



# Chapter 3

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## Charging and Plea Bargaining

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## WHO TO INDICT

In deciding who to charge in the typical bookstore, video store, or movie theatre case, it is generally advisable to charge as many persons associated with the crime as possible, including all low-level employees up to, and including, the owner. You should charge all individuals and corporations with multiple counts, and as co-conspirators or *co*-principals where possible. Moreover, even if the actual owner is unknown, all known employees should be charged. Quite often the establishment is purportedly "owned" by a corporation, which serves as a mere shell to hide the actual owner. These "shell" corporations should be included as co-defendants.

There are a number of reasons for charging as many employees as possible. While obtaining convictions against low-level employees alone will not necessarily force the offending business into compliance with the law, it will deter employees from continuing the violations and may encourage employees to testify or provide information. Such establishments often retain and pay for common defense counsel, as well as pay fines for convicted employees. Obscenity convictions therefore increase the cost of doing illegal business, and may discourage the further distribution of hard-core pornography. Further, low-level employees will often agree to turn "state's evidence" in return for a favorable plea agreement. Such employees often have little loyalty to the owner. In this way, valuable information and evidence may be obtained concerning the identity and scienter of the true owner or local operator. Moreover, while judges rarely impose imprisonment on low-level employees, at least on first conviction, some jurisdictions retain jury sentencing. In jury sentencing states, the likelihood of obtaining jail time against such employees is greatly enhanced. If just a few employees are sentenced to jail, a general ripple effect is created in the local retail porno industry. This decreases the likelihood that new illegal establishments will open, and also has a deterrent effect on the continued operation of those already doing illegal business. It will also increase the level of cooperation of other low-level employees. Also, charging all known conspirators, and all types of outlets distributing hard-core material (such as theatres, bookstores, video stores), eliminates equal protection and selective enforcement claims. See: *State v. Flynt*, 407 N.E.2d 15 (Ohio 1980), writ dismissed for want of jurisdiction after argument, 451 U.S. 619 (1981); *Starley v. City of Birmingham*, 377 So.2d 1131 (Ala. Crim. App. 1979) cert. denied, 446 U.S. 956 (1980); *People v. Mantel*, 388 N.Y.S.2d 565 (Crim. Ct. N.Y.C. 1976); 227 *Book Center v. Codd*, 381 F.Supp. 1111 (S.D.N.Y. 1974).

## CONFLICTS OF INTEREST

By charging all employees as well as the owner, conflicts of interest may result among these individuals as defendants. If conflicts of interest arise, it will be difficult for them to share common counsel. A common defense attorney faces serious ethical questions in attempting to represent all parties in such a case. As a consequence, it is more likely that separate counsel will be employed, thus increasing the prosecutor's opportunity to use a plea bargain to obtain an employee's testimony.

If it does appear that the bookstore or theatre owner is paying the fee for an employee's attorney, the arrangement may constitute a violation of the employee's Sixth Amendment right to representation that is free from conflict of interest. See: *Wood v. Georgia*, 450 U.S. 261 (1981); *Simpson v. Georgia*, 450 U.S. 972 (1981). See also: *Flanagan v. United States*, 465 U.S. 259 (1984); *United States v. Dolan*, 570 F.2d 1177 (3rd Cir. 1978); *Fleming v. Georgia*, 270 S.E.2d 185 (Ga. 1980), *cert. denied*, 449 U.S. 904 (1980). In such a case, the prosecutor should file a motion to determine if defendant's constitutional rights are being violated.<sup>1</sup> If the establishment or a third party distributor is paying the defendant's fees, the attorney may be disqualified, and the employee defendant forced to obtain his own counsel or receive court appointed counsel. Such a motion (under *Wood v. Georgia*) will benefit the prosecutor in several ways as discussed above.<sup>2</sup> Since the prosecutor is primarily interested in convicting the owner, it will allow the prosecutor to deal with a defense counsel loyal to the employee, not the owner. Obviously, this may result in greater cooperation from the employee and his attorney. The motion will also help eliminate the risk that a conviction will later be reversed due to the attorney's conflict of interest or ineffective assistance, causing a violation of defendant's

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<sup>1</sup> Before making such motions the prosecutor should have more than a mere "hunch" or unsubstantiated newspaper reports. *U.S. v. Pryba*, 674 F.Supp. 1502 (E.D.Va. 1987).

