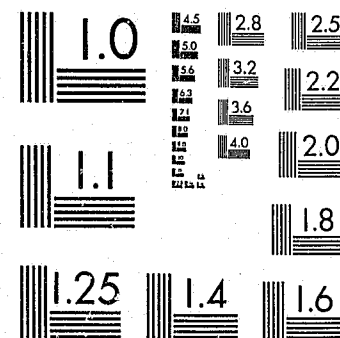


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National Institute of Justice
United States Department of Justice
Washington, D. C. 20531

Date Filmed

3/06/81

ANTITRUST LAW MANUAL FOR
VIRGINIA LAW ENFORCEMENT OFFICIALS

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October 17, 1977

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Antitrust issues arise in an wide variety of situations falling under the heading "White-Collar" or "Organized Crime." Whenever you are dealing with such a case be sensitive to the possibility of an antitrust investigation and prosecution.

The Virginia Antitrust Act offers several advantages over traditional criminal investigations. First, the Act provides investigative tools not generally available -- among these is the power to issue civil investigative demands. These are essentially subpoenas duces tecum and subpoenas ad testificandum pursuant to which the books and records and testimony of individuals and corporations can be obtained. The Act also gives the Attorney General the power to require a person to answer written questions under oath. Further, the Act permits the Attorney General to compel a witnesses's testimony through a grant of immunity. Should a witness so immunized fail to answer, he may be held in civil contempt and confined until he does.

The second advantage of the antitrust laws is that they are civil statutes. Consequently, the burden of proof to be met at trial is reduced from "beyond a reasonable doubt" to a simple "mere preponderance of the evidence," which is to say that in an antitrust case the government must prove only that it is more likely than not that the true facts are as alleged.

✓ A third advantage of an antitrust prosecution are the remedies available. These laws provide for a civil penalty of \$100,000 for each violation. Thus, if there are three instances

of price fixing, the maximum recoverable penalty is \$300,000.

This penalty is higher than any presently awardable under a Virginia criminal statute. In addition, treble damages and attorneys fees are awardable to a private party who proves injury resulting from an antitrust violation.

Antitrust enforcement is not the only civil theory applicable to the types of conduct we are concerned with during these seminars. Frequently, corruption, bid rigging and extortion are also violations of other civil statutory and common law. A fairly succinct statement of these theories may be found in Appendix A, which is a portion of a trial brief prepared in connection with a civil prosecution of some corrupt municipal officials. Civil litigation provides certain investigative tools which are not now available under Virginia criminal law. Once a civil action has been filed, a process known as discovery begins. During discovery, both sides are allowed to require their opponents to testify under oath, to provide documents which are relevant or which may lead to the discovery of relevant material, to require the answering of written questions under oath, and to require a party to make admissions. In addition, because these prosecutions are civil many fifth amendment considerations which arise in the criminal law are not present. In a civil case, the court can enter a protective order barring the use of the fruits of discovery in a subsequent criminal action. This is tantamount to a grant of limited immunity and may be likened to the immunity provisions of

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the antitrust laws. As you can see, the investigative tools available through traditional civil prosecutions are similar to those provided in the Antitrust Act.

In addition to these similarities, the burden of proof under civil theories is lower than under criminal statutes.

Once again, the prosecution need prove its case by a mere preponderance of the evidence and not by proof beyond a reasonable doubt. Civil law also provides for the recovery of damages and for the imposition of punitive damages in egregious cases. Since most cases of corruption or organized crime activity will be egregious, these penalties should generally be available.

A few examples of organized crime and corruption that can be prosecuted under antitrust and other civil theories will demonstrate my point.

Example 1: The Johnson Auto Parts Company is a small auto parts dealer located somewhere in Virginia. Sam Johnson is the owner. Sam has been trying to get the business of a few of the larger fleet accounts in his area. He has tried to convince the owners of these fleets, through legitimate means, of the desirability of purchasing auto parts from Johnsons. The fleet owners have, relying on their shop foreman, repeatedly turned him down. One day Sam meets Alvin Thomas, the foreman of one of the shops. The two men begin talking. Sam explains his problems to Alvin, who is very sympathetic. Alvin tells Sam that he does all of the parts ordering for the fleet and that his supervisors routinely approve purchases of

less than \$300.00. As the conversation progresses, Sam tells Alvin that his profit on each sale is about 20% and that he would be willing to share it with Alvin. Alvin agrees and begins to place part orders with Johnsons. Sam sees Alvin on a monthly basis and gives him the agreed upon sum. This course of conduct continues for several years. Sam approaches other fleet repair foremen and gets their business under similar terms.

Analysis: The conduct described above is commercial bribery and is a misdemeanor under Virginia law. Va. Code § 18-444. From an antitrust viewpoint, Sam has entered into a conspiracy with the foreman to foreclose the market, represented by the fleet's auto parts needs, to other suppliers. In other words, Sam and the foreman have entered into a type of commercial boycott -- this is illegal under the antitrust laws. In addition Sam and the foreman have engaged in price fixing. The agreement to split the profits on sales made to the fleets probably affected the prices charged -- this too is a violation of the antitrust laws.

Example 2: Desmond Duster is a small garbage collector. He is about to purchase two additional trucks and expand his service area northward. Shortly after Desmond ordered the trucks he was visited by Charlie "Butch" Brown. Butch is a local union official reputed to have organized crime connections. He tells Desmond that another garbage collector, Larry

Harper, is concerned about Desmond's planned expansion.

Harper has been the only collector operating in the area north of Desmond for years. Butch explains that Harper is aware of Desmond's plans and that he does not want Desmond

in the territory. Butch also explains that if Desmond does expand his business north he may have labor and other troubles. Three weeks later Desmond's new trucks arrive. They are parked in the lot behind his offices. Two days later Butch pays Desmond another visit. He and Desmond walk out to see the new trucks. Butch says it would be ashame if anything happened to them. Desmond hires a night watchman to protect his yard. A few days later a union organizer appears at Desmond's office and begins passing out leaflets and talking with the men. A short while later Desmond signed the bidders list and gets a copy of a bid from a school district in the north. Once again Butch visits Desmond, this time he is accompanied by Harper. Once again Butch voices Harper's concerns about Desmond's expansion. The two men then leave. The next morning Desmond finds that the gas tanks of his trucks have been filled with sand. He calls Harper who denies any responsibility. However, Harper once again tells Desmond to keep out of his territory. Desmond, fearing further injury, agrees.

