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## Risks of Criminal Liability for Union Business Agents

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INTRODUCTION

This paper discusses some of the risks of violating criminal laws that union stewards and business agents encounter in connection with representing employees. It is not about RICO.<sup>1</sup> The analysis is particularly focused on the types of crimes they might commit inadvertently in grievance meetings with management, when preparing and presenting cases in labor arbitrations and in representing and advising employees in matters such as worker's compensation and unemployment compensation proceedings. The potential for criminal liability is discussed for business agents and union stewards in both the public and private sectors. While most business agents or stewards would not intentionally commit most of the crimes found in state penal codes when representing employees, there are several crimes that they may commit or be at risk of committing without realizing the potential for such.

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<sup>1</sup> 18 U.S.C. §§ 1961-1968.

Nearly all of the examples of cases in which business agents or stewards committed or nearly committed crimes given below arose in cases the author heard as Arbitrator. This is not to say that in every instance I heard about the union steward or business agent was guilty of or was convicted of a crime. It is, however, to say that they got too close to a sometimes dim line between being a good investigator or advocate giving good advice and committing a crime. Moreover, it is believed that union stewards and business agents are not adequately warned of these risks in their training.<sup>2</sup>

My paper is organized as follows: First, I will discuss the legal setting in which business agents and union stewards work and what they do in a general way, and then make a few comments about their work environment. Second, I will summarize the elements of several crimes stewards and business agents might commit. Third, sprinkled throughout are some of my opinions about what stewards and business agents can do to avoid committing crimes and still effectively represent employees. Hopefully, attorneys advising unions as well as union stewards and business agents who read this paper will be better prepared to decrease the risk of engaging in criminal conduct.

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<sup>2</sup> This subject is not covered in Schwartz, The Legal Rights of Union Stewards (2<sup>nd</sup> ed., 1988) or Prosten, Ed., The Union Steward's Complete Guide (2<sup>nd</sup> ed., 2006).

## GENERAL BACKGROUND

The National Labor Relations Act imposes on employers the duty to bargain with a union which the National Labor Relations Board has certified as the exclusive representative of the employees in an appropriate bargaining unit. After bargaining the company and union often enter a contract setting forth the terms and conditions of employment, sometimes including certain rights of the union officials.<sup>3</sup> Typically, labor contracts provide that management runs the plant, determines the products to be produced and the like. Labor contracts also generally deal with the matter of employee conduct, wages and discipline, either in the contract itself or in work rules. When company management makes a decision, whether it be to discipline an employee or to assign overtime work, there is in the typical labor contract a grievance procedure through which management decisions can be challenged for being in violation of the contract. Labor contracts generally provide for union representation of employees by union stewards at the initial stage of the grievance procedure. At the later stages of the grievance procedure, a union business agent generally becomes involved.<sup>4</sup> The final step in the grievance procedure is usually arbitration.

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<sup>3</sup> See generally I Developing Labor Law (Parts III and IV, 5<sup>th</sup> ed. 2006).

<sup>4</sup> See generally Elkouri & Elkouri, How Arbitration Works, Ch. 2 (5<sup>th</sup> ed. 1997).

Union stewards are generally employees of the company who are in the bargaining unit represented by the union and who have been elected or appointed to serve in that capacity. In rank, they are beneath union presidents and other union officers, including union business agents who are usually full-time employees of the union. When an employee has a problem at work, whether being laid off, discharged, or being denied an overtime opportunity, generally the first person the employee will contact is the union steward. In many situations, the union steward will know little or nothing about the employee's complaint prior to hearing about it from the employee. In other situations, such as an anticipated layoff, the union steward may already be familiar with the problem. Similarly, employees may not know the precise provision of the contract they think has been violated. They are more likely to have a general belief that the Company did something to them that was wrong or unfair. Conversations between the employee and the steward at this point, which occur before the union files a grievance, are likely to be spontaneous, disorganized, and sometimes emotional. For example, an employee who has just been told he is fired is likely to be angry, frightened and confused.

Union business agents are often exposed to the same risks as union stewards, but their involvement in a dispute usually comes later, hopefully

after a period of thought and reflection. An experienced business agent is likely to be more familiar with the interpretation of labor contracts than a steward. Further, as full-time employees of the union, they are probably more experienced and better trained, and hence are better able to anticipate some of the problems described below.

In the overall scheme of things, the risk of a union steward or business agent committing a crime may not be great, as might be inferred from the dearth of published cases cited herein. However, the lack of published decisions involving union stewards and business agents convicted of crimes while performing their representational duties is probably the result of the nature of the crimes they may inadvertently commit and the fact that they do not generally have prior criminal records. Another circumstance contributing to the steward's or the business agent's risk of becoming involved in a crime is the fact that conversation with an employee about one subject may involve very little risk of criminal activity, whereas conversing or giving similar advice about another subject may involve a significant risk of engaging in criminal conduct. In any event, potential criminal liability is a risk about which union stewards and business agents should be knowledgeable.

One or two illustrations may put this in sharper focus. If an employee came to a union steward and said, "The company has discharged me for

absenteeism, and I would like to file a grievance,” one of the first things that the union steward would do is to get the employee’s attendance record and learn all of the days on which the employee was absent. Very early in the steward’s investigation he would ask the grievant why was he was absent on the various days in order to learn whether any of the absences were unavoidable and perhaps excusable under the company’s absenteeism policy. Quite naturally, the union steward would ask questions like, “Were you sick on any of the days you were absent? Was some member of your family sick or was there a death in your family on a certain day you were absent? Were you in a car wreck?” A competent union steward would assist the employee in developing reasons for his absences. As will be seen in detail below, the union steward would commit a crime in some states if the employee was a public employee and he suggested to the employee that he get a doctor’s excuse to cover one of the absences, or that he alter a doctor’s excuse if the steward knew the employee was not sick on the day of the excuse.

Similarly, if an employee were discharged for assaulting another employee or supervisor, one would expect a competent union steward to investigate the case and attempt to learn exactly why the employee assaulted a fellow worker or supervisor. He would seek to locate other witnesses to

the incident; he would ask the grievant as well as other employees if the victim of the assault somehow provoked the grievant, and many other things. He would attempt to get other employees to tell a story that put the grievant in a good light. All of this would be expected of a competent union steward or business agent. However, in the context of an employee who may have committed some kind of work-related crime, such as possession of narcotics on company property, the union steward asking the same kinds of questions and making the same kinds of suggestions suggested by the answers to the above questions that he might make in an absenteeism or assault case could result in the union steward being guilty of criminal conduct.

One final introductory point is necessary. Throughout criminal law, there are specific crimes such as criminal trespass, perjury and tampering with witnesses or documents. There are also other crimes which are closely associated with these crimes, such as being an accessory, being complicit in a crime and conspiring to commit these crimes. For the business agent or steward, the difference between committing criminal trespass, being complicit in criminal trespass or conspiring to commit criminal trespass is only slight. The business agent who refuses to leave a plant at the end of a grievance meeting may commit criminal trespass. If he says to the employee, "Let's refuse to leave the premises," he is soliciting someone else



to commit a criminal trespass. The same thing is true of perjury or any other crime a steward might commit. If a business agent lies under oath in an official proceeding, he commits perjury. If he advises the employee to lie under oath, he is guilty of subornation of perjury under the law of most states. Because the related offenses such as complicity, solicitation and conspiracy, are often so factually related to the substantive offense, I have chosen to discuss the related offenses together with the actual offenses in this paper rather than have separate sections on complicity, solicitation and conspiracy for each crime. They are set out in the footnote.<sup>5</sup> Throughout the article I will generally refer to the elements of crimes as defined in the

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<sup>5</sup> Complicity is found in Section 2.06 of the Model Penal Code and is defined as follows: (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both. (2) A person is legally accountable for the conduct of another person when: (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or (c) he is an accomplice of such other person in the commission of the offense. (3) A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or (b) his conduct is expressly declared by law to establish his complicity.

