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PROTECTING OURSELVES FROM OURSELVES: IMPEDING THE ANTITRUST GRAND JURY BY LAWFUL MEANS

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With modest exceptions, every firm or person receiving a grand jury subpoena at the instance of the Antitrust Division is safely considered at least a "subject" of investigation; that is, a "person whose conduct is within the scope of the grand jury investigation."1 Whether the firm or person graduates to the status of "target," a person about whom the prosecutor or the grand jury has substantial evidence of commission of a crime, depends in most antitrust investigations on whether a Sherman Act offense can be proven without the cooperation of the firm or person.

Protecting the rights of subject individuals, while preserving the position and options of the corporate subject is the dilemma of outside counsel for the corporation. That the Grand Jury's job is made more difficult in the face of multiple representation does not justify judicial intervention in and of itself.2 On the other hand, such representation entails so many real risks to the corporation and employees alike, that its folly will become apparent.

1. THE RISK OF ONE RANGER

A. THE RULES

Counsel must anticipate corporate pressure to represent subpoenaed officials and employees as well as the corporation itself. Generally corporate counsel have good reasons to press for joint representation at early stages of an investigation. First, multiple representation can become quite expensive to the corporation since most have indemnification agreements that permit advancing fees for directors officers and employees. Second, the corporation often will feel a sense of loyalty to the employee and be concerned that referral to separate counsel will signal that adverse employment action is imminent irrespective of the investigation's outcome. Third, there is a natural tendency for the corporation to feel that everyone is in the same position and should stick together.

In sum, the "one riot, one ranger"3 preference in defending the corporate family still enjoys wide boardroom popularity. Whether motivated by economy, solidarity or loyalty to those subpoenaed, joint representations are fraught with hazards and risk disqualification of counsel entirely.

Rule 1.7, Rules of Professional Conduct, sets forth the general rules of conflict of interest in connection with joint representations: a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1)the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

With respect to the issue of joint representation, the following provisions of Rule 1.13 pertain:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

* * *

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The difficulties inherent in joint representation may be exacerbated if corporate counsel exerts pressure to jointly represent the corporation and individuals after an internal investigation. At the inception of such an inquiry, outside counsel should advise the individual that he/she represents the corporation, not the individual.4 Subsequent representation of the individual, unless the Division identifies him or her as a non-subject or witness, entails risks for both outside counsel and the corporation.

B. Cases with Consequences

Worthy of study is United States v. Moscony, 927 F.2d 742 (3d Cir.), cert. denied, 501 U.S. 1211 (1991). In that case a law firm was disqualified from representing a defendant where the attorney had met with three of the defendant's employees who were also under investigation at the time but who were to testify for the government, under circumstances in which they understood that the lawyer was representing them and gave him statements.

In the joint representation, counsel and clients risk counsel's being obliged to defend the corporation or other constituents at a trial in which other of his or her clients are government witnesses. The government typically takes the position that counsel is bound to use confidences gained in representation of the employees to cross-examine those client-witnesses in that defense. Moreover, because multiple representation may prejudice defendants' Sixth Amendment right to effective assistance of counsel,5 the government has an interest in raising it to preclude an appellate issue.

Once the corporation is persuaded that other counsel should be recommended to employees, cost and other considerations will impel the corporation to economize if possible. This approach also has risks if the corporation seeks to employ one or a few counsel to represent many witnesses.

In Re Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977) involved whether two lawyers should be disqualified from representing seven grand jury witnesses, including witnesses employed by one another. Where a grand jury witness had been conferred statutory immunity and had been given a formal offer of nonprosecution by the government, where testimony given by the witness pursuant to immunity could have been detrimental to certain of the witnesses so represented, and where one witness was an employee of one such individual, the witness' waiver of her right to conflict-free counsel was deemed illusory. Counsel was disqualified in further representing her. On the other hand, the court declined to disqualify counsel from representing other witnesses who bad been granted neither statutory immunity nor a non-prosecution offer.6

