Chapter IV Litigation

This chapter outlines some of the practices and procedures that the Antitrust Division has used in civil and criminal litigation. The chapter is not intended as a litigation handbook; rather, it selectively addresses a number of practices that are part of any litigation effort.

Because of the varied nature of matters most common in antitrust litigation, this chapter presents certain issues in a detailed manner and others only as an outline of possible issues or questions. The civil litigation sections contain:

- A brief description of the preparation and filing of the complaint.
- A detailed legal and practical analysis of the requirements and standards for obtaining preliminary relief.
- An outline of issues that may arise during civil discovery.
- A brief discussion of the trial of a civil case and suggested methods of expediting and streamlining litigation.
- A detailed description of the manner of negotiating and entering consent decrees.

The criminal litigation section includes:

- A description of the preparation and filing of the indictment.
- An outline of pretrial discovery and motion practice.
- A list of practical trial suggestions.
- A description of the considerations in negotiating plea bargains and recommending sentences to the court in appropriate circumstances.

The final section of the chapter sets forth the procedures used in preparing or opposing an appeal in either a civil or criminal action.

It is impossible to establish any one set of procedures for the conduct of the Division's pretrial and trial efforts. Since each case poses problems that are unique to the particular facts of that case, this chapter should be used only as a starting point from which ideas and strategies may be developed.

A. Beginning Civil Litigation

1. Drafting and Filing the Complaint

All civil litigation begins with the filing of the complaint, regardless of the type of violation alleged or whether the Division is seeking preliminary relief. Staff will have prepared a complaint for submission to the section or field office chief and the Director of Civil Enforcement as it submits other materials relating to the case.

The section and field office files, as well as the Division's Work Product Document Bank, contain sample complaints for different violations in different circumstances. These sample complaints provide the basic style and substance of the complaints filed by the Division and may assist staff in drafting a complaint based on particular facts. Generally, complaints filed more recently are better models. Staff should consider checking with the appropriate special assistant for the best examples.

Staff should also consult the local rules and practices of the district where the complaint will be filed to determine the specific requirements of the district (e.g., size of paper and margins, form of caption). The local U.S. Attorney's Office should be informed of the Division's intention to file a complaint in the district and should be consulted to ensure that staff follows the correct format.

In preparing the complaint, staff should not overlook the significance of venue and interstate commerce allegations. In alleging venue, staff should be alert to where the defendants transact business or are found. At least one of the defendants must meet this venue requirement. While often all of the defendants will meet the venue requirement, there are sometimes situations where one or more of the defendants do not, or may not, meet it. In such instances, the complaint should indicate that fact and, in the prayer for relief, the complaint should ask that the court issue a summons to each defendant not meeting the venue requirement to bring them within the court's jurisdiction for purposes of the litigation. The issuance of a summons is provided for under Section 5 of the Sherman Act, 15 U.S.C. § 5, if the case arises under the Sherman Act, and under Section 15 of the Clayton Act, 15 U.S.C. § 25, if the case arises under the Clayton Act. In many cases, the defendants will stipulate to venue.

In alleging interstate commerce, staff should be as clear and specific as possible, consistent with the facts of the case. Whenever possible, staff should allege such facts as are necessary for both the "affecting" and "in commerce" ("flow") tests. The complaint should also state a general allegation of interstate commerce. In

addition, the complaint should be a concise and persuasive statement of the allegations and the relief prayed for by the Division. For a detailed description of the Division's procedures for review and approval of complaints and accompanying papers, see Chapter III, Part G.2.

Staff must notify the Director of Operations and the appropriate special assistant of the tentative filing date as soon as it is known so that the Office of Operations can send the draft press release to the Office of Public Affairs sufficiently in advance. The Office of Public Affairs requires one day's notice of the release date. Staff should not forward the press release directly to the Office of Public Affairs.

The day before the filing date, staff should ensure that the Head Secretary in the Office of Operations and the Office of Public Affairs have a complete and signed set of the papers. Staff should file the complaint with the clerk of the court, together with whatever forms the clerk requires under local procedures, and ensure that it complies with the applicable rules for electronic case filing.

2. Post-Filing Procedures

Immediately after filing the complaint, staff must inform the appropriate special assistant of the filing, the Judge's name, and the case's civil number. The Office of Operations will then notify the Office of Public Affairs that the press release may be issued.

A stamped copy of the complaint and all papers filed with it must be provided to the Director of Operations as soon as possible after the complaint is filed. In addition, staff should provide a copy of all filed papers to the Antitrust Documents Group and an electronic version of all filed papers to the web contact for its section, so that the filed papers may be posted on the Internet and the Division's intranet (ATRnet). When staff has filed a proposed consent decree, it should also notify the judgment coordinator for its section. The litigating staff is responsible for ensuring that all filed papers are properly posted and recorded by Division staff.

Staff should issue the complaint and summons to the defendants, pursuant to Rule 4 of the Federal Rules of Civil Procedure, and provide defense counsel with a copy of the papers as well. After the parties have been informed of the filing of the complaint and all local district procedures have been completed, staff should follow the local rules and practices and the Federal Rules in setting up whatever conferences are deemed necessary to expedite the matter. When appropriate,

procedures for obtaining preliminary relief through a temporary restraining order or preliminary injunction should begin.

B. Obtaining Preliminary Relief: Temporary Restraining Orders and Preliminary Injunctions

This section discusses the legal analysis and procedures that will assist Division trial staffs in determining whether to seek preliminary relief. The legal discussion is more extensive than that in any other section of this chapter. Trial staffs are more likely to need a readily available source of case law and analysis in this area since preparation time is usually short and staff is confronted with numerous factual and legal considerations. While this analysis is not exhaustive, it identifies major legal issues that may arise in seeking preliminary relief, as well as procedures that must be completed before a hearing is held. Staff is expected to ensure, in every instance, that papers filed address the relevant legal issues and follow applicable procedures.

The purpose of preliminary relief has been described as creating a state of affairs such that the court will be able, at the conclusion of the full trial, to make a meaningful decision. *See Development in the Law—Injunction*, 78 Harv. L. Rev. 996, 1056 (1965); *see also* Note, *Preliminary Relief for the Government Under Section 7 of the Clayton Act*, 79 Harv. L. Rev. 391 (1965). The Division should seek preliminary relief whenever, in its absence, the relief obtainable following a trial on the merits may not be adequate to restore effective competition in the affected market or where an interim anticompetitive effect is likely, assuming the legal prerequisites are otherwise met. Preliminary relief is particularly appropriate in Section 7 cases, but is also available in other types of cases, including actions brought under Sections 1 and 2 of the Sherman Act. *See* 15 U.S.C. § 4; *see also De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 219-20 (1945); *United States v. Visa U.S.A., Inc.*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001) (violation of 15 U.S.C. § 1); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (violation of 15 U.S.C. § 2).

A temporary restraining order (TRO) is an extraordinary remedy used to prevent imminent and irreversible developments that may seriously compromise the applicant's right to relief on the merits until the court can hold a hearing on an application for preliminary injunction. A TRO may be issued with or without notice to, or appearance by, the adverse party (although efforts should be made to give notice and the court may require it in an antitrust action). It is strictly limited in duration, and issuance is generally nonappealable.

A preliminary injunction (PI) functions similarly to a TRO, pending a full trial and ultimate disposition of the case, but it is based on a richer record. The affected party must be given a full and fair opportunity to contest the requested relief. In most cases, an evidentiary hearing, often substantial, will be held. The order, if granted, may be of indefinite duration. It must be supported by findings of fact and conclusions of law, and it is immediately appealable.

In merger investigations, it is often necessary to prepare to seek a TRO to stop the merger from being consummated. Unless the defendants are willing to stipulate to interim relief (i.e., an agreement not to consummate a merger) until a PI hearing or full trial can be held, a TRO will be required to ensure that competition will not be irreversibly harmed. In addition, it may be useful to seek a TRO as a means of obtaining an expeditious hearing on the application for a PI. *See* Fed. R. Civ. P. 65(b) (stating that when a TRO is granted without notice, the hearing on the motion for a PI takes precedence over other matters).

1. Procedural Requirements

a. Temporary Restraining Order

Rule 65(b) of the Federal Rules of Civil Procedure permits TROs to be issued *ex parte* and without notice to the adverse party, but it places a variety of restrictions on such TROs, and it provides for a hearing, on motion by the adverse party, for dissolution or modification of such an order. The rule is silent as to the conditions applicable to TROs issued with notice and appearance by the adverse party.

i. Notice

Rule 65(b) provides that a TRO may be granted "without written or oral notice" only in circumstances where the applicant "clearly" shows from "specific facts" that "immediate and irreparable injury" will occur before the adverse party can be heard in opposition, and where the applicant certifies in writing the efforts made to give notice and the reasons for proceeding without it. The Advisory Committee Notes to the 1966 amendment to Rule 65(b) state, however, that "informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all."

The Rule does not specify what written or oral notice is sufficient to take the case out of the category of orders issued "without written or oral notice" and thus sufficient to relieve the applicant of making a Rule 65(b) showing. *See* 11A Charles Alan Wright et al., *Federal Practice and Procedure: Civil 2d* § 2952 (2d ed. 1995) (*Wright*) (suggesting that written notice pursuant to Fed. R. Civ. P.

5(b) should suffice). However, for safety, Division attorneys in applying for a TRO should follow the rules for TROs issued without notice regardless of whether actual notice has been given, while every effort should be made to provide as much actual notice as possible. Staff should research the local rules and practices of the district in which the application will be made and modify its approach accordingly.

ii. Content of Affidavits

Rule 65(b) requires a TRO granted without written or oral notice to be based on an "affidavit or ... verified complaint" "clearly" setting out "specific facts" showing (1) immediate and (2) irreparable damage "will result to the applicant before the adverse party or that party's attorney can be heard in opposition." In lieu of sworn affidavits and verifications, unsworn declarations under penalty of perjury may be utilized. *See* 28 U.S.C. § 1746. There is apparently no case law defining the standard for judging the quality and character of a declaration offered in support of a Rule 65(b) motion. *See* 11A *Wright* § 2952. It is reasonable to apply the applicable standards for affidavits supporting an application for PI. *See id.* The declarations specified by Rule 65(b) should not be required to satisfy the more rigorous requirements of Rule 56(e), relating to summary judgments. *See id.* Of course, declarations that rely more heavily on personal knowledge than on information and belief are likely to be accorded greater weight by the court.

iii. Hearings

a. *No hearing prescribed.* No hearing is prescribed by Rule 65(b) for granting of a TRO. When a hearing is held on a TRO application, it is sometimes held in chambers and off the record. A party, however, has a right to have the proceedings recorded, *see* 28 U.S.C. § 753(b); *Nat'l Farmers' Org., Inc. v. Oliver*, 530 F.2d 815 (8th Cir. 1976), and it is advisable to request that a record be made.

b. *Preliminary injunction hearing follows*. Rule 65(b) provides that if a TRO is granted without notice, "the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character." When the motion comes on for hearing, the party that obtained the TRO must proceed with the application for a PI, or the court "shall dissolve" the TRO. The purpose of an *ex parte* TRO is to preserve the status quo and prevent irreparable harm "just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. of Teamsters, Local 70*, 415 U.S. 423, 439 (1974).

c. *Hearing on Motion to Dissolve*. The adverse party may appear and move to dissolve or modify the TRO, after giving two days' notice to the party who obtained a TRO without notice (or such shorter notice as the court may prescribe). The court is directed by Rule 65(b) to "proceed to hear and determine such motion as expeditiously as the ends of justice require."

iv. Duration

Under Rule 65(b), a TRO issued without notice is effective only for the period set by its terms, not to exceed 10 days. However, within the period set by the order, it can be extended for "a like period" (i.e., 10 days) upon a showing of good cause. The rule also provides that a TRO can also be extended if "the party against whom the order is directed consents." The literal language of the rule permits extensions by consent without regard to the 20-day limit; however, local authority should be consulted on this point, and any extension may not be indefinite, consistent with the order's purpose as "temporary" relief until a hearing can be held. *See*, *e.g.*, *Fernandez-Roque v. Smith*, 671 F.2d 426, 429-30 (11th Cir. 1982); *Connell v. Dulien Steel Prods., Inc.*, 240 F.2d 414, 417-18 (5th Cir. 1957); 11A *Wright* § 2953. The courts apply the same rule on duration to *ex parte* TROs as to those issued with informal notice. *See Granny Goose Foods, Inc.*, 415 U.S. at 433 n.7 ("Although by its terms Rule 65(b) . . . only limits the duration of restraining orders issued without notice, we think it applicable to the order in this case even though informal notice was given.").

Restraining orders ordinarily should be drafted to specify their duration. If the order does not state how long it will remain in effect, it automatically expires after 10 days, unless extended. *See Granny Goose Foods, Inc.*, 415 U.S. at 443-44; 13 James Wm. Moore, *Moore's Federal Practice* § 65.38 (3d ed. 2006) (*Moore*).

The cases offer little guidance as to the grounds for extending a TRO. *See* 11A *Wright* § 2953. It is clear, however, that the proponent of an extension must move for renewal before the original order expires. *See id.*; 13 *Moore* § 65.38. There is little law as to what constitutes good cause for extension. It should be sufficient that more time is required to complete the hearing, *see United States v. United Mine Workers of Am.*, 330 U.S. 258, 301 (1947); *Maine v. Fri*, 483 F.2d 439, 441 (1st Cir. 1973), or for submission of additional evidence on the application for PI, *see Weyenberg v. Town of Menasha*, 409 F. Supp. 26, 27-28 (E.D. Wis. 1975), or for the court to prepare its decision, *see Steinberg v. Am. Bantam Car Co.*, 76 F. Supp. 426, 433 (W.D. Pa. 1948), *appeal dismissed as moot*, 173 F.2d 179 (3d Cir. 1949), at least as long as the grounds for originally granting the order continue to exist. *See* 11A *Wright* § 2953; 13 *Moore* § 65.38.

If the parties clearly intend it, a hearing to modify or dissolve a TRO can be converted to a PI hearing. *See Granny Goose Foods, Inc.*, 415 U.S. at 441.

v. Form

According to Rule 65(b), "[e]very temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice." TROs issued with informal notice and appearance should make comparable recitations. In addition, Rule 65(d) states that every restraining order (and injunction) "shall set forth the reasons for its issuance; shall be specific in its terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *See* Chapter IV, Part B.3 (summarizing what should be included in a proposed TRO drafted by the Division). Local rules and practice should also be consulted as they may affect the form of the order.

vi. Appeal

Issuance or denial of a TRO is generally not appealable. 11A *Wright* § 2962 & n.13. *See*, *e.g.*, *Connell v. Dulien Steel Prods., Inc.*, 240 F.2d at 418. However, when a TRO is continued beyond the 10 or 20 days permitted by Rule 65(b) (or far beyond this period with the consent of the parties), some courts will treat the TRO as a PI for purposes of appealability. The TRO may then, however, be held inadequate, because it fails to satisfy the requirements for PIs, such as inclusion of findings of fact. *See*, *e.g.*, *Sampson v. Murray*, 415 U.S. 61, 86 (1974); *In re Arthur Treacher's Franchise Litig.*, 689 F.2d 1150, 1153-55 (3d Cir. 1982); *Telex Corp. v. IBM*, 464 F.2d 1025, 1025 (8th Cir. 1972); *Nat'l Mediation Bd. v. Air Line Pilots Ass'n.*, 323 F.2d 305, 305-06 (D.C. Cir. 1963); *In re Criminal Contempt Proceedings*, 329 F.3d 131 (2d Cir. 2003); 11A *Wright* § 2953.

b. Preliminary Injunction

i. Notice and Hearing

Rule 65(a)(1) states that "[n]o preliminary injunction shall be issued without notice to the adverse party." Notice is not defined by Rule 65(a), but Rule 6(d) generally requires a motion to be served, along with notice of the hearing, "not later than 5 days before the time specified for the hearing." Since Rule 6(d) allows the time limit to be changed by court order, a shortened time can be requested. Local rules should also be consulted for time limits, including required notice for motions. As to content adequate to provide sufficient notice,

a copy of the motion for PI and specification of the time and place of hearing should be adequate. *See* 11A *Wright* § 2949; *but see United States v. Microsoft Corp.*, 147 F.3d 935, 943-45 (D.C. Cir. 1998) (finding notice provided by the United States inadequate).

