THE ANTITRUST INVESTIGATION: A PANEL DISCUSSION

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MR. FORD: It is a distinct pleasure to be here in Dayton this afternoon in connection with the Annual Meeting of the Ohio State Bar Association. Our panel discussion will relate to the many problems resulting from the institution of an investigation by the Antitrust Division of the Department of Justice.

The best way of approaching this subject is to go through a hypothetical fact situation, and discuss the questions that might come up. Assume that an agent of the Federal Bureau of Investigation arrives at the offices of the client and, after properly identifying himself, requests permission to examine the correspondence files of all sales executives and to interview the Vice President of Sales, the Sales Manager, and the Assistant Sales Manager. Murray, in this type of situation, what form of response would you suggest?

MR. MONROE: Before we get to the actual question, I would like to make a few preliminary comments. Whether you believe the antitrust laws are a charter of economic freedom or something less than that, your client is in trouble when you receive notice that the Antitrust Division is starting an investigation. As you point out, your first inkling of this will probably be when you hear that an FBI agent has arrived at your client's door and wants to look at documents. As I view it, your job is to confine the investigation as much as reasonably possible without irritating the investigator. In this connection I would like to make one observation which is reasonably self-evident but which has been ignored enough times in my experience that it might be worth mentioning. Almost without exception, I have found that the government representatives are both competent and courteous. You should treat them with this thought in

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mind. I don't mean to indicate that they are going to give you any preferred treatment because you're courteous to them, but I think that it will pay off in the long run. They deserve to be fairly treated.

As to the documents, it seems to me that the best procedure, or a desirable procedure at least, is to ask the agent for a copy of the letter authorizing the investigation. My experience has been that the FBI has such a letter and he will probably give it to you. This will set forth the scope of the inquiry so that later there will be no misunderstanding as to which documents were to be produced. If he does not have such a letter, you probably should ask him to write it out. While this runs the risk that he might write out more than he would have asked for otherwise, I think that in the long run it is better to have the list and to try to cut it down later.

The second thing to do, of course, is to discuss the scope of the inquiry with your client and determine whether he is in a position to segregate the files or whether he wants you to do it.

As to interpreting the letter, I usually try to do it myself and usually don't ask at this stage for an interpretation from the government. If you do ask for an interpretation, the chances are that any important issue will be resolved against you. Occasionally there is an area in which it is worthwhile to ask for a limitation. For instance, if you wish to avoid searching the branch office files it may be possible to eliminate some of the work by agreement.

The next step it seems to me is to review the documents yourself before they are submitted. In most cases, if the company has conducted the file search, there will be documents which will not be called for by the FBI's letter and, of course, those can be eliminated. We then come down to the documents which are left and which are covered by the letter. Unfortunately, in some cases there will be damaging material in those documents. It seems to me at that point you have two choices—either give the government all or none of the documents. If you decide to withhold the documents, of course, you create the impression that they are damaging and that you are hiding them. Nevertheless, if there is a so-called purple document in the group, I would prefer to give the FBI agent nothing and let the government go about using the usual legal processes to obtain the documents. While the government ultimately will probably get the document, at least I have the satisfaction in knowing they have worked for it.

Another point to keep in mind is the attorney-client privilege. Documents subject to the privilege should be eliminated. Finally, in all cases I recommend that the FBI not be allowed to rummage through the company's files. There is one leading company that per-

mitted this in the late 1930's and there were seven cases that were brought against that company arising out of that invesigation. While I realize that many companies feel they have nothing to hide, the antitrust laws, at best, are an inexact science and there are many areas of doubt.

MR. FORD: Murray, assuming that the FBI agent is at your client's office at the time of the call, would you try to persuade him to schedule his visit at a later date?

MR. MONROE: The way this situation usually arises is that you get a call from a client, and he says that an FBI agent is there. I usually suggest to the client that he politely tell the FBI agent that he would appreciate it if the agent would make an appointment to come back later so that the matter can be studied. I usually have had no trouble with that procedure. The agents usually will agree to come back in two or three weeks or whenever you can make an appointment to see them.

MR. FORD: If you give the FBI agent certain documents, should these be originals or copies?

MR. MONROE: I usually give him copies and I usually have found that there is no problem along these lines. A word of caution —do not destroy original documents during the investigation. It is undesirable and probably illegal.

MR. FORD: If the agent wants to review the documents should he be permitted to do this at the company offices?

MR. MONROE: I try to interest the agent in coming to our office or some place outside of the company's office to review the documents. If the agent is at the company office, there may be questions raised by the employees as to what is happening. They see an FBI agent and it is upsetting to them. Also, there is always the possibility that the agent will engage some of the personnel in conversation, and there may be a conversation of which you do not have a record. It's even possible that the agent will obtain a lead which he wouldn't have obtained otherwise.

