. 4108; R.I. General Laws Ann. 11-7-3; S.C. Code 16-570; Va. Code Ann. 18.1-404; Wash. Rev. Code 49.44.060; Wisc. Stat. Ann. 134.05.

³Model Penal Code, Sec. 224.8. Proposed official draft, 1962.

covering everyone on whom an employer might be dependent for advise or information in order to make a business decision. The authors of the code argue that since the employer pays each of these individuals for their services he is entitled to their unbiased opinion whether they work directly under him or as an equal partner or as a professional consultant. At present, only one state, Hawaii, which has the commercial bribery statute of most recent origin, has adopted the wording of the Model Penal Code. In all other jurisdictions the statutes do not cover these recommended additions.

Gift or Gratuity

Commercial bribery statutes are concerned with the offering, soliciting or giving of some gift or gratuity to the agent of another. In this context, the courts have interpreted gift or gratuity to mean anything which if given to the agent might prompt disloyalty to his employer. Some statutes have used additional terms in order to depict more clearly what types of inducements are prohibited.¹ However, such a specific list if followed by words of a more general nature risks the possible application of the judicial rule of ejusdem generis. Simply stated, ejusdem generis would restrict the prohibited inducements to those listed. Unless this restriction is the intent of the wording of the legislation, the use of the words gift or gratuity alone will suffice.

Another problem arises in the determination of whether a gift or gratuity has been tendered "to" an agent. The question has been raised whether a gift to a friend or a relative of the agent should be considered a gift "to" the agent. Clearly, if the gift is the result of some prior agreement with the agent then for purposes of the statute it should be treated as if it were presented directly to him. Some states have tried to deal with such indirect bribes by prohibiting gifts to the agent's spouse,² members of his family³ or to the agent indirectly. Again, specific enumeration of prohibited recipients presents hazards. If the agent may obtain the gift indirectly through anyone then the law will be circumvented. The use of the more general term "indirectly" can prevent this from occurring and is therefore considered preferable.

¹See Iowa Criminal Law, s. 741.1 (1958) (any gift, commission, discount, bonus, or gratuity); Miss. Code Ann., s. 2027 (1956) (any money, goods, chattels, right in action, or other property, real or personal); Nev. Rev. Stat., s. 613.110 (1957) (any compensation, gratuity or reward); R.I. General Laws Ann., s. 11-7-3 (1956) (any gift or valuable consideration); Wash. Rev. Code, s. 49.44.060 (1958) (any compensation, gratuity or reward).

²Miss. Code Ann., s. 2027 (1956).

³Pa. Stat. Ann. Title 18, s. 4667 (1945) repealed in June, 1973.

Relation to the Principal's Business

Although the actual wording of the different state statutes varies, each requires that the bribe must be tendered with the intent of influencing the agent's actions in relation to his principal's business. It is not necessary that the agent's actions have a negative effect on his employer's business. The statutes are designed to insure the agent's undivided loyalty to his employer. Bribery is forbidden even in those instances when the agent is being encouraged to take some action which would be beneficial to his employer. The agent has a duty of fidelity to his employer and ". . . Whenever an agent accepts a bribe which he does not remit to his employer he has violated that duty."¹

The bribe, however, must be intended to influence the agent's behavior in relation to his principal's business and it must involve some activity in which the agent is, or should be, engaged in on behalf of his employer. In the case of *People v. Jacobs*,² the New York Court of Appeals overturned a conviction under the New York commercial bribery statute on the grounds that the gift was not intended to affect the principal's business in any manner. In this case a ship's purser had been selling rosters of cruise passengers to a photographer. The Court found that since the steamship company did not make any use of these lists after the cruise and since they were often published in local newspapers, the company was not affected by their agent's sale of the lists. Despite the fact that the agent acquired the information as a result of his employment, the Court ruled that the principal was unaffected and the agent was therefore innocent of the charge of commercial bribery.

Knowledge and Consent Clause—Business Customs

Although commercial bribery statutes forbid the giving of any gift or gratuity to the agent of another, they often exempt gifts given under certain specified conditions. Five states have provisions in their statutes which exempt any gratuity given to an employee with the knowledge and consent of his employer.³ The principle behind this exemption is that if the employer is aware of the gift then he will be able to determine if there has been an effect on his agent's judgment regarding the donor. The employer is therefore unlikely to be misled by his employee's advice.

¹Minnesota Law Review, Vol. 46, January, 1962, p. 618.

²*People v. Jacobs*, 309 N.Y. 315, 130 NE 2nd 636 (1955).

³Louisiana, Nebraska, New Jersey, New York and Virginia. Section 741.5 of the Iowa Code has been erroneously construed as a knowledge and consent clause.