Although in many courts a PI can be based solely on affidavits and documents, an evidentiary hearing will be requested by one or more of the parties in most antitrust cases. In these cases, live testimony will usually be supplemented with declarations, deposition transcripts, and documents. *See*, *e.g.*, *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1129-30 (D.D.C. 1986), *vacated*, 829 F.2d 191 (D.C. Cir. 1987). Affidavits must be served not later than one day before the hearing. Fed. R. Civ. P. 6(d). As to the requirements applicable to affidavits, Wright argues that the standards of Rule 56(e) for affidavits submitted in support of summary judgment (e.g., affidavit made on personal knowledge, setting forth facts that would be admissible in evidence and that show that the affiant is competent to testify to those facts) are unnecessarily strict, because the PI is not a permanent adjudication and time is of the essence. *See* 11A *Wright* § 2949. "[I]n practice affidavits usually are accepted on a preliminary injunction motion without regard to the strict standards of Rule 56(e), and . . . hearsay evidence also may be considered." *Id.* at 217. However, the motion cannot be based solely on information and belief and hearsay. *See id.*

Preliminary injunction hearings in antitrust cases tend to range from one or two days to one or two weeks in length, or longer. As provided in Rule 65(a)(2), the court may order that the trial on the merits be consolidated with the hearing on the application for PI. Staff must therefore be prepared to explain whether such consolidation is appropriate. In many instances, the Division's position will be that consolidation is not appropriate.

The Division often will have good reason to argue against consolidation. For example, merger challenges raise complex legal and factual issues and may require significant post-complaint discovery. *See SEC v. Sargent*, 229 F.3d 68, 80 (1st Cir. 2000) ("'[T]here is no authority which suggests that it is appropriate to limit [an enforcement agency's] right to take discovery based upon the extent of its previous investigation into the facts underlying its case.'" (*quoting SEC v. Saul*, 133 F.R.D. 115, 188 (N.D. Ill. 1990)); *United States v. GAF Corp.*, 596 F.2d 10, 14 (2d Cir. 1979) ("It is important to remember that the [Justice] Department's objective at the pre-complaint stage of the investigation is not to 'prove' its case but rather to make an informed decision on whether or not to file a complaint." (*quoting* H.R. Rep. 94-1343 at 26, Hart-Scott-Rodino Antitrust Improvement Act of 1976)). Consolidation of a trial on the merits with a PI hearing is an abuse of discretion if it deprives a party of its right to fully and fairly present its case on the merits. *See* 11A *Wright* § 2950; *see*, *e.g.*, *Paris v.*

HUD, 713 F.2d 1341, 1345-46 (7th Cir. 1983). Additional issues that may make consolidation inappropriate include the necessity of perfecting evidence in an admissible form and the need to address issues, such as proposed divestitures, that arose late in the investigation.

Rule 65(a)(2) provides that all evidence received upon application for a PI that would be admissible at trial automatically becomes part of the record and need not be repeated at trial; however, it may be reintroduced if there is adequate reason to do so. 11A *Wright* § 2950.

ii. Duration and Form

A PI, unlike a TRO, can be of indefinite duration. It ordinarily will remain in effect until completion of a trial on the merits, although the court retains plenary power to dissolve or modify it as circumstances warrant. *See* 13 *Moore* § 65.20.

Rule 65(d) requires that the injunction or restraining order "shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." *See City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 991 (7th Cir. 1980) (holding mere incorporation of language of the Sherman Act insufficient to describe in reasonable detail action sought to be restrained), *cert. denied*, 449 U.S. 1096 (1981). Rule 65(d) also specifies that such orders are binding "only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." In addition, Rule 52(a) requires a statement of "the findings of fact and conclusions of law which constitute the grounds of [the court's] action" in granting or denying interlocutory injunctions.

iii. Appeal

Preliminary injunctions are appealable under 28 U.S.C. § 1292(a)(1) ("Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"). Both the district court and the court of appeals are authorized either to grant or to stay a PI pending appeal. *See* Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a). Such orders are frequently granted, and appeals of the grant or denial of a PI may be heard on an expedited basis.

The articulated scope of review on appeal is narrow. Most courts state that they will reverse only for clear abuse of discretion, *see*, *e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Am. Med. Ass'n v. Weinberger*, 522 F.2d 921, 924

(7th Cir. 1975); *SCM Corp. v. Xerox Corp.*, 507 F.2d 358, 360 (2d Cir. 1974), or an error of law, *see*, *e.g.*, *Selchow & Righter Co. v. McGraw-Hill Book Co.*, 580 F.2d 25, 27 (2d Cir. 1978); *Jones v. Snead*, 431 F.2d 1115, 1116 (8th Cir. 1970). Findings of fact are reviewed for clear error. *See* 11A *Wright* § 2962. The appellate court "ordinarily will not delve any further into the merits of the controversy than is necessary to decide the specific issues being appealed." *Id.*

2. Standard for Granting Preliminary Injunction

The Federal Rules do not prescribe a standard for granting or denying a PI. Traditional equitable considerations apply. Wright describes the most important factors in the decision as:

- The probability that plaintiff will succeed on the merits.
- The significance of the threat of irreparable harm to plaintiff if the injunction is not granted.
- The balance between this harm and the injury that granting the injunction would inflict on defendant.
- The public interest.

11A *Wright* § 2948 (collecting cases). *See*, *e.g.*, *Doran v. Salem Inn, Inc.*, 422 U.S. at 931. *See also* Morton Denlow, *The Motion for A Preliminary Injunction: Time for a Uniform Federal Standard*, 22 Rev. Litig. 495 (2003).

a. Probability of Success on the Merits

Most commonly, courts have articulated the plaintiff's burden as demonstrating a reasonable probability of success on the merits. While courts have framed this concept in a variety of ways, they agree that the plaintiff must present a prima facie case. A plaintiff, however, need not demonstrate a certainty of winning at trial. *See generally* 11A *Wright* § 2948.3; *see*, *e.g.*, *United States v. Nippon Sanso*, 1991-1 Trade Cas. (CCH) ¶ 69,377 (E.D. Pa. 1991) (Section 7 case; reasonable probability test); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 673 (D. Minn. 1990) (government failed to show probability of success in Section 7 case); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1420 (W.D. Mich. 1989) (government had established "prima facie" Section 7 case); *FilmTec Corp. v. Allied-Signal, Inc.*, 939 F.2d 1568 (Fed. Cir. 1991).

In most nonantitrust cases, the likelihood of success is balanced with the comparative injury to the parties. Where the balance of hardships tips decisively toward the plaintiff, the plaintiff need not make as strong a showing of likelihood of success to obtain a PI. This balancing has been described as a

"sliding scale." *See* 11A *Wright* § 2948.3; *see also*, *e.g.*, *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509 (7th Cir. 1994). As Judge Frank's often-quoted opinion in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953) (footnote omitted) states:

> To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation.

While this "fair ground for litigation" standard has been applied in a variety of types of private antitrust suits, the Second Circuit has refused to apply the standard in government Section 7 suits on the ground that, once the government shows a reasonable probability that Section 7 is violated, irreparable harm is presumed; in light of this presumption, the government should be required to raise more than a "fair ground for litigation." *United States v. Siemens Corp.*, 621 F.2d 499, 505-06 (2d Cir. 1980). *But see United States v. Gillette Co.*, 828 F. Supp. 78, 86 (D.D.C. 1993) (holding that in Section 7 case, because showing of irreparable injury was strong, the government had to make a lesser showing of likelihood of success). Cases in the particular circuit should be consulted to determine what standard of likelihood of success is applied to government Section 7 cases.

Confusion can result concerning the proper showing of likelihood of success necessary for a PI in Section 7 cases, because Section 7 of the Clayton Act involves a prediction about the effect that mergers or acquisitions may have on competition. Similarly, granting a PI involves a prediction as to the plaintiff's chances of success. Thus, the government, to obtain a PI, needs only to show a reasonable probability that it will be able to show that competition may be substantially lessened. *See* Comment, *"Preliminary Preliminary" Relief Against Anticompetitive Mergers*, 82 Yale L.J. 155, 157 (1972); *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199, 222-23 (D. Md. 1976) (requiring "a substantial probability of establishing that the effect of [the transaction] 'may be' substantially to lessen competition"), *aff'd*, 546 F.2d 25 (4th Cir. 1976).

To establish probability of success unless it can show likely anticompetitive effects directly, the government must present evidence on geographic and product markets. Because of time and discovery constraints, the government's additional arguments concerning likely adverse effects on competition often concentrate heavily on structural evidence (the magnitude of and change in the

Herfindahl-Hirschman Index and other factors discussed in the *Horizontal Merger Guidelines*) and any other available evidence addressing the harm to consumers the merger is likely to cause. Under the case law, "[s]tatistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power." *Brown Shoe Co. v. United States*, 370 U.S. 294, 322 n.38 (1962); *see also United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963). The government is entitled to rely on such evidence to make a prima facie case of probable anticompetitive effect and hence illegality, *see Philadelphia Nat'l Bank*, 374 U.S. at 363, but the defendants are entitled to attempt a rebuttal by showing "that the market-share statistics gave an inaccurate account of the acquisitions' probable effects on competition." *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120 (1975); *see also Gen. Dynamics Corp.*, 415 U.S. at 497-504; *United States v. Consol. Foods Corp.*, 455 F. Supp. 108, 134-35 (E.D. Pa. 1978); *United States v. Amax, Inc.*, 402 F. Supp. 956, 970 n.53 (D. Conn. 1975). As a result, courts routinely make findings concerning structural factors affecting competition, such as entry conditions, when preliminary relief is sought. *See*, *e.g.*, *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1135 & n.18 (D.D.C. 1986), *vacated*, 829 F.2d 191 (D.C. Cir. 1987); *United States v. Calmar, Inc.*, 612 F. Supp. 1298, 1305-07 (D.N.J. 1985); *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001). Staff should be prepared to offer evidence on relevant structural issues in its direct case at a PI hearing.

b. Irreparable Injury

Historically, equity could intervene only when there was no adequate remedy at law (for example, when the alleged injury could not later be repaired by an award of damages). A showing of irreparable harm in the absence of injunctive relief demonstrated that no adequate legal remedy was available, and that equity should intervene to prevent the impending injury. *See* 11A *Wright* § 2944. Irreparable harm in modern practice is one of the factors to be weighed by the court in considering whether to grant preliminary relief.

Although courts have applied the traditional equity standards of irreparable injury to private actions brought under Section 7 of the Clayton Act, they have recognized that a different test is appropriate where the government seeks preliminary relief under the Act. Courts have held that where the government shows a probability of success on the merits, it need not make a separate showing of irreparable injury. *See FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115-17 (D.D.C. 2004); *United States v. Siemens Corp.*, 621 F.2d at 506; *United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1429 (W.D. Mich. 1989); *United States v. Culbro Corp.*, 436 F. Supp. 746, 750 (S.D.N.Y. 1977); *United States v. Atl.*

Richfield Co., 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969), *aff'd mem. sub nom. Bartlett v. United States*, 401 U.S. 986 (1971); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 567 (N.D. Ill. 1968); *United States v. Pennzoil*, 252 F. Supp. 962, 986 (W.D. Pa. 1965); *United States v. Chrysler Corp.*, 232 F. Supp. 651, 657 (D.N.J. 1964); *United States v. Crocker-Anglo Nat'l Bank*, 223 F. Supp. 849, 850 (N.D. Cal. 1963). Indeed, the Supreme Court in dictum stated that "[i]n a Government case [under Clayton Act, Section 15] the proof of the violation of law may itself establish sufficient public injury to warrant relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990).

This doctrine is sometimes characterized as dispensing with the need for the government to prove irreparable injury, but it is perhaps more accurate to say that the necessary element of irremediable harm is implied as a matter of law from the threatened violation of the statute. *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 544-45 (W.D. Pa. 1963), *aff'd*, 320 F.2d 509 (3d Cir. 1963) ("[T]he threatened violation of the law here is itself sufficient public injury to justify the requested relief."); *see also United States v. Crocker-Anglo Nat'l Bank*, 223 F. Supp. at 850.

Several persuasive arguments can be made for not requiring a showing of irreparable harm in government cases. First, the "harm" or "injury" at issue must be defined in terms of threats to legally protected rights and interests of the parties. The government as plaintiff, at least in Section 7 cases, has no private business or property interest at stake. It sues instead as sovereign to vindicate the public interest in a competitive, free-market economy; that interest is violated and, by definition, harm is inflicted whenever the statutory prohibition is violated. A potential violation, therefore, necessarily threatens impairment of protected interests.

> Defendants' argument that there has been no showing of irreparable injury to warrant a preliminary injunction is irrelevant. Sec. 7 of the Clayton Act expresses a Congressional proscription of such an acquisition where its effect "may be substantially to lessen competition, or to tend to create a monopoly." This proscription is a legislative declaration that an acquisition having such an effect is against the public interest. The Government need not show that it will suffer irreparable damage *qua* Government, but only that there is a probability that it would prevail upon a trial on the merits.

United States v. Chrysler Corp., 232 F. Supp. 651, at 657 (D.N.J. 1964); *United States v. Crocker-Anglo Nat'l Bank*, 223 F. Supp. at 850-51.

That such injury is sufficiently irreparable to satisfy the traditional standard may be presumed from the intangible nature of the threatened harm; the uncertainty that the anticompetitive impact of even a temporary combination of previously independent companies can ever, after the fact, be fully eliminated; the congressional mandate to prevent competitive injury; and the overriding importance of that policy.

In addition, the alternative to interim injunctive relief—"unscrambling" a merger or acquisition post consummation through the divestiture of stock or assets—is generally not adequate to serve the public interest. Even when aided by the entry of a preliminary hold-separate order, divestiture has proven to be an inadequate remedy.

First, in most cases the illegally acquired company cannot be (or at least is not) reestablished as a viable, independent competitor. Its assets may have been scrambled or sold by the acquiring company and its key managers may have left. Second, even in apparently successful divestiture cases, there may be considerable permanent damage to the market structure due to the temporary disappearance of competition, the delay in innovation or research and development, or the transfer of trade secrets or other confidential information. *See FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508-09 (D.C. Cir. 1986). In addition, competition will be adversely affected during the pendency of the case, and this harm cannot be redressed post-trial.

Many courts have recognized the substantial problems involved in unscrambling an accomplished merger and reconstituting the acquired company as a viable competitive entity. *See*, *e.g.*, *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 542-43 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

In practice, it is virtually impossible to predict all potential anticompetitive effects with precision. Injury to the competitive process (as opposed to injury to particular competitors, customers, or suppliers, which may not be the same) is likely to be subtle, gradual, and often unquantifiable even after the fact. "[T]he fact that no concrete anticompetitive symptoms have occurred does not itself imply that competition has not already been affected, 'for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger.'" *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505 (1974) (quoting *FTC v. Consol. Foods Corp.*, 380 U.S. 592, 598 (1965)). Remedial adequacy is almost entirely a matter of speculation. The essential issue is who should be forced to bear the risk of this uncertainty; the case law supports the conclusion that it should not be the public.

In sum, "divestiture does not always turn out to be a feasible remedy and is never a painless one." *Elco Corp. v. Microdot, Inc.*, 360 F. Supp. 741, 755 (D. Del. 1973). It "is usually fraught with difficulties and presents a whole range of problems which should be avoided if possible." *United States v. Atl. Richfield Co.*, 297 F. Supp. 1061, 1074 (S.D.N.Y. 1969), *aff'd mem. sub nom. Bartlett v. United States*, 401 U.S. 986 (1971); *see also FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1217 n.23 (11th Cir. 1991).