MR. FORD: Walter, would you consent to the agent's request to interview certain employees of the company?

MR. BATES: Taking employees to include officers, my answer can be summed up very briefly—in the case of employees, never, and in the case of officers, rarely. I find there is nothing to be gained by permitting such interviews or statements; you probably cannot talk the government out of the investigation, but in some cases you can help build its case.

MR. FORD: Following the visit of the FBI agent the client mentions that he has heard the Federal Trade Commission is investi-

gating certain pricing practices in a certain market of the company. He wonders whether the rumored investigation and the agent's visit are in any way connected. Carl, is there any form of liaison between the Department of Justice and the FTC?

MR. STEINHOUSE: Yes, there is, Tom. It's an informal type of arrangement but it's highly effective. Obviously, we don't want an individual or company being investigated by two agencies of the United States government for the same practices. Before an investigation is authorized, the Antitrust Division will contact the Federal Trade Commission to ascertain if it is handling anything similar; the FTC utilizes a similar procedure of clearance with the Antitrust Division. In a case where we find that we're initially handling the same matter there will be a determination as to which agency should handle it. I haven't known of any cases where both agencies have been inadvertently investigating the same companies or individuals for the same practice.

MR. FORD: Is this liaison on a national level, Carl, or is it done on a local office level?

MR. STEINHOUSE: It's done through Washington. Every matter which is authorized for investigation must go through Washington, and one of the stages of this authorization is checking with the FTC.

MR. FORD: At this time, the client also is interested in whether the investigation affects his competitors. He asks if he should attempt to determine if any of them are involved in the FBI's investigation.

Generally, if the investigation relates to price fixing or some other form of concerted behavior, it is possible that competitive companies may be involved. On the other hand, at this stage, the FBI may only be inquiring of one or a few companies in the field, and I think it would be completely premature for the client to do any checking with competitors to determine whether they have received a similar FBI inquiry.

A few months later, you are advised by the client that he has received a document captioned "subpoena duces tecum" and that it calls for production of a great many documents in about three and one-half weeks. A copy of the subpoena is delivered to you, and you review it, noting the different types of information called for. Subsequently, you discuss this matter with the client from the standpoint of the type of investigation which is involved. Sherman, should the propriety of service of the subpoena be examined?

MR. UNGER: I think you should do that as a matter of good practice. However, if you find that the subpoena is not in proper form it is no panacea. I think about all you can do is to notify the government of that and tell them to re-serve it properly. I doubt

if you can get out of much if it is improper. On the other hand, you may as well make certain that the record is proper and that you are going forward appropriately in the first instance.

MR. FORD: Is it an advantage to the client to have the subpoena properly served?

MR. UNGER: I think there is an advantage, yes. Then you are complying with the proper court order.

MR. FORD: Do you think there is any advantage from the standpoint of the secrecy of the documents that might be produced in response to the subpoena?

MR. UNGER: Yes, but I think frankly, if you respond to a subpoena that is prima facie sound, that you would have adequate protection.

MR. FORD: Murray, is there any basis, generally speaking, for challenging the reasonableness of the subpoena?

MR. MONROE: I think there is. The basic question is whether under the fourth amendment there is an unreasonable search and seizure. There is language in some of the cases that perhaps Rule 17 (c) of the Federal Rules of Criminal Procedure applies,[1] and some courts have so held,[2] but I think that's probably the lesser of the available legal authorities. In answer to whether it is practical or not, it seems to me that your rights are limited. One of the best examples of this involves the investigation of the Borden Company in 1938. In that case the company had a response to the subpoena which weighed 50 tons, filled ten truckloads and required the strengthening of one wing of the court house in order to store the documents. The court said that this was a reasonable search and seizure.[3] The cases set out several yardsticks to be used in determining whether a subpoena is too broad, such as the length of the time periods covered,[4] the number of documents,[5] the particularity of the description[6] and so forth. However, I think as a practical

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1 FED. R. CRIM. P. 17 (c):

> . . . The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive . . . .

2 *E.g.*, Application of Radio Corp. of Am. CCH 1952 TRADE CASES ¶ 67,352 at 67,869 (S. D. N. Y. 1952). *See In Re* Investigation of World Arrangements with Relation to the Production, Transportation, Refining, and Distribution of Petroleum, CCH 1952 TRADE CASES ¶ 67,358 (D. D.C. 1952); Hale v. Henkel, 201 U.S. 43 (1906).

