

Reproduced by permission. ©1990 Colorado Bar Association, 19 *The Colorado Lawyer* 2021 (October 1990). All rights reserved.

FIRREA and the S&L Bailout

by Patrick T. Murphy and Kathryn Haight Meyer

About the Authors

Patrick T. Murphy is a partner in the law firm of Martin, McAllister & Murphy, P.C., and is a former Chief of the Criminal Division in the Colorado U.S. Attorney's Office. Kathryn Haight Meyer, also with Martin, McAllister & Murphy, is a former Assistant U.S. Attorney with the Mountain States Organized Crime Drug Enforcement Task Force.

The government, the press and the public are expecting heads to roll in the costly bailout of the thrift industry. In testimony before the Senate Banking Committee, Comptroller General Charles Bowsher stated that \$325 billion would be needed to resolve the savings and loan crisis and pay off the obligations of the Federal Savings and Loan Insurance Corporation ("FSLIC").^(fn1) More recently the estimate has been increased to nearly \$500 billion, with an estimated cost to taxpayers in excess of \$3,000 for every man, woman and child.

This article discusses the savings and loan ("S&L") bailout legislation and addresses specific problems related to parallel proceedings, grand juries and immunity, attorney liability and the attorney-client privilege. Additionally, the article focuses on the pitfalls associated with the authorized sharing of grand jury information.

FIRREA

The costs of stabilizing the savings and loan industry, restoring the public's confidence in the industry and in a deposit insurance fund, and restructuring the industry to prevent future abuses were addressed by Congress in its enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA" or the "Act").^(fn2) In enacting FIRREA, Congress has attempted to protect the thrift industry against the insider abuses and fraud that have contributed to the crisis threatening the viability of affordable housing finance.^(fn3)

Pursuant to FIRREA, the S&L industry has been administratively restructured, and penalties have been increased substantially. Some of the most significant changes include:

- 1) the Federal Deposit Insurance Corporation ("FDIC") now is assigned the duty of insuring the deposits of not only banks, but S&L institutions as well, under the umbrella of "financial or depository institutions";
- 2) the Resolution Trust Corporation ("RTC") has been established to serve as the receiver for S&L institutions placed in conservatorship or receivership between January 1, 1989, and August 9, 1992;
- 3) civil penalties for violations of various statutes include assessments of \$1 million per day;
- 4) maximum criminal penalties have been increased to twenty years' incarceration, in addition to million-dollar fines;
- 5) banking offenses have been specifically enumerated as offenses within the racketeering laws (RICO); and,
- 6) property forfeitures are now statutorily authorized for specified violations of the laws related to financial institutions.(fn4)

Since the adoption of FIRREA, additional amendatory legislation has been

[Please see hardcopy for image]

Patrick T. Murphy is a partner in the law firm of Martin, McAllister & Murphy, P.C., and is a former Chief of the Criminal Division in the Colorado U.S. Attorney's Office. Kathryn Haight Meyer, also with Martin, McAllister & Murphy, is a former Assistant U.S. Attorney with the Mountain States Organized Crime Drug Enforcement Task Force.

2022

proposed almost daily, which include life sentences for certain banking offenses and private "bounty hunter" or *Qui tam* suits.(fn5)

To facilitate enforcement, FIRREA required the U.S. Department of Justice ("Justice Department") to establish a regional office of the Criminal Division's Fraud Section in Dallas--the Northern District of Texas. Additional regional fraud offices may be created as needed.(fn6) For each of the next three years, the Act authorizes the Justice Department to receive \$10 million per year for civil enforcement proceedings involving financial institutions and \$65 million per year for the investigation and prosecution of banking crimes.(fn7) Moreover, \$10 million was appropriated for the federal judiciary to cover the anticipated costs of increased litigation.(fn8) Additional appropriations are being considered by Congress. In the District of Colorado, more Assistant U.S. Attorneys as well as Special Agents with the Federal Bureau of Investigation ("FBI") are to be added to the S&L prosecution team. Colorado's U.S. Attorney has created a new section within the Criminal Division dedicated to the enforcement of complex fraud and white-collar cases.

