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TABLE OF CONTENTS

INTRODUCTORY REMARKS 1

ANNUAL REVIEW OF ANTITRUST DEVELOPMENTS 3

MOLLY S. BOAST
Debevoise & Plimpton LLP
New York City
Former Director, Bureau of Competition
Federal Trade Commission

RECENT DEVELOPMENTS IN CRIMINAL ANTITRUST ENFORCEMENT 12

Moderator:

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Panelists:

RALPH T. GIORDANO
Chief, New York Field Office
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ROBERT M. SILVERI
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Federal Bureau of Investigation
New York City

SECTION BUSINESS MEETING: ELECTION OF OFFICERS AND MEMBERS OF THE EXECUTIVE COMMITTEE **28**

INDIRECT PURCHASER STANDING: THE CURRENT ANSWER, THE PROPOSED ANSWER, THE RIGHT ANSWER **30**

Moderator:
BARBARA HART
Lowey, Dannenberg, Cohen & Hart, PC
White Plains, NY

Panelists:
LINDA NUSSBAUM
Kaplan, Fox & Kilsheimer LLP
New York City

DEBRA J. PEARLSTEIN
Weil Gotshal & Manges LLP
New York City

JAMES R. WARNOT, JR.
Linklaters LLP
New York City

PEGGY J. WEDGWORTH
Lovell Stewart Halebian LLP
New York City

RESALE PRICE MAINTENANCE POST-*LEEGIN* **46**

Moderator:
ELAI KATZ
Cahill Gordon & Reindel LLP
New York City

Panelists:
RICHARD BRUNELL
Director of Legal Advocacy
and Senior Fellow
American Antitrust Institute
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Recent Developments in Criminal Antitrust Enforcement

MS. MAHONEY: For those who are joining us just now, this will be your first panel of the day, welcome.

We have for you next our program "The Recent Developments in Criminal Antitrust Enforcement." Though many of us do not face criminal antitrust enforcement on a daily basis, there are few antitrust practitioners who will not have such a case across their desk at some point in their careers. So it is really imperative to each of us to keep up on the initiatives and perspectives of the criminal antitrust enforcement authority, particularly given the ever-increasing amount of jail time and fines that continue to be imposed on individual and corporate defendants.

In order to provide us with that update, this panel includes representatives from United States Department of Justice, private plaintiff and defense bar litigators and a Supervisory Special Agent from the Federal Bureau of Investigation.

The program will further our understanding of the issues raised by criminal investigations, indictments, sentencing and the potential relevance of criminal proceedings to civil litigation.

Our moderator for this program today is Steven Tugander. Steve is a trial attorney with the New York Field Office of the United States Department of Justice, Antitrust Division, where he has been since 1989. During his tenure with the Department of Justice, Steve has investigated and prosecuted numerous criminal antitrust cases affecting various industries and jurisdictions throughout the northeast.

In addition to being an active Executive Committee member and former chair of this Section, Steve is also an active member of the New York Inn of Courts and the SUNY Stony Brook Attorney Alumnae Group.

He received his undergraduate degree from SUNY Stony Brook and JD from Hofstra Law School. I will ask Steve to introduce his illustrious panel to you this morning.

Steve.

MR. TUGANDER: Thank you, Stacey.

Good morning. The last time the Antitrust Law Section presented a program at the Annual Meeting focusing on criminal antitrust enforcement was in January of '03. At that meeting our panel discussed the then recent investigation and trial of Alfred Taubman, who was convicted for his role in a conspiracy to fix auction house commission rates. During that program we also discussed what were then the recent trends and developments in criminal antitrust enforcement.

Since that program in '03, the practice of criminal antitrust has experienced a number of major developments that significantly impact the way cases are investigated and prosecuted. Included among the developments that we plan to cover today are: the Antitrust Division's increased use of search warrants; legislation that significantly increased the maximum prison sentences and fines applicable to both individuals and corporations; changes to the United States Sentencing Guidelines to reflect the increased penalties; a series of decisions by the Supreme Court holding that the Sentencing Guidelines are now advisory rather than mandatory; detrebling legislation that allows amnesty applicants to pay single rather than treble damages to victims of antitrust conspiracies, and finally, the Antitrust Division's increased efforts to bring fugitive defendants to trial.

Stacey described the make-up of our panel today. It is quite varied and experienced. We are going to engage in a roundtable discussion where we are going to go through various stages of the investigative process and get the perspectives of the different panelists one at a time throughout those different stages.

So let me take a few moments to introduce our distinguished panel. Patricia Jannaco is a Trial Attorney in the Antitrust Division's New York Field Office. Pat has extensive experience investigating and prosecuting criminal antitrust cases and was a key member of trial staff in *U.S. v. Taubman*. Pat is also a member of the Antitrust Law Section and is co-chair with me of this program. Good morning, Pat.

Ralph Giordano is my boss. As many of you know, he is the Chief of the Antitrust Division's New York Field Office. Under Ralph's supervision we are responsible for investigating and prosecuting criminal antitrust cases throughout the northeast region of the U.S. Prior to becoming Chief, Ralph worked at the New York Field Office as a Trial Attorney and handled numerous criminal and civil antitrust matters.

Sitting next to Ralph is Supervisory Special Agent Robert Silveri, who is in charge of Squad C4, of the FBI's New York Office. Special Agent Silveri oversees the investigative work of twelve special agents and two financial analysts. Until March of 2007, one of Squad C4's responsibilities was to investigate criminal antitrust violations. As a result, Special Agent Silveri has worked closely with attorneys from the Antitrust Division and particularly the New York Field Office.

Just so you know, prior to joining the FBI, Bob spent several years in the public accounting field as a CPA.

Sitting next to Bob is Stephen Houck, who most of you know. Right now Steve is of counsel to the New York City law firm Menaker & Hermann, where he focuses on

antitrust law and commercial litigation. In addition, Steve right now is the Executive Director of the Center for State Enforcement of Antitrust and Consumer Protection Laws, Inc. Steve also serves as enforcement counsel to eight states and the District of Columbia in the government lawsuit against Microsoft.

Now, as most of you know from 1995 to 1999 Steve served as the Chief of the Antitrust Bureau of the New York State Attorney General's Office. Steve is currently a member of the Antitrust Law Section Executive Committee and he is also a former chair of this Section. Welcome, Steve.

Nathan Muyskens is a partner in the Washington D.C. law office of Troutman Sanders. A main focus of Nathan's practice is the representation of corporate and individual clients in criminal and grand jury investigations and prosecutions, and he has particular experience in government antitrust investigations. Nathan has also conducted numerous internal investigations, advised on corporate governance issues and has been involved in the implementation of compliance codes. Before entering private practice Nathan was a trial attorney with the Bureau of Competition of the Federal Trade Commission.

Finally, Bernie Persky is the head of the antitrust practice group of the New York law firm Labaton Sucharow. For many years, Bernie's practice has involved complex business litigation and class actions, primarily antitrust, trade regulation, securities fraud and civil RICO. Bernie has played a key role in major antitrust class actions that have resulted in monetary recoveries to class members, including consumers and businesses, of well over $1 billion.

Bernie is a member of the Advisory Board of the American Antitrust Institute and also serves on the Executive Committee of this Antitrust Law Section.

Just a little disclaimer before we begin. Please note that anything that I, Pat or Ralph say today are our own views and do not necessarily represent the views of the Antitrust Division or Department of Justice.

With that, Pat, we will start with you. Pat, there was a time not that long ago when the execution of a search warrant by the Antitrust Division was rare. Today search warrants are considered a main weapon in the Division's arsenal. What has accounted for the change?

MS. JANNACO: Well, I would have to say that the vigor of our amnesty program probably accounts largely for the increased number of search warrants that we are executing. Along with the corporation that seeks amnesty come employees who cooperate. And those cooperators are able to provide us with the facts that we need to support a probable cause determination. They will point us in the direction of documents and the location of documents. So I would say that probably is the main consideration.

MR. TUGANDER: Under what circumstances is the Division likely to proceed by search warrant rather than Grand Jury subpoena?

MS. JANNACO: Of course, if we have probable cause, that's a great thing. We are able to get our documents immediately. As in a subpoena situation we don't have the delays that are built into subpoena compliance negotiations, which can go on for some time. We can zero in on critical documents, and we also get better documents. We are looking to get to the heart of things as quickly as we can. Production is not sanitized. There is no erring on the side of nondisclosure in production. And we also may have a concern about document destruction. So those are some of the factors that weigh in our decision to go by search warrant.