Model Penal Code § 5.02(1) defines “solicitation” as: “A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted submission.

Model Penal Code §5.03(1) defines “conspiracy” thusly: “A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Model Penal Code. However, there are places in which reference will be made to federal criminal statutes.

## CRIMINAL TRESPASS

Criminal statutes in nearly every state provide that “criminal trespass” is a misdemeanor. A criminal trespass occurs when the defendant enters or remains in a place where he/she is not licensed or privileged to be.<sup>6</sup>

Union stewards would violate this statute if they refused to leave the personnel office of an employer after being specifically directed to do so by the company. This is a crime which a union steward or business agent could commit very easily if a heated grievance meeting with management got out of hand. Generally cooler heads prevail. Nevertheless, stewards and business agents need to understand that when they are told, “This meeting is over. Please leave the plant,” that there may be criminal consequences for refusing to leave.

There are published decisions which hold that union representatives can be held liable under state criminal trespass statutes by refusing to leave

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<sup>6</sup> The Model Penal Code Section 221.2, Criminal Trespass, states: A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass has been given by: (a) actual communication to the actor; or (b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or (c) fencing or other enclosure manifestly designed to exclude intruders. An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation.

the employer's premises when not engaged in lawful Union activity. For example, in State v. McDermott,<sup>7</sup> the Defendant union representative entered the employer's premises for the purpose of seeing that the employees obtained their rights under a labor contract. The company arranged for the union representative to meet with a shop steward in the company's personnel office. After this meeting, the business agent learned that company representatives were in the process of conducting discussion with employees regarding Union activities. Without the company's permission, the union representative left the personnel office and proceeded to a production area. The union representative was told to leave the production area but refused. The company had criminal charges brought against the union representative. The Connecticut Appellate Division upheld the conviction. In contrast, in In re Catalano,<sup>8</sup> the California Supreme Court held that where a Union business agent entered a job site to conduct lawful union activity, including a safety inspection and the preparation of certain reports, the business agent could not be found guilty of criminal trespass. The court thought the employer acted arbitrarily in directing the business agent to leave when he had entered the construction site for a lawful purpose.

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<sup>7</sup> 220 A.2d 38 (Conn. App., 1965).

<sup>8</sup> 29 Cal. 3d 1, 623 P.2d 228 (Cal., 1981).

Another case in which the criminal conviction of a union official for criminal trespass was upheld is State v. Otten.<sup>9</sup> Here, the Defendant, an employee of the AFSCME, which represented the employees at the Wayne County Care Center, entered the employer's premises upon learning that a member of the union was charged with abusing a resident. The defendant met with the employee for a pre-disciplinary meeting. During that discussion, the defendant learned that a resident wanted to make a statement on the employee's behalf. The defendant and the employee entered the resident's room and notified the Director of Nursing of this fact. The Director of Nursing told the employee and the defendant to leave the resident's room. Another employer official ordered the defendant to leave the resident's room, but the union representative refused to leave. Criminal trespass charges were filed. The trial court found the defendant guilty of criminal trespass. Even though the appellate court found the business agent's initial entry into the resident's room was proper, the defendant was convicted of violating the criminal trespass section of the Ohio criminal code. The court reasoned that since there had been no request by the resident for the defendant to visit with him, he had no privilege to remain in the resident's room. The resident never requested that the employer allow

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<sup>9</sup> 33 Ohio App.3d 339, 515 N.E.2d 1009 (Ohio App., 1986).

the defendant to remain in his room after the defendant was told to leave. In light of this circumstance, the employer's representatives were entitled to order the defendant to leave the resident's room. Since the defendant had no privilege to remain, the trial court correctly found the defendant negligently failed to leave in violation of the above-quoted statute. The conviction was affirmed.

A union business agent investigating a grievance or preparing a case for arbitration could easily run afoul of criminal trespass statutes. This could happen if the business agent entered the plant with permission, but went to places in the plant where he or she was not authorized to go or failed to leave the employer's property when requested. I was once involved in a case in which a business agent was threatened with this offense. He was photographing some of the employer's equipment for use in an arbitration, and the employer believed the photographs could divulge secret production processes. He was asked to leave and was finally escorted from the plant by a company security officer.

One can easily imagine a situation arising in which a steward or business agent would encourage or even tell other employees not to leave the employer's premises. If a group of employees became upset about a work practice or something they considered dangerous, one would almost

expect the steward to say, “We are not leaving until this is resolved.” Encouraging others to continue to trespass could subject the steward to a charge of criminal solicitation or possibly conspiracy. While such conduct is probably protected activity under Section 8(a)(1) of the National Labor Relations Act, it is not clear that criminal prosecution would be preempted.<sup>10</sup>

### TAMPERING WITH RECORDS

There are a number of situations in which union stewards or business agents could be guilty of “tampering with records” or other similar criminal statutes. Section 224.4 of the Model Penal Code defines this offense very broadly. It states: “A person commits a misdemeanor if, knowing that he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing.” It should be noted that this statute criminalizes several different acts, including falsification, destruction, removal and concealment of documents or records. It is also worth noting that Section 224.4 by its terms applies to private records as well as documents submitted to public agencies. A steward or business agent who either falsified production

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<sup>10</sup> *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 US 180 (1978); Gorman & Finkin, *Labor Law Note* at 1101 (“The question of determining precisely when the state’s action is trespass is preempted—a matter which arguably calls for a bright line rule for guidance of the parties—remained unreached by the Supreme Court.”).

records, attendance records, doctors' excuses or any of the many kinds of documents that are normally submitted to an employer or encouraged an employee to falsify such records would run afoul of this statute.

Tampering with public records or information is made a crime by Section 241.8<sup>11</sup> of the Model Penal Code. Such conduct is also a federal crime.<sup>12</sup> Both Sections 241.8 and 224.4 deal with the same kind of conduct. The major difference for present purposes is that Section 224.4 applies to any falsified document, and Section 241.8 applies to false documents submitted to a government agency. Of course, public sector employees would violate this statute by submitting a false document to their employer, as would a union steward who participated in that action. There are many private sector industries which are required to keep records that fall within Section 241.8 or a parallel federal statute. A sampling would include almost any company doing work under contract with a federal or state government

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<sup>11</sup> Section 241.8 reads, in part: (1) Offense Defined. A person commits an offense if he: (a) knowingly makes a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept by, the government for information or record, or required by law to be kept by others for information of the government; or (b) makes, presents or uses any record, document or thing knowing it to be false, and with purpose that it be taken as a genuine part of information or records referred to in paragraph (a); or (c) purposely and unlawfully destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing.

<sup>12</sup> 18 U.S.C.A. §1001 provides, in part: "(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully-- . . . (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry . . . shall be fined under this title or imprisoned not more than five years, or both."

agency, industries that are subject to OSHA,<sup>13</sup> DOT regulations,<sup>14</sup> and large segments of food production industries.<sup>15</sup> In a plant in which an employee, inspector or watchman has a designated inspection schedule or is expected to sign a document stating that he made a certain inspection or passed given check points at certain times, such records might be falsified to conceal the failure to inspect or patrol. If the records were of a type that were to be submitted to a governmental agency, a union steward's participation in, or perhaps having knowledge of, such falsification could put the steward in jeopardy.

