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A Practical Approach to Representation of a Client during a Federal Antitrust Grand Jury Investigation

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A PRACTICAL APPROACH TO REPRESENTATION OF A CLIENT DURING A FEDERAL ANTITRUST GRAND JURY INVESTIGATION

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GENERALLY, IN WHITE-COLLAR CRIME SITUATIONS, particularly antitrust, the first time a client may know he is under investigation is after the grand jury proceedings have commenced. The client will usually find out about the investigation through the industry grapevine, through the receipt of a subpoena by his employer or through a subpoena *ad testificandum* to an individual in his company. It is necessary for an attorney to understand the investigative process in order to properly represent his client in the antitrust proceedings that follow.[1]

The United States Attorney's Office can commence a grand jury investigation under its own authority. However, a division of the Department of Justice, such as the Antitrust Division, requires the approval of the Assistant Attorney General in charge of the Division through the issuance of letters of authority to the members of the Division Staff who will be conducting the grand jury investigation.[2] For the Antitrust Division staff attorneys to obtain such letters of authority, they must have convincing preliminary evidence that a crime has been committed. This evidence must be made available to their superiors when requesting such authority.

How do these investigations generally arise? Information indicating the possibility that a crime has been committed comes to the Justice Department in many forms and from many sources. One common source is complaints from citizens who feel that they have been victimized or dealt with unfairly by the people against whom they are complaining. In the antitrust context, these may include consumers who feel they have been overpaying as a result of a suspected price-fixing conspiracy, or a competitor who feels he has been unable to purchase supplies as a result of an illegal boycott.[3] Another source of complaints is those by disaf-

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[1] *See generally* ABA HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS (1978). This book is an excellent resource for the substantive and procedural aspects of a grand jury investigation, particularly in the antitrust context. *See also* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GRAND JURY PRACTICE MANUAL (1975).

[2] HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS, *supra* note 1, at 1.

[3] Private parties, of course, can and do bring their own antitrust civil actions. Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), states that "any person who shall be injured in his business or property" by an antitrust violation is entitled to recover treble damages. Section 16 of the Clayton Act, 15 U.S.C. § 26 (1976),

fected or fired employees of a corporation who have inside knowledge, by virtue of their employment, of many of the corporation's inner-most secrets, some of which may be very incriminating. Finally, complaints can come from disaffected conspirators who either have had a falling out with the other members of the conspiracy, or who feel that they have been dealt with unfairly.

The Antitrust Division frequently receives information which is discovered in the course of investigations by other agencies such as the Federal Bureau of Investigation, the Securities and Exchange Commission and the State Attorney General's office. Information received from Congressional committee and sub-committee investigations also is often a catalyst for the commencement of an investigation.[4]

Antitrust Division monitoring of publications can also result in the commencement of an investigation. The Antitrust Division monitors the local newspapers and many trade publications and trade association publications looking for indications of conduct which suggest possible antitrust conspiracies. The Division also conducts economic studies in particular industries by analyzing prices, costs and other significant competitive criteria in order to determine if the market appears to be acting in a normal competitive manner or whether it appears to be subject to artifical restraints.

It is important to understand how these investigations may arise because one of the first things an attorney should do when he meets with his client is to ascertain whether the client knows of any likely sources of complaints, such as an employee who was recently fired or a competitor who has threatened the client. Knowing the probable sources of a complaint will be helpful in devising an initial strategy to protect a client's rights, particularly if the likely complainant is an individual injured by one's client and thereby has motives other than those of a public-spirited citizen. Additionally, early involvement with a client is essential to obtain the facts, as the client knows them, in order to best protect his rights at the initial stages of an investigation, and to try to ascertain whether the client will be a target of the investigation or merely a potential witness.

In the antitrust or white-collar context, the term "client" frequently connotes either an individual or a corporation. In recent years, the Antitrust Division has focused on multiple representation of the corporation and the individual employee, vigorously asserting that this situation presents a conflict of interest.[5] Where both the individual and his corporation are under investigation, or involved in an investigation, the

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says that persons, firms, corporations or associations are entitled to sue and obtain injunctive relief "against threatened loss and damage" if an antitrust violation is proved.

[4] Congressional staff members frequently have close contacts with Antitrust Division personnel.