3 *In re* Petition of Bordon Co., unreported opinion of Barnes, J., (E.D. Ill. 1938), *discussed in* Petition of Bordon Co., 75 F.Supp. 857, 860 (E. D. Ill. 1948).

4 U.S. v. Medical Society of the District of Columbia, 26 F. Supp. 55 (D. D.C. 1938). *See* Brown v. U.S., 276 U.S. 134 (1928).

5 *In re* United Shoe Mach. Corp., 6 F.R.D. 347 (D. Mass. 1947).

6 *In re* Petroleum Indus. Investigation, CCH 1957 TRADE CASES ¶ 68,892 (D. Va. 1957).

matter that your chance of winning on a motion is not very great.

Obviously from what I have said it is apparent that my success in court on these motions has not been great. I have found though that by filing the motion, you may have a basis to deal with the government that you wouldn't otherwise have and an opportunity to work out practical limitations. In some cases I have been successful in that area. Since there are some definite disadvantages to filing a motion, I would suggest that you attempt to work out your problems informally first and only if unsuccessful file the motion.

MR. FORD: Carl, would you recommend that the party seek to work out a satisfactory adjustment of the subpoena with the Department before filing a motion contesting its reasonableness?

MR. STEINHOUSE: I find that in most cases, attorneys that have problems with the subpoenas come into the Department and we generally can work something out. Frequently in drafting a subpoena we do not appreciate some of the problems the company may have in complying with its literal terms, and if substantial compliance can be had in a way that is in the spirit of the subpoena I think we would go along with it. Of course, the other way is to file a motion and we can still come to some accommodation. Frequently, however, you save a lot of time by first resorting to the Department of Justice.

MR. FORD: Sherman, is it customary that all documents of the company are frozen upon receipt of a subpoena of this type?

MR. UNGER: I don't think you freeze them ad infinitum; I think you should hold all of your documents until you are certain that you've complied with the subpoena and have covered everything. I wouldn't encourage clearing of the file. But after a reasonable length of time, I think you should go back to whatever orderly file clearance procedure you may have set up. In the first instance, I think you should hold everything until you are certain that you have complied.

MR. FORD: Do you thing that applies to all company documents?

MR. UNGER: I would apply it that way until the subpoena has been interpreted and you determine what the government thinks it is covering as well as what you think it is covering. I wouldn't want to find myself in a situation where we had thrown something out even though we could honestly say it was inadvertent.

MR. FORD: Walter, one of the first steps in connection with the response to the subpoena is its interpretation. What considerations do you feel dictate whether you initially seek a conference with the Department of Justice?

MR. BATES: I think generally you will find that the Department of Justice subpoena will be the "double-barrelled shotgun" type rather than the "high-powered rifle" type. However, despite the broadness with which these things are drawn, I do not recommend scurrying off to the Department as soon as you are served. Take a look at the limits of your task, and then settle down to see if there is any real need for a conference. Problems may arise in one of the three areas. First, if there is any technical language, as might be involved in the chemical or patent fields, you may wish to approach the Department to make sure you are on the same wave length; second, definitional problems may arise, such as whether a discount schedule is a price list; third, there may be problems in determining the scope of particular requests. If serious problems arise that you can't settle to your own satisfaction, then we do suggest a conference on such specific problems.

MR. FORD: After this decision has been made and any conference held the project of collecting and selecting the documents responsive to the subpoena should begin. Assume that the subpoena period is five years, and that the subpoena permits response to certain paragraphs to be made by a certified statement and asks for the names of those individuals having "any responsibility for determining prices or for participating in the determination of prices." I suppose one of the first questions is whether we would recommend that the company take advantage of the option to give certain responsive information by certified statement. I would certainly suggest that the company use this option to respond by certified statement in those cases where the certification is in lieu of producing documents which are actually in the client's files.

Let's assume that the company has a large main office and ten branches located throughout the midwest, each of which has documents. Sherman, is it your policy to go to each of these branches and examine documents?

MR. UNGER: The short answer to that is yes.

MR. FORD: Walter, do you think that the selection of documents should be made by counsel or by company employees?

MR. BATES: It depends to a great extent upon the mass of documents involved. First, as the lawyer for the company, you must learn the client's filing system yourself. You must learn where the files are located and what they consist of—whether there are central files, whether the executives have personal files and as Sherman has indicated whether there are branch files. Secondly, we recommend appointing a responsible file clerk. For this task you may wish to use one of your associates. Finally, the clerk or the associate should

do the *designation* and *separation* of the files to be searched, but you as responsible counsel or other counsel under your close supervision should do the *selection* of documents.