I have heard many allegations that employees, sometimes on the advice of union officials, have falsified various kinds of documents that were submitted to the company which everyone understood could or would be passed on to a government agency. These have included doctor's excuses, a false x-ray that concealed a back injury, a bogus chauffeur's license and DOT log books. This can happen in a number of different settings. If, for example, the falsified doctor's note were submitted to support an unemployment compensation claim or a worker's compensation claim, that would be a crime under Section 241.8 of the Model Penal Code,

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<sup>13</sup> 29 U.S.C.A. §657;

<sup>14</sup> 49 U.S.C.A. § 14907, MSHA 30 U.S.C.A. §813.

<sup>15</sup> See generally 21 U.S.C.A. §301, *et seq.*



and a felony. The submission of a falsified chauffeur's license and DOT log book would violate several statutes.

A business agent should understand that sometimes a supervisor may instruct a bargaining unit employee to falsify documents such as those just described. I once heard a case in which a public employee was encouraged to falsify travel reimbursement vouchers. The discharged employee's supervisor actually signed the false reimbursement forms knowing they were false. When the fraud was discovered and the grievant was discharged, the discharged employee testified that his supervisor and the union business agent were involved in the scheme to defraud the government. If the grievant is to be believed, the union steward violated Section 241.8 of the Model Penal Code and federal law, or at a minimum conspired with the grievant to commit an offense or was complicit in it. The prudent business agent must also understand that employees who are being discharged may think that their best defense is to say that the union steward, business agent or supervisor advised them to make the false statement or to engage in some other criminal conduct.

I have also seen this in the coal mining industry. Union members working for coal mining companies sometimes fill out a document called a "fireboss" report. This report is nothing more than what the employee,

“fireboss,” observes on a pre-shift inspection of a coal mine. Falsifying this document is a crime under the Federal Mine Safety and Health Act.<sup>16</sup> A union official’s concurrence in or concealment of such a falsification is also a crime. There are a number of ways such documents could become relevant in a labor arbitration. For example, if employees were discharged for engaging in an unauthorized work stoppage, the union might want to use the fireboss logs to support a contention that the mine was dangerous and the employees were justified in not working. For at least 40 years there has been a provision in the National Bituminous Coal Wage Agreement permitting employees to refuse to work in an area of a mine if they reasonably believe they are in eminent danger of bodily injury. These logs can be falsified for many purposes, some of which benefit the company and some of which benefit the union or the employees. The employer might want the fireboss log falsified to avoid a fine or an order closing down the mine.

Another line of work in which documents rapidly find their way into government files is the manufacturing of aircraft parts or other types of work performed under government regulations or contracts. I once had a case in

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<sup>16</sup> 30 USCA § 820(f) provides: “Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than five years, or both.”

which the FAA told a manufacturer of aircraft parts to destroy some defective parts in a certain way so they would not get mixed up with parts that were to be used in commercial jets. Instead of destroying the parts as the FAA directed, an employee of the company sold the defective parts to a scrap dealer. The employer subsequently told the FAA what had happened. However, at my hearing the grievant testified that his supervisor told him to sell the parts to the scrap dealer and that he and his supervisor split the money he received from the scrap dealer. If a union steward participated in either the sale of the scrap to the scrap dealer or the submission of false information regarding the sale to employer and hence to the FAA, the steward could face criminal charges.<sup>17</sup>

One major risk for union stewards in this kind of situation is the complete unpredictability of the other people involved when the government begins a criminal investigation, especially when people who have never committed crimes or been interviewed by law enforcement agencies are threatened with criminal prosecution. There may be no better example of “a rat abandoning a sinking ship” than when an employee, a union representatives and a company official are all accused of a crime.<sup>18</sup> The

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<sup>17</sup> 410 FR Subpart 45.600.

<sup>18</sup> There clearly is. The Watergate scandal during the Nixon years was largely the story of one government employee who had committed a crime “telling on” others. Woodward & Bernstein, All the President’s Men.

union steward needs to understand that everyone will attempt to “save his own hide” first. I have heard cases in which the Union Steward’s main problem is seeing the problem very early and then saying, “No.” Once a pattern of document falsification is started, it is hard to stop. The following example illustrates the point.

I heard a case several years ago in which a union steward found himself in a rather precarious position, both with regard to the discharged employee and what he learned about a Company official who was involved in the case. The case involved an over the road truck driver who had to maintain a log book required by United States Department of Transportation regulations.<sup>19</sup> One company official learned that the grievant falsified his DOT logbook by overstating the number of hours that he rested on several different occasions.<sup>20</sup> The employee told the union steward that he had falsified his DOT logbook but said that he did so because the company’s dispatcher had ordered him to do so. The union steward, who was also a driver, talked to a number of employees who also told him that the dispatcher had directed them to falsify their DOT logbooks. Later, a business agent for the union became involved. At the arbitration, the dispatcher and other members of management denied any wrongdoing. The

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<sup>19</sup> The regulations are reproduced in the “Federal Motor Carrier Safety Regulations Pocketbook.”

<sup>20</sup> Federal Motor Carrier Safety Regulations, Part 395.8. My case arose before on-board recorders came into use.

union steward had secretly recorded telephone conversations between the dispatcher and himself, as well as other members of management. He told the business agent about his recordings. Eventually, the business agent conferred with the union's attorney, and reported everything they knew about the company's practices to the Department of Transportation. However, during my hearing the grievant testified that both the union steward and the dispatcher had told him to falsify his logs. It is clear that the driver's falsification of his log book would have violated Section 224.4 of the Model Penal Code, 49 USC § 521(b), 18 USCA § 1001, and Section 395.15(g)(3) of the DOT regulations. Had the union steward encouraged the driver to falsify his log book, he would have violated the complicity or conspiracy sections of the Model Penal Code, as well as federal law.

In the ordinary course of things, it is believed that an employee is more likely to falsify or destroy records in violation of Section 224.4 of the Model Penal Code than is a union steward or business agent. A more serious problem for the union steward occurs when the employee tells the steward about a record that demonstrates misconduct, such as a "punch" or "swipe" on a time clock which indicates that the employee was not at work when he should have been. The union steward would be guilty of a crime if he destroyed or changed the record himself. More importantly, he would be

guilty of several other crimes if he advised the employee to destroy or alter the record or told the employee how he might conceal his wrongdoing, possibly including solicitation or conspiracy. The matter of employees preparing false documents is a quite serious one in certain places of work, such as hospitals, nursing homes and mental institutions, where there are controlled substances, state regulations and patient privacy issues present. It is also a very sensitive matter in the public sector, such as in law enforcement agencies and in the defense and security sectors where statutes other than Section 224.4 may be applicable.

## PERJURY AND RELATED STATUTES

Before getting into the discussion of perjury and similar offenses, it should perhaps be noted that the author found no published cases involving business agents either suborning perjury or committing perjury in a labor arbitration hearings. From time to time, arbitrators have used the term “perjury” to describe testimony they found untrue.<sup>21</sup> These cases do not deal with whether such untruthful testimony constitutes perjury under a possibly applicable criminal statute. However, several of the cases found were public sector cases that, for some of the reasons discussed below, could constitute

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<sup>21</sup> Department of Homeland Security & American Border Patrol Council, 128 LA 737 (Cocalis, 2010); Metro Transit & ATO Local 1005, 127 LA 1643 (Neigh, 2010).

criminal perjury.<sup>22</sup> There are judicial decisions which discuss setting aside an arbitration award because “perjury” was committed at the arbitration hearing.<sup>23</sup> Such decisions do not impose criminal sanctions on anyone for the commission of perjury or false swearing. They contend that an arbitrator’s award should be set aside because an important witness lied at the arbitration. Those cases are not what this article is about.<sup>24</sup> This section is about the risk of a union steward or business agent committing or suborning perjury or making false statements in an arbitration, unemployment compensation or workers’ compensation hearing and subsequently being tried in the criminal courts.