It is important to note that the presumption of irreparable injury is not a doctrinal innovation peculiar to the antitrust laws. The same rule is commonly applied where other important statutorily declared public policies are involved. *See*, *e.g.*, *Gov't of the Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 286 (3d Cir. 1983) (Virgin Islands statutes); *United States v. Spectro Foods Corp.*, 544 F.2d 1175, 1181 (3d Cir. 1976) (Federal Food, Drug & Cosmetic Act); *SEC v. Globus Int'l, Ltd.*, 320 F. Supp. 158, 160 (S.D.N.Y. 1970) (Securities Act of 1933 and Securities Exchange Act of 1934); 11A *Wright* § 2948.4 (collecting cases).

Significant support for the presumption of irreparable injury in Section 7 cases is found in the legislative history of 15 U.S.C. § 53(b), which specifically authorizes the FTC to obtain preliminary relief in merger cases. Until a 1973 amendment, the FTC had no statutory authority to obtain preliminary relief except against false or misleading food, drug, or cosmetic advertising, using 15 U.S.C. § 53(a). The only way the FTC could gain an injunction in merger cases was by applying to the Court of Appeals pursuant to the All Writs Act (28 U.S.C. § 1651(a)), and showing that "an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree of divestiture futile." *FTC v. Dean Foods Co.*, 384 U.S. 597, 605 (1966).

The amended FTC statute provides that a PI may be granted by a district court "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). This amendment was intended to establish essentially the "presumed irreparable injury" standard applied by the courts in Section 7 cases brought by the Department of Justice.

> The intent [of the amendment] is to maintain the statutory or "public interest" standard which is now applicable, and *not* to impose the traditional "equity" standard of irreparable damage, probability of success on the merits, and that the balance of equities favors the petitioner. This latter standard derives from common law and is appropriate for litigation between private parties. It is not, however, appropriate for the

> implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and the need for injunctive relief.

H.R. Rep. No. 93-624, at 31 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2417, 2533 (emphasis in original).

The courts, in applying the FTC's statutory standard, have given it the liberal interpretation intended by Congress. *See*, *e.g.*, *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1216-17 (11th Cir. 1991); *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714, 727 (D.C. Cir. 2001).

In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division should argue that the authority of the Department of Justice to seek preliminary relief under Section 15 of the Clayton Act (15 U.S.C. § 25) should be interpreted in a manner consistent with 15 U.S.C. § 53(b).

The distinction between the burdens of the government and private plaintiffs is also consistent with the very different language employed by Congress in those sections of the statute respectively authorizing preliminary relief for private plaintiffs and the government. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides that a private plaintiff may obtain a PI "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity," including "a showing that the danger of irreparable loss or damage is immediate." By contrast, Section 15 of the Clayton Act, 15 U.S.C. § 25, contains no standards for granting preliminary relief other than what is "deemed just in the premises."

> The failure of Congress to require that the Government show irreparable loss on the application for a preliminary injunction in a Section 7 action, as is the case with a private plaintiff, 15 U.S.C. § 26, indicates the Congressional desire to lighten the burden generally imposed on an applicant for preliminary injunctive relief.

United States v. Atl. Richfield Co., 297 F. Supp. 1061, 1074 n.21 (S.D.N.Y. 1969), *aff'd mem. sub. nom. Bartlett v. United States*, 401 U.S. 986 (1971).

In sum, if the Division establishes probable success on the merits, there is, by definition, a reasonable probability that the transaction will substantially impair competition. Having proved this much, the government should not be assigned the unrealistic burden of proving the time, manner, and irreparable nature of the

harm with the precision assumed by the traditional test. Public policy considerations dictate that the probable injury be irreparable.

c. Balancing the Equities

Even though the government has shown likelihood of success on the merits when seeking a PI in a Section 7 case, and has satisfied the "threat of irreparable injury" requirement (by virtue of the legal presumptions applicable in Section 7 cases), "a court of equity [must still] balance hardships, i.e., determine whether the harm to the defendants outweighs the likelihood that adequate relief will be available to the Government if the merger is consummated." *United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d. Cir. 1980); *see also*, *e.g.*, *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 525 (3d Cir. 1963) (stating that trial court must weigh the possibility of injury to the defendants, the effect of divestiture as opposed to injunctive relief, and the respective positions of the parties); *United States v. ITT Corp.*, 306 F. Supp. 766, 797 n.95 (D. Conn. 1969) (holding that under Clayton Act § 15, balancing of equities "in terms of injury to the public interest if an injunction were denied, as against injury to the defendants if it were granted" becomes relevant once the government has shown probability of success).

The governmental interest being weighed here is the government's interest in avoiding irreparable harm that is likely to result if the injunction is not granted. Although this harm is established by a presumption in Section 7 cases, courts nonetheless need to think about the harm in concrete terms in order to weigh the equities. Certainly, the relevant harm includes the harm that will result if a divestiture needs to be carried out after a merger has been consummated. The harm also includes injury to competition caused by the merger, in the interim, before divestiture is ordered. *See United States v. Siemens*, 621 F.2d at 506.

Courts generally give the government's interest far more weight than private claims when balancing equities in government Section 7 cases. *See*, *e.g.*, *United States v. Siemens*, 621 F.2d at 506 (private interests must be subordinated to public ones); *United States v. Columbia Pictures*, 507 F. Supp. 412, 434 (S.D.N.Y. 1980) (public interest in enforcement of the antitrust laws and in the preservation of competition "is not easily outweighed by private interests"); *United States v. White Consol. Indus., Inc.*, 323 F. Supp. 1397, 1399-1400 (N.D. Ohio 1971) (balancing possible harm to the defendants against probable antitrust violations; finding "no question that national interests must take precedence"); *United States v. Atl. Richfield Co.*, 297 F. Supp. at 1073 (stating that defendants' claims of financial harm were "entitled to serious consideration" but "[n]evertheless, they cannot outweigh the public interest in preventing this merger from taking effect pending trial" and that "[t]he public interest with

which Congress was concerned in enacting Section 7 is paramount"); *United States v. Pennzoil Co.*, 252 F. Supp. at 986 (a showing of injury to the defendant "must be so proportionately persuasive as to submerge the principle that 'the status of public interest and not the requirements of private litigation measure the propriety and need for relief'") (citation omitted). *But see United States v. FMC Corp.*, 218 F. Supp. 817, 823 (N.D. Cal. 1963) (denying PI because of harm to defendants), *appeal dismissed*, 321 F.2d 534 (9th Cir. 1963); *United States v. Brown Shoe Co.*, 1956 Trade Cas. (CCH) ¶ 68,244, at 71,116-17 (finding government case to be weak; denying PI because of harm to defendants; and issuing hold-separate order).

Nevertheless, individual courts may find defendants' argument of injuries to persons associated with the transaction, if it is delayed, to have some merit. Defendants will argue that the injuries allegedly resulting from a delay of the transaction are concrete, immediate, and substantial. The Division should be prepared to explain the transaction's potential anticompetitive impact and the undesirability of divestiture or hold-separate orders. Assuming a substantial probability of success on the merits has been established, it may also be helpful to point out that the private benefits delayed or foregone flow from a transaction that is likely to be found illegal, and therefore claims of private injury should be discounted. In addition, as held in *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001), the timing of a transaction is under the control of the parties; if it made economic sense to them before the injunction, it is likely that it will be attractive in some form later as well.

d. Public Interest

Courts often do not make a separate finding on public interest in government Section 7 cases, because the finding is implicit in the presumption of irreparable harm and in balancing the equities as they affect the governmental plaintiff. *But see United States v. Gillette Co.*, 828 F. Supp. 78, 86 (D.D.C. 1993) ("interests of the public are not necessarily coextensive with the irreparable injury criterion"; where merger is not reversible, public interests favor injunction). Generally, "[a] federal statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction." 11A *Wright* § 2948.4; *see also United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965). Thus, a showing by the government that a merger is likely to violate Section 7 should satisfy the public interest test.

e. Other Equitable Considerations

Despite the widespread recognition that a government request for preliminary relief is subject to different rules than those that apply in purely private

litigation, such a request remains an equity proceeding. Among the equity issues which Division attorneys should be prepared to address are the following:

i. Maintenance of the Status Quo and Mandatory Injunctions

The goal of preliminary relief is often described as maintenance of the status quo, to preserve the court's ability to exercise its jurisdiction and effect meaningful relief. In addition, if a defendant with notice in an injunction proceeding completes the acts sought to be enjoined, the court may by mandatory injunction restore the status quo. *See* 11A *Wright* § 2948. Courts are sometimes reluctant to issue mandatory injunctions (requiring the defendant to take certain action) if the injunction changes the status quo, even if the injunction is necessary to preserve the court's ability to render a meaningful decision. *See id.* This reluctance has been criticized as failing to recognize that preservation of the court's ability to grant relief is the cornerstone of preliminary relief. *See id.* at n.17 (collecting cases where courts have acted to change status quo); 11A *Wright* § 2948.2; *Canal Auth. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

In a merger case, where an order is sought prospectively to enjoin consummation, the status quo is maintained. However, if relief is sought following completion of a merger or against continuation of a practice alleged to be illegal under the Sherman Act, it may be opposed as a mandatory injunction and a disruption of the status quo. These objections can be rebutted by showing that preliminary relief is necessary to preserve the court's power to render a meaningful decision on the merits. It may also be pointed out that the government could have phrased the request for relief as a prohibition rather a mandatory injunction, and that the form of phrasing should not control. *See* 11A *Wright* § 2948.2 ("[W]ith a little ingenuity practically any mandatory injunction may be phrased in prohibitory form."). It may also be possible to argue that the court is merely being asked to restore the status quo as of the "last peaceable uncontested status." 11A *Wright* § 2948 (citation omitted).

ii. Reluctance to Give Complete Relief

Defendants sometimes argue that a PI should be denied because the injunction would give the plaintiff all the relief it could expect after a trial on the merits. However, the fact that the plaintiff may "temporarily . . . taste the fruits of victory" should not distract the court from applying the relevant criteria; rather, the court should apply the usual analysis—that is, harm to the defendant that will result from preliminary relief, balanced against the harm to the plaintiff if the injunction is denied. 11A *Wright* § 2948.2; *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1058 (1965); Thomas R. Lee,

Preliminary Injunctions and the Status Quo, 58 Wash. & Lee L. Rev. 109, 110 (2001).

In merger cases, this principle is often cited by defendants where an injunction might lead to abandonment of the transaction, thus giving the government a victory by default. *See*, *e.g.*, *United States v. Atl. Richfield Co.*, 297 F. Supp. 1061, 1073 (S.D.N.Y. 1969), *aff'd mem sub. nom. Bartlett v. United States*, 401 U.S. 986 (1971). In addition to citing the above argument, the government should respond that the equities weigh in favor of the government because the claimed private injury is being weighed against public interests. *See id.* at 1073-74. In addition, the alleged injury usually is within the control of the defendants and thus not a legitimate consideration for the court. *See FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 791 (N.D. Ill. 1978). In recent years, courts have been more skeptical of self-created claims of urgency and rejected bare assertions that a deal will unravel. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 726 (D.C. Cir. 2001). There is no special standard for PI requests involving mergers where the deal might unravel.

iii. Delay

Generally, a defendant cannot assert laches as a defense to an antitrust suit brought by the government; the Supreme Court has consistently adhered to the principle that laches is not a defense against the government acting as sovereign. *See*, *e.g.*, *California v. Am. Stores Co.*, 495 U.S. 271, 296 (1990) (dictum); *Nevada v. United States*, 463 U.S. 110, 141 (1983) (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917)); *Costello v. United States*, 365 U.S. 265, 281 (1961). However, this doctrine does not extend to government delay in requesting preliminary relief. If a plaintiff delays in requesting preliminary relief, the court can consider this delay in deciding whether to afford such relief and in choosing the type of preliminary relief to be granted. *See* 11A *Wright* § 2946. This rule has been applied in antitrust cases where the party requesting preliminary relief is the government. *See*, *e.g.*, *United States v. Acorn Eng'g Co.*, 1981-2 Trade Cas. (CCH) ¶ 64,197, at 73,713 n.4 (N.D. Cal. 1981) (considering, in particular, hardship to the defendant); *United States v. Aluminum Co. of Am.*, 247 F. Supp. 308, 314 (E.D. Mo. 1962) (considering, but giving "little weight" to, seven month delay), *aff'd*, 382 U.S. 12 (1965); *United States v. Columbia Pictures Corp.*, 169 F. Supp. 888, 896-97 (S.D.N.Y. 1959); *United States v. Inter-Island Steam Nav. Co.*, 87 F. Supp. 1010, 1022 (D. Haw. 1950).

Generally, explainable delays will not be held against the government. The decision to sue, and the marshaling of sufficient evidence to make a prima facie case, require more time on the part of the government than for private plaintiffs.

Private plaintiffs can react to a threatened takeover immediately, without considering the merits of the case as a matter of public policy. The government is expected to, and should, make a more careful and objective determination of the desirability of challenging a merger. Moreover, unlike the usual private plaintiff, the government does not begin with an intimate knowledge of the industry and the facts surrounding the acquisition. Information gathering is essential and, while it can be done expeditiously, it cannot be done instantaneously.

The desirability of allowing the government sufficient time to obtain information necessary to analyze properly the competitive effects of a transaction and adequately prepare for trial was explicitly recognized by Congress when it enacted the premerger notification and waiting period provisions of 15 U.S.C. § 18a. In fact, it was the clear congressional intent that the Antitrust Division would use the 20-day period after receipt of second request information "in order to analyze it and prepare a possible case based upon it." H.R. Rep. No. 94-1373, at 6 (1976). Since most actions for preliminary relief will be filed before the expiration of the Hart-Scott-Rodino waiting periods, staff can rely on the statutory framework to rebut any allegation of delay.

Moreover, a policy that penalizes the government for seeking relief at the eleventh hour, without considering whether it would be realistic or desirable as a matter of policy to require an earlier decision, is itself inequitable. It would encourage the premature filing of ill-considered cases on insufficient facts, a result justifying more significant objections from defendants and courts alike. Furthermore, given the relatively short time span between filing and the PI hearing, a contrary policy would place the government in the dilemma of choosing between inadequate discovery and preparation (as the price for seeking preliminary relief) and inadequate relief following a plenary trial on the merits. The dilemma intensifies as the legal and factual issues involved become more complex.

Of course, these considerations do not justify unnecessary delay by the government and, as a matter of both policy and tactics, staff should prepare its case as expeditiously as practicable. Whether warranted or not, courts likely would view with disfavor requests for emergency relief made only days before a scheduled closing when the government was aware of the merger or acquisition months in advance and the parties likewise provided all the relevant information to make a decision months in advance. Prudence and responsible prosecutorial policy dictate that if a case can be filed and a motion for preliminary relief argued in advance of the merger, it should be done; however, given the timing of mergers under the premerger notification rules and the strategic decisions of many merging parties, this is rarely possible. Staff should take pains to inform

the court that it has exercised due diligence and proceeded with all possible dispatch in those situations.

3. Practical Problems and Procedures

Speed of preparation is essential in applying for preliminary relief. When faced with an impending merger or acquisition, most efforts will, of necessity, be directed at fact gathering. Even so, staff should be fully familiar with the case law for the relevant circuit and district, with the local rules of court, and with the opinions of judges that staff will likely draw when a case is filed. Pleadings should be drafted at the earliest possible time and staff is encouraged to review previously filed briefs and pleadings relating to TROs and PIs. These may be obtained from the Division's Work Product Document Bank on ATRnet, the FOIA unit, or the appropriate special assistant. The legal analysis set forth in this section should also be helpful in developing a quick and usable analysis of the applicable standards.

a. Pleadings and Briefs

When it first appears that a request for preliminary relief may be necessary, a member of the staff should be assigned to complete any unfinished legal research and prepare pleadings and other papers. The following will commonly be required: (1) summons and verified complaint; (2) application or petition for a TRO and PI; (3) notice of hearing; (4) proposed restraining order; (5) brief in support; (6) supporting declarations; and (7) certificate of service. If parties or potential witnesses cannot be served within the district or within 100 miles of the court, applications and proposed orders for service of summons or subpoenas pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, must also be prepared. Depending on the time available, staff should consider drafting additional pleadings, such as statements of issues and contentions, proposed stipulations, requests for admissions, motions in limine, and proposed findings of fact and conclusions of law.

