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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON PRIVATE REMEDIES: DISCOVERY AND GATHERING OF EVIDENCE

-- United States --

The attached document is submitted by the delegation of the United States to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item VII of the agenda at its forthcoming meeting on 31 May 2005.

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1. In the U.S., discovery in federal civil antitrust cases is governed by the same rules that apply generally to civil cases in the federal district courts: the Federal Rules of Civil Procedure, which are approved by Congress. Depositions and discovery are covered in Rules 26-37. The scope of discovery is very broad, and judges retain wide discretion in managing the discovery process. In general,

> "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1).

2. The federal discovery rules are applied flexibly by the courts, allowing parties considerable room to negotiate the parameters of discovery to suit the needs of individual cases. Courts may limit discovery which is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive" and where "the burden or expense of the proposed discovery outweighs its likely benefit." Rule 26(b)(2). The Rules were amended in recent years to put significant presumptive limits on depositions: a total of 10 per side (Rule 30(a)(2)(A)), and a seven hour time limitation per deposition (Rule 30(d)(2)). Local court rules in particular jurisdictions may contain similar limitations. Although these limits can usually be modified by agreement or court order (and presumably frequently are in complex cases), they at least force the parties to think about their discovery plan carefully and justify more expansive discovery to their opponents and the court.

> "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property ..., for inspection and other purposes; physical and mental examinations; and requests for admissions." Rule 26(a)(5). A Party may take the deposition of any person, including both parties and non-parties, upon oral examination or upon written questions without leave of court in most circumstances. Interrogatories and requests for admission may only be served upon parties, but requests to produce documents or things or for entry upon land may also be served upon non-parties.

Duty of Disclosure

3. Rule 26(a)(1) imposes an affirmative duty of disclosure on parties to a civil lawsuit; generally, "a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party," including copies of evidentiary material on which such computation was made.

4. The rules also impose a duty on a party who has made a disclosure or response to a discovery request "to supplement or correct the disclosure or response to include information thereafter acquired."

Protective Orders

5. A party or a person from whom discovery is sought may seek a protective order from the appropriate judge, who "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including orders limiting the type, manner, or extent of discovery, or "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." Rule 26(c).

Sanctions for Failure to Cooperate in Discovery

6. Rule 37 regulates failure to make disclosure or cooperate in discovery and sanctions. A party may apply to a court for an order compelling disclosure or discovery where the person from whom the disclosure or discovery is sought refuses to comply or provides an evasive or incomplete answer. Where a motion to compel is granted, the court may require the party or deponent whose conduct necessitated the motion to pay the moving party's reasonable expenses, including attorney's fees; if the motion is denied, the court may enter a protective order and require the moving party to pay reasonable expenses. Failure by a deponent to be sworn or to answer a question after being directed to do so by a court may be considered a contempt of that court and punished accordingly. Where a party fails to obey an order of the court regarding discovery, "the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:"

- an order that facts that were the subject of the order be taken as established in accordance with the claim of the party obtaining the order;
- an order refusing to allow the disobedient party to support or oppose designated claims or evidence, or prohibiting that party from introducing designated matters in evidence;
- an order striking pleadings, or staying further proceedings until the order is obeyed, or dismissing the action or rendering a default judgment against the disobedient party;
- in addition the court may treat the failure to obey as a contempt of court; reasonable expenses may also be assessed against the disobedient party.

7. Similar penalties may be imposed for failure to disclose or to amend prior responses to discovery.

Rules of Privilege

8. Certain information is protected from discovery under well-established U.S. rules of privilege. Rule 501 of the Federal Rules of Evidence provides that a privilege "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." While a number of different privileges exist, those most commonly invoked in the antitrust context are the attorney-client privilege, which in the U.S. generally covers both outside counsel and in-house counsel, and the work product rule, which applies to preparatory work done by attorneys or their agents. Both of these privileges are subject to an exception for communications with attorneys that were made in furtherance of an ongoing or future criminal or fraudulent act.