MR. FORD: Carl, do you think it is a good idea to keep track of the number of man-hours and the expense going into production of documents so that at a later date if necessary you can establish your good faith in responding to the subpoena?

MR. STEINHOUSE: I cannot say we have ever asked for this type of documentation. Perhaps it is one indicia that a search was made. As to the question of whether there is good faith compliance, I'm not sure that it would affirm or refute it. For example, one test is the presence or absence of key documents or replies or chronological inconsistencies in a set of documents. These are some of the more important indicia of good faith compliance. As to whether there has been a thorough file search perhaps the man-hour records would show that.

MR. FORD: In any case where you have claimed that a response has been deficient, have you ever asked for this kind of information?

MR. STEINHOUSE: I have never asked for records of this sort.

MR. FORD: Sherman, how do you determine which employees have "any responsibility for determining prices or for participating in the determination of prices" as those terms are used in the subpoena?

MR. UNGER: I think you have to select those employees or officers that in effect really make this determination as opposed to those who simply carry it out.

MR. FORD: How do you draw the line?

MR. UNGER: You are in a judgment area here. I think you should draw the line someplace that is both practicable and at a level where the determinations are actually made.

MR. FORD: Do you think that you ought to be somewhat liberal from the standpoint of the number of individuals which you place in the category of persons having price authority?

MR. UNGER: No, I wouldn't put too many people into it. There are a lot of people who think they have authority in most corporations, but when you get right down to it pricing decisions are limited to a few people. Many of the former are consulted, but very few of them actually make the determination. There's where you have to draw the line.

MR. FORD: If you have an assistant sales manager who has a great deal of price information and who is consulted with respect to prices, would you say that he participates in the determination

of prices?

MR. UNGER: Well, if he is merely consulted I do not think he really determines prices. If he sits in on a meeting and says this is my information and this is what I think we should do and this is why I think we should do it, then I think he does.

MR. FORD: Yes, but does he participate in the determination of prices if he is consulted?

MR. UNGER: If he is consulted or he voices an opinion, yes. If his information is merely picked up in that type of discussion I do not think he does. If I asked you if you had two or three books and if upon discovering you did have them I said I would take them, does that mean that I have consulted you for a judgment?

MR. FORD: Would you agree with the statement that he has made, Carl?

MR. STEINHOUSE: Well, I am not sure I do. Take a hypothetical price fixing situation where an employee is sent to a meeting and he finds out what competitors are charging. He comes into the meeting at the company with the people who are responsible for determining prices, and he just reports what he has heard or what others have agreed to, and then the pricing decision is made by someone else—I think he would be one of those involved in the determination of prices. Certainly, he would be within the spirit of the definition from my viewpoint.

MR. UNGER: That's putting him into an illegal act to begin with. I assume that my clients are all legal people; that they would not do that. If you asked me who determined prices and I simply pick up information—everybody I picked up information from really is not determining prices; they are contributing to my ultimate judgment. If I send a man, or a man goes to a price fixing meeting, of course he is determining prices and of course he is breaking the law. I hope that my clients do not do that.

MR. FORD: I think, though, Carl, that when you use the term "participating in the determination of prices" as that term is used in a subpoena, you are talking about general participation in price making of the company, aside from any illegal activities.

MR. UNGER: I'm presuming that a routine determination is what we are talking about.

MR. FORD: Assuming that this is a routine determination of prices, and an employee who has substantial market information is consulted in connection with such determination, is he participating in the determination of prices?

MR. STEINHOUSE: I think in that sense he would probably still be within my view of this definition because generally one of the

purposes of asking this question is to determine who has anything to do with prices. We would like to ask such an employee who does mechanical and ministerial work, "Well, what were your instructions?" This is one of the main reasons for requesting this information in a subpoena. And if such a demand in a subpoena does not, in the eyes of the private bar, encompass such an employee, I will have to reconsider this definition.

MR. FORD: As the documents are selected, Walter, suppose that a few bear no date. It is not possible to tell the dates from their content, but as far as you can tell they are otherwise covered by the subpoena.

MR. BATES: As a general rule, the practice that we have observed is that a document is not included or is "out" unless it is clearly included or "in." Usually there are at least three requirements that should be fulfilled. First, the document must be within the time period specified; second, it must have some bearing on the specified product or service or situation that is under investigation; third, it must have some relation to the challenged area or violation. The document that bears no date does not fall within the first requirement that it be within a certain time period and so we would say that the document is excluded as not responsive to the subpoena.

MR. FORD: Let's suppose that you have a document that has three paragraphs, only one of which is responsive.

MR. BATES: This document then, under the three rules outlined above, must be submitted and should be submitted without blocking any unresponsive paragraph.

