

1962

Commercial Bribery: The Need for Legislation in Minnesota

Minn. L. Rev. Editorial Board

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Editorial Board, Minn. L. Rev., "Commercial Bribery: The Need for Legislation in Minnesota" (1962). *Minnesota Law Review*. 2777.
<https://scholarship.law.umn.edu/mlr/2777>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Commerical Bribery: The Need for Legislation in Minnesota

In view of the structure of the modern business organization and the demands made upon the individual by present-day business, both the opportunities for, and the practice of, influencing the agents of others are increasing. The author of this Note examines the civil remedies and criminal sanctions against commercial bribery presently available both in Minnesota and in other jurisdictions. He concludes that existing Minnesota law is inadequate as a deterrent to commercial bribery and suggests specific legislation designed to meet the problem.

INTRODUCTION

*Every man has his price,
I will bribe left and right.*

*Lytton, Walpole,
Act II, Scene 2*

As commonly understood, bribery is the act of giving or receiving a gift for the purpose of effecting the improper discharge of a *public* duty. The term bribery and the act it signifies is not limited, however, to the corrupt influencing of public officers. Bribery also denotes the act of giving or receiving a gift for the purpose of influencing any agent to improperly discharge a duty entrusted to him by a *private* individual or corporation.¹ The latter form of bribery normally occurs with reference to a commercial transaction—as where an agent receives money or other concessions² from

1. A bribe is defined as "A price, reward, gift or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct of a person in a position of trust, as an official or a voter." WEBSTER, NEW INTERNATIONAL DICTIONARY 333 (2d ed. 1947). Commercial bribery itself has been judicially defined as "the advantage which one competitor secures over his fellow competitors by his secret and corrupt dealing with employees or agents of prospective purchasers." *American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939).

One writer has impliedly suggested that commercial bribery statutes should seek only to protect principals against the corrupt act of an agent or other person in a position of trust. See Note, 108 U. PA. L. REV. 848 (1960). This is not disputed. However, if such statutes are to effectively deter corrupt acts, strict prohibition against the acceptance of any gift may be required in some instances. See text accompanying notes 121–24 *infra*.

2. The bribes at which commercial bribery statutes are directed usually

the briber in return for the agent's effort to further the briber's interests in business dealings between the briber and the principal. There is general agreement that bribery, both public and commercial, must be deterred.³ Although all jurisdictions have laws which proscribe public bribery,⁴ there is a definite lack of control over commercial bribery.⁵

The purpose of this Note is to examine Minnesota statutory and case law which may be applicable to commercial bribery, to analyze the effectiveness of such law, and to propose specific legislation to cure any inadequacies. This Note will also consider civil remedies and criminal sanctions against nongovernmental corruption available both in Minnesota and in other jurisdictions.

I. CIVIL REMEDIES

The rules of agency applicable in Minnesota provide a principal with several civil remedies against both a briber and a bribee. Some of the remedies are cumulative; others are alternative. The remedies available to the principal of a disloyal agent against the briber are: (1) a right to rescind any contract induced by the agent as a result of the bribe; and (2) a right to sue the briber for damages resulting from the bribe. The remedies available to the principal against the bribee are: (1) a right to recover the amount of the bribe from the disloyal agent; (2) a right to sue the disloyal agent for damages resulting from the bribe; (3) a right to dismiss the disloyal agent; and (4) a right to withhold compensation for the agent's disloyal service.⁶

A. RIGHTS AGAINST THE BRIBER

If without the principal's knowledge the negotiating agent accepts compensation from the other party to the transaction, un-

take one of three forms; money, gifts and entertainment, and salesmen's subsidies. See Note, 108 U. PA. L. REV. 848 (1960).

3. See FLYNN, GRAFT IN BUSINESS 108 (1931); HENDERSON, THE FEDERAL TRADE COMMISSION 224-25 (1924); JONES, TRADE ASSOCIATION ACTIVITIES AND THE LAW 34-43 (1922); Eliasberg, *Corruption and Bribery*, 42 J. CRIM. L., C. & P.S. 317 (1951); Ivamy, *Bribery of Agents*, 16 SOL. 245 (1949); Note, 45 HARV. L. REV. 1248 (1932); Note, 28 COLUM. L. REV. 799 (1928).

4. See, e.g., MINN. STAT. §§ 613.02-.11 (1957).

5. The various statutes dealing with commercial bribery have been collected and categorized at 108 U. PA. L. REV. 848, 866 (1960).

6. The extent to which commercial bribery constitutes fraud—thus making available to the principal the remedies of rescission of fraudulently induced contracts and an action for damages against the participants in the fraud—will be discussed later in connection with criminal fraud. See text accompanying notes 41-49 *infra*.

der Minnesota law the principal may rescind the transaction.⁷ Generally, this right is not limited to the commercial bribery situation. Moreover, it is available despite a lack of intent to deceive⁸ and even though the third party was ignorant of the fact of the prior agency.⁹ In *Olson v. Pettibone*,¹⁰ the principal engaged an agent to sell his resort business. This agent, secretly in the employ of the principal's arch business rival, arranged a clandestine sale to the competitor. In an action to rescind the contract, the Minnesota Supreme Court held that since the principal was ignorant of his agent's other employment he had an absolute right to rescind the sale without a showing of either injury or intent to deceive. *Olson* and its progeny¹¹ have clearly established the principal's right to rescind transactions negotiated in whole or in part by a disloyal agent. However, where the disloyal agent merely *influences* the principal's decision to enter into the transaction and does not actually conduct the negotiations himself, the existence of a right of rescission is less certain.¹²

In Minnesota, as in most jurisdictions,¹³ the principal's right to

7. See *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 94 N.W.2d 273 (1959); *Doyen v. Bauer*, 211 Minn. 140, 300 N.W. 451 (1941); *Olive v. Taylor*, 182 Minn. 327, 234 N.W. 466 (1931); *Olson v. Pettibone*, 168 Minn. 414, 210 N.W. 149 (1926); 1 DUNNELL MINN. DIG. *Agency* § 198 (1951).

8. See *Olson v. Pettibone*, 168 Minn. 414, 417, 210 N.W. 149, 150 (1926). The court stated that the party ignorant of the double employment may rescind "without showing any injury or intent to deceive."

9. The general rule is that if neither party has knowledge of the dual agency the contract is voidable at the option of either. See *Gordon v. Beck*, 196 Cal. 768, 239 Pac. 309 (1925); *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N.Y. 446, 34 N.E. 200 (1893); RESTATEMENT (SECOND), AGENCY § 313(c) (1958); Comment, 2 STAN. L. REV. 574 (1950). This rule, however, may not apply in Minnesota. Cf. *Olive v. Taylor*, 182 Minn. 327, 234 N.W. 466 (1931).

10. 168 Minn. 414, 210 N.W. 149 (1926).

11. See cases cited in note 9 *supra*.

12. See *Boulevard Plaza Corp. v. Campbell*, 254 Minn. 123, 131, 94 N.W.2d 273, 281 (1959). Although the agent actually handled the transaction in this case, the specific questionable conduct approved by the court was the agent's failure to communicate to the principal all the facts within his knowledge which "might affect his [the principal's] rights or interests." See also 1 DUNNELL MINN. DIG. *Agency* § 198 (1951), which states that the right to rescind exists if the contract required the exercise of discretion by the agent.

13. The New York courts have allowed recovery against the briber in *Donemar, Inc. v. Malloy*, 252 N.Y. 360, 169 N.E. 610 (1930); *Hearn v. Schuchman*, 150 App. Div. 476, 135 N.Y. Supp. 52 (1912); *In re Brown's Estate*, 176 Misc. 308, 27 N.Y.S.2d 318 (Surr. Ct. 1941). However, a New Jersey court, in *Kuntz v. Tonnele*, 80 N.J. Eq. 373, 84 Atl. 624 (Ch. 1912), refused affirmative recovery on the basis of the secret payment alone. There appears to be a lack of authority upon the issue in other jurisdictions.

recover damages from the briber is an open question.¹⁴ The *Restatement of Agency* takes the position that any "person who . . . intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal."¹⁵ Since by definition a bribe is intended to cause the agent to disregard his duty to the principal, application of the *Restatement* rule would seem to allow the recovery of damages from the successful commercial briber. Furthermore, the *Restatement* provides specifically that if the third party knows of the principal-agent relationship and engages the negotiating agent to act in his behalf, that third party is liable to the principal.¹⁶ As an alternative to proving actual damage, the *Restatement* suggests that the principal should at least be able to collect the amount of the bribe from the third party.¹⁷ Inasmuch as it is difficult to argue that a briber should not be liable for the damage he has intentionally caused, it seems probable that in a case of first impression the Minnesota Supreme Court would follow the lead of the *Restatement* and allow the principal to recover from the commercial briber.

B. RIGHTS AGAINST THE DISLOYAL AGENT (THE BRIBEE)

The principal has an absolute right to recover the amount of the bribe from his disloyal agent.¹⁸ This right does not require a

14. Arguably, the right to recover damages is unavailable in Minnesota. This argument is based on the fact that while the Minnesota court has often upheld the right of a principal to rescind the contract, it has failed to mention the availability of the alternative right to recover damages. See cases cited in note 9 *supra*. However, the court's apparent failure to recognize the right to recover damages may be explained by the fact that the right to damages is not co-extensive with the right to rescind. See *RESTATEMENT (SECOND), AGENCY* § 313 (1958).

15. See *RESTATEMENT (SECOND), AGENCY* § 312 (1958).

16. *RESTATEMENT (SECOND), AGENCY* § 313 (1958) reads as follows:

(1) A Person who, knowing that the other party to a transaction has employed an agent to conduct a transaction for him, employs the agent on his own account in such transaction is subject to liability to the other party, unless he reasonably believes that the other party acquiesces in the double employment.

(2) If without knowledge of the common agency, two persons employ the same agent to conduct a transaction between them, the transaction is voidable at the election of either.