The application for a TRO and PI can be drafted as a single document or as two separate petitions. The latter is common practice in the Division. The application should state: (1) the statutory authority relied on; (2) relevant background information about the proposed transaction; (3) that the proposed transaction will occur on a given date unless restrained; (4) that a verified complaint has been filed alleging that the proposed transaction violates the relevant statute (usually Section 7 of the Clayton Act); (5) that a TRO is necessary because immediate and irreparable injury, loss, and/or damage will result to the public interest before a hearing on the request for a PI can be held; and/or that a PI is necessary to prevent a violation of the statute and to protect the public interest;

(6) that a brief and declarations have been filed in support of the motion; (7) that the defendants have been notified of the filing of the application for a TRO, and the method of notification; and (8) the nature of the relief sought.

The notice of hearing on the motion for a PI should be prepared with the dates left blank, to be filled in when a date is set down by the court after ruling on the TRO. A blank copy may be filed with the other pleadings, or the hearing may originally be noticed for a date certain, based on the local rules concerning motion practice (and the judge's motion calendar if the judge to whom the case will be or has been assigned is known). This may be done with the expectation that the judge, in issuing the TRO, will provide for an expedited hearing. A notice is unnecessary if the PI hearing is brought on by order to show cause rather than as a motion.

Staff must submit a proposed TRO. A proposed PI will generally also be offered for filing at the same time. The proposed TRO should conform to the requirements of Rule 65(b) and (d) and, equally important, local rules and practice. It should recite: (1) the court's authority to issue the order; (2) the fact that a complaint has been filed alleging a violation of Section 7 or other statute and a PI has been sought; (3) that the transaction, if not restrained, will occur before a hearing can be held; (4) the materials relied on to support the order (brief, declarations, etc.); (5) the facts and conclusions justifying issuance of the order, defining the injury and stating why it is immediate and irreparable (and, if granted without notice, stating why the order was granted without notice) (The preferred practice is for the court to file an opinion stating the reasons for issuing the order, but Rule 65 and simple prudence suggest that some reference should be made to substantive issues raised on the merits and irreparable injury in the TRO itself.); and (6) the operative terms of the proposed order, describing in reasonable detail the acts sought to be restrained. The order should contain a place for indorsement of the date and hour of issuance, as well as the place of issuance. It should be directed at the defendants and, tracking the language of Rule 65, "their officers, agents, servants, employees, and attorneys" and "persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." It should specify the date of the PI hearing and the duration of the order, with a provision for renewal.

An attorney's declaration in support of the TRO should verify the complaint, identify and authenticate important documents (which should be attached to the declaration) and other exhibits (such as declarations and depositions), detail the notice given to the defendants of the application for a restraining order, and comply with any other procedural requirements (e.g., a statement that no similar relief has been previously requested). The declaration should also explain the sequence of events leading up to the filing of the case in order to demonstrate

due diligence and lack of unnecessary delay in seeking relief. *See* Chapter IV, Part B.2.e.iii.

An economist should be prepared to testify at the initial hearing. Staff should carefully consider whether the testifying economist should prepare a declaration setting forth the economic analysis of the proposed transaction. In each case, it is necessary to weigh the advantages and disadvantages of supplying an economist's declaration.

Every effort should be made to obtain supporting declarations from third parties (unless witnesses will testify at a hearing, in which case staff should consider whether declarations are appropriate). Some courts require a great deal of evidence before granting a TRO. Other courts will hear TROs and PIs on the original papers filed and will not ordinarily conduct an evidentiary hearing. It is better to err on the side of too much evidence rather than too little at this stage. If there is time during the investigation, the taking of CID depositions is useful because they are a useful alternative way to present third-party evidence. They are virtually the only means of getting admissions from the defendants at this stage, and they help to bind the defendants to their testimony.

Before beginning to draft the necessary papers, staff should closely examine the local rules of the district where the action will be filed. It is good practice to provide a copy of the local rules to every member of the staff. Second, staff should contact the local Division field office and U.S. Attorney's Office and arrange to have a liaison person assigned to the case, who should be consulted on all questions of form and procedure. This person can give advice on district customs and practices, which can greatly affect the manner in which the papers are drawn and the matter presented for hearing. The local attorney will be familiar with how the hearing will be conducted and can help staff tailor its case to the concerns and style of the court. It is often helpful for the liaison person to accompany staff to court. Finally, a local attorney (e.g., the liaison attorney) should be designated for service of papers. Although most defendants will serve their papers on the trial staff, this cannot always be assured. In addition, delays may result if the district court serves orders and notices directed to the United States only on the local U.S. Attorney's Office. Staff should make arrangements for speedy notification and transmission of papers served on a local office, preferably by having them routed directly to the designated local attorney rather than to the U.S. Attorney.

The logistical problems involved are significant when the case is filed in a distant forum. Someone in staff's section or field office should arrange for travel and hotel reservations. Arrangement should also be made for temporary offices, document storage, computer hardware and software, graphic and copying

services, and telecommunications services. Procedures should also be worked out for local secretaries on an emergency basis. *See* Division Directive ATR 2510.4, "Administrative Support for Remote Trial Staffs" (describing procedures).

If the U.S. Attorney's Office or Division field office has an office manager or administrative assistant, it will be important to develop a good working relationship with that person. Staff should also keep the field office chief or U.S. Attorney informed of the progress of the case.

b. Filing and Hearing Procedures

The usual procedure where a TRO is sought begins with filing the complaint and accompanying papers in the clerk's office, with service on the defendants. The application for a TRO will then be presented to the judge assigned to the case. The court may or may not wish to receive copies of pleadings filed with the clerk's office. Defendants commonly appear in opposition to TROs sought by the Division. The proceedings may be conducted in open court or in chambers. The parties have the right to insist that proceedings be on the record. If the judge to whom the case is assigned is unavailable, the application can be presented to the miscellaneous or emergency judge.

The procedure will obviously be different if the case is filed sufficiently far in advance of the proposed transaction to permit the application for a PI to be brought on as a regular motion. Given the usual time constraints, however, this is rarely possible unless the defendants voluntarily agree to postpone the transaction pending the outcome of a PI hearing. Another variation (primarily in the paperwork, not the procedure) will occur if the preferred practice in the district is for the TRO to include an order to show cause why a PI should not be issued. Whether this is the practice should be determined well in advance.

Given the heavy dockets of most courts, the court usually will urge the parties to agree to a date, often four to six weeks in the future, for a PI hearing, and will urge them to agree to a discovery plan. In other cases, the court will put the matter down for hearing within a matter of days. Staff cannot rely on any significant period of time between the granting of a TRO and the beginning of a PI hearing. Further, trial on the merits may be consolidated with the PI hearing; although such a hearing will almost always be after a more significant period of discovery, it may be more abbreviated than discovery in a normal civil case. *See* Chapter IV, Part B.1.b.i. In short, staff should pursue intensive prefiling discovery aimed at meeting a PI standard and should be prepared to move aggressively after filing to obtain full discovery for a trial on the merits. On occasion, courts have scheduled the trial on the merits only a few weeks after the

complaint was filed. Any such proposed schedule should be vigorously contested when it would likely prejudice the ability of the United States to obtain necessary discovery or fairly present its case at trial.

Staff should impress upon reluctant affiants or deponents, for example, that if they do not come forward at this stage, there may be no second chance. Note also that the importance of the prefiling investigation makes document control, as well as adequate staffing, exceedingly important. One person should be assigned the task of document control, and should be responsible for organizing and transporting documents for use at the hearing. One attorney should be assigned early to work with the testifying economist to prepare for a hearing.

There are strong pressures on all parties, including the judge, to complete the hearing as quickly as possible. Many judges will set strict limits on how much time each party has to present its case. Even when time limits have not been set, staff should not test the limits of either the permissible duration of a TRO hearing or the judge's patience. In view of the fact that the government is insisting by the very act of seeking preliminary relief that the matter is urgent, it is incumbent on the trial staff to pare and streamline its case. Indulging the usual luxury of putting into evidence every scrap of possibly relevant evidence will quickly alienate most judges. Having substantially interfered with the proposed transaction at our behest, the judge will expect an expeditious presentation of the government's case.

The court will likely insist that the parties stipulate to as many facts as possible, and if the court does not do so, the trial staff should consider taking the initiative and offering proposed stipulations or filing requests for admission. The original declarations presented with the TRO application can be considered by the court in deciding whether to issue a PI. Under extreme time pressures, to expedite the presentation of evidence, it may be possible—albeit usually unwise—at the outset of their testimony for witnesses to adopt their declarations, either those given previously and submitted with the TRO application or those prepared especially for the PI hearing (and served on the defendants in advance of the hearing). This still permits cross-examination on the subject matter of the declarations, but it economizes on trial time. The same practice may be followed for depositions. The far better practice, however, is to have the court hear both direct testimony and cross-examination live.

The relative speed of the procedure, at least as measured in antitrust terms, is largely disadvantageous to the government because most relevant information is in the hands of others and because the persuasive burden—whatever the technical legal burden—of convincing a court to interfere with a transaction lies with the government. The most that can be said is that the fast pace may help the

plaintiff maintain the initiative. Where essential data has been difficult to obtain and areas of the case require additional discovery, the fast pace especially works to the defendants' advantage. There is a strong case for conditioning a speedy hearing on an equally speedy disclosure by defendants of all necessary information. Staff may make a similarly strong case when the government has proceeded with all due diligence but has been unable to discover essential facts. When appropriate, a motion to compel discovery or compliance with the premerger notification rules (where the response has been inadequate and the Division maintains that the parties are not in substantial compliance) on an expedited basis might accompany the request for a TRO.

In deciding whether to recommend that the Division seek preliminary relief, staff should consider: (1) the strength and complexity of our case on the merits; (2) the magnitude of the probable injury to competition from the merger or acquisition, how quickly it is likely to occur, and the extent to which, absent preliminary relief, it can be reversed or forestalled after a trial on the merits (including the practicability and efficacy of divestiture); (3) the amount of harm to public and private interests that the defendants will be able to claim; (4) how far advanced preparation of the case will be at the time of filing; and (5) any special problems or advantages (e.g., logistical considerations, or the necessity for an unusual form of relief such as a mandatory injunction upsetting the current status quo). As a general rule in Section 7 cases, the presumption will be in favor of seeking preliminary relief, given the fact that, in its absence, final relief is almost certain to be less effective than if some form of interlocutory injunction had been entered. Preliminary relief also provides the defendants and the court with a powerful incentive to try the case expeditiously; without it, defendants have incentives to delay.

c. Hold-Separate Orders

Staff should be prepared to react to defense arguments that hold-separate orders adequately protect the interests of the government. Although hold-separate orders are often distinguished from PIs (i.e., absolute prohibitions on consummation of the acquisition or merger), they are in fact merely a species of PI. Tactically, the decision on how to react to a proposed hold-separate order is extremely important because the courts tend to seek a middle ground. If the government implies that a hold-separate order may be adequate, the chances of obtaining a complete prohibition on consummation of the transaction are greatly reduced. On the other hand, if the government refuses to admit that a hold-separate order could be adequate relief when this is true, even as a less desirable alternative, it may be faced with an inadequate order drawn by a judge who has been given little help in its formulation, or the complete denial of relief by a judge who might have been willing to issue a hold-separate order.

Nonetheless, where preliminary relief is sought in Section 7 cases, the Division generally seeks to prohibit consummation of the proposed merger or acquisition. The Division generally opposes hold-separate orders for the following reasons: (1) divestiture, which will be necessary if the Division prevails on the merits after a hold-separate order is entered, is often difficult to accomplish; (2) under a hold-separate order, there will often be an interim loss of competition because the two firms have limited incentives to compete against each other while under common ownership; (3) even under a hold-separate order, it is difficult to prevent the acquiring firm from obtaining confidential information from the acquired firm; and (4) under a hold-separate order, acquired firms typically become progressively weaker as time passes, making it less likely that competition will be fully restored even if the Division ultimately prevails on the merits. The case law supports the Division's position that hold-separate orders are usually inadequate. *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1506-09 (D.C. Cir. 1986) (Bork, J.); *United States v. Wilson Sporting Goods Co.*, 288 F. Supp. 543, 569-70 (N.D. Ill. 1968). *But see FTC v. Weyerhaeuser Co.*, 665 F.2d 1072 (D.C. Cir. 1981) (upholding order in special circumstances).

Staff also can argue, by analogy to cases interpreting Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), that a hold-separate order is appropriate in lieu of enjoining the acquisition only if "significant equities favor the transaction *and* the less drastic restraint of a hold separate order realistically can be expected (a) to safeguard adequate eventual relief if the merger is ultimately found unlawful, and (b) to check interim anticompetitive harm." *FTC v. Weyerhaeuser Co.*, 665 F.2d at 1085 (emphasis in original). In making this determination, the district court should recognize that a showing by the government that it is likely to succeed on the merits creates a presumption that the acquisition should be enjoined. *See FTC v. PPG Indus.*, 798 F.2d at 1506-1508. Finally, while private equities can be considered, "private equities alone are insufficient to justify entry of a hold separate order." *Id.* at 1506.

C. Discovery Under the Federal Rules of Civil Procedure

After the filing of the complaint, discovery should begin at the earliest time possible. Pretrial discovery will typically proceed at a faster pace in a merger case than it will in a nonmerger civil case. With the investigatory powers available to the Antitrust Division under the amendments to the Antitrust Civil Process Act and the premerger notification procedures established by the Antitrust Improvements Act of 1976, the Division has substantial prefiling investigatory tools to develop its case during the investigation. For example, CID depositions of employees of defendants are admissible at trial as admissions (however, CID depositions of third parties are not typically admissible for the

government, but may be for the defendants under Rule 32. Staff should therefore consider whether information needed from third parties can be obtained effectively through interviews as well as whether the deposition is useful to lock-in testimony). While these tools are of great assistance in developing the case, discovery is still a necessary element in case development. To expedite the case, staffs should use pretrial discovery procedures chiefly to isolate and narrow the issues of the litigation. Consulting the language of the most recent cases can help staff better formulate requests for admissions, interrogatories, and deposition questions.

The discovery provisions of the Federal Rules of Civil Procedure were substantially revised in 1993. For example, the revisions imposed limits on the number of depositions and interrogatories and established a procedure for parties to meet and prepare a discovery plan for presentation to the court. Each federal district court has the option to accept all, part, or none of the new rules. It is essential that staff consult with the local U.S. Attorney's Office regarding the extent to which the court in the district in which the case is filed has adopted the 1993 amendments. Staff should obtain a copy of the local rules prior to filing the case and inquire of the U.S. Attorney's Office if there are accepted practices and procedures in the district that may not be reflected in the local rules or in general orders issued by the court.

1. Initial Disclosures and Planning Discovery

Absent agreement, court order, or local rule, no discovery may be commenced until the parties meet to develop a discovery plan. *See* Fed. R. Civ. P. 26(d), (f). The meeting must be held at least 14 days prior to the first scheduling conference or due date specified in the court's scheduling order. *See* Fed. R. Civ. P. 26. Form 35 is provided for the proposed discovery plan. The subjects to be addressed in the discovery plan include subjects of discovery; changes in the timing, form, or requirement for Rule 26(a) disclosures; timing of discovery; changes to limitations on discovery. *See* Fed. R. Civ. P. 26(f); Form 35. The proposed discovery plan must be submitted to the court within 10 days after the meeting. In formulating the initial scheduling order, the court is to consider the proposed discovery plan.

The Federal Rules of Civil Procedure also provide that within 10 days after the parties meet to develop a discovery plan, and without waiting for a discovery request, each party must disclose certain information "relevant to disputed facts alleged with particularity in the pleadings." Fed. R. Civ. P. 26(a)(1) advisory committee's note. This requirement may be suspended by stipulation, court order, or local rule. The required disclosures include the name, address, and

telephone numbers of individuals likely to have the information and copies or descriptions by category of documents containing such information. The initial disclosure must be based on information "reasonably available" to the disclosing party, and a party "is not excused from making the disclosures because it has not fully completed its investigation of the case." Fed. R. Civ. P. 26(a)(1). It is anticipated that supplementation of disclosure information may be required.