This provision allows the employer to exempt certain gifts from the operation of the statute and to thereby retain certain business practices involving gratuities. In fact, all customary business practices which would otherwise be prohibited by the statute are legalized unless the principal expressly objects to the acceptance of such gifts by his agents. This effect results from the application of the doctrine of constructive knowledge and implied consent. To date there are no cases dealing with the application of knowledge and consent clauses in commercial bribery statutes; however, there is reason to believe that the interpretation of that construction would be similar to that developed in other contexts:

Other constructions indicate that a knowledge and consent requirement may be satisfied by a finding of constructive knowledge and implied consent.¹

Constructive knowledge means that the principal is aware of facts which would have given actual knowledge to a reasonable man. Constructive knowledge may also be imputed where the principal should reasonably be aware of such facts. Implied consent exists when a principal with actual or constructive knowledge of gifts to his agents voices no objection and takes no action opposing it. Thus, constructive knowledge of and implied consent to the practice can be proved by showing that such gifts are a customary business practice of the particular industry and the employer therefore should have been aware of them. For example, a person who employs travelling salesmen or buyers should reasonably expect that these employees will be entertained by the people with whom they are doing business. Unless the employer expressly forbids the receipt of such gratuities, his agents are not guilty of any wrongdoing in accepting them.

In addition to the five states which exempt customary business practices from their commercial bribery statutes by means of a knowledge and consent clause, five other states bring about this same result through other language.² These statutes contain a qualification that the gift or gratuity must be offered "corruptly". Under such laws in order for a violation to exist there must be an intent to defraud. If the particular gift or gratuity involved is a customary business practice then it is highly unlikely that any intent to defraud can be established.

¹*Op. cit.*, Minnesota Law Review, p. 619.

²Conn. Rev. Gen. Stat. 53-266; Mass. General Laws, c. 271, s. 39; R.I. General Laws Ann. 11-7-3; S.C. Code 16-570; and Wisc. Stat. Ann. 134.05.

In the absence of either a knowledge and consent clause of a "corruptly" offered qualification, ordinary business entertainment may be construed to be a violation of the commercial bribery statute. Prior to June 1973, the Pennsylvania statute contained a provision specifically prohibiting the introduction of any evidence showing that gifts were customary in the trade or business. The legislative intent of this section was to insure that undesirable business practices did not become legal simply because they were customary. The Pennsylvania statute also contained a knowledge and consent clause. The coupling of these two clauses made it possible for a third party to bestow a gift on an employee of another but only after acquiring the principal's express approval. The Pennsylvania statute was amended in 1973 to bring it more into line with the Model Penal Code. The statute no longer contains a prohibition against the presentation of evidence demonstrating that a gift is customary. However, since the knowledge and consent clause of the Pennsylvania statute was dropped at the same time it appears that Pennsylvania joins seven other states in prohibiting all gifts to the agent of another whether or not they are customary or have the principal's approval.

These two different approaches to the problem of commercial bribery represent two divergent legislative philosophies. Those statutes which contain a knowledge and consent clause or a "corruptly" offered qualification attempt to prohibit what is presently considered corruption in the business community. On the other hand, the remaining eight statutes seek to set a higher ethical standard for businessmen than is currently recognized. This effort to raise the standards of ethical conduct is an admirable goal; however, most legal scholars believe that any attempt to accomplish this through legislation is predestined to fail, the most notable example of such an approach being the prohibition of the manufacture and consumption of alcoholic beverages.

Criminal prosecutions in those states with statutes lacking both a knowledge and consent clause and a "corruptly" offered provision have been rare. Officials in at least one of those jurisdictions, Iowa, are concerned that its statute is unenforceable because it outlaws even such accepted practices as tipping in restaurants. The Iowa Legislature considered an amendment during the 1974 session to exclude gifts valued at under twenty-five dollars from the provisions

of the commercial bribery statute. This amendment failed of passage, leaving the Iowa statute without any clause authorizing the exemption of any type of gratuity.¹

In the absence of any injury to the general public, it may be both unwise and impractical to impose higher standards on an unwilling business community. The question remains, however, what is the best method of exempting accepted business customs from the provisions of the statutes. Clearly Iowa's attempt to limit the dollar amount of the gift is unworkable, the matter of multiple gifts all under twenty-five dollars but adding up over a period of time to considerably more is one of the problems which make it impractical. The only methods which seem to be reasonably effective are the two previously discussed, the knowledge and consent clause and the "corruptly" offered provision. Of these two, there appears to be a "slight preference for the former among legal authorities. They indicate that the knowledge and consent clause tends to permit a more objective determination than the "corruptly" offered qualification. Knowledge and consent points to specific facts. On the other hand, whether a transaction is "corruptly" undertaken requires a subjective determination of intent or purpose. The more objective standard is preferred by legal authorities because it more clearly defines the crimes and the acceptable exemptions from the provisions of the statute. Moreover they do not believe that the purposes of the statute will be subverted by a qualification restricting its application to those cases where the principal did not have knowledge of and give his approval of the gift.

For the most part, in the remaining thirty-two states which have no general commercial bribery statute, the practice of commercial bribery is not a punishable criminal offense. A few states emulate the Federal government and have commercial bribery statutes which apply only to specific groups of employees. Arizona, for example, covers persons in the alcoholic beverage industry, as well as telephone and telegraph operators. There is a possibility that a commercial bribery prosecution could be brought under a larceny or swindling statute in some of these jurisdictions.