<sup>2</sup> Working with a defense attorney who is loyal to his client and *not* his client's employer obviously benefits your search for the "true" owner of an "adult" business, but this is not your primary purpose in filing a motion to inquire into a possible conflict of interest. **As** attorneys, we have an ethical responsibility to ensure the "integrity" and "competence" of the legal profession; and **as** prosecuting attorneys, we have an additional responsibility to a defendant, and to the court, to ensure that a defendant receives a fair trial. If you suspect that defense counsel has a conflict of interest (in representing multiple defendants or by receiving payment from a third party), and if that attorney refuses to remove himself from the "conflict," then you have a **duty** to communicate your concerns to the court so it can make an inquiry. Note the Court's language in *Wood*, that it is difficult for a defendant to "waive" the conflict, since neither he nor his attorney can foresee the possible consequences during trial. Note also that a trial judge has the discretion to intervene and appoint or require new counsel where a conflict exists.

Sixth Amendment rights and requiring retrial.

*Wood v. Georgia* involved former employees of an "adult" movie theatre and bookstore convicted of distributing obscene materials. At their trial and probationary hearings they were represented by a single lawyer whose fees were paid by a third party — their employer. On appeal the Supreme Court vacated and remanded due to this apparent conflict of interest, ordering the trial court to "hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed..." 450 U.S. at 273.

In vacating and remanding, the Court reiterated a defendant's Sixth Amendment right to representation by counsel free of conflict of interest. 450 U.S. at 271. The Court recognized that a fee arrangement wherein a lawyer is paid by a third party operates in contravention of this right.<sup>3</sup>

Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party...Another kind of risk is present where, as here, the party paying the fees may have a long-range interest in establishing a legal precedent and could do so only if the interests of the defendants themselves were sacrificed.

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There is also a danger that petitioners' lawyer was influenced in his strategic decision by other improper considerations.

450 U.S. at 268-69, 268 n.14. The Supreme Court quoted the language of ABA Model Code of Professional Responsibility EC 5-23 (1980) with approval, stating:

A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers...[They] may be far more concerned with establishment or extension of legal principles than in the immediate

<sup>3</sup> See also *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) (requiring reversal when an apparent conflict of interest exists at the trial court stage). "Moreover, *Sullivan* mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Wood v. Georgia*, 450 U.S. at 272 n.18.

protection of the rights of the lawyer's individual client...[A] lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person....

450 U.S. at 270 n.17.

In *Simpson v. Georgia*, 450 U.S. 972 (1981), the Court vacated a judgment under the holding of *Wood v. Georgia*, due to conflict of interest of petitioners' lawyers. **As** in *Wood*, the petitioners were charged with distribution of obscene materials, and were convicted. Again, as in *Wood*, they were represented by a lawyer whose fees were paid by a third party. In light of *Wood*, the judgment was vacated and remanded.

The *Simpson* decision also indicates that it is quite difficult for a defendant to waive his Sixth Amendment right to a lawyer free of possible conflict of interest. See: 450 U.S. 972 (Justice White, dissenting). Further, mere acquiescence in the fee arrangement does not constitute a valid waiver of the right to independent counsel. *Wood v. Georgia*, 250 U.S. at 273 n.20, 274. Neither a defendant, nor his lawyer can foresee the possible consequences of the conflict of interest during the trial. As the court stated in *United States v. Dolan*, 570 F.2d 1177, 1181 (3rd Cir. 1978): "the judge may find that the waiver cannot be intelligently made simply because he is not in a position to inform the defendant of the foreseeable prejudices" such an arrangement may entail. Similarly the court in *Fleming v. Georgia*, 270 S.E. 2d 185, 187 (1980), *cert. denied*, 449 U.S. 904 (1980), stated that such an attempted waiver is fraught with dangers since even "[t]he Court is unaware of potential areas of conflict and can only allude to the possibilities in the most general terms...[T]he Court cannot be sure the defendant is sophisticated enough to understand." See also: *Wheat v. U.S.*, \_\_\_\_\_ U.S. \_\_\_\_\_, 100 L.Ed.2d 140 (1988). See Appendix L for Sample of Motion to determine conflict of interest.

## WHAT TO INDICT

The prosecutor should choose only explicit hard-core material as the basis for his charge. Where only simulated sex material is sold (as in many cities where prior enforcement has been successful), or where the medium is more public or accessible to minors (cable, subscription or satellite TV, dial-porn, drive-ins, etc.), convictions can still be obtained under the *Miller* test. Where both explicit and simulated is available, prosecutors almost always start with the more explicit. This

will increase the likelihood of success in meeting the patent offensiveness prong of the three-part *Miller* test, i.e., it will be more likely to offend the contemporary community standard.<sup>4</sup> In a videocassette case it is not advisable to charge more than two cassettes per trial. Showing more than one or two videocassettes to the jury runs the risk of desensitizing them. (They may at least get mad if forced to view several hours worth even if they think they are obscene.) Remember each cassette will be approximately 1-1/2 hours in length.

