ALM
LAW JOURNAL NEWSLETTERS
Business Crimes Bulletin®
Volume 15, Number 9 • May 2008

The 'Unindicted Co-Conspirator'

Vilification Without Vindication

By Stanley A. Twardy, Jr. and Doreen Klein

The criminal justice process can be arcane, but one term is recognizable to the public. An indictment is a formal accusation by a grand jury that an indicted individual has committed a crime. While damning, the indicted defendant nonetheless has the constitutional right to say to the government, "Prove it," and, if the government fails, to be cleared of all criminal wrongdoing.

In contrast, an individual designated in an indictment as an "unindicted co-conspirator" has not been charged by a grand jury with a crime. Rather, the label reflects only the view that the individual is complicit in the defendant's wrongdoing. Unlike the defendant who has a right to defend himself, the unindicted co-conspirator is not on trial but confined to a limbo in which vindication is never possible.

Courts recognize that this public stigma may rise to the level of a due process violation. Both the courts and the Department of Justice (DOJ) impose constraints on the identification of unindicted co-conspirators by name. However, as a practical matter, these protections fall short. The resulting damage to the individual — and, by extension, his corporate employer — can be incalculable. Therefore, defense counsel must be proactive in requesting safeguards for clients who may be recognizable in an indictment without being charged.

Stanley A. Twardy, Jr. (satwardy@ daypitney.com), a member of this newsletter's Board of Editors, is a partner at Day Pitney LLP in Stamford, CT, and former U.S. Attorney for the District of Connecticut. **Doreen Klein** is a former New York County Assistant District Attorney and Counsel at the firm in its White Collar Defense and Internal Investigations group.

In the Courts

The Fifth Circuit has recognized that an individual's reputation and economic interests are "legally cognizable interests entitled to constitutional protection against official governmental action that debases them." Accordingly, that court, among others, has made clear that a grand jury is not empowered to issue an indictment identifying by name an unindicted co-conspirator. To do so would subvert the grand jury's shielding function, the court noted in *U.S. v. Briggs*, 514 F.2d 794, 803 (5th Cir. 1975). "If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause he should not be denied a forum." *Accord U.S. v. Chadwick*, 556 F.2d 450 (9th Cir. 1977). The appropriate remedy is to expunge from the indictment all references to the person's name. *Chadwick*, 556 F.2d at 450; *Briggs*, 514 F.2d at 806.

Due process concerns have led courts to order expungement and/or sealing in connection with other official acts and filings, including guilty pleas (*In re Smith*, 656 F.2d 1101, 1107 (5th Cir. 1981)), bills of particular (*U.S. v. Anderson*, 799 F.2d 1438, 1442 (11th Cir. 1986); *U.S. v. Smith*, 776 F.2d 1104, 1115 (3d Cir. 1985)), legal memoranda (*U.S. v. Anderson*, 55 F. Supp.2d 1163, 1168 (D. Kan. 1999)), and any documents forming a part of the official record of a case (*Application of Jordan*, 439 F. Supp. 199, 209 (S.D. W. Va. 1977)).

Case law of this kind has led the DOJ to instruct prosecutors that ordinarily there is "no need to name a person as an unindicted co-conspirator in an indictment in order to fulfill any legitimate prosecutorial interest or duty." U.S. Attorney's Manual (USAM) at 9-11.130. Federal indictments, therefore, typically reference uncharged individuals by number (*i.e.*, "Unindicted Co-conspirator #1").

In practice, however, anonymity in an indictment provides only limited protection. First, the uncharged individuals are often named in other documents available to the public and press. *See, e.g.,* USAM at 9-11.130 (identity of unindicted co-conspirators may be supplied, upon request, in a bill of particulars). Second, ordinarily inadmissible out-of-court statements become admissible under Federal Rule of Evidence 801(d)(2)(E) if the court finds that the speaker is an unindicted co-conspirator. To determine that issue, the court is likely to engage in on-the-record colloquy with counsel about the potential witness, or require briefing on the issue, or even conduct a hearing (often called a *Geaney* hearing after *U.S. v. Geaney*, 417 F.2d 1116 (2d Cir. 1969)). The uncharged individual's name may surface at any point during these publicly accessible proceedings. Further, the indictment invariably describes conduct or statements attributed to the unindicted co-conspirator, and anyone following the trial — especially the press — will have little difficulty figuring out his identity merely by matching the evidence to the allegations in the indictment.

The harm caused by this public stigmatization may be avoided or at least lessened by counsel's early intercession. While the USAM calls for advance notification to the target of a federal investigation, *see* USAM 9-11.153, there is no requirement that the prosecutor notify an individual judged to be an unindicted co-conspirator. Thus, as a practical matter, counsel will generally find out that her client is an unindicted co-conspirator only after the indictment issues. At that point, among the steps that she should consider to protect her client are: 1) sealed filings; 2) safeguards during Rule 801(d)(2)(E) inquiries; and 3) judicial clarification.