Rule 29 provides that the parties may by written stipulation modify any of the discovery limits imposed by the rules without leave of the court, unless the court orders otherwise. However, any stipulations extending time for discovery responses cannot interfere with the times set by the court for completion of discovery, hearing of motions, or trial.

Consistent with the scheduling order, staff may obtain, or be asked to provide, discovery through the use of interrogatories, requests to produce documentary materials, requests for admissions, and depositions. The following is a brief description of some practical considerations that might arise during the discovery period.

2. Use of Depositions

Depositions are often the most useful means of conducting pretrial discovery. If properly employed, depositions can narrow the issues of the case, expedite agreements and stipulations between the parties, authenticate documents, and shorten the amount of trial time required for the case.

This section is not intended as a comprehensive review of the legal principles applicable to, or techniques for, conducting depositions, because there are many valuable texts on these subjects. *See, e.g.,* 8 *Wright* §§ 2101-2300; 6 *Moore*. This section is intended only to suggest general methods and practices that have been used successfully by Division attorneys in the past.

a. Applicable Federal Rules of Civil Procedure

During the preparation for and taking of depositions, staff should be familiar with Rules 26 to 32 of the Federal Rules of Civil Procedure, as well as the sanctions provisions of Rule 37 and the evidentiary and subpoena provisions of Rules 43 and 45, respectively. Staff should consult the relevant sections of such texts as *Wright* and *Moore* in determining how to prepare and conduct depositions.

Absent leave of the court, agreement of the parties, or a differing local rule, no more than 10 depositions per side may be noticed. *See* Fed. R. Civ. P.

30(a)(2)(A), 31(a)(2)(A). A Rule 30(b)(6) deposition is treated as a single deposition even if more than one person is designated to testify. *See* Advisory Committee Notes to Rule 30(a)(2)(A). The ten-deposition limit applies to all depositions, oral depositions and depositions by written question, unless changed by leave of court or stipulation of the parties. *See* Fed. R. Civ. P. 31(a)(2)(A). No person may be deposed more than once without leave of the court or agreement of the parties. *See* Fed. R. Civ. P. 30(a)(2)(B), 31(a)(2)(B). No deposition may be taken before the initial discovery meeting unless the deponent is expected to leave the country and be unavailable for examination. *See* Fed. R. Civ. P. 30(a)(2)(C).

b. Purpose of Depositions

Under Rule 26, depositions may be taken for use as evidence at trial or for discovery. As a discovery tool, a deposition may be used to find facts that relate to the claim or a defense of a party taking the deposition. Depositions of party opponents and, in some circumstances, of nonparty witnesses, may be admissible as substantive evidence at trial. *See* Fed. R. Evid. 801(d)(2), 804(b)(1).

Under certain circumstances, it may be advisable to take the depositions of witnesses who reside more than 100 miles from the place of the trial because the court, in its discretion, may refuse to issue trial subpoenas to witnesses residing that distance from the place of trial. Staff should ascertain whether there is any possibility that the court might refuse to issue trial subpoenas for distant witnesses and may, out of an abundance of caution, find the deposition procedure to be the best available means of obtaining and preserving the testimony for possible trial use. While a witness may be more effective presenting his or her testimony live at trial, circumstances peculiar to the witness may make it necessary or advisable to obtain the witness's testimony through deposition even if the court would issue a subpoena.

The deposition of any witness may be used for impeachment purposes at trial. *See* Chapter IV, Part C.2.k (describing other procedures involving the use of depositions as evidence at trial).

c. Persons Whose Depositions May Be Taken

i. Requirements Under the Rules

Under Rule 26, any party may take the testimony of any person, including a party, by deposition. This includes corporations, partnerships, and other associations, as well as individuals.

Rule 30(b) provides that reasonable notice of the taking of the deposition be given to every party. The notice must set forth the time and place of the taking of the deposition, the name and address of each person to be examined, if known, or, if the name is not known, a general description to identify the particular class or group of persons to which he or she belongs. A notice and accompanying subpoena may name as a deponent a corporation, partnership, association, or government agency and describe with reasonable particularity the matters upon which examination is requested. The organization must then designate one or more of its officers, directors, managing agents, or other persons to testify on its behalf about the matters stated in the notice and subpoena. A subpoena to a nonparty corporation, partnership, association, or governmental entity must advise that party of a duty to make such a delegation. *See* Fed. R. Civ. P. 30(b)(6). Under § 13 of the Clayton Act, the court may grant a motion for nationwide service of process in antitrust cases brought by the United States. *See* 15 U.S.C. § 23.

The notice must also state the method by which the testimony shall be recorded. Unless the court orders otherwise, the testimony may be recorded by audio, audiovisual, or stenographic means. A party other than the one noticing the deposition may arrange, at its own expense, for the recording of a deposition stenographically. *See* Fed. R. Civ. P. 30(b)(3). If a party offers deposition testimony recorded by nonstenographic means in a court proceeding, the party must provide the court with a transcript of the portions used. *See* Fed. R. Civ. P. 32(c). Where it may be important or tactically advantageous to provide to a judge or jury an audio and visual presentation of the testimony of a nonappearing witness, staff should consider videotaping a deposition. If staff is taking a deposition of a government witness in lieu of an appearance at trial, staff should weigh the advantages of having its witness seen and heard against the possible discomfort and self-consciousness to the witness that videotaping might cause.

ii. Practical Considerations

When the Division decides to take the depositions of certain individuals or representatives of corporations, it should give adequate advance notice to all parties to the action. It is good practice to inform the witness or his or her attorney of the tentative date of the deposition prior to filing the notice and serving the subpoena. When practicable, efforts should be made to interview the witness in advance of this testimony. Staff should also attempt to interview a third party prior to a deposition noticed by the defendants. When staff also contemplates requiring documents from the deponent by means of a subpoena *duces tecum*, staff should allow the deponent adequate time to assemble the materials.

Notice of the taking of a deposition should be filed in the jurisdiction where the case is pending and in the jurisdiction where the deposition will be taken. The local rules may not allow the issuance of a deposition subpoena until such time as the clerk of the district court in the jurisdiction where the case is pending receives a certified copy of a notice.

If a subpoena *duces tecum* is to be served on a third party, a list of the materials to be produced, as set forth in the subpoena, must be attached to, or included in, the notice. *See* Fed. R. Civ. P. 30(b). If the notice is to a party deponent, it may be accompanied by a request for production of documents under Rule 34 at the time of the taking of the deposition. *See* Chapter IV, Part C.4 (discussing Rule 34 document requests).

d. Place of Deposition

i. Requirements Under the Rules

If the parties and the witness agree on the location, a deposition can be scheduled anywhere. In the absence of such an agreement, the deponent usually must be deposed within 100 miles of where he or she is employed, resides, or regularly transacts business. *See* Fed. R. Civ. P. 45(c)(3)(a)(ii). The court may be willing to issue an order altering the place of the deposition upon the motion of a party or the deponent if necessary to avoid undue burden or expense. *See* Fed. R. Civ. P. 26(c)(2).

ii. Practical Considerations

Prior to the time of the deposition, staff should make arrangements for adequate space for taking the deposition, the presence of an officer authorized to administer oaths, and the attendance of a court reporter to record testimony (often the court reporter is a designated officer who can administer oaths).

The U.S. Attorney in the district in which the deposition is to be taken, or the Antitrust Division field office, if one is found in that district, is usually accommodating in making arrangements for taking depositions. In addition, the U.S. Attorney's staff or field office chief can provide staff with advice as to the local practice for taking depositions.

e. Length of Depositions

The parties are to consider imposing time limits on depositions at the discovery planning meeting. *See* Fed. R. Civ. P. 26(f). The court can also limit the length of depositions through an order or local rule. The court is to allow extra time for a

deposition if necessary for a fair examination or if the deponent or another party impedes or delays the examination. *See* Fed. R. Civ. P. 30(d)(2). The court can impose sanctions for such delays or interference.

f. Presiding Officer at the Deposition

i. Requirements Under the Rules

Under Rule 28, depositions taken within the United States will be taken before an officer authorized to administer oaths by the laws of the United States and the place where the examination is held or before a person appointed by the court where the action is pending. The person so appointed may administer oaths and take testimony.

ii. Practical Considerations

Where practicable, the court reporter should be qualified to administer oaths in these matters. In arranging for court reporting services, staff should consult Division Directive ATR 2570, "Payment of Litigation-Related Expenses."

g. Requiring the Presence of Witnesses

All witnesses, other than parties to the action, must be subpoenaed. Parties may also be subpoenaed as a matter of caution, although Rule 37(d) provides that willful failure of parties to appear authorizes the court, on motion, to strike the pleadings of that party or to take other punitive action. Depositions to occur in districts other than where the action is pending are noticed pursuant to Rule 45(a). A blank subpoena form can be obtained from the clerk of the court of any district and may be issued by counsel. One should check the local rules and the U.S. Attorney's Office to ensure that the particular district does not have any special requirements, such as the signature of the clerk of the court. Assuming it does not, the blanks in the form should be filled out to show the district in which the deposition will occur and whether it is for deposition only, or for production of documents as well. Subpoenas *duces tecum* may also be served upon nonparties and Rule 34 document requests may be used to obtain documents from parties. *See* Chapter IV, Part C.4.

Counsel may sign the subpoena as the issuing officer. Service on the deponent is made by delivery of a copy of the subpoena by any person over 18, although generally counsel for the witness will agree to accept service. If service must be done formally, staff should consult with the U.S. Attorney's Office in the district in which the deposition will be taken to arrange for service. *See* Fed. R. Civ. P.

45(b). Notice of service of the subpoena should also be provided to opposing counsel and filed in the jurisdiction where the case is pending.

h. Taking the Deposition

Once the witness is sworn and counsel's appearances are noted for the record, the following procedures are suggested for conducting the deposition.

i. Waiver of Formalities

As part of the discovery plan, the parties should stipulate waiver of certain of the formalities provided for by the Rules for depositions that do not appear to be necessary. Rule 29 authorizes the parties to agree among themselves, by written stipulation, "that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions" taken in strict observance of the rules. The requirement that stipulations be in writing is met by having them included in the discovery plan. These stipulations can also be recorded in the transcript of a deposition if not included in the discovery plan.

Although the rules provide that many defects in deposition procedures are automatically waived unless a timely objection is made, it is desirable for clarity of the record and for trial preparation purposes to eliminate before trial all possible objections related to formalities. Stipulations waiving such deposition formalities should be limited to (1) objections to the qualification of the presiding officer (after ascertaining whether or not he or she is a relative or employee of the deponent or opposing counsel, or has a financial interest in the case) and the time, place, and notice of taking the deposition; (2) objections to any errors or irregularities in the completion and return of the deposition by the presiding officer; (3) an agreement that the deponent may sign the transcript of his or her testimony before any notary; and (4) an agreement that attorneys for the respective parties may agree to corrections of the transcript at any time prior to submission to the court. Stipulations relating to deposition procedures should be included in the discovery plan.

Any defects that occur during the deposition may be cured by a stipulation at that time or at the end of the deposition session.

ii. Scope of the Examination

Rule 26(b) provides that the deponent may be examined regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of either party. The deponent

may also be questioned concerning the existence, description, and location of any books or records and the location of persons having knowledge of discoverable matter. Inadmissibility at trial is not a proper ground for objection if the testimony appears reasonably calculated to lead to the discovery of admissible evidence.

It is permissible for the witness to offer hearsay evidence. The witness should answer all nonprivileged questions, leaving the determination of their admissibility as evidence for the trial.

iii. Examination and Cross-Examination

Pursuant to Rule 30(c), examination and cross-examination may proceed as permitted at trial. Leading questions may be used in the direct examination of a hostile witness, an adverse party, or a witness identified with an adverse party. *See* Fed. R. Evid. 611(c). The credibility of the deponent may be attacked by any party, including the party calling him or her. *See* Fed. R. Evid. 607. While cross-examination of the deponent should be limited to the subject matter of the direct examination and to matters affecting the credibility of the witness, Fed. R. Evid. 611(b) allows the court, at its discretion, to permit inquiry into additional matters as if on direct examination.

iv. Objections to Evidence

Objections to questions during a deposition are to be stated "concisely and in a non-argumentative and non-suggestive manner." Fed. R. Civ. P. 30(d)(1). A party may "instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion [for a protective order]." *Id.* Rule 32(d)(3)(A) provides that objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of a deposition, unless the ground for the objection is one which might have been obviated or removed if presented at that time.

Objections to irregularities of a more formal nature, such as the form of questions and answers, the oath, the conduct of the parties, and other similar matters which might be obviated, removed, or cured if promptly presented, are waived unless "seasonable" objections are made at the taking of the deposition. *See* Fed. R. Civ. P. 32(d)(3)(B).

Rule 30(d) permits any party or the deponent, upon a showing that the examination is being conducted in bad faith or in a manner to annoy, embarrass, or oppress the deponent or party unreasonably, to move the court in which the

action is pending or the court in the district in which the deposition is being taken for an order to cease taking the deposition or to limit the scope and manner as provided in Rule 26(c). Upon demand of the moving person, the deposition shall be suspended for the time necessary to make such a motion. The court may award reasonable expenses, including attorneys' fees, to the prevailing party. *See* Fed. R. Civ P. 37(a)(4).

v. Recording Objections

Rule 30(c) provides that the presiding officer shall note upon the deposition all objections made at the time of the examination to the qualifications of the officer taking the deposition; the manner of taking; the evidence presented; the conduct of any party; and any other objections. Evidence objected to shall be taken subject to the objections.

vi. Documentary Evidence

Any documents to be used during the deposition should be submitted to the presiding officer prior to use to be numbered serially and marked for identification. The defendant may also use documents during cross-examination. It is good practice to mark each exhibit with the witness's name as well as a number or letter (e.g., "Allen No. 1") and to attach copies of all exhibits to the transcript. Because local rules or practices may be applicable, staff should consult the local rules and the court clerk. *See* Chapter VI.B (providing a fuller discussion of organizing exhibits and employing them in examination).

i. Formalities at the Conclusion of the Deposition

i. Correcting the Transcript and Signing by the Witness

Review and signature are required only if requested by the deponent or a party before completion of the deposition. It is advisable for staff to request the reading and signing of the transcript by every witness it deposes. If the request is made, the deponent has 30 days after notification by the officer that the transcript is available in which to review the transcript and, if there are changes in form or substance, to sign a statement setting forth the changes and the reasons for making them. The officer should state in the certificate if review and signing were requested and list the changes made by the deponent within the period allowed. *See* Fed. R. Civ. P. 30(e). The parties may wish to include in the discovery plan an agreement that witnesses will read and sign the transcript within a period less than 30 days. As a practical matter, the parties review the deposition transcript and discuss and agree on corrections that should be made in the record before it is signed. If the changes made by the deponent contradict or

materially change the testimony, it may be advisable, under certain circumstances, to seek leave of the court to reopen the deposition to examine the witness, under oath, on the reasons for the new statements and changes. Many courts hold that the changes to a deposition transcript do not replace the original answers, which remain part of the record and can be used at trial; some courts have even rejected critical alterations. *See* 8A *Wright* § 2118.

Mechanical errors and irregularities, such as the way the reporter transcribed the testimony or prepared the transcript for filing, or otherwise dealt with the deposition as he or she is required to do under Rules 30(c) and 31(b), may be corrected by agreement of the parties. In the absence of agreement on such mechanical matters, Rule 32(d)(4) authorizes a party to move, with reasonable promptness after a defect is or might have been ascertained, for suppression of the deposition or any part of it. Such a motion may be used to obtain court approval of the corrections sought.