We have logistical concerns as well. We need to have two warrants approved by a court, so we have to manage that. We also have to coordinate multiple searches around the country for different companies. We want to usually do those at the same time. There are technical requirements, imaging hard drives; these are things that don't necessarily come up in the context of a subpoena. The documents that we do get are not screened for privilege typically, obviously. So there are certain considerations that have to be given to that and procedures that have to be followed with respect to that.

MR. TUGANDER: Well, if a decision to proceed by search warrant is made on a company, will document subpoenas serve any function?

MS. JANNACO: Yeah, of course they do serve a function. The Grand Jury subpoena will reach documents that are not at the premises being served. And the subpoena is usually left with the company that is being served. They also gather up other documents that may be at the premises but not gathered in the course of the search. There are other kinds of documents that are not necessarily evidence of the crime but needed in order to conduct our investigation.

We are also using Grand Jury subpoenas to reach subjects for whom we don't have probable cause but who we believe may be involved and have documents that are relevant to our investigation.

MR. TUGANDER: So it is not an either/or proposition?

MS. JANNACO: No, we use both in the same investigation.

MR. TUGANDER: Bob, I want to ask you about the FBI's role in search warrant execution in a minute. But before we get to that, can you briefly describe how the FBI is structured in New York and particularly how do agents get assigned to antitrust cases?

MR. SILVERI: Sure. There are 56 field offices mostly in every state. We have a number of offices around the

world. But in New York, it being the largest, we have about 1,200 agents, 1,200 support personnel. The way it is broken down, because New York is so large, that as opposed to a smaller office, where an agent might do every type of crime, white collar, terrorism, organized crime, you jump. But in New York you're kind of assigned to one specific area.

In New York we have six divisions. It is broken down to the criminal division, counter-terrorism, counter-intelligence, admin, special operations and field intelligence group. That is headed by what we call a SAC. A SAC is a special agent in charge. Within each division, the division is broken down by branches. Could be anywhere from one to five branches. My own experience being in the criminal division there are three branches in the criminal division: White collar, violent crime, organized crime. Each branch is headed by an assistant special agent in charge. Then broken down even further within each branch you can have as many as five to fifteen squads that are headed by a supervisory special agent, like myself. Again, in my case, being on the criminal division white collar crime branch, I am in charge of a public corruption squad. But we have bank fraud, security squad, healthcare fraud, economic, cybercrime and government fraud. So each squad handles a specific violation or violations. Our government fraud squad, for example, is the squad that handles antitrust matters, also environmental crimes and bankruptcy fraud. So it kind of makes it easy when complaints come in or referrals come in from other offices, law enforcement agencies or requests come in from the Antitrust Division, it goes specifically to the government fraud squad, to that supervisor, and they in turn assign it to a specific agent.

MR. TUGANDER: Thanks, Bob. Without getting into any sensitive areas or techniques, can you give us a general sense of the type of work the FBI needs to do to gear up for an Antitrust Division search?

MR. SILVERI: A lot goes into that obviously. Most importantly I can't stress enough that communication is the biggest part when you're dealing with your trial attorneys or Assistant United States Attorneys, that you brief each other on the evidence that you have to date, the interviews you have done, what people have said. If you've wired people up, what are on the tapes. You want to get all that evidence out in the open so that you know what you have and to be sure, and as an agent I want to be sure that you have probable cause to go out and do that search warrant. Once you get all that evidence gathered, it goes into an affidavit, the agent has to swear to that affidavit, and that agent better make sure he can attest to everything that's written in that affidavit. That's why it is so important to work with a trial attorney to make sure what you're swearing to in front of a judge is true.

Simultaneously to working on that affidavit and working with the attorneys to get that done, the agents are determining what can be seized and to make sure that conforms to what the warrant allows you to go get. Usually the case agents are looking into determining where you're going to do that search warrant, whether you're going to need locksmiths, photographers, transportation, maybe you need SWAT. You might need the evidence control unit. The case agents will usually lead that search but only in the event of dealing with crazy owners of the search location that you're conducting, dealing with their attorneys, who I guaranty you are usually going to show up within hours of going into that door, and any interviews that you're hoping you might get to do when you get to that search location. Employees are going to start showing up and wondering what's going on and pretty much panic sets in. It can get a little crazy. So there's usually a second agent there to direct the search, make sure everything gets done, leading the case agents, deal with anything that might crop up.

MR. TUGANDER: What about in this era of electronic evidence, which is usually pretty high on the list of what the Government is coming after. Do you have to make certain technical arrangements?

MR. SILVERI: Absolutely, yes. I failed to mention that. One of the most important things is to get the CART team on board; those are our computer guys, to get in and seize the computers or try to image the hard drives that are there. Just seems to be getting more and more complex, so we have a rather large CART team that just goes in and handles that work. If we can take the hard drives, we prefer to image them, try not to upset the business in any way, but try to make it as easy as possible. But it is vitally important that we get that stuff.

MR. TUGANDER: Are there situations in a large search where you might partner up with another law enforcement agency?

MR. SILVERI: Absolutely. I think it is a great thing. It brings not to mention man hour, brain power and fire power when the FBI and IRS are showing up at your door to execute a search or try to do an interview. It is good perception of the public that we are working together, and we are not messing around. So we are going to get in there and do our thing. And it is kind of like the FBI and IRS agents, we are one team, but also the IRS is looking for things a little more towards the evidence of tax fraud. We are looking for antitrust crimes or bank fraud or whatever it is. So we are a combined team helping each other out. It makes it that much more of a powerful unit.

We have other non-antitrust cases where we work a lot with offices of Inspector General for a lot of other federal agencies, local law enforcement, NYPD, New York City Department of Investigations; we have done a lot of searches with them. It is really good. We try to do them with other agencies.

MR. TUGANDER: Ralph, we are going to get back to the topic of search warrants in a moment, but before we

do, can you give us an overview of the work that's done by the New York field office.

MR. GIORDANO: Good morning. Our office is located in lower Manhattan, Foley Square area. We are one of seven field offices. We have nineteen attorneys, nine paralegals and of course clerical support. The geographic area assigned to us is all of New England, New York State, northern New Jersey and parts of central New Jersey.

We don't, however, just investigate and prosecute local and regional criminal conspiracies. We also have and will look at national conspiracies and international conspiracies; usually where there is some nexus to our area. For example, a victim is located in our area; an overt act has occurred in our area; some of the conspirators are located in our area. But we do look at and prosecute international and national as well as local and regional conspiracies.

At this point essentially the New York office does criminal work. We investigate and prosecute the per se criminal antitrust violations. By that I mean agreements among competitors to rig bids, agreements among competitors to fix prices and agreements among competitors to allocate customers and territories. We also bring related Title 18 offenses: perjury, obstruction of justice, tax counts, conspiracies to commit fraud, et cetera.

As with the other field off offices, we have been busy over the years. If I may I'll give you some statistics, and I promise you I'm not going to do that anymore after these few. Over the past ten years or so we have brought about 160 criminal cases—that's just our office—against over 50 companies and over 175 individuals. Almost all of these defendants have pled guilty or have otherwise been convicted. About 70 of the individual defendants were sentenced to jail for a total jail time of over 95 years. Thirty-seven of these individuals were sentenced to jail for one or more years. On all of these matters, virtually all of them, we have worked with FBI agents, primarily with Bob's office, and we have gotten invaluable assistance from them, and we have a splendid working relationship with the FBI, and we expect that to continue.

MR. TUGANDER: Thanks, Ralph.

Let's get back to the topic of search warrants. Seized documents, both hard copy and electronic, may contain potentially privileged attorney-client materials. What steps has the Division taken to protect that privilege?

MR. GIORDANO: There are a multitude of steps. I'll mention some very broad outlines. The steps will vary with the circumstances of the matter. We at the Division are very mindful of the attorney/client privilege, and we clearly do not wish to intrude upon or violate it.

If, for example, a very small number of documents have been seized from an individual or company, we may assign an attorney in our office not on the investigation in question to review the documents and isolate any documents that may in his or her opinion infringe upon the attorney/client privilege. Documents that are clearly covered by the privilege will be returned by the attorney, to the counsel of the company or individual whose documents have been seized. If there is some question, that attorney will talk to counsel and attempt to resolve the issue.

In situations where we have an awfully large number of documents, electronic or hard copy, what have you, again in this case we'll assign one or more attorneys not involved in the investigation to deal with counsel for the company or individual or companies or individuals involved, in an attempt to try and work with those attorneys and that counsel to identify documents that may come within the privilege. And clearly to the degree they do, return them to counsel.