The FBI currently has 8,000 cases of potential banking fraud across the country, 1,300 of which have been inactive for lack of resources.(fn9) As the government's resources are marshalled, long-term investigations will undoubtedly focus on a broad network of individuals. These include the officers, directors, partners, employees, lenders, agents and borrowers of savings and loans. Investigations also will focus on the attorneys and other professionals who have advised those institutions.

Because the savings and loan crisis is not subject to a criminal prosecution response alone, a garden variety of civil and administrative litigation will continue to proliferate. However, as the criminal prosecution response to the S&L scandal gears up, RTC attorneys, attorneys representing witnesses or targets of these investigations, and other counsel increasingly will face a variety of difficult legal and ethical issues, complicated by a vocal and unsympathetic public.

THE PROBLEM OF PARALLEL PROCEEDINGS

While the public continues to demand indictments, the federal government's prosecutorial response has been glacierlike: gradually growing, moving slowly, but eventually impossible to stop. Significantly, FIRREA legislation encourages this slow prosecution response: the usual five-year statute of limitations has been doubled to ten years for offenses involving financial institutions.^(fn10) Thus, although it is unrealistic to expect that indictments in these white-collar cases will be returned by grand juries any time soon, indictments are a certainty. In the meantime, hundreds of civil cases have been filed and are in the discovery process, and many of the witnesses and potential targets of future and even simultaneous criminal investigations are being deposed.

Bank officers and directors unwarily may be providing the rope to hang themselves by testifying in civil cases and before administrative panels, unaware that they may become targets of criminal investigations. As such, a prosecutor's ally may be the delayed timing of the criminal investigations. Therefore, it is important for civil attorneys to warn and provide adequate counsel to vulnerable clients who may be testifying parties or witnesses in related civil litigation or in administrative proceedings.

Common Scenarios

Parallel civil and criminal proceedings frequently present ethical and legal problems for litigators. Consider the following scenario, which may be retold over and over in the coming years: An RTC attorney represents an insolvent S&L institution in receivership or conservatorship. A former loan officer is scheduled to be deposed in a contract suit brought by the RTC against a real estate developer for his or her failure to perform under the terms of a promissory note related to the purchase of Property A. The developer has counter-claimed, asserting lender liability and alleging, *inter alia*, that the loan officer required the developer to pay a fee as payment to secure the loan.^(fn11) If the loan officer in fact received a bonus or a finder's fee for arranging the institution's loan to the developer, there is a strong possibility that, in the federal investigation, the fee would be considered an unlawful "kickback," proscribed by 18 U.S.C. § 215.

Plainly, the RTC attorney is in need of the bank officer's testimony to rebut the counterclaims; however, the loan officer may be vulnerable to criminal prosecution and should consult independent legal counsel. The loan officer needs to obtain advice concerning the implications regarding a waiver or invocation of his or her Fifth Amendment rights.^(fn12)

The foregoing factual scenario indicates not only a conflict of interest for the RTC lawyer, but it lays the foundation for a classic irony: the "right hand" of the government---the U.S. Treasury Department's RTC---needing the testimony of a witness whom the "left hand" of the government---the Justice Department---may be considering for criminal prosecution. Similar conflicts for attorneys representing various parties, as well as for government agencies, can be imagined under a number of circumstances.

Another example: Assume that the above real estate developer's counterclaims involve an unlawful "tying" arrangement. In a counterclaim, the developer has alleged that loan financing was based on a "swirl." In a "swirl" arrangement, the loan officer requires the borrowing real estate developer to purchase Properties B and C [real-estate-owned ("REO") properties from one of the S&L's wholly owned subsidiaries] as a condition of obtaining financing for Property A. Such unlawful tying arrangements are proscribed by 12 U.S.C. § 1464(q), which authorizes a civil cause of action for treble damages.(fn13) Although § 1464 does not provide for a criminal penalty, the loan officer's alleged conduct could later be determined to fall within a number of criminal statutes (such as the misapplication of funds). This again implicates the loan officer's Fifth Amendment rights should the RTC attorney hope to use his or her testimony in the civil suit.

Regardless of the civil or criminal ramifications of the loan officer's alleged conduct in the preceding examples, if the loan officer's interests appear to conflict with those of the savings and loan, the RTC attorney should keep in mind the ethical obligations of the Code of Professional Responsibility's DR 7-104 (A)(2) to avoid giving advice to one of adverse interests.