Analysis: From an antitrust viewpoint Harper, Desmond and Butch have entered into an agreement to allocate markets by imposing territorial restraints -- this is illegal. In addition, Butch and Harper may also be found liable for an

attempt to monopolize the market for garbage collection service in the north and also may be prosecuted criminally for

"agreeing to injure another in his trade or business." Va. Code § 18.2-499. The fact that Desmond was a victim and was

reluctant to participate does not detract from his status as a co-conspirator.

An example of the applicability of these principles to corruption and extortion cases is the criminal case of United States v. Kenny, 462 F.2d 1205 (3d Cir. 1972), and the civil follow-up action filed by the New Jersey's Attorney General's office, New Jersey v. Abbott Laboratories, No. 1769-73 (D.N.J., filed Dec. 10, 1973). In the Kenny case, the United States Attorney prosecuted several major Jersey City and Hudson County, New Jersey political figures for extortion. The government proved that the defendants fastened upon both city and county governments a thoroughly meshed arrangement whereby vendors wishing to deal with either would have to pay kickbacks of 10 percent. After the government obtained convictions, the State Attorney General filed suit against some 230 individuals and corporations for conspiring to violate the antitrust laws, the public policy relating to governmental purchasing, and for breach of fiduciary duties. The State's theory was that when vendors agree to pay kickbacks to obtain contracts and then pass along to the city the cost of the kickbacks in the form of higher prices, they have entered into a price fixing agreement. In addition, these agreements secured for the dishonest vendors access to a market not available to honest vendors. Thus, they

and the officials foreclose that market or enter into a boycott against those unwilling to pay.

Conspiracies: Conspiracies are at the heart of antitrust cases. Without an agreement, a mutuality of action, there cannot be an antitrust case. The law comprehends two broad classes

of conspiracies, civil and criminal. Under the common law, a criminal conspiracy is the mere making of an agreement to do an act. The agreement itself violates the law. Modern developments now require the commission of an overt act in furtherance of the conspiracy before criminal liability may be imposed.

Civil conspiracies are somewhat different. Under civil law a simple conspiracy is not the basis of an action. Rather, there must be an actionable wrong that is aggravated by the conspiracy. Civil conspirators are made jointly liable for the wrong. Antitrust conspiracies combine elements of both civil and criminal law. Under the antitrust laws the mere agreement without an act in furtherance thereof is actionable. Thus, like criminal law the agreement itself is illegal. Like civil law an antitrust conspiracy is a basis for imposing joint liability upon all of the participants.

The factual situations giving rise to an antitrust conspiracy would probably not meet the requirements of criminal law. An antitrust conspiracy is proven when a mutuality of action is demonstrated. A few examples drawn from some cases will demonstrate the point:

1. A group of real estate brokers are attending a meeting. One stands up and says, "I don't care what the rest of you are going to do, but I'm going to raise my commission rates to 7%." He sits down. Then there is a discussion of market conditions and of the need to increase commissions. No agreement is reached. Within a few weeks of the meeting, all of the attendees and other industry members raise their rates to 7%. This evidence was sufficient for a jury to find a conspiracy within the meaning of the antitrust laws.

2. A movie distributor sends a letter to all of his exhibitors asking that they raise the price of first run films to a stated amount. The bottom of the letter lists the names of all others to whom it was sent. Shortly thereafter, the exhibitors raised their prices. This evidence was found sufficient to support a finding of conspiracy under the antitrust laws.

These examples should suffice to distinguish antitrust conspiracies from criminal ones. The same attenuated view of conspiracy theory exists in other areas of the civil law.

Framing the Investigatory Plan: Despite the investigative and prosecutorial advantages of antitrust cases, they are as complicated as any other involving white collar crime. They will require that you carefully frame an investigatory plan. The plan allows you and the attorney you are working with to insure that all aspects of the problem are considered

and that the techniques to be used will achieve the desired results.

Some people believe that there are two schools of prosecutors -- those who can carry on a brilliant investigation without much planning, and those who cannot. Antitrust and white collar cases are enormously complex. They normally require the analysis of enormous quantities of documents, interview memoranda and other material, and the careful preparation of evidence. While there may be brilliant prosecutors who can conduct a thoroughly organized investigation without planning, most of us are not so endowed. An investigative plan is a valuable tool for organizing the effort to be undertaken. The plan is a document prepared in the early stages of the investigation by the prosecutor and the investigative personnel working with him. Each step to be taken during the investigation is set forth in some detail. While the plan need not exhaustively list each intended step, it should be a working guide for the investigative team. Generally, the plan will contain the following classes of information:

1. A definition of the problem and summary of the facts. This provides you with a basis for determining the steps to be taken, the type of case under investigation, and special problems which might occur during the investigation.

2. Legal theories: the plan should sketch broadly the various legal theories thought applicable to the facts. Discuss these with Antitrust Unit attorneys. The thrust of the investigative plan should be to develop

information to substantiate the legal theories, or to provide a basis for eliminating or reformulating them or fashioning new ones.

3. Investigative steps: The body of the plan should set forth each investigative step which will be taken. These should include the documents to be obtained, their sources, the interviews which will be conducted, and

the types of particularized and specialized skills needed. While this portion of the plan should be detailed, it need not be exhaustive. It should, however, provide you with a fair guide to the course of the investigation.

4. A schedule: The plan should contain a schedule for the actions to be taken. Do not try to cram into a short time things which will take a long time to be done well.

The plan has a variety of uses. Most important among these is helping to organize the investigation and assessing the methods to be used. For this reason it is important that all members of the investigative team participate in developing the plan. In addition, consideration must be given to the sequence of events and the procedures to be followed. This will help eliminate bad ideas and faulty methods before they can prejudice the effort. In addition, the plan will give you a guide to your manpower needs and requirements for specialized personnel. If you need specialists, such as accountants or industry experts, they should be located and placed on-call during the early stages of the investigation.