Larceny Statutes

Larceny statutes proscribe the obtaining of another's property by

¹In *Iowa v. Prybil*, 211 NW 2d 308 (1973), the Court seems to impute such a provision in the statute.

theft or fraud. Theft occurs when the property is obtained without the consent of the owner and fraud is involved when the owner's consent to the transfer is obtained illegally. At least one type of commercial bribery transaction may be construed as theft of another's property --- when the purpose of the gift or gratuity is to obtain secret business information, formulae, or processes.

Larceny by Theft. To constitute theft under most larceny statutes it is necessary that a person take property or an article of value from its owner. This raises the question as to whether secret formulae or processes can be considered property. At least one Federal case¹ has held that secret processes or formulas constitute property within the meaning of a criminal statute and state courts have similarly ruled in numerous cases. However, while some intangible interests such as secret formulae and processes have been considered property as used in a larceny statute, ordinary business information or plans do not meet this test.

A second problem often surfaces in applying larceny statutes to bribery cases which involve secret formulae, processes or information. In most jurisdictions, an intent to permanently deprive the owner of title to and possession of his property, or the use and benefit of it, must be shown. Therefore in a commercial bribery case it must be shown that if the bribe succeeds the owner will be deprived of the possession or the use and benefit of his property. A literal interpretation of this section of the statute would seem to indicate that secret formulae, processes or information could not be the subject of larceny since the owner is not deprived of their use, although he may suffer great financial losses due to the fact that this knowledge is no longer exclusively his. This problem arises from the fact that the standards used, namely the divesture of title, possession or use and benefit, are concepts developed in dealing with tangible property while the interests involved in respect to formulae and other processes are not within the traditional concepts of tangible property.

Larceny by Fraud. Other commercial bribery activity may constitute fraud under a larceny statute rather than theft because the principal's consent has been obtained, albeit illegally. The most common practice of commercial bribery is to influence a business transaction between the principal and the briber. In today's complex

¹*United States v. Proctor & Gamble Co.*, 47 F Supp. 676 (D Mass. 1942).

business society most transactions involving the transfer of property between the principal and the briber result from a contract. Since the principal agreed to the contract it will not be considered an unlawful appropriation without proof that his consent was obtained by means of fraud.

In the only criminal case discussing whether commercial bribery constitutes fraud, a Federal district court ruled that commercial bribery constituted a violation of the Federal mail fraud statute.¹ The Court stated that the fraud consisted of the misrepresentations made by the bribed employee as the loyal servant of his principal.

In addition to proving that the agent has been bribed, it is also necessary to show that the agent's misrepresentation was "material" to his principal's decision to enter into the contract. In many business transactions the agent is authorized to conduct the negotiations and to enter into an agreement on behalf of his principal. If commercial bribery accompanied these circumstances there appears to be little doubt that the agent's role is "material". In many other instances, however, the agent serves only in an advisory capacity. These cases get involved in the gray area of determining the principal's motivation for entering into the contract. Consequently in these cases the causal connections are extremely difficult to prove since any extrinsic evidence is likely to be minimal.

Thus, although some instances of commercial bribery may constitute a violation of the theft or fraud sections of the larceny statutes it would normally be very difficult to produce evidence sufficient to prove the violation.

Embezzlement Laws

Most states also have a statute which prohibits embezzlement and similar misappropriations of property by agents or employees. Like the theft violations it must be proven that "property" or "an article of value" has been misappropriated. Once again the problem of whether secret processes, formulae and information falls under these statutory terms is present.

It must also be shown that the agent charged with commercial bribery had the property in question in his possession, custody or control, or that he was authorized by an agreement or competent

¹*Op. Cit.*

authority to take such possession, custody or control. If the agent has been authorized to know secret formulae, processes or information which he reveals to the briber then this requirement of possession is satisfied. When the purpose of the bribe is to bind the principal to a contract then it must be shown that the agent either had the authority to enter the agreement on behalf of the principal or that he had sufficient influence over his principal's decision that he may be said to have had "possession, custody, or control" of the assets which are transferred as a result of the agreement. As an example, it has been determined that a bank officer who is authorized to manage the bank's affairs and to make loans of the bank's funds has possession, custody and control of the bank's assets within the meaning of the Minnesota larceny statute.

Under this statute, however, the agent must have independent control of the principal's assets. If another person is required to and, in fact, does exercise his independent judgment as to whether to enter into the contract, the requirement of control of the accounts is not met and therefore misappropriation or embezzlement does not occur under the statute.

Commercial bribery constitutes a violation of embezzlement and related statutes only when the bribed agent plays the dominant role in a transaction entered into by or on behalf of his principal. If the agent cannot be shown to have played this dominant role there is no violation of the embezzlement statute. As in the larceny statutes there is little likelihood of any extrinsic evidence concerning the principal's motivation and this makes prosecution difficult, if not impossible.

