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LEGAL ETHICS IN THE BID RIGGING CASES

*Anthony F. Troy**

As a member of the Bar, one can never be too conscious of the ethical duty owed to the client, to the system of justice, and to the general public. Members of the public are viewing the legal profession with increasing skepticism. Even the Chief Justice of the United States Supreme Court recently asked rhetorically whether the decline in the public standing of attorneys is the product of a general impression that our profession is lax in dealing with incompetent or dishonest lawyers.¹ Ethical issues arise in many settings. This article will focus mainly on the ethical issues which arise during the representation of highway contractors in an antitrust investigation.

The term bid rigging is generally associated with an agreement among competitors that a particular contractor will be the successful low bidder on a contract. Although there is disagreement regarding the impact of bid rigging on the prices the state ultimately pays for services,² the case law is clear that bid rigging is a *per se* violation of the federal antitrust laws.³

I. VIRGINIA'S BID RIGGING CASES

In *United States v. Portsmouth Paving Corp.*,⁴ the Fourth Circuit characterized bid rigging agreements as "little less than a cartel, which is 'never legally nor economically justifiable.'"⁵ The

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1. Pike & Harrison, *The True Story on Lawyer Discipline*, A.B.A. J., Sept. 1984, at 92, 94.

2. *Bid Rigging*, Richmond News Leader, Oct. 22, 1981, at 12, col. 1 (editorial).

3. See *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982).

4. *Id.* The author had the fortune—or misfortune—to try the *Portsmouth Paving* case twice during an eight-week period in 1981. Whenever cases are referred to generally in this article, they refer to cases involving clients of the author's law firm only.

5. *Id.* (quoting 1 R. CALLMANN, *THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES* § 4.20, at 109 (4th ed. 1981)).

Fourth Circuit has also said that "[t]he undisputed effect [of bid rigging] is to force the contracting government entities to pay more for the goods and services sought than they would 'had there been free competition in the open market.'"⁶

Beginning in 1979, the Antitrust Division of the United States Department of Justice began an investigation into allegations that the highway construction industry in Virginia was rampant with bid rigging on road construction and resurfacing projects approved by the Virginia Department of Highways. The indictment in *Portsmouth Paving* charged three Tidewater area corporations and eight individuals with conspiracy to allocate contracts and rig bids on more than 250 contracts over an eighteen year period.⁷ The first Tidewater bid rigging trial began on February 23, 1981, and ended in a hung jury after nearly two days of deliberations.⁸ Following this mistrial, the defense maintained that a second trial would violate the Double Jeopardy Clause because the jury in the first case was dismissed without having received proper instruction on how to break a deadlock. The Fourth Circuit, however, denied the motion to bar a retrial, and the Supreme Court of the United States refused to intervene. After a ten-day second trial in April, 1981, Portsmouth Paving Corporation, its president, and the three remaining codefendants were found guilty.⁹ The Fourth Circuit affirmed the convictions in 1982.¹⁰

In the 1983 trial of *United States v. Marvin V. Templeton & Sons, Inc.*,¹¹ a Lynchburg paver was acquitted by a Roanoke jury. Among the other noteworthy bid rigging cases in Virginia, two highway contractor defendants pled *nolo contendere* to bid rigging charges; four other bid rigging indictments against highway contractors went to trial between 1981 and 1983, resulting in a total record of three convictions, three acquittals, and one hung jury.¹²

6. *Portsmouth Paving*, 694 F.2d at 317 (quoting *Marcus v. Hess*, 127 F.2d 233, 234 (3rd Cir. 1942) (describing a collusive bidding scheme to defraud the United States)).

7. *Portsmouth Paving*, 694 F.2d at 315.

8. *Id.*

9. *Id.* Portsmouth Paving Corp. was fined \$400,000 and its president was fined \$30,000. The president of Portsmouth Paving Corp. was also sentenced to imprisonment for a period not to exceed 120 days. *Id.* at 315-16.