When the non-lawyer thinks of the crime of perjury, consciously lying in a trial usually comes to mind. Similarly, when non-lawyers think of subornation of perjury, they usually think of one counseling or asking another person to lie in court. One would suppose that every business agent knows the risks of lying in court, so that point needs no further discussion. The crimes of perjury,<sup>25</sup> false swearing in official matters,<sup>26</sup> unsworn

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<sup>22</sup> For example, a public sector employee who submitted a false employment application to a public sector employer and is discharged for that act committed the crime of false statement in submitting the application with false information in it to a public employer. Lying about this matter in an arbitration hearing might not be perjury.

<sup>23</sup> Mitchell v. Ainbinder, 214 Fed.Appx. 565 (6<sup>th</sup> Cir. 2007). This was an action against a brokerage firm. The plaintiff sought to set aside an arbitration award on the theory that perjury was “fraud” and “undue means” under 9 USC 10(a)(1).

<sup>24</sup> Rolon v. Henneman, 517 F.3d 140 (2d Cir. 2008), suggests that one who lies in a public sector arbitration hearing could be charged with perjury.

<sup>25</sup> Section 241.1 of the Model Penal Code defines perjury. It states in part:

falsification to authorities<sup>27</sup> and tampering with witnesses<sup>28</sup> involve the

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(1) Offense defined. A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

<sup>26</sup> Section 241.2 of the Model Penal Code states in part: (1) False Swearing in Official Matters. A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a misdemeanor if: (a) the falsification occurs in an official proceeding; or (b) the falsification is intended to mislead a public servant in performing his official function.

18 U.S.C.A. § 1621 provides: Whoever (1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under Section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

[18 U.S.C.A. § 1001: (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
- (2) makes any materially false, fictitious, or fraudulent statement or representation; or
- (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than five years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than eight years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.)] THIS DOES NOT BELONG HERE. BRACKET IT.

<sup>27</sup> Section 241.3 of the Model Penal Code defines the crime of “unsworn falsification to authorities” as follows: (1) In General. A person commits a misdemeanor if, with purpose to mislead a public servant in performing his official function, he: (a) makes any written false statement which he does not believe to be true; or (b) purposely creates a false impression in a written application for any pecuniary or other benefit, by omitting information necessary to prevent statements therein from being misleading; or (c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or (d) submits or invites reliance on any sample, specimen, map, boundary-mark, or other object which he knows to be false.

<sup>28</sup> Section 241.6 of the Model Penal Code defines “tampering” as: (1) Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to: (a) testify or inform falsely; (b) withhold any testimony, information, document or thing; or (c) elude legal process summoning him to testify or supply evidence; or (d) absent himself from any proceeding or investigation to which he has been legally summoned. The offense is a felony of the third degree if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor.



making of or encouraging others knowingly to make false statements, false documents or encouraging others to do these things in an “official proceeding.” This is true under the under the Model Penal Code and most state and federal statutes. As can be seen from the footnotes, these statutes frequently deal with making false statements and the submission of false documents to public officials and in official proceedings, as well as encouraging or assisting another person to do the same thing. As is discussed in detail below, the precise boundaries or outer limits of the term “official proceedings” are not entirely clear, especially as related to arbitration. It is clear that workers’ compensation hearings and unemployment compensation hearings are official proceedings. So, either knowingly lying, encouraging another to lie or submitting false documents in such proceedings would be a crime.

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18 U.S.C.A. § 1512, the federal prohibition against tampering with witnesses, victims and informants states: (a)(1) Whoever kills or attempts to kill another person, with intent to—(A) prevent the attendance or testimony of any person in an official proceeding; (B) prevent the production of a record, document, or other object, in an official proceeding; or (C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be punished as provided in paragraph (2). (2) The punishment for an offense under this subsection is—(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in 1112; and (B) in the case of an attempt, imprisonment for not more than twenty years.

## OFFICIAL PROCEEDINGS

Sections 241.1 and 241.2 of the Model Penal Code, as well as many state statutes dealing with the subjects of perjury and false statements provide that the false statement must be made under oath or affirmation “in an official proceeding.” It should be noted that 18 U.S.C.A. § 1001 provides that making a false statement “in any matter within the jurisdiction of the executive or judicial branch of the federal government” is a crime. This is clearly a broader term than the term “official proceeding.” Whether a labor arbitration hearing is an “official proceeding” or a “matter within the jurisdiction of the executive or judicial branch of the federal government” is not a simple question. There could be a number of answers to this question, depending on the setting in which the arbitration occurred. Analogous proceedings at the federal and state levels do not seem consistent. It is clear that a trial in state or federal court is an official proceeding, as is a grand jury proceeding.<sup>29</sup> There is case law holding that a deposition in a civil trial is an official proceeding.<sup>30</sup> Furthermore, it is clear that if a witness lies in an unemployment compensation hearing or a workers’ compensation hearing, this would be a crime under most any perjury statute.<sup>31</sup>

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<sup>29</sup> US v. Streets, 401 Fed. App. 81 (6th Cir. 2010); US v. Kilgarin, 157 Fed. App. 716 (5<sup>th</sup> Cir. 2005); 60A Am. Jur.2d “Prejury,” §1,17; 60A Am. Jur.2d §40.

<sup>30</sup> US v. Garcia, 69 F.3d 810 (7th Cir. 1995).

<sup>31</sup> People v. Post, 94 Cal. App.4th 467 (2001); State v. Black, 2005 WL 2863007.

The judicial decisions applying the concept of “official proceeding” under perjury and related statutes in other types of situations that may be analogous to those encountered by a union steward or business agent do not all point in one direction. As already noted, several cases have held that false statements to a grand jury were made in official proceedings. False statements made to probation officials have been held to have been made in an official proceeding.<sup>32</sup> False statements in applications to be a court appointed attorney have been held to have been made in an official proceeding.<sup>33</sup>

In In re: Disciplinary Proceedings Against King,<sup>34</sup> a bar association disciplinary proceeding was held to be an official proceeding and submitting a false statement therein was perjury in violation of the state of Washington’s RCW 9A.72.020 and false swearing in violation of Washington law. However, proceedings before the “judicial commission” of a medical society were held not to be official proceedings authorized by law in Hackethal v. Weissbein.<sup>35</sup> In In re: Roberts,<sup>36</sup> it was held that false statements made while procuring a mortgage were not made in an official proceeding. The proceedings in the King and Hackethal cases seem

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<sup>32</sup> United States v. Vogel, 251 Fed. App. 399 (2007).

<sup>33</sup> People v. Schupper, 140 P.3d 293 (Colo. App. 2006).

<sup>34</sup> 232 P.3d 1095 (Wash. 2010).

<sup>35</sup> 24 Cal. 3d 55 (1979).

<sup>36</sup> 2009 WL 794486.

analogous to arbitration, worker's compensation and unemployment hearings, since arbitrators, worker's compensation and unemployment compensation administrative law judges are authorized to hear evidence under oath.<sup>37</sup>

The perjury statutes of several states define perjury to include false statements made "to any other officer authorized to administer oaths." For example, Kentucky law defines "official proceeding" as "a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or depositions in any such proceedings."<sup>38</sup>

State v. Jarrett<sup>39</sup> stated that it was perjury to testify falsely to any material fact "upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths." (Emphasis added). In most states and under the Federal Arbitration Act,<sup>40</sup> arbitrators are authorized to administer oaths. Under this analysis, if an arbitrator is "another officer," knowingly making false statements in material matters before an arbitrator would be perjury.

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<sup>37</sup> KRS 416.090; KRS 416.100.

<sup>38</sup> KRS 523.010(3); CITE AM JUR 2D ARB.