Swindling Statutes

In addition to the larceny and embezzlement statutes, there is a possibility that a prosecution of a commercial bribery transaction could occur under a state swindling statute. These statutes prohibit the taking of another's property by use of instruments, tricks, devices or similar means. The courts have held that the terms "instruments or devices" do not refer exclusively to mechanical or physical contrivances. Rather they have held that words that are used in conjunction with conduct occurring in the course of a business transaction may also be interpreted as a trick or device.¹

In view of this broad interpretation given to the words "trick or

¹*State v. Yurkiewicz*, 208 Minn. 71, 292 N.W. 782 (1940).

device" by the courts it may be argued that the bribing of an agent coupled with his misrepresentation of continuing loyalty to his employer is prohibited by swindling statutes. This statute, however, was not designed to meet the special conditions associated with commercial bribery. Again the problem of interpreting the term "property" to fit the bribery transaction and of establishing a causal connection between the trick or device and the transfer of property appears. As in the larceny and embezzlement statutes, the lack of extrinsic evidence makes prosecution difficult.

The inadequacy of the larceny and swindling statutes in dealing with commercial bribery stems from the fact that they were designed to deal with an entirely different type of criminal conduct. However, even if these statutes were adequate for prosecuting every commercial bribery transaction, there would still exist a very strong argument for establishing a separate commercial bribery statute.

The larceny and swindling statutes do not clearly define and describe what type of business transaction constitutes the crime of commercial bribery. As was stated previously, there are many gray areas which border between customary business practices and crimes. Without a commercial bribery statute which clearly defines the offense there exists a strong likelihood that a situation will arise where an individual charged with commercial bribery will argue that he was unaware that his actions were illegal. While ignorance of the law is not a legal defense, it is a very compelling moral argument in favor of passage of a statute which specifically outlines the crime and punishment.

Commercial Bribery Under Civil Law

While the only laws on the statute books which deal with commercial bribery are the criminal statutes previously discussed, the vast majority of the prosecutions of this crime are not brought under these statutes. In contrast to the confused situation regarding criminal commercial bribery statutes, every state recognizes this offense as actionable under their non-criminal civil laws. These laws have developed over time based on precedents dating back to the British common law.

In order to constitute commercial bribery under the civil law three conditions must be met:

(1) The person making the payment must make it to an agent of

another with whom he engaged in a business transaction.

(2) He must be aware that the individual to whom he makes the payment is the agent of the person with whom he is dealing.

(3) He must fail to disclose to the person with whom he is dealing that he has made a payment to an individual whom he knows is the other's agent.

Only these three conditions must be met in order to prove a civil case of commercial bribery. It is immaterial whether the bribe has had an effect upon the agent or not.

Upon discovering that an illegal payment has taken place the principal affected is entitled to take certain actions. First, he may dismiss his employee and withhold any compensation which would otherwise be due to the agent for the payment periods which include the bribery transaction. Secondly, the principal may rescind any contract which may have been influenced by the bribe. Lastly, the employer can bring a civil suit against either the briber or the bribee in order to recover the full amount of the bribe and any damages which he has suffered as a result of the transaction.

The aim of a civil commercial bribery action is to restore the conditions which existed prior to the bribe. The disloyal employee is discharged and presumably replaced by someone of greater loyalty. The bribe is surrendered to the principal who also recoups any financial losses he may have suffered. Lastly, the principal has the right to decide whether to void the contract or to continue it in force.

This latter provision is to protect a principal who has been deceived into entering an unfavorable situation and has succeeded in rectifying the problem. As an example, a principal might be tricked into purchasing a faltering business which he then converts into a profitable enterprise. Under these circumstances the principal is entitled to bring suit for the amount of the bribe and still enforce the sales agreement which brought him the currently profitable business.

The civil remedies relating to commercial bribery have been used more extensively than the criminal laws for a number of reasons. First, a cause of action is recognized by all states. Secondly, the burden of proof required of the plaintiff rests on the preponderance of evidence basis and not on the "beyond a reasonable doubt" test in a criminal action. Third, the nature of the crime is such that it involves secrecy. The person most likely to discover the bribe is the principal

and his main concerns are likely to be recovery of any financial losses he has suffered.

CHAPTER III. PROSECUTION PROBLEMS

Considering the number of states which have statutes outlawing commercial bribery and the length of time many of these laws have been in existence, the relatively few criminal prosecutions brought under these statutes illustrate the difficulty of prosecuting under them.

Secrecy of the Crime

The main problem associated with the prosecution of commercial bribery is the nature of the crime itself. As the noted sociologist and criminologist, Edwin Sutherland, points out: "What differentiates the white collar offender from the Series I offender (crimes of violence) is that the Series I offender seeks to conceal his identity whereas the white collar offender seeks to conceal the fact that a crime has been committed."¹

In most instances of commercial bribery the only people who are aware that a crime has taken place are the participants, the briber and the bribee. The perpetrators of any crime which involves secrecy have a vested interest in seeing that the crime and their involvement remain undiscovered. Even those cases where the bribery transaction is not completed are rarely brought into the open. Since the gravamen of the offense lies in the intent to influence, both parties are guilty of a criminal action when they agree to the transaction. If later the briber fails to pay or the bribee refuses to perform the actions which were agreed to, then the bilked party cannot reveal the crime in order to get even or in order to enforce the agreement. First, because they are equally guilty of the crime and secondly because such compacts are unenforceable at law. Therefore even in an incomplete bribery transaction both parties will probably still maintain their secrecy.