Sealed Filings

Case law provides support for sealing documents that name the unindicted co-conspirator. In *Smith*, *supra*, the Third Circuit

affirmed the district court's denial of press access to a sealed portion of a bill of particulars in which the government identified the unindicted co-conspirators referenced in the indictment. The court reasoned that publishing the list would communicate to the public that its chief federal law enforcement official believed the individuals may be guilty of a felony, without providing the public with facts to evaluate that assessment. Moreover, since the individuals were not indicted, they could not prove their innocence at trial and might suffer "clearly predictable injuries" to their reputations that are "likely to be irreparable." 776 F.2d at 1113-14.

In *Anderson*, *supra*, even though the uncharged individual testified as a government witness at trial, the court held that the government had violated her due process rights by publicly identifying her as an unindicted co-conspirator in pretrial moving papers and ordered the expungement of all references to her in the government's filing. The court rejected the government's contentions that the witness's testimony for the government permitted it to label her a co-conspirator and that its subsequent Rule 801(d)(2)(E) proffer retroactively vindicated its pretrial identification of the witness.

Rule 801(d)(2)(E) Inquiries

When a court determines whether a potential witness is or is not a co-conspirator for the purpose of Rule 801(d)(2)(E), even this can be done in a manner that protects the witness's reputation. The substantial public right of access to criminal proceedings and judicial records is qualified by "recognition of the privacy rights" of a potential witness. *In re Application of Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990).

Courts can conduct *in camera* proceedings to adjudicate substantive evidentiary rulings. *See Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 598 n.23 (1980). Counsel should request that the court determine co-conspirator status for Rule 801(d)(2)(E) before trial and *in camera*. A pretrial conference might resolve the issue. Defendants might not object to the admissibility of the statements. They might be ruled admissible on other grounds. Or the statements might be deemed inadmissible. Unfortunately, this may present only a short-term solution, for such conferences generate transcripts that are subject to the public's right of access. *U.S. v. Smith*, 787 F.2d 111, 116 (3d Cir. 1986).

Alternatively, the parties can be instructed to use generic references (*i.e.*, "Individual 1") rather than names. The government's own policy manual supports such an approach. *See* USAM at 9-27.760 ("federal prosecutors should strive to avoid unnecessary public references to wrongdoing by uncharged third-parties" and use generic references to third parties where it is necessary to reference their alleged criminality). This approach has the benefit of being both simple to execute and comprehensive in its protection.

Bear in mind that, even if the court's ruling is made during trial, there is never any need for the jury to hear the term "unindicted co-conspirator." Counsel should request that the court preclude the parties from using that term. The determination to admit statements on this ground is a legal one made outside the presence of the jury. The label "unindicted co-conspirator" is relevant only to the evidentiary theory for introduction of out-of-court statements. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987). Once the court has determined that statements are admissible because the declarant is an "unindicted co-conspirator," the jury should hear only the declarant's name, not his evidentiary label.

Clarification

Because any spectator armed with the indictment can identify the unindicted co-conspirators, where the court conducts an 801(d)(2)(E) hearing outside the presence of the jury but in open court, counsel should consider requesting a clarifying explanation from the court for the benefit of anyone attending the proceedings.

In *Anderson*, *supra*, the court noted that "an 801(d)(2)(E) coconspirator is not necessarily a criminal. All that is required is that he or she be a "joint venturer" in a common plan … " 55 F. Supp.2d at 1169. An explanation in open court that the admissibility of Rule 801(d)(2)(E) statements does not signify that the speakers are engaged in wrongdoing is therefore simply a statement of the law. This explanation would at least clarify the legal significance of a 801(d)(2)(E) determination and might ameliorate to some degree the reputational harm caused by the "co-conspirator" label.

Caveats

Some practical concerns bear mention. This is one circumstance where the less counsel does, the more she can achieve. The act of intervening in order to protect the client's identity may cause the very damage counsel seeks to avoid. A formal motion will appear on the docket unless accompanied by a motion to seal, and either motion may arouse unwanted press attention. Counsel should consider an initial telephone call to the government in order to determine its position on the matter. For example, you may learn that the government has decided not to use the 801(d)(2)(E) statements, in which case the issue is less of a problem. If counsel cannot reach agreement with the government, counsel should attempt to avoid any public filing by communicating with the court and the parties by letter, with the request that any such correspondence not be docketed for the reasons outlined above. While the court's response is not assured, it may prove a receptive audience if it is appropriately sensitized to the due process concerns raised by the label "unindicted co-conspirator."