MR. FORD: Suppose there are studies and surveys that are readily available to the Department of Justice from the Public Library or other sources. Carl, would you require this kind of material to be submitted?

MR. STEINHOHSE: Generally, if they let us know these materials are readily available we will consider the ease of obtaining the materials versus the expense of the company's production of them, as well as the significance of the possession of such materials by the company. There is no flat answer but generally if it is public information which we could have secured from the library, but asked for it through a subpoena, it is possible that we will on request not require the company to duplicate it.

MR. FORD: Let's assume that the documents containing the called for information are filed in about 100 filing cases in the company's warehouse, what do you do then?

MR. MONROE: Probably the best thing to do is talk to the Department and see if you can't work out a sampling procedure or

some sort of a limitation under which you do not produce the majority of the documents until a later date and only then upon specific request. I do think you have to take those records into consideration.

MR. FORD: The company is a rather large closely-held company, and its sales figures have always been considered very confidential. Murray, do you think this kind of data can be protected as confidential?

MR. MONROE: Not completely. The cases are reasonably clear that you can't quash or limit the subpoena on the basis that this is confidential business information.[7] The theory is that the grand jury procedure is secret and, therefore, your confidential information will be held in secrecy by the grand jury. Unfortunately, there are a number of recent cases in which the courts have allowed access to the grand jury minutes and the documents that were submitted.[8] For instance, a co-defendant in a criminal case may be able to obtain access to the documents[9] and I understand that the government in companion civil cases has used the documents. In recent years, there have been some private treble damage cases where the damage claimants have been able to obtain access to the grand jury minutes.[10] Finally, of course, the government in some cases has been allowed to keep copies of the documents and only return the originals. Over the years it is conceivable but not likely that information may become available through these copies. In summary, I know of no absolute way to protect the confidentiality of the sales figures and other types of business information. Hopefully, by the time the information is revealed in any of the ways I have mentioned, it will have lost some of its confidential character.

MR. FORD: At this stage, we decide to interview the President, the Vice President and the Sales Manager of the company, and discuss generally what the investigation may involve and the extent to which the company may be implicated. The company has a general counsel who wants to sit in on these discussions. Sherman, do you see any problem with the general counsel participating in these discussions?

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7 *In re* Grand Jury Investigation of Aviation Ins. Indus., CCH 1961 TRADE CASES ¶ 69,916 (S.D.N.Y. 1960).

8 *E.g.*, United States v. Proctor and Gamble Co., 356 U.S. 677 (1958); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). *See* FED. R. CRIM. P. 6(c).

9 *Cf.* United States v. Anaconda Am. Brass Co., CCH 1963 TRADE CASES ¶ 70,821 (D. Conn. 1963).

10 *E.g.*, Allis-Chalmers Mfg. Co. v. Fort Pierce, 323 F.2d 233 (5th Cir. 1963).

MR. UNGER: I think he has the right to sit in on the discussions. The problem is that some place along the line the individuals should be advised that there may be a conflict of interest, and that they may want to retain their own counsel.

MR. FORD: Is there any problem with the attorney-client privilege being lost because the general counsel of the company sits in on the discussions?

MR. UNGER: If you are all counsel to the company, there may be a conflict of interest and the individuals may, in fact, have no relationship that would justify an attorney-client privilege being established or conversely, may have waived this privilege by entering the discussions with these parties.

MR. FORD: Suppose also that at this conference are a few lower eschelon employees (for example, an employee in a particular territory where certain illegal activity is alleged to have taken place). Is there any problem from an attorney-client standpoint with them participating in these discussions?

MR. UNGER: I do not think they should be there for their own benefit. They may be subject as individuals.

MR. FORD: Previously we have mentioned the advisability of certain communications with others in the industry concerning their possible involvement in the investigation. Walter, do you think that it is advisable at this stage to try to ascertain whether other companies are involved in the investigation?

MR. BATES: At this point where we are in the preparation and investigation stage, I would still avoid too much inter-company conversation. I would recommend an inquiry to check for common problems such as any extensions of time that have been given or any possible limitations of the subpoena that may have been given but at this time I would avoid discussions of the substance of the possible offense charged.

MR. FORD: How would you learn which companies are involved in the investigation?

MR. BATES: Ordinarily, you probably would have some knowledge of this coming in from the people in the field. The word in these cases usually gets out rather quickly. The salesmen pick it up and it is funneled back to the home office and then to counsel.

MR. FORD: Would you normally talk only to the counsel for these companies?

MR. BATES: My contact would be through counsel. The name of the lawyer can be learned by a telephone call to the home office.