It's possible that there are issues on particular documents that cannot be resolved with counsel. We may seek the assistance of the court, but that's unusual, but it may happen. Again, we are mindful of the privilege and very interested in protecting it.

MR. TUGANDER: Sometimes you can get an argument from a company that it can't function without access to its documents, both hard copy and electronic. What can be done to provide access to a company while those documents are seized?

MR. GIORDANO: Well, if the company knows specifically what documents are involved, we can arrange to have copies made for the company. If the company or individual isn't sure what documents they need, we can arrange to have them come in and review the documents, electronic or otherwise. They can then identify those documents which they feel they need, and we can arrange to have copies made for them.

MR. TUGANDER: Thanks, Ralph.

Bob, how do your agents get involved in the post-search review process?

MR. SILVERI: It happens every time. We get the documents, and as agents we need to look at them and try to hopefully generate new leads, new angles to look into. We are looking for bank accounts that we are not aware of, assets that may be hidden, any kind of smoking gun that's going to lead us into a new direction or support the evidence that we have. We will look for associations with individuals and companies that we weren't aware of. Any clues, I mean it is vitally important. If we do the search, we need to look at the stuff and look at it hard.

As I mentioned before, the bigger area obviously is the computer evidence. We find a lot more of the computer evidence to be extremely valuable. More times than not there is a gazillion e-mails, files, letter, graphs, Internet

sites that are targets going into. And again, we need to look at it and develop leads to continue our investigation to support the criminal activity that we have. It is good that we do that on our own and with attorneys. Communication is huge. We are looking at it first, then the attorneys might look at it. We look at it together and talk about it. It is an important part of post-search.

MR. TUGANDER: Bob, you've obviously had cases with the United States Attorneys Office and with the Antitrust Division. Are those investigations handled in the same way or are there differences between the two types of investigations? What has been your experience?

MR. SILVERI: Good question. I've been fortunate to do several cases with the U.S. Attorneys Office and with the Antitrust Division. I'll say this from the get-go. In both instances the attorneys that I've worked with are incredibly bright and thoughtful, and they want to learn from you. They make you feel like you are a part of the team. Arguments and differences of opinion do occur at times, but it is all part of the learning process.

In my case I get to learn how to think like a prosecutor. A prosecutor gets to try to think like an investigator and everybody learns from that. It makes the case that much stronger. That said, I've observed differences in the office makeup, personality and styles between both offices. So let me say this, and I hope I don't offend anybody.

With the U.S. Attorney's Office, my experience is they tend to be younger, right out of school, three years experience, that kind of thing. That's not a bad thing. That's not to say they are not good at what they do, but they are younger and usually have about 80,000 cases assigned to them. So I probably have to say they have very little time to really strategize with the agents in terms of how to take a case further. Basically, they want you to bring an airtight case to them, and that's fine, and then they are ready to jump in and do everything that needs to get done to get the case prosecuted. I'll tell you that some FBI agents prefer that. They want to run the case, and they want to run it by themselves, how they think it should be done. And that is fine.

With the Antitrust Division, equally intelligent and I would say usually far more experienced in prosecuting cases, specifically in antitrust crimes. There is no question about that. So I would say that as a result antitrust attorneys, in essence, to me become partners from the get-go with agents. Thoughts and ideas are shared amongst the entire team, among agents, analysts, trial attorneys, paralegals. You're discussing who to approach first, who to approach next, the types of techniques that you might want to use. What to do two, three, four steps ahead of the game. As I said, I think that's a benefit, because it helps me to think like a prosecutor, and prosecutors kind of get to think like us.

We can investigate a case till the cows come home, but if we can't prosecute it and know what evidence to get from the beginning, we are wasting time.

MR. TUGANDER: We have a lot of meetings?

MR. SILVERI: A lot of meetings. Communication.

MR. TUGANDER: Ralph, what type of interaction does the New York field office have with the United States Attorney's Office during the course of an antitrust investigation?

MR. GIORDANO: Bob, I think after all these years I'm starting to think like an FBI agent.

The Antitrust Division is authorized to investigate and prosecute criminal violations of the federal antitrust laws, and that's what we do. We do, however, keep contact with the U.S. Attorney Offices in our area. Any investigation, even a preliminary investigation, that we begin we will notify the pertinent U.S. Attorney's Office. We will keep that office abreast of the progress of the investigation. We will seek their counsel as appropriate. We will try and become aware of their particular practices and policies. Any plea agreement, information or indictment that we file, before we file it we will show the U.S. Attorney's Office in the pertinent district the pleadings to be filed.

Also we have made outreach presentations to the U.S. Attorney Offices in our area. By that I mean we talk to their attorneys, tell them what we do, tell them what to look for in terms of their Title 18 investigations as possible leads or suggestions or indications that an antitrust criminal violation might also be occurring. And from time to time we get leads from U.S. Attorney Offices as to possible antitrust conspiracies.

In short, we try and I think we do achieve a good working relationship with the various U.S. Attorney Offices in our area.

MR. TUGANDER: Thanks, Ralph.

Nate, I want to turn to you. In the written materials that accompany this program you submitted a handout that relates to training that your firm provides to corporate clients to be prepared in the event the Government makes an approach by way of either search, subpoena, or interview. Could you describe the advice that is given?

MR. MUYSKENS: Yes. In this day and age it seems that in a lot of companies it is almost a certainty at some point a search warrant is going to come or some sort of government investigation. So what we try to do in a lot of our compliance efforts is we add a little section on what do you do if Bob shows up. The reason we do that is just basically because the liability for obstructing an investigation or destroying a document or any of the things that often can happen when something like this occurs is a lot

greater than the actual underlying offense in most situations.

For example, a Sherman Act offense, it is a ten-year hit. 18 U.S.C. 1519, destroying a document, is a 20 year hit. The intent requirement is such that you want to be a lot more careful.

So what we do is during any kind of compliance presentation give a little 30-second spiel about if the Government comes knocking, you certainly can talk to them if you like. You're more than welcome to do that, but you don't have to. There is a card we give out. It is a little card that outlines just what you should basically be doing and what rights you have. We think that's a good thing.

Bob made an interesting comment, that they always bring another agent, because when the employees show up panic sets in. And that is absolutely right. When you get a call from the plant manager or the office manager or a place that is being searched, it is generally a pretty irrational call. People do freak out when guys with guns show up. They are always very polite, but it still is disconcerting. So again, we lay out some ground rules. The card is actually laminated, and that's how hokey it actually is. But we have found that people do keep it. We only give the cards out when we have some reason to think there is a good reason we should.

If we get a whistleblower phone call, and if we've been looking into what's been going on, we will make sure the general counsel will have a few of these cards available. If we have gotten wind there are other competitors in the industry that have been questioned by the FBI, we will give out the card. We don't always do it. You obviously get some interesting questions when you hand out a laminated card that says what do you do if the Government knocks on my door. But this day and age I think a little bit of training is necessary.

MR. TUGANDER: So you want to be prepared. Nate, how widely is that information disseminated throughout the company?

MR. MUYSKENS: We keep it as narrow as possible. We wouldn't give it to every employee of General Motors. Again, if you use the whistleblower example, we would give it to the sales folks in the area we think might be investigated.

Actually, we have a different laminated card for directors and officers that's a little more detailed, things you would want to know if you have more responsibility in a publically traded company. So it is limited. Again, you get a lot of questions when you hand out a card that says what do you do when the Government comes knocking, so you don't want to create undue panic.

MR. TUGANDER: So Nate, when you get that nervous call from the client, he tells you a search warrant was executed by the FBI as part of an Antitrust Division investigation, what action do you take?

MR. MUYSKENS: The first thing we do, if he doesn't have my handy card, is go through the rules again. But you want the person who is on the ground to not interfere with the search warrant but to try to learn as much as possible. The agents are pretty good at taking a useful inventory of items, but often they will call an item something different than you call the item. So you want to have somebody who is on the ground who can really let you know at the end of the search what has been taken so you can begin to try to figure out what your problems actually are.

The other thing you can do almost immediately after that is start putting in place systems and other things to make sure no other documents get destroyed. While the search warrant may have been carried out at plant A, we want to make sure that all e-mails are frozen company wide. Because again, your obstruction hit is always going to be a lot greater than the underlying offense in these situations and certainly something that can be avoided.

MR. TUGANDER: Nate, if possible, will you actually visit the search site?