The plan is neither permanent, nor binding. As the investigation proceeds, some of the steps will no longer be useful. These should be eliminated and different procedures used. If the investigation is to undergo a major change in its direction, the plan should be amended in writing. The plan should be consulted during the investigation to insure that the original design of the inquiry is carried out. Planning is, in reality, the only effective means of carrying out a complicated investigation.

In preparing a plan certain considerations should be borne in mind:

1. When a victim of, or participant in, illegal conduct complains to authorities be aware that he has a selfish interest in complaining. He may be honestly motivated and simply wants something done to stop the conduct, or he may be attempting to "use you." He may discuss his conversations with authorities with those acting against him. This raises the possibility that by coming to enforcement officials he will attempt to negotiate with the culprits to achieve some relief. If this happens, the complainant likely will be unwilling to continue cooperating, or he will appear to be cooperating when in reality, he is lying. It is important that the initial interviews of the complainant be conducted by two persons and that a detailed memoranda of the discussions be prepared immediately after the interview. Also, if based upon the interview, there is a reasonable probability

that the matter warrants further investigation, a follow-up interview should be conducted. This interview should be tape recorded or transcribed. The complainant should be prepared for this interview. Be sure to identify all voices by having each participant state his name and affiliation. Also be sure to note the date and time of the interview. When the interview is completed remove the tape, punch out the back tabs and put it in the document room or some other place under lock and key. Be sure that the tape does not leave your possession or control without obtaining a signed receipt.

2. When dealing with a complainant, arrange to get his documents as quickly as possible. Do not give him time to change his mind. If the complainant is unwilling to provide you with originals, get copies. Usually, a complainant will be happy to assist you during the early stage of the investigation.

3. Be aware of the fact that in these investigations you will be dealing with businessmen and commercial enterprises. Each form of enterprise, i.e., sole proprietorship, partnership or corporation, may have a different significance in the law.

4. Because antitrust cases involve conspiracies, one of your first tasks will be to identify likely conspirators. This is a vital first step in formulating an intelligent investigative plan. If you do not

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carefully analyze the situation you may jeopardize the investigation by initiating it prematurely or not making it broad enough. By doing so, you invite the conspirators not identified to destroy their documents and other evidence.

Example No. 2, set forth earlier, provides a clear example of the need for careful assessment of the potential scope of the conspiracy. In that case, garbagemen located in an area agreed to a north/south allocation of territories. A union leader helped secure this agreement. So far, there are three conspirators, the northern and southern garbagemen, and the union leader. Obviously, if a person is concerned about competition from the south he will also be concerned about competition from the east and the west. He will probably have similar agreements with garbagemen located in those areas. This hypothesis can be tested by checking with local sanitation officials to determine which collectors service particular areas. If they indicate that collectors tend to concentrate their efforts in particular areas, a fair working assumption is that they do so as a result of an agreement. The union can also be checked through the National Labor Relations Board or through local political officials to determine its area of activity. Assuming that this preliminary review supports the territorial allocation hypothesis, all of the collectors must be regarded as potential conspirators.

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Thus, if subpoenas for documents and testimony are to be the first public investigative step, thought should be given to serving all of the collectors. By doing so, you make all of the parties to the conspiracy aware of your investigation at the same time and minimize the possibility that evidence will be destroyed.

5. When you are investigating conspiracies you are attempting to create a climate of suspicion among the conspirators. You will also be attempting to bring sufficient pressure to bear on one or more of the participants to cause him to cooperate with you, or to seek immunity in return for cooperation. You are attempting to force one conspirator to tell you about the others. Frequently he will do so without explaining his part fully. Armed with this information, you can approach another of the conspirators and force him to provide you with additional information. Frequently, this pressure will be created through carefully timed investigative steps and the painstaking analysis of business records and patterns of commercial conduct. Also, be aware that if you are able to get information concerning any act which is prosecutable under the criminal law you will have a major advantage in securing the cooperation of one of the participants.

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The precise steps which you will be using to create this climate must be detailed in the investigative plan.

Doing so will provide you with an opportunity to carefully plan contacts with the targets and provide the prosecutor sufficient time to do any legal research necessary to safeguard the investigation.

6. Always remember that the people under investigation know more about their particular profession or occupation than do you. For this reason, they may be able to snow you with business trivia, or may state as fact things which are untrue. Consequently, you will have to learn a good deal about their business quickly. A review of the card catalogue, the readers guide to periodical literature, the index to business publications and the vertical files in the local library will provide you with much valuable information about any industry. Frequently, you will find pamphlets published by trade associations or government concerning the industry. You will also find statistics relating to the profitability of the industry generally and specific practices or trends in it. Gather this before you take any active investigative steps. The vertical file is particularly helpful in this regard. All large libraries have vertical files. These are collections of newspaper and magazine clippings relating to particular topics. One of the advantages of the vertical file is that it gives you information concerning recent newsworthy events in the industry.

Stock brokerage firms are another valuable source of information. All brokerage firms prepare research papers on various companies and industries. These studies will give the general level of profitability of a firm and the industry. They may also provide you with the name of a safe person with whom you may talk to learn more about the industry. Also do not forget that government is the major purchaser of just about everything. Frequently, government will have a person with unique knowledge of a particular industry or class of products. Do not hesitate to contact these sources to gather information.

7. Since antitrust issues arise in a commercial setting, the analysis of documents is always a necessary part of an antitrust investigation. Before the documents can be analyzed, they must be obtained. Before this can be done, one must determine the types and classes of documents which may be relevant. These will vary with the nature of the offenses under investigation.

As a general rule, since these cases are premised upon agreements among competitors or persons involved in a particular chain of distribution, you will want all documents evidencing a communications between them. These communications can be in the form of letters, notes, telegrams, telephone calls and the like. Frequently, businessmen will make memoranda of telephone

calls or notes in their diaries. Desk calendars, appointments calendars, and travel vouchers should also be obtained. Also, if you are lucky enough to have a particular participant in the conspiracy whose telephone calls are recorded on a long distance telephone bill, these too should be obtained.