On the other hand, since Moscony, district courts have upheld the right of a defendant to counsel of choice over the competing interests of former clients against the representation where those former clients either did not object at all or it was clear that counsel would not employ confidences in cross-examination. For example, in United States v. McDade, Criminal Action No. 92-249, 1992 U.S. Dist. LEXIS 11447 (E.D. Pa. July 30, 1992), a law firm representing the defendant faced a Moscony challenge based on that firm's former representation of an immunized government witness. That case involved, as well, a joint defense agreement and continued sharing of confidences which the witness sought to preserve although he did not join in the motion to disqualify. The court balanced the defendant's right to chosen counsel with the need to preserve confidences of former clients and permitted counsel and clients to agree by affidavit, without rendering counsel ineffective, that counsel would refrain from using such confidences. The government claimed that defendant's lawyer would be ineffective at trial if he could not avail himself of confidences of the former client. "But", wrote the court, "logic suggests that not only could that lawyer not cross-examine on those confidential matters, but no lawyer could." McDade, 1992 U.S. Dist. LEXIS 11447, at *8. See also United States v. Bicoastal Corporation, No. 92-CV-261, 1992 U.S. Dist. LEXIS 21445 (N.D. N.Y. Sept. 28, 1992), in which a court, exercised its independent responsibility to ensure that both clients and former-client witnesses understood the risks of waiving conflict-free

counsel and accepted the waivers of former client-witnesses. In a motion to inquire, rather than disqualify, the government "essentially claimed that three of the defense attorneys were formerly attorneys representing immunized government witnesses in the Grand Jury, and one of the attorneys formerly represented a different defendant than he presently represents." As the court observed, "in cases where counsel was disqualified, generally the former client, then prosecution witness, objected strenuously to counsel's representation of the defendant."7

C. The Division's Interest, From Corporate Counsel's Viewpoint

While the Division's opposition to joint representation is vigorous, it can be subdued when corporate cooperation appears in the offing. The fact-bound nature of disqualification challenges and judicial intervention permits some give, most often where witnesses, who otherwise would be categorically listed as "subjects," become "nonsubjects" or mere "witnesses."

Unless the corporation knows immediately that it will pursue a global deal, the Division may be depended upon to challenge joint representation.

D. Indemnification

A recurring issue in antitrust investigations is whether the corporation pays the individual's counsel. The Comment to Rule 1.7 anticipates the course many corporations elect when their constituents are subpoenaed or sought for interview:

"A lawyer may be paid from a source other than the client, if the client is informed of the fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8(f). For example, ...when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees if the c1ients consent after full disclosure and consultation and the arrangement ensures the lawyer's professional independence."

Almost all states permit corporations to indemnify officers and employees for third parry actions and consequences, including criminal proceedings. In general they permit the corporation's board to resolve to advance legal fees, expenses and even fine payments to individuals, provided it is not determined that the individual's actions were taken to harm the corporation or willfully. (See Exhibit 1, attached, as a sample indemnification.)

A representative statute is Pennsylvania's law. Quite generously, it provides that even resolution of charges against the individual does not negate good faith in having engaged in the conduct being defended.8

A typical undertaking recites that the officer or employee has been advised that he or she is a "subject" of the current federal grand jury investigation; that under company bylaws, he or she will be indemnified against any expenses (including attorneys' fees), fines or judgments incurred in connection with this investigation, so long as he or she has acted in good faith and in a manner which he or she reasonably believed to be in the best interests of the company and had no reasonable cause to believe the conduct as an employee was in any way unlawful. The individual generally recites acknowledgment of receipt of a copy of relevant article of the bylaws. A second paragraph general-

ly contains an agreement that the company may make advance payment for expenses (including attorneys' fees) upon receipt of an undertaking by the officer or employee to repay the amount of such advanced payments in the event it is ultimately determined that the officer or employee is not entitled to indemnification. The penultimate paragraph of the letter will recite that the letter's purpose is to supply the undertaking to repay and request advance payment on the individual's behalf. 2. The Quest for Immunity

Since transactional immunity became obsolete with the passage of 18 U.S.C. §6001, counsel's typical objective is to obtain an order compelling testimony of his or her client with the least ceremony and minimal advance disclosure. While candor will be required if the witness is immunized, advance predictions of details can prove perilous. Contrary to the views of some prosecutors, client recollections rarely improve when exposed to government skepticism.