Civil litigators should also recognize that it is not difficult for the FBI to obtain a copy of deposition testimony. Such testimony could be devastating to persons and institutions unaware of the existence of planned or ongoing criminal investigations. Not only can deposition testimony greatly facilitate a criminal investigation, but the spectre of criminal

2023

2024

charges hanging over the heads of litigants may well force premature settlements. Although civil litigators quietly use the leverage of possible criminal prosecution for the benefit of their clients, beware of the obvious prohibition: an attorney's threats regarding criminal prosecution will subject him or her to professional sanctions.(fn14)

Stay of Proceedings

In the preceding examples, the witness/loan officer's attorney may seek to delay the client's deposition by seeking protective orders pursuant to Rule 26(c) of the Federal Rules of Civil Procedure ("F.R.C.P."). A stay of the entire civil matter could also be warranted pending the outcome of criminal proceedings.

Although there is no constitutional or statutory requirement that civil actions be stayed until the conclusion of related criminal proceedings, courts have the inherent power to stay civil proceedings pursuant to their authority to issue stays and other similar relief when necessary to ensure the fairness of pending matters.(fn15) In determining whether to grant a stay of civil proceedings, courts balance the harm that delay would cause to the civil litigants against the difficulties that parallel proceedings pose to the moving party in the related criminal case. As a general rule, federal courts indulge every presumption against granting stays in cases involving parallel proceedings.(fn16)

The reason for the courts' reluctance to grant stays in the absence of a compelling showing of prejudice is that granting such relief, in some cases, would subject civil plaintiffs to lengthy delays, or even the effective denial of relief, simply because of the pendency of a related criminal case.(fn17)

IMMUNITY IN EXCHANGE FOR TESTIMONY

The government may agree to provide immunity to certain witnesses who would otherwise take the Fifth Amendment in lieu of testifying either before an administrative agency, the grand jury or in other criminal proceedings. Immunity usually provides a testifying witness with a level of protection against criminal prosecution.

The general federal immunity statute, 18 U.S.C. § 6002, is a "use immunity" rather than a "transactional immunity" statute.(fn18) As such, federal statutory immunity provides no broader protection to a witness than would the Fifth Amendment right against self-incrimination. Once immunized, the witness is compelled to testify, but that testimony cannot later be used against the witness in a criminal prosecution except for perjury and related offenses.(fn19)

During the next several years, many witnesses undoubtedly will receive federal grand jury subpoenas to testify as to matters involving S&L institutions. At the outset, an attorney representing a grand jury witness should attempt to determine whether the witness has been designated as a "target" of the grand jury---a possible indictee. In the District of Colorado, a "target letter" normally accompanies a grand jury subpoena if, at the time it is issued, the government attorney and the grand jury have reasonably determined that the subpoenaed person may be a target of the grand jury's investigation. A target letter should set forth the offenses under investigation and should also include an advisement of rights.

If a witness does not receive a "target letter" with the subpoena, the witness probably is not a grand jury target. However, counsel and the witness should be aware that, *on occasion*, a witness has been targeted for prosecution by the grand jury after the subpoenaed witness has testified. Thus, although the witness should derive some comfort from not being designated as a target at the time he or she is subpoenaed, consideration should be given to that rare occasion when a witness is later targeted as a result of unexpected developments in a grand jury's investigation. A telephone call to the Assistant U.S. Attorney may provide the necessary information.

Immunity may be particularly appropriate where it is determined that the institution's officers and directors have strong legal and factual arguments in their defense, *i.e.*, that they were acting on the advice of their agents---the good faith reliance defense.(fn20) Where such a defense is properly raised, the government's investigation may refocus on the lawyers, accountants and appraisers who guided and approved the actions of the lending institution with the knowledge of the regulators. Thus, the federal prosecutor may determine that, rather than prosecuting them as defendants, the institution's officers and directors would be better as witnesses testifying against the institution's lawyers or other professional agents.