Selecting the documents requires a detailed examination of the facts of the particular case. Let us use Example No. 2 for this purpose. Since the case involves the division of markets among competitors, you will want copies of each garbage collector's customer list. Because stable service areas tend to support the inference of an agreement to divide territories you will want the customer lists for the past several years. In addition to customer lists, you will also want all bills sent by the company to their customers. This will serve to verify the customer lists and provide addresses of potential witnesses. The customers can be contacted and asked why they selected a particular collector. If they indicate that a specific collector is the only one who would service the account, the inference of territorial allocation is supported. It is also helpful to obtain a map of the entire area and place different colored pins in the map at the locations served by the different competitors. This will allow you to visualize the manner in which the allocation scheme works.

Because garbage can only be collected from designated pick-up points, you will want copies of the drivers' routes. Because there are telephone calls and other communications involved, you will want to obtain copies of all of the companies' notes and internal memoranda of telephone calls and communications. In addition, you will wish to see copies of all of the letters sent back and forth between competitors.

Since the case concerns market allocation, you cannot eliminate the possibility that the conspirators are trying to minimize the disparity in their market shares by making payments to one another in some form. For this reason, you will want copies of all checks and check stubs for the past five years, as well as the accounts receivable and payable ledger for the companies. Contracts among the collectors are another means of accomplishing this end. Copies of these should also be secured. In addition, since the conduct is market allocation, the participants must also have an agreement concerning who will service major purchasers, such as school districts, hospitals and factories located in each of their areas. Competitive bids submitted to all private and public users in the area should also be obtained. In addition, since an honest bid for garbage service will require a detailed analysis of the equipment and labor needed and their cost, the bidder will have prepared worksheets. Someone who is

submitting a complimentary bid will not necessarily go through the trouble of preparing detailed worksheets.

Rather, he will rely on the price telephoned to him by his competitor. The absence of worksheets thus be-

comes an indication that your suspicions are correct.

In addition, completing a major contract bid will frequently require the purchase or leasing of additional

equipment. A serious bidder will have obtained price information for equipment. The records of price quotations obtained from suppliers of products necessary to the contract should also be obtained. Once again, the absence of such quotes will support your suspicions.

Another possibility is that the needed equipment will be subcontracted from the other conspirators. This is a convenient way of giving each collector a part of the contract. Such subcontracting allows all of the participants to profit from the scheme. Thus, where subcontracting is a possibility, all subcontracts and the records of their negotiations should be obtained. The statute of limitations under the antitrust laws is four years. Documents for these four years and one additional year should be obtained.

In addition to these, there are numerous other records which would be helpful. Discuss the documents that will be necessary with the attorney working on the case. Be sure that you can clearly articulate the kind of information you wish to obtain from each class of documents

to be secured. Also be sure that you know how the information is going to be used.

Documents can be obtained by the Antitrust Unit through a civil investigative demand, i.e., an adminis-

trative subpoena deces tecum. In preparing the demand, we are sensitive to the varying constitutional rights of the individuals involved; recognizing the constitutional status of the individuals in advance will help prepare for possible claims of privilege which may later arise.

Another consideration which we keep in mind in determining what documents to subpoena is that a civil investigative demand has a 20-day return date. This is an enormous amount of time in which the recipient may destroy documents. Thus, you must consider surveillance or having the individual's garbage collected on a daily basis and reviewed to determine whether he is destroying documents. This is, of course, to be done in extraordinary cases only.

8. Whenever possible, documents should be secured prior to interviewing. The reason for this is obvious. A review of the documents in conjunction with the other information which has been collected will permit a more thorough interview. It also enables any misstatements made by the interviewee to be refuted. Also keep in mind that the interview may be conducted under oath. In this situation you should work carefully with the

attorney to exploit any possible perjury or failure to cooperate. If the subject does commit perjury or fails to cooperate, indictments should be sought immediately. Indeed, if this is likely to occur, the necessary preparatory work should be done before the interview.

9. Between the time that the demand is served and the documents are returned, a careful plan must be devised for reviewing them. The detail and extent of the plan will vary with the complexity of the investigation, and the variety and quantity of documents to be produced. You may have to arrange for specialists to review particular documents. For instance, if you have demanded financial records, you may want an investigative accountant to analyze them for questionable payments or checks. In addition, you will also want to determine the possibility of any tax violations or frauds. The documents should also be studied to determine the frequency of social and business contacts among the conspirators.

10. A note about Civil Discovery: The rules of court in civil cases provide for discovery. This is a process whereby each side may secure virtually all of the materials accumulated by an opponent. Both the defendant and the plaintiff may conduct discovery. In most civil enforcement actions, law enforcement officials will have little need for actual discovery. This

is not to say that discovery will not be conducted; there are a number of tactical reasons for conducting it which impact directly on the probability of success at trial.

The defense will also have an opportunity to take discovery. During defendant's discovery, the prosecutor

may be put in the position of opening his entire file.

While efforts may be made to limit discovery, caution dictates that an investigation proceed under the assumption that the defendant will be allowed access to the entire file. This, of course, will directly influence the investigatory methods used. Be aware that every report you prepare may be read by the other side. Consequently, it is vitally important that all of the reports be entirely factual. Do not mix opinions concerning the credibility of witnesses or the sufficiency of the evidence with facts in an investigative report. Place these in separately numbered paragraphs. This will allow the prosecutor to have a protective order issued preventing discovery of these portions of the report. Separate fact from allegation or suspicion. It is perfectly all right to include in the report your hypothesis and rumors concerning other persons involved in the conduct; however, make sure that these are included in separate paragraphs. Once again, it will allow the prosecutor to make an argument to protect these portions of the report from discovery and will increase his probability of success. Tape recordings of interviews are also discoverable. As a general rule,

conduct yourself during the investigation as if every word you write or speak will be read and picked apart by the opponent.

Price Fixing: As noted in the first part of this memorandum, price fixing is any agreement which affects the free play of market forces which determine prices. A price fixing agreement need not be among competitors. Price fixing is a broad term under which many forms of activities may fall. If the conduct under investigation affects or arguably affects the price of goods or services, it may be price fixing.

