[Judge Gilliam's bench copy] [ms-0494.013016.001]

3/10/89

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NANCY HUNTER, aka Nancy Hoover, Defendant.	Criminal Case No. 86-0960-G DATE: March 28, 1989 TIME: 9:00 a.m. GOVERNMENT'S TRIAL MEMORANDUM

COMES NOW the plaintiff, United States of America, by and through its counsel, William Braniff, United States Attorney, and S. Gay Hugo, Assistant United States Attorney, and files the attached trial memorandum.

This trial memorandum is respectfully submitted in anticipation of issues that may arise at trial.

DATED: March 10, 1989.

WILLIAM BRANIFF
United States Attorney

S. Gay Hugo

S. GAY HUGO
Assistant U.S. Attorney

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I

STATUS OF CASE

A. INDICTMENT

On December 1, 1986, defendant was arraigned on a superseding 234 count indictment charging her in Count One with conspiracy to commit fraud by a commodity pool operator, to commit mail fraud, and to make false statements to a federal agency (18 U.S.C. § 371); in Counts 2 through 127 with mail fraud (18 U.S.C. § 1341), in Counts 128 through 223 with fraud by a commodity pool operator, (7 U.S.C. §§ 60(1)(A) and 13(b)); in Count 224 with false statements to a federal agency (18 U.S.C. § 1001); in Counts 225 through 228 with income tax evasion (26 U.S.C. § 7201); and in Counts 229 through 234 with aiding and assisting in the preparation and filing of false income tax returns (26 U.S.C. § 7206(2)).

B. TRIAL STATUS

Jury trial on all counts of the Indictment is scheduled for March 28, 1989, at 9:00 a.m. before the Honorable Earl B. Gilliam.

C. LENGTH OF TRIAL

The estimated length of the Government's case-in-chief is six weeks.

D. CUSTODY STATUS

Defendant is released on a personal surety bond of $100,000 certificate of deposit made payable to the United States.

E. WITNESSES

The Government anticipates calling approximately seventy witnesses in its case-in-chief.

F. INTERPRETER

No interpreter will be needed.

G. AUDIO - VISUAL AIDES TO BE EMPLOYED

The Government will use an overhead projector for transparencies of certain exhibits. In addition, several enlargements of photographs and charts will be used.

H. IMMUNITY REQUESTS

Debra Hart and Roger Hedgecock will be testifying under grants of immunity.

I. EXHIBITS

The Government will furnish an exhibit list during the week of March 13, 1989. The Government will prepare for the court a set of marked Government exhibits.

J. STIPULATION

It is anticipated that the Government and defendant will stipulate to the authenticity and foundation for the majority of the Government's documentary exhibits.

K. PRETRIAL MOTIONS

Defendant's motion to change venue was denied with leave to reinstate at voir dire. Defendant's pretrial motions for ministerial grand jury records and transcripts and to dismiss the superseding indictment were denied and the denials affirmed by the Ninth Circuit Court of Appeals. Defendant's pre-trial motion for a bill of particulars was denied.

The Court ruled on defendant's motion for discovery as follows:

The Court denied defendant's requests for production of the prosecutors handwritten notes of interviews with defendant and the names and addresses of potential witnesses the Government does not intend to call at trial.

The Court ordered the Government to include in its trial memorandum the statements of non-testifying co-conspirators made in furtherance of the conspiracy when defendant was not present and defendant's oral statements made to CFTC auditor Randell Hobbs.

Government agents' handwritten notes of interviews with defendant were discoverable when and if the agent testified.

The Court continued until time of trial defendant's requests for production of Witness and Exhibit Lists and Jencks material.

The Court took under submission whether questionnaires mailed to investors by the Government were Brady material if the investor responded that there was no contact with defendant.

The Court granted the Government's motion for disclosure of jury panel information pursuant to 26 U.S.C. § 6103(h)(5).

II

STATEMENT OF FACTS

In August 1975 defendant became employed as an account executive (A.E.) commonly referred to as a "stock broker" with San Diego Securities. As an A.E. she received trading orders from her clients and executed those orders through her brokerage house to the appropriate exchange.

In January 1976, she left San Diego Securities and joined the La Jolla office of Bache, Halsey, Stuart, Shields as broker/A.E. There she met Dominelli who was also an A.E. at Bache. The two had adjoining desks in the open floor area or "bull pen". Each of them had been assigned an A.E. number, defendant's was 17 and Dominelli's 11. This A.E. number was used for Bache record keeping purposes. It identified the broker assigned to a client's account. It appeared on the client's monthly account statements. On occasion two or more brokers shared a client's business in which case they were assigned a joint number. Defendant and Dominelli shared some accounts.

In November 1979 Dominelli left Bache and started his own business, J. David & Co., a sole proprietorship. He registered with the NFA as a commodity pool operator and advisor. He began soliciting investors for pooled accounts structured as limited partnerships which invested in commodity futures contracts. Investors were told that not more than 50 percent of their funds would be at risk in the market at any one time and that the other 50 percent would be invested in low risk, high yield government-type

securities, such as T-bills which earned interest. He leased a small office space at Seatree Plaza on Girard Street, La Jolla, CA.

From the inception of J. David through 1982, Dominelli and his salesmen solicited investors for J. David's commodity futures pools. Some of these pools were disclosed to regulatory agencies while others were not. The disclosed pools were titled J. David & Associates I, II, III and IV, Seatree, Pisces, Enterprises and later La Jolla Partners I (a pooled account which merged all the other disclosed pools). J. David employees referred to these pools as "the little pools". The undisclosed pools were named J. David & Associates I, II and PHD. J. David employees referred to these pools as "the big pools", "Nancy's pools" or just "one and two".

By the time Dominelli had left Bache to start his business, defendant had also left Bache and returned. Upon her return to Bache, in October 1979, she was recognized as a more productive broker and was assigned to a private office instead of the open "bull pen". Her office had two desks. From November 1979 through most of 1980, on a daily basis Dominelli was in her office and occupied the second desk. He conducted J. David business in her office, meeting clients and salesmen.

From October 1979 until she left Bache in April 1981 to join Dominelli's operation,, she was his broker of record for all his Bache accounts. He placed all his Bache trades exclusively with her. When she placed a trade for one of Dominelli's accounts, defendant followed the Bache procedures and record keeping requirements. She took the trade order from Dominelli and on most occasions wrote a ticket for the order which she gave to the wire operator who transmited it to the floor broker on the appropriate exchange to execute. Immediately after its execution, the wire operator gave her an execution report indicating that the trade had been executed. As a broker it was to her benefit to immediately check the accuracy of trade information on the execution report to her record because an error caught before the exchange opened the next day cost her less than if corrected later. She also received confirmation slips of the executed trade which

had been mailed overnight to her as the broker and to the client. The confirmation slip reflected the date traded, number of contracts traded, the price, and a description of the product bought or sold. After receiving the trade confirmation and checking its accuracy, she hand-posted the trade on an A.E. trade posting record for that account.

She was required by the industry to maintain an A.E. trade posting record for each commodity and security account she handled. She kept these posting records in a three-ring binder in her office. She posted the following information for each trade: a description of the product, the type of the trade (short or long), the date bought and sold, number of shares or contracts bought and sold, the price bought and sold and the approximate profit or loss on the position. At Bache, the A.E. records were filed alphabetically by client in a blue loose-leaf book. Each broker's book was reviewed yearly by the branch manager. In addition, when a broker left Bache, the broker was required to leave all A.E. records of accounts that would remain at Bache. These A.E. records were given to the new broker assigned to the account.

As Dominelli's broker, defendant maintained and recorded A.E. trade posting records for the numerous J. David accounts. One of these accounts was EO-02403. Beginning in November 1979 she hand-posted the individual commodity futures trades for this account onto A.E. trade posting records. The first A.E. record she kept covered trades executed in November and December 1979. When compared to records maintained by Bache her A.E. record accurately reflected the actual trading activity of the account for the two months except for one loss of $383.50 and one gain of $1,187.50 which she omitted from the record.

The second A.E. record she posted for EO-02403 listed January through October 1980 trades. Her record had only one trade posted for August, two for September, one for October and none for November and December. Comparison of her four-page record to those maintained by Bache showed defendant's was accurate.

Defendant hand-posted a third seven-page A.E. trade posting record of purported trades in account EO-02403 from January through December 1980. However, comparison of this record to those at Bache indicated defendant's was false and misleading. Several trade losses were switched to appear as profits creating a false net profit for the year-end trading on the account instead of the true net loss. In addition, defendant recorded numerous trades for August, September, October, November and December 1980. These trades were not executed in account EO-02403. Analysis of Bache records revealed that these additional posted trades were actually executed in account EO-02387, another Dominelli account for which defendant was the broker and kept an A.E. record.

Her false A.E. record reflected that most trades for EO-02403 were only one contract trades. This included those trades for September through December that actually occurred in EO-02387. Bache records and defendant's A.E. record for EO-02387 correctly showed the actual number of contracts for each of those trades was two, three, four, five, six, or ten times greater.

In 1981 defendant gave a J. David employee her handwritten false A.E. record of Dominelli's account EO-02403 and instructed the employee to type a performance or "track" record of Dominelli's 1980 trading using the figures on the A.E. posting record. This track record was used by Dominelli, defendant and other J. David employees to solicit investors. It was captioned "Trading record account No. EO-02403 at Bache, Halsey, Stuart for J. David Dominelli 1980 (initial investment $30,000)".

Bache records for account EO-02403 stated an initial investment of only $91.00 with additional deposits of $28,223.60. These records also indicated in 1980 a net trading loss of $28,314.60 whereas the false A.E. record and typed track record showed a $24,554.91 gain.

Other typed trading records were also used by defendant, Dominelli and other J. David employees to solicit investor funds. Three of those records were for Bache account EO-87017 for the years 1977, 1978 and 1979. This account was Dominelli's

employee account which he traded in 1977, 1978 and 1979 until he left Bache. Those three track records were captioned:

> TRADING RECORD ACCOUNT #EO-87017-R AT BACHE HALSEY STUART FOR J. DAVID DOMINELLI 1977. (INITIAL INVESTMENT $5,000)
>
> TRADING RECORD J. DAVID DOMINELLI - 1978
> ACCOUNT #EO-87017-R AT BACHE HALSEY STUART
> (INITIAL INVESTMENT $10,000.00)
>
> TRADING RECORD J. DAVID DOMINELLI - 1978
> ACCOUNT #EO-87017-R AT BACHE HALSEY STUART
> (INITIAL INVESTMENT $15,000.00)

They had columnar headings labeled "position" (number and description of the futures traded), "purchase date", "price", "date sold", "price", and "profit/loss". Bache records for this account showed that in November and December 1979, defendant was the broker. Bache records also reported only five trades in this account for November 1979 and no trading activity for December 1979. Whereas the typed trading record reported 16 trades for these two months. These 16 trades actually occurred in November and December 1979 in Bache account EO-02403. Defendant's hand-posted A.E. record for EO-02403 (November and December 1979) reported these trades.