As a matter of convenience, the parties should stipulate at the deposition that, if the deponent does not wish to make any material changes in his or her testimony after it has been transcribed, the deponent may sign before any notary public. This obviates the need to bring back the presiding officer. However, the deposition should then be returned to the presiding officer, or reporter, so that the officer may comply with Rule 30(f).

ii. Certificate of Presiding Officer

Rule 30(f)(1) requires that the presiding officer certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless subsequent formalities are waived, the officer should then seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of _____" and promptly file it with the court in which the action is pending or send it to the attorney who arranged for the transcript. Any protective orders affecting public filing should also be marked on the envelope.

iii. Filing in Court and Inspection

Rule 30(f)(1) provides that the presiding officer shall promptly file the deposition with the court where the action is pending or send it to the attorney who arranged for the transcript. A deposition that has not been filed, and thereby made part of the record of the case, cannot be considered by appellate courts hearing interlocutory appeals. Fed. R. App. P. 10(a). Mere filing, however, does not make the deposition part of the trial record. Moreover, many districts have

adopted rules prohibiting filing of all transcripts due to the paperwork burden. Staff should, as always, check the local rules.

j. Expenses of Taking Depositions

The party taking the deposition bears the cost of recording the deposition. *See* Fed. R. Civ. P. 30(b)(2). Some of the costs of taking depositions may later be recovered by the prevailing party pursuant to 28 U.S.C. § 1920, which enumerates costs that may be taxed against losing parties in the federal courts. *See also* 28 U.S.C. § 2412.

Among the taxable costs allowed by § 1920 are marshal's fees, the costs of deposition stenographic transcripts, and witnesses' travel expenses. These items of cost may later be awarded in the court's discretion.

Certain expenses may also be awarded to prevailing parties under Rule 37, including penalties imposed upon parties who fail to appear at their own depositions and upon parties, deponents and their counsel who fail to answer, or give evasive or incomplete answers to, questions at depositions.

k. Use of Deposition at Trial

i. Application of the Federal Rules of Civil Procedure

Rule 32(a) provides that a deposition, or any part thereof, may be used at trial or in any preliminary hearing so far as admissible under the Federal Rules of Evidence, against any party that was present or represented at the deposition or that had reasonable notice of the deposition.

The following provisions of Rule 32(a) are applicable:

1. A deposition may be used by any party to contradict or impeach the testimony of deponent as a witness.
2. The deposition of a party (including its officers, directors, or managing agents, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party) may be used by an adverse party for any purpose.
3. The deposition of any person may be used by any party for any purpose if the court finds one of the following:
   - The witness is dead.
   - The witness is more than 100 miles from the place of trial or is out of the United States, unless the absence was caused by the party offering the deposition.

- The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment.
- The party offering the deposition has been unable to procure the attendance of the witness by subpoena.
- Upon application and notice, a showing of exceptional circumstances is made.

A deposition cannot be used against a party who, having received fewer than 11 days' notice of a deposition, promptly filed for a protective order under Rule 26(c)(2) requesting that the deposition not be held or be held at a different time or place, and the motion is pending at the time the deposition is taken. A deposition also cannot be used against a party who demonstrates that, when served with the notice, it was unable to obtain counsel to represent it at the deposition, despite diligent efforts to do so. *See* Fed. R. Civ. P. 32(a)(3).

ii. Application of the Federal Rules of Evidence

The Federal Rules of Evidence allow more liberal use of depositions than Rule 32(a):

1. Deposition statements of a nonparty witness may also be offered at trial as substantive evidence if the deponent testifies at trial and is subject to cross-examination concerning the statements, and one of the following applies:
   - The statements are inconsistent with his or her trial testimony, *see* Fed. R. Evid. 801(d)(1)(A).
   - The statements are consistent with his or her trial testimony and offered to rebut a charge that the trial testimony is fabricated or improperly influenced or motivated, *see* Fed. R. Evid. 801(d)(1)(B).
2. A statement that is an admission by a party-opponent is admissible as substantive evidence under the circumstances described in Fed. R. Evid. 801(d)(2).
3. If a witness is unavailable, as defined by Fed. R. Evid. 804(a), the deposition will not be excluded as hearsay when offered against a party if that party had an opportunity and similar motive to develop the testimony of the witness at his or her deposition by direct, cross, or redirect examination. *See* Fed. R. Evid. 804(b)(1).

iii. Use of Part of the Deposition

If only part of a deposition is offered in evidence, an adverse party may require the contemporaneous introduction of any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts. *See* Fed. R. Civ. P. 32(a)(4); Fed. R. Evid. 106.

iv. Objections to Admissibility

Rule 32(b) provides that objections may be made at trial to the admissibility of any deposition for any reason which would require the exclusion of the evidence if the witness were then present and testifying. The only exceptions to this Rule relate to objections that must be made at the time of the deposition. *See* Fed. R. Civ. P. 32(d)(3).

v. Effect of Taking or Using Depositions

The Federal Rules of Evidence have eliminated the concept that a party calling or taking the deposition of a witness vouches for that witness and is barred from impeaching the witness.

Fed. R. Evid. 607 provides that the credibility of a witness may be attacked at trial by any party, including the party calling the witness. Fed. R. Evid. 611(c) provides that when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party at trial, interrogation may be by leading questions. Taking the deposition of a witness does not bind the party to frame questions as on direct examination.

3. Use of Interrogatories

a. Applicable Federal Rule of Civil Procedure

Under Rule 33, a maximum of 25 written interrogatories, including "all discrete subparts," may be served upon any party. A question asking about communications of a particular type counts as one interrogatory, even though it requests the time, place, persons present, and contents separately for each communication. *See* Advisory Committee Notes to Rule 33(a). The limitation can be altered by local rule, order of the court, or stipulation of the parties. *See* Fed. R. Civ. P. 33(a).

b. Form and Use of Interrogatories

Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated. Unless the court rules or the parties agree otherwise, answers and objections must be served within 30 days after the service of the interrogatories.

An interrogatory is proper so long as it is directed at obtaining information reasonably calculated to lead to the discovery of admissible evidence relevant to the subject matter involved in the pending action. *See* Fed. R. Civ. P. 33(c), 26(b)(1).

Under certain circumstances, a party may answer an interrogatory by specifying the records from which the answer may be ascertained and affording the serving party an opportunity to examine and copy such records. *See* Fed. R. Civ. P. 33(d). Where defendants respond to interrogatories by directing Division attorneys to a mass of business records, or even to all of the defendants' records, the response may be objected to since Rule 33(d) specifies that the option of producing records is permitted only where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Further, Rule 33(d) requires that the answering party "specify" the records from which an interrogatory may be answered. Such specification must "be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." Fed. R. Civ. P. 33(d).

Interrogatories requiring statements of opinion or contentions may be helpful as a means of narrowing the issues and determining whether defendants will raise affirmative defenses. Such interrogatories are important in establishing what the affirmative defense is and how it is framed. In circumstances not involving affirmative defenses, it is usually the better practice for Division attorneys to avoid asking numerous and detailed "contention" interrogatories. The court may order that this type of interrogatory "need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time." Fed. R. Civ. P. 33(c).

Interrogatories are an important tool in obtaining information such as the identification of corporate officers, the company's business in the relevant products or geographical markets, names of personnel having information that is relevant to the subject matter of the action, the description and location of documents that may later be subject to a Rule 34 request, dates and places of meetings, and other information of material value to the extent not already collected prior to the filing of the complaint.

c. Objections to Interrogatories

Interrogatories that are objectionable in part must be answered to the extent not objectionable. *See* Fed. R. Civ. P. 33(b)(1). Grounds for objections must be stated with specificity and "[a]ny ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." Fed. R. Civ. P. 33(b)(4).

Claims of privilege must be made in writing and described with specificity. *See* Fed. R. Civ. P. 26(b)(5). A party claiming privilege must "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *Id.*

The courts tend to be quite liberal in requiring answers to interrogatories, and objections to those served upon the Division usually should be based on factors that create an undue burden or that would not lead to the discovery of evidence admissible at trial. Staff should be careful, however, not to waive any of the Division's rights with respect to information of a privileged nature.

4. Requests to Produce Documents

a. Applicable Federal Rule of Civil Procedure

Under Rule 34, a party may, without leave of court, serve upon any other party a request to produce and permit the inspection and copying of designated documents, not privileged, that are relevant to the subject matter of the action and which are admissible as evidence or appear reasonably calculated to lead to the discovery of admissible evidence. Rule 34 also permits service of a request to permit entry upon designated land or other property, such as a plant, for inspection, photographing, surveying or any other operation within the scope of Rule 26(b). Staff can also have an expert inspect the property.

Documents may be obtained from nonparties by subpoena issued under Rule 45, which may also command the respondent to appear at a deposition. Such a deposition may be useful to authenticate or explain the documents produced.

b. Use of Requests to Produce Documents

Rule 34 requires that the request specify the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request must also specify a reasonable time, place, and manner of carrying out the inspection and copying.

The party upon whom the request is made is required to serve a written response within 30 days after service of the request, unless the court orders or the parties agree to a different time. Unless objection is made, the response must state, with respect to each item and category, that inspection and copying will be permitted as requested. If objection is made to the request, the reasons for the objection must be stated; if objection is made to only part of an item or category, the part shall be specified and inspection permitted of the remaining parts.

c. Drafting the Request

Many of the same considerations that apply to drafting grand jury subpoenas *duces tecum* and documentary CIDs are equally relevant to Rule 34 requests. *See* Chapter VI, Part B. Requests should be as specific as possible. Careful consideration should be given to limiting the time frame of the documents requested. Under most circumstances, it is likely that some documents will have been obtained during the investigation stage by means of CIDs or premerger notification procedures. This may limit the need for extensive document discovery from defendants.

d. Compliance Procedures

i. Limiting the Scope

Attorneys for the parties frequently attempt to narrow the scope of document requests through negotiation. Good faith agreements of this nature are much preferred to time-consuming litigation over such matters. Information about the corporate filing system may permit agreements limiting file searches to specific locations or files. It may also be possible to exclude certain kinds of documents, such as invoices or other transaction documents. The terms of any negotiated agreement related to a Rule 34 request should always be reduced to writing, and staff should preserve its right to require production of all documents originally requested at a later time.

ii. On-Site Screening

A preliminary screening at defendants' offices is one method of dealing with a large volume of documents that are responsive to a document request and of eliminating a great many unimportant documents. Moreover, defendants' employees and attorneys are available to answer questions and facilitate the review.

Conversely, there is a tendency during such on-site screenings to move too fast, thereby missing some important documents. The better procedure is to use such

screenings to eliminate voluminous, clearly unnecessary categories of documents and to reserve remaining documents for more deliberate review later.

iii. Requiring Originals or Copies

Staff should require the production of originals for inspection and copying. While originals are preferable to copies, the differences in quality are often not significant, assuming the defendant has made a good faith effort to provide good copies. Division attorneys may well decide to accept delivery of copies in their offices, reserving the right to inspect originals. This may be advantageous if defendants also agree to number and segregate the documents.

iv. Numbering and Sorting

Numbering documents facilitates their control. In most cases it is obviously preferable for defendants to number the documents, and defendants usually desire to do so for their own organizational purposes. The request should describe the numbering system staff prefers. The documents should be numbered so that they are distinguishable from second request and CID documents.

v. Privileged Documents; Confidentiality

The Rule 34 request should require identification of all documents withheld on any basis of privilege, using a form similar to those used for grand jury subpoenas or documentary CIDs.

Defendants may also desire to limit the Division's use of documents containing competitively sensitive or highly confidential information. In evaluating the defendants' request for protection, staff should consider the government's preference for open proceedings, the age of the information the defendants seek to protect, and the significance of the information in the case. *See United States v. IBM*, 67 F.R.D. 40 (S.D.N.Y. 1975). Under appropriate circumstances, the Division will enter into agreements to protect the sensitive portions of documents, and, pursuant to Rule 26(c), move for a protective order. Protective orders should not be broader than necessary to protect the parties' legitimate interests and should not significantly interfere with the conduct of discovery or trial. Staff should always consult with the FOIA Unit before entering into agreements for protective orders. *See also* Chapter III, Part E.6.b.(5)(c).

In appropriate circumstances, staff may agree to provide defendants with notice of the intention to disclose such documents to third parties. Such agreements should be reduced to writing and specifically exclude economists, computer personnel, or other individuals working for the Division on a contractual basis.

The agreement should be drafted to avoid committing the Division to procedures that would significantly affect the use of such information at trial or in pretrial depositions with third parties that are important to the government's case.

This issue is often raised during discovery conferences. The Division customarily opposes sealing or otherwise limiting access to the trial record by the public, although the Division is amenable to protection of third parties' confidential information when such protection can be provided without compromise of the need to have the case tried in open court (e.g., redaction of confidential information irrelevant to the case from exhibits). *See* 28 C.F.R. § 50.9.

5. Requests for Admissions

Under Rule 36, a party may serve upon any other party a request for the admission of the truth of any matter, not privileged, that is relevant to the subject matter of the pending action and that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request and served with it.

Rule 36 is designed to reduce trial time by eliminating issues from the case and by facilitating proof with respect to issues that cannot be eliminated. A party denying a requested admission may be subject to court ordered payment of the expenses, including attorneys' fees, incurred by the party in proving the matter at trial. *See* Fed. R. Civ. P. 37(c)(2).

A request for admission must set out separately each matter as to which an admission is requested, and the matters are deemed admitted unless the party to whom the request is directed serves upon the requesting party a written answer or objection within 30 days after service of the request, unless the court orders or the parties agree to a different time schedule.

Under Rule 36, the effect of admitting a matter is to establish the truth or genuineness of that matter for the purpose of the pending action. It is not an admission for any other purpose and may not be used against the admitting party in any other proceeding. Rule 36 also authorizes the court to permit the withdrawal or amendment of an admission under appropriate circumstances. The Rule does not require that answers to requests for admissions be sworn; it merely requires the answers to be signed by the party or by his or her attorney.

Rule 36 requests for admission are typically used less often than the more common discovery devices of depositions, interrogatories, and document

requests. Such requests can, however, aid significantly in identifying and narrowing issues in a complex case. Rule 36 requests can most efficiently be used as part of a comprehensive pretrial plan for resolution of issues, and such a program should be subject to close supervision by the court.

The requests for admission may be used in conjunction with other pretrial devices, such as statements of contentions and stipulations of fact.

6. Disclosure of Expert Testimony

At least 90 days before trial (absent other direction from the court or stipulation by the parties), parties must disclose the identity of any expert witnesses to be used at trial. *See* Fed. R. Civ. P. 26(a)(2). If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party in an expert report, the disclosure of expert testimony shall be made within 30 days after the disclosure made by the other party.

An expert witness disclosure must include a written report, prepared and signed by the expert, containing:

> 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 of 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.

Fed. R. Civ. P. 26(a)(2)(B). An expert may not be deposed until the required report has been submitted. *See* Fed. R. Civ. P. 26(b)(4)(A). The parties have a continuing duty to supplement or correct the disclosure of expert testimony (as contained in the expert report or provided through a deposition of the expert) whenever the party learns the information is incomplete or incorrect. *See* Fed. R. Civ. P. 26(e)(1). The supplementary or corrected information must be provided at least 30 days before trial, unless otherwise directed by the court. *See* Fed. R. Civ. P. 26(e)(1), (a)(3).

7. Disclosure of Witnesses and Exhibits

Unless otherwise directed by the court, parties must identify all witnesses and exhibits to be used at trial at least 30 days before trial, except if they are to be used solely for impeachment. *See* Fed. R. Civ. P. 26(a)(3).

8. Continuing Duty to Correct and Supplement Disclosure

As with expert testimony, parties have a continuing duty to notify the other parties in writing if they learn that information disclosed is incomplete or inaccurate and if the additional or corrected information has not otherwise been made known to the other parties through discovery or in writing. Prior responses to an interrogatory, request for production, or request for admission must be amended if the party learns that the response is materially incomplete or incorrect. *See* Fed. R. Civ. P. 26(e).