When investigating a price-fixing case, you will have to develop the following information as a starting point:

1. The names of competitors in the relevant area, their locations and managerial personnel.
2. The relative size of each of the competitors.
3. The relationship of various commercial units in the market; for instance, supplier/distributor, component manufacturer/assembler. These relationships will help determine the potential scope of the conspiracy.
4. The general conditions in the market for the particular product or service as well as the specific conditions in the market under investigation.
5. The dates of price increases and decreases by those under investigation.
6. The identity of persons, if any, who have not varied their prices in conformity with the others.

This preliminary information will provide a basis for the analysis of business records and purchase information.

The information will also help you to structure the interviews which will be conducted during the course of the investigation.

An example of the uses of this method will demonstrate its usefulness.

Bid rigging is a form of price fixing. A rigged bid is an agreement among competitors concerning the award of a particular contract. The conspirators agree among themselves that vendor X will win a contract. Once they have decided that a particular competitor will win a contract they are also giving him the freedom to charge whatever price he chooses.

Developing bid rigging cases is difficult. Detecting possible instances of bid rigging, on the other hand, may be relatively simple. This is not to say that bid rigging is easy to detect, but rather that an analysis of purchasing records, with little more, may raise the possibility of bid rigging. To develop information concerning possible instances of bid rigging requires an extensive analysis of purchasing records for governments or large private companies that purchase through competitive bidding. Such an analysis must begin with the selection of a particular product or service to be scrutinized. A product or service may be selected because there has been an abnormal increase in the prices charged, that there have been instances of bid rigging in neighboring states, or that the industry has a reputation for engaging

in such practices. Once you have determined a particular product or service market to investigate, you should obtain all bid and purchase records for an extended period of time. You must secure copies of all bids, those which were awarded and those which were rejected. You will also want copies of all invoices sent by the government to the vendor. Your first step will be to arrange the information chronologically. Determine each element of the price bid, that is, unit price, discounts and delivery charges, if any. Most purchasers function on the basis of total net price. Thus, a variation in the discount offered or in the cost of delivery may effect the award of the contract. Once you have done this you must analyze the information to determine if bid rigging is suggested. The following conditions may give rise to such a possibility:

1. Uniform prices and price increases: A price should reflect the cost of acquiring the product, the vendor's overhead costs, and the delivery costs. Different size businesses will have varying overheads and may also have different delivery costs. If the bidders' prices are uniform, or if any particular element of the vendors' prices are uniform, there may be bid rigging. Be sensitive to certain other considerations, such as the ownership of the companies bidding and their relationship to one another. It is not illegal for a manufacturer to bid against his distributors for a

particular contract. If the manufacturer does so and fails to win a single bid there is a reason for it.

Normally one would expect that the manufacturer would be able to offer the good at a lower price than a distributor who purchases the item from him. Where the manufacturer does not win a bid it may be part of his marketing strategy to permit his distributors to win contracts. In this case, the manufacturer is probably submitting a complimentary bid. Alternatively, the manufacturer may bid based on the same price list that he makes available to his distributors. In this case the manufacturer is placing himself on an equal footing with his distributors and is competing with them as if he were a distributor. Also be aware of the manufacturer's pricing policy. Frequently the manufacturer is willing to vary his prices on large orders. To obtain a quantity discount, the distributor will call the manufacturer and tell him that he is bidding on a large contract and ask for a quantity discount. Consequently, the manufacturer is in a position to funnel the contract to whomever he pleases. He may refuse to give one distributor a volume discount while agreeing to give it to another. In this instance the manufacturer is engaging in bid rigging.

Construction projects are usually bid on the basis of unit price, alternates, and total price. If, on a

particular bid, the vendor's prices are uniform or nearly so, save in one small detail, the bid may be rigged. In other words, if there is a pattern of uniformity in the bids, one would expect this pattern to continue throughout. If it does not, there is a reason for it. If this reason cannot be explained through normal or accepted business practices, suspect collusion.

2. Uniform pattern of contract awards. If over the course of years a particular vendor or group of vendors succeed in obtaining the same contracts or contracts of relatively the same size, suspect bid rigging.

3. Extreme price variations in bidding patterns: The following example is drawn from a case currently under investigation. All relevant facts have been changed. The investigation arose as a result of an FBI report forwarded to us by the Antitrust Division of the Department of Justice. The report concerned an interview of a Virginia businessman. Because the product was one that governments purchase, the appropriate state agency was contacted and copies of all their invoices and bids for the particular product were obtained. The particular agency involved advertises for bids and requires bidders to specify their unit price and the

total amount of the bid. Suppliers frequently give a discount for payment within a particular period of time. The bid information was reduced to a chronological chart as follows:

	Date	UNIT	Total	UNIT	Total	UNIT	Total	UNIT	Total	UNIT	Total	UNIT	Total
1	9/4/73	12.75	867.75	12.25	828.25								
2	1/30/74	14.50	370.00	14.00	353.43								
3	9/30/74	14.75	1,213.75	14.90	1,211.26			14.29	1,162.11	11.95	917.73		
4	1/17/75	14.50	348.00	14.35	344.40								
5	5/1/75	14.75	708.00										
6	8/26/75	15.35	1,176.00	14.29	1,091.38	14.29	979.90	13.25	1,002.37	12.49	846.60		
7	12/3/75	16.25	812.50	16.15	799.42	16.20	810.00			13.24	629.16		
8	4/1/76	16.58	3,463.00	16.50	3,722.00	16.40	3,425.00	① 13.50	2,700.00	16.72	3,815.46		
9	4/14/76	16.58	1,710.60	16.50	1,725.00	16.40	1,714.80			14.96	1,538.56		
10	5/6/76	15.50	558.00	13.75	490.05	15.25	549.00	15.75	561.33	14.95	532.82		
11	12/20/76			15.50	558.00	16.50	594.00	15.00	540.00			17.75	639.00
12	3/2/77	17.25	3,545.00	15.50	3,247.00	15.30	3,203.00	② 13.50	2,801.69			15.00	3,138.00
13	4/14/77	15.00	750.00	14.21	710.50	15.00	750.00	7.25	358.87			15.55	777.50
14													

1. Recinded contract with the State.

2. Rejected as non-conforming, item requested 38" bid submitted on 28".

Notice the unit prices bid by Vendor E over the years.