In contrast to those false records defendant did accurately post several A.E. records for Dominelli's accounts. She posted correctly the following accounts for the disclosed or "little pools":

Account Number	Account Name	Period Reported
EO-02587	J. David & Associates I	June - Dec. 1980
EO-02944	J. David & Associates III	Oct. - Dec. 1980
EO-03744	Pisces	Nov. -Dec. 1980
EO-02865	Seatree	July - Dec. 1980

Another A.E. record defendant posted correctly was for EO-02707, a futures account of J. David & Co. II, one of the undisclosed "1 and 2" pools. It reflected trading

activity from March through August 1980, showed three of the six months had net trading losses and indicated a net profit of only $3,359.38 on the account.

Except for omitting one gain of $16,815.00 and four losses totaling $63,961.00, defendant recorded accurately another J. David & Co. account EO-02387. This 11-page A.E. record covered Bache trades for 1980.

While a Bache broker in addition to keeping records for Dominelli's Bache accounts, defendant also posted A.E. records for his accounts at other brokerage houses. She hand-posted the following records which reflected the true account activity:

Broker	Period	Account	Name Of Account
Merrill Lynch	Jul - Dec '80	291-84816	J. David & Co.
Drexel Burnham	Nov '79 - Dec '80	89-40040-2-1-8M	J. David & Co.
Clayton	1980	21580	J. David & Co.
Clayton	Mar -Apr '80	21587	Gilbert Schwartz Acc. Corp.
Clayton	Jan -Sep '80	21583	J. David & Co. II (one of "Nancy's pools")

Clayton's records of account 21583 for this period reflected a net loss of $28,703. Defendant omitted six losses totaling $24,265, therefore her posting record disclosed a net loss of only $4,437.00.

After Dominelli formed J. David & Co., defendant was not only his Bache broker but also his J. David & Co. employee/partner. She solicited clients for him. She handled all of the accounting work for "1 and 2". She calculated the alleged trading results and interest for these undisclosed pools. She prepared and typed the investors' monthly statements and mailed them to the investors. She maintained all the records for "1 and 2" at her Bache office. She assigned account numbers for these big pools to a new investor opening an account. She posted to and kept a record book for "1", "2", and "PHD" which indicated the date the account was opened, the account number, and the

name of the investor. Eventually the investor information in the book also indicated the salesman who received commissions for the account.

In November 1980 Dominelli moved his J. David office from the Girard Street location to La Jolla Bank and Trust, Prospect Street, La Jolla. There, his office had two desks, one for himself and one for defendant. From November 1980 until she left Bache in April 1981 at one o'clock in the afternoon when the market closed in New York, defendant left her Bache office and went to her J. David office where she worked her other job for which Dominelli paid her.

Although a conflict of interest existed with defendant having these two jobs, she never sought approval from the New York Stock Exchange (NYSE) or Bache to participate in Dominelli's business. It is an industry regulation that a broker cannot do other brokerage business unless reported to and approved by NYSE and the broker's employee. In addition, it is a conflict of interest for a broker who is executing the trades for a client's brokerage house accounts to prepare monthly statements or track records indicating the client's trading performance. The broker could be fired or lose his license for doing this kind of work without authorization.

By July 1980, Dominelli had two clerical employees working in his Seatree office. They handled the statements and customer transactions for the disclosed "little pools". They received in the mail and filed in their office the brokerage house trade confirmations and monthly statements for these pools. They posted and kept trading records for these pool. The limited partnerships or pools funds were divided into units. As a new investor opened an account his initial deposit bought a certain number of units in that pools. The pool's assets were comprised of investors funds, trading profits and interest earned on T-bill investments. The number of units a new investor purchased was based on the net asset value for each unit in the pool.

At the beginning of every month the employees prepared the investors' monthly account statements for the "little pools". This included calculating the trading results

and T-bill interest from the brokerage house information. They also figured Dominelli's management fees, brokerage commission, net performance, ending net asset value and monthly rate of return. They used the previous month's statement as a worksheet to prepare and type the current month's statement. They mailed the statements to the investors.

While the J. David employees were working on the "little pools", defendant was preparing the monthly statements for the "big pools". By mid-1980 she delegated some of her "1 and 2" monthly statement work to the J. David employees. She permitted them to type the monthly statements. They also photocopied the new statements for files kept in defendant's office at Bache. Each month defendant brought to J. David's Seatree office a photocopy of the prior month's investor statements. On each statement defendant had written the new monthly figures to be typed for the current monthly statement. At first the employees typed about 100 of these statements each month. Soon defendant increased the J. David emoployees' duties for "1 and 2". She gave the employee the interest per unit figure for the month and instructed the employee how to determine the interest earned on the account. The employee then entered the interest earned and accumulated interest earned year-to-date on the previous month's statements and returned them to defendant who calculated and entered other information on the photocopy. Afterwards, she returned it to the employee for typing. By this time, the employees were typing 200 statements each month.

Defendant again increased the employees' duties for the preparation of "1 and 2" monthly statements. She calculated and wrote on a piece of paper the net asset value per unit and the interest per unit for each pool ("1 and 2") and gave this information to the employee. She instructed the employee how to use these two figures to calculate the remaining information necessary for preparing the monthly statements. Each month the employee calculated the new information, wrote it on the prior month's statement, typed a new statement, photocopied it and returned them all to defendant.

Defendant instructed J. David employees how to calculate Dominelli's commissions or fees on "1 and 2". At first, his fees were calculated quarterly. Pool "1" investors were allegedly charged ten percent of profits. This pool was comprised of preferred clients, those being close friends and relatives. Pool "2" investors were charged 20 percent of Dominelli's alleged profits on his trading.

While at Seatree office, J. David employees' duties and responsibilities for "1 and 2" were restricted to preparing the monthly statements from information given to them by defendant. They did not see any brokerage house confirmation or statements of Dominelli's supposed trading for "1 and 2". They never calculated the net trading results for these pools. They never reconciled the trading results reported on brokerage house statements to those they received from defendant. They did not maintain any books or records for "1 and 2". These items were kept by defendant at Bache. If employees needed information about "1 and 2", they telephoned defendant at Bache. They did not even open the mail for "1 and 2". Defendant did. All mail for "1 and 2" sent to J. David's office was given to defendant.

In November 1980 when J. David's operation moved to the La Jolla Bank and Trust building, the books and records for "1 and 2" were relocated from defendant's Bache office to her J. David office. She continued to keep the brokerage house confirmation slips and statements as well as open all the mail. She continued to provide the "raw" trading information for "1 and 2" which each month she gave to the employees who continued to prepare the monthly statements.

She prepared an A.E. trade posting record with her trading calculations for pools "1", "2" and "PHD". On the record she had written net asset values and interest figures for each day of the month. In addition she had calculated the brokerage house commission for each pool and had noted the open trade per unit for each pool. (The open trades were those for which the related buy or sell had not been executed.) The

employees used this record to calculate the new monthly statement information for "1 and 2".

In September 1981 J. David's monthly statements were computerized including those for pools "1 and 2" and La Jolla Partners I. The procedure used to process the pools after being computerized remained the same. Defendant continued to give the employees her (defendant's) worksheets which showed the daily net asset value and daily interest figure for pools "1", "2" and "PHD". No employee saw brokerage house confirmation slips or statements for the trading activity on these pools. This information was never inputted in the computer consequently the computer never calculated the daily trading activity for "1" , "2" or "PHD". Defendant continued to do these calculations in contrast to total computerization for La Jolla Partners I.

After the monthly statements were computerized, a J. David employee asked defendant about reconciliation of the brokerage house statements for "1 and 2" with the client statements. The employee suggested to defendant that this should be done in order to determine whether the clients' monthly statements for each pooled investment balanced with the actual trading result for that pooled investment. The employee gave defendant the computer's monthly totals for "1 and 2". Defendant responded that she would take care of reconciling those figures to the actual trades reported on the brokerage house statements. About two weeks later, defendant told the employee that it had been taken care of. Subsequently, no reconciliation of the trade results reported on the brokerage house statements to the J. David generated client monthly statements was ever done by a J. David employee for "1 and 2".

Defendant controlled access to the brokerage house statements sent to J. David & Co. She always opened all the mail. She examined its contents, wrote on the outside of the envelope notes to various J. David employees, and then gave the mail to an employee to hand out.

From November 1980 to September 1982, the investor monthly statements were mailed from J. David's La Jolla office. Subsequently, beginning around October 1982, these statements were mailed from J. David's London office because in July 1982, the accounting work for J. David's monthly investor statements moved to London, England. However, until October or November 1982, J. David employees in the La Jolla offices continued to process the monthly statements. They ran a dual system to determine the accuracy of the information generated from London. Under the new system information on Dominelli's "trading" was telexed to London. This information was for "1 and 2" taken from the A.E. trade posting worksheets that defendant prepared.

In April 1981, defendant had left Bache and had become President of J. David Trading Company. Dominelli had hired an attorney to review his J. David investor solicitation materials. After looking at the documents, the attorney explained to Dominelli and defendant that J. David was soliciting investors for commodity pools in violation of federal agency regulations. The attorney told Dominelli and defendant that to remedy the past noncompliance a rescission offer had to be made to all commodity pool investors. The attorney told her that he needed performance data for Dominelli's trading from the beginning of his business until the rescission offer was sent to investors and that the performance data had to be separated into three categories, one for all commodity futures pools, another for La Jolla Partners I, and a third for all accounts managed by J. David Trading (the advisor for J. David & Co. accounts). Defendant was responsible for coordinating and gathering all the information. After explicitly being directed to supply certain information on all commodity pools, she gave the attorney information on only the "little pools" - J. David & Associates I, II, III and IV, Seatree, Pisces, Enterprises and La Jolla Partners I. Neither Dominelli nor defendant gave the attorney any information about "1 and 2" - "Nancy's pools".