The most common indication of the bribery transaction is a contract which is somewhat unfavorable to the bribee's principal. In most cases, however, the principal would be inclined to attribute this to poor business judgment by his agent rather than corruption. The

¹Edwin Sutherland, *White Collar Crime*, Dryden Press, New York, 1949, p. 9.

only other clue which is present is the bribe itself but it is rare that the bribe would involve amounts appreciable enough to noticeably affect the recipient's standard of living and thereby alert the principal.

Finally, it should be apparent that if the illegal transaction is going to be discovered it will probably be the principal who uncovers it. He is the one closest to the participants and the one most adversely affected by their crime. However, upon discovery of the crime he is unlikely to bring it to the attention of the authorities in order to bring a criminal prosecution. He is much more concerned with recovering the damages he has suffered and therefore he is likely to bring a civil suit.

The Matter of Evidence

Several difficulties attend the prosecution of commercial bribery offenses, among them being the introduction of substantial evidence. Usually, the available evidence tends to be circumstantial. Moreover, the evidence needed to prove the case beyond a reasonable doubt is in the possession of one of the defendants. In such a situation the defendant will frequently involve the self-incrimination clause of the Fifth Amendment of the Federal Constitution. To encourage people to come forward with information regarding commercial bribery transactions and to surmount the obstacle to prosecution offered by the Fifth Amendment, several states have incorporated immunity against prosecution provisions in their commercial bribery statutes.

These immunity clauses are of two principal types. The first form provides immunity to the first participant who agrees to testify concerning the bribery transaction. The second form enables the prosecutor to use his own discretion in granting immunity to either party. In the latter case it is not necessary for the witness to request or even desire immunity. If after he has been granted immunity a witness still refuses to answer the prosecutor's questions, he can be held in contempt of court and if he testifies falsely he is subject to the perjury laws.

In practice, these two types of immunity clauses serve slightly different functions. New Jersey is one of three states which authorizes the former type of immunity clause:¹

Any person who may have committed an offense under the provisions of section 2A:170-88 of this title who first reports

¹Louisiana, Michigan and New Jersey.

the facts under oath to any county prosecutor of this state, and who gives evidence tending to the conviction of any other person charged with an offense under that section, shall be granted full immunity from prosecution or conviction under that section with respect to the offense reported (New Jersey Revised Statutes, Article 9, 2A:170-89).

While this provision serves a secondary purpose of facilitating prosecutions, its primary objective is to increase the detection of commercial bribery transactions. Under this provision an individual who has participated in a bribery transaction can reveal his part in the crime to the county prosecutor with the knowledge that he or she will not face a criminal prosecution as a result. This encourages people to reveal their crimes to the county prosecutor. If they feel guilt and remorse for their involvement or if they fear that the other participant may betray them, this immunity provision can provide the inducement needed for their confession.

In eight other states the prosecutor has statutory authority to grant immunity.¹ Such clauses do not have quite as much impact in the area of detection as the "first to testify" exemption because there is no assurance that an individual seeking immunity will secure it. Their advantage lies in the production of pertinent direct evidence during the trial. If during the course of the proceeding the government's attorney views his case as "weak" and that a conviction is unlikely without additional evidence, he may then confer immunity upon either party and use this defendant's testimony to convict the other.

In seven jurisdictions which authorize this second type of immunity the individual who testifies is protected from criminal prosecution only. The evidence that he provides may later be used against him in a civil suit. This prospect of "self-incrimination" has caused some civil libertarians to question its constitutionality. However, whenever the constitutional question has been raised, the provisions have been upheld.²

In one state, Massachusetts, a defendant who testifies under a grant of immunity is protected against both criminal and civil action.³ While this provision removes any doubt as to the constitutionality of

¹Connecticut, Iowa, *Massachusetts*, Michigan, New York, North Carolina, Rhode Island, and Virginia. The Michigan statute contains both provisions.

²*People v Nankervis*, 330 Mich. 17, 46 NW 2d 592 (1951).

³G.L., c. 271, s. 39.

the immunity clause, its effect on the rights of the bribee's principal has been questioned. In essence, this provision prevents him from bringing suit against one of the participants in the bribery transaction. However, the net effect of this statute may be beneficial, the evidence gained under the immunity clause may make it easier for the principal to prove his case against the remaining participant and, if successful, recover the full amount of the bribe and damages from this participant.