They show a gradual increase. Contrast these with the

bids of Vendors A, B and C which show a more dramatic

increase in prices over the same period of time. Also

note the similarity of the increases of Vendors A, B

and C. Compare these with those of Vendor E. These

comparisons indicate the following:

(a) The rate of price increases of Vendors A, B and C are greater than that of E.

(b) At the point in time that Vendor E was able to offer a price of \$13.24 (line 7), Vendors A, B and C were all offering prices above \$16.10. These prices were within \$.10 of one another.

(c) Note line 10 and the precipitous decrease in prices by Vendors A, B and C.

(d) Note line 12 and the dramatic increase in Vendor A's price and the absence of a bid by Vendor E.

The questions which these facts present are clear:

Why the parallel increases, why the precipitous decrease at a time when one would be expecting an increase, why is Vendor A so out of line on line 12 with the others, and why did Vendor E not bid despite an extremely successful bidding history. Armed with these facts, the owner of

Vendor E was contacted and an interview arranged.

During the course of the interview Mr. E indicated that

he had began having problems with his supplier in

December, 1975. His supplier is a manufacturer known to

us as Vendor A. He indicated that there were a number

of letters written by Mr. A to him concerning his bids.

He provided us with these and with copies of the price

lists supplied by Vendor A (copy attached). At the

bottom of the price list is the following sentence

"prices must be verified in advance of all bid submissions."

This price list and all correspondence were

integrated into a new chart.

#	Date	unit	Total	unit	Total	unit	Total	unit	Total	unit	Total	unit	Total
1	9/4/73	12.75	867.75	12.25	828.25								
2	1/30/74	14.50	370.00	14.00	353.43								
3	9/30/74	14.75	1,213.75	14.90	1,211.26			14.29	1,162.11	11.75	917.73		
4	1/12/75	14.50	348.00	14.35	344.46								
5	5/1/75	14.75	702.00										
6	8/26/75	15.35	1,176.00	14.29	1,091.38	14.29	979.90	13.25	1,062.37	12.49	846.60		
7	12/3/75	16.25	812.50	16.15	799.42	16.20	810.00			13.24	629.16		
12/30/75 Letter from A To E complaining of E2 bid and asking prior review of bids													
8	4/1/76	16.58	3,463.00	16.50	3,722.00	16.40	3,425.00	① 13.50	2,700.00	16.72	3,815.46		
9	4/14/76	16.58	1,710.00	16.50	1,725.00	16.40	1,714.80			14.76	1,533.56		
4/15/76 Letter from A To all distributors asking for prior review of bids.													
4/15/76 Letter from A To E asking him to refrain from bidding.													
4/19/76 Letter from A To E changing his status from a distributor to a dealer.													
10	5/6/76	15.50	558.00	13.75	490.05	15.25	549.00	15.75	561.33	14.75	532.82		
11	12/20/76			15.50	552.00	16.50	544.00	15.00	540.00			17.75	639.00
12	3/2/77	17.25	3,595.00	15.50	3,247.00	15.30	3,203.00	② 13.50	2,902.61			15.00	3,135.00
13	4/14/77	15.00	750.00	14.21	710.50	15.00	750.00	7.25	352.24			15.55	777.50
14													

1. Recinded contract with the State.

A second interview with Mr. E was arranged. This interview was tape recorded. Mr. E was asked in advance of the interview to have all documents concerning the product available. The second interview was conducted and additional price lists and letters were obtained. These indicated that Vendor F was the marketing agent for Vendor A. That is to say, Vendor F was the wholly-owned subsidiary of Vendor A. Additional correspondence in the files indicated that the Director of Marketing for Vendor A, who had previously handled all relations with distributors, was the president of Vendor F. The second interview also produced information indicating that Vendor A owed Vendor C a favor of some sort. For this reason Vendor A, in verifying prices, gave higher prices to others and a somewhat lower price to Vendor C. The bid documents obtained from the state indicated that Vendor C was located in a small town in up-state New York. The documents provided by Mr. E indicated that Vendor A's sales manager for Virginia was also located in the small up-state New York town.

With this information, the State agency was contacted again and asked to provide information concerning any other purchases from Vendors A, B and C. This inquiry led to another set of bids for a widely-used product. Copies of these bids were obtained and analyzed. The following is a portion of the chart which as produced:

	A	B	C	D	E
	Unit Total	Unit Total	Unit Total	Unit Total	Unit Total
1/16/73 /	5.85 4860.00 /	5.25 4159.00 /	/	/	/
3/28/73 /	5.40 3888.00 /	5.25 4159.00 /	/	/	/
10/26/73 /	6.00 300.00 /	5.87 273.50 /	/	/	/
10/26/73 /	6.00 900.00 /	5.87 880.50 /	/	/	/
10/30/73 /	6.00 300.00 /	5.87 273.50 /	/	/	/
12/17/73 /	8.50 255.00 /	7.40 217.56 /	/	7.85 233.14 /	/
5/2/74 /	8.82 441.00 /	8.15 407.50 /	/	/	/
8/5/74 /	8.82 264.60 /	8.25 245.02 /	/	/	8.38 248.89 /
1/23/75 /	7.00 210.00 /	8.80 264.00 /	/	7.95 236.10 /	7.84 232.85 /
9/15/75 /	6.37 2133.95 /	8.05 2669.78 /	7.49 2509.15 /	6.67 2212.11 /	7.49 2484.06 /
1/5/76 /	6.14 27472.00 /	6.48 30772.96 /	/	7.95 37778.40 /	/
11/15/76 /	5.64 10602.00 /	/	6.75 42600.00 /	8.00 57024.00 /	/
3	/	/	/	/	/

Once again the same pattern that obtained with the former product is apparent. A close analysis of this chart also

indicates a potentially valuable witness -- Vendor D.