MR. FORD: How would you attempt to learn whether the subpoena has been limited? In the same manner?

MR. BATES: If you have any problems on limitations, such as time or product scope, and you find that these problems have arisen with your fellow counsel, these could be discussed and then you could inquire about any possible limitations.

MR. FORD: Carl, if a subpoena is limited in some way for one company and this limitation is generally applicable to others, do you advise the others of the limitations?

MR. STEINHOUSE: As a rule, we do not discuss or identify subpoenas issued to persons other than your client. However, if the "limitation" will alleviate problems of compliance common to all the subpoenaed companies, and thereby eliminate delay and confusion, I expect that we would contact the others, but without specific reference to other subpoenas. Obviously, if there is a good faith problem that we are eventually going to have to resolve either prior to or before the grand jury, then in fairness we would probably let the other subpoenaed companies know what an acceptable accommodation would be.

MR. FORD: Sherman, do you think at this stage it is wise to have meetings of counsel? Can you accomplish anything by such meetings at this stage?

MR. UNGER: No, I don't think that everyone as yet knows what is involved or what documents they themselves have put in or will put in. I think it is better for the time being to respond directly to your own problems and maybe at a later date it will be appropriate to talk with counsel. But at this time I think it would be premature.

MR. FORD: The responsive documents have now been selected and examined and are ready for production by the client. Carl, are the originals usually required to be submitted to the jury?

MR. STEINHOUSE: Yes, we generally require the originals to be submitted unless there is some business necessity which requires the daily use of the originals. In this case, some method can be worked out beforehand with proper safeguards to present the originals and then submit copies with the understanding that the originals will be preserved and produced upon request.

MR. FORD: Murray, do you think it is advisable to number the documents when they are submitted?

MR. MONROE: I think that they all ought to be numbered and I think obviously that you ought to keep copies of them and perhaps you really ought to have two sets of copies.

MR. FORD: Would you arrange them for submission to the jury according to paragraph number in the subpoena?

MR. MONROE: No, I do not think so. I think it depends on

what you've got to submit. Price lists and things of this sort segregate themselves. However, as to correspondence. I usually submit it as a group without segregating it by paragraph numbers. I've never had any objection to this procedure from the government.

MR. FORD: Would you have any objection to that form of submission, Carl?

MR. STEINHOUSE: I think I would. Generally, we ask a witness who is appearing before the grand jury on behalf of a corporation pursuant to a subpoena dues tecum, if the corporation has various documents pursuant to each paragraph, and then we go down each paragraph. It sort of puts the witness in a bad spot before the grand jury if he only has them in one unsegregated lump. I presume that when the search is made it is made paragraph by paragraph and there is a determination as to which documents comply with which paragraphs. I have not had many situations where the witness was not able to tell me what he had pursuant to each paragraph.

MR. FORD: Is production of the documents made only to the grand jury, Carl?

MR. STEINHOUSE: Ordinarily, we insist that production of documents be made to the grand jury. Of course, like any rule, there are always situations where it is practically impossible or where it would work an extreme hardship upon the company or the individual. In such circumstances we may take an affidavit of compliance with perhaps an agreement to come before the grand jury at a later date relating to the documents.

MR. FORD: At this stage, there is always the question as to who should produce the documents to the jury. Should it be the lawyer, the person having responsibility for the document search, the President or another officer of the company? I would say that production of documents should be made by the employee of the company who has had close connection with the document search. On occasion it has been suggested that if the President or another high level employee is sent into the grand jury room with the documents he may say something that will enable him to secure immunity. I don't think this approach is particularly sound. First, the Division attorneys are going to be very circumspect in their questioning if this type of employee does produce documents. Secondly, he will not, of course, secure immunity simply by voluntarily giving information not in response to the question. Finally, it is questionable whether he would secure immunity even if examined since he is merely producing documents in response to a subpoena addressed to the company and not giving testimony in obedience to a subpoena

directed to him.[11]

After the document submission has been made, we have a chance to do some things that we did not have an opportunity to do during the period in which documents were being selected. Do you think at this time, Murray, we should interview former employees who may have certain information concerning the matters under investigation?

MR. MONROE: I don't think it is necessary at this point. I think it is desirable to keep in touch with them particularly to see if they have received a subpoena. However, only when I am aware of some particular problem and I am unable to obtain information from the present employees of the company, have I actually interviewed them at this stage. If they are subpoenaed, you have a different problem.

MR. FORD: Walter, suppose that there were certain trade association minutes of which we were aware, but which were not in our files, and hence were not submitted to the grand jury. Our client is a member of the association. Should we locate copies of these minutes for review?