10. *Id.* at 325.

11. No. 83-00001 (W.D. Va. 1983).

12. This list does not count the numerous pleas of guilty and *nolo contendere* entered in these cases. One estimate is that the highway bid rigging investigation in Virginia produced \$5,670,000 in corporate fines (among seventeen firms), \$215,000 in personal fines, and total jail time of 1,622 days among twenty-six individual defendants.

There has probably never been a more intense concentration of federal prosecutorial resources in Virginia than in the highway bid rigging investigation between 1979 and 1983.

II. ETHICAL ISSUES

To understand how the various legal ethics issues affect the representation of highway contractors, it is necessary to go back to 1979 when the investigation began. The highway contractor's first indication that he and/or his company were under investigation came in the form of a subpoena from a federal grand jury in Richmond. The subpoena commanded either the production of documents or the appearance of one or more officers of the company to testify before the grand jury.

A. *Conflict of Interest*

In advising a client on how to respond to such a subpoena, a fundamental ethical issue to consider is whether it is proper for counsel to advise and represent both the company under investigation and its various officers, all of whom may have been designated "targets" of the grand jury. A variety of resources are available to guide an attorney in determining whether a conflict of interest exists in representing a corporate client and its various officers and employees who are subjects of a single investigation.

The Virginia Code of Professional Responsibility requires a lawyer to refuse "to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer."¹³ Furthermore, the Code requires that "[a] lawyer

13. VIRGINIA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1983) [hereinafter cited as VA. C.P.R.]. "Differing Interests" are defined as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it will be a conflicting, inconsistent, diverse, or other interest." *Id. Definitions* (1). Throughout this article, references will be made to three different parts of the Code: first, Disciplinary Rules (abbreviated as DR); second, Ethical Considerations (abbreviated as EC); and third, Canons. These parts of the Code are explained as follows:

Canons are statements of axiomatic norms expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Disciplinary Rules and Ethical Considerations are derived.

The Disciplinary Rules, unlike the Canons and Ethical Considerations, are mandatory in character, as stated in DR 1-102(A)(1). The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action

shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client."¹⁴ Of course, any disability that applies to one attorney affects his partners or associates within the same firm.¹⁵ A lawyer or law firm is permitted, however, to represent multiple clients "if it is *obvious* that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."¹⁶

With each of the corporate paving clients counseled in a bid rigging investigation, it is necessary to consider at the outset that the possibility of a conflict of interest in representing the company and one or more officers or employees may arise. If a potential conflict exists, the usual rule is to represent only one defendant. There might exist some instances where, for several reasons, both the company and the officer could be represented. Such instances may include: where the officer was either the sole stockholder or owned the controlling interest in the company; where for all practical purposes the officer was strongly identified in the community as the company; or where the officer's alleged unlawful activity has resulted in the company being investigated.¹⁷ The determination of "no conflict" should only be made after full and complete discussion with the officer and with others in the company who have an ownership interest.¹⁸

A different philosophy, however, should be followed when the investigation focuses not only on a corporation and an officer, but also on a lower level employee. In such a case, the conflict envi-

The Ethical Considerations are aspirational in character and represent the objectives towards which every member of the profession should strive

Id. Preamble.

14. *Id.* DR 5-105(B).

15. *Id.* DR 5-105(E).

16. *Id.* DR 5-105(C) (emphasis added).

17. For a discussion of factors influencing the propriety of representing multiple defendants, see Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978).

18. An Ethical Consideration deems it

[e]ssential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representations and should accept or continue employment only if the clients consent.