Vendor D was obviously a victim of the conspiracy

to the same extent as was the State. Representatives of Vendor D were contacted and asked to come in for an interview. Vendor D had so obviously been victimized by the bid rigging conspiracy that an appeal to his self-interest seemed a likely means of obtaining his cooperation. After asking a few preliminary questions designed to determine whether he was involved or likely to be involved in the conduct, the fact of his victimization was graphically presented. This had the desired effect of securing his cooperation. Vendor D agreed to supply us with copies of all information in his files and to review this information with us. Some of the material contained notes of telephone conversations with representatives of Vendor A. One of these phone calls was a request by Vendor A that Vendor D renege on a contract with the State. This was the same contract which Vendor A wished awarded to Vendor C in payment for some favor. This information confirmed that previously provided by Vendor E.

Armed with this information a series of civil investigative demands were sent to Vendors A, B and C.

The investigative plan which was used in this case reflected each of the elements and actions taken.

It also reflected the timing of the interviews, the requests to the State agency involved, the interview of

the representatives of Vendor D, and the type of approach which would be used.

A Further Note on Interviews: The example above graphically indicates the viability of an appeal to self-interest. This interest is normally in staying out of jail. However, since you are dealing with businessmen, self-interest also includes their pocketbooks. If you can graphically demonstrate to an individual that he has been victimized, that his business has not grown because of it, or that his profits have been lowered, you may have a secured and extremely valuable source of information. However, be extremely careful in using this approach. Frequently when you appeal to a businessman's monetary self-interest you will be providing him with ammunition to use against the culprits. You must therefore not only appeal to his self-interest you must also convince him that you are going to do something about the conduct and do so promptly. If during your preliminary discussions you suspect that the person is a hothead and likely to take matters into his own hands, proceed cautiously. If you do encounter such an individual the self-interest appeal need not be abandoned. Rather, you will have to carefully cultivate his confidence. You will have to convince him of your willingness and ability to deal with his problems. This should be done over a short period of time and you should not proceed with substantive questioning until you are confident that the individual will deal openly with you.

Kickbacks and Political Corruption: It is not the point of this discussion to lay out the substantive law of extortion, bribery, conflicts of interest and the like. Rather, my concern is with the methods of investigating this form of conduct. Before proceeding, some preliminary observations should be made. The first is that one man's extortion is another's bribe. A person who is the "victim" of extortion is, in most instances, as much a culprit as the one who is demanding a kickback. If a businessman is willing to pay a kickback to obtain a contract which will be profitable to him, can it be fairly said that he is the victim of an extortion scheme? While he certainly is being victimized, his willingness to pay in return for business is nothing more than a cost of doing business. In most instances the price is inflated to cover the kickback which he must pay. A kickback or a bribe is paid for something. If a person pays for a contract, it is the tangible result of the agreement. The contract would probably not have been made but for the kickback. Therefore, you will have something tangible upon which to proceed. The agreement to pay a kickback need not be made prior to the time that the contract is awarded. Frequently, a contract will be awarded and then the request for a kickback made. The businessman is placed in a defensive position. He fears the loss of the contract and is often willing to go along with the demand. In this situation the businessman and the official will negotiate the means of payment and cash generation. The official may

agree to allow extras on the contract, or change orders in the case of construction contracts. Or, if he is particularly clever, he will simply agree to make non-publicly bid purchases from the businessman in the future. The following is an example. A vendor of automobiles to a particular county paid a kickback of 10% to public officials of the county. There was never a specific agreement to do so. Rather, the agreement arose from a course of dealing between the vendor and the city officials. He would supply the cars and they would come to him later to collect the kickbacks. The vendor was allowed to recoup the cost of his kickbacks in several ways. First when the county needed a single car, it would be purchased from the vendor at list price with no discount. Second, when the county needed auto parts, which was frequent, these would be purchased from the vendor without the benefit of public bidding. The prices charged were list price or higher. Lastly, the vendor was allowed to supply the city with certain high profit specialty equipment for a reduced kickback. This arrangement was extremely profitable to both the vendor and the official.

Another example was a vendor of street sweepers. He had a contract with a city for the sale of sweepers. After the contract was entered into, an official of the city approached him for a kickback, which he agreed to pay. He was then allowed to purchase, at less than half of market value, the city's entire inventory of "out-of-date" parts.

These parts were then resold to municipalities with older machines at more than three times the price which he paid.

Therefore, the vendor was quite willing to pay a kickback to sell sweepers to the city.

Governmental Purchasing: Governments purchase the goods and services they require either through competitive bidding or negotiation with particular vendors. The latter form of purchasing vests in the purchasing officials broad discretion. They are free to deal with whom they chose and to negotiate for a price which they find acceptable. Where purchasing officials are vested with such discretion the potential for corruption increases. Frequently government is allowed to purchase professional services and specialty equipment through negotiation. Since negotiated purchases are breeding grounds for corruption you must be sensitive to it. Elaborate justification can be offered by officials for dealing with a particular businessman. An investigation must pick through these justifications to determine whether they are real or fanciful. If they are insubstantial the suspicion must arise that arbitrary criteria entered into the decision making process.

While competitive bidding, honestly run, is the surest guard against corruption it too can be manipulated to serve the ends of corrupt officials. Bids can be manipulated in a variety of ways; among the most common are the following:

1. Potential bidder can be disqualified from dealing with the government. This has the

effect of limiting the bidders to those who are willing to cooperate in illegal schemes.

2. Specifications can be drafted to deliberately exclude unwanted vendors. The effect is to award the contract to a particular vendor at the time the specifications are drafted. Bidding is used as a means of concealing the illegal agreement.

3. Bids can be rejected on a technicality and new bidding conducted until the "right" vendor wins the contract.

4. Corrupt engineers can make false estimates of quantities a job will require to mislead honest bidders. Favored bidders can be given the true estimates. This has the effect of letting the favored bidder submit an abnormally low price and thus win the contract.

5. The pre-ordained winner can be allowed to bid unrealistically low, knowing he will make his profit, once the job is begun, on changes which will be obingly endorsed by the supervising engineer and ratified by the government.

