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Lessons from *United States vs. True*
Effective Use of Expert Testimony in Defending Criminal Antitrust Cases

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YOU ARE AN EXPERIENCED antitrust lawyer, with a long list of mergers and compliance programs under your belt, and you have participated frequently in both civil cases and investigations by the Federal Trade Commission. But you have just entered a new— and very dangerous— environment: your client has been indicted for allegedly participating in a criminal antitrust conspiracy. Hopes for immunity, leniency and plea bargaining are behind you. Most of the things that you have learned from criminal practice programs have guided you well to this point, but there is nothing in the course materials to direct you from here. You are going to TRIAL!

Your adversaries, prosecutors from the Antitrust Division of the United States Department of Justice, have used their array of powerful investigative and prose cutorial weapons to build a formidable case. The government, with virtually unlimited resources, has conducted a lengthy investigation using grand jury subpoenas to gather thousands of documents and immunity orders to compel the testimony of dozens of witnesses. The government also has used the threat of criminal prosecution. involving the likelihood of imprisonment for individuals and sub substantial fines for corporations to induce your client's employer to plead guilty and his business acquaintances and colleagues to testify against him as cooperating accomplice witnesses. Notwithstanding these facts, your client insists he never agreed to do anything illegal—and you believe him.

You are about to discover that there are some laws and procedures in the criminal field that can be exploited for tactical advantage by an overzealous prosecutor. The recognition that some criminal procedures favor the government may not surprise you. But if you are a good lawyer, you also will begin to realize that some of the most frustrating features of criminal procedure can be converted into opportunities, particularly for an antitrust defendant.

Beware of excessive reliance on popular wisdom. One of the most pervasive myths in the antitrust bar is that, at least when it comes to criminal cases, the government always prevails. Perhaps we all read too many press releases from the Antitrust Division without sufficient cynicism. But look up the record for yourself. Most individual defendants win—if they go to trial.

As you begin preparing for trial, you realize that, unlike your experiences in civil cases, the most difficult task is determining exactly what the government will try to prove that our client said or did. That task is difficult because the discovery rules in a federal criminal case permit the government to withhold critical information until trial. While casual lore has it that the Antitrust Division will not behave as if they are pursuing an organized crime figure or a drug cartel, don't count on it. Our experience indicates that the weaker the government's case, and the less confident its lawyers, the more likely they may be to insist on keeping the case and the evidence under wraps.

Rule 16 of the Federal Rules of Criminal Procedure governs discovery in federal criminal cases. That rule requires the government to provide prompt discovery cry of certain materials, such as any written or recorded statement made by the defendant or the substance of any other oral statement the defendant made to a law enforcement agent *(see* Rule 16(a)(1)(A)) or documents or tangible objects that the government may offer as evidence in its case-in-chief *(see* Rule 16(a)(1)(C)).

But the government is not required to provide pretrial discovery of prior statements of prospective government witnesses. *See* Rule 16(a)(2). Discovery of those critical statements is expressly governed by 18 U.S.C. § 3500, known as the Jencks Act, which provides that

> no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

And while the district court may encourage pretrial disclosure for the sake of fairness and to expedite the trial itself, the court has no authority to direct the government to provide those materials to the defense before trial, even if the documents contain impeachment material that the government is constitutionally mandated to provide to the defense pursuant to *Brady* v. *Maryland,* 373 U.S. 83 (1963), and its progeny. *See, e.g., United States v. Presser,* 844 F.2d 1275 (6th Cir. 1988). If the government refuses to provide pretrial discovery of these materials, this means the government has elected "trial by ambush."

Well, you say, "If I can't force the government to disclose the fruits of its investigation, then I'll just have to conduct my own. I'll depose the most obvious witnesses to get their stories." Once again, you will find that criminal procedures are not amenable to effective trial preparation; there will be no depositions. "If that's the case," you say, "I guess I'll just have to rely on off-the-record witness interviews." Unfortunately, you will probably be guessing who those witnesses will be; there are no interrogatories in criminal cases. And when you contact them, they may seem unusually reluctant or bluntly uncooperative. That is because the government will have required these witnesses to cooperate with the government as part of their plea agreements, and in many cases the government may have delayed the witnesses' sentencing on their pleas until after they testify in your trial. Such "at-risk" witnesses are genuinely apprehensive (because

their lawyers have made them so) that they will not get the full downward departure under the Sentencing Guidelines for "substantial assistance," and will face aggressive government advocacy as to judicial discretion within a sentencing range, if the government lawyers became unhappy with these witnesses assisting you.