The scope of immunity for individual is worth considering at some length. Unlike transactional immunity, statutory use-immunity permits prosecution of immunized witnesses based on independent evidence, and the Division has brought such prosecutions. For example, where an immunized witness denies involvement in a conspiracy but is subsequently linked to the conspiracy by other evidence, the Division has prosecuted the witness both for the substantive offense and perjury. See United States v. Dynalectric Co., 859 F.2d 1559 (11th Cit. 1988) (substantive offense), cert. denied, 498 U.S. 1996 (1989) and United States v. Paxson, 861 F. 2d 730 (D.C. Cir. 1988) (perjury).9 These occasions are exceptional, however, because of the heavy burdens imposed on the government to show independent evidence underlies the prosecution. See Kastigar v. United States, 406 U.S. 441 (1972); see also United States v. North, 910 F.2d 843, 854 (D.C. Cir. 1990).

The immunity statute specifically states that immunized testimony cannot be used against the witness in any criminal case, "except a prosecution for perjury, giving a false statement,. or otherwise failing to comply with the order." Of course, a witness who testifies falsely pursuant to an immunity order can be prosecuted for perjury or other false statement offenses.10

It should be noted that the immunity statute not only bars use of a witness' testimony as substantive evidence against that witness but also bars use of the immunized testimony to impeach the witness at trial." Moreover, the government may not make indirect use of the testimony to obtain other evidence of the substantive offense from other witnesses.

A grant of immunity before a federal grand jury will preclude use of that testimony11 in a state criminal prosecution just as a grant of state immunity will foreclose use by federal criminal prosecutors.12 A second prosecution may, however, go forward, provided the second prosecutor is able to establish that all of the evidence he had against the defendant was derived from sources independent of the earlier immunized testimony.13

A. Absolution, By Degrees

In addition to the familiar Order to Compel Testimony, entered by a United States District Judge whom the government contends has little choice once the United States Attorney applies, the Division started permitting chiefs to confer informal letter immunity, as United States Attorneys long had done, in the early 1980s.

Typically, these letters informed counsel simply that 'the testimony given by your client before the grand jury...will be treated as if compelled by Court Order pursuant to 18 U.S.C. §6001 et seq. Specifically, no testimony or other information (or any information directly or indirectly derived from such testimony or other information) may be used against [client] in any criminal case, except a prosecution for perjury or giving a false statement."14

Changes in the form of immunity letters, at least among United States Attorneys, may make them less valuable than statutory orders. Unlike compulsion orders, letters often reserve the possibility that the witness' testimony may be used to impeach him or her at trial. Moreover, as United States Attorneys now press to confine their pledges not to use the testimony in a prosecution in their district, the government also may attempt to limit the immunity understanding in a letter to testimony about the subject of the inquest, such as Sherman Act violations or even particular investigations. Since the goal of counsel for the individual is to ensure the broadest possible immunity, a change in Division policy has the potential to complicate negotiations for witness testimony.

B. Protecting the Client from the Proffer

A standard feature of the Division's evaluation of a witness as a candidate for immunity is the request for, and review of, a witness proffer. Whether preceded by an attorney proffer or not, counsel should not assume that any such discussion in anticipation of immunity is off-theÑrecord. Over the years, the Division, as well as the United States Attorneys, adopted a standard understanding to govern pre-immunity debriefings.15 Mainly, they aim to protect the witness against his or her statements being quoted in testimony of agents present at the interview, unless, of course, the witness makes a contrary statement at trial. For its part, the government also seeks in these Letters to protect itself from having to show later that its case did not derive from information in such a debriefing under Kastigar. Whether this caveat is or could be effective is debatable. Most proffer sessions with the Division lead to immunity in Order or letter form, leaving few occasions to test such letters.

Conclusion

As even the courts acknowledge, an attorney would be derelict if he or she did not try to impede the grand jury investigation of the client through lawful means. Determining who that client is and how to best protect the confidences of that client in the course of the investigation is the most sensitive tasks corporate counsel faces.