In addition to being told about the necessity for a rescission offer, Dominelli and defendant were also told to stop soliciting investors for all commodity futures pools.

The attorney told them that continued solicitation without proper disclosure documents was a violation of federal agency regulations. He discussed with them the nature and extent of disclosure required if they wished to continue solicitation commodity pool investors. No proper disclosure documents were prepared. Nevertheless, solicitation continued for "1 and 2" and defendant continued to supervise the record keeping for these pools.

They questioned him about federal regulations applying to Interbank solicitation. He told them about the general ambiguity at that time for whether Interbank was in fact regulated. He said that Interbank regulation was a "grey area".

Shortly afterwards in late 1981, Dominelli began focusing his J. David investor solicitations on "Interbank" accounts. J. David & Co. salesmen represented to investors that Dominelli was trading foreign currencies on the Interbank Currency Market, an international network of commercial financial institutions around the world which created markets for foreign currencies on a 24-hour basis. Profits were made by capitalizing on fluctuations in the rates of exchange.

Dominelli had been trading Foreign Currency Futures as early as December 1980. He had placed these early trades through defendant, his broker at Bache. As the broker, she kept A.E. trade posting records for what was labeled an "Interbank" account. These false trading records were used for investor solicitation.

From late 1980 until she left Bache in April 1981, she was Dominelli's broker for account UN-10005-19, which traded foreign currencies. Her hand-posted A.E. record for this account reflected an initial investment of $32,000 and showed trades from December 1980 through May 1981. The record was grossly false. It omitted numerous transactions. It reported a net fictitious trading profit of $103,000.00 whereas the actual net gain was only $61,000.00. Defendant, Dominelli and other J. David employees used her false record to solicit investors.

Other false records of Dominelli's alleged Interbank trading were used to solicit investors. One of them was an A.E. record hand-posted by defendant for Drexel account 92-10420-7-2. Actually defendant made two A.E. records for this Interbank account. One (not disclosed to investors) accurately reported the trades for November and December 1981. The other one used for solicitation was grossly false. The November trades appearing on the record had been inflated five times that of the actual trades and December's had been doubled. This manipulation caused the record to reflect much larger volume than was actually traded. In addition, on some reported trades the "bought" and "sold" prices were switched turning an actual loss into a fictitious gain - the largest converted an actual loss of $11,022.00 into an invented $55,110.00 gain.

This second record reflected other manipulation to the trade figures - a sale price was changed resulting in an exagerated $121,065.00 gain for the transaction as opposed to an actual gain of only $2,781.00. Investors saw a record which demonstrated a net gain of $262,094.00 whereas Dominelli's actual trading resulted in a net gain of only $5,163.00.

Another false record prepared by defendant was used to solicit Interbank investors. Her hand-posted A.E. record for Interbank account 588-13007 at Merrill Lynch showed trading from June through October 1981. Comparison of this record to Merrill Lynch's indicated her trades were grossly inflated. The number of shares bought and sold for each trade as they appeared on her A.E. record had been either multiplied by "5" or by "10" times the actual number. In addition, three losses were switched to gains. Seven trades were omitted. Five were losses totaling $162,230.00. Two were gains totaling only $20,220.00. The record showed a net profit of $661,150.00 in stark contrast to the true net loss of $152,960.00.

Finally defendant wrote a three-page A.E. record with pages captioned "#1", "#2", and "#3". It was a composite of two other false A.E. records she posted, Merrill Lynch's account 588-13007 and Drexel's 92-10420-7-2. It also included 14 trades from

Dominelli's Drexel account not on defendant's inflated posting record. The number of contracts bought and sold for these trades reported on defendant's record were either two, three or five times greater than the actual number traded. In addition, four trades were switched in that the price sold became the price bought resulting in the trade appearing on her record as a profit when it was really a loss.

Defendant, Dominelli and other J. David employees used a typed "Interbank Trading Record, December 1980 - February 1982" to solicit investors. This was constructed from a composite of false A.E. records hand-posted by defendant. The first one and a half pages were copied from defendant's fictitious A.E. record of Bache account UN-10005-19. The remainder was copied from defendant's fraudulent "#1", "#2" and "#3" A.E. record.

Defendant's participation in the creation of this typed Interbank trading record is shown on a typed draft version of the three-page record. It had columns for the following information: date bought, position and price, date sold, position and price, profit/loss. The draft version segregated into blocks alleged trades for each month. After each block of monthly trades, defendant wrote on the draft "End of month" and a figure which totaled that month's supposed profits/losses. Her handwritten notations were typed on the final version shown to prospective investors.

Comparison of the net profit/loss from Dominelli's trading records used for investor solicitation to brokerage house records of these trades disclosed the following:

Dominelli's Trading record	Trading record net profit/loss	Brokerage house net profit/loss
1977 Bache EO-87017	+ 52,181.50	+ 46,371.00
1978 Bache EO-87017	+ 92,418.35	- 15,380.25
1979 Bache EO-87017	+ 1,280,870.00	- 37,009.00
1980 Bache EO-02403	+ 24,554.91	- 28,314.60

Dominelli's Trading record	Trading record net profit/loss	Brokerage house net profit/loss
1981 Bache UN-10005-19	+102,785.00	+ 61,287.50
1981 Merrill, Lynch 588-13007	+ 661,150.00	- 152,960.00
1981 Drexel 92-10420-7-2	+ 262,094.00	+ 5,163.00
Dec. '80 -Feb. '82 Composite	+1,204,201.00	-109,429.00

The monthly investor statements and Dominelli's track record of his trading results indicated a return on the investors' money of 30 to 40 percent. The statements reflected a loss in only one month.

Defendant was aware of the actual trading results. She participated in preparing these monthly figures. While at the La Jolla Bank and Trust office and later in the Ivanhoe office, at the beginning of the month defendant and Dominelli had a closed-door meeting. About a half-hour to 45 minutes after the meeting either defendnt or Dominelli came out of the meeting and handed to a J. David employee a handwritten note, usually on J. David memo pad, which indicatd the total dollar trade result and the total interest figure for Dominelli's Interbank trading. Usually another sheet of paper contained the trading results for pools "1", "2" and "PHD".

Early in J. David & Co.'s operation, defendant and Dominelli envisioned forming a "boutique" brokerage house. They had a J. David employee working the federal regulatory requirements to obtain a license for their brokerage house, J. David Securities. In August 1981, defendant became President of J. David Securities. By September 1981, J. David Securities had met all regulatory filing requirements, was licensed to do business, and had a trading seat on the New York Stock Exchange.

Subsequently, defendant wrote a note to Dominelli which stated, "I'm not eager for J. D. Securities to clear your Interbank trades - they will then be able to construct their own version of your track record. It could be bad." An IRS agent will testify that on June 4, 1986, he was present when defendant provided handwriting exemplars to Dave

Oleksow, the questioned documents examiner. He dictated the words on the note to defendant and after writing his dictation the first time, she stated, "Mark Yarry". After writing the same words the second time, she stated, "I didn't write that one!"

Defendant and Dominelli limited and controlled all J. David employee access to information on "1 and 2" and Interbank. They hired the in-house accountants for the business. Although the accountants' duties and responsibilities included setting up and maintaining books and records for J. David & Co., no accountant was given access to the records for "1 and 2" "Nancy's pools" or Interbank.

The first in-house accountant asked defendant for information on these pools to establish accounting controls. Defendant refused to give it. The successor accountant had access to only the computerized investor information for "1 and 2". No J. David employee saw confirmation slips or brokerage house monthly statements for "1 and 2" and Interbank.

In contrast, J. David personnel did have access to the disclosed pools - La Jolla Partners I accounting records. They saw the broker confirmation slips and monthly statements, kept the general ledger, posted the monthly activity and knew the income generated from trading in these pools.

No accountant had access to revenue figures for J. David & Co. On several occasions the accountant asked defendant and Dominelli for J. David's revenue information. He never received it. The chief financial officer was also denied access to this information.

The in-house accountants recognized that most of the J. David entities never generated profits except for a few occasions when an entity may have shown a profit for a particular month. Dominelli carried the unprofitable operations by providing cash with checks drawn on his personal accounts. Defendant in an interview with IRS agents admitted that Dominelli's personal bank account was held in the name of J. David & Co. and that he (Dominelli) never reconciled nor balanced his checking account. Defendant

knew that practically all of the J. David entities lost money every month because each month she received a monthly expense statement for the various J. David entities. These statements showed the operating losses.

The sources used to fund the losing operations of the various J. David entities were Dominelli's "magic checkbook" accounts for J. David & Co. located at La Jolla Bank and Trust Co. and First National Bank. Checks drawn on these accounts were deposited to defendant's personal accounts. She did not report any of these funds as income. Over a four-year period they totaled the following:

1980	$46,500.00
1981	$454,800.00
1982	$909,000.00
1983	$1,050,000.00

One J. David accountant discovered that clients' funds had been deposited into Dominelli's personal account. The accountant, knowing that comingling of client's funds was prohibited by the SEC and CFTC, confronted defendant and Dominelli about it. Defendant replied, "We're here to have fun - don't be so serious."

Defendant's 1980, 1981 and 1982 federal income tax returns were prepared by Edward W. Dunn Tax Service. He prepared the returns in San Diego using information provided by defendant.

Her 1983 federal income tax returns were prepared by Al Tarkington. He prepared the returns in San Diego using information obtained from defendant and others.

The partnership tax returns for pools "1 and 2", (referred to on the tax returns as J. David & Associates I and II), were prepared by Burson W. Treadwell of AD-CO Income Tax Service. He prepared the 1980 return based on monthly client account statements. He also used "corrected" copies of the monthly client account statements for December 1980. Defendant had mailed them to Vince, owner of AD-CO, attached to a handwritten

transmittal note. Defendant also asked a J. David employee to deliver to Vince information he had requested to prepare tax returns for "1 and 2".

In May 1982, the Commodities Futures Trading Commission (CFTC) conducted a compliance audit of J. David's commodity pools. Randell Hobbs, an auditor for the CFTC, was assigned to review the books and records of Dominelli who was registered with the CFTC as a commodity pool operator. In June 1982, he came to J. David's office and met with defendant. He explained to her that he was there to see all the books and records of the commodity pools operated by J. David & Co. He was told that there was only one commodity pool. Hobbs said that he knew that J. David managed more than one pool. He was told that at that time only one pool was open; there were other pools that had existed but they were no longer open.