VA. C.P.R., *supra* note 13, EC 5-16; *see also id.* DR 5-105(C); text accompanying note 16.

sioned in the Virginia Code of Professional Responsibility is obvious. In some instances it could be to the individual's benefit to cooperate with prosecutors in the investigation of the company or its president. For example, the prosecutor may be willing to provide immunity to the lower level employee in order to obtain evidence against the corporation or its officer.¹⁹

In each of the Virginia highway construction bid rigging cases with which the author is familiar where the lower level employee retained separate counsel, the company paid the legal fees for the employee without hesitation.²⁰ In each case, the employees retained competent attorneys who exercised independent judgment on their behalf, but also cooperated with the corporate counsel during the investigation. Such cooperation generally helps both the corporate defendant and the employee, especially in situations where the employee remained on the job. The employee's knowledge, that both his personal counsel and the company's counsel were "working together" on the investigation, tended to ease tension at work.

Having the lower level employee retain separate counsel can also help the company. Indeed, in some situations it may benefit the employer to fire or suspend the employee for violating the anti-trust laws. This action may be necessary to demonstrate that the company has and enforces an antitrust compliance program. This course was not considered in the majority of Virginia bid rigging cases, but it was an approach taken in a bid rigging case tried in Newport News in 1982, involving Basic Construction Company of Newport News.²¹ The corporation's defense rested almost entirely on the position that it had a firm company policy requiring compliance with the antitrust laws, and that it had fired the employees who were found to have engaged in collusive bidding practices.²² The company was found guilty, however, and the conviction was

19. See ANTITRUST SECTION, AMERICAN BAR ASSOCIATION, ANTITRUST HANDBOOK ON GRAND JURY INVESTIGATIONS 89 (1978) (giving additional illustrations of situations which may present conflicts of interests).

20. The Code allows the attorney for the lower level employee to accept compensation from the employer only after "full and adequate disclosure under the circumstances." VA. C.P.R., *supra* note 13, DR 5-106(A). Furthermore, even if the lower level employee's attorney is paid by the employer, the attorney should exercise his independent professional judgment solely on behalf of the lower level employee. *Id.* EC 5-21, 5-22 & 5-23.

21. *United States v. Basic Constr. Co.*, 711 F.2d 570 (4th Cir.), *cert. denied*, 104 S. Ct. 371 (1983).

22. *Id.* at 573.

affirmed by the Fourth Circuit.²³

In addition to being aware of the position on conflicts of interest taken by the Virginia Code of Professional Responsibility, it is important to recognize that Rule 44(C) of the Federal Rules of Criminal Procedure now requires a court, in a multiple representation case, to conduct its own inquiry into the existence of a conflict.²⁴ Furthermore, representation of multiple clients may require consideration of the sixth amendment right to counsel. The Supreme Court of the United States, in June, 1984, held that multiple representation of codefendants directly implicated such right to effective assistance of counsel.²⁵

Pursuant to Rule 44(C), the courts inquired into the existence of a conflict in each of the Virginia bid rigging cases, because in each case both a corporate defendant and the president of the company charged with illegal conduct were represented by common counsel. The courts were satisfied that no such conflicts were present, presumably on the ground that the corporations were small, closely-held, family businesses where the individual defendant had either sole ownership or a controlling interest in the company. Although the prosecutors in the Virginia bid rigging cases did not raise the conflict issue, it is important to be aware that the government may challenge, under Rule 44(C), any multiple representation of codefendants.²⁶

23. *Id.* at 575.

24. FED. R. CRIM. P. 44 (stating in part: "Unless it appears that there is good cause to believe no conflict of interest is likely, to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."). It is important to note that the Federal Rules of Criminal Procedure apply to "all criminal proceedings in the courts of the United States." FED. R. CRIM. P. 1.

25. *Flanagan v. United States*, 104 S. Ct. 1051, 1056 (1984) (asserting that if a person is denied his choice of separate counsel, his sixth amendment rights are violated and his conviction will be reversed, whether or not he suffered prejudice).

26. *See, e.g., United States v. Dolan*, 570 F.2d 1177, 1182-83 (3d Cir. 1978) (holding that a court may disqualify an attorney representing multiple criminal defendants even though all of the defendants want the same attorney); *In re Investigation before the February, 1977 Lynchburg Grand Jury*, 563 F.2d 652, 657 (4th Cir. 1977) (asserting there is an impermissible conflict of interest when an attorney is unable to advise a client to cooperate or seek immunity since to do so would prejudice another client).