[5] *See* notes 9-11 *infra* and accompanying text.

Division takes the position that a serious problem of potential conflict of interest between the corporation and the individual can arise. The most obvious potential conflict between the employee and the corporation is the individual's fifth amendment rights against self-incrimination. Since only individuals possess this right, they are the only ones that can bargain it away.[6] It may be in the employee's best interests to attempt to limit his personal criminal liability by seeking to obtain immunity in return for his testimony before the grand jury. This cannot be done by the corporation. In addition, the offer of cooperation by the employee at a very early stage can result in limiting his personal criminal liability.[7] With respect to obtaining immunity under the Organized Crime Act,[8] there is frequently a race to the Antitrust Division to seek immunity during an investigation because the Division will immunize only as many people as is necessary to build a case, and will usually indict the remainder of the perpetrators.

All of these actions by which the individual's attorney may attempt to limit the individual's personal criminal liability will likely implicate his employer, the corporation. This is especially true where an employee will testify about the illegal acts of a corporation and the participation of his superiors in these acts. On the corporation's side, it may have a very vigorous antitrust compliance program and thus may be genuinely surprised by what it considers the "ultra vires" acts of certain employees.

Many of these potential conflicts between employee and corporation arise early in an investigation. For instance, they may arise when the attorney is representing the corporation and, in the course of interviewing employees to obtain the story, he begins to receive implicating facts

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[6] In Counselman v. Hitchcock, 142 U.S. 547 (1892), the Supreme Court found that a grand jury investigation is a "criminal case" within the scope of the fifth amendment. The opinion held that a grand jury witness was entitled to assert his fifth amendment privilege if any answer he was asked to give might involve him in the criminal conduct under investigation. *Id.* at 562-63. Corporations, on the other hand, do not have a fifth amendment privilege against self-incrimination. Wilson v. United States, 221 U.S. 361, 384 (1911).

[7] Within the past year, the Antitrust Division has announced a policy of leniency for those who voluntarily disclose their own wrongdoing to the Division at an early stage and prior to a Division investigation. *See* J. Shenefield, The Disclosure of Antitrust Violations and Prosecutorial Discretion (address before the 17th Annual Corporate Counsel Institute, Chicago, Illinois, Oct. 4, 1978), *summarized in* [1979] 5 TRADE REG. REP. (CCH) ¶ 50,388 at 55,858 (Nov. 13, 1978); To Confess or Not to Confess: Agonies of Uncovering Price Fixing, ANTITRUST AND TRADE REG. REP. (BNA), No. 861, § AA (Apr. 27, 1978).

[8] Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-6005 (1976). This statute replaced the traditional transactional immunity with a use immunity, thereby barring the use of an immunized witness' incriminatory disclosures against him in any criminal case. This statute was held to be constitutional in Kastigar v. United States, 406 U.S. 441 (1972).

from a particular employee. At this point, the corporate attorney is confronted with some hard decisions. He should advise the employee of the dangers of not having his own attorney. In the past, prior to the vigorous push by the Justice Department on this issue, attorneys representing the corporation had a tendency to listen to the employee's story and compare it to the versions of other employees before considering the conflict in question. However, the corporate attorneys should be aware that this course of action may cause the government to take an aggressive position and mount an early conflict challenge to this dual representation of the corporation and the individual employees.[9] On occasions there have been successful motions to 1) disqualify counsel,[10] 2) prevent counsel from practicing before the court for a period of time[11] and 3) attacks on any claim of attorney-client privilege that might have resulted from the communication of such an employee to the attorney for the corporation.[12] Thus, even if the attorney for the corporation thinks that he or she is not adversely affecting the rights of the employee, there are practical reasons for early considerations of this issue.

It is likely that an attorney representing a client before the grand jury will eventually be dealing with a subpoena.[13] There are wholly different considerations with respect to representing a corporate client and representing an individual client. The subpoena *duces tecum*[14] has some special problems for the corporate client. The standards for a grand jury subpoena are that it must be relevant to the inquiry, and must not be unreasonable or oppressive.[15] The procedure for challenging

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[9] *See In re* Investigation Before the April 1975 Grand Jury, 531 F.2d 600 (D.C. Cir. 1976); United States v. Garafola, 428 F. Supp. 620 (D.N.J. 1977). These cases dealt with the government's standing to object to the multiple representation of defendants. *See also* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR5-105.