Given these substantial handicaps, your natural instinct developed after years of civil litigation experience, where extensive pretrial discovery is customary, is to request all of the discovery that is available under Rule 16. But this instinct may actually cause you to squander one of the few tactical opportunities available to a criminal defendant: defense expert testimony and the elimination of government pretrial discovery regarding such an expert. You need to adjust your attitudes. If the government chooses to assert its rights under the Jencks Act in a case like yours— where no one reasonably expects a witness to disappear mysteriously or appear with broken arms and legs to recant his grand jury testimony—you should realize that you are dealing with government lawyers who believe that uncertainty can be fatal to an opponent. You need to maximize *their* uncertainty.

Rule 16(b)(I)(C) specifically conditions a defendant's obligation to provide pretrial expert discovery to the government on two alternative bases: (1) the defendant's request for pretrial expert discovery from the government pursuant to Rule 16(a)(1)(E), and the government's compliance with that request; or (2) the defendant's intent to present expert testimony on the defendant's mental condition. The second condition applies only in rare cases—and almost never in an antitrust case.

In a typical criminal antitrust case, though, defense counsel routinely requests expert discovery from the government under Rule 16(a)(1)(E), which triggers the defendant's reciprocal obligation to provide expert discovery to the government under Rule 16(b)(1)(C). As indicated, such a request is often made reflexively, without considering whether the government is likely to have any expert witness, whether pretrial discovery regarding the government's possible expert is vital to the preparation of the defense, and whether it may be tactically superior to prevent the government from obtaining pretrial discovery regarding potential defense experts. Every case is to some extent unique, and you need to look for an approach that best fits yours.

Learning from Experience

We recently defended an individual in a federal criminal antitrust trial. *United States v. True,* Crim. No. 4:97CR-ll-M (W.D. Ky. filed Sept. 3, 1997). The charge was a continuing conspiracy over a five-year period to fix prices, rig bids, and allocate customers for the sale of commercial explosives in a three-state area. In that case, we made an early decision to use experts, and deliberately decided to forgo expert discovery from the government, in order to prevent the government from obtaining pretrial discovery regarding our expert witnesses. Nevertheless, the government asked the court to order us to provide pretrial discovery regarding our anticipated experts, and the court automatically granted that request without awaiting our response.

On motion for reconsideration, we successfully persuaded the court that, in light of our deliberate tactical decision, the court did not have the authority under Rule 16 to require a defendant to provide pretrial expert discovery, including the experts' exhibits and demonstrative charts, until after the close of the government's case. *See, e.g., United States v. Dailey,* 155 F.R.D. 18 (D.R.I. 1994) (district court does not have the authority to alter the defendant's conditional disclosure obligations under Rule 16 by way of local rule, standing order, or adjudication on a case-by-case basis). The court acknowledged that it had overlooked our failure to trigger a discovery obligation.

As a result of the court's decision to allow us to delay production of defense expert discovery, government counsel was not able to cross examine effectively the two defense experts we did use at trial.[2] We believe that this approach to expert discovery was a significant factor that contributed to the acquittal of our client without his testimony. The experts were able to generate substantial skepticism, and the government could not overcome it. But to see why this tactic was successful, it is necessary to understand why the selection of the specific types of defense experts is crucial in undermining the government's evidence in a typical criminal antitrust case.