MR. BATES: I would, first of all, find out why, if we attended these meetings, we did not have copies of the minutes. But the answer to your question is that this would be very helpful. The minutes should be reviewed.

MR. FORD: Approximately two months later, the company receives two subpoenas calling for the testimony of two employees of the company. Walter, what procedure would you follow to prepare these witnesses for giving testimony?

MR. BATES: This is a matter on which considerable time should be spent, but unfortunately we do not have that time available to us. First, they should be prepared as thoroughly as possible. They should be advised on the subject to immunity—that immunity should be claimed and what that means to them. They should be advised about the procedures of the grand jury—that there will be no judge present, that the questioning will be done by the government, that they have no right to counsel, and that the counsel will not be present with them in the room. The simple mechanics of the grand jury which is undoubtedly unfamiliar to this witness should be explained thoroughly so that he is as much at ease as possible in the grand jury room. As far as preparation is concerned—you mentioned two subpoenas—we would recommend that these witnesses be prepared separately. The reason is that you do not wish to educate

11 *See* McAlister v. Henkel, 201 U.S. 90 (1906).

either of these two men as to subjects about which they have no need to know. This also goes for reviewing documents with them. If they are the recipient or the author of a document and it is one about which they are likely to be questioned, this document might be reviewed with them. However, if it is not a document that they wrote, received, or saw, then we believe it is unwise to educate them concerning that document.

MR. FORD: At this stage, there should be some explanation of antitrust immunity: what it is, and whether it must be claimed. We normally suggest that a witness, prior to testifying before the grand jury, read a statement into the record formally claiming his rights under the immunity provisions, and reserving his rights under the fifth amendment as to any provisions (section 3 of the Robinson-Patman Act, for example[12]) not covered by the immunity sections.

What about waiver of immunity, Carl, is this ever requested?

MR. STEINHOUSE: I cannot speak for the other offices in the Department but in Cleveland and in other offices where I have worked we have not requested waivers of immunity.

MR. FORD: Would this waiver of immunity always be requested with counsel present?

MR. STEINHOUSE: I would prefer that a prospective witness discuss it with counsel before he makes a decision to waive.

MR. FORD: Murray, what about discussions with witnesses at recesses of the grand jury? First of all, do you think that is permissible, and secondly do you think it is advisable?

MR. MONROE: I think that there are two schools of thought on this. Under the Federal Rules of Criminal Procedure, Rule 6 (c),[13] the witness cannot be sworn to secrecy. In my experience, the government in some cases has attempted to swear witnesses to secrecy—at least while he is testifying. Now, some lawyers I know talk to their witnesses during a recess and they simply ignore any attempt by the government to swear the witness to secrecy. Sometimes this is done to obtain information as to the direction of the proceedings or perhaps to help the witness prepare for the next session or even to help instill confidence in the witness as he is testifying. Frankly, in most cases I do not think these reasons are too persuasive. The argument on the other side is that if you do talk to the witness during recess, the chances are that the government

12 15 U.S.C. § 13a.

13 FED. R. CRIM. P. 6 (e):

. . . No obligation of secrecy may be imposed upon any person except in accordance with this rule . . . .

will try to bring this out on the resumption of the hearings. Generally speaking, I do not talk to the witnesses during a recess. I might add as I suggested before that I know a number of lawyers that disagree with this.

MR. FORD: Would your discussions with these witnesses be privileged, Murray?

MR. MONROE: Some of it would be. To the extent that you are giving them legal advice, I think so. However, I think that some of the areas you may be getting into with the witnesses would not be privileged.

MR. FORD: Well, that's the question. And if you are going to talk with your witnesses at the recesses, then you had better tell them that the government may inquire as to what has been said, and caution them to be ready to claim the privilege.

MR. MONROE: Well, I've got a serious question, Tom, whether the privilege really applies; you may not be talking to him for the purpose of finding out facts to give him legal advice.

MR. FORD: Following this testimony the witness returns to your office for the so-called debriefing, which is the review of his testimony before the grand jury. Sherman, what procedure do you follow in debriefing?

MR. UNGER: Perhaps I bend over backwards in debriefing, I am not sure. The procedure I follow generally is to have the witness tell me what went on, and then I write down his impression in my handwriting. Subsequently, I may dictate something and put it in the file but I do not ask him to dictate anything. I do not ask him to write anything out. In this way I believe what we have preserved is clearly my work product.

MR. FORD: Do you retain your handwritten notes?

MR. UNGER: Yes, I do.

MR. FORD: Even though you dictated into a machine?

MR. UNGER: Yes.

MR. FORD: Walter, would you follow a similar procedure in debriefing?

