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Talk Is Cheap: The Misuse of 'Speaking' Indictments

In white collar fraud, public corruption and other high-profile cases, DOJ prosecutors sometimes go well beyond the"notice" principle and draft thick indictments laying out in conclusory language the regulatory schema surrounding the challenged conduct; public policy rationales for the laws and regulation said to be violated; alleged motives of defendants; and the government's inferences from alleged facts ("connecting the dots") — all under section headings or captions advocating the government's view.

By Ronald H. Levine

The term "speaking indictment" refers to indictments that go beyond the Fed.R.Crim.P. 7(c)(1) requirement of a "plain, concise and definite written statement of the essential facts constituting the offense charged" — *i.e.*, an indictment that does more than simply track the statutory charging language and state the who, what, when, where and the elements of the crime, the manner and means, and, for Section 371 conspiracies, overt acts. The use of speaking indictments is often justified as providing notice to defendants of allegations the absence of which might otherwise provoke pretrial motions to dismiss or for a bill of particulars. *See* Department of Justice (DOJ) Criminal Resource Manual at § 214 ("The [indictment] drafter must afford the defendant … a document … that is *sufficiently descriptive to permit the defendant to prepare a defense*, and to invoke the double jeopardy provision of the Fifth Amendment, if appropriate.") (emphasis added). Indeed, prosecutors and courts often cite to "speaking indictments" as a reason to deny a defense motion for a bill of particulars. *See*, *e.g.*, *United States v. Schaefer*, 2016 U.S. Dist. LEXIS 51897 *9-12 (N.D.Ind. April 19, 2016).

However, in white collar fraud, public corruption and other high-profile cases, DOJ prosecutors sometimes go well beyond this "notice" principle and draft thick indictments laying out in conclusory language the regulatory schema surrounding the challenged conduct; public policy rationales for the laws and regulation said to be violated; alleged motives of defendants; and the government's inferences from alleged facts ("connecting the dots") — all under section headings or captions advocating the government's view. The recent securities and FDA fraud indictment of Acclarent executives is a good example. *United States v. Facteau*, 15 CR 10076 (D.Ma. indictment filed April 8, 2015); *see also*, *e.g.*, *United States v. Mahaffy*, 446 F. Supp. 2d 115, 118-19 (E.D.N.Y. 2006) (underlined and capitalized indictment captions referring to front-running, bribery, cover-up and lying to investigators); *United States v. Sattar*, 314 F. Supp. 2d 279, 320-21 (S.D.N.Y. 2004) (Rule 7 does not prohibit "background" section consisting of 27 introductory paragraphs not a part of any count). Sometimes the indictment even contains a table of contents.

In other words, by design, the government's speaking indictments advocate a story — one usually reserved for opening and closing jury arguments, but now intended for the news media, the jury pool and the

trial jury. *See* Crafting Helpful Indictments, *United States Attorneys' USA Bulletin* at 9, 18 (July 1998) ("An indictment … is an advocacy tool … 'Speaking indictments' are more effective because they help notify the defense, court and jury of the Government's theory.").

Costs and Benefits of A Speaking Indictment

It is not necessarily all bad. By laying out evidence, theories and arguments that otherwise might not become as explicit until trial, advocacy speaking indictments can help the defense prepare, and can also provide grounds for pretrial motions. However, the potential benefit to the defense of additional notice should be weighed against the costs of these "advocacy" speaking indictments on a case-specific basis.

Front-End

At the front-end of prosecutions, speaking indictments frequently provide sensational content for jury–pool-tainting press releases and ongoing press coverage. Federal regulations and DOJ policy limit DOJ press disclosures to the defendant's demographics, the charge, the identity of the investigating agencies and items seized upon arrest. 28 C.F.R. § 50.2(b)(3); accord U.S.A.M. 1-7.520. These regulations and policy also forbid, among other things, making "[s]tatements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial." 28 C.F.R. § 50.2(b)(6)(v); accord U.S.A.M. § 1-7.550. Prosecutors should "avoid any statement or presentation that would prejudice the fairness of any subsequent legal proceeding." U.S.A.M. § 1-7.401(H). They are also instructed to avoid disclosures that create the "substantial likelihood of materially prejudicing an adjudicative proceeding." U.S.A.M. § 1-7.500.

Yet the DOJ's policy carves out a huge safe harbor for prosecutors. For post-indictment, pre-conviction matters, press communications "should be limited to the information contained in an indictment … " U.S.A.M. § 1-7.401(D). So, information contained in an indictment is fair game, advocacy speaking indictments contain a lot of "information" and indictments are matters of public record anyway. For prosecutors, it's game on.

Back-End

At the back-end of prosecutions that go to trial, "advocacy" speaking indictments may afford the government a second, and this time *ex parte*, closing argument to the jury. This occurs if and when the trial court reads from the indictment or sends it back with the jury during its deliberations.

Practical Responses To Advocacy Speaking Indictments

Move to Strike Surplusage

Language that is not essential to the indictment, irrelevant to the allegations and prejudicial should be stricken as surplusage under Fed.R.Crim.P. 7(d). *United States v Hedgepeth*, 434 F.3d 609, 612 (3d Cir. 2006). As the trial court has wide discretion, and courts "generally will not strike portions of an indictment that allege facts that the government will be permitted to prove at trial" (*United States v. Weaver*, 2014 U.S. Dist. LEXIS 4162 *12 (E.D.N.Y. Jan. 10, 2014) (citation omitted)), surplusage motions rarely gain sufficient traction to fundamentally modify an indictment. *But see*, *e.g.*, *United States v. Renzi*, 2009 U.S. Dist. LEXIS 35969 *10-14 (D.Az. Jan. 14, 2009) (allegations regarding civil laws and House rules stricken). While a relatively weak weapon in the face of an advocacy speaking indictment, a surplusage motion may sensitize the court to reasons why the indictment should not go back with the jury. That is no small accomplishment.