Picking Defense Experts

Far and away the most common federal criminal antitrust charge is horizontal conspiracy—an alleged agreement or understanding among competitors to fix prices, rig bids, or allocate customers. Given the nature of a criminal conspiracy, the participants engage over time in numerous communications: some procompetitive, some neutral, some problematic. The terms of the alleged agreement are almost never memorialized in writing. And rarely is the government able to penetrate an ongoing conspiracy to record surreptitiously the conversations of alleged co-conspirators. The investigation and recent prosecution of the Archer Daniels Midland case is the exception, not the rule. Therefore, the government's evidence in the typical criminal antitrust case consists of the historical testimony and writings of accomplices— alleged co-conspirators who testify pursuant to immunity orders and plea agreements. By the very nature of their admitted participation in criminal conduct and the inducements that they have received from the government in exchange for their testimony, these witnesses are especially vulnerable to impeachment. Indeed, so-called "white-collar" accomplice witnesses are particularly

susceptible to coercive threats by the government, and therefore responsive to rewards of immunity or lenient plea agreements, because they fear being indicted and are terrified by the prospect of being imprisoned. We believe that a targeted individual in a managerial capacity is more likely falsely to incriminate an innocent competitor than is a hard-core criminal falsely to incriminate an innocent associate. [3]

It is extremely difficult to demonstrate for the jury solely through cross examination the coercive pressure that has been applied to "at-risk," white-collar witnesses. Such witnesses are unfamiliar with substantive and procedural criminal law and the federal Sentencing Guidelines; much of their terror actually originated from their own lawyers' explanations of these subjects, and those conversations are privileged. These witnesses are also prepared to emphasize that they are obligated to testify truthfully. Thus, the witnesses are incapable of explaining the fundamental facts that fully support a defense argument that they have an incentive to implicate others falsely, including the defendant on trial, and they are not inclined to admit it.

It is critical for the defense to introduce the facts and thereby clearly demonstrate that the government's key witnesses have a motive to testify falsely. The defense can do this best through a "legal" expert. Ideally, the expert should be a for-flier federal prosecutor, who can testify from personal experience about how criminal antitrust investigations are conducted by the Department of Justice, how plea and immunity negotiations are conducted in such cases, the possible statutory penalties for antitrust and antitrust-related offenses, and the operation of the Sentencing Guidelines.[4]

Such testimony is admissible pursuant to Rule 702 of the Federal Rules of Evidence, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In determining whether expert testimony is admissible under that rule, courts generally look to four criteria: (1) qualified expert; (2) proper subject; (3) conformity to a generally accepted explanatory theory; and (4) probative value compared to prejudicial effect. *See, e.g., United States v. Smith,* 736 F.2d 1103(6th Cir.); *United States v Amaral,* 488 F.2d 1148 (9th Cir. 1973).

With respect to the first criterion, if the proffered expert is an experienced practitioner, there should be no doubt that the expert is "qualified" under the meaning of Rule 702. Indeed, it would be ironic for government counsel to challenge a former colleague on this ground. Conversely, neither the third nor the fourth criterion is applicable in determining whether a legal expert should be permitted to testify for a criminal defendant. The third criterion does not apply, because the expert will not be asked to render an expert opinion on the credibility of the government's witnesses or any other subject. *See, e.g., United States v. Rahm,* 993 F.2d 1405, 1411(9th Cir. 1993) ("the decision whether to admit expert testimony does not rest upon the existence or strength of an expert's opinion. Rather, the key concern is whether the expert testimony will assist the trier of fact in drawing its own conclusion as to a 'fact in issue.'"). The fourth criterion does not apply because the "prejudice envisioned by Rules 403 and 702 is prejudice *to* a criminal defendant." *Smith,* 736 F.2d at 1107 (emphasis added).[5]

With respect to the second criterion, courts have recognized that a "proper subject" is any testimony "that *assists* the trier of fact." *Smith,* 736 F.2d at 1105 (emphasis added). This simple, common sense test is derived from the Advisory Committee notes to Rule 702:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject in that dispute.