MR. BATES: I think the debriefing that Sherman has described is very conservative, but I adhere to the same thing. I think that you have to get as much from the witness as possible and you have to also separate what the witness *said* from what he *wished* he had said. I think it is important in debriefing to delineate those. But I believe that in order to protect the information, it must be done by the lawyer as his own work product.

MR. UNGER: The reason for protecting the information is that there might be subsequent private litigation. If the witness

writes it out or dictates it on a tape, these tapes or his notes might be subject to subpoena. If you do it, it is clearly your work product and it is not so subject.

MR. FORD: Murray, would you follow a procedure in debriefing similar to that used by Sherman?

MR. MONROE: I think Sherman is perhaps a little bit more conservative than I would be. The cases, particularly those growing out of the Philadelphia electrical cases[14] admittedly go quite far in this area and without going into all the technicalities, you must be careful in taking statements from your witnesses to preserve the work product and attorney-client privilege. I usually take down as best I can what the witness has said and immediately dictate a memorandum. In some cases I have had him dictate it into a machine and then have made a memorandum from the transcript.

MR. FORD: During this period, while testimony is being taken by the jury there will no doubt be suggestions that counsel meet and discuss certain things. Do you think this is advisable now, Walter?

MR. BATES: At this point I would still be very careful about contact with other potential co-defendants. To me, the principal consideration at this point is to learn from counsel of any documents or testimony that bear on my client. If there are such, I would like an exchange of this information, but I would still avoid discussion of any substantive violations of the law.

MR. FORD: Would you agree with that, Murray?

MR. MONROE: I think so generally.

MR FORD: Would you have any exchange of documents at this stage, Murray?

MR. MONROE: I usually have only a limited exchange and I think pretty much along the lines that Walter is talking about. If there are documents that bear on a company which is represented by somebody else, I have on occasion exchanged particular documents relating to that company with its counsel; however, I have only made that exchange after the documents have been submitted by my client to the grand jury. While there doesn't appear to be too much authority on the subject, communication between counsel acting for the witnesses subpoenaed have been protected under the joint-defendant rule.

MR. FORD: What about a common document file with respect to those documents submitted? Do you think it is premature?

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14 *E.g.*, Philadelphia v. Westinghouse Elec. Corp., 210 F.Supp. 483 (E.D. Pa. 1962). *See* Hickman v. Taylor, 329 U.S. 495 (1947).

MR. MONROE: I think it probably is and again I think this gets into the practicalities of the situation. Before going to trial in a criminal case, it is almost mandatory to have some sort of a central file, and perhaps even sooner than that. I think one of the problems is, though, that in the rush to do other things this project is deferred until you are really faced with the trial. One caveat I would like to add, though, is that as soon as the criminal trial is over I think it is desirable to disband the central file system as quickly as possible.

MR. FORD: Sherman, what about joint studies and investigations concerning prices and that sort of thing by counsel at this time?

MR. UNGER: I do not really lean toward it at this point. I know that it is done sometimes. I would rather be working on my own problems at this stage and later, if there is to be an indictment, see who is indicted and who is not indicted and go from there.

MR. FORD: A number of months later, the grand jury concludes its sessions and the Department of Justice counsel informally advises the company counsel that they are now in the process of reviewing the evidence for purposes of making their recommendations. Carl, what factors normally determine whether the Department will proceed criminally?

MR. STEINHOUSE: Well, first, I might say we rarely advise your clients of what stage the grand jury investigation is in—whether we are in the reviewing stage or whether we are going ahead with further grand jury. But getting to the factors in determining how the Department will proceed, obviously an important factor is the type of violation—that is, whether it is a hardcore section 1 violation such as price fixing or boycotting. Another factor is the evidence which we have received. Of course, a criminal case has different standards of proof. Finally, the length of time the violation has been going on is also a factor. These criteria will generally determine whether we will decide to proceed criminally. The very fact that we convened the grand jury indicates that initially we felt this was a criminal type of violation, and at such time as we determine that we are going to go civilly then we do not use the grand jury any more.

MR. FORD: Sherman, with this kind of information concerning the status of the grand jury investigation, would you arrange a conference with the Department of Justice either on the local level or in Washington?

MR. UNGER: My answer is yes. I would try to arrange such a conference and I feel that it is appropriate to arrange a conference both on the local level and in Washington; local level first and then

carry it on to Washington, if needed.

MR. FORD: Gentlemen, thank you for participating this afternoon. In this period of increasing investigative activity by the Antitrust Division I am confident that our discussion has been timely and will prove worthwhile to lawyers representing clients involved in antitrust investigations.