ATTORNEYS AS FEDERAL GRAND JURY TARGETS

As noted, the government's investigation may turn to the attorneys or other professional agents who have advised the S&L institution in the commission of criminal acts. A typical case involving an attorney is shown by the facts in *United States v. Payne*.(fn21) In *Payne*, an attorney was prosecuted for criminal conduct related to a loan transaction. The lawyer had been retained by and had participated as the loan-closing attorney for the financial institution in the relevant transactions. The *Payne* court held that the attorney had been properly charged under 18 U.S.C. § 657 (misapplication of funds) and § 1006 (false entries) as a person "connected in any capacity with" the bank.(fn22) The court also considered and rejected the attorney's contention that his conviction should be reversed because he had no "control" over the wrongful act that caused the harm to the financial institution, stating:

Although the courts in several cases have stated or implied that the defendants' "control" is a *factor* in determining whether or not the defendants were "connected in any capacity with" the bank [*citations omitted*], we have found no cases ... holding that "control" is a *requirement* under 18 U.S.C. §§ 657 and 1006. On the contrary, we note that the Ninth Circuit reached the opposite conclusion in the factually analogous case of *United States v. Rice* [*citations omitted*].(fn23)

An attorney under investigation concerning his or her actions as an agent for an S&L may be faced with another interesting twist of fate---the attorney-client privilege. The question is, What if the attorney argues that he is entitled to use in his defense communications falling within the ambit of the attorney-client privilege?

The Attorney-Client Privilege

The attorney-client communications privilege is not the privilege of the attorney, but that of the client.(fn24) Hence, if the attorney represented the S&L institution, the institution, as the client, is the holder of the privilege for the purpose of determining privilege issues, including waiver and assertion. However, what if the thrift institution is under the control of the FDIC or the RTC? In a Colorado case,(fn25) the FDIC, as the receiver, was found to be the holder of the bank's

surviving attorney-client privilege.(fn26) There is also case law to the contrary, holding that the FDIC cannot assert a privilege on behalf of an institution which is no longer operating.(fn27)

Although the attorney-client privilege is subject to waiver, where an S&L is under the conservatorship or receivership of the RTC, the RTC may be unwilling to waive the privilege because it could be vulnerable with respect to adverse claims. The question then is, in the absence of a waiver, when can the former S&L attorney---who is now a criminal defendant--rely on privileged information in his or her own defense?

A persuasive argument may be made that the attorney-defendant's Sixth Amendment right to the compulsory process of favorable witnesses outweighs any interest that the holder of the privilege may have in maintaining confidentiality.(fn28) To be successful, the defendant must be able to show that the needed evidence would be both material and favorable to the defense. The defendant must also persuade the court that it is empowered to rule in favor of the defendant's Sixth Amendment argument at the cost of revealed attorney-client communications.(fn29)

Rule 501 of the Federal Rules of Evidence provides that common law privileges should be applied and interpreted by the courts "in the light of reason and experience." This Rule recognizes the general disfavor of testimonial privileges in federal practice.(fn30) Indeed, as the U.S. Supreme Court has stated, a "statute granting a privilege is to be strictly construed so as 'to avoid a construction that would suppress otherwise competent evidence.' "(fn31) Hence, privileges in federal courts are accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."(fn32) Given the federal courts' reluctance to recognize testimonial privileges, coupled with the liberty interests at stake in a criminal trial, the attorney-client privilege should fall where the attorney-defendant makes a sufficient showing of need.

Government counsel may also be in the position where it may seek to obtain and use attorney-client information to establish its criminal case. Because the government may likely be the holder of the privilege through the agency of the FDIC or the RTC, it is difficult to imagine a case where the privilege would not be waived by the FDIC or the RTC. Nonetheless, assuming that the privilege has been properly asserted and has not been waived by its holder, can the government defeat the testimonial privilege?