A J. David employee was told by defendant that an auditor from the CFTC was in the office and that if he asked about pools nothing was to be said about "1 and 2". Hobbs did ask the employee about furnishing him all books and records for all commodity pools and whether there were any other pools. The employee per defendant's instructions did not disclose the existence of "1 and 2".

The "little pools" tax returns and Hobbs' audit work papers reflect substantially fewer investors, fewer dollars invested and little or no trading gains compared to "1 and 2" tax returns and trading results. Information taken from U.S. partnership tax returns for "1", "2", and La Jolla Partners I alleged that their respective total assets were:

	Pool 1	Pool 2	La Jolla Partners I
12-31-80	$1,911,307.00	$923,301.00	$594,758.00
12-31-81	2,478,013.00	$6,316,090.00	$984,816.00
12-31-82	2,755,831.00	$4,810,729.00	$242,272.00

By the end of January 1984, J. David investors were coming to the La Jolla office demanding their investment funds be returned to them. Some investors met and discussed forcing J. David into bankruptcy. By February 1984, J. David employees knew

that Dominelli was not meeting investors' demands for their funds. One night in February 1984, defendant and several other J. David employees began stuffing J. David's records, including those from defendant's and Dominelli's office, into large garbage bags. They loaded Parin Columna's pickup truck with these bags of J. David records. Columna drove his truck to an undisclosed location and hid the records in a friend's garage. Defendant and Dominelli also burnt his canceled checks from his personal checking accounts and defendant shredded brokerage house statements.

The evidence will show that through the use of investor funds defendant and Dominelli gained social and political prominence and acquired expensive personal possessions and real property. In 1981, one political chrony wrote to defendant that she had made a wise decision to use her money to influence politics from behind the scenes rather than run for office. He stated that she would be more effective and powerful than an elected official.

In 1981 defendant and Dominelli agreed to fund Roger Hedgecock's San Diego mayorial campaign via contributions to Tom Shepard & Associates, Hedgecock's campaign manager. Knowing that campaign contributions in excess of $250.00 were illegal, defendant claimed $100,163.00 in contributions as a partnership loss on her 1983 personal return.

In 1986 defendant pled guilty to one count of conspiracy and one count of perjury in municipal court resulting from her financing Roger Hedgecock's San Diego mayorial election campaign. Defendant admitted the following:

In 1981 she and Tom Shepard discussed Shepard's new company, Tom Shepard & Associates and its participation in Hedgecock's mayorial election campaign; that it was her desire to assist Hedgecock in his efforts to become mayor, and that if Hedgecock won, Hedgecock, Shepard and Shepard's company would benefit. Late in 1982 she caused additional funds to be provided to pay for Tom Shepard & Associates employees who

were working on the Hedgecock campaign. There was no discussion about any agreement to pay the monies back.

She stated further that at the time she supplied funds to Tom Shepard & Associates, she knew that the most she could give Hedgecock as a contribution to his campaign was $250.00 in the primary and $250.00 in the general election and that she knew that the funds would be used to pay employees who were working almost exclusively on Hedgecock's campaign and to pay other expenses Tom Shepard & Associates were incurring as a result of the Hedgecock campaign.

A note from Tom Shepard to defendant dated July 15 set forth the amounts of monies that defendant was to pay Tom Shepard & Associates as follows:

July	$18,000.00
August	$16,000.00
September	$14,000.00
October	$12,000.00
November	$10,000.00
December	$ 8,000.00
January	$ 6,000.00

In closing Shepard wrote "Though we are fading out of your pocketbook, I hope we never fade out of your heart!"

Attached to Tom Shepard & Associates' 1983 partnership tax return was a K-1 which showed that Cheyney & Associates, SSN 555-56-2570, owned 100 percent of the capital and shared 90 percent in the profits and losses. The SSN belonged to defendant. Cheyney was the name of her dog. The K-1 reflected contributions by defendant in 1983 of $195,000.00.

Tom Shepard will testify that his consulting firm was to a great extent financed by defendant and J. David & Co.; that his firm received large sums of money through defendant during 1982 and 1983; that in 1982 he hired several employees to work

primarily on the Hedgecock campaigns; and that these employees could not have been hired but for money supplied through defendant. He will also testify that he discussed with defendant on many occasions the Hedgecock campaign and the need for financing. Shepard will identify checks dated from January 1982 to December 1983, made payable to Tom Shepard & Associates from Dominelli and defendant totaling $361,859.35. The checks written by Dominelli were drawn on his J. David & Co. account at La Jolla Bank and Trust. Two of J. David & Co.'s checks to to Shepard were written by defendant. They totaled $26,000.00 and were drawn on an account at First National Bank.

In 1982 defendant told a newspaper reporter "I've gotten disenchanted with politics, but I still love to volunteer. I love to raise money for worthwhile events. So if you're not doing it for politics, the arts is the next place to go." Throughout the existence of J. David & Co., defendant and Dominelli continued to gain social prominence by contributing J. David investor money to numerous charitable organizations and events. They bought tables for the Jewel Ball and Night in Monte Carlo, block tickets for the symphony and contributed to the landscaping of Mandell Weiss Center for the Performing Arts at UCSD. They made large contributions to the San Diego Symphony. In 1982 defendant was appointed to boards for the San Diego Symphony and the La Jolla Museum of Contemporary Art. Discussing J. David's contributions, defendant stated "I like to support things. I really feel money needs to be recirculated. I'm amazed at people who have money and don't share it."

During the operation of J. David, defendant and Dominelli spent investor funds on their business and employees. In April 1982, when defendant and Dominelli moved their offices to a new location on Ivanhoe Street next to La Jolla Bank and Trust. They spent huge sums of money remodeling and furnishing the space. This office was referred to by the employees as the "Mahogany Palace". Among its lavish appointments were mahogany paneling throughout, parquet floors, coffered ceilings, built-in Victorial era bookcases, and leather chairs.

Defendant and Dominelli also spent excessive money on employees. For two years they paid for many J. David employees to go to the Ironman contests in Hawaii. They funded "Team J. David". They paid the membership fees for 50 J. David employees to use the La Jolla Athletic Club, gave employees cars and interest-free loans, permitted them to live "rent free" in homes and condominiums owned by defendant and Dominelli, and sent them to Las Vegas for a weekend.

Individuals also benefited from defendant's generosity with J. David's funds. She loaned individuals money by setting up an Interbank account which reflected certain amount of money in the account. She knew no actual investor funds had been deposited to the account. The individual made withdrawals from the account as he needed the money.

She also credited an investor's Interbank account for money that J. David Securities had lost trading a stock account for the same investor. The investor never deposited the money into the Interbank account.

Defendant and Dominelli used investor funds to amass lavish personal and real property. Defendant entered into a settlement agreement of her personal and real property with the J. David & Co. bankruptcy trustee in which she admitted that a significant percentage of her property interests were acquired with funds derived from J. David & Co. Those real estate interests included:

1. A home in Rancho Santa Fe at 15632 Las Planideras
2. A home at 7734 Hidden Valley Court, La Jolla
3. A condominium at Stein Erickson Lodge, Dear Valley, Utah
4. A home at 901 Highland Avenue, Del Mar
5. A condominium at 12978 Caminito Bodega in Del Mar Heights

The personal property included:

1. A California limited partnership of Montgomery Field, Ltd
2. One-sixth interest in Del Mar Garage

3. 50,000 shares of Divigision, Inc.

4. 13,888 shares of G.T.I.

5. $25,000 cash

6. Twenty units of a limited partnership (J. David Century 83)

7. A limited partnership interest in J. David Energy I and III

8. Thirty-nine percent limited partnership interest in Triathlon Magazine, Ltd.

9. 9.62 percent limited partnership interest in Vacuum Research

10. Her interest in Olympian Bank Corp.

11. Restricted stock for Dynasty Resources.

12. $18,700 note receivable from Architura.

13. Defendant's stock in J. David Securities Inc.

14. Mercedes 300SL Gull Wing

15. Money impounded for the Highland Avenue home sale

16. Several pieces of jewelry

17. Two fur coats, a black mink and a sable

18. Ten race horses

19. Syndicated interest in Bates Motel

20. Furniture, fixtures and other items in the Las Planideras home, the La Jolla Hidden Valley home, the Del Mar Heights condominium

21. A note for $22,500.00

22. Stock in the San Pasquel vineyards

Defendant agreed to liquidate the following:

1. Her limited partnership interest in La Jolla Village Associates

2. Her 100 percent ownership of Patriot Limosine Corporation

3. The John Howard Multi-Fitness, Inc., corporation

4. Her 90 percent interest in Parin Columna Contracting Corporation

5. $20,000 note receivable from FMS Partners

George Kilcrease, a partner with the accounting firm Touche Ross, will testify that in 1984 he was hired by the J. David & Company bankruptcy trustee to help the trustee identify the assets of the bankrupt estate and to assist the bankruptcy trustee in the process of liquidating those assets to make a distribution to the creditors including investors of the bankruptcy. Touche Ross's analysis of the investor claims against the estate indicated that 1,500 investors had legitimate claims for $200 million.

He analyzed the banking records for J. David accounts from January 1983 through February 1984. He determined that First National Bank account 1345 was a J. David banking account in which investor funds were deposited. First National Bank account 1086 was Dominelli's personal bank account. In 1983 investors deposited $72 million into account 1345. Eleven million dollars of those investor funds was placed with various brokerage houses for investment and/or trading purposes under the names of Nancy Hoover, Jerry Dominelli or J. David & Company. In January and February 1984, $29 million was transferred from investor account 1345 to Dominelli's personal account 1086.

In 1983 Dominelli's total overhead for the entire operation which included 50 entities, subsidiaries and partnerships underneath J. David & Company, was $26 million. His operating expenses included $1 million a month for payroll of approximately 200 employees. All the overhead expenses were paid out of or funded by Dominelli's account 1086.

Dominelli also paid for his personal expenditures out of this account. They included race cars, automobiles, jet airplanes, horses, cash payments to charities, operation of restaurants, health spas and art business, furniture, capital improvements to the J. David office, condominiums and houses jointly owned with defendant.