MR. MUYSKENS: I've never actually visited a search site because it has never been practical. The way these antitrust cases seem to work is you never have someone five miles from your house, so it is sort of an impractical thing. Would it be good? Yes. Is it nice if you at least have your general counsel or someone with legal training to sort of keep track of what's going on? Yes, that's great. But it tends to be an impossibility in antitrust cases, unfortunately.

MR. TUGANDER: If you can't visit the site, will you try to contact either the agents or prosecuting attorneys by phone immediately?

MR. MUYSKENS: I'll always ask to talk to whoever is on the site immediately. The worst they can say is no, I'm busy. But you can learn some fairly useful things. You want to get on as soon as you possibly can, figure out what's going on. Try to determine what conduct is at stake, what the facts might be, anything you need to know. And if some polite FBI agent is willing to tell you a little bit, that's great. After the search is over, yes, I would call whoever is listed on the warrant to say hi, I represent company X, how can we cooperate with you, how can we further help you. So yes, you really want to get in contact immediately.

MR. TUGANDER: Steve, let's turn to you. Let's say you happen to represent an individual who is involved in the conduct under investigation, and he happens to be employed by the searched company. The client informs you the agents on the site want to interview him. How would you advise him?

MR. HOUCK: My general philosophy is to be very, very nice to prosecutors and to cooperate with them to the maximum extent possible. As you look up here and you look at these four people, they all look to be very nice, decent, well-meaning, well-intentioned people, but don't let appearances deceive you. You'd be guilty of the grossest malpractice if you let an unrepresented client in a room with a couple of sharks like these people.

So the advice always would be to have a lawyer present during interrogation. There are a lot of good reasons for this. Antitrust investigations can be very, very complicated. And sometimes the facts aren't very clear. A witness really may benefit from having his or her recollection refreshed before going on record with the prosecutors. It is not unknown in antitrust investigations, in particular that sometimes things are proven through inference, rather than overtly. So exact words witnesses say are important. And it wouldn't be unheard of that somebody would try to put words in a witness's mouth.

It is also very important in terms of your representation of the client to know what the client has told the prosecutors. You can't really give sound legal advice unless you know what the individual has said. So it is very important to be there for that reason.

Finally, I want to point out the scenario was clearly written by Pat and Steve, because it assumes when somebody like Bob shows up at the door of a witness that he's somebody like Tony Soprano with a criminal antitrust lawyer on retainer and picks up the phone and calls you. The reality, as Nate said, is that this is a very disconcerting experience for most people. And, if you're lucky, they will have heeded Nate's advice and called up the person's company, not you directly as a lawyer. So you will be retained down the line somewhere.

As I'm sure we'll discuss more here, it is always very important for corporations or your individuals to make clear exactly whose interest they are representing. So that's something you want to make clear at the outset.

MR. TUGANDER: Well, Bob, let's say you're on site and you get a call from an attorney representing the company or individual. How much information will you give him about what you're doing on the premises?

MR. SILVERI: This is a great question, and I think it is why I love my job so much. To answer the question, it really depends on who the lawyer is. Who is he representing? Is he representing the target, the subject? Is he representing a victim—not a victim, but maybe a witness who I don't believe really has anything to do with the alleged crime? But the short answer is absolutely, I will talk to them. I'm probably not going to say much. I'm going to want to know what they are interested in learning, and based on what Nate said, you try to be as cooperative as possible. I'm not going to get into the details of the case. I'm there to do a job; I want to get in, get out with the documents we need. We can talk in more detail at a later point.

That being said, depending on who they are representing, if there's somebody I really want to talk to, we'll try to make some time right there and then to ask some questions, and we will try to make it work. I think communication is only the best way to get the evidence that we need, and we will do it.

MR. TUGANDER: Thanks, Bob.

Nate, I want to turn the attention back to you and talk about internal investigations. Let's assume a search warrant is executed on your corporate client, and you've learned that amnesty is no longer available; however, there is still an opportunity for a company to be second in the door.

Let's assume a company is interested in being second in the door. Two questions: Do you immediately begin an internal investigation? And if so, how is that investigation conducted?

MR. MUYSKENS: Well, the availability of amnesty doesn't really drive my decision on whether to push the company to start an internal investigation. It is basically the fact that the search warrant came that's going to get it rolling full steam ahead. You get a search warrant. You know there's probable cause there. There's an affidavit sworn out, so you've got a problem, and you need to start looking immediately. If amnesty plus is still available that's all well and good, but we have probably at that point into the internal investigation for sure.

I think these days really need to start as soon as you possibly can. The one thing you want to make sure you've done is make sure the conduct has stopped. You guys don't look very kindly on companies that once they are being investigated keep fixing prices, so you want to make sure that's ended. And to be honest, that's easier said than done. You need to actually figure out who is doing what, if there are mechanisms in place that maintain a price at a certain level that you need to figure out kind of a different way to stop.

The second reason you want to get this internal investigation moving is you've got a lot of audiences here who you are kind of playing with. One is the Government, but you've also got shareholders, customers, suppliers. People want to see the company act as a responsible corporate citizen. In order to do that you need to get on these things immediately. Even other government agencies where you may do work, when they later decide whether to bar you or not, they'll look at what you did in terms of compliance and after the search warrant went out and whether the company is responsible.

So to answer your question, the key to when to start the internal investigation doesn't have much to do with

amnesty at all, but has to do with whenever you think there might be an issue.

In terms of how the investigation is conducted, going along the same lines as trying to be a responsible corporate citizen or at least creating that appearance, you want to create an independent review of things. It has to be a real internal investigation. You want to bring outside counsel in. Your clients always want to try to do these things on their own at times, and you have to dissuade them from that. There is nothing worse than when your general counsel and your AGC then become the third witnesses at trial. You want to make sure the internal investigation is somewhat removed to give it that unbiased, clean appearance. That's how we generally try to conduct them, but sometimes your client has other ideas.

MR. TUGANDER: Now, how do you go about informing employees? If we are in this plan of trying to cooperate with the government, do you inform employees that what they tell you may be disclosed to the government?

MR. MUYSKENS: One of the first things you do with any internal investigation is you start interviewing the folks who probably screwed up. When you do that there is an interesting dynamic that goes along. You want to learn as much as you possibly can, but you want to make sure you're not just completely running roughshod through the rights of the employee. We always give a warning, if you will. You explain to the employee first that I represent the company; I don't represent you. Everything we are discussing here is something we consider privileged, and I am conducting this interview to assess the case for the company and to prepare for litigation. But you do also need to know as the employee that this privilege does belong to the company and the company can decide whether to waive it. It's the company's owning, not yours. Then we move on from there.

Actually, the follow-up question you always get from people after you've said that is well, do I need a lawyer? And that's a little bit more difficult. Especially considering these initial interviews during an internal investigation, you don't really know who has done what. You have some ideas, but you're talking to people, and we haven't gotten target or subject letters from you guys, so we don't know where everybody fits. So if you know full well that somebody is going to be a target, you would debate whether to even interview them. Try to get him his own counsel.

Where people are in that gray area and ask you if they need a lawyer, I always cop out and go well, I can't answer that question, but we can certainly find somebody you can talk to about it. That seems to work. All the model rules about that in the case, it is all over the board. So there is no real bright answer. But we always try to be very honest with people.

There are some people that think you should give these sort of mini Miranda warnings, you have the right to remain silent, and that I will or may turn this over to the government. I don't view myself as an agent of the government and I don't think I'm a special assistant attorney when I'm doing an internal investigation, so I don't think that's quite necessary. But that is something that a lot of people that are better at this stuff do, so it is another thing to think about.

MR. TUGANDER: What happens to employees who refuse to cooperate?

MR. MUYSKENS: They are seldom seen again.

I would view that as two classes of employees. There are the ones who clearly think they have a problem, so I don't really view that as not cooperating. Those are people we would probably get counsel for. If they have an issue, you want to get them lawyered up separately. You don't want to create ethical issues.

In terms of employees who are a problem, that just come in and try to lie to you or trick you, that does happen. Usually it is somebody who thinks they are pretty slick. I always consult with my employment partners first, people in HR, because I don't understand employment law very well. Depending on what their contract says or if there's a union involved, there are all kinds of issues there. Again, as part of our antitrust training—and we do this in our FCPA training—you sign something that says you've read it and understand it. And you also sign something that says it is part of my responsibility as employee that I will assist and cooperate truthfully and fully in any sort of internal investigation. These folks know that going into it.

MR. TUGANDER: Can you tell us what usually goes into the company's thinking as to whether or not to pay legal fees for either a current employee or former employee?