An "untrained layman" is not qualified to determine intelligently and "to the best possible degree" the complex, often secret process by which the government frequently converts targets in a criminal investigation into cooperating witnesses against their former friends and business associates. Thus, using a "common sense" test, it is clear that the testimony of a legal expert is admissible under Rule 702.[6]

Concededly, there is no case law ruling on the admissibility of the testimony of a legal expert in a criminal case.[7] In our case, though, because government counsel were totally unprepared for this testimony, their objection to its admissibility was ineffective.[8] The prosecutor argued that the expert's testimony was improper because it invited the jury to consider possible punishment of the defendant. The prosecutor also argued that the expert's testimony was irrelevant because he did not have firsthand knowledge of any of the negotiations that culminated in the specific cooperation agreements and the immunity deals in this case. Both arguments were rejected by the court, and the government's objection was promptly overruled.[9]

The testimony was devastating. After describing the typical process by which a witness obtains testimonial immunity, the expert described some of the aspects of the relationship between the government and a witness whose testimony was particularly damaging to the defendant. Specifically, the expert explained that

the government's offer to immunize that witness was expressly conditioned on the witness' ability to "materially advance the investigation." The expert testified that, based on his experience as both a prosecutor and a defense attorney, that condition required the witness to implicate another person who had not yet been charged or immunized by the government. Given the other facts already available to the jury, there was only one person who fell into that category — our client.

The expert also testified that the Antitrust Division's manual contained a specific provision that cautioned prosecutors that 'the immunity and proffer process can be abused and may inadvertently lead to perjury." As the expert explained, it is "not uncommon" for people to "tell a story or a version of events which coincides with the Government's theory, simply to get immunity whether [the story is] true or not." This may not shock you, but it causes serious concern in a juror.

With respect to government witnesses who had testified pursuant to immunity orders or plea agreements, the expert outlined the significant benefits that had been bestowed upon these witnesses by the government. For example, the expert introduced two charts. One chart depicted the number of years of imprisonment these witnesses would have faced if they had been fully prosecuted on all of the crimes for which they were immunized,[10] A second chart graphically showed the extent of the downward departures these witnesses received for their cooperation under the Sentencing Guidelines.

The expert also testified about one provision in the plea agreement executed by the government's key witness. That provision required the witness to provide testimony that was "coextensive and consistent with the information he has provided prior to the execution of [the] plea agreement." The expert explained that this "unusual" provision effectively required the witness to repeat at trial the same story he had previously told the government, or the government could unilaterally void his deal.

Complementary Expert Testimony

All defense experts should be complementary. While a legal expert's testimony is designed to demonstrate that the government's witnesses have a powerful incentive falsely to implicate other people in a manner consistent with the government's theory, a second expert's testimony can cast doubt upon the existence of the specific conspiracy the government is trying to prove. Naturally, if you are asking the jurors to believe that the government's witnesses are in fact fabricating, then jurors may expect to be shown facts that raise doubts about the witnesses' reliability on the merits. Every case is different, but often expert testimony can effectively focus on prices in comparable markets to accomplish this second objective. The technique is similar to benchmarking, not for the purpose of showing reasonable prices or lack of injury, but to cast doubt on whether anything unusual had actually occurred in the charged market versus routine occurrences in an unblemished one. Where there are differences, an expert can frequently identify likely explanations that are at least as plausible as the government' s theory.

In order to appreciate fully why such an expert can be effective, it is necessary once again to consider the typical criminal antitrust case. Because it is well settled that a price-fixing agreement between or among competitors is a per se violation of the Sherman Act, the crime is said to be complete when one competitor enters into such an agreement with another, whether or not the agreement is feasible, likely, or actually implemented.[11] Therefore, the government consistently argues, the success or failure of the conspiracy—that is, the "economic effects" of the conspiracy —are irrelevant.

In light of this doctrinaire position, the government typically does not seek to offer the testimony of an economic expert, fearing the door will be opened on a no harm/no-foul cross examination where the law may be made to look as arbitrary as business executives see it to be. Trial lawyers remain sensitive to the long tradition of jury nullification; in particular, Antitrust Division prosecutors know that it is difficult to convince a jury to incarcerate a person when it appears that he may have been merely trying to get a fair price. Indeed, largely for this reason, in our experience the government does not even bother to analyze the economic data reflected in the voluminous documents that were gathered during the grand jury investigation. The government merely combs those records for evidence of alleged conspiratorial and collusive communications. Its case focuses on the alleged plot but rarely displays the actual results.