## HOW TO INDICT

While it is good practice to fully allege detailed facts and the specific statute involved in the charge, it is unnecessary to set forth the three-part *Miller* definition of obscenity. In describing the nature of the material, it is adequate to simply allege that the material is obscene as defined by statute or case law. See: *Hamling v. United States*, 418 U.S. 87 (1973). Scierter should also be alleged in the charge. *KMA, Inc. v. City of Newport News*, 323 S.E.2d 78 (Va. 1984); *State v. Dalene Burgun*, 359 N.E. 2d 1018 (Ohio Ct.App. 1976).

Separate acts of distribution of the same material may be charged as separate offenses. Hence, the sale of the same film or magazine at different times may constitute separate offenses. However, the uninterrupted showing of multiple movies for one admission is sometimes held to be one offense. See: *State of Georgia v. Adult Bookmart, Inc.*, 264 S.E.2d 273 (Ga.Ct.App. 1979); *State of Georgia v. Maxwell*, 264 S.E.2d 254 (Ga.Ct.App. 1979), *cert. denied*, 449 U.S. 889 (1980); and *Stancil v. State of Georgia*, 272 S.E.2d 511 (Ga.Ct.App. 1980), *cert. denied*, 451 U.S. 975 (1981). But showing the same movies on separate days for separate admissions should support separate offenses. *Isaac v. State*, 439 N.E.2d 1193 (Ind.Ct.App. 1982). A prosecutor may charge the defendant with separate counts for each magazine sold, even though they were purchased during a single transaction. *Educational Books, Inc. v.*

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<sup>4</sup> However, prosecutors over time should prosecute cases on a wide scope of material to show that community standards reach more than just "ABCDE" material (animals, bondage, children, deviants, excretory functions). Materials which do not even show penetration have been found obscene under the provisions of the *Miller* test. See: *Penthouse v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *Penthouse v. Webb*, 594 F.Supp. 1186 (N.D. Ga. 1984); *City of Belleville v. Morgan*, 376 N.E.2d 704 (Ill.App.Ct. 1978); *State v. Flynt*, 264 S.E.2d 669 (Ga.Ct.App. 1980), *cert. denied*, 449 U.S. 888 (1980). When a broad range of conduct and explicitness has been convicted, all similar and harder materials are clearly beyond community standards. This aids the prosecutor's position in the eyes of the judges, media and public, and removes the dealers' argument that his items are okay because others have worse. You don't want to inadvertently legalize any hard-core material by implying that only blood, goats, and kids are illegal.

*Comm.*, 323 S.E.2d 84 (Va. 1984). The showing of 33 different allegedly obscene films can support 33 separate indictments under the same statute. *KMA, Inc.* See also: *State v. VonWilks*, 362 S.E.2d 605, 609 (N.C.Ct.App. 1987), *State v. Smith, II*, 365 S.E.2d 631 (N.C.Ct.App. 1988).

Each item can be the subject of a separate count, and you should seek a separate judicial determination as to the obscenity of each. Therefore, you need not include more than one title in each count unless other circumstances warrant such strategy (mass seizures, shipments of several items in same package, multiple purchases and/or seizures joined in same title). *United States v. Thevis*, 526 F.2d 989, 993 (5th Cir. 1976); *State v. Hungerford*, 278 So.2d 33 (La. 1973); *State v. Curlson*, 192 N.W.2d 421 (Minn. 1971).

## PLEA BARGAINING

Prior to entering into plea agreements, you should take the steps outlined to eliminate the common representation of defendants by a single defense attorney. You should seek to obtain cooperation, testimony, and evidence from lower level employees against the owner. The plea agreement is obviously a valuable tool in this respect.

Except in the situation where an employee-defendant agrees to assist you, *always* seek to obtain jail time as part of the recommended punishment. Paying a fine is merely the cost of doing business to most pornographers. They simply adjust the price of their product and pass the fines on to the purchasers (or launder more drug or other criminal enterprise money to cover expenses). If actual jail time is not obtainable, always require suspended jail sentences and probation. In addition to the usual good behavior requirements, condition the suspension and probation on defendants having no involvement or association with any "adult entertainment" businesses. Should the defendant violate the conditions of the suspension or probation, move for revocation and imposition of the jail sentence.

## THE CORPORATE DEFENDANT

While it is preferable to charge the individual persons and officers of a corporation, also charge the corporate owner. A corporation cannot be put in jail, but it can pay fines when convicted. It can also be required to post a bond pending appeal. If it does not, you can seize

corporate property in satisfaction of the fine. A criminal conviction may also be grounds for revocation of the corporate charter by the state. If nothing else, doing business as usual becomes more difficult **and** a deterrent effect is created. As a matter of trial strategy, and under the federal constitution, corporations are not within the privilege against self-incrimination and can be subject to subpoena. Their failure to offer evidence can, in some respects, be commented upon during trial, but must be done cautiously. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968); *United States v. White*, 322 U.S. 694 (1944).