MR. MUYSKENS: Well, I'm always a big believer that you should just pay them, even though it could be a bitter pill to swallow. These fees are obviously pretty high. But at the end of the day for your employees who need counsel, you want to make sure that they have good counsel. There is nothing worse than having the government's main target, who happens to be one of your employees, get upset with you and go hire a guy who does mostly DUIs. I'm not trying to be flippant, but I've seen that happen. You want to make sure your employees have lawyers that are going to cooperate with the government and work with the government well. They are going to make sure the employee tells the truth and don't do anything else wrong. So I always push to pay.

There are certainly situations where you wouldn't. But in a matter like this, it's usually good. And to be really practical about it, usually you don't even have a choice. Based on the articles of incorporation or the employment agreement, you're paying.

That is one of those things that in all these white-collar conferences everybody gets upset about indemnification and paying legal fees. Maybe I sort of missed out, but I've never found it to be a real big issue with the government. I've never had a prosecutor be a nay sayer or anybody get angry at me for paying the fees. I've had guys get very angry with people employed, but the fee thing, I guess post-McNulty memo, I don't view it as much of an issue anymore.

MR. TUGANDER: Steve, let's turn to you. Suppose you represent somebody who has a problem; they independently retain you, outside of whatever lawyer the company wants to refer them to. From your point of view what are the pros and cons of asking the company to pay for your legal fees?

MR. HOUCK: This is a very important practice pointer. Your fees are much likelier to be paid if they are footed by a big corporation and not an individual. So that's a definite plus.

Also, from the perspective of the individual, he or she is being asked to incur legal fees for something done on the job, so I think there is a perception that it's fair to ask the company to pay those fees. And the reality is, an antitrust investigation is often very complex, and doing a really good job, as you should for your client, can be expensive. It takes time and money to try to figure out what's going on. There are lots of witnesses, and it can get quite expensive to be able to give your client the representation he or she ought to have.

So my experience is it is not really that much of a question if the company is willing to pay the bill. The downside is although you clearly have to provide an independent representation to your individual client—that's your first and highest obligation, you nevertheless feel some responsibility towards the company that's paying the bill, and that may present some issues as you go forward. Notwithstanding the fact that at the end of the day you really have to do what's in your client's best interest.

MR. TUGANDER: Let's envision a situation where the client begins to cooperate with the government, and the corporation is paying your legal fees, and for whatever reason he doesn't want the company to know that he's cooperating. Is there a way that you can continue to bill the company without disclosing the fact that all this time and effort in cooperation is being made?

MR. HOUCK: I think practically, certainly, you can do the work and just not send the bill for a while. I'm not sure that's the best way to proceed. As you say, maybe circumstances are such that's in the best interests of the client. My general philosophy is I try to be honest and forthright not only with you folks, which is the most critical thing, but also with the company. And the company itself, notwithstanding what you guys sometimes think, really wants the individual to cooperate. They don't want to continue to employ somebody who unbeknownst to them has done something illegal. So they have their own interests in that regard. In fact, the condition of continuing to pay legal fees is probably that the individual continue to cooperate with the government investigation. So certainly there are ways not to let the company know what's going on for a period of time. But overall, I would try to be above the board with everybody involved, if that's possible.

MR. TUGANDER: Nate, let's turn back to you. Suppose there's an employee or even a former employee where the company is paying his legal fees, and it turns out the company finds out he's cooperating against the company. Does that have any effect on the company's continued payment of his legal fees?

MR. MUYSKENS: You know, it really doesn't. Although I would add, if you do send the bill for the individual three or four months late, you get paid about nine or ten months late. In a white-collar case, you know the individual is going to try to work a deal out with the Government. Nobody ever says screw you guys, I'm not working, let's take it to trial. So you kind of know going into it that you're going to be paying for some cooperation that potentially harms the company. But that's going to happen whether you pay it or not. I would rather have a good lawyer helping cooperate, knowing it is being done properly than just have an employee going in there by themselves or with the lawyer who takes on a full cooperation in an antitrust case for 500 bucks flat. So I don't think I would particularly let that dissuade me from paying fees.

Often your client will get a little annoyed if an employee is dimeing out the company, but what are you going to do, cut him off and have him go somewhere else? It is just not a practical thing.

The other thing to, just getting back to it, with most employment agreements and articles of incorporation, like Delaware, you're not really going to be able to pull it anyway. So that's where I am on the issue.

MR. TUGANDER: Turning to a bit different topic. In the written materials we have provided you is a sample joint defense agreement, which I recommend everybody take a look at. Nate, at what point in the investigation is such an agreement likely to be entered into by the parties?

MR. MUYSKENS: Well, I think as early as you can. Once the search warrant has been carried out and we have gotten some idea of who the other coconspirators might be, I'm going to reach out to counsel for those other companies, because I'm going to want to know what's going on. You want to do that very quickly in the internal investigation to get as much information as you can. Generally the other coconspirators are fairly willing to cooperate. Frankly, when you start doing that you always

enter into some form of oral joint defense agreement right off the bat.

When does the agreement get written down? That can vary. I don't know if it is always a good idea to have a written joint defense agreement. There are certainly times when it is. If you're exchanging a huge number of documents, there is probably a greater need for a written joint defense agreement than if you're just sort of talking in generalities. So it is really quite fact-specific.

MR. TUGANDER: Generally, what are the key terms to the joint defense agreement; what are you most interested in?

MR. MUYSKENS: I don't know if there are really key terms. I would argue that any agreement you write you try to make it as simple as possible. There are two key things you need to remember. The first one is you don't need to produce everything you have. You've got to keep in mind you're going to have some documents that you're just not going to turn over. Because in the back of your head you always have to remember that it is a joint defense agreement. Think things might go out, and you could maybe argue it is not admissible later, but you can't get the toothpaste back into the tube. So don't be lulled into a false sense of security with the joint defense agreement.

The second thing to always keep in mind is you can get out of these things any time you want, but so can everybody else. So while your interests may be aligned at the time, that can change really quickly. You never want to be the first guy to get out of a joint defense agreement, because you feel like you're the one the mob would shoot. But if it is in the best interest of your client, you should do it. And everyone else would do it to you in a second. So those are things you need to keep thinking.

MR. TUGANDER: So you're not completely trusting of your partners in this agreement?

MR. MUYSKENS: Well, if it's Steve, I certainly am. But it varies. You're trying to do the best for your client, but there are times when it just doesn't go along with the interest of everybody else.

MR. TUGANDER: Steve, do you have a preference for oral versus written joint defense agreements?

MR. HOUCK: I agree with Nate. It is a somewhat controversial subject. I've heard some lawyers say they absolutely insist on a written agreement, and others say they would never sign one. I guess I would say I'm somewhat agnostic. In some jurisdictions there may be some case law that requires a written agreement. I think that's the minority rule. Really, the key thing is to have a common interest in jointly defending a case. So if you're all representing clients that have been told by you folks that they are subjects of investigation, that's probably common interest enough to establish the agreement. And as Nate said, it is a very Hobbesian world out there. I was saying in jest with regard to the prosecutors that appearances can be deceiving, but the same goes with defense counsel. Everyone looks nice, but everyone has their interests and client's interest first. When you're in the middle of an investigation, it is a delicate dance.

Clearly, there is reason to share information. You guys have a tremendous advantage in a lot of cases, because you've got all the documents from everybody else. You've talked to the victims; you have some testimony, and the rest of the defendants are on the outside looking in and just seeing a small piece of this and don't really know what happened. So it can be useful to collect materials so that the defendants are in the same position you are in terms of knowing what the facts are.

On the other hand, if you have a client or individual in the company who has done something he shouldn't have, that's probably not something you want to publicize to the group as a whole. It may be something you want to talk about with another company. Let's say there are five subjects of the investigation and a meeting just two of them attended. You may want to talk with counsel for the other party who attended a meeting to see if you can understand what happened and confirm what your client is telling you is correct. As a good lawyer you always need to have some skepticism about what your client is telling you. So as Nate said, it is a very complicated situation, and you really have to play it by ear a lot.

MR. PERSKY: The joint defense agreement, if it is oral, are you fully protecting yourself against the privilege waiver arguments? If you start handing out privileged material to somebody who is not your client, somebody, like a plaintiff's lawyer, might argue you've waived your privilege. But if it is not in writing, that could be contested.

MR. HOUCK: As I said, the one reason for writing is it removes some of the doubt. Still, with an oral agreement, it is possible to establish in the court that there is such a relationship, because there is a common interest and there's usually at least a writing, an exchange of letters to that effect.