<sup>39</sup> 304 S.W.3d 151 (Mo. 2009)

<sup>40</sup> 9 USC § 1, et seq. (CHECK)

Similarly, in State v. Maynard,<sup>41</sup> the court said “official proceeding means any proceeding before a legislative, judicial, administrative or governmental body or official authorized by law to take evidence.” (Emphasis added). Arbitrators are clearly “authorized to take evidence” under state and federal law. A literal application of these cases leads to the conclusion that knowingly making false statements to an arbitrator is perjury.

It is clear from the foregoing that there is some doubt as to exactly what is and what is not an official proceeding for purposes of perjury and related statutes. It seems fairly clear to the author that this uncertainty in the cases points in one direction: there is a real risk in committing perjury, making false statements or subornation of perjury by making false statements or encouraging others to do so in arbitration hearings. It is worth noting that I am not taking into account the damage perjury in an arbitration can cause to the relationship of the parties and the reputation and effectiveness of the business agent who perjures him or herself.<sup>42</sup>

## DIFFERENT TYPES OF ARBITRATION HEARINGS

Whether making a false statement concerning a material matter in a labor arbitration is perjury because the falsehood was uttered under oath in

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<sup>41</sup> 926 A.2d 172 (Me. 2007),

<sup>42</sup> Tidwell, *The Effects of Perjury Committed at an Arbitration Hearing*, 38 Arb. J. No. 3, 44 (1983).

an “official proceeding” may depend on a variety of circumstances, other than the arbitrator’s authority to administer an oath and hear evidence, such as the nature of the appointing agency and whether the arbitration hearing is in a public or private sector case. If the arbitration were held pursuant to an agreement between a private company and a union, as for example a contract between X Corporation and Y Union, and the contract named an arbitrator or a group of arbitrators (without the involvement of any appointing agency), or if the parties knew a certain arbitrator and simply asked him or her to hear a case, there would seem to be very little basis to call the arbitration an “official proceeding” of a state, aside from the arbitrator’s authority to administer oaths and hear evidence, unless a state or federal arbitration statute makes it such. If the arbitrator were selected in a private sector case using the procedures of the American Arbitration Association, there would seem to be little basis for calling the hearing an “official proceeding” of a state, absent a state or federal statute making it such. The American Arbitration Association is a private organization, not a government agency. However, there may be some ambiguity here because of the wording of Rule 24 of the labor arbitration rules of the American Arbitration Association, which authorizes arbitrators to administer oaths.<sup>43</sup> The selection of an

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<sup>43</sup> Rule 24 states, in part: “The arbitrator may require witnesses to testify under oath administered by a duly

arbitrator in the private sector using the procedures of the Federal Mediation and Arbitration Service does not necessarily make the arbitration hearing a “public proceeding.” The regulations of the Federal Mediation and Conciliation Service state that the selection of an arbitrator by the parties to hear a case does not make the arbitrator an employee of the federal government. However, arbitrators appointed under FMCS procedures are authorized to administer oaths and hear testimony.<sup>44</sup>

That is not the end of the matter as far as FMCS and AAA appointments are concerned. Both of these agencies, along with some state and local government agencies, have procedures for the appointment of arbitrators to hear private and public sector labor cases. Furthermore, the applicability of state and federal arbitration statutes must be considered.

Various state and federal statutes authorizing and regulating arbitration could bear on the question of whether labor arbitration hearings are official proceedings, thereby making the above-mentioned criminal statutes applicable. The following is not intended to be an exhaustive analysis of such statutes, but rather a sampling of how state and federal arbitration statutes and regulations could bear on the question of whether

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qualified person and, if required by law or requested by either party, shall do so.”

<sup>44</sup> 29 C.F.R. § 1404.4(c).

labor arbitration hearings are “official proceedings” within the meanings of criminal statutes.

One common feature of state arbitration statutes is that these statutes say that agreements to arbitrate are binding and enforceable. They also generally authorize the arbitrator to administer oaths, take testimony and subpoena witnesses and documents. Enforcement of subpoenas, however, is generally left to the courts.<sup>45</sup> One could argue that statutes simply making arbitration awards enforceable does not make the arbitration process an “official proceeding.”

There is considerable variation in the degree to which state and federal statutes regulate arbitration. Some do it in great detail.<sup>46</sup> For example, Pennsylvania’s Uniform Arbitration Act, 42 Pa. CSA § 7302, provides for broad applicability of the Act. It applies to collective bargaining agreements and government contracts. Section 7303 states that agreements to arbitrate are “valid, enforceable” and generally “irrevocable.” Section 7304 authorizes legal actions to stay or compel arbitration. If a contract does not provide a method for appointing an arbitrator, Section 7305 authorizes the court to appoint the arbitrator. Section 7309 authorizes arbitrators to subpoena witnesses and order the production of documents. It

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<sup>45</sup> Elkouri & Elkouri, How Arbitration Works, 355-62 (6<sup>th</sup> Ed. 2003).

<sup>46</sup> See New York CPR § 7501, *et seq.*; 27 Ohio Revised Code § 2711.01, *et seq.*; Pa. CSA § 7301, *et seq.*



also gives arbitrators the power to administer oaths and compel witnesses to testify. However, it does not say that arbitration hearings are “official proceedings” for purposes of perjury and related statutes. The New York statutes and commentary on arbitration covers about 600 pages in Book 7B. Various sections deal with the effect of agreements to arbitrate, powers of the arbitrator, compelling arbitration, the hearing, the form of the award and modification of the award.

An argument can be made that private sector employers and unions which have a contractual duty to arbitrate under statutes such as New York’s and Pennsylvania’s are involved in an “official proceeding.” This could be inferred from the detail with which the entire process has been regulated by state law. However, it should be emphasized that no published New York or Pennsylvania case was found holding that labor arbitrations are “official proceedings” within the meaning of applicable perjury statutes. The author thinks that there is considerable risk that arbitrations could be held to be official proceedings under such statutes. Other states, including Ohio, Michigan and California, have very detailed arbitration statutes.

Somewhat different considerations are involved in determining whether labor arbitration hearings in the federal sector are subject to perjury and false statement statutes. All federal agencies which have contracts with

labor unions are authorized by statute or regulations to enter such contracts. That circumstance alone should go a long way toward making labor arbitration in the federal sector an “official proceeding.” 5 U.S.C.A. § 575, entitled “Authorization of Arbitration,” is found in a section of the United States Code dealing with federal personnel matters. Section 575(a)(1) states:

Arbitration may be used as an alternative means of dispute resolution whenever all parties consent. Consent may be obtained either before or after an issue in controversy has arisen. A party may agree to--

(A) submit only certain issues in controversy to arbitration; or

(B) arbitration on the condition that the award must be within range of possible outcomes.

5 U.S.C.A. § 578(1) gives the arbitrator the authority to “regulate the course of and conduct arbitral hearings,” as well as administer oaths and compel the attendance of witnesses and the production of documents. Other sections of this legislation deal with enforcement of arbitration awards, the authority of the arbitrator, arbitration proceedings and judicial review. When one considers these statutes along with statutes authorizing various federal agencies to enter labor agreements providing for arbitration,<sup>47</sup> a strong case

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<sup>47</sup> Several sections of 39 U.S.C.A., dealing with the United States Postal Service, could be said to support the conclusion that arbitration of disputes within that agency are official proceedings.

can be made for the proposition that labor arbitration in the federal sector is an official proceeding within the meaning of the federal perjury and false statement statutes.