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III

PERTINENT LAW

A. APPLICABLE STATUTES

1. Title 18, United States Code, Section 371, provides:

If two or more persons conspire either to commit an offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

2. Title 18, United States Code, Section 1341, provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

3. Title 7, United States Code, Section 6o(1)(A) provides:

It shall be unlawful for any commodity trading advisor or commodity pool operator, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly . . . to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant;

and

Section 13(b) provides:

(b) It shall be a felony punishable by a fine of not more than $500,000 or imprisonment for not more than five years, or both, together with the costs of prosecution for any person . . . knowingly to violate the provisions of section 6o(1) of this title . . .

4. Title 18, United States Code, Section 1001, provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

5. Title 26 United States Code, Section 7201, provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

6. Title 26 United States Code, Section 7206(2), provides:

> Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

B. CASE LAW

1. Conspiracy Elements

The essential elements which must be proved in order to establish a conspiracy are: (1) an agreement or understanding by two or more persons to combine for an illegal purpose; (2) an overt act in furtherance of that agreement or understanding; and (3) the same degree of criminal intent as is required for commission of the underlying substantive offense. United States v. Abushi, 682 F.2d 1289, 1293 (9th Cir. 1982); United States v. Jit Sun Loo, 478 F.2d 401 (9th Cir. 1973).

a. Method of Proof

The existence of a conspiracy and the fact of a defendant's participation in it need not be established by direct evidence. The essential elements of the offense may be proved through relevant and competent circumstantial evidence, including the acts and declarations of the conspirators and the general inference deducible therefrom. United States v. Turner, 528 F.2d 143, 162 (9th Cir. 1975), cert. denied, 423 U.S. 996; United States v. Westover, 511 F.2d 1154, 1157 (9th Cir. 1975). In a conspiracy prosecution, it is immaterial whether or not the substantive offense is actually consummated. An overt act in furtherance of the conspiracy is all that is required. United States v. King, 478

F.2d 494, 508 (9th Cir. 1973); United States v. Root, 366 F.2d 377 (9th Cir. 1966), cert. denied, 386 U.S. 912 (1967).

b. Overt Act - Defined

An overt act for purposes of a criminal conspiracy may be a perfectly innocent act when standing by itself so long as it is an outward act done in pursuance of the conspiracy and with an intent or design to accomplish the criminal objective. Chavez v. United States, 275 F.2d 813 (9th Cir. 1960).

c. Persons Liable Under Conspiracy Statute

Once a conspiracy has been established, only slight evidence is required to connect a particular defendant to it. United States v. Federico, 658 F.2d 1337, 1344 (9th Cir. 1981); United States v. Calhoun, 542 F.2d 1094, 1105 (9th Cir. 1976), cert. denied, 429 U.S. 1064 (1977); United States v. Turner, supra, at 162; United States v. Nunez, 483 F.2d 453, 460 (9th Cir. 1973), cert. denied, 414 U.S. 1076; United States v. Knight, 416 F.2d 1181, 1184 (9th Cir. 1969). Of course, this evidence still requires proof beyond a reasonable doubt. United States v. Dunn, 564 F.2d 348 (9th Cir. 1977).

A conspirator need not join a conspiracy at its inception. Each person joining a conspiracy is taken to adopt, and is bound by, the prior acts and statements made in furtherance of the common objective even if he is unaware of precisely what was done and who did it. United States v. Taylor, 656 F.2d 1326, 1337 (9th Cir. 1981); United States v. Knight, supra; United States v. Friedman, 445 F.2d 1076, 1080-1081 (9th Cir. 1971), cert. denied, 404 United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). Moreover, a minor or subordinate participant in a criminal conspiracy is equally liable with those who originated and dominated it. Sabari v. United States, 333 F.2d 1019, 1021 (9th Cir. 1964); Hernandez v. United States, 300 F.2d 114, 122 (9th Cir. 1962). Under Pinkerton v. United States, 328 U.S. 640 (1946), each member of a conspiracy is deemed to be criminally liable for any crime, including

substantive offenses, committed by co-conspirators during the course of and in furtherance of the conspiracy.

d. Knowledge of Co-conspirators

The Government need not prove that each participant in the conspiracy knew the identity and functions of all of his alleged co-participants or that each participant was aware of all of the details of the criminal enterprise. United States v. Baxter, 492 F.2d 150, 158 (9th Cir. 1973) cert. denied, 416 U.S. 940; United States v. Friedman, supra, at 1080-1081. Each participant in a criminal conspiracy is legally responsible for the acts of other participants done in furtherance of the conspiracy even though he is unaware of these acts. United States v. Roselli, supra.

e. The Conspirators Exception to the Hearsay Rule

Evidence of the acts and statements of one co-conspirator during and in furtherance of the conspiracy is admissible against other co-conspirators whether or not they were present at the time of the acts or statements. Fed. R. Evid. 801(d)(2)(E). Salazar v. United States, 405 F.2d 74 (9th Cir. 1968); Carbo v. United States, 314 F.2d 718, 735 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964). The hearsay declaration of a co-conspirator may be received into evidence upon a showing that the declaration was made in furtherance of the conspiracy; that it was made during the pendency of the conspiracy; and that there is independent proof of the existence of the conspiracy and of the defendant's participation in it. United States v. Dixon, 562 F.2d 1138 (9th Cir. 1977); United States v. Ellsworth, 481 F.2d 864, 871 (9th Cir. 1973).

The court may properly admit evidence of the acts and declarations of co-conspirators upon the condition that such evidence will be stricken should the Government fail to establish the existence of the conspiracy by independent evidence. United States v. Castanon, 453 F.2d 932 (9th Cir. 1972), cert. denied, 406 U.S. 922; United States v. Smith, 445 F.2d 861 (9th Cir. 1971) (per curiam); United States v. Zemek, 634 F.2d 1159, 1169 n. 13 (9th Cir. 1980). The fact that a defendant is linked to

a criminal conspiracy only by circumstantial evidence does not preclude the admission of a co-conspirator's hearsay statements against him. United States v. Castanon, supra; United States v. Ellsworth, supra. Moreover, it has long been the rule that the hearsay conspiracy exception in no way violates the Sixth Amendment rights of co-conspirators. Dutton v. Evans, 400 U.S. 74 (1970).

Statements made by co-conspirators which relate to agreeing upon the conspiracy, its objectives and its modus operandi are verbal acts and are thus not hearsay and therefore admissible. United States v. Wolfson, 634 F.2d 1217, 1219 (9th Cir. 1980).

A defendant's own statements are admissions wholly apart from the co-conspirator exception and as such are admissible as non-hearsay and evidence of the existence of the conspiracy and of the defendant's participation in it. United States v. Perez, 650 F.2d 654 (9th Cir. 1981); United States v. Cawley, 630 F.2d 1345, 1350 (9th Cir. 1980).

2. Mail Fraud Elements

The elements of mail fraud are: (1) a scheme or artifice to defraud, and (2) use of the mails in furtherance of the scheme. United States v. Vaughn, 797 F.2d 1485, 1492-93 (9th Cir. 1986).

a. Use of the Mails

It is of no consequence that a defendant himself did not do the mailing. United States v. Jones, 712 F.2d 1316, (9th Cir.), cert. denied, 464 U.S. 986 (1983).

> "It is well settled . . . that so long as one participant in a fraudulent scheme causes a use of the mails in execution of the fraud, all other knowing participants in the scheme are legally liable for that use of the mails." United States v. Toney, 598 F.2d 1349, 1355 (5th Cir. 1979), cert. denied, 444 U.S. 1033, (1980).

An individual causes the mails to be used when he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. Pereira v. United States, 347 U.S. 1, 8-9 (1954).

A mailing need not itself be false to be in furtherance of a scheme to defraud. United States v. Buckley, 689 F.2d 893, 898 (9th Cir. 1982). Mailings required for mail fraud conviction need not be an essential part of the scheme, but they must be made or caused to be made for purpose of executing the scheme. United States v. Maze, 414 U.S. 395, 400 (1974). This requirement is satisfied if the completion of the scheme or the prevention of its detection is in some way dependent upon the mailings. United States v. Mitchell, 744 F.2d 701 (9th Cir. 1984) reversed on other grounds. 89 D.A.R. 1929.

b. Intent

A fraudulent statement is one known to be untrue, or made with reckless indifference as to its truth or falsity, and made with the intent to deceive. United States v. McCollum, 802 F.2d 344 (9th Cir. 1986). Reckless disregard for truth or veracity is sufficient to sustain a mail fraud conviction. United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983).

An honest belief in the ultimate success of an enterprise is not, in itself, a defense to mail fraud. United States v. Beecroft, 608 F.2d 753 (9th Cir. 1979). An individual may not be convicted for acts done in good faith but if the apparent good faith is smothered by unwarranted statements and false and reckless representation, made for the purpose of enticing persons to make investments which they would not otherwise make, a condition is presented which enthusiasm cannot justify nor optimism excuse. Levy v. United States, 92 F.2d 688, 692 (9th Cir.), cert. denied, 303 U.S. 639 (1937).

c. Proof of Loss

No one need actually be defrauded. United States v. Rasheed, 663 F.2d 843, 850 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982). However, the scheme must affect property rights or money. McNally v. United States, ___ U.S. ___, 107 S. Ct. 2875 (1987).

3. Fraud by Commodity Pool Operator Elements

The elements of fraud by a commodity pool operator are: (1) a commodity trading advisor, associate of a commodity trading advisor, or commodity pool operator, or associate of a commodity pool operator; (2) a device, scheme, artifice, practice or course of business to defraud or deceive a client, participant or prospective client or participant; and (3) use of the mails in furtherance of the scheme. United States v. Sawyer, 799 F.2d 1494 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987).

a. Commodity Pool Operator Defined

Title 7, U.S.C. Section 2, defines commodity pool operator to mean:

> [a]ny person engaged in a business which is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market . . .

b. Knowledge or Intent

It is sufficient to prove that the commodity pool operator acted intentionally. He must have intended to employ the device, scheme or artifice. It is not necessary that he know that its result will be to defraud the client or prospective client. CFTC v. Savage, 611 F.2d 270 (9th Cir. 1980).

> "If the trading advisor or commodity pool operator intended to do what was done and its consequence is to defraud the client or prospective client that is enough to constitute a violation.

Id. at 285.

c. Types of Schemes

Misappropriation of customers' funds which had been entrusted to the commodity pool operation for trading purposes is a fraud. CFTC v. Skorupskas, 605 F. Supp. 923 (E. D. Mich. 1985). Likewise issuing false monthly account statements to investors which purport to show the account balance of each investor and the trading results is a

violation. Id. Solicitation of investors with deceitful performance tables is a fraudulent activity. Id.