17. See comments to *RESTATEMENT (SECOND), AGENCY* § 313 (1958), which state that the recovery of the amount of the bribe is an alternative right. The liability of the third party—the amount of the bribe—fixed by the leading case of *Salford v. Lever*, [1891] 1 Q.B. 168, has been extended by a holding that damages are presumptively equal to the amount of the bribe. *Donemar, Inc. v. Malloy*, 252 N.Y. 260, 169 N.E. 610 (1930). In *In re Browning's Estate*, 176 Misc. 308, 27 N.Y.S.2d 318 (Surr. Ct. 1941), the rationale for the rule is stated to be that the contract price was "loaded" by the amount of the bribe.

18. *Tarnowski v. Resop*, 236 Minn. 33, 51 N.W.2d 801 (1952); *Magee*

showing of damage; it exists even if the transaction was profitable to the principal.¹⁹ Furthermore, the remedy is cumulative. That is, the principal may recover the amount of the bribe from his disloyal agent in addition to recovering actual damages from the agent or the briber, or in addition to rescinding the contract induced by the disloyal agent.²⁰ Hence, in some cases the principal may recover an amount greater than the actual injury sustained.

The agent is also liable to the principal for all damages resulting from his disloyalty. Thus, in the leading case of *Tarnowski v. Resop*,²¹ the Minnesota Supreme Court held that in addition to the amount of the bribe the principal could recover all damages caused by the agent's disloyalty. The agent who negotiated the principal's purchase of the briber's juke-box business was held liable to the principal for: (1) the losses suffered in operating the business prior to rescission of the purchase; (2) the time lost by the principal in operating a worthless business; (3) the expenses incurred in connection with the rescission action; (4) the non-taxable expenses incurred in prosecuting the suit against the seller-briber; and (5) the attorney's fees. Except for recovery of the bribe, however, the principal may satisfy his actual damages only once. He may not recover from both the briber and the bribee for the same damage.²²

Furthermore, the principal may dismiss the disloyal agent without incurring any liability for breach of an employment contract. Agents owe the highest duty of loyalty to their principal as an implied condition of the employment contract.²³ If the agent accepts a bribe the implied condition of loyalty is breached and the principal has sufficient cause to terminate the relationship.²⁴

Finally, the agent forfeits any right to compensation for services disloyally performed.²⁵ However, the agent's disloyalty does not allow the principal to withhold compensation for prior or subsequent faithful service unless such payment includes some compen-

v. Odden, 220 Minn. 498, 20 N.W.2d 87 (1945); Doyen v. Bauer, 211 Minn. 140, 300 N.W. 451 (1941).

19. *Tarnowski v. Resop*, 236 Minn. 33, 36, 51 N.W.2d 801, 803 (1952); *Raymond Farmers Elevator Co. v. American Sur. Co.*, 207 Minn. 117, 290 N.W. 231 (1940).

20. RESTATEMENT (SECOND), AGENCY § 313, comment *b* (1958).

21. 236 Minn. 33, 51 N.W.2d 801 (1952).

22. RESTATEMENT (SECOND), AGENCY § 313, comment *b* (1958).

23. See Laube, *The Right of an Employee Discharged for Cause*, 20 MINN. L. REV. 597, 610-11 (1936).

24. See RESTATEMENT (SECOND), AGENCY § 409 (1958).

25. See *Hlubeck v. Beeler*, 214 Minn. 484, 489, 9 N.W.2d 252, 254 (1943); *Sinna v. Sperry Realty & Inv. Co.*, 181 Minn. 183, 232 N.W. 5 (1930); *Blackey v. Alexander*, 156 Minn. 478, 195 N.W. 455 (1923); *Venie v. Harriet State Bank*, 146 Minn. 142, 178 N.W. 170 (1920); RESTATEMENT (SECOND), AGENCY §§ 456, 469 (1958).

sation for wilfully disloyal service. Thus, if the agent received a monthly salary he would forfeit the entire month's salary for any month in which he was wilfully disloyal.²⁶ Although the principal may not withhold the entire month's salary if the disloyalty was unintentional,²⁷ a bribed agent seldom violates his duty inadvertently. Hence, the bribee will forfeit all compensation for any tainted payment period. Moreover, in Minnesota, forfeiture is not limited to accrued unpaid wages; the principal may also recover compensation that has been paid to the agent for the disloyal service before the disloyalty was discovered.²⁸

C. CONCLUSIONS

Despite their apparent breadth, the civil remedies available against participants in a commercial bribe are basically ineffectual. In the first place, it is difficult to ascertain and even more difficult to prove that an agent has been bribed. The bribe is secretive by nature and there are few outward manifestations which indicate its occurrence. Although an agent's action is detrimental to his principal's interests, the inference that a bribe has occurred is slight; even loyal agents make unsound decisions. And, unless the bribe is extremely large, the agent's increased affluence would be unnoticeable and hence not suspect. Second, these civil remedies have a negligible deterrent effect. The recovery of the bribe from the agent leaves the agent in no worse position than before the bribe. Similarly, the right to recover damages from the briber affords no greater protection because, in addition to being difficult to show, the amount of injury to the principal's business will normally approximate the gain made by the briber. Certainly the major source of evidence of the extent of the injury caused will be the gain to the briber. Moreover, the principal's right of rescission merely returns the parties to the *status quo*. When the doubtful chance of detection and the doubtful extent of loss on the part of the bribee and briber are weighed against the overwhelming opportunities for success, the inadequacy of the civil remedies as a deterrent to commercial bribery becomes manifest.

II. MINNESOTA CRIMINAL STATUTES

Although not a completely reliable guide, it should be noted that there are no reported cases involving prosecutions of commer-

26. See *Hlubeck v. Beeler*, 214 Minn. 484, 9 N.W.2d 252 (1943); *RESTATEMENT (SECOND), AGENCY* § 456 (1958).

27. *Ibid.*

28. *Blackey v. Alexander*, 156 Minn. 478, 195 N.W. 455 (1923).

cial bribery under Minnesota criminal statutes. However, two Minnesota criminal statutes may apply to some commercial bribery transactions. They are the larceny statute which deals with theft, fraud and embezzlement,²⁹ and the swindling statute which deals with the taking of another's property by trick or device.³⁰

A. LARCENY STATUTE, SECTION 1

The first section of the Minnesota larceny statute proscribes the obtaining of another's property by theft or by fraud.³¹ In general, theft occurs where property is taken without the consent of the owner. Fraud occurs where the owner's consent to the transfer of property is obtained illegally. At least one type of commercial bribery transaction may constitute theft of the principal's property. Where the purpose of the bribe is not to secure an advantage in a business transaction between the principal and the briber but rather where the bribe is offered in return for business information, formulae, or processes there may be a theft.

To constitute theft under the statute it is necessary that a person take "property" or an "article of value" from the true owner.³² This poses the question whether the term "property" or the phrase "article of value" includes secret business information, formulae or processes. An early Minnesota civil case held that in equity a secret formula or process for making paint constituted property.³³

29. See MINN. STAT. § 622.01 (1957):

Every person who, with intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person:

(1) Shall take from the possession of the true owner, or of any other person, or obtain from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing, or secrete, withhold, or appropriate to his own use, or that of any person other than the true owner, any money, personal property, thing in action, evidence of debt, or contract, or article of value of any kind;

(2) Having in his possession, custody, or control as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or person authorized by agreement or by competent authority to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, shall appropriate the same to his own use, or that of any other person than the true owner or person entitled to the benefit thereof . . .

Steals such property, and shall be guilty of larceny.

30. MINN. STAT. § 614.11 (1957).

31. See note 29 *supra*.

32. Only property and articles of value are relevant to commercial bribery, but the statute also proscribes the taking of money, things in action and evidence of debts or contracts. See note 29 *supra*.

33. *Elaterite Paint & Mfg. Co. v. Frost*, 105 Minn. 239, 117 N.W. 388 (1908).

A comment on the case, however, suggested that the decision should not have been based on property concepts since "there is no legally recognized property right in a trade secret or secret process."³⁴ In Minnesota civil cases, as well as in those of other jurisdictions, the term "property" has been held to denote certain intangible interests such as processes, formulae, and goodwill.³⁵ In criminal cases in other jurisdictions, however, the term "property" has been held not to include such intangible interests as a judgment debtor's address, a plan for a movie or a free game on a pinball machine.³⁶ Nevertheless, at least one federal case has held that secret formulae, facts and figures constitute property within the meaning of a criminal statute.³⁷ The Minnesota court has not discussed to what extent the term "property" as used in the larceny statute includes intangible interests. But in view of the tendency of the courts to construe criminal statutes strictly,³⁸ there is considerable doubt as to whether the term "property" would be given the same meaning in both civil and criminal cases. However, some intangible interests such as formulae or processes might be considered "property" as used in the larceny statute, but it is extremely doubtful that ordinary business information or plans would be. In any event, doubts as to whether the taking of such interests comes within the purview of the larceny statute may tend to discourage prosecution.³⁹ The phrase "article of value" is not commonly used to

34. See Note, 14 MINN. L. REV. 537, 539 (1930). "[This] is demonstrated by the fact than anyone honestly and fairly acquiring knowledge of such secret process, not patented, may use it." *Id.* at 539.

35. See *Red Wing Malting Co. v. Willcuts*, 15 F.2d 626 (8th Cir. 1926) (goodwill); *Durand v. Brown*, 236 Fed. 609 (6th Cir. 1916) (secret process and formulae); *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939) (musicians' performance); *Middlemas v. Strutz*, 71 N.D. 186, 299 N.W. 589 (1941) (game on pinball machine); *Hansen Mercantile Co. v. Wyman, Partridge & Co.*, 105 Minn. 491, 117 N.W. 926 (1908) (goodwill).

36. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944) (free games on pinball machine); *State v. Miller*, 192 Ore. 188, 233 P.2d 786 (1951) (oral guarantee of loan); *State v. Waite*, 156 Kan. 143, 131 P.2d 708 (1942) (free games on pinball machine); *Futter v. Paramount Pictures, Inc.*, 69 N.Y.S.2d 438 (Sup. Ct. 1947) (a plan, suggestion or arrangement involving motion pictures); *Schwartz Estate v. Dunishtock*, 175 Misc. 869, 25 N.Y.S.2d 741 (N.Y. City Ct. 1941) (judgment debtor's address).

37. See *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942). The case is peculiar in that the defendant argued that larceny—a state crime—had been committed. *Id.* at 679.

38. The rule of strict construction of criminal statutes has been abolished in Minnesota by MINN. STAT. § 610.03 (1957). However, the annotation to MINN. STAT. ANN. § 610.03 (1947), and cases therein, indicate that in interpreting penal statutes the court will not go beyond the clear meaning to find something not clearly implied by the language used. See, e.g., *Anderson v. Burnquist*, 216 Minn. 49, 11 N.W.2d 776 (1943).

39. If there are legal doubts as to whether certain conduct constitutes a

refer to intangible interests as the word "article" ordinarily connotes a material object.⁴⁰ In the absence of an indication that the word is to be given a special meaning, this ordinary meaning should control.

A second problem may arise in applying section 1 of the larceny statute to commercial bribes designed to obtain secret formulae, processes or information. An intent to deprive an owner of the possession "of his property, or of the use and benefit thereof" must also be established. Thus, it must be shown that if the bribe achieves its purpose the owner will be deprived of the possession or the use and benefit of his property. The principal may well be deprived of substantial benefit as the formulae, processes, or information are no longer secret. However, a literal interpretation of the statutory language would indicate that formulae, processes or trade secrets could not be the subject of larceny since the principal is not deprived of their use. This difficulty stems from the fact that the standards used—possession or use and benefit—are tangible property concepts while the interests involved are not within the traditional concept of tangible property. They are intangible property rights. Thus, it appears that the larceny statute does not effectively deter commercial bribes aimed at obtaining secret business formulae, processes, or information.

Other commercial bribery transactions may constitute fraud under the larceny statute rather than theft since the principal's consent to the transfer of property is obtained, albeit illegally. The most common purpose of commercial bribery is to influence a business transaction between the principal and the briber. In these situations property normally passes from the principal to the briber under the terms of a contract.⁴¹ Since the principal has consented to the transfer it cannot be considered an unlawful appropriation without proof that his consent was obtained "by color or aid of

crime, prosecutors will tend not to prosecute. First, the fact that it is not clear that a crime has been committed indicates that the conduct is not so morally reprehensible that the failure to prosecute will be criticized. Second, prosecutors prefer to prosecute sure cases and do not like to take the chance of losing if it can be avoided. Third, doubtful prosecutions mean much more work for the prosecutors which at least some will try to avoid.

40. *Gayer v. Whelan*, 59 Cal. App. 2d 255, 138 P.2d 763 (Dist. Ct. App. 1943). See also *Junge v. Hedden*, 146 U.S. 233 (1892); *Harrison Supply Co. v. United States*, 171 Fed. 406 (1st Cir. 1909); *People v. Epstean*, 102 Misc. 476, 170 N.Y. Supp. 68 (Ct. Gen. Sess. 1918).

41. The most common situation in the litigated cases is where the agent received money for inducing the principal to buy or sell goods or services to the donor at a price favorable to the donor of the bribe. A problem of whether "property" is passing from the principal to the donor would appear to be presented only when the principal is performing services for the donor of the bribe.

fraudulent or false representation or pretense"⁴²—in other words, by fraud.

In the only criminal case discussing whether commercial bribery constitutes fraud, a federal district court held that commercial bribery constituted a violation of the federal mail fraud statute.⁴³ The court stated that the fraud consisted of the misrepresentation that the employee was loyal to his employer's interests.⁴⁴ In *Erickson v. Frazier*,⁴⁵ a civil case, the Minnesota Supreme Court held that inducing an unfaithful discharge of a duty of trust was actionable fraud. In *Erickson*, as in the federal mail fraud case, the fraud consisted of depriving the principal of the faithful service of his agent.⁴⁶ In *Sorenson v. Greysolon Co.*,⁴⁷ however, the court based its finding of fraud on misstatements as to the value of certain property made by the agent to the principal. Although misrepresentations of opinion are ordinarily not a basis for a fraud action, the court held that they were fraudulent when made by a person in a fiduciary relationship to the injured party. The briber was held responsible for the misrepresentations he induced; he had hired the bribee as his own agent and, thus, under agency principles, was responsible for his actions.⁴⁸

Arguably, each of the foregoing rationales supports to some extent the theory that some forms of commercial bribery may constitute criminal fraud where, as a result, the principal transfers

42. See MINN. STAT. § 622.01 (1957), set out in note 29 *supra*.

43. See *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942). The court stated that "the misrepresentation may be as well by deeds or acts, as by words—by artifices to mislead, as by positive assertions." *Id.* at 678.

44.

When one tampers with that relationship for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests. The employee, in using the employment relationship for the express purpose of carrying out a scheme to obtain his employer's confidential information and other property, as alleged in the indictment, would be guilty of deliberately producing a false impression on his employer in order to cheat him. Such conduct would constitute a positive fraud . . .

Id. at 678.

45. 169 Minn. 118, 210 N.W. 868 (1926).

46. Both of these cases stress only the fact of the agent's disloyalty as the grounds for finding fraud. Although in both cases the agent performed acts which did in fact injure the principal, the courts did not stress the nature of such acts.

47. 170 Minn. 259, 212 N.W. 457 (1927).

48. The same result could have been reached under the principles of conspiracy and accessories since the two were working together to perpetrate the fraud.

property to a third party. The requisite causal relationship between the fraud and the transfer of property may be established, as in civil cases, by showing that the misrepresentation was "material" to the transaction and that it was in fact relied upon by the injured party.⁴⁹ In many commercial situations there is little question that the recommendations of the agent play an important part in the principal's decision to enter into the transaction. This occurs most often where the agent conducts the negotiations with the briber or where the agent is authorized to enter into an agreement on behalf of the principal. However, the necessary reliance and materiality might also be found in situations where the agent serves only in an advisory capacity since businessmen often rely upon the ability and judgments of their agents when entering into contracts. Each case would present the factual issue of whether the principal relied on the agent's judgment or opinion as to the advisability of the contract in question. Where the agent did not actively negotiate the contract, the causal connection may be difficult to prove for it involves a subjective determination of the principal's motivation; moreover, the extrinsic evidence available to substantiate any determination of reliance may be negligible.

Thus, although some instances of commercial bribery may constitute violations of section 1 of the larceny statute, it would normally be very difficult, if not impossible, to produce evidence sufficient to prove such a violation.

B. LARCENY STATUTE, SECTION 2

Section 2 of the larceny statute is designed to prohibit embezzlement and related misappropriations of property by agents, employees, bailees, and trustees.⁵⁰ To establish a violation of this section, as of section 1, it must be shown that "property" or an "article of value" was misappropriated. Once again the problem of whether formulae, processes, and trade secrets come within those statutory terms is presented.⁵¹ Second, it must be shown that the person charged had the property in question in his possession, custody or control or was authorized by agreement or competent

49. See *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 74 N.W.2d 305 (1955); *Rien v. Cooper*, 211 Minn. 517, 1 N.W.2d 847 (1941).

50. The statute requires that the property be obtained "by means of" the fraud. This would require a showing that the transfer was the result of the fraud. See note 29 *supra*; *Lehman v. Hansord Pontiac Co.*, 246 Minn. 1, 74 N.W.2d 305 (1955); *Behrendt v. Rassmussen*, 234 Minn. 97, 47 N.W.2d 779 (1951); *Rien v. Cooper*, 211 Minn. 517, 1 N.W.2d 847 (1942).

51. See text accompanying notes 33-42 *supra*.

authority to take such possession, custody, or control.⁵² If the agent is authorized to know the formulae, processes or trade secrets which he discloses to the briber, this requirement is satisfied.⁵³ Where the purpose of the bribe is to influence a business transaction, it must be established that the agent had authority to bind the principal or had such a degree of influence over the principal's decision that he may be considered to have had "possession, custody, or control" of the assets transferred as a result of the transaction. For example, in *State v. Kortgaard*,⁵⁴ the court held that an officer who had general management of a bank's affairs and controlled the making of loans had possession, custody and control of the bank's funds within the meaning of the larceny statute. Thus, where the agent is authorized to, and does, enter into the transaction on behalf of the principal the statutory requirement is satisfied.⁵⁵ Arguably, the statutory requirement is also satisfied where the agent in fact dominates the person or persons authorized to enter into the transaction although the agent himself is not given such power under the business structure. This may be inferred from the use of the terms "possession, custody, or control" which in ordinary usage refer to a practical relationship rather than to theoretical powers.⁵⁶ It is doubtful, however, that this requirement is met when another person is required to and in fact does exercise his independent judgment as to whether to enter into the transaction. In these situations the agent does not have the personal control which the phrase "*his* possession, custody, or control" implies is necessary.⁵⁷

Thus, commercial bribery constitutes a violation of section 2 only where the agent plays the dominant role in the transaction entered into by or on behalf of the principal. The evidence needed to show

52. See *State v. White*, 108 Minn. 346, 122 N.W. 448 (1909); *State v. Holton*, 88 Minn. 171, 92 N.W. 541 (1902).

53. If the agent is not authorized to know the information but obtains it by stealth, it may not constitute a violation of this section but would come under section 1.

54. 62 Minn. 7, 64 N.W. 51 (1895).

55. Where the agent has power to bind the principal in a transaction, he has "control" over that portion of the principal's assets to be used in the transaction. See, e.g., *State v. Irish*, 183 Minn. 49, 235 N.W. 625 (1931); *State v. Kortgaard*, 62 Minn. 7, 64 N.W. 51 (1895).

56. See *State v. Murphy*, 113 Minn. 405, 129 N.W. 850 (1911) (officer of corporation having only *de facto* existence, thus no legally authorized powers, had control); *State v. Bourne*, 86 Minn. 432, 90 N.W. 1108 (1902) (proof of legal appointment of corporation officers not required).