The failure to conduct an economic analysis of the data leaves the government vulnerable to attack. Specifically, the defense can call an experienced economist who has conducted a thorough analysis of the records. The stated purpose of this testimony is not, however, to prove that the alleged conspiracy produced only "reasonable" consequences that do not deserve punishment. Rather, counsel explains to the court that the purpose of the economist's testimony is to cast doubt on the existence of the alleged conspiracy.

If offered for that purpose, such testimony is clearly relevant and admissible.[12] But that analysis need not —and should not —consist of some complex econometric or methodological analysis. For that kind of presentation will provoke a rebuttal or critique by a government economist, who with little advance preparation can challenge the methodology employed by the defense expert. Instead, the defense expert can simply compile the sales and pricing data[13] and, assuming the data support the conclusion, testify that the data are not consistent with the exis-

tence of the conspiracy alleged by the government.

In other words, notwithstanding colorful testimony by questionable accomplices and strained interpretations of ambiguous documents, the proof just doesn't show in the pudding. This is the antitrust version of the popular rhetoric, "Where's the beef?" Jurors understand this idea. The point to remember in selecting a defense expert is that a criminal trial is not science. We are not trying to prove theorems; we are instilling doubt.

If effective economic testimony is coupled with a delayed disclosure of the expert's summary charts and exhibits, the government will be unprepared to cross examine the expert or respond with an effective rebuttal. Indeed, in our recent trial, the prosecution resorted to cross examining the defense expert with an almost incomprehensible hand-drawn chart that had been hastily prepared by a government economist together with a passage from Adam Smith's *Wealth of Nations.*

And when, out of exasperation, the prosecutor asked during cross examination whether it was possible for the government to replicate the defense expert's charts in such a short amount of time during trial, the defense expert responded that "prudence" would have dictated that the government conduct a similar analysis of the transactional data at some point during the investigation, implying that a careful, thorough investigator would have wanted to test the reliability of the stories he had obtained from witnesses with potentially questionable motives. That response stung the government, because it was readily apparent that the government had not done such an analysis.

Tactics Count

Every case has its own dynamics and personalities—and its own facts. But tactics matter. Forgoing expert discovery from the government in a criminal antitrust case can be quite effective. It may allow you to present more innovative forms of expert testimony, such as the testimony of a legal expert. It will also increase the impact of defense expert testimony, because the government will not be prepared to respond quickly, either on cross examination or in its rebuttal case.

This tactic is not advisable in every criminal case. In some cases you may be able to predict that the government will introduce expert testimony in its case-in-chief. In those cases, the advantages of having pretrial discovery concerning government experts may clearly outweigh the advantages of forgoing expert testimony. Therefore, the decision whether to request expert discovery pursuant to Rule 16(b)(1)(C) should be made on a case-by-case basis after a careful consideration of all factors, including whether the government is likely to have experts and whether pretrial discovery of those experts is vital to the preparation of the defense. In criminal antitrust cases, though, this tactic, coupled with experts whose testimony is specifically targeted to the prosecution's vulnerabilities, can significantly improve your chances of vindicating an innocent client.

The fundamental message is this: a criminal antitrust defense is not a hopeless cause. It can be challenging. It can be infuriating. But it can also be creative and successful.

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1 We looked at a recent time-period in which virtually all filed criminal antitrust cases had reached resolution. Our research revealed that in all of those cases filed during the five-year period from 1992 to 1997 that went to trial, individual defendants were convicted in only four cases but were acquitted in fifteen cases. In another case, the trial court granted the defendants' motion for a judgment of acquittal at the close of the government's case pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. *See* United States v. General Elec. Co., 869 F. Supp. 1285 (S.D. Ohio 1994).

2 The impact of this delay was magnified because the government did not provide a witness list, thereby allowing every witness to be a "surprise." There were actually some witnesses we did not anticipate and at least one that we had never previously heard even mentioned. Naturally, however, our reciprocal withholding of the defense witness list meant the government had no indication of the number or identity of our experts and, therefore, a limited ability to anticipate even the subjects on which defense experts would testify. As it turned out, government counsel guessed wrong. That is an important objective for defendants. Antitrust Division prosecutors accustomed to the plodding gait of a grand jury often cannot react quickly.