[10] *See In re* Investigation Before the February 1977 Lyndburg Grand Jury, 563 F.2d 652 (4th Cir. 1977). Two attorneys were disqualified from representing ten witnesses. One of the attorneys was a target of the investigation; three of the witnesses invoked their fifth amendment privilege in an effort to protect the lawyer and the other witnesses. In *In re* Gopman, 531 F.2d 262 (5th Cir. 1976), the court of appeals affirmed an order of disqualification where three labor union officials, called as witnesses before a grand jury investigating a breach of fiduciary duties by another union official, were represented by one union attorney.

[11] *See In re* Special February Grand Jury, 406 F. Supp. 194 (N.D. Ill. 1975) (motion to prevent counsel from practicing before the court).

[12] *See* Decker v. Harper & Row Publishers, Inc., 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

[13] FED. R. CRIM. P. 17.

[14] A subpoena *duces tecum* is an order to produce documents or to show cause why they need not be produced. *See* Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

[15] *See In re* Grand Jury Subpoena *Duces Tecum* Issued to Southern Motor Carriers Rate Conference, Inc. Dated August 13, 1975, 405 F. Supp. 1192 (D.C. Ga. 1975). The Supreme Court has held that the fourth amendment reasonable search clause will limit an unreasonably broad subpoena *duces tecum*. Hale v.

a subpoena is to file a motion to quash or limit the subpoena under Federal Rules of Criminal Procedure 17(c).[16] Because of the broad standard for testing the reasonableness of the subpoena, success on such a motion will necessarily depend on the court's discretion and should be used only as a last resort.[17]

Initially, an attorney should attempt to negotiate with the government. Filing the 17(c) motion prior to discussing the terms of the subpoena will create unnecessary confrontation which a target client does not need. Additionally, it often involves an impatient court in matters which an attorney should have been able to settle directly with the Antitrust Division.

When the government is drafting a subpoena, it likely has little or no knowledge of the client's filing system, the client's problems, or the attorney's interpretive ingenuity with respect to the various specifications of the subpoena. Accordingly, the Justice Department tends to take a conservative stance and draft the subpoena as broadly as possible. The government expects an attorney to come and discuss particular problems, and, as a result, they are usually cooperative in working out a reasonable solution. Thus, it is necessary to carefully analyze the subpoena and become familiar with the client's business and recordkeeping system. In so doing, the attorney can ascertain the burden involved in complying with the subpoena. Frequently, because the government does

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Henkel, 201 U.S. 43 (1906). For an explanation of fifth amendment due process considerations, see *In re* Grand Jury Proceedings, 486 F.2d 436 (3d Cir. 1968); United States v. Doe, 405 F.2d 436 (2d Cir. 1968). A corporation, however, has no fifth amendment privilege against compulsory self-incrimination. Wilson v. United States, 221 U.S. 361, 384 (1911).

[16] FED. R. CRIM. P. 17(c) provides:

> (c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

See Margoles v. United States, 402 F.2d 450 (5th Cir. 1968) (court has discretion to quash a subpoena *duces tecum* if compliance would be unreasonable). The Constitutional basis for the motion to quash is the fourth amendment. *See* Hale v. Henkel, 201 U.S. 43 (1906).

[17] *See In re* Corrado Bros., Inc., 367 F. Supp. 1126 (D. Del. 1973). The court stated it would quash an otherwise valid subpoena only in the most unusual cases of a clear showing of unreasonableness amounting to a governmental abuse of power. In a rather extreme case, the court found no abuse in a situation where a corporation had been under investigation by the Antitrust Division for almost ten years and had turned over 50 tons of files. Petition of Borden Co., 75 F. Supp. 857 (N.D. Ill. 1948).

not know the internal workings of the client's business, the language of a particular subpoena may call for what appears to be a carload of unintended documents that have no particular relevance to the investigation. In most instances the government would like to be informed, and will be open to compromise. Thus, if the attorney needs more time for compliance, the government is usually willing to negotiate an extension as well as the scope of the compliance. Frequently, an attorney can get more time for compliance if a phased compliance is agreed upon, that is, as the attorney completes a specification, he submits the documents. The Justice Department, as part of a *quid pro quo* for an extension of time, will indicate those specifications of the subpoena with which they want compliance first.