A business agent representing a grievant in a public sector case could either make a false statement himself or could encourage or advise the employee to make a false statement under oath in an arbitration hearing. This could be the case with a public school teacher, an employee of a law enforcement agency, or in the case of a federal employee, an employee of the United States Postal Service, the Internal Revenue Service or a unionized section of the Department of Defense. As an example, consider a business agent telling or encouraging a public school teacher to lie about hitting a student. Lying in the hearing would be perjury or subornation of perjury only if it is concluded that the hearing is an official proceeding.

If, however, the business agent participated in writing a false report about striking a student in connection with the investigation of that matter which was submitted to the employer, both the business agent and the teacher could be guilty of the crime of making an unsworn false statement to authorities under Section 241.3 of the Model Penal Code.<sup>48</sup> If the employer

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<sup>48</sup> Section 241.3 of the Model Penal Code defines the crime of “unsworn falsification to authorities” as follows: (1) In General. A person commits a misdemeanor if, with purpose to mislead a public servant in performing his official function, he: (a) makes any written false statement which he does not believe to be true; or (b) purposely creates a false impression in a written application for any pecuniary or other benefit,

was a federal agency, such a misrepresentation would violate 18 U.S.C.A. § 1001.

Union business agents could also run afoul of Section 241.3 of the Model Penal Code by aiding in the submission of unsworn false statements while performing many different representational activities. A business agent assisting an employee with a claim for unemployment compensation who signs a document to be submitted to the unemployment compensation officials stating that the employee was not terminated for some kind of misconduct when, in fact, he had been, would be in violation of Section 241.3. Precisely the same thing could happen in the case of a business agent assisting an employee in a worker's compensation proceeding. Again, if the employer is the federal government, 18 U.S.C.A. § 1001 comes into play. As noted elsewhere, if a business agent knowingly made such a false statement in a hearing before either of these agencies, or encouraged the employee to do so or suborned perjury or was complicit or conspired, that would be a crime.

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by omitting information necessary to prevent statements therein from being misleading; or (c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or (d) submits or invites reliance on any sample, specimen, map, boundary-mark, or other object which he knows to be false. (2) Statements "Under Penalty." A person commits a petty misdemeanor if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable. (3) Perjury Provisions Applicable. Subsections (3) to (6) of Section 241.1 apply to the present Section.

## TAMPERING WITH WITNESSES

Tampering with witnesses and informants is prohibited by Section 241.6 of the Model Penal Code<sup>49</sup> as well as federal law.<sup>50</sup> Union officials have been accused of violating this statute on several occasions in my hearings. I once heard a case in which a police officer was called to a domestic dispute. When he arrived at the home, between ten and fifteen angry people were present. In trying to resolve the domestic dispute between a man and a woman, the officer eventually became the object of the anger of several onlookers. Some bystanders threatened him. The officer believed he was in danger, and he shot one of the individuals with a taser. A complaint was filed against the officer for using excessive force. The city investigated the matter. Officials of the police department interviewed a number of witnesses. The statements taken by the police department were both confusing and conflicting. Eventually, the city decided to discharge the police officer for improperly using a taser. There were allegations that the

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<sup>49</sup> (1) Tampering. A person commits an offense if, believing that an official proceeding or investigation is pending or about to be instituted, he attempts to induce or otherwise cause a witness or informant to: (a) testify or inform falsely; (b) withhold any testimony, information, document or thing; or (c) elude legal process summoning him to testify or supply evidence; or (d) absent himself from any proceeding or investigation to which he has been legally summoned. The offense is a felony of the third degree if the actor employs force, deception, threat or offer of pecuniary benefit. Otherwise it is a misdemeanor.

<sup>50</sup> 18 USCA §1512. See page 24, *supra*.

police officer was being made a scapegoat so that the police department could improve its image in a poor part of the city.

The union filed a grievance protesting the discharge of the officer. The union steward who investigated the case was an experienced criminal investigator. Some of the residents testified during the arbitration hearing that the police department had pressured them to testify against the police officer. Other witnesses said that the union steward tried to get them to falsify their testimony in favor of the police officer.

This union steward had to walk a tightrope during his investigation. The taser incident had been widely publicized. The political leadership in the city wanted the whole matter to go away. Many of the police officers felt that the grievant was being treated badly by the Police Department. There was great pressure on the union steward. He could easily have been charged with violating a state law version of Section 241.6 of the Model Penal Code. The city's investigation of the officer's official misconduct was an official proceeding of the city, and the union steward might have interfered with that investigation. Even if the arbitration of the officer's discharge was not an official proceeding, the potential for someone filing criminal charges against the union steward was real in this case. Had the

policeman been a federal official, the union steward would have been at risk of violating 18 USCA § 1512(b).

Another situation in which I was involved occurred at a federal installation at Hanford, Washington. The employer was a government contractor at a World War II-era nuclear facility. The company had a rule which prohibited employees from working for any other employer while on disability leave. An employee of the company performed work in her mother's small retail laundry in Hanford while she was on disability leave. The company discovered this and discharged the employee. The union defended on the theory that the daughter was not working for her mother because the mother did not pay her daughter anything. The company's main argument was that the union had procured the false testimony of the mother, who denied paying her daughter anything, and that the union induced the mother to destroy some checks she had written to her daughter.

This would have been a very easy case for a union steward to have committed several crimes while preparing the union's case for arbitration. The steward could have told the mother to deny having paid her daughter for working. The union steward might think there was little risk in the mother changing her testimony at some later date. However, there are several ways this could go very wrong for the union, the grievant and her mother.

Suppose, for example, in an unemployment compensation or worker's compensation proceeding where the fact of a payment to the daughter might not be crucial or perhaps relevant, and in the absence of both the company and the union, the mother said she paid the daughter. A union steward charged with either subornation or perjury or tampering with a witness or evidence in a criminal proceeding might successfully defend on the basis of lack of knowledge of any fraud. However, if either the mother or daughter changed their story, a jury could convict the union steward of either of these crimes.

It should also be noted that this is a situation in which the mother and daughter could be lying to the union steward. The conversation between the grievant, the union steward and the mother could have gone like this. Grievant: "The company fired me because they said I was working for another employer while on disability leave." Steward: "Did you work for anyone else?" Grievant: "No. I did help my mother a little." Steward: "According to the contract, you had to be paid before they can fire you. Did you get any money from your mother?" Grievant: "No." Also, if the grievant denied being paid, the steward might not believe the grievant but be tempted to go along with her story. Even if the grievant did admit being paid, it is easy to see how a business agent could think, "This is a little lie and no one



will ever be able to prove it.” In fact, someone else might learn the truth, and the union steward could be hurt badly. It is submitted that in the long term, the better course of action for the steward is being educated about the possibilities of tampering with witnesses and documents and subornation of perjury so as not to participate unwittingly in it. One way of mitigating this risk is taking signed written statements from potential witnesses. In sum, the steward should ask the mother about payments to the daughter and advise the daughter that if such payments were made, she violated company policy.

## TAMPERING WITH DOCUMENTS AND PHYSICAL EVIDENCE

Tampering with or fabricating physical evidence is made a crime by Section 241.7 of the Model Penal Code<sup>51</sup> as well as federal law.<sup>52</sup> This is an offense no business agent should commit or be a party to. In many cases the business agent has ample warning that an employee is considering

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<sup>51</sup> A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such proceeding or investigation.

<sup>52</sup> Several federal statutes including 18 USCA §1001 and 18 USCA § 1512 criminalize tampering with documents and physical evidence.

committing this offense, unlike the grievant in the case just discussed. It tends not to be the kind of crime one inadvertently commits.