3 The Tenth Circuit recently wrestled with the issue of the potential for induced perjury that derives from offering anything of value to a fact witness. *See* United States v. Singleton, 1999 U.S. App. LEXIS 222 (10th Cir. Jan. 8, 1999). The reciprocal of bribery is coercion. When the government confronts a target with personal jeopardy and an opportunity to reduce or evade a penalty in exchange for inculpatory testimony, the effect is potentially coercive. Although the Tenth Circuit has held that Congress did not intend to outlaw this traditional practice, all courts have recognized that jurors must scrutinize such testimony with great care, and jurors are always instructed to that effect. The key is to exploit that skepticism.

4 In the *True* case, we called James A. Backstrom, Esq., of Philadelphia, Pennsylvania. Mr. Backstrom spent eleven years prosecuting criminal antitrust cases for the Department of Justice and held important management positions in the Antitrust Division. Since 1987, he has been in private practice.

5 The Sixth Circuit has observed *(Smith, supra.* 736 F.2d at 1107, quoting *United States v. Brown,* 557 F.2d 541, 556 (6th Cir. 1977)):

> that the clear trend in federal courts is toward admission of expert testimony whenever it will aid the trier of fact, but warned that "a strong countervailing restraint on the admission of expert testimony is the defendants right to a fair trial." That "countervailing restraint" is not present in the case before us [i.e.. where the issue is the admissibility of the testimony of a defendant's expert].

6 *See also* United States v. Hall, 93 F.3d 1337, 1342 (7th Cir. 1996) (if expert testimony would he helpful and relevant with respect to an issue in the case, trial court should not exclude testimony simply "because the testimony may, to a greater or lesser degree, cover matters that are within the average juror's comprehension").

7 For another anecdotal account about comparable experiences, see Martin S. Pinales, *Your Best Friend Could Be Your Best Witness,* 22 CHAMPION 14 (1998).

8 Until the expert entered the courtroom, the prosecutors did not know even his identity or the subject of his testimony.

9 Had the prosecutors anticipated our tactic, the government might also have argued that the expert's testimony should not be admitted because it is the witnesses' subjective perceptions of the benefits they received by virtue of their respective deals—not an objective, expert assessment of those benefits—that is relevant to the issue of the witnesses' potential motive to provide false or exaggerated testimony for the prosecution. This argument is more persuasive. Nevertheless, for the reasons outlined above, we believe the testimony is admissible pursuant to Rule 702.

10 Antitrust plea agreements commonly list a series of statutes that could apply to a co-conspirator's conduct, e.g., federal antitrust statutes (15 U.S.C. § 1 et seq.); the mail and wire fraud statutes (18 U.S.C. §§ 1341 and 1343*);* the federal conspiracy statute *(*18 U.S.C. § 371); the false claims statutes (18 U.S.C. §§ 286 and 287): the false statement statute (18 U.S.C. § 1001); and the Racketeer Influenced and Corrupt Organizations (RICO) Act (18 U.S.C. § 1961 et seq.). The combined potential penalties under these statutes is quite substantial.

11 Unlike some other federal criminal conspiracy statutes, *see, e.g.,* 18 U.S.C. § 371, the government in a criminal antitrust case is not required to prove that a co-conspirator committed an overt act in furtherance of the conspiracy. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150. 224—25 n.59 (1940).

12 The seminal case on this point is *Continental Baking Co. v. United States,* 281 F.2d 137 (6th Cir. 1960). In that case, the court held that, where the government offers circumstantial evidence to prove the existence of the alleged conspiracy, it was reversible error to preclude the defendant from eliciting testimony and introducing documentary evidence about prices and sales in the relevant market. The court's logic was quite simple: where the government has offered circumstantial evidence to prove the existence of the conspiracy, the defendant must be permitted to offer circumstantial evidence to disprove the existence of the conspiracy.

13 These compilations are, of course, admissible as summaries under Rule 1006 of the Federal Rules of Evidence with no need to introduce any of the source documents into evidence. The expert is able to present the materials in the most easily comprehended and conclusory manner.