This is not to say, however, that everything must be negotiated with the Justice Department. One rule of thumb is that if the attorney does not want a "no" answer, he does not ask. Thus, in situations where the language of the subpoena is open to several fair interpretations, one of which will be of more benefit to the client, then an attorney should not go to the Justice Department seeking permission to utilize that interpretation. The attorney should simply do what is best for his client.

Upon receipt of the subpoena *duces tecum*, one of the first things that must be done is to make sure that the client does not destroy any relevant documents,[18] either willfully or inadvertently, as through a document destruction program. The client should be assisted in drafting a memorandum to recordkeepers setting forth the type of documents that must not be destroyed until further notice. In addition, it is important to set out the parameters of the file search, to assure that the client institutes procedures sufficient to both comply with the subpoena and be able to detail a method of compliance before the grand jury at some point after the document submission is complete.

A troublesome area in subpoena compliance is documents kept in an employee's personal files, such as diaries, calendars, notes and handwritten memoranda. If these documents contain information that in any way connects the employee with his business duties, these documents are corporate documents and must be produced.[19] These include documents which the employee may keep at home, outside the office or locked in a desk. Thus, it is necessary to review what many employees consider their own personal documents. Another point to remember, with respect to a grand jury subpoena, is that the Justice Department is

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[18] United States v. Walansek, 527 F.2d 676, 679-80 (3d cir. 1975) (destruction of subpoenaed documents is an obstruction of justice).

[19] *In re* Grand Jury Investigation, [1972] Trade Cas. (CCH) ¶ 74,172 (W.D. Pa. 1972); *In re* Grand Jury Proceedings, [1972] Trade Cas. (CCH) ¶ 74,174 (W.D. Ohio 1972) (documents kept at home but used primarily for corporate business are outside scope of fifth amendment privilege).

entitled to originals if it insists upon them.[20] Frequently, if the originals are essential to the on-going functioning of the business, the Justice Department will not insist upon them, providing it has the right to look at the original documents. The reason for this requirement is that there may be writing on the other side of a document, or copies may not pick up lightly written or color notations.

The subpoena *ad testificandum* issued to the individual client is a different matter.[21] The first consideration, of course, is the individual client's fifth amendment right against self-incrimination. As stated above, documents prepared by an employee such as diaries, calendars and notes that relate in any way to his job responsibilities are subject to discovery as corporate documents; individual and corporate clients should be made aware of this. With respect to the client who is a potential target or who possesses any incriminating information, the attorney should consider seeking immunity for the client prior to testifying. The individual client has a right to assert the privilege against self-incrimination with respect to any answer that would furnish a link in the chain of evidence against him. The witness' reasonable belief of the possibility of incrimination is sufficient,[22] and the courts will generally uphold the privilege unless the answers cannot possibly tend to incriminate, such as refusing to answer questions as to the witness' name and address.

Upon receipt of the subpoena, and after interviewing the client to determine the scope of his knowledge, counsel should inform the Justice Department of any intention to seek immunity for his client. Under the Organized Crime Control Act of 1970, the Justice Department must embark upon certain procedures in order to effectuate that immunity. The Department must make an application to the court, with the approval of the proper authorities within the Justice Department. The court may then grant the order compelling testimony and granting immunity. It is a more or less perfunctory act by the court, for if the application is in proper form, the court has no discretion to deny the immunity.[23] It is thus important to advise the Justice Department in advance of any intentions to seek immunity. Furthermore, current Department policy[24] is to not require a "target" to appear before the grand jury and personally

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[20] *See In re* Grand Jury Proceedings, [1972] Trade Cas. (CCH) ¶ 73,826 (S.D. Ohio 1972) (Rule 17(c) of the Federal Rules of Criminal Procedure requires that originals of documents be produced).

[21] The subpoena *ad testificandum* is a court order to appear before the grand jury at a specified time to give testimony. *See* United States v. Calandra, 414 U.S. 338 (1974).