57. It would be difficult to argue that a person had control over some property if he did not have physical possession and could transfer it only with the approval of another person.

that the agent dominated the transaction would be similar to that necessary to show materiality and reliance under section 1.⁵⁸

C. SWINDLING STATUTE

The Minnesota swindling statute⁵⁹ proscribes the taking of another's property by use of instruments, tricks, devices or similar means. The Minnesota Supreme Court has held that the statutory term "trick or device" does not refer exclusively to a physical or mechanical contrivance; words in conjunction with conduct occurring in the course of a business transaction may also constitute a "trick or device."⁶⁰ For example, the court has held that a fraudulent investment proposal coupled with an offer of employment constitutes a trick within the meaning of the statute.⁶¹ Similarly, the passing of a bad check coupled with the purchase of goods and an order for other goods has been held to come within the statute's prohibitions.⁶² Arguably, in view of the broad interpretation of the term "trick or device" which has been adopted by the court, the bribing of an agent coupled with a representation of continued loyalty is prohibited by the swindling statute. This statute, however, was not designed to encompass commercial bribery. Again the problem of "property" could arise,⁶³ and a causal connection between the "trick or device" and the transfer of property must still be established.⁶⁴ In any event, the swindling statute does not outlaw any commercial bribe which the larceny statute does not proscribe. Inadequacy of the larceny and swindling statutes as

58. See text accompanying note 51 *supra*.

59. MINN. STAT. § 614.11 (1957), which reads as follows:

Every person who, by means of three-card monte, so-called, or of any other form or device, sleight of hand, or other means, by use of cards or instruments of like character, or by any other instrument, trick, or device, obtains from another person any money or other property of any description, shall be guilty of the crime of swindling, and be punished

60. See *State v. Yurkiewicz*, 208 Minn. 71, 292 N.W. 782 (1940).

61. In *State v. Yurkiewicz*, 208 Minn. 71, 292 N.W. 782 (1940), the court held that a fraudulent solicitation of investment funds coupled with a contingent offer of employment constituted a trick although consisting only of words and conduct.

62. In *State v. Cunningham*, 257 Minn. 31, 99 N.W.2d 908 (1959), the court held that although the ordinary passing of a bad check did not constitute swindling, when it was coupled with a present purchase of goods and a future order it came within the statute. See Note, 45 MINN. L. REV. 150 (1960), for a discussion of the swindling statute and of this case.

63. The basic nature of fraud and swindling are very similar in that both involve deception of the intended victim. The means used must in fact deceive the victim (reliance) and must prompt him to do something he would not otherwise have done (materiality).

64. The statute requires that the property be obtained "by means of" the trick. See statute quoted in note 59 *supra*.

effective deterrents of commercial bribery also stems from the fact that they were designed to deal with a different type of conduct. Consequently, the statutes fail to set forth an adequate standard for determining illegal conduct. Hence, an agent is unable to determine whether he should accept a certain gift or gratuity even though the practice is commonly followed in his particular business. Thus, the Minnesota larceny and swindling statutes may provide criminal sanctions for some forms of commercial bribery. A third Minnesota statute supplements the operation of these statutes.

D. ATTEMPT STATUTE

The Minnesota attempt statute proscribes acts "done with intent to commit a crime and tending, but failing, to accomplish it."⁶⁵ Therefore, where an agent accepts a bribe but does not succeed in influencing the transaction, a felony may have been committed. This in turn depends upon whether the bribe, if successful, would have constituted a violation of the larceny or the swindling statutes. However, a rejected bribe offer would probably not constitute a violation of the attempt statute in any event.⁶⁶ The attempt statute requires "the commission of some specific intentional overt act tending in the natural course of events toward the commission of the crime."⁶⁷ The naked solicitation of another to commit a crime without more does not constitute a criminal attempt as the commission of the crime depends upon the agreement and further action of an independent party.⁶⁸ The failure to encompass rejected offers and solicitations of commercial bribes is a serious handicap to the effective handling of commercial bribery from an enforcement standpoint since that is the one occasion where the wrongful conduct may often be brought to the principal's attention.

III. COMMERCIAL BRIBERY STATUTES

Since present Minnesota criminal laws do not provide adequate protection against commercial bribery, legislative action is necessary if criminal statutes are to be relied upon to prevent dishonest

65. MINN. STAT. § 610.27 (1957). See *State v. Brooks*, 151 Minn. 502, 187 N.W. 607 (1922), where the court upheld an attempted swindling conviction although the intended victim was not induced to part with his money.

66. See generally HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 558-99 (2d ed. 1960), for a discussion of the problems involved in criminal attempts.

67. See *State v. McLeavey*, 157 Minn. 408, 196 N.W. 645 (1923); *State v. Lampe*, 131 Minn. 65, 154 N.W. 737 (1915); *State v. Dumas*, 118 Minn. 77, 136 N.W. 311 (1912).

68. See *State v. Lowrie*, 237 Minn. 240, 54 N.W.2d 265 (1952).

commercial practices. At least 17 states have some form of commercial bribery statute.⁶⁹ The basic elements of these statutes are similar. They prohibit the tender to an agent, or the solicitation or acceptance by an agent, of gifts which are intended to influence his action with respect to his principal's business. Some of the statutes have special provisions designed to aid in the enforcement of the basic provisions by requiring or encouraging the disclosure of violations by participants.⁷⁰ The New York statute is typical.⁷¹ Its provisions will be discussed in some detail.

State commercial bribery statutes are necessary to protect pri-

69. See CONN. GEN. STAT. REV. § 53-266-268 (1958); IOWA CODE § 741.1-5 (1958); LA. REV. STAT. § 14.73 (1950); MASS. GEN. LAWS ANN. ch. 271, § 39 (1956); MICH. COMP. LAWS § 750.125 (1948); MISS. CODE ANN. § 2027-28 (1956); NEB. REV. STAT. § 28-710 (1956); NEV. REV. STAT. § 613.110 (1960) (applies only to the agents not the donor of the bribe); N.J. STAT. ANN. § 2A:170-88,89 (1953); N.Y. PEN. LAW § 439; PA. STAT. ANN. tit. 18, § 4667 (1945); R.I. GEN. LAWS ANN. § 11-7-3 (1956); S.C. CODE § 16-570 (1952); VA. CODE ANN. § 18.1-404 (1950); WASH. REV. CODE §§ 49.44.060, 49.44.070 (1951); WIS. STAT. § 134.05 (1959).

70. Six statutes have separate provisions which grant the courts the power to compel testimony over the constitutional objection that it may incriminate the witness and which provide protection for the person so compelled to testify. See CONN. GEN. STAT. REV. § 53-2, 68 (1958); IOWA CODE § 741.3 (1958); LA. REV. STAT. § 15.468 (1950); MASS. GEN. LAWS ANN. ch. 271, § 39 (1956); MICH. COMP. LAWS § 750.125 (1948); N.Y. PEN. LAW § 2447. Three statutes have immunity provisions to encourage disclosure. See LA. REV. STAT. § 14.73 (1950); MICH. COMP. LAWS § 750.125 (1948); N.J. STAT. ANN. § 2A:170-89 (1953). In addition, one statute provides for recovery of double civil damages. See R.I. GEN. LAWS ANN. § 11-7-3 (1956).

71. Section 439 reads as follows:

1. A person who gives, offers or promises to an agent, employee or servant of another, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with the intent to influence such agent's, employee's or servant's action in relation to his principal's, employer's or master's business; or an agent, employee or servant who without the knowledge and consent of his principal, employer, or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself or to another, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business, or receives a reward for having so acted; or an agent, employee or servant, who being authorized to procure materials, supplies or other merchandise either by purchase or contract for or on account of the credit of his principal, employer or master, or to employ services or labor for his principal, employer or master, receives directly or indirectly for himself or for another, a commission, discount, gift, gratuity or bonus from the person who makes such sale of contract, or furnishes such materials, supplies or other merchandise, or from a person who renders such services or labor; and any person who gives or offers such an agent, employee or servant such commission, discount, or bonus;

vate individuals or corporations against violations of a duty of trust occurring within the state. Although many commercial bribes come within the purview of federal regulatory or criminal statutes,⁷² existing federal "regulation" of bribery is limited to specific areas.⁷³ All attempts to secure legislation to outlaw bribery generally in interstate commerce have failed,⁷⁴ even though the practice is common.⁷⁵ Such legislation is desirable since "state laws may be hampered by jurisdictional limitations."⁷⁶ This jurisdictional defect might be cured by uniform state or federal legislation on the matter.⁷⁷ However, state commercial bribery statutes may be proper despite federal regulation of the matter. Some bribes will violate neither federal criminal or regulatory statutes nor a state commercial bribery statute—such as New York's.⁷⁸ Thus, other state legislation is needed to prevent bribes in this category.

The problem is whether the scope of state commercial bribery legislation should be restricted to instances in which the principal may suffer some business loss.⁷⁹ Apparently, the New York courts

and any person, corporation, partnership or other organization who shall use or give to an agent, employee or servant of another, or any agent, employee or servant who shall use, approve, or certify, with intent to deceive the principal, employer or master, any receipt, account, invoice or other document in respect of which the principal, employer, or master is interested, which contains any statement which is wilfully false or erroneous in any material particular or which omits to state fully the fact of any commission, money, property, or other valuable thing having been given or agreed to be given to such agent, employee or servant, is guilty of a misdemeanor and shall be punished by fine of not more than five hundred dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.

2. In any criminal proceeding before any court, grand jury or magistrate for a violation of the provisions of this section, the court, grand jury or magistrate may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter.

N. Y. PEN. LAW § 439.

72. See Note, 108 U. PA. L. REV. 848 (1960); Note, 45 HARV. L. REV. 1248 (1932); Note, 28 COLUM. L. REV. 799 (1928).

73. See Note, 108 U. PA. L. REV. 848, 849-50 (1960).

74. See Note, 28 COLUM. L. REV. 799, 804-05 (1928).

75. *Id.* at 803.