9. The privilege against self-incrimination can be invoked in any sort of proceeding in which a witness is asked a question that the witness believes will require him to incriminate himself. *Pillsbury Co.*

v. Conboy, 459 U.S. 248 (1983)(deposition). "As a general rule, a witness's invocation of the [privilege against self-incrimination] in the course of civil litigation permits an inference that the testimony would be adverse to the witness's interests."[1] A claimed threat of foreign prosecution cannot be the basis of a self-incrimination claim unless the United States and a foreign country, working together on an international criminal problem, enact similar criminal statutes. *United States v. Balsys*, 524 U.S. 666 (1998). The degree of cooperation must be so close that the prosecution becomes a joint operation. *In re Impounded*, 178 F.3d 150 (3d Cir. 1999).

Expert Witnesses

10. Expert witnesses are frequently used in civil antitrust litigation. Experts may be appointed by the court, or are hired by both plaintiffs and defendants to explain complex economic issues, accounting subtleties, or substantive areas (e.g., software, technology, science). Prior to trial, a party must disclose to other parties the identity of any person who may be called as an expert witness, and

> "this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." Rule 26(a)(2)(B).

11. "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." Rule 26(b)(4)(A). At trial, expert witnesses are subject to cross-examination regarding their qualifications, bias, and opinions. Purely conclusory expert testimony is accorded no weight. See SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 25 (1st Cir. 1999) ("Expert testimony that offers only a bare conclusion is insufficient to prove the expert's point."). Consequently, expert reports are often quite extensive and even more detailed than the eventual testimony. Expert reports have to include the opinions to be offered by the expert and the basis for each opinion, and the party offering the expert will have to make out a prima facie case for admissibility, establishing that the witness is indeed an expert on the relevant subject matter and that a basis exists in both fact and the discipline of the expert for every opinion.

Relationship Between Civil Litigation and Law Enforcement

12. The U.S. antitrust agencies gather evidence only to further their own investigations.[2] In theory, a court could order an agency to produce evidence to a private party for use in private litigation. In practice, this is rare. The Division routinely objects to almost any third party discovery request, invoking numerous privileges (e.g., attorney-client, work product, law enforcement) that protect most evidence obtained during a criminal or civil investigation.[3] In *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997),

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1 ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002), p. 991.

2 This paper does not address administrative adjudication before the Federal Trade Commission, another category of U.S. civil antitrust enforcement. The rules governing such proceedings, found at 16 C.F.R. Part 3, are similar in many ways to the rules used in federal district courts but are tailored to the considerations of litigating before an administrative agency.

3 There are also additional confidentiality provisions in the FTC Act that complicate disclosure of information by that agency.

a private suit involving the lysine price-fixing investigation, the court upheld a law enforcement investigatory privilege and the "pretty strong presumption against lifting" it to deny plaintiffs' request for copies of surreptitious videotapes that the DOJ had played to lawyers for outside directors of one of the criminal defendants in order to convince them of the strength of the government's criminal case. The plaintiffs eventually obtained some evidence, far from everything they initially asked for, but long after the criminal case was concluded, after many years of litigation over privileges.

13. Rule 6(e) of the Federal Rules of Criminal Procedure protects the secrecy of grand jury proceedings by limiting disclosure of "matters occurring before the grand jury" to situations where a strong showing of "particularized need" has been made and "when so directed by a court preliminary to or in connection with a judicial proceeding." The Supreme Court has held that "Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil Co. v. Petrol Shops Northwest*, 441 U.S. 211, 222 (1979). Rule 6(e) protects both testimony and documents or other evidence presented to a grand jury.

14. In situations where criminal proceedings and private litigation covering the same subject matter are occurring simultaneously, the Division has on occasion sought and obtained an order staying discovery in the private case when such discovery might interfere with the government's case.

Risks and Concerns Associated with Federal Discovery Rules

15. Two major complaints relating to broad discovery requests in civil antitrust cases are (1) the burden and cost associated with compliance, and (2) the burden and risk of producing confidential business information. Both of these risks are addressed by the Federal Rules. The rules limit the amount of discovery (for example limits on the number and length of depositions) allowed in typical cases while permitting the parties to agree to broader discovery in cases that require more for full development of the issues. Confidential information is protected through the use of confidentiality orders limiting access to and the use of sensitive information. Consequently, the rules limit the risks while permitting the benefits of private enforcement of the antitrust laws and, in many cases, the avoidance of a costly and risky trial through settlements prompted by parties discovering the strengths and weaknesses of their respective cases.