Government counsel may have sufficient facts to argue that the crime-fraud exception to the attorney-client privilege is applicable and, therefore, evidence not protected by the privilege and otherwise admissible at trial should be made available for the prosecution's use. To establish entitlement to the use of such privileged information under this exception, government counsel must make a sufficient showing that legal advice was obtained in furtherance of illegal or fraudulent activity.(fn33)

SHARING OF FEDERAL GRAND JURY INFORMATION

Perhaps one of the most significant changes made in the law with the enactment of FIRREA is the statutorily authorized sharing of grand jury information among civil and criminal government agencies.(fn34) The significance of this legislation is shown when placed in historical perspective. Grand jury proceedings are governed by rules of procedure designed to ensure secrecy. Historically, matters occurring before a federal grand jury have not been subject to disclosure to anyone except as provided for by Rule 6(e) of the Federal Rules of Criminal Procedure.(fn35) Rule 6(e)(3)(A) provides in pertinent part that disclosure of grand jury materials may be made to federal prosecutors "for use in the performance of such attorney's duty" and to "such government personnel ... as are deemed necessary ... to assist ... in the performance of such attorney's duty to enforce federal criminal law."(fn36) Outside of federal criminal investigations, disclosure of grand jury information has been strictly limited by Rule 6(e)(3)(C) to the following circumstances:

- (i) when *so directed by a court* preliminarily to or in connection with a judicial proceeding;
- (ii) when *permitted by a court* at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; ...
- (iv) when *permitted by a court* at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law....(fn37) [*Emphasis added.*]

This rule has been interpreted to require a party seeking disclosure to obtain court authorization based on a showing of a "particularized need" outweighing the public interest in grand jury secrecy.(fn38)

Within the Justice Department and its U.S. Attorneys' Offices, "firewalls" have been long established to protect grand jury information from being accessed by other government attorneys involved in *civil* matters. This protective procedure has been required because Rule 6(e) does not permit disclosure of grand jury material to any and all attorneys for the government, but only to those involved in criminal matters pending before the grand jury. Hence, a government attorney, previously uninvolved in the criminal aspects of the particular matter, but who nonetheless seeks to obtain grand jury information for civil purposes, may be denied access to grand jury information where he or she cannot show the requisite "particularized need."(fn39)

However, in the FIRREA legislation, Congress enacted a new statutory provision(fn40) stating that any attorney representing the government or anyone who has previously received grand jury information in the process of aiding a grand jury investigation(fn41) may make further disclosures of such information *without court authorization*. Subsection (a) of 18 U.S.C. § 3322 provides that these persons:

may disclose that information to an attorney for the government for use in enforcing section 951 [FIRREA, 12 U.S.C. § 1833a---the civil penalties for violations of FDIC laws] or for use in connection with civil forfeiture under section 981 of title 18, United States Code, of property described in section 981(a)(1)(C) of such title.(fn42) Subsection (b) of the statute authorizes disclosures, in addition to the above, on motion of the government and on a judicial finding that disclosure to a regulatory or other government civil enforcement agency is justified by "substantial need" rather than Rule 6(e)'s "particularized need."(fn43)

At the time this article was drafted, no reported case could be found addressing the validity of this new statutory

2027

2028

provision. Nonetheless, the courts may be required to address issues concerning the apparent conflicts related to disclosure of grand jury information between the court's rule (Rule 6) and Congress' statute (18 U.S.C. § 3322). Did Congress properly create a justified "banking-law" exception to the court's grand jury secrecy rule?

The traditional rule of secrecy governing grand jury proceedings has had a long and justified history. Not only does secrecy protect an innocent accused from the disclosure of unfounded accusations, but it serves to protect the independence of the entire grand jury process, as well as the privacy of those who may appear before the grand jury.^(fn44) Additionally, due to the historical limitations placed on disclosure of grand jury information, use of the grand jury's investigative power for an otherwise improper purpose---*i.e.*, investigating facts establishing a civil violation of the law ---was circumscribed where not otherwise specifically proscribed. The new statute's disclosure authorization plainly broadens the scope to persons otherwise restricted from obtaining such information, thereby altering the usual rules of grand jury procedure in banking cases.

Since Congress delegated its rule-making power to the courts to avail itself of the judiciary's expertise, congressional alteration of the court's rules has been and should be strictly limited.^(fn45) This deference to the judiciary is arguably more compelling here because the U.S. Constitution requires that federal criminal charges be brought solely by grand jury indictment. As a result, Congress' new statute may have yet unforeseen constitutional implications.

Given the significance of this new statute's authorization to share grand jury information with civil and administrative enforcement agencies, attorneys representing persons involved in savings and loan investigations should be aware that the "firewalls" are down at the Justice Department.