Also as I said, you want to be very careful, and Nate said the same thing, what you share with other people. It is one thing to share factual information, and put in a depository all the documents that were produced to Ralph's folks. It is another thing when you think about sharing your perceptions about whether your client is telling the truth about something. You probably wouldn't want to do that even though you had a joint defense agreement.

MR. TUGANDER: Well, Bernie, let's get you involved now. DOJ's investigation is underway, volume of commerce appears to be high, damages appear to be major. As an antitrust class action attorney you may be

interested in this case. How do you go about getting your client?

MR. PERSKY: Well, we have relationships with clients in various industries to whom we provide antitrust advice, and they would come to us. We have relationships with counsel in various industries who would come to us on behalf of their clients.

In addition, if it is an industry that we are familiar with and we know counsel in that industry, we could bring to the attention of that counsel that their clients may have an interest in pursuing the matter, authorizing an investigation, hiring of economists to see if they have any rights to pursue. So there are various ways in which we get involved. Sometimes we get called. Sometimes we reach out to people. Sometimes the clients themselves call us.

MR. TUGANDER: Do you ever face a situation where a potential client is fearful of bringing a case because he fears some sort of retaliation from a defendant?

MR. PERSKY: That's the constant refrain with respect to direct purchaser cases, which are the vast majority of antitrust cases. You're suing your supplier, you're suing the company, or you're thinking about suing the company that supplies you or who was your customer.

If for example, there's an announced criminal investigation or a grand jury, one of the things we have told potential clients is it is not likely that a company under criminal investigation would compound its criminal conduct, possible criminal conduct, by retaliating. But we also disclose the fact that it is conceivable that the supplier of the company with whom the potential plaintiff does business would take adverse action. We think that would be an example of unlawful conduct and would compound the antitrust violation and would be part of a civil suit. But it is something that plaintiffs in antitrust cases do take into account.

One client that was negotiating a deal with a potential defendant, said let me finish this deal first, then bring the suit. So it does come into play. They are concerned, but I think that to retaliate against a company for enforcing its congressionally secured rights is illegal.

MR. TUGANDER: Let's assume that you're successful in getting your client, and this government investigation is going forward. How likely are you to approach the Antitrust Division and offer to provide some help by way of documents, evidence, witnesses?

MR. PERSKY: Well, if they have already brought the action, they sometimes contact us as part of their investigation. They would want to know more about the market, more about the pricing. On occasion where they haven't contacted us but we know where the investigation is, we are quite happy to call up the office conducting the investigation to provide our client's cooperation. Because we feel it is in our mutual interest for the government to be successful in its investigation and prosecution.

MR. TUGANDER: So if the government makes its case, it makes your life a lot easier?

MR. PERSKY: You bet.

MR. TUGANDER: Ralph, how interested are you in sitting down with Bernie and hearing him out to see if he can help your case along?

MR. GIORDANO: Well, Bernie is right. On occasion we will call private plaintiff's counsel to see if there is any information that he may wish to share with us that he has and which is not otherwise covered by a protective order under seal in that case. In that situation of course we'd have to get a court order to examine that information.

But we are always interested in listening to private plaintiffs as to any information they feel we ought to be considering. We are aware that our interests and those of the private plaintiff may not always be the same. We don't use the private plaintiff in a private action as our stalking horse. That is we don't rely on them to acquire information for us. To the degree we have an investigation, we will keep it separate from the private action, and we are not likely to share information that we get in our investigation with the private plaintiff. But to the degree there is information that a private plaintiff wishes to bring to our attention, they ought to do so.

MR. TUGANDER: And how much information are you going to share with him?

MR. GIORDANO: It is not likely that we are going to share much of our investigation with the private plaintiff. As I say 1) our interests may not be the same; 2) the information that we have as a result of a Grand Jury investigation is likely covered by the prohibitions of Rule 6E, confidential. So the short answer is not much.

MR. TUGANDER: So basically a one-way street.

So Bernie, getting back to you, let's assume you have a client, and you file your private suit while the Division's case is pending. You then seek discovery by way of interrogatories, depositions. Are you anticipating the government might have some problems with your discovery requests?

MR. PERSKY: Well, they will probably object to any depositions we want to take if they have an ongoing Grand Jury investigation. Any witnesses they have spoken to or want to call before the Grand Jury, they would probably be quite loath to allow us to depose. So it would be unlikely in the face of a Grand Jury investigation of antitrust violations, where we have a parallel civil proceeding, that we would be able to take depositions, unless they would for some reason allow us to do it.

On the other hand, there have been times where we can get the documents provided to the Grand Jury, other written materials. We can take third-party discovery sometimes. So yes, we can get some stuff. We probably can't take depositions. It may slow us down if there is a Grand Jury, but ultimately if the Grand Jury ends up indicting and there's a guilty plea, it is to the civil plaintiff's benefit.

MR. TUGANDER: Pat, are you likely to move to stay Bernie's requests?

MS. JANNACO: Yes, I'm afraid so, we are going to move to stay.

MR. PERSKY: Well, in the National Gas commodity manipulation case—it is not an antitrust case, but quite similar, in the Southern District of New York, we had a working relationship with the U.S. Attorney's Office, because we would tell them what witnesses we want to depose. They usually said no, but they often didn't care, because we had 22 defendants, and they had pending investigations on some but not all.

So we worked out a protocol with them. But yes, normally if there's a Grand Jury, no, we can't take deposition.

MS. JANNACO: And we would move to stay. Sometimes the defendant wants to take the depositions, and that creates other problems for us as well.

Our goal in moving to stay is not to thwart the civil plaintiffs in getting the relief they want, but we feel they can wait until we continue our investigation, and it may do them some good. Our main goal is to preserve the integrity and secrecy of our Grand Jury investigation. We don't want to be broadcasting a road map of our investigation.

The potential criminal defendants don't have a right to any kind of discovery while our investigation is going on, and we don't want them to be able to circumvent the criminal discovery rules by using more liberal civil discovery rules.

With respect to documents, sometimes there are documents which are really key, and we just don't want them to be out prematurely. We don't want them to be known. Because we don't want the witnesses to tailor their testimony to what they think we already know. We are still bringing people before the Grand Jury to get their recollections as broadly as they can give it to us.

We also have worries about manufacturing evidence. And we are also concerned about some possible witness intimidation in some cases.

MR. PERSKY: Well, sometimes we have found if we phrase a document request as to all the documents you provided to the Grand Jury that might be objectionable. But if you can figure out another way of describing the documents you want and not key it to Grand Jury production, you can still get it.

MS. JANNACO: In the auction house matter, while our investigation was still going on, we did move to stay discovery of about fifteen documents, which we considered to be a reasonable request, and they were key documents in our case. Will we get the stay? We will probably get the stay. Will we get everything we want? Probably not. We did get protection for those fifteen documents, but we will not necessarily get as much time as we want with that. I think we got two months where we had asked for three and a half.

We also moved in that case to stay depositions, and we got the depositions stayed. Again not as much time as we wanted, but as it turned out, by the time our stay would have expired, before then they had already settled the class action, and that pretty much cut off some of the discovery anyway.

MR. PERSKY: One of the issues that's come up when a company is under criminal or government investigation is that the company sometimes puts together a report, analyzes the material evidence and tries to persuade the government not to pursue it. They submit it to the government and then enter into a privilege agreement claiming it is not a waiver. We have litigated that point. So far we haven't been successful, but there's a split in authority--even though you say that you've reserved your privilege, you're still voluntarily giving material to a third party. I think the D.C. Circuit allows the plaintiffs to get it. But in Natural Gas commodity manipulation litigation we never succeeded in getting the materials that were put together by the defendants to persuade the government not to go forward. We think that's good stuff to try to get.

MR. TUGANDER: Bernie, you've recently filed a motion in the Southern District of Ohio seeking to compel the FBI to produce tape recordings and transcripts of a cooperating witness. Can you talk about that a little bit?

MR. PERSKY: It was not a typical situation. We had been in contact with a whistleblower who had brought a civil lawsuit against his former employer who were retaliating against him, because, he says, he disclosed an antitrust violation. The U.S. Attorney's Office started a Grand Jury investigation, and as part of that investigation they got the whistleblower's father, who had been a former employee of one of the companies under investigation, to make surreptitious tape recording of telephone conversations. Thereafter the Grand Jury dissolved and there was no indictment. But we had a civil class action pending against these companies. So after the Grand Jury dissolved, but we knew about these tape recordings, we wrote a letter to the FBI informing them that we expected them, notwithstanding the dissolution of the criminal investigation, to preserve these documents.