B. *Coordination of Efforts in Conducting a Defense*

1. The Confidentiality Requirement

A second ethical issue which was confronted in representing the Virginia highway contractors was determining the extent to which counsel could coordinate the defense of his clients with the defense efforts of other subjects of the bid rigging investigation. Although it may be apparent to the attorney that sharing information with other counsel may benefit the client, the attorney-client privilege belongs to the client and not to the attorney.²⁷ Indeed, the privilege may be waived only at the client's option.²⁸ The Virginia Code of Professional Responsibility provides, generally, that an attorney shall not reveal information protected by the attorney-client privilege to anyone, unless the client's permission is obtained after full disclosure.²⁹

It is natural that, in these situations, the client will look to the attorney for advice regarding any adverse consequences that might flow from disclosing information to third parties. In advising clients on the desirability of sharing privileged information in bid rigging investigations, the attorney should warn clients that the privilege is generally deemed waived upon disclosure to third parties,³⁰ but that the waiver doctrine is not applicable when the disclosure is made for the purpose of gathering and exchanging information pursuant to a joint defense effort.³¹ This exception to the rule of waiver has come to be known as the "joint defense exception." The leading case in the joint defense area is *Chahoon v. Commonwealth*.³²

Chahoon was a criminal conspiracy case in which several defendants were tried together. Prior to trial, the defendants had met together with their lawyers to map out defense strategy. At the trial, one of the codefendant's attorneys was asked to testify re-

27. *Parker v. Carter*, 18 Va. (4 Munf.) 273, 287 (1814).

28. *Virginia State Bar v. Gunter*, 212 Va. 278, 287, 183 S.E.2d 713, 719 (1971) (citing *Grant v. Harris*, 116 Va. 642, 648-49, 82 S.E. 718, 719 (1914)).

29. VA. C.P.R., *supra* note 13, DR 4-101. It should be noted that a lawyer has no obligation to keep communications made by a client concerning a future intention to commit a crime privileged. *Id.* DR 4-101(D)(1).

30. *See, e.g.*, *Cook v. Hayden*, 183 Va. 203, 224, 31 S.E.2d 625, 633-34 (1944) (holding that a communication made in the presence of the client's adverse party was not privileged).

31. *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871); *see infra* text accompanying notes 33-34.

32. 62 Va. (21 Gratt.) 822 (1871).

garding privileged information revealed at the joint defense meeting. The trial court held that the discussions were protected by the attorney-client privilege, even though revealed to third parties. The Supreme Court of Virginia affirmed, concluding that "it was natural and reasonable, if not necessary, that these parties . . . should meet together in consultation with their counsel . . . to make all necessary arrangements for the defense."³³

The *Chahoon* rule, providing that exchange of information pursuant to a joint defense effort does not constitute a waiver, has been generally accepted by other courts confronting the issue.³⁴ The joint defense privilege also has been extended to protect an attorney's work product.³⁵ The work product privilege should apply to all oral communications and to traditional work product items such as interviews with witnesses and memoranda prepared at the pre-indictment investigative stage.³⁶

In the Virginia bid rigging investigation, defense attorneys were quite successful in keeping abreast of the progress of the investigation, thanks to the coordinated efforts of several dozen defense attorneys from across Virginia, who joined together in what was labeled the "Joint Defense Group." This group was organized and coordinated by several of the larger firms in Richmond. At its peak in 1981, more than forty-five highway contractors and their counsel were members of the Joint Defense Group. The members received regular memoranda on the progress of the government's investigation, which included identification of witnesses who had testified

33. *Id.* at 839.