4. False Statement to a Federal Agency Elements

In order for defendant to be found guilty of making a false, fictitious or fraudulent statement or representation, in violation of Title 18, United States Code, Section 1001, the Government must prove: (1) defendant made or used a writing or document which contained a statement in a matter within the jurisdiction of the Commodity Futures Trading Commission; (2) the statement was untrue; (3) defendant knew that the statement was untrue; (4) the statement was material to the Commodity Futures Trading Commission's activities or decisions; and (5) defendant acted knowingly and willfully. United States v. Green, 745 F.2d 1205 (9th Cir. 1984), cert. denied, 474 U.S. 924 (1985). The Government is not required to show that a defendant knew of or intended to deceive the Government agency. United States v. Yermian, ___ U.S. ___, 104 S. Ct. 2936, 2943 (1984); United States v. Green, 745 F.2d 1205, 1210 (9th Cir. 1984).

The evidence will establish the materiality of the false statements and representations as well as the materiality of facts concealed. The test for materiality in the Ninth Circuit was recently stated in United States v. Green, supra, 745 F.2d at 1208:

> The materiality requirement of Section 1001 is satisfied if the statement is capable of influencing or affecting the federal agency . . . The false statement need not have actually influenced the government agency.

Accord, United States v. Salinas-Ceron, 731 F.2d 1375, 1377 (1984), vacated on other grounds, 755 F.2d 726 (9th Cir. 1985); United States v. Duncan, 693 F.2d 971, 975 (9th Cir. 1982), cert. denied, 461 U.S. 961 (1983); United States v. Deep, 497 F.2d 1316, 1321-22 (9th Cir. 1974); United States v. East, 416 F.2d 351, 353 (9th Cir. 1969).

There is no requirement that the Government actually rely on the false information. It is therefore no defense that the Government knew the statements were false when made. United States v. Salinas-Ceron, supra, 731 F.2d at 1377.

> [T]he test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end measured by collateral circumstances.

Id. (quoting Brandow v. United States, 268 F.2d 559, 565 (9th Cir. 1959)); accord, United States v. Goldfine, 538 F.2d 815, 820-21 (9th Cir. 1976).

The indictment charges that the defendant falsified, concealed, and covered up material facts by tricks, schemes, and devices and made and used documents containing false, fictitious, and fraudulent statements. It is proper to allege in one count that the defendant, in making a false statement, used various means to violate 18 U.S.C. § 1001. United States v. UCO Oil Co., 546 F.2d 833, 838 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977).

5. Income Tax Evasion (Title 26, United States Code, Section 7201)

There are no limits to the ways there can be an attempt to evade income taxes. Federal law expressly provides -- "attempts in any manner" (Title 26, United States Code, Section 7201). The only requirement is that the taxpayer take some affirmative action. The general rule -- "any conduct, the likely effect of which would be to mislead or to conceal for a tax evasion motive." Spies v. United States, 317 U.S. 492, 499 (1943). The Government must prove some affirmative act constituting an attempt to evade but it need not prove each act alleged. United States v. Mackey, 571 F.2d 376 (7th Cir. 1978). The filing of a false return constitutes an attempt to evade. Sansone v. United States, 380 U.S. 343, 351 (1965); United States v. Habig, 390 U.S. 222 (1968); United States v. Schafer, 580 F.2d 774 (5th Cir.), cert. denied, 439 U.S. 970 (1978).

Even where the taxpayer files a false return the Government must prove a tax deficiency, that is, that there was a tax due and owing. However, it is not necessary that the defendant owe the tax. The tax may be owed by the person charged, or a third person, e.g., where the defendant files a false return for a corporation, or a client, or any third person. United States v. Troy, 293 U.S. 58, 61 (1934); United States v. Johnson,

319 U.S. 503 (1943); United States v. Frazier, 365 F.2d 316 (6th Cir. 1966), cert. denied, 386 U.S. 971 (1967).

The Government is not required to prove the exact amount of the tax due and owing. Tax evasion prosecutions are not collection cases. It is not necessary to determine the exact amount of defendant's income. It is sufficient to prove that the defendant attempted to evade a substantial income tax — whether greater or less than the income tax charged as unreported in the indictment. United States v. Johnson, 319 U.S. 503, 517-518 (1943); United States v. Marcus, 401 F.2d 563, 565 (2d Cir. 1968), cert. denied, 393 U.S. 1023 (1943); Swallow v. United States, 307 F.2d 81, 83 (10th Cir. 1962), cert. denied, 371 U.S. 950 (1963) (indictment charged $33,000; proof established $14,000 — upheld); United States v. Burdick, 221 F.2d 932, 934 (3d Cir. 1955), cert. denied, 350 U.S. 831 (1955); United States v. Costello, 221 F.2d 668, 675 (2d Cir. 1955), aff'd, 350 U.S. 359 (1956) (indictment charged $244,000; proved $288,00 — upheld).

Although the Government is not required to prove the exact amount of tax due and owing, it must prove that the unreported tax for a given year was substantial. Substantial or not is a jury question. Any amounts of income or tax greater than sums relatively small under the particular circumstances are substantial. As the court noted in United States v. Nunan, 236 F.2d 576, 585 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957): "A few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution." A prosecution under 26 U.S.C. § 7201 with four specific items of omitted income totaling $6,455 resulting in $2,100 net tax and $420 tax deficiency has been held appropriate. Marks v. United States, 391 F.2d 210 (9th Cir.), cert. denied, 393 U.S. 839 (1968).

The term willfully, as used in 26 U.S.C. § 7201, simply means a voluntary intentional violation of a known legal duty. United States v. Bishop, 412 U.S. 346, 360 (1973); United States v. Pomponio, 429 U.S. 10, 12 (1976). The Supreme Court has "formulated" or described the requirement of willfulness as "bad faith or evil intent,"

United States v. Murdock, 290 U.S. 389, 398 (1933), "evil motive and want of justification in view of all the financial circumstances of the taxpayer," Spies v. United States, 317 U.S. 492, 498 (1943), knowledge that the taxpayer should have reported more income than he did. Sansone v. United States, 380 U.S. 343, 353 (1965). The bad faith or evil intent requirement described in Murdock means nothing more than -- the specific intent to violate the law. The only motive that must be proved — intentional violation of a known legal duty. As the Court noted in United States v. Pomponio, 429 U.S. at 12, "We did not, however, hold that the term requires proof of any motive other than an intentional violation of a known legal duty."

Although direct proof of a taxpayer's intent to evade taxes is rarely available, willfulness may be inferred by the trier-of-fact from all facts and circumstances of attempted understatement of tax. United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980). In Spies v. United States, 317 U.S. 492, 499 (1943), the Court lists examples of conduct from which an affirmative willful attempt may be inferred, which are as follows: keeping a double set of books, making false entries or alterations, making false invoices or documents, destruction of books and records, concealment of assets or sources of income, handling transactions so as to avoid making the unusual records, any conduct, the likely effect of which would be to mislead or to conceal.

Willfulness may be inferred by evidence of a consistent pattern of under-reporting large amounts of income. United States v. Skalicky, 615 F.2d 1117 (5th Cir.), cert. denied, 449 U.S. 832 (1980); United States v. Larson, 612 F.2d 1301 (8th Cir.), cert. denied, 446 U.S. 936 (1980); United States v. Gardner, 611 F.2d 770 (9th Cir. 1980). Failure to supply an accountant with accurate and complete information -- taxpayer-kept receipt books for cash received but does not supply them to accountant thus concealing cash receipts -- does not negate willfulness. Defendant's reliance on the advice of his lawyer and accountant does not negate willfulness unless defendant made a

complete disclosure of all pertinent facts. United States v. Samara, 643 F.2d 701, 703 (10th Cir.), cert. denied, 454 U.S. 1094 (1981), see also United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); United States v. Scher, 476 F.2d 319 (7th Cir. 1972).

The defense of inefficient bookkeeping or a negligent accountant does not remove from jury consideration "the question of willfulness". United States v. Venditti, 533 F.2d 217, 219 (5th Cir. 1976). In other words, a taxpayer who relies on others to keep his records and prepare his tax returns may not withhold information from those persons relative to taxable events and then escape criminal responsibility for the resulting false returns. United States v. Garavaglia, 566 F.2d 1056 (6th Cir. 1977).

Willfulness may also be inferred by evidence of destroying, throwing away or "losing" books and records, United States v. Conforte, 624 F.2d 869 (9th Cir.), cert. denied, 449 U.S. 1012 (1980); Yoffe v. United States, 153 F.2d 570, 573 (1st Cir. 1946); Gariepy, B. F. V. United States, 189 F.2d 459, 463 (6th Cir. 1951); United States v. Holovachka, 314 F.2d 345, 357 (7th Cir.), cert. denied, 374 U.S. 809 (1963); United States v. Stione, 431 F.2d 1286, 1288 (5th Cir.), cert. denied, 401 U.S. 912 (1970); making or using false documents, false entries in books and records, false invoices and the like. United States v. Lange, 161 F.2d 699 (7th Cir. 1947); Marienfeld v. United States, 214 F.2d 632 (8th Cir.), cert. denied, 348 U.S. 865 (1954).

6. Aiding and Assisting in Preparation and Filing False Return Elements

To establish a Section 7206(2) offense, the Government must prove the following elements beyond a reasonable doubt:

(1) Defendant aided, procured, counseled, or advised the preparation or presentation of a document in connection with a matter arising under the internal revenue laws;

(2) The document was false as to a material matter;

(3) The act of the defendant was willful.

United States v. Perez, 565 F.2d 1227, 123-1234 (2d Cir. 1977); United States v. Crum, 529 F.2d 1380, 1382 n. 2 (9th Cir. 1976).

a. Persons Liable

Section 7206(2) is not limited to return preparers. The rule is that anyone who causes a false return to be filed or furnishes information which leads to the filing of a false return can be guilty of violating Section 7206(2). Otherwise stated, did the person consciously do something that lead to the filing of a false return.