Then it just so happened that the Cincinnati office of the FBI was within a hundred miles of the Columbus courthouse, so we issued a subpoena to the FBI for the tape recordings of this whistleblower's father with these two former employees who, we understood, disclosed relevant and material information that would be of assistance to us in the civil litigation. The FBI initially said it would violate the privacy statute to give it to us. And we pointed out that the privacy statute has an exception that would allow the FBI or the government to produce materials, notwithstanding the privacy statute, in accordance with a Court order. That's what we are seeking. We have got a motion to enforce the subpoena. The FBI took the position the subpoena was not a court order. We said the motion sought a protective order. Then the FBI said you don't have the consent of the parties to the conversation. And we then produced an affidavit from the father who was on the call consenting to the production. And as to the two witnesses whom he spoke with, we said we didn't need their consent because they are executives of the defendant and their names are already known so no privacy interests were involved. So the FBI took the position that we hadn't gotten the consent and hadn't sufficiently demonstrated relevance.

It just so happens there's a split in authority as to what standard would govern the obligation of the FBI to turn this over. There's a case called Laxalt in the D.C. Circuit that says all you have to show is that it is relevant under Rule 26. There is no Privacy Act privilege at all. So we argued that.

There is another case that takes a slightly different approach, the *Perry* case in the Second Circuit that talks about balancing the privacy interests against the relevance to the litigation. Then we also cited the *Archer Daniels Midland* litigation where in fact the FBI did produce the tape recordings, but under a court order saying that it would be produced to the limited extent necessary to move forward with litigation.

We also finally, in our motion papers, said if the Court thought it was appropriate we could have the materials produced under seal. Now, before the motion was decided, the case was settled, so I don't know what the answer is. But it was interesting, because I'm not sure how many people have subpoenaed the FBI for criminal tapes.

MR. TUGANDER: I assume that's not something you face regularly. Bob, do you have anything to add to the discussion about confidential sources?

MR. SILVERI: Sure, and I understand Bernie and Nate and Steve in any given case would want to have evidence like that. My big problem is that we have cooperating witnesses that we treat like gold. They are giving us information, and we are working very closely with them under controlled operations. My obligation to them is to try to keep their identity hidden until absolutely necessary. Our sources know that they are going to have to testify at some point and tapes would be turned over. I just don't want to do it sooner than legally necessary, because it could create some very serious situations, potentially harmful. So when I hear somebody putting in motions for tapes, there goes the identity of my source, and that's not a good thing for me. I understand where you're coming from, but it's just a very difficult thing because it creates a lot of issues.

MR. PERSKY: This confidential witness was also a moving party. He gave us an affidavit that he gave to the FBI saying that he didn't have any confidentiality interests. He had put in an affidavit in his son's litigation describing his conversations with them, but the best evidence of those conversations was the tape recordings.

MR. SILVERI: And that's an excellent exception. More times than not our cooperating witnesses are not just cooperating in our case; they have terrorism information, they have organized crime information. So when we divulge any of our source, I'm kind of cutting off what they are doing for other squads and other terrorism, things of that sort. Those are our issues.

MR. TUGANDER: Thanks, Bob.

Ralph, let's say we are at the point of investigation that is well advanced and staff is recommending an indictment. We provide opportunities to defense counsel to make a presentation both at your level and sometimes above your level to discuss the reasons why the client should not be indicted. Can you tell us from the presentations that were made to you what types of presentations you find to be most useful. What are you looking to take away from those presentations?

MR. GIORDANO: Let me just backtrack a bit. Any indictment, plea agreement or information that's filed by our office or any field office or any section in the Antitrust Division has to be finally approved by the Assistant Attorney General in charge of the Antitrust Division. So what normally happens if the staff investigating the matter is inclined to recommend individuals and companies be indicted in connection with their investigation, that staff will prepare a memorandum, submit it to me and our assistant chief. We will review it, and we will in turn prepare a short memorandum on top of that memorandum giving our recommendations, stating whether we agree with staff, disagree, agree in part, disagree in part.

At that point we make available to counsel for the involved individuals and companies an opportunity to be heard by myself and our assistant chief. They can come in and make a presentation to us as to why they feel their clients ought not be indicted.

I think, Steve, you asked what factors ought a counsel coming in to be heard present. The short answer to that is anything that counsel feels might be relevant to our decision. Anything they feel that might convince us not to indict. It could be evidence or information they feel we

may not be aware of. Trial tactic questions; they might come in and say look, if you indict this individual it is so minor and so insignificant that you're going to hurt yourself with your major defendants at trial. And we probably have considered that, but we may not have. So anything that counsel feels is important or relevant to convincing us not to indict, that's what you ought to present. It is better to err on the side of including as opposed to excluding. Tell us anything you feel we ought to be considering.

Now, these presentations are made to myself, and our assistant chief and the staff involved in the matter will also sit in on the presentation. It is an opportunity for us to hear you or to hear defense counsel. We don't view it as an opportunity for defense counsel to learn every ounce of our evidence. It is an opportunity for you to come in and tell us why we ought not indict a particular client.

MR. TUGANDER: Ralph, would you say there have been occasions where these presentations have swayed you?

MR. GIORDANO: There have been some situations.

MR. HOUCK: Three in the last 20 years.

MR. GIORDANO: There have been some situations where we have been persuaded not to recommend that a particular individual or particular corporation be indicted. It doesn't happen often, but it has happened. And sometimes the staff itself is persuaded.

My advice to any defense counsel out there is if you're given the opportunity I would take advantage of it.

MR. TUGANDER: Thanks, Ralph.

Nate, from a defense attorney's perspective, is there anything that you think the Division should do differently in these pre-indictment presentations?

MR. MUYSKENS: Well, yes, lots of things. Realistically, I'm going to answer this a little differently, because I'm always told I focus too much on the negative. So I'll focus on the positive here. One thing the Division has been pretty good at in the last couple of years, and this isn't as blatant sucking up, but when I go in pre-indictment I don't have to hand over every bit of privileged material I have. I don't have to hand over written things. I don't have to essentially explain my legal theories, like other U.S. Attorney's Offices will do. And I think that creates a much more constructive environment for settling a case, and it certainly is appreciated.

On the downside, the one thing I'll quickly differ is the other U.S. Attorney's Offices and fraud section, criminal section down in D.C. generally tell you a lot more about their case early on, so completely contradicting what Ralph just said, that he doesn't view it his job to provide every fact. But it is a lot more helpful when you're representing a company to know more about the government's case. We are not asking for all the details right off the bat, but there are times I've gotten an answer to this question or statement from folks in other field offices, not this one: You know what you did. Well, you know, no, sometimes we actually don't know what we did. So sometimes it would be helpful to have a little bit more facts.

On the other hand, I certainly understand you have informants you want to keep safe. I would argue that most of our antitrust cases we don't have that many ties to al-Qaeda. So I think you folks understand the difference between the U.S. Attorney's Office cases and the ones at the Division. They do have a lot of cases. A lot of the cases do seem to be pretty neatly tied up in a bow. So I'll grant them the ability to give you more facts. But I would guess that you think about providing a little more guidance to your actual case plan so we know where we should be going with our offer to get rid of the case.

MS. JANNACO: Nate, really it hasn't been unknown for attorneys to come in and talk to us, maybe even before this stage, and say I really don't know what my client did. Well then, we'll point you in some direction.

MR. MUYSKENS: I guess you could ask some of your colleagues in D.C. I think I'm pretty annoying, I call a lot. If I have questions, I don't hesitate to get on the phone and say hey, we are having trouble seeing where you're going. We want to do the right thing and get to the bottom of what happened. I have an audit committee and shareholders to answer to. This may sound hokey, but in the initial parts of an internal investigation, I don't view it as being that adversarial a process with the government. My interest at the end is to not be indicted. But we all have an interest to learn the facts and figure out what happened. That is something that you guys—I could be wrong, but you do it a little differently than other offices.

MR. TUGANDER: Steve, do you think it worthwhile for defense counsel to coordinate their presentations?

MR. HOUCK: Yes, before I answer that directly, let me reiterate some of the things that Pat and Nate said. I think you'd be derelict in representing your client if you waited until the last minute to talk with Ralph. You certainly shouldn't pass up that opportunity. But you really ought to be in there talking with Pat and Steve, if they are running the investigation, to find out their thinking and to tell them what you're thinking. I think that's probably in everyone's mutual interest. In my experience at least they have been very good in terms of talking with defense counsel about what their theory of the case is once they have one. Often times the initial phase of the investigation is just collecting facts. But at some point they have some working theory about what happened. I think it is in their interests early on to tell you we think this is what happened, and to find out from you if you thing they're going to have a problem here or a problem there. So before they

get to Ralph, they have thought about that and tried to shore up the case.