34. *See, e.g.*, *United States v. McPartlin*, 595 F.2d 1321, 1335-36 (7th Cir. 1979) (holding that statements made by a codefendant to defense attorney's investigator were privileged); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965) (holding that information shared among attorneys representing different clients is privileged if it deals with common trial strategies or defenses); *Continental Oil Co. v. United States*, 330 F.2d 347, 349-50 (9th Cir. 1964) (citing *Chahoon* in support of the "joint defense exception").

35. *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 447 (W.D. Mo. 1976) (holding that work product immunity is not waived when material is exchanged among joint parties because it is assumed parties with a common interest will not disclose to opposing parties); *Transmirra Prod. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960) (holding that attorneys' exchange of "work products" does not necessarily render the material discoverable if their clients have a common interest). Of course it is important to remember that all work product, even that which an attorney keeps absolutely confidential, may be discovered if there is good cause. *FED. R. CIV. P.* 26(b)(3). The attorney client privilege, however, if present, is absolute. *Parker v. Carter*, 18 Va. (4 Munf.) 273, 286-87 (1814).

36. *See, e.g.*, *Vilastor-Kent Theatre Corp. v. Brandt*, 19 F.R.D. 522 (S.D.N.Y. 1956) (holding that memoranda exchanged by attorneys representing different defendants in an anti-trust suit were immune from discovery due to the work product privilege).

before the grand jury, rumors and actual reports of pending indictments, positions the government was taking with respect to immunity and plea bargains, and the names and addresses of attorneys for witnesses. Witness information was obtained so that other counsel could contact the attorneys to obtain information regarding the witness's testimony.

Realizing that case law generally recognized the joint defense exception, defense attorneys had an ethical duty to be sure that they did not conduct the joint defense effort in a manner that would possibly have been construed as a waiver of the attorney-client privilege. The attorneys were very careful to have each member firm and individual attorney execute a Joint Defense Confidentiality Agreement. This document contained recitals pertaining to the existence of the highway bid rigging investigation, along with express recognition "that a joint defense effort is in [our] common interest and is desirable to facilitate effective and economic legal representation, including formulation of defenses and strategy" The Agreement also recited that

[t]he parties desire to cooperate in such a joint defense effort and to exchange work product and other confidential or privileged information . . . [without waiving] any attorney client, work product or other privilege, or to engage in any act or omission that would in any way obstruct, interfere with, or otherwise improperly threaten the integrity of ongoing investigations or grand jury proceedings.

2. Grand Jury Monitoring

The Joint Defense Agreement provided for sharing of expenses, including the most successful and controversial aspect of the joint defense effort—the monitoring of the investigating grand jury. The monitoring consisted initially of obtaining information about the grand jury meeting schedule from members of the joint defense group whose clients had received a subpoena to testify on a given date. Once the group knew that at least one of the members would have a client testifying in a given session, defense attorneys were able to discover and interview other witnesses at the grand jury session about whom they had not had any previous information.

On the days that the grand jury met (generally two to three days per month), the group posted a monitor, usually a paralegal or young attorney, in a position to see who came in and out of the grand jury meeting room. The monitor would attempt to obtain

the name and address of the witness, the witness's counsel's name, address and telephone number, and would ask permission to interview the witness following his or her testimony. The group was careful to determine whether or not the witness was represented, so as not to run afoul of the Virginia Code of Professional Responsibility which bars direct contact with one who is represented by counsel, unless the witness's counsel consents.³⁷ The monitor's request for a full debriefing interview would occasionally be granted, but more often than not, the group would receive a summary of the testimony from the witness's attorney, or would be flatly refused any information.

In establishing and conducting this grand jury watch, the group was mindful of the ethical considerations governing its conduct. Primarily, although there is no direct ethical proscription against interfering with the grand jury processes, one can read into Canon 7—pertaining to representing a client zealously within the bounds of the law—a “gloss” requiring an attorney to consider whether his conduct will in any way interfere with the administration of justice.³⁸ Several Disciplinary Rules within Canon 7 could be interpreted to prohibit activity which could obstruct the functioning of a grand jury. For example, a lawyer shall not “[i]ntentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.”³⁹ Although the foregoing rule appears to be expressly limited to a situation where an attorney is appearing “in his professional capacity before a tribunal,”⁴⁰ it could be interpreted to prohibit obstructing the functioning of a grand jury.⁴¹ Moreover, the harassment of jurors is clearly forbidden.⁴² Although these rules apply directly only to contact with petit jurors, one may conclude that it is ethically im-

37. During the course of his representation of a client a lawyer shall not: (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party of it authorized to do so.