9. Motions to Compel

If the party or person on which discovery is served objects, or if an answer is evasive or incomplete, the burden is on the party seeking discovery to move to compel compliance under Rule 37(a). The exception to this rule is that any party may move to compel if a party fails to provide the initial disclosure required by Rule 26(a). Motions to compel may only be made to the forum court, unless they are directed to nonparty witnesses outside the forum. *See* Fed. R. Civ. P. 37(a)(1). A motion to compel must include a certification that parties have in good faith conferred or attempted to confer to resolve the dispute. *See* Fed. R. Civ. P. 37(a)(2)(B).

If the motion to compel is granted or if the response is provided after the motion is filed, the court "shall" impose sanctions, including costs. The court need not do so if the withholding was "substantially justified" or if the movant failed to make a good faith effort to resolve the dispute before seeking a court order. *See* Fed. R. Civ. P. 37(a)(4).

A party that does not disclose information required under Rule 26(a) (initial disclosure) or 26(e)(1) (expert testimony) without substantial justification may be barred from using the information or witness as evidence, unless the failure is harmless. The jury may be informed of the failure to disclose. *See* Fed. R. Civ. P. 37(c)(1).

Rule 37 also provides that a failure by any party to participate in good faith in the development and submission of a proposed discovery plan as required by

Rule 26(f) may subject that party to the reasonable expenses, including attorneys' fees, caused by the failure. *See* Fed. R. Civ. P. 37(g).

D. Negotiating and Entering Consent Decrees

In general, adequate relief in a civil antitrust case is relief that will (1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred. Normally, the government is entitled to any relief that is reasonable and necessary to accomplish these ends. While the scope of relief obtained in prior antitrust cases may be viewed as precedent, the theory behind equitable relief is that it should be fashioned to fit the particular facts of the case at issue.

It is often possible to obtain effective relief without taking the case to trial. This section describes the procedures used by the Antitrust Division in negotiating and entering civil consent judgments under the Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 (APPA, Act, or Tunney Act).

1. Antitrust Procedures and Penalties Act

The APPA was enacted in 1974 and amended in 2004. The APPA subjects the Division's consent judgments to public scrutiny and comment. The Division must ensure complete compliance with the requirements of the APPA.

a. The Competitive Impact Statement

The first significant requirement of the APPA is that the government file with the court a Competitive Impact Statement (CIS) at the time the proposed consent judgment is filed. This document must be self-contained, setting forth the information necessary to enable the court and the public to evaluate the proposed judgment in light of the government's case. Its object is to explain why the proposed judgment is appropriate under the circumstances and why it is in the public interest. Because the CIS is directed to the public, as well as to the court, it should be written in a narrative style that avoids technical jargon. As a general rule, the CIS should not use extensive verbatim quotations from the complaint and judgment. Rather, care should be taken to make the CIS as understandable and persuasive as possible. Although the CIS should be tailored to each matter, the Division has developed standard language that should be used to reduce the drafting burden.

The CIS is the Division's explanation of its case, the judgment, and the circumstances surrounding the judgment. Therefore, it should not be the subject

of discussion or negotiation with defense counsel, and defense counsel will not be permitted to review the CIS prior to its filing with the court unless the Assistant Attorney General approves an exception to this procedure.

The APPA requires that the CIS "recite" certain topics, and all CISs are organized according to the statutory requirements: (1) the nature and purpose of the proceeding; (2) a description of the practices giving rise to the alleged violation; (3) an explanation of the proposed final judgment; (4) the remedies available to potential private litigants; (5) a description of the procedures available for modification of the judgment; and (6) the alternatives to the proposed final judgment considered by the Division. Although the statute does not specify that the CIS must discuss determinative documents, a seventh section on determinative documents is usually added to the CIS as this is a convenient place to publicly state what the determinative documents are or, more commonly, that there are no determinative documents. *See Massachusetts School of Law v. United States*, 118 F.3d 776, 784-85 (D.C. Cir. 1997) (discussing what qualifies as a determinative document). CISs also routinely discuss the standard of judicial review under the Tunney Act, even though this discussion is not required by the APPA.

The CIS's description of the nature and purpose of the proceeding and the practices or events giving rise to the alleged violation should go beyond the allegations in the complaint. The CIS should describe the defendants, the trade and commerce involved, and the challenged activity in sufficient detail to convey the essence of the alleged violation. For instance, in a merger case, the industry, the parties' relationship to the industry and to each other, and the theory of the violation should be explained. In a nonmerger case, the CIS should make clear what the defendant did and explain the resulting competitive harm. The Division drafts CISs not only to meet the requirements of the APPA, but also to provide the bar with useful instruction and guidance on the Division's enforcement intentions.

The CIS should describe the proposed relief in a manner that the public will understand. All material provisions of the proposed judgment should be discussed. The reasoning behind the Division's acceptance of the proposed relief and the anticipated competitive effect of the relief must also be set forth. Although this discussion should be persuasive, it should be candid as well.

The CIS must also describe and evaluate alternative forms of relief actually considered. This does not mean that negotiated language changes must be discussed unless such changes significantly alter the judgment's scope. Similarly, defendant's proposals which were unacceptable need not be discussed, unless they would have provided significantly broader relief than that ultimately

accepted. Even if a proposal met either of these two criteria, in general it would not qualify as an alternative form of relief actually considered unless it was (a) in the prayer of the complaint, (b) submitted to defense counsel in writing during negotiations, or (c) submitted to the Assistant Attorney General in final form for approval. In rare instances, a seriously considered alternative that does not meet these three criteria may exist (i.e., where extended negotiations were conducted with the defendant concerning a specific relief proposal). In such cases, staff should consult with the chief and the Director of Operations about whether it is appropriate to include a discussion of that proposal in the CIS. The discussion of alternatives and the Division's reasons for not adopting them should be candid.

The court must approve the relief accepted by the government if it is within the "reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995) (citations omitted). In making that determination, the Court is required to consider:

- The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
- The impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); see generally *United States v. SBC Commc'ns, Inc.*, 489 F.Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act). "More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (citations omitted). With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (*citing Bechtel Corp.*, 648 F.2d at 666); *see also Microsoft*, 56 F.3d at 1460-62. Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its

Complaint. The United States District Court for the District of Columbia recently confirmed in *SBC Communications*, that courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. §16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: [t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.

The CIS must also discuss the remedies available to potential private plaintiffs. This discussion will be brief and in most instances will be standardized.

b. Materials and Documents

The APPA requires the Division to file with any proposed consent judgment all materials and documents considered determinative in formulating the judgment. This is to be distinguished from materials and documents supportive of the litigation. *See Massachusetts School of Law v. United States*, 118 F.3d 776, 784-85 (D.C. Cir. 1997). In most cases, the relief is determined by the sum total of the Division's investigation and evidence. There will seldom be any particular document or documents that influenced the formulation or rejection of a particular item of relief. The materials and documents to be filed, if any, might consist of submissions by the defendants or other persons, including other government agencies or experts' studies that were determinative in formulating the judgment, or contracts that embody the terms of a divestiture. Staff should consult with the Director of Operations if there is any question about interpreting this requirement in a given case.

c. Publications in the Federal Register

The APPA requires that the proposed judgment and the CIS be published in the Federal Register "at least 60 days prior to the effective date of such judgment." There is, however, at least a five-working-day delay between submission of materials to the Federal Register and their publication. Because the Division does not request publication until the filings are made with the court, there consequently will usually be at least an additional five days added to the 60-day waiting period.

The APPA also requires that before the judgment can be entered, the Division must publish in the Federal Register any public comments the Division receives about the proposed judgment during the notice and comment period and the Division's reply to them. The Division may to respond to each comment directly by letter and attach each letter to a court filing, or it may have a unified response. Although which choice is appropriate depends on the circumstances, it is generally preferable to answer comments by a single response, filed and published, if possible, before the expiration of the waiting period. If meeting that target date is not practicable because of, for example, the actual or possible receipt of comments just prior to the close of the waiting period, the Division should file and publish all comments and one unified response as promptly as possible after the period has expired. As a matter of policy, the Division calculates the 60-day comment period from the date of publication in the Federal Register, or the last date of publication in the newspaper, whichever occurred later.

The Office of Operations will arrange for the necessary Federal Register publications. Federal Register notices are standardized, and should be prepared for the signature of the Director of Operations. *See* sample Federal Register notice. This sample is typical of a merger case requiring a divestiture. Notices for civil nonmerger cases are similar but tend to exhibit more variation given the diversity of practices being challenged and of proposed relief. Staff can obtain copies of recent published Federal Register notices from the appropriate special assistant.

d. Newspaper Publication

The newspaper notices required by the APPA, which summarize the proposed judgment and CIS and outline procedures available for the submission of comments, must begin appearing at least 60 days prior to the effective date of the judgment and must appear in the legal notice section. To provide interested persons with at least 60 days to submit comments, the Division calculates the

60-day comment period from the date of publication in the Federal Register, or the last date of publication in the newspaper, whichever occurred later.

Newspaper notices should be brief—if at all possible limited to 30 typewritten lines—to reduce the costs of publication. *See* sample newspaper notice. As with the sample Federal Register notice, the same newspaper notice is typical of a merger case requiring a divestiture. Staff can obtain copies of recent notices from the appropriate special assistant.

The Office of Operations will make arrangements for placing the newspaper notice in a newspaper of general circulation in the District of Columbia and in a newspaper of general circulation in the district where the action was filed. The APPA requires such publication in every case. The Office of Operations will also arrange for any additional publication that the court may order and will obtain the necessary affidavits of publication that will provide the basis for the Division to certify to the court that such publication has occurred.

Because newspapers occasionally fail to publish a notice or do so inaccurately, staff should check the text of the copy of the notice that the Office of Operations will send them from the newspaper in which publication is made, to ensure the correctness of the notice. If the newspaper notice is incorrect, the Office of Operations should be notified immediately to take corrective action.

As noted above, the court may sometimes require additional newspaper publication beyond the minimum requirements of the APPA, unaware of the cost this entails. When the cost of the additional publication appears to be excessive, staff should request a delay until it can ascertain the costs and, if possible, establish an alternative publication schedule that will reduce the cost but meet the court's objective.

2. Internal Procedures

It is the general practice of the Division not to begin settlement discussions until the appropriate Deputy Assistant Attorney General and the Director of Operations have decided that there is good cause to believe that the antitrust laws have been broken. Once defense counsel has broached the issue, however, the component to which the case is assigned is free to prepare a proposed first draft of a judgment if its chief believes it is advisable for the government to make a proposal.

The chief and the staff must submit to the Director of Operations any written settlement proposal they want to submit to defense counsel. Under no

circumstances should a draft settlement proposal be submitted to the defendants before the Director of Operations and the appropriate Deputy Assistant Attorney General have had an opportunity to review the proposal and the proposed case.

Judgment negotiations are conducted by staff under the immediate supervision of the chief. In some cases, the negotiations will be fairly straightforward and follow the general parameters of the original written settlement proposal. Where negotiations raise significant issues that were not addressed in drafting the original proposal, however, the appropriate Deputy Assistant Attorney General and the Director of Operations should be further consulted. The chief should provide a summary of the new issues involved, describe any areas of disagreement, and recommend the appropriate scope of relief.

Staff should make clear to defense counsel that final authority to approve the judgment rests with the Assistant Attorney General and, pursuant to the APPA, the judgment is subject to withdrawal or change at any time prior to its formal entry by the court. Defense counsel should also be advised that the APPA requires each defendant to file a description of specified oral and written communications with the government concerning the decree. 15 U.S.C. § 16(g). Defense counsel should also be informed that they will not be permitted to review court papers, other than the proposed judgment and hold separate stipulation and order, prior to filing with the court.

In preparing its proposed draft decree, staff should consult the Division's Work Product Document Bank for form and language used by the Division in its recent decrees. For merger decrees, staff should start with the model consent decree. Once staff's proposed draft decree has been approved, staff should conduct negotiations consistent with the overall plan of relief contained in the approved draft. Staff may consult informally with the Director of Operations to determine current Division practice and alternative relief proposals. Also highly useful to staff in framing appropriate relief is the Division's Policy Guide to Merger Remedies.

With regard both to the preparation of proposed draft decrees by staff as well as to decree proposals that may be made by defendants, note that the Division's standard decree language requires that the consent decree expire on the tenth anniversary of its entry by the court. Staff should not negotiate any decree of less than 10 years' duration, although decrees of longer than 10 years may be appropriate in certain circumstances.

When the proposed final version of the consent judgment is submitted for approval, the chief will submit a recommendation to the Director of Operations. The recommendation should include all necessary papers, including the

stipulation, the decree, the competitive impact statement, the Federal Register and newspaper notices, and the proposed press release. The Federal Register notice should be prepared for the signature of the Director of Operations. All papers should be forwarded for review with the recommended consent judgment. In many merger cases, a hold-separate order has been appropriate. The hold-separate order and stipulation are normally combined into the same document.

The Office of Operations must be notified at least 24 hours in advance of filing the proposed decree and related papers with the court so that the press release may be finalized for issuance. At the time of filing the judgment with the court, the requirements of the APPA and the procedures for complying with the Act should be explained to the court orally if feasible and otherwise by filing an explanation of the procedures, with a copy to counsel, if local practice permits. It should be emphasized that the waiting period may exceed 60 days because of the publication requirements and the possibility of receiving last-minute comments and that the judgment cannot validly be entered before the comment period is complete. The court should not sign and enter the decree until the requirements of the APPA have been met. Staff will file a certificate of compliance when the requirements are met. The Office of Operations must be notified immediately after the case has been filed and provided with the name of the judge and the file number. In addition, the Office of Operations must be notified as soon as the decree has been entered.

3. Consent Decree Checklist

Staff should keep track of the various requirements of the APPA for each consent decree. *See* sample checklist.

4. Consent Decree Standard Provisions

The Antitrust Division uses a number of decree provisions that are essentially standardized in form and that appear in virtually all decrees. Such provisions cover matters such as the form of stipulation, the preamble to the decree, jurisdictional and applicability clauses, notice of corporate changes provisions, the visitorial clause, the term of the judgment, and retention of jurisdiction. Division decrees also contain provisions (e.g., the compliance provisions) that may vary somewhat from one decree to another, due to the nature of the violation alleged or the specific circumstances of the industry or defendant involved.

To ensure appropriate Division consistency in the selection and wording of decree provisions, staff should always (1) consult the Division's Policy Guide to Merger Remedies, and (2) review several of the most recent decrees contained in the Division's Work Product Document Bank that closely parallel the case being settled. The Work Product Document Bank may also be reviewed to obtain recent copies of pleadings that are filed with the court during the process of entering consent decrees.

5. Certificate of Compliance with Provisions of APPA

Upon completion of compliance with the APPA, staff should file a Certificate of Compliance setting forth precisely how compliance was accomplished. *See*, *e.g.*, sample Certificate of Compliance; United States's Revised Certificate of Compliance with the Antitrust Procedures and Penalties Act, United States v. Alcan Inc., et al. The Certificate serves as a check-off schedule, assuring that compliance has actually been effected and serving as a court record of that compliance. When appropriate, staff may wish to send an accompanying letter to the court explaining the significance of the Certificate of Compliance.

At the time of filing the proposed Final Judgment, counsel for each of the defendants should be reminded of his or her responsibilities under Section 16(g) of the APPA. If there have been no reportable communications, counsel should file a statement to that effect. Because the Certificate of Compliance certifies compliance with the APPA, staff should ascertain that the necessary filings have been made under Section 16(g).

Because circumstances in each case will vary and the Antitrust Division does not have complete control of the mechanics of complying with the APPA, there should be constant communication during this period between the office of the appropriate Director of Enforcement and the section or field office handling the case in order to prevent mistakes.

6. Collection of Taxpayer Identification Numbers in Certain Civil Actions

The Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001, 110 Stat. 1321-1 - 1321-43, (DCIA) provides that federal agencies shall require each person doing business with that agency to furnish to that agency such person's Taxpayer Identification Number (TIN). "Doing business with" is defined by the DCIA to include entities that have been assessed a fine, fee, royalty, or penalty by the agency. *See* 31 U.S.C. § 7701. The Department has determined that this provision applies to civil penalties and damages imposed in cases litigated by the Department. Therefore, in Antitrust Division cases in

which a civil penalty has been imposed, such as an action under 15 U.S.C. §18a(g)(1) to enforce the premerger notification provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, or in which damages have been imposed, such as a treble damage action under 15 U.S.C. § 15a, the Division must obtain each liable defendant's TIN.