EXHIBIT 1

INDEMNIFICATION

(a) The corporation shall indemnify and hold harmless or director or officer of the corporation, or other employee thereof designated from time to time by the Board of Directors to be entitled to indemnification who now or hereafter may act as director, officer, employee or agent for the corporation or at the request of the corporation for another corporation, partnership, joint venture, trust or other enterprise (hereinafter collectively referred to as "other enterprise"), for and against all liabilities and expenses reasonably incurred by or imposed upon him in connection with or resulting from any civil criminal administrative, investigative or other claim, action, suit or proceeding (hereinafter collectively referred to as "action"), whether made or instituted by or in the name of the corporation or such other enterprise. or otherwise made or instituted in which such person may become involved as a party, officer, employee or agent, or by reason of any act performed or not performed in any such capacity, whether or not he continues to be such at the time such liabilities or expenses are incurred and whether or not such act or omission to act occurred before or after the adoption of this By-Law, provided (1) that in respect of any action by or in the right of the corporation or such other enterprise, such person was not guilty of misconduct or negligence in performing his duty to the corporation or such other enterprise, and (2) that in respect to all other actions such person acted in good faith in what he reasonably believed to be in the best interests of this corporation or such other enterprise, and in addition in any criminal action had no reasonable cause to believe that his conduct was unlawful.

(b) As used in this By-Law, the term "liabilities and expenses" shall include but not be limited to counsel fees and expenses and disbursements and amounts of judgments, fines or penalties against, and amounts paid in settlement by such person but unless approved by a court as being fair and proper under all the circumstances shall not include amounts paid to this corporation or such other enterprise.

(c) Where such person has been wholly successful on the merits in such action or where a court has awarded indemnification to him, he shall be entitled to indemnification as of right: otherwise the corporation shall reimburse or indemnify him only if it shall be determined that such person has met the standards set forth in paragraph (a) hereof, Such determination shall be made by the Board of Directors, acting by a quorum consisting of two or more directors of the corporation other than those involved in the action, or if there are not at least two directors then in office other than those involved in the action, by arbitration in accordance with the Rules of the American Arbitration Association.

(d) The termination of any action by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that such person did not act in good faith and in a manner that he reasonably believed to be in, or not opposed to, the best interests of the corporation or such other enterprise, and, with respect to any criminal action had reasonable cause to believe that his conduct was lawful.

(e) The corporation may advance expenses incurred with respect to any action prior to the final disposition, thereof, upon receipt of an agreement by such person to repay any amounts for which

it shall ultimately be determined that he is not entitled to indemnification.

(f) The foregoing right of reimbursement or indemnification shall not be exclusive of other rights in which any such person may otherwise be entitled and. in the event of his death, shall extend to his legal representatives.

(g) The Board of Directors shall have power to purchase and maintain insurance on behalf of the corporation and of each such person against the liabilities and expenses referred to in this By-Law.

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Footnotes:

1 United States Attorney's Manual, 9-11 .150. Indeed, because the line between non-subject witness and subject is so indistinct in most antitrust investigations, there is some danger in relying on Division staff representations that a witness is not considered a "subject."

2 See Matter of Grand Jury Empaneled January 21, 1975, 536 F.2d 1009, 1013 (3d Cir. 1976).

3 Legendary remark of a solitary Ranger upon arriving to quell a disturbance at College Station, Texas.

4 To comply with Rule 1.13(a), it is advisable to warn each employee, officer or director at the beginning of an interview:

"We have been retained by the Company to represent the Company with respect to the Department of Justice's investigation. Management has asked you to meet with us as part of our inquiry into this matter. The purpose of our meeting is to gather information that we need, as counsel, to advise the Company on how to respond to this investigation. We are attorneys for the Company and represent the Company, our inquiry is being undertaken pursuant to the Company's attorney-client and work product doctrine privileges. What this means is that the Company is currently treating all our discussions as confidential and subject to that privilege. It is important for you not to discuss the substance of this interview with anyone else, including other Company employees. We are not at this time representing you or any other current or former employee personally. You should also

understand that these privileges are the Company's and that the Company may waive them at any time.Do you understand what I've told you? Do you have any questions about it?"

5 See Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1992).

6 In Matter of Grand Jury Empaneled January 21,1975, 536 F.2d 1009, 1012-1013 (3d Cir. 1976), the Third Circuit placed the point when a potential conflict is transformed into an actual conflict at whenever the government communicates to the attorney that it desires to offer immunity to any of his clients. Other courts have chosen both earlier and later points to find the existence of an actual conflict on the part of counsel.