Jurisdiction

Another major problem which is often encountered in commercial bribery prosecutions is the question of jurisdiction in the instance of interstate bribery. As was indicated in Chapter II, there is a serious doubt as to whether a commercial bribery transaction can be prosecuted under the laws of the thirty-two states which do not have general commercial bribery statutes. Many companies which engage in interstate commerce can avoid those states which have a commercial bribery statute by offering gratuities and paying bribes in states which lack an effective statute. There are cases on record of bribers opening bank accounts in the name of an employee whom they have bribed. These accounts are opened in a state which lacks a commercial bribery statute and the passbooks are then mailed to the employee in a state which does have a statute. The legal questions which are raised by such devices are extremely complicated and make prosecution very difficult.

The only effective solution to the jurisdictional problem is the passage of either a federal statute or uniform state laws in all states dealing with commercial bribery. Neither occurrence appears likely at this time.

Rejected Offers

It would appear that the possibilities for a commercial bribery conviction would be enhanced in a situation where a bribe was offered to an individual who refused to participate in a criminal action and rejected the offer. However, in these circumstances a conviction becomes difficult because there is no extrinsic evidence. It is simply a case of one person claiming that a bribe was offered and refused and another person arguing that the offer was never made. On the other hand, if the individual who is offered the bribe pretends to accept it in order to gather evidence against the briber, such action

would be considered entrapment and any evidence gathered in this manner would be inadmissible in a court of law.

Indirect Payments

As Chapter II of this report reveals, most states do not have a provision which covers bribes paid to individuals other than the employee. Thus, it is possible to avoid prosecution by channelling the bribe to the recipient's wife, relative or some third party.

Public Complacency

Probably the most important reason for the paucity of commercial bribery prosecutions is complacency regarding the offense on the part of the general public. Law enforcement agencies do not expend more time and effort on commercial bribery investigations and prosecutions because the public is relatively unconcerned about the crime. This posture has been explained by one political scientist in the following terms:

Pecuniary corruption in the political and commercial spheres must be expected. . . . Public reaction to political and commercial corruption is as predictable as the incidence of corruption itself. The familiarity of the fact evokes complacency, especially since many an onlooker preserves his virtue only for lack of opportunity to sin. The public rises in indignation only when the magnitude of the outrage exceeds the customary, when corruptive practices run counter to the political mores — which are indifferent to some offenses, such as implicit bribery, but condemn others, such as open blackmail or when a prominent member of the other party or of the opposition has been caught.¹

There are several reasons for the public's apathy regarding commercial bribery. First, commercial bribery is not a crime of violence. This automatically lessens the public's concern about the crime. In addition, the effects of commercial bribery are difficult to trace. Upon hearing that some large company has bribed an employee of another firm, most people would be unaware that the bribery

¹Hans Morganthau, *Reaction to the Van Doren Reaction*, New York Times, November 22, 1959, s. 6 (magazine).

transaction could affect them. Individual instances of bribery usually have a very minute effect upon the prices of consumer goods. It is the aggregate of bribes which will eventually have a noticeable impact on prices but even then the public is unaware that it is paying for them.

Social scientists who study white collar crimes and public opinion believe that the crime cannot be effectively controlled by existing statutes alone. They stress that unless there is a significant change in the public's attitude regarding these crimes the chances of uncovering and successfully prosecuting commercial bribery episodes are slim:

Not only are these crimes still not in the mores but there exists strong pressures within occupations, trades, industries for their rationalization and even their conventionalization. As our economy becomes more and more urbanized, the counter pressures of community sentiment become weaker. Perhaps the only effective counter to these pressures making for these crimes is the opposition of other groups in the community whose own interests are adversely affected by these crimes. This includes competing corporations and industries, labor, small business, and consumer groups. This implies a system of crime control comparable to those in representative government. This crime control in a democracy involves no panaceas but a constant struggle of competing forces to establish optimum conditions for their own operation.

When public opinion reaches the point that these optimum conditions include occupation, trade and industry self-enforcement of standards that are in the general public interest, both administrative and criminal law may be strengthened in their controls. But the achievement of such a public opinion requires the continued and relentless publicity to violations, the education of the public as to the need of higher standards of economic conduct and the use of constant pressures upon other groups in the society to desist from practices inimical to the injured groups.

In short, only the maintenance of a high level of social equilibrium will serve the purposes of social control in this crime area.¹

¹Harry Manuel Shulman, *Cultural Aspects of Criminal Responsibility*, Journal of Criminal Law, Vol. 43, September-October, 1952, pp. 323-27.

CHAPTER IV.

SUGGESTED DETERRENTS TO COMMERCIAL BRIBERY

Over the years there have been a number of proposals for additions or modifications to strengthen the existing commercial bribery statutes. Most legal scholars believe that the main weakness of these laws is that they fail to provide an adequate balance between the possible gains and losses which could result from a commercial bribery transaction.