In United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976), the scheme was to furnish high income doctors with backdated beaver purchase contracts for use in obtaining a fraudulent depreciation deduction. Crum, who bred and sold beavers, did not participate in the preparation of the returns, but he did attend two meetings with doctors where the scheme was discussed. He also signed two backdated beaver purchase contracts, one of which was signed to display to an IRS agent. Crum, supra, 529 F.2d at 1381-1382. In affirming the conviction, the court described as "a proper statement of the law" the following jury instruction pertaining to the "aids or assists in" language in Section 7206(2), Crum, supra, 529 F.2d at 1382 n. 4:

> "In order to aid and abet another to commit a crime it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to bring about; that is to say, that he willfully seeks by some act or omission of his to make the criminal venture succeed.
>
> "In making a determination as to whether the defendants aided or assisted in or procured or advised the preparation for filing of false income tax returns, the fact that the defendants did not sign the income tax returns in question is no material to your consideration."

The court in Crum also rejected the contention that Section 7206(2) applies only to preparers of tax returns and quoted the principle set forth in United States v. Johnson, 319 U.S. 503, 518 (1943) as follows, 529 F.2d at 1382:

> The nub of the matter is that they aided and abetted if they consciously were parties to the concealment of [a taxable business] interest * * *.

For another example of a defendant who did not participate in the preparation of the false return, see United States v. Maius, 378 F.2d 716 (6th Cir. 1967), cert. denied, 389 U.S. 905 (1967). Maius, among other things, managed the bar and restaurant at the casino that employed him. As part of his duties, he prepared false daily sheets of the casino gambling loss collections, with the figures being entered in the casino books and ultimately reflected on the returns of the casino. His knowledge that the records would be used in preparing the tax returns was held sufficient, under the circumstances, to sustain his conviction. Maius, supra, 378 F.2d at 718.

United States v. Wolfson, 573 F.2d 216 (5th Cir. 1978) sets forth the causation theory that can support a Section 7206(2) violation. The scheme charged there was that Wolfson supplied inflated appraisals to persons who donated their yachts to a university and in turn claimed a charitable deduction on their returns on the basis of the inflated appraisals. While reversing the conviction on evidentiary grounds, the court rejected the contention that Wolfson did not come under Section 7206(2) since: "At best, he provided only an appraisal that the taxpayer or his accountant used to prepare a return." Wolfson, supra, 573 F.2d at 225. The court said, ibid."

> Thus, Wolfson does not have to sign or prepare the return to be amenable to prosecution. If it is proved on remand that he knowingly gave a false appraisal with the expectation it would be used by the donor in taking a charitable deduction on a tax return, it would constitute a crime.

b. Signing of Document Not Required

The violation is the assisting, counseling, aiding, preparing, or supplying of false information that causes a false document to be filed. The fact that the defendant does not actually sign or file the document itself "is not material." United States v. Maius, 378 F.2d 716, 718 (6th Cir. 1967), cert. denied, 389 U.S. 905 (1967); United States v. Crum, 529 F.2d 1380, 1382 n. 4 (9th Cir. 1976).

c. Knowledge of Taxpayer

It is no defense that the taxpayer was not charged, even where the taxpayer was aware of the falsity of the return, went along in a scheme with the defendant, and could have been charged with a violation. Otherwise stated, the innocence or guilty knowledge of the taxpayer does not condone the conduct of the defendant. Thus, the case could be one involving an innocent taxpayer who was supplied with false information by the defendant or a guilty taxpayer who willingly accepted and used the false information supplied by the defendant. This is clear from the language of Section 7206(2):

> * * * whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document * * *.

The Fourth Circuit, after reviewing non-return preparer cases under Section 7206(2) from other circuits, stated that all that is required for a Section 7206(2) prosecution is that a defendant "knowingly participate in providing information that results in a materially fraudulent tax return, whether or not the taxpayer is aware of the false statements." United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984). See also United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978); United States v. Greger, 716 F.2d 1275, 1278 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 35551 (Sup. Ct. Jan. 25, 1984); United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976); United States v. Kopituk, 690 F.2d 1289, 1333 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983); United States v. Siegel, 472 F. Supp. 440, 444 (N.D. Ill. 1979).

d. Tax Deficiency Not Necessary

It is not necessary to prove a tax deficiency, an intent to evade, or any pecuniary loss to the Government. The falseness of the material matter is the crime, regardless of the tax consequences of the falsehood. Thus, in Baker v. United States, 401 F.2d 958, 987 (D.C. Cir. 1968), the defendant argued that a count in the indictment did not charge a Section 7206(2) offense because the count "alleged a 'wash' transaction having no tax consequences." The argument was rejected - "a false statement may be 'material'

notwithstanding the lack of tax consequences." Id. Similarly, in Hull v. United States, 324 F.2d 817 (5th Cir. 1963), the Section 7206(2) indictment there was found sufficient and the argument rejected that the indictment was defective because it failed to state the amount of income which was not reported. Hull, 324 F.2d at 823. The court went on to say, ibid.:

> We further conclude that there is no merit in Hull's contention that the trial court erred in failing to charge the jury that a showing of a tax deficiency is a prerequisite to conviction.

To the same effect, see United States v. Abbas, 504 F.2d 123, 126 (9th Cir. 1974), cert. denied, 421 U.S. 988 (1975):

> Defense argues that the items alleged to be false must be material to the computation of the correct tax liability to support a conviction of 26 U.S.C. § 7206(2). Edwards v. United States, 375 F.2d 862, 865 (9th Cir. 1967) belies this contention.

e. Willfulness

The same considerations and the same proof is required to establish willfulness as in other criminal tax violations. "The court, in fact, has recognized that the word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty." United States v. Bishop, 412 U.S. 346, 360 (1973).

In Edwards v. United States, 375 F.2d 862 (9th Cir. 1967), the defendant was a tax attorney who collected estimated tax payments from his clients, pocketed the money, and then reported on their returns that the estimated tax payments had been made and were a proper credit against the tax due. The defendant argued that he did not intend to evade tax but only wanted to gain a little time. The court summarized the applicable law as follows, Edwards, supra, 375 F.2d at 865:

> The offense to which this section is directed is not evasion or defeat of tax. Rather it is falsification and the counseling and procuring of such deception as to any material matter. Here the falsification was committed deliberately, with full understanding of its materiality; with intent that it be accepted as true and that appellant thereby gain the end he sought. This in our judgment is sufficient to constitute willfulness under this section.

See also United States v. Greer, 607 F.2d 1251, 1252 (9th Cir. 1979), cert. denied, 444 U.S. 993 (1979), - "Section 7206(2) requires that the accused must know or believe that his actions will likely lead to the filing of a false return."

7. Investors' Testimony of their Solicitation Discussions with J. David Salesmen

The Government intends to call J. David investors' to testify regarding discussions they had with J. David salesmen about the investment and Dominelli's performance. Their testimony is being offered to prove the existence of the scheme. The statements are not being offered for their truthfulness. The purpose of the testimony is to establish the fact that the salesmen had made the statements and had given investors Dominelli's performance records.

The Federal Rules of Evidence 801(c) defines hearsay as:

> "[A] statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

The investors' testimony will not be offered in evidence to prove the truth of the matter asserted. The Government will demonstrate their falsity through independent evidence. Therefore, they are not hearsay. United States v. Gibson, 690 F.2d 697 (9th Cir. 1982) cert. denied, 460 U.S. 1046 (1983).

Even if the investors' testimony did fall within the hearsay definition, it is admissible under Federal Rules of Evidence 801(d)(2)(D), (statements by an agent). These statements were made by J. David employees acting in the scope of their employment. Id. at 701. See also United States v. Feldman, 825 F.2d 124 (7th Cir. 1987).

8. Evidence of Other Acts

The courts have permitted prior similar acts to be admitted into evidence under Rule 404(b) of the Federal Rules of Evidence for the reason that the prior acts go to show motive and intent of the indicted act. Essentially, the prior acts show the entire scheme of activity that brings about the charged offense.

In United States v. Jenkins, 785 F.2d 1387 (9th Cir. 1986), the court permitted a witness to testify to irregularities in a conventional loan that defendant had applied for a year prior to the charged offense. The court admitted the evidence pursuant to Rule 404(b) because "[T]he fact that Jenkins used fraudulent means to secure conventional loans is probative on issues of intent, knowledge, good faith and absence of mistake in dealing with FHA transactions." 785 F.2d at 1395.

Recently, the Supreme Court held in Huddleston v. United States, ___ U.S. ___, 108 S. Ct. 1496 (1988), that the trial court need not make a preliminary finding that the Government has proved the "other act" by a preponderance of the evidence before it submits "similar acts" and other Rule 404(b) evidence to the jury. To be admissible the evidence must be relevant.

> Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

Id. at 1499.

Moreover, in United States v. Morris, 827 F.2d 1348 (9th Cir. 1987), the court again permitted the admission of prior conduct to show "issues of identity, preparation or plan, intent to defraud, absence of mistake, and possession." 827 F.2d at 1350. The case concerned the possession and trafficking of counterfeit credit cards. The prior evidence dealt with two witnesses testifying that the defendant, a year previously, had given them altered credit cards.

Also, in United States v. Crocker, 788 F.2d 802 (1st Cir. 1986), statements made a month prior to charged conspiracy were admitted into evidence. The court allowed the statements because they "identified the participants in the conspiracy and revealed their disposition and availability to continue with the counterfeit check cashing activity." 788 F.2d at 805. The court went on to note that the relationship of the acts "made it highly relevant to a proper understanding of the origin, scope, nature and objective of the

conspiracy as well as the defendant's participation in it". 788 F.2d at 806. More importantly, "evidence of acts prior to a conspiracy's alleged onset have been admitted as relevant to show the conspiracy's existence, its purpose and the significance of later behavior". 788 F.2d at 806.

Once again, in United States v. Enright, 579 F.2d 980 (6th Cir. 1978), evidence of a meeting between defendant and a co-conspirator prior to the charged conspiracy was admitted to show relevance and intent. The court noted that "[O]ur circuit and several others have held that evidence of a conspirator's actions, even though they may have occurred before the beginning of the conspiracy alleged in the indictment, are nevertheless admissible as proof of motive or intent, touching upon the conspiracy charged in the indictment". 579 F.2d at 988.

Rule 404(b) is inclusive rather than exclusive, and evidence should be admitted unless it is relevant only to bad character and for no other purpose. United States v. Riggins, 539 F.2d 682 (9th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1045 (1977).