7 Also distinguishing Moscony and noting that in that case, "[t]he Court found that the 'crux' of the Government's case might deal with testimony of the attorney's former clients.... Additionally, the court found that counsel could not utilize information obtained publicly without disclosing confidential information." Id. at *8 [citations omitted].

8 Sec. 1741. Third-party actions, in pertinent part, provides: Unless otherwise restricted in its by Laws, a business corporation shall have power to indemnify any person who was or is a party or is threatened to be made a patty to any threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation), by reason of the fact that he is or was a representative of the corporation, or is or was serving at the request of the corporation as a representative of another domestic or foreign corporation for profit or not-for-profit, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him in connection with the action or proceeding if he acted in good faith and in a manner he reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action or proceeding by judgment, order, settlement or conviction or upon a plea of nolo contendere or its equivalent shall not of itself create a presumption that the person did not act in good faith and in a manner that he reasonably believed to be in, or not opposed to, the best interests of the corporation and, with respect to any criminal proceeding, had reasonable cause to believe his conduct was unlawful.

9 Cited in the Antitrust Division Grand Jury Practice Manual, November 1991 Edition, at n. 48.

10 As noted in the Division's Manual, "The perjury is not compelled testimony about a past crime that is subject to the 5th Amendment protection. Rather, the false testimony is itself the crime and is not subject to any conceivable constitutional protection. However, if a witness testifies with immunity and confesses that he committed perjury on a previous occasion, his confession cannot be used to prosecute him for the previous perjury." Id.

11 See discussion in Antitrust Division Grand Jury Practice Manual, at V-14, n. 49 citing New Jersey v . Portash, 440 U.S. 450 (1979); United States v. Pantone, 634 F.2d 716,722 (3d Cir. 1980).

12 See Murphy v. Waterfront Comm 'n, 378 U.S. 52(1964); Ullman v. United States, 358 U.S. 422 (1956); Reina v. United States, 364 U.S. 587 (1968), Adams v. Maryland, 347 U.S. 179 (1954). As

noted in the Division's Grand Jury Practice Manual, A[s]ome courts have held that the possibility of prosecution under a foreign government's laws is so remote that is an insufficient basis to justify a refusal to testify after the grant of immunity." Id. at V-14.

13 Murphy v. Waterfront Comm 'n, 378 U.S. 52 (1964); United States v. McDaniel, 449 F.2d 832(8th Cir. 1971), cert. denied, 405 U.S. 992(1972).

14 Appendix V-2, Antitrust Division Grand Jury Practice Manual, November 1991 Edition.

15 For example, last year, the Division introduced a letter with the following text:

The Antitrust Division is conducting an investigation of possible violations of the antitrust laws in the structural steel industry. Your counsel has advised us that you would decline to answer our questions at an interview on the ground that your truthful answers may tend to incriminate you. Accordingly, this letter sets forth the conditions under which you will provide statements, documents, and/or objects in response to our questions at your interview.

We will ask questions about alleged violations of Section 1 of the Sherman Act, 15 U.S.C. ' 1, and related federal statutes. Your responses to our questions be complete, candid, and truthful.

The United States will not make direct or indirect use of the oral or written statements that you make in response to our inquiries, nor will we make direct or indirect use of any document or object that you make available to us in response to our inquiries, to prosecute you for any violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. ' 1, or for violation of any other federal criminal statute committed in connection with price fixing or market allocation in the structural steel industry worldwide, between June 1992 and the date of this letter. However, our agreement not to make direct or indirect use of information you provide will not apply to any violation of the federal tax laws.

The United States may use your oral or written statements and the documents or objects you provide against you in the following circumstances:

a. as substantive evidence in prosecuting you for perjury (18 U.S.C. §1621), for making a false statement (18 U.S.C. §1001), for making a false statement under oath (18 U.S.C. §1623), or for obstruction ofjustice (18 U.S.C. §1501 et seq.);

b. to impeach your testimony in any proceeding, including any prosecution of you.

There are no other agreements between the United States and you regarding your prosecution or non-prosecution or the use of the statements, documents, or objects you provide in response to our inquiries.

The United States may use directly or indirectly any of the statements you make or the documents or objects you provide for, or in connection with, the prosecution of any other individual or artificial entity, such as a corporation.