CONCLUSION

The insolvency of S&L institutions has and will continue to create a wide variety of novel legal and ethical problems for attorneys in Colorado. Difficult questions involving conflicts of interest will become more prevalent, not only for clients, but for the attorneys representing the various parties involved. Added complications will be apparent where constitutional rights and privilege issues are implicated.

Parallel civil and criminal proceedings may cause chaos in case management, but the publicized and extraordinary cost of the thrift industry bailout will undoubtedly increase the pressure on the government to proceed with all of its civil and criminal artillery. Lawyers representing clients involved in these civil and criminal investigations should be aware of the pitfalls presented by these extraordinary circumstances and be prepared to advise their clients accordingly.

NOTES

1. CCH Federal Banking Law Reporter, No. 1332 (April 13, 1990), p.2.
2. FIRREA, Public Law 101-73, 103 Stat. 183, enacted August 9, 1989.
3. CCH Federal Banking Law Report, Special Report No. 1298 (August 18, 1989), p.15.
4. See, FIRREA, *supra*, note 2, e.g., §§ 201 *et seq.*; §§ 501 *et seq.* and §§ 951 *et seq.* of the Act. See also, the corresponding criminal penalty and forfeiture amendments to 18 U.S.C. §§ 215 (accepting bribes or kickbacks for procuring loans); §§ 656-657 (embezzlement or misapplication of bank funds); § 981 (civil forfeiture); §§ 1005-1007 (forgery or false banking entries, reports); § 1014 (false statements); §§ 1341-1344 (mail, wire and bank fraud); § 1510(b)(1) (obstruction of banking-related investigation); and §§ 1961-1963 (RICO).
5. See, "Qui tam action," defined in *Black's Law Dictionary*, 5th ed. at 1126.
6. FIRREA, § 965.
7. FIRREA, § 966.
8. FIRREA, § 967.
9. "Bonfire of the S&Ls," *Newsweek*, CXV (May 21, 1990), 20-32.
10. FIRREA includes a new ten-year statute of limitations (18 U.S.C. § 3293) for offenses involving financial institutions, including violations of 18 U.S.C. §§ 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1341, 1343 and 1344, as well as conspiracy to commit those offenses.
11. The "loan officer" example should give rise to consideration of the application of the *D'Oench, Duhme* estoppel doctrine. In *D'Oench, Duhme & Co., Inc. v. FDIC*, 315 U.S. 447, 680 (1942), the Supreme Court established the doctrine which prohibits a borrower from alleging any type of secret agreement with a loan officer in an attempt to defeat any obligation owed the financial institution. See also, *FDIC v. Van Laanen*, 769 F.2d 666, 667 (10th Cir. 1985); 12 U.S.C. § 1823(e).
12. At this time, it should be evident to the RTC attorney that the interests of his or her client and those of the loan officer may be in conflict. The RTC attorney should suggest that

the loan officer consult independent legal counsel. *See*, DR 7-104(A)(2), Code of Professional Responsibility.

13. *Palermo v. First Nat'l Bank and Trust Co.*, 894 F.2d 363 (10th Cir. 1990); *Sharkey v. Security Bank and Trust Co.*, 651 F.Supp. 1231 (D. Minn. 1987).

14. *See, e.g.*, DR 7-105, Code of Professional Responsibility.

15. *Landis v. North American Co.*, 299 U.S. 248, 254-255, 57 S.Ct. 163, 165-66 (1936); *McSurley v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970).

16. *See, Landis v. North American Co.*, 299 U.S. 255, 57 S.Ct. 166 (1972) (party seeking a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else").

17. *See, United States v. Kordel*, 397 U.S. 1 (1970) at 11; *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1214-15 (8th Cir. 1973); *Gordon v. Federal Deposit Ins. Corp.*, 427 F.2d 578, 580 (D.C. Cir. 1970); *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3rd Cir. 1967).

18. *Kastigar v. United States*, 406 U.S. 441, 453-462 (1972). "Use immunity" leaves the witness in the same position that he was in before he was granted immunity; the witness may or may not be prosecuted, but his testimony cannot be used against him in a criminal prosecution. "Transactional immunity" is broader than the Fifth Amendment, providing the witness with immunity from prosecution as to each criminal event to which he testifies.