Draft Points for Charge and Verdict Slip

The government often argues in complex cases that the speaking indictment "has" to go back with the jury to enable the jury to keep the charges straight while evaluating large amounts of evidence. One might hope that the government would demonstrate such concern for jury comprehension upfront when it drafts indictments and determines its manner of proof at trial. That aside, the notion that the jury "needs" the government's one-sided narrative in order to deliberate fails as a matter of logic and fairness under an adversary system. If, instead, the defense submits proposed jury instructions and a verdict slip which sufficiently and neutrally apprise the jury of the linkage between the law and the charges, that should suffice for jury comprehension. If those instructions go back with the jury, as often happens these days, all the better for keeping the indictment out of the jury deliberation room.

Battle to Keep the Speaking Indictment from Going Back With the Jury

Sending the indictment back with the jury seems to be a long-standing default position of many courts:

"[I]n protracted cases involving numerous counts … reference to the indictment often serves as a helpful guide in delineating the issues the jury may be called on to decide. … The decision to do so rests in the sound discretion of the court." *United States v. Fawwaz*, 2015 U.S. Dist. LEXIS 59839 *9-10 (S.D.N.Y.

May 6, 2015) (citation omitted); *United States v. Mumford*, 630 F.2d 1023, 1029 (4th Cir. 1980) (contention that the court erred in submitting a lengthy "speaking" indictment to the jury is "untenable"). It is permissible so long as cautionary instructions are provided.

Accordingly, the battle to keep the indictment from the jury, or at least to redact its argumentative and unfairly prejudicial sections, should commence well before the close of evidence. Early on, the defense should seek to sensitize the court to the inflammatory or prejudicial aspects of the indictment (and resulting press coverage) and/or to the fundamental inequity of having the one-sided speaking indictment go back with the jury. Defense efforts may include: references to those aspects of the indictment in pretrial advocacy regarding *voir dire* and jury questionnaires; if justified, pre-trial motions for production of legal instructions to the grand jury, to strike surplusage and/or to change venue; taking the laboring oar on certain points for charge and the verdict slip, as discussed; and filing of record, if need be, an objection or motion to redact or to keep the indictment from going out with jury. Hopefully, this causes the court to re-examine the illogic of that practice.

There is support for the defense position. As the U.S. Court of Appeals for the Second Circuit said:

Indeed, while it is permissible … to send the indictment into the jury room, *the practice is hardly mandatory, and not all trial judges follow it, particularly when the indictment* does not merely state the statutory charges against the defendant, but additionally *contains a running narrative of the government's version of the facts of the case*, including detailed allegations of facts not necessary for the jury to find in order to address the elements of the charged offenses. In most cases, the judge's instructions regarding the issues to be addressed by the jury and the elements of the offenses charged, which may include a reading of the legally effective portions of the indictment, will more than suffice to apprise the jury of the charges before them.

United States v. Esso, 684 F.3d 347, 352 n.5 (2d Cir. 2012) (emphasis added); *see also United States v. Cirami*, 510 F.2d 69, 74 (2d Cir. 1975) (expressing no view as to whether juries should inspect the indictment in any or all criminal prosecutions).

At least one court apparently has a practice of not sending speaking indictments out. *United States v. Cadden*, 2016 U.S. Dist. LEXIS 58706 *28-29 (D.Mass. May 3, 2016) ("the potential for prejudice inherent in the structure of indictment … is not insurmountable … as is its practice in the case of "speaking" indictments, the court will not have the indictment read to the jurors, nor will the jury be given a copy for its perusal during their deliberations).

Other courts have indicated, at least, hesitation about the prospect of exposing the jury to a speaking indictment. *United States v. Roy*, 609 Fed. Appx. 15 *18 (2d Cir. 2015) (no legal requirement that jurors be provided with a copy of an indictment); *United States v. Kelly*, 349 F.2d 720, 765 (2d Cir. 1965) (court found no prejudice, given cautionary instruction, but noted, "This indictment was too long, too detailed and too involved for us to suppose reading it would be helpful to the jury."); *see also United States v. Watts*, 934 F. Supp. 2d 451, 491-92 (E.D.N.Y 2013) (court elects to read to the jury only a summary of the four counts with which the defendant is charged at the opening of trial).

Conclusion

The government's power to craft charges in the context of severe advisory sentencing guidelines already tilts the playing field. The outsized number of plea agreements and the dearth of trials attest to this. The deployment of speaking indictments, sparking inflammatory media coverage and providing a second government closing argument in the jury deliberation room, should be circumscribed by the courts, contested by defense counsel and re-examined by DOJ policymakers. As the U.S. Court of Appeals for the D.C. Circuit put it: "Despite the all too common use of 'speaking' indictments, the function of a federal indictment is to state concisely the essential facts constituting the offense, not how the government plans to go about proving them." *United States v. Edmond*, 924 F.2d 261, 269 (D.C. Cir. 1991) (citation omitted).

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