76. See Note, 45 HARV. L. REV. 1248, 1249 (1932).

77. *Id.* at 1250.

78. *People v. Levy*, 283 App. Div. 383, 128 N.Y.S.2d 275 (1954). In *Levy*, the state attempted to prosecute a basketball referee. For an explanation of the holding see Note, 108 U. PA. L. REV. 848, 853 & n.35 (1960). At the present time 32 states have separate statutes prohibiting bribery in athletics. See *Id.* at 864-65. Minnesota has such a statute. See MINN. STAT. § 613.251 (Supp. 1960). It is doubtful that the referee's act would violate any existing federal law. *Id.* at 849-50.

79. The general problem of the proper scope of commercial bribery legislation is discussed in Note, 108 U. PA. L. REV. 848, 862-63 (1960).

have literally interpreted the requirement that the bribe must be tendered for the purpose of affecting the principal's "business." They have refused to apply section 439 to a person offering a bribe to an agent of a labor union⁸⁰ or to a basketball referee⁸¹ on the ground that the labor union and the referee's employer were not conducting a "business" within the meaning of the statute. These decisions may be justified on the ground that New York, like many other states,⁸² has special criminal statutes dealing with participants in athletic contests and the bribing of labor union officials.⁸³ Arguably, in nonbusiness cases the problems generated by the betrayal of confidence may best be treated separately or as part of another regulatory scheme. However, the restriction of the general statute to "business" activities should be avoided since it would neither be desirable nor possible to provide special statutes for all "nonbusiness" activities involving agents where the principal may suffer financial loss. Some states have avoided this restriction by substituting the word "affairs" for the term "business."⁸⁴ While such a statute may overlap other criminal or regulatory statutes the use of the term "affairs" may be necessary, in view of the New York courts' determination to exclude those situations where complementary legislation does not exist. The question deserves extensive consideration by any legislature preparing to enact commercial bribery legislation.

In view of the demands made upon the individual by present-day business,⁸⁵ the structure of the modern business organization,⁸⁶ and the continually changing business methods, it may be argued that the terms of a commercial bribery statute should be general and the operational scope of the statute broad. "On the other hand, such general legislation presents the undeniable dangers of lack of clear warning in areas where the prevailing social mores may be ambiguous and of opportunities for discriminatory enforcement by complainants, prosecutors and criminal juries."⁸⁷ However, the statute need not be enforced where action is taken under another statute, and perhaps a legislative direction to this

80. *People v. Graf*, 261 App. Div. 188, 24 N.Y.S.2d 683 (1941).

81. *People v. Levy*, 283 App. Div. 383, 128 N.Y.S.2d 275 (1954).

82. See Note, 108 U. PA. L. REV. 848, 864-67 (1960), which contains a chart showing which states have various types of nongovernmental bribery statutes.

83. See N.Y. PEN. LAW § 380 (labor officials); N.Y. PEN. LAW § 382 (sporting events).

84. See, e.g., LA. REV. STAT. § 14.73 (1950).

85. See Note, 28 COLUM. L. REV. 799, 800 (1928).

86. See Note, 45 HARV. L. REV. 1248 (1932); 28 COLUM. L. REV. 799, 800 (1928).

87. Note, 108 U. PA. L. REV. 848, 863 (1960).

effect may solve the problem adequately until more definite action can be taken.

A. PERSONS TO WHOM THE STATUTE APPLIES

Section 439 for the New York Penal Code is applicable only to attempts to influence "agents, employees, or servants."⁸⁸ There is a considerable body of law in each jurisdiction which determines who are agents, employees or servants in other contexts.⁸⁹ In absence of a statutory definition, the scope of these terms as used in commercial bribery statutes is determined on the basis of this law. However, it may be argued that commercial bribery statutes should be broader. With the addition of the terms "trustee" and "fiduciary," such a statute would seemingly apply to tenders made to all persons who hold a position of confidence and trust in regard to a private person.⁹⁰ The use of these terms may be necessary as it is doubtful that the persons designated thereby would otherwise come within the statute as they should where the "business" or "affairs" of another is involved. The Iowa statute also includes "representatives and officers" within its prohibitions,⁹¹ but it would appear that those persons would also be agents or employees. Thus, the use of these terms is unnecessary.

B. GIFT OR GRATUITY

Under section 439, as under many commercial bribery statutes, the briber must tender a "gift or gratuity" to the agent.⁹²

88. See N.Y. PEN. LAW § 439. In addition to establishing a fiduciary relationship it must be established that the person tendering the bribe had knowledge of that relationship at the time of the tender. In *Rosenwasser v. Amusement Enterprise, Inc.*, 88 Misc. 57, 150 N.Y. Supp. 561 (App. Div. 1914), the New York court held that there was no violation of § 439 where the disloyal agent had held himself out to the "briber" as a real estate broker; the defendant, having no knowledge that the agent was not a broker, paid him a commission for arranging the lease. The result is sound, of course, since a person cannot have the requisite criminal intent if he has no knowledge of the facts which make his action a crime.

89. In *Wasilowski v. Park Bridge Corp.*, 156 F.2d 612, 614 (2d Cir. 1946), the court defined an agent as a person authorized by another to act on his account and under his control. In *National Wooden Box Ass'n v. United States*, 59 F. Supp. 118, 121 (Ct. Cl. 1945), the court defined an employee as one who works for wages or salary in the service of another. Many other definitions of the same general nature and their application to specific facts may be found in any state's digest system. See 2 C.J.S. *Agency* §§ 1-76 (1936); 56 C.J.S. *Master and Servant* §§ 1-59 (1948).

90. LA. REV. STAT. § 14.73 (1950), uses the phrase "any private agent, employee, or fiduciary." By definition "fiduciary" includes any person who holds a position of trust and confidence. See, e.g., *State v. Russell*, 265 S.W.2d 379, 381 (Mo. 1954).

91. IOWA CODE § 741.1 (1958) uses the phrase "any agent, representative, or employee, officer or any agent of a private corporation"

92. See N.Y. PEN. LAW § 439, quoted in note 71 *supra*.

These terms, unless interpreted very narrowly, seem to encompass anything which if given to the agent could prompt his disloyalty—a proper statutory goal. Some statutes have used additional terms in attempting to set out more clearly the different types of inducements which are prohibited.⁹³ It is doubtful, however, that the use of other terms would increase the operational scope of the statute. Moreover, a list of specific items, if followed by words of a general nature, should be avoided since the possible application of the rule of *ejusdem generis* may restrict the scope of the statute.⁹⁴

The gift must also be tendered “to” the agent. Thus, the question may be raised whether a gift to a friend or relative of the agent may also be considered to be a gift “to” the agent. Where the gift was the result of a prior agreement with the agent, the statute should be interpreted to proscribe the gift although the actual transfer was to another person. When there is a prior agreement, the agent exercises control over the gift and presumably uses that control to further his personal desires whether selfish or altruistic. Seldom, however, will the gift to a friend be made out of a sense of charity and normally it will only be an attempt to disguise the bribe.⁹⁵ Some states have attempted to insure that these indirect gifts will not escape the statute by proscribing gifts to the agent’s spouse,⁹⁶ to members of the agent’s family,⁹⁷ or to the agent “indirectly.”⁹⁸ Again, the specific enumeration should be avoided, but the use of the term “indirectly” seems desirable for it would not limit the scope of the statute and would prevent an interpretation which would allow circumvention of the statute by means of an indirect transfer.

93. See IOWA CODE § 741.1 (1958) (any gift, commission, discount, bonus, or gratuity); MISS. CODE ANN. § 2027 (1956) (any money, goods, chattels, right in action, or other property, real or personal); NEV. REV. STAT. § 613.110 (1957) (any compensation, gratuity or reward); PA. STAT. ANN. tit. 18, § 4667 (1945) (any commission, money, property, or other valuable thing); R.I. GEN. LAWS ANN. § 11-7-3 (1956) (any gift or valuable consideration); WASH. REV. CODE § 49.44.060 (1958) (any compensation, gratuity or reward).

94. The fact that the legislature thought there was a need to specifically include gifts to certain persons implies that they did not intend the phrase “to the agent” to include gifts to other persons. Moreover, where a specific enumeration is followed by words of a general nature the meaning given to the latter may be severely restricted by application of the rule of *ejusdem generis*. See Note, 46 MINN. L. REV. 169, 174-75 (1961).

95. This type of procedure in fact may often be adopted since it is much more difficult to trace money which passes through many hands.

96. MISS. CODE ANN. § 2027 (1956).

97. PA. STAT. ANN. tit. 18, § 4667 (1945).

98. IOWA CODE § 741.1 (1958); LA. REV. STAT. § 14.73 (1950); NEV. REV. STAT. § 613.110 (1957); WASH. REV. CODE § 49.44.060 (1958).

C. IN RELATION TO THE PRINCIPAL'S BUSINESS

Section 439 also requires that the bribe must be tendered with an intent to influence the agent's action "in relation to his principal's business."⁹⁹ Although the statute is primarily aimed at preventing conduct which would have an adverse effect upon the principal, it is not necessary that the proposed action be either actually or potentially prejudicial to the principal. Furthermore, the fact that the proposed action would, to some extent, benefit the principal is immaterial since the statute seeks to insure the undivided loyalty of the agent. Whenever an agent accepts a gift which he does not remit to his principal he has violated that duty.

The bribe must, however, affect the agent's actions in his capacity as an agent. The proposed action must be intended to affect the operation of the principal's business, and it must involve some activity in which the agent is, or should be, acting on behalf of the principal. In *People v. Jacobs*,¹⁰⁰ the New York Court of Appeals reversed a conviction under section 439 on the ground that the gift was not designed to effect a change in the operation of the principal's business in any way, although the gratuity was given in return for information acquired as a result of the agent's employment.¹⁰¹

99. N.Y. PEN. LAW § 439. The provision relating to the agent who accepts the bribe uses the wording that he may not accept it under the agreement "that he shall act in any particular manner in relation to his principal's . . . business." Although the wording is different it would appear that the same conduct would be included within each wording.

In addition, several of the other states have different tests as to what gratuity induced conduct is prohibited. Although the Virginia test would apparently restrict the application of that statute it would appear that the other wordings are substantially similar to that of the New York statute. See IOWA CODE § 741.1 (1958) (any gratuity connected with, relating to, or growing out of such business transaction); MISS. CODE ANN. § 2027 (1956) (with intent to influence his vote, opinion, action, or judgment); PA. STAT. ANN. tit. 18, § 4667 (1945) (an inducement or reward for doing or omitting to do any act, or for showing or forbearing to show any favor or disfavor); R.I. GEN. LAWS ANN. § 11-7-3 (1956) (inducement or reward for doing or forbearing to do, or for having done or foreborne to do); VA. CODE ANN. § 18.1-404 (1950) (intent to influence his action to the prejudice of his principal's business).

Although these variations appear to concentrate on the situation where the agent is acting on behalf of the principal and is authorized to bind the principal, the wording seems broad enough to include opinions and judgments of the agent intended to influence the principal.

100. 309 N.Y. 315, 130 N.E.2d 636 (1955).

101. *Ibid.* The court indicated that the steamship company made no use of passenger lists after the completion of the voyage and therefore was little concerned about who received them or what they used them for.

D. KNOWLEDGE AND CONSENT—BUSINESS CUSTOMS

Gifts tendered with the knowledge and consent of the principal do not violate section 439.¹⁰² This qualification provides the principal with the power to exempt certain gifts from the operation of the statute and thus to restrain business practices involving gratuities. It also has the effect of legalizing customary business practices unless the principal expressly objects to the acceptance of such customary gratuities by his agents.

This latter effect results from the application of the doctrine of constructive knowledge and implied consent. Although there appear to be no cases interpreting the knowledge and consent qualification as used in a commercial bribery statute, it is presumed that a construction of that requirement similar to that developed in other contexts would be adopted. Other constructions indicate that a knowledge and consent requirement may be satisfied by a finding of constructive knowledge and implied consent.¹⁰³ Constructive knowledge may be found where the principal is aware of facts which would have given actual knowledge to a reasonable man.¹⁰⁴ It may also be found where the principal should reasonably have been aware of such facts.¹⁰⁵ Consent to an act may be implied where a person with actual or constructive knowledge takes no affirmative action opposing it.¹⁰⁶ Thus, constructive knowledge and implied consent to a gift can be demonstrated by evidence which establishes that such gifts are customary in a particular trade or business. For example, a principal should reasonably expect that his traveling agent will be entertained by persons with whom

102. See N.Y. PEN. LAW § 439 quoted in note 71 *supra*. For examples of the knowledge and consent qualification see *Schiff v. Kirby*, 22 Misc. 2d 786, 194 N.Y.S.2d 695 (1959); *Norton v. John T. Clark & Son*, 144 N.Y.S.2d 245, *rev'd & modified*, 2 App. Div. 2d 875, 156 N.Y.S.2d 233 (Sup. Ct.), *appeal denied*, 2 App. Div. 2d 966, 158 N.Y.S.2d 742 (1956), *appeal dismissed*, 2 N.Y.2d 853, 160 N.Y.S.2d 4 (1957); *June Fabrics v. Teri Sue Fashions*, 194 Misc. 267, 81 N.Y.S.2d 877 (Sup. Ct. 1948); *General Automobile Supply Co. v. Rockwell*, 162 N.Y. Supp. 210 (N.Y. City Ct. 1916).

103. The term knowledge is generally employed to include constructive knowledge which neither indicates nor requires actual knowledge. 51 C.J.S. *Knowledge* (1955).

104. See *The Cleveco v. Szwed*, 154 F.2d 605, 613 (6th Cir. 1946); *Hayward Lumber & Inv. Co. v. Orondo Mines*, 34 Cal. App. 2d 697, 94 P.2d 380 (Dist. Ct. App. 1939); *Kuntz v. City of New Orleans*, 10 So. 2d 658 (La. App. 1942).

105. See *King v. Karpe*, 170 Cal. App. 2d 344, 349, 338 P.2d 979, 982 (Dist. Ct. App. 1959); *Wermeling v. Shattuck*, 366 Pa. 23, 28, 76 A.2d 406, 409 (1950).

106. See *Indiana Harbor Belt R.R. Co. v. Jones*, 220 Ind. 139, 145, 41 N.E.2d 361, 363 (1942); *Delaney v. Delaney*, 71 N.J. Eq. 246, 254, 65 Atl. 217, 220 (Ct. Err. & App. 1906).

he is dealing. If he does not express disapproval of such practices, an agent may assume that he has consented to the acceptance of such business entertainment by the agent.

In addition to the six statutes which contain the knowledge and consent qualification,¹⁰⁷ there are five statutes which impliedly exempt customary business practices from their prohibitions through other language.¹⁰⁸ These statutes contain the qualification that the gift must be tendered "corruptly."¹⁰⁹ Although there are no cases construing the term "corruptly" under these commercial bribery statutes, the term seemingly indicates that an intent to defraud must be shown.¹¹⁰ If the conduct in question were customary in the trade or business, it is doubtful that the tender of such a gratuity would be considered "corrupt" since there would be no intent to defraud. Without the constructive knowledge and implied consent doctrine or the "corruptly" qualification, ordinary business entertainment would constitute a violation of commercial bribery statutes. Apparently the Pennsylvania legislature intended to insure this result. While the Pennsylvania statute contains the knowledge and consent requirement, it prohibits the introduction of evidence tending to show that gifts are customary to any particular trade or business.¹¹¹ The apparent legislative intent behind this provision is to insure that an undesirable business practice will not be deemed legal merely because it is customary. The effect of the statute, in most cases, is to require the giver to seek the express approval of the principal. Constructive knowledge can be shown only through a course of past dealing or other facts peculiar to the particular situation. The statutes in another group of states would apparently have an effect similar to the Pennsylvania statute

107. IOWA CODE § 741.1-5 (1958); LA. REV. STAT. § 14.73 (1950); NEB. REV. STAT. § 28-710 (1956); N.J. STAT. ANN. § 2A:170-88, 89 (1953); PA. STAT. ANN. tit. 18, § 4667 (1945); VA. CODE ANN. § 18.1-404 (1950).

108. See CONN. GEN. STAT. REV. § 53-266 (1958); MASS. GEN. LAWS ANN. ch. 271, § 39 (1956); R.I. GEN. LAWS ANN. § 11-7-3 (1956); S.C. CODE § 16-570 (1952); WIS. STAT. § 134.05 (1959).

109. *Ibid.*

110. See cases cited under headings, "corrupt," "corruptly," and "corruption," in WORDS AND PHRASES for various suggestions as to how the word may be applied. A corrupt act was defined in *Foster v. United States*, 282 F.2d 222, 224 (9th Cir. 1960), as one done with a conscious false intent. See Note, 108 U. PA. L. REV. 848 (1960).

111. PA. STAT. ANN. tit. 18, § 4667 (1945). That provision reads as follows:

Evidence shall not be admissible in any prosecution under this section to show that a gift or acceptance of any commission, money, property or other valuable thing, is customary in any business, trade or calling, nor shall the customary nature of such transactions be any defense in any such proceeding or prosecution.

since they contain neither the "knowledge and consent" nor the "corruptly" qualification.¹¹² Literally read, these statutes also proscribe ordinary business entertainment provided to an agent since presumably it is intended to influence his action in relation to his principal's business. Although no case raising the question has been found, these statutes evince an intention to apply a more stringent standard than the statutes containing the "knowledge and consent" or "corruptly" qualification.

This presents the question of whether "accepted" business practices should be excepted from the operation of commercial bribery statutes. Arguably, they should not be; an attempt should be made to set higher standards of ethical conduct than are currently recognized and followed by the business community.¹¹³ This would be an admirable goal if an objective determination could be made as to which practices should be prohibited and which should be allowed, and if the public at large were willing to accept and able to enforce such higher standards of conduct. However, attempts to raise ethical standards by legislation usually fail. In addition, there would not appear to be a need to prevent all influential gratuities to agents. For example, the Pennsylvania statute specifically allows "tipping."¹¹⁴ The exclusion of "tips" from the purview of the statutes is sound since the practice is universally followed and it only

112. See MICH. COMP. LAWS § 750.125 (1948); MISS. CODE ANN. § 2027 (1956); NEV. REV. STAT. § 613.110 (1960); N.C. GEN. STAT. § 14-353 (1943); WASH. REV. CODE § 49.44.060 (1951). It is doubtful that the practical effect would be any different since prosecutions would not be brought where the employer consented. Concerning New York Penal Law § 439, a New York court said:

It appears obvious that, although the public is concerned with enforcing this statute in the public interest, any prosecution by reason of the very nature of the offense charged, would be initiated on the complaint of an aggrieved principal or employer.

June Fabrics, Inc. v. Teri Sue Fashions, Inc., 194 Misc. 267, 271, 81 N.Y.S.2d 877, 882 (Sup. Ct. 1948).

113. See Note, 108 U. PA. L. REV. 848, 862-63 (1960).

Two approaches can be taken towards commercial bribery statutes; first that such a statute should outline an ideal standard of conduct and improve present business practices, and second, that such a statute should serve merely to prohibit what is presently termed corruption in the business community. Arguably, an attempt should be made to set higher standards of ethical conduct for businessmen than are currently recognized. See Note, 108 U. PA. L. REV. 848, 862, 863 (1960). The Michigan legislature has apparently made such an attempt. See MICH. COMP. LAWS § 750.125 (1948). If taken literally the Michigan statute would prohibit most types of business entertainment and perhaps even tipping. However, most attempts to raise ethical standards by legislation fail as did the attempt to effect prohibition.

114. The exclusion reads as follows: "Nothing contained in this section shall apply . . . to that practice which is commonly known as 'tipping.'" PA. STAT. ANN. tit. 18, § 4667 (1945).

slightly affects the principal's business. The argument in support of the exclusion of business entertainment from the prohibitions of the statute is less strong, but it does not appear that such practices cause any great harm. In absence of injury to the general public it would, therefore, not be sound to attempt to impose higher standards upon an unwilling business community.

However, the knowledge and consent requirement is a more satisfactory means of exempting business practices. Presumably, most employers have actual knowledge of business customs and will instruct their agents accordingly. All that is essential for the protection of the principal's interests is that the principal be aware of facts which will enable him to inquire if he should desire. Moreover, any attempt to exclude certain business practices and to specifically include others would result in a cumbersome and inflexible statute.

One question still remains: whether the "knowledge and consent" qualification is preferable to the "corruptly" qualification. The "knowledge and consent" qualification tends to permit a more objective determination than the "corruptly" standard. It points to specific facts. Conversely, the term "corruptly" refers to a subjective determination of intent or purpose.¹¹⁵ The more objective standard is preferable unless it would facilitate the use of technical defenses to avoid the statute since it more clearly defines the crime.¹¹⁶ It does not appear that the purpose of the statute would be subverted by a qualification restricting application of the statute to those situations where the principal did not have knowledge or consent to the transaction.

E. REWARDS

The requirements of the portion of section 439 which relate to the agent are generally similar to those relating to the briber.¹¹⁷ However, an agent is specifically prohibited from accepting rewards for past action without the principal's knowledge and consent notwithstanding the fact that he did not act pursuant to an agreement with a third party.¹¹⁸ On the other hand, the tender of a simple reward for past action by a third party is not prohibit-

115. See note 110 *supra*.

116. Mechanical and objective tests are often criticized because they are too inflexible while subjective standards are criticized because they do not provide adequate guides. It is true that flexible standards are often necessary in order to insure that justice will be achieved, but care should be taken not to provide a flexible standard where a more objective approach will achieve similar results.

117. See the New York statute quoted in note 71 *supra*.

118. *Ibid*.

ed.¹¹⁹ Arguably, this difference in treatment cannot be justified, and the tender of a reward for past action without the knowledge and consent of the principal should be prohibited.

Theoretically, there is little need to prohibit rewards for past action since such rewards neither harm the principal nor encourage agents to violate their duties.¹²⁰ As a practical matter, however, such rewards may constitute a substantial inducement to favor the giver in subsequent business negotiations, even though it was not so intended. Moreover, if rewards for past action are not prohibited, the evidentiary value of the fact of payment—an important manifestation of a bribe—is to some extent limited. A person honestly desiring to reward an agent should be required to obtain the principal's consent. However, the operation of the statute may be little affected by such a requirement; where subsequent business activities with the principal are contemplated the requisite intent may be easily inferred from the mere fact of payment.

F. SPECIAL PROVISIONS

1. *Purchasing and Hiring Agents*

Several commercial bribery statutes¹²¹ have special provisions which prohibit the tendering of gifts to purchasing and hiring agents or the solicitation or acceptance of gifts by such agents. All of these acts are prohibited without regard to intent or to the principal's knowledge and consent.¹²² The mere tender, acceptance

119. The fact is that the first provisions dealing with a person giving bribes to agents makes no reference to rewards. See the New York statute quoted in note 71 *supra*. In view of the specific inclusion of such a reference in the provision dealing with agents it must be assumed that the legislature intended a different result.

120. Section 439 is principally for the protection of employers. *Schiff v. Kirby*, 22 Misc. 2d 786, 194 N.Y.S.2d 695 (Sup. Ct. 1959); *June Fabrics v. Teri Sue Fashions*, 194 Misc. 267, 81 N.Y.S.2d 877 (Sup. Ct. 1948). Gifts made after the transaction, assuming no prior promise, would not affect the transaction and therefore the employer would be in no need of protection from such gifts.

121. See CONN. GEN. STAT. REV. § 53-266 (1958); MASS. GEN. LAWS ANN. ch. 271, § 39 (1956); MICH. COMP. LAWS § 750.125 (1948); NEB. REV. STAT. § 28-710 (1956); NEV. REV. STAT. 613.110 (1960); N.J. STAT. ANN. § 2A:170-88 (1953); N.Y. PEN. LAW § 439; S.C. CODE § 16-570 (1952); VA. CODE ANN. § 18.1-404m (1950); WASH. REV. CODE § 49.44.060 (1958); WIS. STAT. § 134.05 (1959).

122. See, e.g., WIS. STAT. § 134.05 (1959), which provides for purchasing and hiring agents as follows:

... or an agent, employee or servant, who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such

or solicitation of a gift constitutes a violation. These provisions represent an attempt to avoid some evidentiary problems peculiar to commercial bribery prosecutions in an area where the danger of successful commercial bribery is relatively high. Where an agent is given a kickback for purchasing from a particular person, his principal is not likely to suspect the bribe because he must only pay the quoted—thus the expected—price. Similarly, where an agent is able to demand a tribute from a person he has hired, the principal must only pay the standard wage rate.

Another purpose of the special provisions relating to purchasing and hiring agents is to protect persons dealing with such agents. Small sellers and unemployed workers are ordinarily in a very weak economic position vis-à-vis the purchasing and hiring agents with whom they deal. Consequently, purchasing and hiring agents may be able to demand the payment of a tribute from either sellers or workers respectively. A striking example of the abuses which may arise in this area was uncovered by investigations of the New York City waterfront.¹²³ The investigations disclosed that union officials forced employers to hire their men as hiring agents. The stevedores, who were hired daily, were given work only if they agreed to remit part of their wages to the hiring agents. The problems presented by this situation, however, may be more properly dealt with as matters of labor relations rather than commercial bribery.¹²⁴ It would appear to be of little avail to attempt to prevent such activities where the principal consents since the same economic result could, in many cases, be reached if the principal demanded more from the third party and at the same time increased the compensation of the agent. Any action of the agent concerning a transaction on behalf of and with the knowledge and consent of the principal should be considered the action of the principal. Thus, the added stringency of these special provisions may, in effect, proscribe actions of the principal. If these practices are undesirable they should be prohibited whether or not the principal accomplishes a particular result by means of an agent.

materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employe or servant such commission, discount or bonus

123. See *FOURTH REPORT OF THE NEW YORK STATE CRIME COMMISSION*, NEW YORK STATE LEG. DOC. NO. 70 (1953); H.R. REP. NO. 998, 83d Cong., 1st Sess. 5-6 (1953).

124. See *New York Waterfront Commission Act of 1953*, N.Y. UNCONSOL. LAWS §§ 9801-9937 (McKinney 1961); *De Veau v. Braisted*, 363 U.S. 144 (1960). These indicate the difficulty in dealing with these problems and suggest the futility of attempting to deal with such problems as commercial bribery.

2. Reporting Provisions

Two commercial bribery statutes contain provisions prohibiting the use of erroneous documents to cover up bribery transactions.¹²⁵ They also require disclosure by the agent of any property given to him in connection with any transaction.¹²⁶ The hoped for effect of these provisions is to bring to the attention of the principal any gift or gratuity given to the agent which may have influenced the agent's actions. In the event that such disclosure is not made the agent is subject to the more easily proven charge of failure to report. These statutes require that the misstatement or omission be made "with intent to deceive."¹²⁷ Thus, the agent cannot be prosecuted for his inadvertence. However, an intent to deceive may be inferred from the misstatement or omission of a fact. The question, of course, is one for the jury.

Reporting provisions are desirable in that they allow a principal to more intelligently determine whether his agent's judgment has been objectively exercised. If the principal is forewarned of possible improper influences upon his agent, he will be able to take appropriate action to protect his interests. Furthermore, in view of the difficult problems of proving a violation of a bribery statute, any provision which may ease that burden is desirable.

3. Evidentiary Provisions

(a) Compelled testimony

It has been said that "the difficulty of detecting commercial bribery, which is augmented by the tactical necessity of concealing the crime from the employer, makes it unlikely that prohibitory legislation alone can have any material effect."¹²⁸ Thus, to aid prosecutors in obtaining evidence sufficient to secure a conviction, two types of provisions are used in conjunction with commercial bribery statutes. The first of these, the compelled testimony provi-

125. See MICH. COMP. LAWS § 750.125 (1948); N.Y. PEN. LAW § 439. The Michigan provision reads as follows:

It shall be unlawful for any person to use or to give to an agent, employe or servant or another, or for any agent, employe or servant, to use, approve or certify, with intent to deceive the principal, employer or master, any receipt, account, invoice or other document in respect of which the principal, employer or master is interested, which contains any statement which is false, erroneous or defective in any material particular or which omits to state fully the fact of any commission, money, property or other valuable thing having been given or agreed to be given to such agent, employe or servant.

126. *Ibid.*

127. See note 125 *supra*.

128. 45 HARV. L. REV. 1248, 1250 (1932).

sion, prohibits a person from refusing to answer questions on the ground that he may, by his answer, tend to incriminate himself.¹²⁹ This constitutional objection is avoided by other statutory sections which grant criminal immunity to persons so compelled to testify. Since the self-incrimination provision of the federal constitution applies only to federal action,¹³⁰ the scope of the protection which must be afforded in order to make such compelled testimony constitutional may vary according to the judicial interpretation placed upon each state's constitutional provision against self-incrimination.¹³¹ The Minnesota Supreme Court has held that the immunity granted the witness "must be equivalent to . . . the crime disclosed" to meet the constitutional requirement.¹³² This judicial test is apparently satisfied by a general Minnesota statute which provides that no person shall be subject to *criminal* liability on account of any matter concerning which he was compelled to testify.¹³³ In view of the constitutional interpretation adopted by the court, it would appear that a lesser amount of protection would render the practice of compelling testimony unconstitutional.

Some states, however, provide greater protection than is constitutionally required. For example, the Massachusetts' provisions grant immunity from both civil and criminal actions.¹³⁴ Greater protection than is constitutionally required may be justified on the policy ground that a person compelled to testify against himself should not be injured in any way as a result. A sounder justification for broader immunity, however, is that if a person receives greater protection he will be more likely to tell the truth and to disclose any pertinent information he has. Since a person will be compelled to testify only if it appears that his testimony is necessary it would appear sound to take affirmative steps to insure

129. See, e.g., IOWA CODE § 741.4 (1958); MICH. COMP. LAWS § 750.125 (1948).

130. See *Adamson v. California*, 332 U.S. 46 (1947). The Supreme Court held in this case that the provision of the fifth amendment against self-incrimination was not made effective against state action by the fourteenth amendment.

131. See MINN. CONST. art. 1, § 7. The Minnesota constitutional provision reads: ". . . no person for the same offense shall be put twice in jeopardy of punishment, nor shall be compelled in any criminal case to be a witness against himself. . . ."

132. *State v. Nolan*, 231 Minn. 522, 44 N.W.2d 66 (1950).

133. MINN. STAT. § 610.47 (1957). In *State v. Ruff*, 176 Minn. 308, 223 N.W. 144 (1929), the Minnesota court upheld the constitutionality of MINN. STAT. § 613.04 (1957), which provided that in the case of *public* bribery a person could be compelled to testify, but granted him immunity from prosecution on account of any matter which he was compelled to disclose.

134. See MASS. GEN. LAWS ANN. ch. 271, § 39 (1956).

its accuracy in addition to the perjury sanction. The granting of total immunity from civil process, however, would work an injustice upon persons who have civil claims arising out of the transaction concerning which testimony is given. Nevertheless, the use of the coerced testimony in a civil action against the person compelled to testify should not be allowed since that particular evidence may well have been unavailable to the other party if testimony had not been compelled. Recovery may still be had on the basis of other evidence. This would protect the person compelled to testify and leave the injured party in no worse position than if no criminal proceeding had been undertaken.

(b) Voluntary disclosure

The second type of provision is found in three states; it is designed to encourage participants in commercial bribery transactions to come forward with evidence concerning the bribery transaction. Criminal immunity is provided to the first of the participants to supply evidence under oath which tends to convict the other participants.¹³⁵ Although these statutes, because of their voluntary character, do not present a constitutional question of self-incrimination, they do present the question of how extensive the grant of immunity need be to encourage disclosure. This consideration must be balanced against other interests including the rights of other parties involved in the transaction.

Voluntary disclosure provisions may require that immunity from commercial bribery prosecution be granted¹³⁶ or may simply empower a court or prosecutor to grant such immunity.¹³⁷ Clearly such statutes should contain a self-executing grant of immunity from criminal prosecution for the crime of commercial bribery. Otherwise the disclosure provision would amount to nothing more than a legislative declaration approving a practice now commonly employed. Moreover, a self-executing provision is nec-

135. LA. REV. STAT. § 14.73 (1950); MICH. COMP. LAWS § 750.125 (1948); N.J. STAT. ANN. § 2A:170-89 (1951).

136. For example, the Michigan statute states that the first person so reporting and giving evidence "shall be granted immunity" from criminal prosecution. MICH. COMP. LAWS § 750.125 (1948).

137. The Louisiana provision reads as follows:

The offender under this article who states the facts, under oath, to the district attorney charged with prosecution of the offense, and who gives evidence tending to convict any other offender under this article, may, in the discretion of the district attorney, be granted full immunity from prosecution for commercial bribery, in respect to the particular offense reported.

LA. REV. STAT. § 14.73 (1950).

essary since few participants will come forward if they could be prosecuted after having been induced to testify. It is precisely this possibility which the self-executing provision seeks to avoid. However, if the grant of immunity is self-executing, it would be unwise to grant immunity from prosecution for all crimes which may become apparent upon disclosure of the facts attending the bribe unless disclosure provisions are enacted with respect to all crimes, or the acts which constitute the bribe also constitute a violation of the fraud, larceny, forgery or other criminal statutes.

The three statutes which have voluntary disclosure provisions grant only immunity from criminal prosecution,¹³⁸ however, it may also be necessary to grant immunity from civil suits arising out of the matter testified to in order to make the disclosure provision effective. A compromise measure which merely prohibits the use in a civil action of the admissions and statements of the person offering the evidence provides adequate protection to the informer and at the same time preserves the rights of third parties. Moreover, the effectiveness of the disclosure provision would suffer little if only the use of the evidence was disallowed. In either case the question of whether civil immunity will be granted should not be left to the discretion of the public prosecutor; the legislature should determine whether the rights of third parties will remain intact.

Inasmuch as both compelled testimony and voluntary disclosure provisions aid in the enforcement of commercial bribery statutes they both should be used. Certainly each has a separate, distinct and useful function.

4. *Exemplary Damages*

The Rhode Island commercial bribery statute provides for the recovery of exemplary damages in a civil action by any person injured as a result of a violation of the statute.¹³⁹ Such a provision would seemingly inspire more civil actions against the participants in commercial bribes. This has a dual beneficial effect. The possibility that exemplary damages may be recovered by an injured principal may deter the commission of the crime; moreover, a greater number of violations will be brought to the attention of the public prosecutor. In view of the secretive nature of commercial bribery a

138. See statutes cited in note 135 *supra*.

139. See R.I. GEN. LAWS ANN. § 11-7-6 (1956), which provides as follows:

Any person injured by any violation of the provisions of . . . [commercial bribery statute] may recover from the person or persons inflicting such injury twice the amount of such injury.

provision which encourages individual awareness and private investigation is desirable.

But to insure that the voluntary disclosure provisions will not be rendered ineffective where the person sued has voluntarily given testimony tending to convict other participants of commercial bribery, he should not be obligated to pay exemplary damages in a subsequently initiated civil suit.

5. *Penalties*

The seriousness of commercial bribery as a crime has not been generally agreed upon; the penalties imposed by the various commercial bribery statutes are not uniform.¹⁴⁰ However, two types of penalties—fines and imprisonment—are usually provided for.¹⁴¹ A fine may be appropriate where the injured party fails to bring a civil action against either the bribee or the briber, or where the court determines that while imprisonment is not necessary the imposition of some penalty is appropriate. On the other hand, the actual or potential seriousness of the crime may well call for imprisonment. The crime committed may be in substance, if not technically, tantamount to larceny or swindling. Arguably, the maximum amounts for both the fine and the possible term of imprisonment should approximate the statutory maximums presently found in the larceny statute. Furthermore, in view of the unusual opportunities for the successful commission of the crime, a statute which will have a strong deterrent effect is needed. And since commercial bribery always involves the violation of a duty of trust, the potential penalty should be severe. Whatever the penalty, courts should be given broad discretionary powers to determine the extent to which it will be imposed.¹⁴²

CONCLUSION

Minnesota criminal laws and civil remedies do not effectively deter commercial bribery. In fact, it is doubtful whether the criminal laws even prohibit such bribery. And the civil remedies only com-

140. The maximum amount of a fine that may presently be imposed for violation of a commercial bribery statute varies from two hundred to five thousand dollars. See WASH. REV. CODE §§ 49.44.020, 49.44.060 (1951) (\$200.00); MISS. CODE ANN. § 2028 (1959) (\$5000.00). The maximum length of a sentence that may presently be imposed for a violation of a commercial bribery statute varies from three months to ten years. See ME. REV. STAT. ANN. ch. 136, § 17 (1954) (three months); MISS. CODE ANN. § 2028 (1959) (ten years). For a general index to all commercial bribery statutes, see Note, 108 U. PA. L. REV. 848 (1960).

141. See Note, 108 U. PA. L. REV. 848 (1960).

142. See N.C. GEN. STAT. § 14-353 (1953).

pensate for injuries sustained from commercial bribery; they do not deter the act. Thus, if commercial bribery is to be deterred, a commercial bribery statute is needed. To meet this need the following statute is proposed. This *suggested* statute is based upon section 439 of the New York Penal law; however, it incorporates several changes so as to avoid the defects of the New York statute.

PROPOSED COMMERCIAL BRIBERY STATUTE

The following persons shall be guilty of commercial bribery:

Section 1. subdivision (1) Any person who gives, offers or promises, directly or indirectly, any gift or gratuity to any agent without the knowledge and consent of his principal and with the intent to influence the agent's action in relation to his principal's affairs; or

subd. (2) Any agent who requests or accepts, directly or indirectly, any gift or gratuity or a promise to make a gift under an agreement or understanding that he act in any particular manner in connection with his principal's affairs, or receives a reward for having so acted; or

subd. (3) Any person who shall use or give to any agent, or any agent who shall use, approve, or certify with intent to deceive the principal any receipt, account, invoice or other document in which the principal is interested which contains any statement that is erroneous in any material particular, or which omits to state fully the fact of any commission or gratuity given or promised such agent.

Section 2. In section 1 the term "agent" includes any agent, employee, servant, trustee, or fiduciary, and the term "principal" includes any principal, employer, master, or other person to whom a fiduciary duty is owed.

Section 3. In any prosecution under section 1, any person may be compelled to testify by the court in accordance with section 610.47; provided that no person so compelled to testify shall be criminally prosecuted on account of any action, matter, or thing so testified to, except for prosecutions for perjury committed in such testimony; nor shall such testimony be used as evidence in any civil proceeding against the person so testifying.

Section 4. Any person who may have committed commercial bribery who first reports the facts under oath with the consent or at the request of a county attorney of this state and who gives evidence tending to convict any other person of commercial bribery, shall be granted full immunity from prosecution for commercial bribery with respect to the offense reported. Evidence obtained under section 3 shall not be used in any civil proceeding against the person rendering such testimony.

Section 5. Any person injured by any violation of section 1 may recover in a civil action from the person or persons inflicting such injury twice the amount of such injury; provided that this section shall not apply to any person compelled to testify under section 3 nor to any person who voluntarily gives evidence or testimony under section 4.

Section 6. Commercial bribery shall be punished by a fine of not more than one thousand dollars or imprisonment for not more than ten years or both.