Many commercial transactions which occur in the modern business community involve vast amounts of money. It is not at all unlikely that a relatively minor change in a contract could involve thousands and possibly even millions of dollars. Under the current civil commercial bribery laws a verdict against the defendant simply results in the payment of the damages suffered plus the amount of the bribe to the principal. However, since the briber is usually enriched by an amount equal to the damage inflicted on the other party, paying this amount leaves the briber no worse off than he was before the bribery attempt. Moreover the penalties imposed for a criminal commercial bribery conviction are relatively innocuous. In the majority of states which have a criminal statute the offense is a misdemeanor and the maximum penalty under most of these statutes is a five hundred dollar fine and a one year jail sentence.¹

In actuality, however, these relatively minor penal sanctions are rarely, if ever, imposed. In commercial bribery cases, as in other white collar crime convictions, judges usually limit the penalty to the payment of a fine. This reluctance to send businessmen to jail is the result of a legal fiction that has developed concerning commercial bribery and similar crimes:

White Collar crimes tend to be dealt with, increasingly, in terms of a legal fiction which separates the personal conduct of the offenders, triable under criminal law, from his corporate conduct, triable under administrative law. For the principle of personal responsibility there has been substituted that of corporate responsibility, or even of industry wide responsibility. In place of individual trial and punishment, and the stigma of personal publicity, have developed the practice of corporate hearings, cease and desist orders,

¹See Appendix.

stipulations and fines assessed on corporations. Thus the trend of legal jurisprudence in white collar crime has been to give recognition to the role of functional rather than personal pressure.¹

Thus the individual contemplating commercial bribery weighs the possibility of huge financial gains if he is successful as against a minor fine, which his company will probably pay for him, if he fails and is caught.

Jail Sentences

The first recommendation for strengthening the commercial bribery codes is one that runs directly contra to the current trend in legal jurisprudence as described above. Sociologist Gilbert Geis feels that the most effective deterrent to white collar crimes, including commercial bribery, is the imposition of jail sentences:

The fact is that the corporate offender, brought up to be particularly responsive to others' opinions about him — others of the same social class at least — is especially vulnerable to reform by threat of demeaning social sanctions. It may not be "sporting" to imprison a corporation executive because he and his fellows more than traditional kinds of offenders behave better afterwards, but it seems eminently sound social policy to do just this when the executive knowingly commits a serious criminal act. It can be argued, convincingly I think, that social power and prestige carry heavier demands for social responsibility, and that failure of corporation executives to obey the law represents an even more serious problem than equivalent failure by persons less well-situated in the social structure.²

In seventeen of the eighteen states which currently have commercial bribery statutes the trial judges already have the authority to impose jail sentences of at least six months. Five states currently have a mandatory minimum fine³ for a commercial bribery conviction; however, no state has provisions for a mandatory minimum jail sentence, although there is no legal obstacle to the imposition of such a sentence.

¹Harry Manuel Shulman, *Cultural Aspects of Criminal Responsibility*, Journal of Criminal Law, Vol. 43, September-October, 1952, pp. 323-327.

²Criminal Law Bulletin 8, June, 1972, pp. 377-392.

³See Appendix.

Exemplary Damages

The awarding of exemplary damages has been advocated in some quarters as a deterrent to the commission of commercial bribery offenses. Such a remedy is available in the State of Rhode Island:

11-7-6 *Civil liability for bribery.* Any person injured by a violation of the provisions of secs. 11-7-3 and 11-7-4 may recover from the person or persons inflicting such injury twice the amount of such injury.¹

This section of the Rhode Island statute equalizes the potential gains and losses possible in a commercial bribery transaction. Without this provision a potential briber might be contrasting an expected \$100,000 profit against a possible \$1,000 fine. Under this section the potential net losses are increased to \$100,000 plus the \$1,000 fine. If the briber has inflicted damages of \$100,000 then he is required to pay a penalty of \$200,000 to the injured party. This payment consists of the return of the \$100,000 which the briber profited from the bribery transaction plus an additional \$100,000 which is the briber's actual net loss.

This section is particularly significant because it has been incorporated in the state's civil law rather than the criminal statutes. Since most of the commercial bribery transactions which are prosecuted are civil cases, this provision has a much greater potential impact than possible changes in the criminal commercial bribery statutes.

State Licensing and Professional Association Sanctions

Although commercial bribery is usually only a misdemeanor, one state, New York, has decided that the crime is one that involves moral turpitude. Thus, a state licensing board or a professional organization can take action against licensed professionals convicted of this crime. For example, an attorney who is convicted can be disbarred and a convicted insurance adjuster may be refused a license by the Department of Insurance. This provision might be extended to cover additional professionals. In fact, some professional organizations are actively encouraging state governments to license their members and to require compliance with professional codes of conduct. On the latter score, the National Society of Professional Engineers has suggested the following rules for consideration by licensing authorities as a means to reduce the opportunity for the commission

¹Rhode Island General Laws Annotated.

of commercial bribery.

SUGGESTED MODEL RULES OF PROFESSIONAL CONDUCT FOR ADOPTION BY STATE REGISTRATION BOARDS¹

4. *The (Architect-Engineer-Landscape Architect-Land Surveyor)*

A. The (architect-engineer-landscape architect-land surveyor) shall conscientiously avoid conflict of interest with his employer or client, but, when unavoidable, the (architect-engineer-landscape architect-land surveyor) shall forthwith disclose the circumstances to his employer or client.