I think it is a mutually advantageous process, and you really should be proactive in going to Steve and Pat and talking about the case.

When it does come time to make a pitch to Ralph, I certainly do think it makes a lot of sense to confer with your colleagues. I'm a humble guy, and there may be many things I haven't thought of that other people have thought about. You want to have your stories, to the extent possible, consistent. You always want to emphasize what's best for your own client. But you don't want to go in there and say things that are going to be contradicted by other people or inconsistent with what the prosecutors know the facts to be.

Your biggest asset throughout this is your reputation for credibility and truthfulness. So you want to be very careful about that. Also, I think it probably helps to have some repetition. If three or four or five defense lawyers are all telling Ralph the same thing, that you have this problem, maybe he'll finally believe it after the third or fourth time he hears it. So I would definitely recommend at the final stage sitting down with your colleagues and talking about what kind of pitch you're going to make.

MR. TUGANDER: Thanks, Steve.

Pat, real quick, this decision just a few weeks ago, Gall, in a real nutshell could you tell us how that would affect antitrust defendants being sentenced?

MS. JANNACO: Well, *Gall* followed *Booker* and *Rita*, both of which basically set the guidelines for the guidelines. Sentencing decisions have to be reasonable. Guidelines are no longer mandatory.

The specific question with *Gall* was whether the Court of Appeals could apply a proportionality test and require that a sentence that substantially varies from the guidelines be justified by extraordinary circumstances, and the Court said no, that's not going to happen. It is the same rule. You have to look at a sentence to see if it is reasonable.

But what *Gall* did which the other cases didn't do and has brought together the jurisprudence is they have provided procedure, the Court provided a procedure for doing calculations for sentences. The guidelines are still a factor in 3553, which sets forth sentencing factors to punish and deter. But first thing you do is calculate a proper guideline sentence; that's your benchmark. It is a matter of administration, nationwide consistency, in order to continue with some of the goals of the guidelines. The sentencing court has to give the parties an opportunity to argue for the sentence they deem appropriate. The sentencing judge must consider 3553 factors and make an individualized sentence based upon the facts before him or her.

If there is a deviation from the guidelines, that deviation must be supported by sufficient justification, whatever that means. I'm sure that's something that's going to be litigated from time to time again. And the sentencing judge must adequately explain the sentence that's been imposed sufficiently to allow for meaningful appellate review.

On appellate review the Court takes into account the totality of the circumstances, including the extent of any variance from the guidelines range.

Under Rita an appellate court is not required to apply a presumption of reasonableness to a sentence that falls within the guidelines but must give due deference to the sentencing judge's decision that the sentencing factors justify the extent of any variance.

The appellate court, as in any abuse of discretion standard in any case, the appellate court cannot substitute its own judgment for that of the judge who was on the bench when the sentence was imposed.

I guess a lot of people had thought that this sort of makes the guidelines absolutely irrelevant. I'm not sure that that's the case. In the cases, Justice Breyer in *Rita* I believe made it very plain that the guidelines still play a very important role because the Sentencing Commission, like the sentencing judge, is required to take into account the 3553(a) factors and apply them. And in fashioning their sentences, they have come up with appropriate sentences that take all those factors into account. They studied thousands upon thousands of sentences and basically have a database and a basis for determining what is reasonable and what reflects the achievement of the goals of sentencing. The Sentencing Commission's work continues, so they are continuing to gather data about sentences in cases all over the place.

With respect specifically to antitrust cases, I think that the landscape has changed. In 2004 there were major changes to Section 1, which more than tripled the maximum jail terms and increased the fines from $350,000 for an individual to a million and for corporations from $10 million to $100 million. So we are working in a different environment than we did in the bad old days when courts decided that this is really a victimless crime. The atmosphere reflects that it is not; it is not a victimless crime, especially given globalization of cartel activity and billions of dollars that are affected by antitrust conspiracies. So that's the quick and fast.

MR. TUGANDER: Nate, the fact that the guidelines are now advisory rather than mandatory, how does that affect the way you approach your plea negotiations or sentencing arguments?

MR. MUYSKENS: It changes them actually a fair amount. Because now I get to go in and argue a bunch of the 3553 factors. I get to argue things that under the actual guidelines would never have been something a judge

should look at. For an individual, for example, I can start arguing family circumstance. I can argue my reputation is hurt so I should get a lower sentence because my reputation comes in. Those are factors under the guidelines the Judge could never look at.

One other thing I'm actually going to start arguing in antitrust cases—you just reminded me of this a second ago—there's been a recent spate of cases post-*Gall Kimbrough*, which has only been six weeks or so now, that have looked at how the Sentencing Commission has actually established a penalty. The *Baird* case which actually came out in Nebraska is the one that best describes this. What the *Baird* case says is a criminal penalty that's a Congressional directive, like the antitrust penalty is now—it changed in 2004, should be given less weight than a penalty that the Sentencing Commission has actually run the numbers on and looked at the statistics for. The antitrust penalties were promulgated pursuant to a Congressional directive, time frame is shorter and that sort of thing. So in some ways you could even argue the weight of these Congressional directives for something to look at as favorable. So those are things I would argue. You can be a lot more creative now would be the long and short.

MS. JANNACO: That sounds terribly unreasonable.

MR. TUGANDER: We are getting close to the end of our time, but I would like to ask if there are any questions? We could take one or two.

Yes, Barry.

MR. BRETT: Barry Brett. I would like to ask Ralph, at what point, whether it is in connection with a subpoena or otherwise, will you advise counsel as to whether or not the person to whom the request was made is a target, subject, witness or fall into some other category, whether you view that as a policy of your office or something done overall by the Division?

MR. GIORDANO: Well, I can tell you what we do. We do issue target letters late in the investigation to individuals against whom we have substantial evidence and are likely to recommend a case against. We don't issue target letters for corporations, but we will tell counsel that their company is either a target or we have substantial evidence against them. We also rather early in the investigation will tell counsel whether their company or individual is a subject of the investigation.

Again, that's what we do. I don't want to speak for the entire Antitrust Division at this point. I hope that answers your question.

MR. TUGANDER: Yes.

AUDIENCE MEMBER: Making your list of what to do when the government comes knocking, the person seated to your left made the comment that he thought it could almost be malpractice basically for somebody to go into an interview. But I noted in there you say you don't have to be in a review, but you don't go the next step and say the better course is to call your lawyer or the company lawyer or whomever it might be. I wondered why you don't have that in your list of what you might do?

MR. MUYSKENS: I don't think you can tell someone they can't be interviewed. There is a sort of a fine line to walk between basically obstruction and just sort of—you want to make sure people know their options, and you hope they put two and two together.

AUDIENCE MEMBER: Is the obstruction fear, that's what—

MR. MUYSKENS: Yes, it is the obstruction fear.

MR. HOUCK: Also he was speaking with his hat on as the lawyer for the corporation. So what he advises an individual might be a little bit different. The question I got is I already have the client, and the client is asking me whether he should go in and talk without me being there. So I say no; I recommend against it.

MR. TUGANDER: Yes.

AUDIENCE MEMBER: How do you distinguish between clients you give your laminated card to and the clients you don't give your laminated card to?

MR. MUYSKENS: Whether I like them or not.

It varies. Recently with one of my clients we got a very detailed whistleblower complaint that outlined activity that would lead you to think there may be some reason to do an internal investigation into bid rigging. And moreover, the parties involved—they were ones these guys would probably be thinking about already just because where they did business, in Iraq. That's a hotbed of bid rigging activity. So we decided, I'm not the government, I can profile. So we thought that these people were probably ones who should have the card.

It is a case by case thing. If there is some possibility of it, with the obstruction penalties and all of that being so incredibly severe, we will err on the side of giving them out. And lots of time we will give 50 to general counsel and say hold onto them, and if you feel the need, give them out. I'd love to tell you it is rocket science and we put a huge amount of thought into it, but we really haven't.

MS. MAHONEY: I'm sure some of us are sitting on our questions, but in order to keep ourselves on schedule, I would like us all to give a big round of applause to our panel. Thank you very much.

Now I'm going to turn over the meeting to Saul, our Chair, to handle the business meeting. So please, for those of you interested in voting on the issues, the bylaws and the Nominations Committee report, sit tight for a few more minutes. Saul.