19. *Id.* Compare Colorado's pre-1983 general immunity statute, CRS § 13-90-118, which provided for transactional immunity, with the federal use immunity statute, 18 U.S.C. § 6002. Since 1983, Colorado's general immunity statute has been a use immunity statute. Nonetheless, CRS § 11-51-119 apparently continues to authorize Colorado's securities commissioner to grant *transactional immunity* to subpoenaed witnesses.

20. *In United States v. Bowen*, D. Colo. No. 89-CR-403, Federal District Judge Zita L. Weinshienk gave the jury the following instruction:

The defendant claims that he is not guilty of Count I because he acted on the basis of advice from his attorney,...

The defendant would not be "willfully" doing wrong if, before taking any action with regard to the alleged offense, he consulted in good faith an attorney whom he considered competent, made a full and accurate report to his attorney of all material facts of which he had the means of knowledge, and then acted strictly in accordance with the advice given to him by his attorney.

Whether the defendant acted in good faith for the purpose of seeking advice concerning questions about which he was in doubt, and whether he acted strictly in

accordance with the advice he received, are all questions for you to determine.

See also, Devitt & Blackmar, *Federal Jury Practice & Instructions*, § 14.12.

21. 750 F.2d 844 (11th Cir. 1985).

22. *Id.* at 853.

23. *Id.*

24. Rule 501, Federal Rules of Evidence; CRS § 13-90-107(1)(b); *People v. Silvola*, 547 P.2d 1283 (1976).

25. *Federal Deposit Ins. Corp. v. American Cas. Co. of Reading, Penn.*, Civ. Act. No. 88-M-1244, District of Colorado, order entered December 29, 1989.

26. *Id.* Judge Matsch also held that the FDIC was the holder of the bank's accountant-client privilege. Although the federal courts do not recognize an accountant-client privilege in criminal cases, state law controls privilege issues in civil cases. *See*, Rule 501, Federal Rules of Evidence.

27. *See*, *FDIC v. McAtee*, 124 F.R.D. 662 (D. Kan. 1988); *FDIC v. Amundson*, 682 F.Supp. 981 (D. Minn. 1988).

28. *See*, *Chambers v. Mississippi*, 410 U.S. 284 (1972) (defendant denied Sixth Amendment right when state's evidentiary rules prevented him from calling favorable witnesses).

29. *See, e.g.*, *United States v. Brown*, 634 F.2d 819 (5th Cir. 1981) (concerning privilege giving way to Sixth Amendment right).

30. *See*, *United States v. Zolin*, 109 S.Ct. 2619, 2625-2626 (1989); *Trammel v. United States*, 445 U.S. 40, 50 (1980); *United States v. Nixon*, 418 U.S. 683, 710 (1974); *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981).

31. *Baldrige v. Shapiro*, 455 U.S. 345 (1982), quoting, *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961).

32. *Trammel*, *supra*, note 30.

33. See, *United States v. Zolin*, 109 S.Ct. 2619, 2626, n.7 (1989), wherein the Supreme Court noted that the quantum of proof required to establish admissibility of evidence under the crime-fraud exception remains subject to question.

34. See, 18 U.S.C. § 3322.

35. As a general rule, no one is permitted access to a federal grand jury room other than the grand jurors, the prosecutor and a testifying witness. A witness' counsel may be available outside the grand jury room to provide legal advice to his or her testifying client, but the attorney cannot be present in the grand jury room itself. See, Fed. R. Crim.P. 6(d); *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

36. Fed. R. Crim.P. 6(e)(3)(A)(i) and (ii).

37. Fed. R. Crim.P. 6(e)(3)(C).

38. See, *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 442-444 (1983).

39. *United States v. John Doe, Inc. I*, 107 S.Ct. 1656, 1663 (1987); *Sells, supra*, note 38.

40. 18 U.S.C. § 3322.

41. Disclosures authorized by Fed. R. Crim.P. 6(e)(3)(A)(ii).

42. 18 U.S.C. § 3322(a).

43. 18 U.S.C. § 3322(b).

44. See, *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979).

45. See, e.g., *In re Grand Jury Proceedings*, 558 F.Supp 532 (D.Va. 1983).