B. The (architect-engineer-landscape architect-land-surveyor) shall avoid all known conflicts of interest with his employer or client and shall promptly inform his employer or client of any business association, interests, or circumstances which could influence his judgement or the quality of his services.

C. The (architect-engineer-landscape architect-land surveyor) shall not accept compensation, financial or otherwise, from more than one party for services on the same project, or for services pertaining to the same project, unless the circumstances are fully disclosed to, and agreed to, by all interested parties.

D. The (architect-engineer-landscape architect-land surveyor) shall not solicit or accept financial or other valuable considerations from material or equipment suppliers for specifying their products.

E. The (architect-engineer-landscape architect-land surveyor) shall not solicit or accept gratuities, directly or indirectly, from contractors, their agents, or other parties dealing with his client or employer in connection with work for which he is responsible.

F. When in public service as a member, advisory, or employee of a governmental body or department, the (architect-engineer-landscape architect-land surveyor) shall not participate in considerations or actions with respect to

¹National Society of Professional Engineers. *A Time for Action*, November, 1973.

services provided by him or his organization in private (architectural-engineering-landscape architectural-land surveying) practices.

G. The (architect-engineer-landscape architect-land surveyor) shall not solicit or accept any (architectural-engineering-landscape architectural-land surveying) contract from a governmental body on which a principal or officer of his organization serves as a member.

5. *The (Architect-Engineer-Landscape Architect-Land Surveyor) shall solicit or accept work only on the basis of his qualifications.*

A. The (architect-engineer-landscape architect-land surveyor) shall not offer to pay, either directly or indirectly, any commission, political contribution, or a gift, or other consideration in order to secure work, exclusive of securing salaried positions through employment agencies.

Equalization of Commercial Bribery and Larceny Penalties

It is arguable that a commercial bribery transaction is tantamount to larceny or swindling, if not technically, then at least in substance. Whether an individual embezzles a large sum of money or obtains it at another's expense through a commercial bribery transaction the results are the same, one person is unjustly enriched and the other is unfairly deprived. In 1962 the editors of the Minnesota Law Review advocated that —

...both the maximum amounts for both the fines and the possible term of imprisonment should approximate the statutory maximums presently found in the larceny statute.¹

Presently, the penalties for commercial bribery are approximately equal to those imposed for larceny of under one hundred dollars. Under this provision the penalty would remain the same if the resultant damages were one hundred dollars or less. However, if the injured party suffered damages in excess of that amount the penalty would be greater. Massachusetts, for example, imposes a maximum sentence of either a five year prison term, or a fine of six hundred dollars and imprisonment for not more than two years for larceny of over one hundred dollars. These same penalties could be imposed for commercial bribery involving over one hundred dollars.

¹*Op. cit.*, Minnesota Law Review, p. 629.

APPENDIX

STATE COMMERCIAL BRIBERY LAWS

State	Citation	Minimum Punishment	Maximum Punishment	Knowledge and Consent Clause	Corruptly Offered Provision	Immunity for Testimony Clause
Conn.	Rev. Gen. Statutes 53-266	\$10	\$500 and/or 1 yr.		X	X
Ill.	Penal Code, s.880		Penal Code, s.712-2 \$500			
Iowa	Criminal Law, c.741	\$25	\$500 and/or 1 yr.			X
La.	Rev. Stat. 14:73		\$500 and/or 6 months	X		X
Mass.	Gen. Laws c.271,s.39	\$10	\$500 and/or 1 yr.		X	X
Mich.	Stat. Ann. 750-125		\$500 and/or 1 yr.			X
Miss.	Code Ann. 2027-28		\$1,000 and/or 10 yrs.			
Neb.	Rev. Stat. 28-710	\$10	\$500 and/or 1 yr.	X		
Nev.	Rev. Stat. 613-110		Rev. Stat. 193-140 \$1,000 and/or 1 yr.			
N.J.	Rev. Stat., Sub.s.12, Art.9, 2A:170-88		Rev. Stat., Sub.s.12, 2A:169-41 \$500 and/or 6 mo.	X		X
N.Y.	Penal Law 439		\$500 and/or 1 yr.	X		X
N.C.	Gen. Stat. 14-353		\$500 and/or 6 months			X
Pa.	Stat. Ann. Title 18, s.4108		Title 18, s.1101, \$5,000; Title 18, s.1104, 2 yr.			
R.I.	Gen. Laws iAnn. 11-7-3		\$1,000 1 yr.		X	X
S.C.	Code 16-570		\$500 and 1 yr.		X	

<u>State</u>	<u>Citation</u>	<u>Minimum Punishment</u>	<u>Maximum Punishment</u>	<u>Knowledge and Consent Clause</u>	<u>Corruptly Offered Provision</u>	<u>Immunity for Testimony Clause</u>
Va.	Code Ann. 18:1-404		Code Ann. 18:1-9 \$500 and/or 1 yr.	X		X
Wash.	Rev. Code 49:44.060		Rev. Code 992.020 \$1,000 and/or 1 yr.			
Wisc.	Stat. Ann. 134.05	\$10	\$500 and 1 yr.		X	

END