I have heard the following scenario several times. An employee has brought marijuana or another controlled substance onto the company's property in violation of a work rule, and the employee's conduct, if proved, is a dischargeable offense. The employee is aware of the rule and the penalty. The company becomes suspicious that the employee has marijuana on company premises and calls the local police. The employee learns that the police are about to either search his locker or vehicle for the marijuana. On learning this, the employee asks the union steward what he should do next. The steward should not tell the employee to destroy the drugs, although I have heard cases where the union steward may have done that. The employee is ultimately charged with possession of marijuana. At his criminal trial, the employee testifies that the union steward told him, "Get your car off company property as quickly as possible and destroy any marijuana that is in the car." In this situation, the union steward could possibly be prosecuted for aiding in the concealment and destruction of physical evidence, as well as several other crimes, including criminal solicitation, complicity and obstruction of justice.

It is easy to visualize how an employee can “dribble out” a story bit by bit to the union steward. In turn, the union steward may start giving advice before he understands all of the consequences of the advice he is giving.

Consider again the situation in which an employee brings a controlled substance onto Company property, and the employee becomes suspicious that the Company and law enforcement officials are investigating him. The employee then consults the union steward. During the course of the conversation, either the union steward or the employee may suggest removing the controlled substance from the company property and possibly destroying it. It is possible that this would not be a straightforward suggestion of either the employee or the union steward. The conversation could be rambling and disorganized. The employee might lie to the union steward about certain facts, such as how often he brought drugs into the plant or about other employees who were doing the same thing. It is likely is that the two individuals would have a conversation about the exact location of the controlled substance, as well as the best method for getting the controlled substance off the company premises without being detected. Suppose that the controlled substance was actually a relatively small amount of cocaine which could be concealed on a person leaving the plant. The

business agent and the employee could have a fairly wide ranging conversation about the best method of getting the cocaine off company property without being detected in which the business agent could be anything from a complete listener to the one who was suggesting various methods of removing the controlled substance off the company property. For example, I once heard a case in which an employee got cocaine off company property by putting the cocaine in a condom and ingesting it before leaving the plant. The employee or the steward might suggest secretly placing the cocaine in another employee's lunch bucket and retrieving it after the other employee had left the plant. One of the individuals might suggest destroying the cocaine right on the Company premises by flushing it down a toilet or a drain. Depending on exactly what was said and done by the union steward and the employee, the union steward could commit a number of crimes.

A business agent or steward should also be aware of the way a standard police interrogation technique can be used by an employer against an accused employee in this kind of situation. The following illustrates the tactic. In mid- to large-sized cities, there are always a number of unsolved car thefts and burglaries. The police catch Jones in a stolen car. The police may "threaten" Jones with a very harsh penalty unless he tells them all he

knows about ten or fifteen other car thefts in his neighborhood. In order to avoid a harsh sentence, he may implicate several people in other reported car thefts. I have seen the very same technique used by employers. An IT employee working for a company found a large amount of pornography on the company's server, and management undertook an investigation. It had several very good business reasons for wanting to get to the bottom of this problem and to discipline everyone involved. When it found a certain employee's password or a piece of pornography, it would ask that employee to tell on every other employee he knew who sent or received pornography. It also promised these employees leniency if they cooperated, or if they did not, they would be fired. The same technique can be used in other kinds of employer investigations. In this case, one union representative was implicated by the use of this technique, as were some members of management.

A business agent should also understand that he can potentially be drawn into a crime very quickly and before he has any idea that he has criminal exposure. I once heard a case in which an employee of a federal government contractor was injured on the job. The contract between the company and the union provided that any employee who had an accident in the plant would be drug tested. The company also had a rule prohibiting the possession or use of drugs on company property. The company had issued

cell phones to its employees, and it recorded all conversations of its employees on these phones. A union steward drove the injured employee to a clinic to be drug tested following an accident. On the way, the injured employee made a call on his company-issued cell phone to his brother in which he said, “Meet me at the clinic as soon as possible. Bring a bottle of piss. I’m going to be drug tested, and I’m dirty.” The company eventually learned about this call.

The union steward who heard this statement, if questioned by law enforcement, could face the risk of violating several criminal statutes, depending on how he answered the officer’s questions. If he denied hearing the remark and it could be proved that he did hear it, he could be charged with making a false statement to the officer, obstruction of justice or impeding an official investigation. If he denied that the employee made the statement, he would be guilty of the same offenses and, in addition, he would have made a false statement to the officer. It must be noted here parenthetically that in most states a union business agent does not have a privilege to refuse to testify in criminal matters.<sup>53</sup>

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<sup>53</sup>See Moberly, Extending a Qualified Evidentiary Privilege to Confidential Communications Between Employees and Their Union Representatives, 5 Nev.L.J. 508 (2004). 735 ILCS 5/8-803.5, Section 8-803.5 reads: Union agent and union member. (a) Except when required in subsection (b) of this Section, a union agent, during the agency or representative relationship or after termination of the agency or representative relationship with the bargaining unit member, shall not be compelled to disclose, in any court or to any administrative board or agency arbitration or proceeding, whether civil or criminal, any information he or she may have acquired in attending to his or her professional duties or while acting in his or her

In such situations, the safest thing for the business agents to do, insofar as their criminal liability is concerned, would be to cut the conversation off immediately. Whether the business agent should report the incident to management or law enforcement is a different matter. Doubtless many union stewards would have conflicting reactions when confronting this situation. On the one hand, the steward would want to avoid criminal liability, and on the hand he would want to other help the employee. The big problem is that union stewards can get well into such conversations before they realize that the longer they talk with the employee, the greater their chance of exposure to criminal liability in the event the employee is arrested and decides to plead guilty and involve the business agent for whatever purpose.

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representative capacity. (b) A union agent may use or reveal information obtained during the course of fulfilling his or her professional representative duties: (1) to the extent it appears necessary to prevent the commission of a crime that is likely to result in a clear, imminent risk of serious physical injury or death of another person; (2) in actions, civil or criminal, against the union agent in his or her personal or official representative capacity, or against the local union or subordinate body thereof or international union or affiliated or subordinate body thereof or any agent thereof in their personal or official representative capacities; (3) when required by court order; or (4) when, after full disclosure has been provided, the written or oral consent of the bargaining unit member has been obtained or, if the bargaining unit member is deceased or has been adjudged incompetent by a court of competent jurisdiction, the written or oral consent of the bargaining unit member's estate. (c) In the event of a conflict between the application of this Section and any federal or State labor law to a specific situation, the provisions of the federal or State labor law shall control.

## OBSTRUCTION OF JUSTICE

Obstructing administration of law or other governmental functions is prohibited by Section 242.1 of the Model Penal Code,<sup>54</sup> as well as several federal statutes.<sup>55</sup> This crime covers a wide variety of conduct. Although it covers obstructing the administration of governmental functions by the use of force or violence, it is much broader than that. It has been held to apply to a variety of non-violent acts, such as misleading police officers, concealing material facts and the like.<sup>56</sup> The author has seen several situations in which business agents were at risk of violating this statute and parallel federal statutes. Recall the police officer-union steward who investigated the discharge case for use of a taser. Witnesses in the hearing who testified that the steward tried to get them to testify in the discharged officer's favor, testified to facts that could be considered obstructing or interfering with the local police. Tampering with private records was discussed earlier. Such tampering is an "unlawful act" and could bring that conduct within the purview of obstruction of justice statutes. The same thing could be true of the "fire boss" log book discussed earlier.

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<sup>54</sup> A person commits a misdemeanor if he purposely obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this Section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

<sup>55</sup> 18 USCA § 1001; 18 USCA § 1503; 18 USCA § 1512.

<sup>56</sup> State v. Perlstein, 502 A.2d 81 (NJ Super., AD 1985).