VA. C.P.R., *supra* note 13, DR 7-103(A).

38. *See, e.g., id.* EC 7-9 (asserting that a lawyer may ask his client to forego action he believes unjust); *id.* EC 7-10 (asserting that the lawyer has a duty to treat all persons involved in the legal process with consideration).

39. *Id.* DR 7-105(C)(5).

40. *Id.* DR 7-105(C).

41. Even if an attorney is not representing any witnesses at the grand jury, he is arguably acting in a professional capacity when he seeks to question the witnesses, since he is actively representing his own client, who may be involved in the grand jury investigation.

42. *Id.* DR 7-107; EC 7-27.

proper to attempt to speak with any grand jurors. Furthermore, such contact may be construed as an obstruction of justice under federal law.⁴³

An additional concern with monitoring a grand jury is Canon 9, which provides that a lawyer should avoid even the appearance of impropriety.⁴⁴ An Ethical Consideration states that on occasion even "ethical conduct of a lawyer may appear to laymen to be *un-ethical*."⁴⁵ Mindful of these considerations, the group concluded that careful monitoring of the grand jury in the manner in which it did was proper.

For support of the right of defense counsel to interview grand jury witnesses, one must look first to the provisions of the Federal Rules of Criminal Procedure governing grand jury secrecy. The general rule of grand jury secrecy is that:

A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule.⁴⁶

Absent from the list of persons placed under the obligation of secrecy are witnesses appearing before the grand jury. This point is expressly made in the notes of the Advisory Committee for the Federal Rules, where it is stated:

The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on the witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make disclosure to counsel or to an associate.⁴⁷

43. 18 U.S.C. § 1503 (1982) (making it an obstruction of justice to attempt to influence a grand or petit juror or any officer of the court). A person convicted of an obstruction of justice may be fined up to \$5,000 or imprisoned not more than five years or both. *Id.*

44. VA. C.P.R., *supra* note 13, Canon 9.

45. *Id.* EC 9-2 (emphasis added).

46. FED. R. CRIM. P. 6(e)(2).

47. FED. R. CRIM. P. 6 advisory committee note; see also *First Amendment Coalition v. Judicial Inquiry & Review Bd.*, 579 F. Supp. 192, 216 (E.D. Pa. 1984) (holding that Rule 6(e) prohibits any instruction to a witness that his testimony is secret); cf. *In re Grand Jury Proceedings*, 558 F. Supp. 532, 535 (W.D. Va. 1983) (holding that although witnesses at a

Indeed, courts have consistently held that grand jury witnesses are free to discuss their testimony with anyone they choose.⁴⁸ In 1983, the United States District Court for the Western District of Virginia, following this rationale, denied a motion by the United States Attorney's Office in Roanoke to enjoin a grand jury watch in a criminal tax investigation. Judge Turk, in *In re Grand Jury Proceedings*,⁴⁹ went so far as to hold that defense counsel have first amendment rights of free speech and association that apply to communications with grand jury witnesses.⁵⁰

Several months after the monitoring of the bid rigging grand jury had reached its peak, but while such activity was continuing in Alexandria, the United States Attorney's Office made a bold effort to have the judges of the Eastern District of Virginia amend the Local Rules of Practice to prohibit "loiter[ing] or remain[ing] in the hallways or waiting areas of any floor of any courthouse in this district while a grand jury is in session or is about to commence." The proposed rule would have, in effect, shut down the monitoring operation. Several of the law firms that were active in the monitoring process became aware of the request for a local rule change and filed a memorandum of law opposing adoption of the rule.⁵¹ To date, the court has taken no action in response to the request of the United States Attorney.