[22] *See* Kastigar v. United States, 406 U.S. 441 (1972). The privilege is available only to protect the witness and not another person. Hale v. Henkel, 201 U.S. 43 (1906).

[23] *See In re* Lochiatto, 497 F.2d 803 (1st Cir. 1974).

[24] *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL ¶ 9-11.254 (1977).

invoke the privilege in the presence of the grand jury. Thus, if the Justice Department is advised of the attorney's intention to seek immunity, and the Justice Department cancels the appearance of the client, counsel can be sure that his client is a likely candidate for indictment.

In an industry-wide investigation, such as usually occurs with respect to antitrust, it may not be in the client's best interests to wait for a subpoena. Frequently, immunity belongs to the swift. If the Department is well into the investigation, they usually will have enough information to put together a case and thus will be less willing to immunize someone who they feel is implicated in the conspiracy. As a result, meeting with the Department at an early date with the client who may be implicated or may be a target, raises the possibility that your client, and not someone else's, will be the one granted immunity. The Department of Justice considers such factors as position and responsibility of the client, the nature and extent of his involvement (they are not going to give immunity to the chief executive officer of a corporation when they feel he is deeply involved in the conspiracy, no matter how early he asks for it), and the usefulness of the testimony in determining whether to grant immunity.[25] The last factor is where early communication with the Justice Department helps. It is more effective to offer useful information that the Department does not already have.

Frequently, before the Justice Department will be willing to obtain the compulsion order, it will want to satisfy itself that it is getting something in return for granting immunity. In such circumstances, the Justice Department may demand a proffer of testimony.[26] Of course, this has its own pitfalls. After hearing the client's testimony, the Department may decide not to grant immunity. If the attorney has confidence in the good faith of the staff that is conducting the investigation, and immunity is very important to the witness, the attorney may have no choice. However, the preferred procedure is a two-step process. First, the attorney meets with the Justice Department's staff and advises them in general terms of the type of information that the client possesses. This has the double advantage of assuring the Justice Department that a proffer will be worthwhile, and preventing the client from revealing incriminating facts without protection. Next, the Justice Department can meet with the client. The procedure which can be negotiated necessarily depends upon the office with which you are dealing and the need of the Justice Department for the information.

If the Department has advised counsel that they will prepare an application for immunity and the court signs the immunity order, it is impor-

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[25] *See* HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS, *supra* note 1, at 55.

[26] A proffer is basically a pre-immunity interview with attorneys from the Antitrust Division.

tant to realize that the immunity order is effective only if the witness properly invokes the privilege during the testimony. Once the witness invokes the fifth amendment, the Department will have the immunity order read to the witness, advise him that he now has immunity, and provide him with a copy of the immunity order. Some staffs will give the attorney a copy of the immunity order before the witness testifies. The witness should be instructed to raise the fifth amendment as soon as the first substantive question is asked; this usually means the point after the witness has testified as to his name, address and position in the company.[27] If the witness has any doubts, the attorney should advise him to ask permission to consult with counsel outside the grand jury room. It is important for the witness to raise this privilege early because failure to timely invoke the privilege may result in a waiver.

The function, set up and procedure of the grand jury, and the usual order of questioning before the grand jury should be explained to the witness. Frequently, witnesses going into the grand jury room are intimidated because they are unprepared for the number of people involved in the process, including the fact that grand jurors may ask questions of the witness. The witness should therefore be told about the usual sequence of questioning. The initial interrogation will be conducted by the Justice Department, followed by any questions the grand jurors may have. The witness should be told to carefully listen to the question and answer "yes" or "no" where appropriate. The right of the witness to consult with his attorney outside the grand jury room, if the witness feels the necessity, should be stressed.[28] The witness should ask to consult with his attorney if he feels there has been an abuse of conduct by the prosecutors in the course of questioning. Additionally, the witness should request to see any documents or prior testimony to which the attorneys or grand jurors refer in questioning the witness.[29] Finally, the benefits of full disclosure of details for maximum protection under a use immunity should also be explained to the witness. Prior to the Organized Crime Control Act of 1970, the immunity which was granted was transactional immunity; that is, as soon as the witness with immunity began testifying, he received immunity as to the entire trans-

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[27] Normally a witness will initially be asked to state his name and address. When the witness is asked about his job responsibilities, he should be advised to invoke his fifth amendment privilege at that time.