9. Evidence of Defendant's Guilty Plea and Admission of Her Illegal Contributions to Hedgecock's Campaign are Admissible

Count 228 of the indictment charges defendant with evading her personal income taxes for 1983. Her income tax return reflected a partnership loss from Tom Shepard & Associates of $100,163.00. The Government intends to offer defendant's plea to conspiracy with Hedgecock and Shepard to avoid campaign contribution laws and her admission in support of the guilty plea as evidence that this partnership loss was a false deduction and defendant knew that it was false. Defendant's statement for her guilty plea stated:

> In 1981, she and Tom Shepard discussed Shepard's new company, Tom Shepard & Associates and its participation in Hedgecock's mayorial election campaign; that it was her desire to assist Hedgecock in his efforts to become mayor, and that if Hedgecock won, Hedgecock, Shepard, and Shepard's company would benefit.

Late in 1982, she caused additional funds to be provided to pay for Tom Shepard & Associates employees who were working on the Hedgecock campaign. There was no discussion about any agreement to pay the monies back.

She stated further that at the time she supplied funds to Tom Shepard & Associates, she knew that the most she could give Hedgecock as a contribution to his campaign was $250.00 in the primary and $250.00 in the general election and that she knew that the funds would be used to pay employees who were working almost exclusively on Hedgecock's campaign and to pay other expenses Tom Shepard & Associates were incurring as a result of the Hedgecock campaign.

K-1's attached to Tom Shepard & Associates' 1983 partnership tax return, Form 1065 show that Cheyney & Associates, SSN 555-56-2570, owned 100% of the capital and shared 90% in the profits and losses. The SSN belonged to defendant. Cheyney was the name of her dog. The K-1 reflected contributions by defendant in 1983 of $195,000.00. Her guilty plea and statement are relevant and admissible to prove Count 228 of the indictment charging her with income tax evasion for 1983.

Initially, the Government submits that the proffered evidence is not "other crimes" evidence within the meaning of Federal Rules of Evidence 404(b). Rather, it is direct evidence that defendant knowingly and willfully evaded her 1983 income taxes. United States v. Campbell, 774 F.2d 354 (9th Cir. 1985). Evidence should not be treated as "other crimes" evidence when "the evidence concerning the ['other'] act and the evidence concerning the crime charged are inextricably intertwined". United States v. Soliman, 813 F.2d 277, 279 (9th Cir. 1987), citing, United States v. Aleman, 592 F.2d 881, 885 (5th Cir. 1979).

Evidence that directly proves an element of the charged crime is not controlled by Rule 404(b). United States v. Vaccaro, 816 F.2d 443, 452 (9th Cir. 1987). "[C]riminal activity is an integral part of the offense charged if it is so blended or connected with the one on trial as that proof of one incidentally involves the other or explains the circumstances thereof .." United States v. Van Cauwenberghe, 814 F.2d 1229, 1338 (9th Cir. 1987).

Here, defendant's plea to conspiring with Hedgecock and Shepard to avoid campaign contribution laws directly proves an element of the income tax evasion charge. She admitted that she intended to make contributions to Hedgecock's campaign in excess of those allowed by law and that she executed this scheme through a bogus partnership arrangement with Tom Shepard & Associates. It proves an element of the offense that she knowingly and willfully claimed a false deduction for a partnership loss from her "investment" in Tom Shepard & Associates. In addition, to prove her claimed deduction was false and therefore not allowed, the Government must prove that this deduction was an illegal campaign contribution. Her plea and admission makes this clear.

The evidence that the Government seeks to offer is also legally relevant; thus, it should not be excluded under Federal Rule of Evidence 403. Rule 403 permits a trial judge to exclude logically relevant evidence only if its probative value is substantially outweighed by attendant probative dangers. In weighing probative value against the danger of undue prejudice, the general rule is that the balance should be struck in favor of admissibility. United States v. Finestone, 816 F.2d 583, 585 (11th Cir. 1987) ("Rule 403 is an extraordinary remedy which should be used only sparingly"); United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980).

Here, contrary to the express justifications for excluding evidence under Rule 403 (e.g., confusion of issues, tendency to mislead, undue delay; needless presentation of cumulative evidence), the probative effect of the Government's evidence is substantial and far outweighs any slight, non-probative effect. Consider that: (1) there will be a clear showing by direct evidence that defendant claimed a partnership loss on her 1983 tax return; (2) there will be a clear showing by direct evidence that K-1's attached to Tom Shepard & Associates' 1983 partnership tax return show defendant owned 100% of the capital and shared 90% in the profits and losses. They indicated $195,000.00 in contributions by defendant; (3) Tom Shepard will testify about the funds he received from defendant; (4) the crime charged involves knowledge and willfulness - and the

from defendant; (4) the crime charged involves knowledge and willfulness - and the proffered evidence directly establishes that defendant had the required intent; and (5) the issues of knowledge and willfulness are material and in dispute. These factors collectively skew the balancing required by Rule 403 in favor of admitting the proffered evidence. United States v. Vaccaro, 816 F.2d at 452-453.

Furthermore, Rule 403 is to be interpreted and applied in conjunction with the overall purposes of the Federal Rules of Evidence. See Fed. R. Evid. 102. In light of the most recent pronouncements of the Supreme Court and of the Ninth Circuit which emphasize the broad admissibility of evidence offered pursuant to Rule 404(b), e.g., Huddleston v. United States, ___ U.S. ___, 108 S. Ct. 1496, 1501 (1988) ("Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence"); United States v. Catabran, 836 F.2d 453, 459 (9th Cir. 1988) ("This circuit has repeatedly stated that Rule 404(b) is 'an inclusionary rule', which admits evidence of other circumstances unless the evidence tends only to prove criminal disposition"), the evidence proffered by the Government in this case does not provide an appropriate instance for exclusion under Rule 403.

For all these reasons, Rule 403 poses no barrier to the admissibility of the Government's proffered evidence.

10. Hostile Witnesses

Over the years, the courts have permitted certain witnesses to be declared hostile based upon very minimal standards. Essentially, the criteria is quite broad and encompassing. In Esco Corporation v. United States, 340 F.2d 100 (9th Cir. 1965), a witness, not considered favorable to the party calling him (the Government) was subject to leading questions. Similarly, in Haney v. Mizell Memorial Hospital, 744 F.2d 1467 (11th Cir. 1984), a witness who was employed by the defendant, allegedly present when the malpractice occurred; adverse to plaintiff, was declared hostile by the court,

enabling plaintiff's counsel to ask leading questions. Defendant's girlfriend was declared a hostile witness because she was identified with the "adverse party" and therefore subject to leading questions. United States v. Hicks, 784 F.2d 854 (4th Cir. 1984). A witness who is considered evasive and adverse to the Government, not hostile, may be questioned by the prosecutor using leading questions on direct testimony, even though the prosecutor fails to declare witness hostile. United States v. Brown, 603 F.2d 1022 (1st Cir. 1979).

In United States v. Bensinger, 430 F.2d 584 (8th Cir. 1976), a witness employed by defendant was considered hostile and therefore subject to leading questions by Government counsel. The court also ruled that the witness was not adverse to the defense. As such, defense counsel was not permitted to use leading questions when a fact witness who is considered defense-oriented is testifying. United States v. American Radiator & Standard Sanitary Corporation, 433 F.2d 174 (3d Cir. 1970).

IV

PROPOSED VOIR DIRE QUESTIONS

In addition to the questions generally proposed by the court to the jury panel, the Government submits the following proposed voir dire questions in this case:

1. Do any of you know or are any of you familiar with any of the Government's witnesses (as listed above)?

2. The Government attorney in this case is Assistant United States Attorneys S. Gay Hugo and Stephen P. Clark. In addition, the Government will be assisted by Special Agent David Chell and Revenue Agent Paul T. Perry of the Internal Revenue Service. Do any of you know any of these individuals? Do any of you know or are any of you familiar with defendant?

3. The defense will be represented by Richard Marmaro and Robert Brewer. Do any of you know these individuals or any of their associates in their law practices?

4. The defense may call the following witnesses in its case [ask defendant's counsel to name their witnesses]: Do any of you know or are any of you familiar with any of defendant's witnesses?

5. Have any of you been involved in any incident involving the enforcement of the criminal law as a witness, victim, or the accused? Have any of your close family members or friends been involved in any criminal court proceedings as a witness, victim, or the accused?

6. Have any of you ever had an "unpleasant experience" with any law enforcement agency, i.e., a traffic ticket which you felt was unjustified?

7. Would that experience cause you to be prejudiced against the Government in this case?

8. This case initially was investigated by the Internal Revenue Service. Have you or any members of your family, or any of your close friends, to the best of your knowledge, had any experiences with the Internal Revenue Service or any agency of the United States Government?

9. Some of the witnesses for the Government in this case will be Internal Revenue Service agents. Do any of you have any feelings which might tend to make you favor or disfavor these agents, or give any more or less credibility to the testimony of these agents?

10. Do you and/or your spouse prepare your income tax returns?

11. If not, did someone such as an attorney, accountant, or income tax preparer prepare your income tax returns?

12. Have you or any members of your family, or any of your close friends, ever studied bookkeeping or accounting?

13. Have you or any members of your family ever worked for an accountant or one who prepares income tax returns? Who?

14. Have any of you ever invested in what are commonly called "tax shelters"?

15. Have you or any members of your family or any of your close friends ever invested in a limited partnership?

16. Have any of you had any prior jury experience? [To those who answer in the affirmative]: In what court? How long ago? In what kind of dispute (criminal or civil)? Was the jury able to reach a verdict?

17. Do any of you have any legal training of any sort? Are any of you related to lawyers or other persons having legal experience or training? If so, describe the level of experience or training of that person. Do any of you have any difficulty reading or understanding the English language?

18. Do all of you understand that the subject of punishment is not to be discussed by you either inside or outside of the jury room, and that subject is not to enter into your deliberations at all concerning whether a defendant is guilty or not guilty of the offenses charged?

19. The law requires that you base your verdict on the facts as you find them to be from the evidence. The law does not permit you to consider any emotion such as sympathy, prejudice, vengeance, fear, or hostility. Is there anybody here who feels that he or she cannot put these emotions out of his or her mind when deliberating on a verdict?

20. Does anyone have any problem with his or her hearing or sight or any other medical problem which would impair his or her ability to devote full attention to the trial?

21. Do any of you have any religious, moral, ethical or philosophical beliefs which would make it difficult for you to sit in judgment of another human being?

22. If, after hearing all the facts and having instruction on the law, you are convinced beyond a reasonable doubt that the defendants are guilty, would any of you hesitate in voting the verdict of "guilty"?