6. Performance bond requirements can be set unnecessarily high, shutting out unwanted small firms from the competition.

7. Purchases can be split into smaller units to bring them below the legal requirements for

public bidding. The smaller purchases are then

~~made on a piecemeal basis from the desired vendor.~~

Detecting Potential Instances of Corruption: The easiest

~~and most effective way of determining instances of corruption~~

~~is through a complainant or informer. Many times businessmen~~

are reluctant to come forward and discuss an approach for a

kickback with authorities. Frankly, I do not understand

this reluctance. Several explanations have been offered.

Among these are fear of reprisals, a belief that enforcement

personnel are in bed with the officials, a fear that the en-

forcement will have to yield to the superior political power

of the officials, a fear of losing status in their professions

or that they will be unable to deal with other governments, even

the most honest ones, because of the fraternity of politicians.

Assuming an independent and honest law enforcement agency,

these explanations are unpersuasive. Because informers or vic-

tims are an extremely valuable source of information, they

should not be turned aside and their allegations, unless patently

absurd, should not be dismissed. Of course, this places a

great burden on the enforcement agency. They must proceed

with utmost caution and secrecy in verifying the informer's

allegations. Absolute discretion is the only means of

ensuring that the reputations of honest political officials

are preserved while allowing allegations of corruption to be

investigated. Once again, all of the cautions about dealing

with businessmen-complainants, made in the opening part of this

manual, apply here. In addition to those, also be aware that

~~a person who complains about a political official may be doing~~

so for his own equally political ends. He may be coming to you

at the direction of another who may wish to discredit a public

official. Therefore, it is important to ask the complainant the

names of all other persons with whom he has discussed his allega-

tions. He must be impressed that the penalty for discussing

a confidential antitrust investigation is a misdemeanor. Be-

ware of being placed in the position of having to refute allega-

tions that an informer came to you with valuable information

concerning an individual and that you did nothing.

A second, and more difficult means of uncovering possible

instances of corruption is through an analysis of business pat-

terns. The exclusive or near exclusive use of a particular

vendor, such as a consulting firm which has gotten all or

most of a particular city's business, is one such pattern.

There are a lot of reasons why one firm may frequently be

selected. Many of these are wholly legitimate. However, if

there are a number of other firms in the area which have

never obtained governmental work, despite their obvious

qualifications to do the work, and despite repeated attempts

to obtain it, the inference that something out of the

ordinary is occurring must arise. Also, if you find a situa-

tion where the same firms are continually bidding for a

particular type of work over a goodly period of time and that there are other firms in the area equally capable of doing the work who do not bid, the inference that something is amiss may arise. Generally, the steps which must be followed are as follows:

1. Determine the particular business or product which you will be looking into.
2. Gather together information concerning the bids, contracts and purchases of a particular product which have been made during a lengthy period.
3. Gather all public information concerning the corporations or persons who have dealt in this product with the municipality.
4. Analyze the purchasing history chronologically.
5. Correlate the purchasing history with information concerning the vendors.
6. Determine whether there are or should be other companies in the area dealing in the same product.
7. Determine whether these have ever done or attempted to do business with the municipality.
8. Investigate the product or service involved to determine whether money could be "hidden" in the contracts or generated through them. The example provided in the workshop part of the manual will help demonstrate the method.

A Word About Kickbacks: Kickback and bid rigging investigations are similar. Where a repeated pattern of bid rigging is

present, the possibility of corruption may arise. Once such a pattern has been developed, the businessman must be pressured into discussing their illicit arrangements with public officials. The possibility of prosecution under antitrust and all other civil and criminal laws should be used to force the businessman to seek immunity in return for information.

A businessman must generate money to pay kickbacks. Frequently, he will use the contract with the government as a means of doing so. Less frequently, he will pay the kickback with his own funds and replace them at a later time from profits. Both methods are used. Generating kickbacks is a difficult business. To generate money effectively, cash must be obtained from the business and be virtually untraceable. The means selected for this purpose will generally conform to the nature of the business. A labor intensive industry will tend to conceal its cash generation in labor. A capital intensive industry, in capital. A few examples will explain the point:

1. An engineering firm agrees to pay kickbacks on a particular contract. To generate the money, the firm pays a large "bonus" to one of its employees. The employee returns a portion of the bonus to the employer keeping for himself sufficient funds to pay the income taxes on the added income.
2. An engineering firm agrees to pay a kickback on a contract. The firm's records show that over 100 employees were assigned to this project at various times. The project was large enough to require this effort.

However, a careful check of the work schedules of the men indicates that, while indeed they did work on the particular project, they did not work on it to the extent shown on the companies' books. The men were paid for what they did work, the excess was charged by the corporation president to the labor account and withdrawn by him, with the collusion of the treasurer, in the form of cash.

3. A supplier of fuel oil agrees to pay kickbacks on a particular contract. The contract calls for the delivery of No. 6 fuel oil to a school district over the course of a year. No. 6 fuel oil expands in volume as it is heated. At 160°, its volume is approximately 30% greater than at 140° which is the normal delivery temperature. The fuel is delivered to the school in two trucks. The temperature of the oil in the first truck is 140° and that of the second truck is 160°. The vendor is paid as if all of the oil were at 140°. His books reflect the delivery of two trucks at 140°. He receives payment for the oil and deposits both checks retaining for himself the excess moneys paid. A portion of this is returned to the official.

4. An auto parts supplier agrees to pay kickbacks to a foreman. To generate money, the foreman orders parts, for obsolete equipment or orders redundant parts. The invoice is paid by the company and the parts are returned to the supplier by the foreman. He records the installation of the part in the vehicle. The supplier records

a cash credit in his books returns a portion of this money to the foreman.

5. A construction firm agrees to pay a kickback on a contract. To generate the funds, the engineer issues a change order for the removal of rock. Rock removal is charged by the cubic foot. The construction firm reports twice as many cubic foot removed as are actually done. The inflated rock removal is verified by the consultant's inspecting engineer. The excess payment is returned to the engineer in the form of a kickback. Because the method of cash generation will usually conform to the type of business, it is important that you acquire expert advice on the operation of such businesses during the investigation. This will facilitate your discovery of the means used to generate the funds. This information is vital to the investigation. Once you have a key to the method used, the company's books and records can be analyzed to determine if cash has been generated. With this information, businessmen can, frequently, be pressured into providing information concerning illicit payments.

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