The position of the United States Attorney, as expressed in a memorandum of law supporting the rule, was that the group's "surveillance" of the grand jury enabled them to "observe who appears before the Grand Jury, how long they remain, whether the witness brings documents or other tangible evidence, and, in general, and without any contest by the witness, all the circumstances regarding his appearance." The United States Attorney character-

grand jury proceeding have a right to discuss their testimony with third parties, the government may indicate that it would prefer that the witnesses remain silent).

48. *In re Investigation before the April 1975 Grand Jury*, 531 F.2d 600, 606-07 n.11 (D.C. Cir. 1976) (stating "there is no general obligation on the part of a grand jury witness to refrain from disclosing the contents of his testimony before the grand jury"); *In re Vescovo Special Grand Jury*, 473 F. Supp. 1335, 1336 (C.D. Cal. 1979) (holding that witnesses may be interviewed after testifying at a grand jury proceeding); *In re Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238, 240 (N.D. Ohio 1970) (stating that "[w]hile the relevant case law is not abundant . . . [t]he cases show that secrecy of grand jury proceedings may not be imposed upon witnesses.").

49. *In re Grand Jury Proceedings*, 558 F. Supp. 532 (W.D. Va. 1983).

50. *Id.* at 535.

51. Copies of the Memorandum submitted to the court by the United States Attorney's Office and the Response Memoranda are on file with the author.

ized counsel's ability to monitor the grand jury as "an accident of courthouse architecture and supervised by counsel's self interested judgment occurring in the adjacent hallway." The cases cited by the government, however, were those cases which admittedly held that "[t]he person who is the subject of [a grand jury] investigation has no right to require a witness to divulge such information."⁵²

The proposed local rule was also purportedly justified on the ground that it would expand "the witness's freedom to decide whether to disclose his testimony or the degree of his cooperation." The memorandum also indicated that "only if counsel are barred from the courthouse will the witness be able to make that decision without pressure from the interests of persons he may have incriminated only minutes before."

The defense attorney could certainly argue that as long as a witness is free to disclose his testimony to whomever he wants, and under such circumstances as he desires, defense counsel must have an unfettered right of access to these individuals. Indeed, counsel may well have a *duty* to make use of the monitoring process to fulfill a professional responsibility to represent his clients "competently" and "zealously" within the bounds of the law.⁵³ Of course, the grand jury witness has no obligation to provide any information requested of him.⁵⁴

On the other hand, there is certainly at least some merit to the idea that monitoring can affect the functioning of the grand jury to the extent that witnesses might be discouraged from coming forward, if they know their identities will be revealed once they are seen by a monitor entering or exiting the grand jury room. Based on experience in the bid rigging cases and also based on an understanding of the case law, it appears that the proposed solution—barring counsel from the courthouse while the grand jury is in session—would be worse than the "problem" as perceived by the United States Attorney's Office.

52. See, e.g., *In re Swearingen Aviation Corp.*, 605 F.2d 125, 127 (4th Cir. 1979) (holding that a witness may communicate information concerning his testimony in a grand jury proceeding solely at his or her option).

53. VA. C.P.R., *supra* note 13, Canons 6 & 7.

54. *In re Swearingen Aviation Corp.*, 605 F.2d at 127.

III. CONCLUSION

This article has tried to present an overview of interesting ethical issues which arise during bid rigging cases. Each case implicated difficult issues under the Code of Professional Responsibility. The ethical issues described in this article are applicable to nearly every large scale criminal investigation, including most "white-collar type" criminal cases, and even some civil matters. All important ethical issues appear to involve a balancing of one set of interests against another. Therefore, there is frequently no "right" answer. If an attorney thoughtfully considers ethical issues in connection with his day-to-day practice, he will not only be doing a service to his client, the public and his profession, but to himself as well.