From time to time, law enforcement officials become involved in the investigation of offenses that occur in a plant. There are many examples of this. OSHA inspects plants on a regular basis, as does the FDA and the Department of Agriculture, not to mention state and local agencies. Postal Inspectors are frequently called in to investigate a number of different crimes, including crimes committed by postal employees, that occur inside post offices and elsewhere. For example, Postal Service management might ask the Postal Inspectors to investigate cash or other items of value disappearing from the mails or from cash drawers in retail post offices. During the course of such investigations, the Postal Inspectors might undertake a wide variety of activities. They might wish secretly to place a work area under surveillance. They might put cash in envelopes and mail them to a certain location for the purpose of seeing if an employee removes envelopes containing cash from the mail stream. These are just a few ways in which Postal Inspectors might investigate misconduct inside a post office. Similar tactics are used by other federal and state agencies.

There are several different risks that a union steward faces in representing employees in this environment. For example, suppose the union steward is told that management is suspicious of theft from the mails and that Postal Inspectors are investigating the matter. A union steward in

any line of work could learn that the company is concerned about employee theft or fraud. If the union steward warns the employees of the investigation, depending on exactly what the steward tells the employees, it is conceivable that the steward could be charged with interfering with the investigation. If the union steward knows the identity of an offending employees and warns them or gives them advice, the case would be analogous to the narcotics cases discussed above. This could also happen in the private sector if an employer called on local law enforcement for assistance.

A most difficult case would arise if the Postal Inspectors knew that the union steward was aware of the investigation and directed him not to warn the employees of the ongoing investigation. I was involved in a case in which the Postal Inspectors believed that an employee (employee B) had knowledge of a crime that had been committed by another employee (employee A). There was testimony in my hearing that a Postal Inspector directed the union steward not to talk to employee A until the Postal Inspector had a chance to interview employee B, who was not under investigation. If the union steward told either employee that he/she was about to be interviewed by the Postal Inspectors, or if the union steward advised the employee not to talk to the Postal Inspectors or told them to lie to the Postal Inspectors, the union steward could be guilty of violating

Section 242.1 of the Model Penal Code, as well as of interfering with federal officials in the performance of their official duties or tampering with a witness. For a union steward or business agent not to talk to an employee in this situation runs against every instinct the steward has. After all, his job is helping employees who may be in trouble.

Another risk that a union steward faces occurs when a government official is investigating a crime which an employee is alleged to have committed against an outsider. For example, suppose that a route salesman is charged with sexually assaulting a customer of the employer on his route. The customer complains to both the company and the police. The company discharges the employee, and during the course of its investigation of the alleged sexual assault, the union steward interviews the sexual assault victim. One would expect a union steward investigating something like this to seek to have the victim tell the story in the way most favorable to the employee. A union steward doing this kind of thing risks running afoul of several criminal statutes. One would be tampering with a witness. Another could be subornation of perjury if the union steward went too far in trying to persuade the victim to testify to something different than what he/she told the investigator. Finally, the union steward would risk committing the crime of interfering with a criminal investigation.

Employees may commit several types of criminal and dischargeable offenses to which other union members may be called as witnesses. This type of case likewise involves the risk of a union steward inadvertently committing a crime. For example, when a physical assault occurs in a plant, it is not unusual for the union steward to go to the assault victim and try to talk the victim into minimizing the seriousness of the assault in order to save the discharged employee's job. The steward may attempt to get the victim to say he was not hurt or that he did something to provoke the assault. Managers and fellow employees expect union stewards to do some of this kind of thing in an in-plant altercation. The union steward is seen as the grievant's advocate and advisor. After all, managers may wish to maximize the seriousness of a fight in order to get rid of a problem employee. In the early 1980s, I heard a discharge case in which the president of the union was being discharged for threatening to kill union members. The company and the union were negotiating what were then called "takeaways." The company was seeking a reduction in wages and other benefits. After some negotiations, a company proposal was to be submitted to the union membership for a vote. The union president opposed the takeaways. The proposal was discussed among the membership. One union member reported to the company that the union president threatened to kill him if he

voted for the proposal. The company discharged the union president. At my hearing, the complaining employee denied that the union president had threatened to kill him. He did admit that there was a heated discussion of the company proposal at a union meeting. No one else admitted overhearing the threat. If criminal charges against the union president had been pending, it is easy to see how the business agent preparing the case for arbitration could have committed several offenses, much like the sexual assault or the taser situation mentioned earlier.

When an outside victim is interviewed by a steward in this kind of situation, different considerations come into play than when interviewing a fellow union employee. When another union employee is the potential witness, a battery of issues about union “brothers” testifying against each other arises. It is frequently asserted that there is a code of silence among union members. These same factors may not be present in the case of a non-employee victim. When dealing with the outside victim/witness, there is probably a greater risk of the outside witness telling his/her story to the police about what the union steward said to him/her, which could incriminate the union steward, than is the case with an employee-witness.

Almost any time union representatives are interviewed about either civil or criminal wrongdoing in or around the plant, they are in a challenging

situation. Several possible criminal violations have already been discussed. The best advice that can be given to union stewards who are being interviewed by federal or state officials can be stated in three words: "Do not lie." Whether it would be prudent for a business agent to refuse to talk to an investigator is a difficult matter which will vary with the circumstances, but "do not lie." When being interviewed by an investigator, a union steward can say things that could make him criminally liable under several statutes mentioned above. In the possession of narcotics case discussed above, suppose the employee had told the steward that the marijuana was in his car. Suppose further that the union steward did not give the employee any advice about what to do with the marijuana. If a DEA agent asked the union steward if he had discussed the possession of marijuana on company premises with the employee, and the union business agent denied the entire conversation, he would be in violation of 18 U.S.C.A. §1001. The DEA agent would have been interviewing the steward in the course of his official duties. Since the steward knew that he had talked to the employee about the possession of marijuana on Company premises, the union steward would have made a false statement to the DEA agent, in violation of this statute.

Under some state statutes volunteering a false statement knowingly to a law enforcement official is a crime.<sup>57</sup>

Suppose a union steward is being interviewed by an OSHA investigator about a safety violation the union steward thinks an employee committed but which the steward also thinks was quite trivial and silly. Further, suppose the company condoned the employee's conduct. Here we have a union steward who feels pressured in three directions. He does not want to tell the investigator something that will hurt the offending employee. He does not want to get the company in trouble with OSHA because he thinks the violation is trivial. Finally, he does not want to commit a crime himself. Nevertheless, I think the foregoing advice applies: "Do not lie."

Over the years I have heard several cases in which a business agent faced the possibility of engaging in criminal conduct. One of the best defenses to many of these charges is a detailed set of notes made at the time the events occurred. If a business agent (or any witness, for that matter) can say in a hearing, "I wrote down everything the witness said," or "I wrote down everything I said to the police right on the spot," the business agent is a much more effective witness.

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<sup>57</sup> State v. Valentin, 506 A.2d 748 (N.J. Super. A.D., 1986).

## CONCLUSIONS

Most law review articles end with conclusions or general advice for the reader. Here, the advice would normally be for union stewards and business agents. Given the variety of conduct (perhaps misconduct would be a better term) I have described, and the many possible responses to it, I think that giving general advice for all situations would be a disservice to union stewards and business agents. Many arbitrators have seen situations in which a business agent's detailed notes (the same ones I just recommended keeping) were used against the union. I do hope that union representatives will be able to better anticipate their potential criminal exposure as a result of reading this article. The most I can hope for is that they become aware of the wide variety of pitfalls they face when they are doing their jobs. I am confident that what will happen to them will not be exactly the same kinds of things that I have heard about over the years. Employee misconduct today is similar, yet different than it was when I started hearing cases. One thing I hope does not happen as a result of this article is that hard-nosed representatives of companies recognize the risks union representatives face and use that circumstance against them or the employees.