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UNITED STATES ATTORNEYS' MANUAL

CRIMINAL DIVISION

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UNITED STATES ATTORNEYS' MANUAL
TITLE 9--CRIMINAL DIVISION

B. Comment

USAM 9-27.270 is intended primarily to ensure an adequate record of disposition of matters that are brought to the attention of the government attorney for possible criminal prosecution, but that do not result in federal prosecution. When prosecution is declined in serious cases on the understanding that action will be taken by other authorities, appropriate steps should be taken to ensure that the matter receives their attention and to ensure coordination or follow-up. This might be done, for example, through the appropriate Federal-State Law Enforcement Committee.

9-27.300 SELECTING CHARGES

9-27.310 Charging Most Serious Offenses

A. Except as hereafter provided, the attorney for the government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction.

B. Comment

Once it has been determined to initiate prosecution, either by filing a complaint or an information, or by seeking an indictment from the grand jury, the attorney for the government must determine what charges to file or recommend. When the conduct in question consists of a single criminal act, or when there is only one applicable statute, this is not a difficult task. Typically, however, a defendant will have committed more than one criminal act and his/her conduct may be prosecuted under more than one statute. Moreover, selection of charges may be complicated further by the fact that different statutes have different proof requirements and provide substantially different penalties. In such cases, considerable care is required to ensure selection of the proper charge or charges. In addition to reviewing the concerns that prompted the decision to prosecute in the first instance, particular attention should be given to the need to ensure that the prosecution will be both fair and effective.

At the outset, the attorney for the government should bear in mind that at trial he/she will have to produce admissible evidence sufficient to obtain and sustain a conviction or else the government will suffer a dismissal. For this reason, he/she should not include in an information or recommend in an indictment charges that he/she cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial.

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In connection with the evidentiary basis for the charges selected, the prosecutor should also be particularly mindful of the different requirements of proof under different statutes covering similar conduct. For example, the bribery provisions of 18 U.S.C. §201 require proof of "corrupt intent," while the "gratuity" provisions do not. Similarly, the "two witness" rule applies to perjury prosecutions under 18 U.S.C. §1621 but not under 18 U.S.C. §1623.

USAM 9-27.310 expresses the principle that the defendant should be charged with the most serious offense that is encompassed by his/her conduct and that is likely to result in a sustainable conviction. Ordinarily, this will be the offense for which the most severe penalty is provided by law. This principle provides the framework for ensuring equal justice in the prosecution of federal criminal offenders. It guarantees that every defendant will start from the same position, charged with the most serious criminal act he/she commits. Of course, he/she may also be charged with other criminal acts (as provided in USAM 9-27.320, *infra*), if the proof and the government's legitimate law enforcement objectives warrant additional charges.

In assessing the likelihood that a charge of the most serious offense will result in a sustainable conviction, the attorney for the government should bear in mind some of the less predictable attributes of those rare federal offenses that carry a mandatory, minimum term of imprisonment. In many instances, the term the legislature has specified certainly would not be viewed as inappropriate. In other instances, however, unusually mitigating circumstances may make the specified penalty appear so out of proportion to the seriousness of defendant's conduct that the jury or judge in assessing guilt, or the judge in ruling on the admissibility of evidence, may be influenced by the inevitable consequence of conviction. In such cases, the attorney for the government should consider whether charging a different offense that reaches the same conduct, but that does not carry a mandatory penalty, might not be more appropriate under the circumstances.

The exception noted at the beginning of USAM 9-27.310 refers to pre-charge plea agreements provided for in USAM 9-27.330, *infra*.

9-27.320 Additional Charges

A. Except as hereafter provided, the attorney for the government should also charge, or recommend that the grand jury charge, other offenses only when, in his/her judgment, additional charges: