This is a PDF of the separately accessible version of Section B.3a of the main Prosecutorial Misconduct page (PMP) of jpscanlan.com. This version reflects the section as it appeared when a link to it was provided in a January 2010 letter to Judith B. Wish, Deputy Director of the Office of Professional Responsibility (which may be found on the Letters (Misconduct) sub-page of PMP).

B.3a. Independent Counsel Efforts to Cause the Defense to Fail to Discover the Mitchell Telephone Message Slips [b3a]

The Bruce C. Swartz profile (at [4]) discusses Bruce C. Swartz's representation to Judge Laurence Silberman in the court of appeals argument that Independent Counsel attorneys regarded the Mitchell telephone message slips as incriminating rather than exculpatory, as well as the following statement, also made to Judge Silberman (Tr. 44):

> I must say that, everything in the record belies any suggestion that the government had an interest in hiding information here. The government exceeded, in almost every area, its statutory obligation in terms of turning over materials.

That in its decision the court of appeals would "deplore" the failure to segregate the Mitchell message slips indicates that it did not believe Swartz's representation that Independent Counsel attorneys did not segregate the message slips because they thought the message slips were incriminating rather than exculpatory. Section B.3 and the materials it references show why no one could believe that representation.

But a word is in order regarding Swartz's reference to the "hiding of information." Swartz was merely using the word "hiding" with regard to the failure to segregate exculpatory information rather than actually hiding. Because the Sankin Business School application discussed in Section B.7a was actually hidden (and successfully hidden for many years), the Independent Counsel's actions regarding the actual hiding of that document was not at issue. But apparently efforts were also made, if not to hide the Mitchell message slips in precisely the way that Independent Counsel attorneys hid the Sankin Business School application, at least to diminish the chances that the defense would discover the message slips.

That matter can best be explained with reference to the claim that Independent Counsel attorneys regarded the message slips as incriminating, even if doing so belabors that issue somewhat. To begin with, if the Independent Counsel attorneys in fact regarded the message slips as incriminating, they would have confronted Maurice C. Barksdale with information on the message slips rather than failing to do so. And, it would seem, they would at least consider using the items in some manner in their case. As it was, of course, after the defense introduced the items into evidence, in closing argument Robert E. O'Neill, while knowing with absolute certainty that the message slips in fact pertained to the Arama project, would seek to lead the jury to believe that the receipts did not have apply to Arama, stating in closing argument: "First of all, we don't know what project they're talking about here. Arama is not mentioned ... " Tr. 3516.

In any event, the instant subject involves the Independent Counsel's preliminary trial exhibit production at the end of 1992. The production consisted of 3679 unindexed pages of materials that the Independent Counsel indicated it might be using at trial. As is common in the circumstances, the production was vastly overinclusive in order to include anything that, as trial approached, Independent Counsel attorneys might decide actually to use as an exhibit. As in the case of the Sankin Harvard Business School applications discussed in Section B.7a (and who knows what other items), Independent Counsel attorneys also used the production to fulfill production obligations as to important relevant materials that they had previously withheld from the defense.

In the case of materials from Mitchell's files, while Independent Counsel attorneys otherwise included all documents relating to the Arama project in the preliminary trial exhibit production, they excluded the Mitchell telephone message slips. The exclusion of the items from this vastly overinclusive preliminary production of materials the Independent Counsel might possibly use at trial is further, albeit superfluous, evidence that Independent Counsel did not regard the items as incriminating.

More to the instant point here, however, in producing the Mitchell files regarding the Arama project, Independent Counsel attorneys (who did not yet know whether the defense had discovered the message slips) took some pains to obscure the fact that two items had been excluded from Mitchell's Arama files. The precise manner in which that was done is set out in Part II.C of the District of Columbia Bar Counsel materials, which, with slight redaction, is available by means of the indicated link.

It is probably too late to know – or so it seems at the moment – whether similar efforts were made to cause the defense to fail to find the Mitchell telephone message slips when the Independent Counsel Independent Counsel included them in its original production, not of 3700 pages of documentary materials, but of several hundred thousand pages of documentary materials. But certainly there is no reason to believe that the involved Independent Counsel attorneys would have felt ethically constrained from obstructing the defense's efforts to discover exculpatory information if they believed they could get away with it. And, as reflected throughout the misconduct materials made available on this site, those attorneys believed they could get away with a great deal.