[28] Although the Supreme Court has held that a witness does not have a right to an attorney before the grand jury, *In re* Grobar, 352 U.S. 330 (1957), witnesses are allowed to leave the grand jury room and confer with an attorney if they wish advice on how to answer a question. *See* United States v. George, 444 F.2d 310 (6th Cir. 1971). This practice was subsequently ratified by the Supreme Court. United States v. Mandajano, 425 U.S. 564 (1976).

[29] If your client has testified before a previous grand jury on the same subject matter, he may be entitled to discovery from the government of the transcript of his prior testimony to refresh his memory concerning matters previously explored. *In re* Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975).

action which was the subject of his testimony. Now, under the Act the witness only receives *use* immunity; that is, he receives immunity only for such testimony that forms a link in the chain of evidence against him. To the extent that the witness does not testify with respect to a subject, he does not supply the link which gives him the immunity protection. Thus, it may be in the witness' best interest to testify in full and complete detail to give himself as broad a protection as possible. This, incidentally, is another situation in which the witness' interest may conflict with that of his corporate employer.

After completion of testimony, the client should be debriefed as soon as possible while his testimony is fresh in his mind. The attorney should attempt not only to learn the substance of the questions and responses, but also the client's impression of the manner in which the questioning was conducted, a report of any unusual events occurring in the grand jury room, and any suggestion of abuse of conduct by the prosecutors. Note that at this point, the debriefing is protected by the attorney-client privilege; however, this can be breached if either the witness or the attorney reveals its contents to others.[30]

There is authority for protecting the privilege of debriefing memorandum in instances where information has been exchanged between attorneys. For example, two companies under investigation may combine to establish a joint defense in anticipation of an indictment. In that situation, the privilege may not be waived.[31] This, of course, is of major concern in antitrust cases where private treble damage plaintiffs who do not have access to the grand jury transcript may seek discovery of the debriefing memos. The issue of whether the privilege has been waived or not will thus become vital to the success of such discovery.

Finally, if during the course of the client's grand jury testimony, the attorney encounters serious problems threatening the rights of the client which he cannot resolve with the prosecutor, the attorney should request that the prosecutor appear with him before the court.[32] The pri-

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[30] The basic protection for debriefing memoranda is extended by Rule 26(b) of the Federal Rules of Civil Procedure, as the attorney's mental impressions and/or material prepared in advance of litigation. *See* FED. R. CIV. P. 26(b). The privilege becomes more difficult to maintain, however, if either the client or the attorney reveals the testimony to third parties. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947); Tasby v. United States, 504 F.2d 332 (8th Cir. 1974), *cert. denied*, 419 U.S. 1125 (1975).

[31] *See generally* Fellman and Jacobs, *Joint Counsel Committees in Antitrust Litigation*, 26 MERCER L. REV. 873 (1975).

[32] While there are many possibilities for abuse in the grand jury process, courts are generally reluctant to intervene except in extreme situations. The attorney should watch for failure to record the proceeding, FED. R. CRIM. P. 6, and the presence of unauthorized persons while the grand jury is in session, FED. R. CRIM. P. 6(d) (defines who may be present). Prosecutorial misconduct must border on the "outrageous" before the courts will grant relief. *See* United States v. Wells, 163 F. 313 (9th Cir. 1908).

vate attorney should check with the clerk as to which judge has the criminal calendar, or as to which judge is available. If the prosecutor refuses to go before the court, the attorney should advise the witness to refuse to answer any further questions. At this point the prosecutor will either have to excuse the witness or take him before the court. The witness' attorney can then present the issue for the court's resolution.

When the antitrust investigation is finished, the prosecutors will recommend that an indictment be returned or that the grand jury be discharged. Most prosecutors will agree to notify an attorney if his client will be indicted. It is usually possible to meet with the prosecutors to argue that the indictment is not warranted or to limit its scope. Any factors which mitigate the offense should be stressed, and any abuses in the investigation should be pointed out. Finally, a lawyer representing a client who is likely to be indicted, should arrange to be notified by the Justice Department immediately after the indictment is returned so that he can inform his client as to the proper course of future action.