The DCIA further requires that each person from whom a TIN has been obtained pursuant to the above provision be notified of the agency's intent to use such number for purposes of collecting and reporting on any delinquent amounts arising out of such person's relationship with the government. Therefore, in any civil action brought by the Division that results in the imposition of a fine or damages, whether by consent decree or litigated judgment, the sample TIN letter (or one substantially similar) should be sent to a representative of each party that is liable to pay such fine or damages, with two possible exceptions.

The first exception is where the Division already has a party's TIN and knows that the party has been notified that its TIN may be used to assist in collecting delinquent moneys owed the government. This may be the case, for example, in certain HSR enforcement actions if the FTC has previously acquired a party's TIN (or required its submission as part of a premerger notification filing) and has given the party notice of its possible use for DCIA purposes. The second exception concerns parties, likely to consist largely of foreign persons and corporations, that do not possess taxpayer identification numbers. In these cases, the Division is not required to comply with the TIN notification requirement.

7. Dismissal of Filed Complaints

The Division has dismissed filed complaints during Tunney Act proceedings on rare occasions, such as when the parties abandoned a proposed merger. The Division has dismissed such cases by filing a notice of dismissal pursuant to Rule 41 of the Federal Rules of Civil Procedure. Filing a Rule 41 notice is appropriate when no defendant has filed an answer or a motion for summary judgment, even if the parties have appeared in court and engaged in discovery. Rule 41 also allows for dismissal of an action by filing a stipulation of dismissal signed by all parties who have appeared in the action.

E. Procedures and Suggestions for Litigating a Civil Case

1. Simplifying and Expediting Civil Litigation

Division attorneys should endeavor to expedite and streamline civil litigation to the greatest extent practicable, consistent with obtaining a fair trial and a full

opportunity for both sides to present a case. While the following suggested procedures are not mandatory and may not be appropriate in every case, they are procedures that experience has demonstrated to be helpful in many cases. Staff should also consider in each case other ways of simplifying litigation. Judicial management and the cooperation of the parties should result in a speedy and fair determination of the issues in controversy and effective resolution of the suit.

a. It is preferable if the federal district judge assigned to the case handles all decisions in the case. This will familiarize the judge with at least some aspects of the case prior to trial.

   There are, however, circumstances where the judge may wish to use a magistrate to supervise certain pretrial matters, particularly discovery. Subject to local rules, a court may designate a special master for certain matters and, with the consent of the parties, a magistrate may serve as a special master without regard to the limitations of F.R.C.P. 53(b). *See* 28 U.S.C. § 636(b)(2); 28 C.F.R. §52.01(a). The Division may determine, on a case-by-case basis, the type of argument that will be made either proposing or opposing the use of a magistrate or special master, but Departmental policy encourages their use. *See* 28 C.F.R. § 52.01(b).

   Division attorneys should consult with the Support Services Staff of the Executive Office regarding the selection and employment of a special master. *See* Division Directive ATR 2110.1, "Employment of Expert Witnesses."

b. Close supervision and control by the court of procedures should be encouraged as a means to curb undue delay and abuse of discovery. Division attorneys should give serious consideration to moving for relief under Rule 37 when faced with unreasonable discovery demands or recalcitrance by defense counsel in responding to discovery requests, since the court must be made aware of wasteful and dilatory pretrial techniques and the need to control the situation.

c. Stipulations of objective facts should be sought to the maximum extent possible in litigation, time permitting. This may limit substantially the number of witnesses and exhibits introduced at trial. In merger cases, staff should, at a minimum, seek stipulations regarding jurisdiction, venue, interstate commerce, and market shares. Time constraints may prevent staff from spending time preparing, reviewing, or negotiating other stipulations.

d. Judicial notice should be sought when appropriate. The possibility of judicial notice can help overcome the hesitancy of counsel to stipulate the facts that are not substantially disputed. *See* Fed. R. Evid. 201(b), (c), (f).

e. Partial or full summary judgment under Rule 56 in some cases may expedite litigation by narrowing, resolving, or eliminating issues, reducing the scope of discovery, shortening the length of trial, and increasing settlement prospects. In civil nonmerger cases, it is almost always advisable to seek summary judgment on some issues.

f. In a merger case, staff should evaluate the pros and cons of seeking or opposing an order consolidating the PI hearing with a trial on the merits pursuant to Rule 65(a)(2). Although consolidation should give staff a longer preparation period before evidence is presented to the judge, staff should prepare so that they can proceed to obtain a PI quickly if necessary. If staff proceeds with a PI followed by a trial on the merits, the combined court preparation time for the two proceedings may in fact be longer than would precede a consolidated hearing.

g. Trial proof should be simplified and streamlined in advance of trial. Staff should consider filing motions in limine or preparing bench memos on legal issues that they anticipate arising during trial.

h. Relief issues should be considered from the earliest stages of the discovery process. The manner of discovery and pretrial activity should concentrate heavily on the relief to be sought if the Division prevails on the merits. The Division's major reason for challenging behavior or structure by a civil suit is to obtain adequate relief; in civil nonmerger cases, relief may be a difficult issue. Information that will assist the Division in establishing evidence to support such relief should be organized and determined early in the process.

2. Summary Judgment

In many civil cases, either the Division or the defendants may move for summary judgment in order to expedite a decision on the issues in the case. Either partial or full summary judgment motions are proper in certain circumstances. Rule 56 provides for the timing and requirements of the motion. The local rules of the district should also be consulted in preparing for summary judgment.

Before making a motion for summary judgment, staff should consult with the chief. If the chief approves the request, it should be sent to the appropriate

Director of Enforcement and Deputy Assistant Attorney General for approval before filing.

A copy of the motion papers and accompanying affidavits and exhibits should be approved by the chief and submitted to the appropriate Director before staff informs any party of the Division's intention to move for summary judgment.

Examples of summary judgment motions and briefs, both in support of government motions and in opposition to defendants' motions, may be obtained from the Work Product Document Bank on ATRnet, the FOIA unit, or the appropriate special assistant.

3. Civil Antitrust Trial Methods and Procedures

This chapter has concentrated on the pretrial procedures that are central to any civil antitrust case. As to the conduct of the trial itself, there are numerous handbooks and guides that discuss trial methods and skills. One of the best practical sources is the *Handbook* of the Attorney General's Advocacy Institute. The *Handbook* sets out in detail methods used in civil trials, including suggestions for opening statements, closing arguments, cross-examination, and examination of expert witnesses. In addition, the *Handbook* offers a series of checklists and suggested models for admission of demonstrative evidence and documentary evidence, including suggestions for laying the foundation for admission of business records and summaries, the impeachment of witnesses, objections, trial motions, and rebuttal evidence.

The *Handbook* describes how to prepare trial witnesses and how to prepare and negotiate stipulations. Preparation for direct examination of government witnesses and anticipation of cross-examination of defense witnesses is also discussed in the *Handbook*.

In addition to the *Handbook*, trial staffs should consult Chapter VI.B regarding specific skills, including advice for preparing government experts for direct and cross-examination. That section also describes the Division resources available to support trial staffs in developing and presenting their cases.

Staff should always consult with the field office with responsibility for the district where the trial is held and with the U.S. Attorney's Office and the clerk of the court in that district to determine local procedures. Familiarity with local custom and practice will assist staff in presenting its case. Staff should also attempt to obtain a clear statement of the procedural aspects of the trial at the final pretrial conference or in a pretrial order. Especially significant are local

rules and practices of the district or circuit regarding the manner in which co-conspirator declarations are admitted into evidence and the manner in which the court admits testimony of expert witnesses. At all times, staff should make timely objections or motions to protect the Division's position in the event of an appeal.

Prior to filing, staff should annotate an order of proof with CID depositions, documents, interviews, and declarations. The annotation process should continue post filing with exhibits and the results of discovery. The factual points will become more refined through this process and more numerous, as points are broken down into subparts. The annotation process should continue during trial through digesting of trial transcripts and exhibits, so that staff has a preliminary set of findings of fact by the end of trial. This process will assist staff in preparing its briefs and final arguments. They are also extremely valuable for use in the appellate process.

The trial itself is based on the preparation and analysis that have preceded it. It is important to be as completely prepared for the proceedings as possible, remembering that the Division is not only an advocate for a position but the representative of the Attorney General and the government in the courtroom.

F. Criminal Litigation

A significant number of Antitrust Division cases that are litigated are brought as criminal violations of Section 1 of the Sherman Act. Although this section of the manual is not intended to set forth all of the issues relevant to proper preparation for a criminal trial, the Division's collective experience has identified a number of common problems and procedures that have arisen in Division criminal cases. Among other topics, this section sets forth suggested methods that attorneys in the Division have used in: (a) conducting pretrial discovery; (b) making and opposing pretrial motions; (c) preparing trial briefs; (d) selecting a jury; and (e) opposing defense motions for judgment of acquittal and other post-trial motions. This section also discusses the Division's practice of making sentencing recommendations to the court.

The materials in this section are intended only as a broad overview of methods of approaching criminal litigation issues. Trial staffs also should consult:

- The Work Product Document Bank on ATRnet, the FOIA Unit, or the Office of Criminal Enforcement (OCE) for pleadings, briefs, and transcripts from earlier Division criminal cases.
- The *Handbook* prepared by the Attorney General's Advocacy Institute.

- The United States Attorneys' Manual.
- Chapter II of this manual.
- The Antitrust Division Grand Jury Practice Manual.
- ABA, Criminal Antitrust Litigation Handbook (2d ed. 2006).

1. Drafting the Indictment

In the Antitrust Division Grand Jury Practice Manual ch. VII, there are detailed guidelines for drafting indictments. Additionally, copies of indictments used by the Division in previous cases may be found on the Division's Internet site, in the Work Product Document Bank on ATRnet, in the files of each field office and section that does criminal work, and in the FOIA Unit. If staff is considering charging violations not routinely charged or if there are unusual facts that need to be explained in the indictment, OCE should be contacted for advice. That office may be able to refer staff to sample indictments with similar violations or facts. Other information concerning specific charging matters is found at United States Attorneys' Manual § 9-12.000.

2. Returning the Indictment

A discussion of Division policies and practices concerning the return of indictments may be found in the Antitrust Division Grand Jury Practice Manual ch. VII, at 90-96. In addition, staff should consult with the U.S. Attorneys' Office or the clerk of the court in the district where the indictment is to be returned about any peculiarities of local practice, such as forms that must be completed at the time of indictment.

After the indictment is returned, staff must notify OCE immediately and provide the docket number and the name of the judge, if available. OCE will inform the Office of Public Affairs, which will issue the press release. Staff should not make any statements to anyone concerning the indictment until the Department's press release is issued in Washington and, thereafter, press inquiries should be handled in accordance with the policies set out in Chapter VII.G. Staff may give a copy of the proposed press release to the U.S. Attorney in the relevant district in advance of the return of the indictment.

Once OCE has been notified, it is customary for staff to call counsel for each defendant, inform them that an indictment has been returned, and give them the date of arraignment, if known. This courtesy is intended to give notice to defense counsel and defendants before they learn about the indictment from the news media.

Upon return of an indictment in open court, a summons ordinarily will be issued to each defendant who agrees in advance to appear for arraignment at a specified time. *See* Fed. R. Crim. P. 9. In cases where a defendant does not agree to appear for arraignment before a summons is issued, an arrest warrant will be issued and executed by a U.S. Marshal.

3. The Arraignment

Under most local rules, an arraignment will take place on a date certain after the return of the indictment. Neither the Federal Rules of Criminal Procedure nor the Speedy Trial Act require that arraignment occur within a set period after indictment. At the arraignment, staff should be prepared to respond to pleas of *nolo contendere* that may be tendered, discuss bail or release on personal recognizance, and take a position on such procedural details as photographing and fingerprinting the defendants. The Division follows the procedures of the local U.S. Attorney's Office and U.S. Marshal's Office.

The Division will oppose pleas of *nolo contendere* at the arraignment. For Department and Division policy on the subject of *nolo* pleas, see Principles of Federal Prosecution, United States Attorneys' Manual §§ 9-27.500 - .530.

At arraignment, the court may establish a briefing schedule for pretrial motions and set a trial date. Staff should be prepared to state its position with respect to the timing of pretrial discovery, trial, and other matters that can be anticipated. Under normal circumstances, staff should argue for an early trial date. Staff should also be mindful of the 70-day trial deadline under the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). Failure to comply with the Speedy Trial Act deadlines, even if due to an error on the part of the court or the clerk's office, may result in dismissal of the indictment.

4. Pretrial Discovery and Motions

The local rules in most districts set a timetable for pretrial criminal discovery and motions practice. In some districts, the local rules require that an informal discovery conference take place within a certain period after arraignment. Because of the timing of these conferences and the desire to expedite pretrial procedures, staff should evaluate what information is required to be disclosed to the defendants and prepare to have the information available as soon as practicable. One alternative to this procedure is to negotiate a stipulation governing discovery. Such stipulations are quite helpful in achieving a wide range of objectives for both sides that go beyond conventional discovery. For a more detailed discussion of both prosecution and defense discovery and motion

practice, see ABA, Criminal Antitrust Litigation Handbook chs. VII - IX (2d ed. 2006).

Typical requests for pretrial discovery by defendants may include the materials and information discussed below.

a. Statements of the Defendant

Under Fed. R. Crim. P. 16(a)(1)(A) & (B), defendants are entitled, upon request, to all of their prior statements in the possession of the government. The rule applies to four types of statements: (1) the substance of any other relevant oral statement made by the defendant in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use the statement at trial; (2) any relevant written or recorded statement made by the defendant; (3) that portion of any written record containing the substance of any relevant oral statements made by the defendant in response to interrogation by any person then known by the defendant to be a government agent; and (4) any grand jury testimony of the defendant relating to the offense charged.

In the case of corporate defendants, Fed. R. Crim. P. 16(a)(1)(c) provides that the defendant corporation may obtain any of the above types of statements of any witness who the government contends: (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been legally able to bind the defendant corporation in respect to the subject of the statement; or (2) was, at the time of the offense, personally involved in the alleged illegal conduct and so situated as a director, officer, employee, or agent as to have been legally able to bind the defendant corporation with respect to the alleged conduct in which the person was involved.

b. Prior Criminal Record of the Defendant

Fed. R. Crim. P. 16(a)(1)(D) provides that the defendant's prior criminal record should be made available to the defendant. Staff should request FBI assistance to obtain the prior record of each defendant and check with OCE to determine the past criminal antitrust record of corporate and individual defendants. Staff should provide this material to the defendants after FBI and Division checks are completed.

c. Documents and Tangible Objects

Under Fed. R. Crim. P. 16(a)(1)(E), a defendant, upon request, may obtain access to items such as books, papers, documents, photographs, and tangible objects within the possession of the government that are material to the

preparation of the defense, are intended for use by the government as evidence in chief at trial, or were obtained from, or belong to, the defendant. The courts have interpreted the meaning of documents "material to preparing the defense" in various ways. A determination of what must be disclosed to the defense under this provision depends upon the facts of each particular case.

Under this provision, staff will usually provide defendants with its trial exhibits on a date certain before trial. When the Division discloses its trial exhibits under this provision, it should invoke the provisions of Rule 16(b)(1)(A) and obtain a written commitment from defense counsel for reciprocal discovery of all defense trial exhibits by a date certain prior to trial.

Defense counsel often argue that they cannot determine what materials they will use at trial until the close of the government's case. The Division may face the same situation (i.e., that it cannot predict exactly what exhibits will be used until the case is underway). Nonetheless, because the Division is ordinarily required to turn over all proposed exhibits, the same should be required of the defense. Staff should argue that the defense should provide all proposed exhibits to the government in the same fashion as the Division must provide its proposed exhibits to the defense.

Failure of the defense to comply in good faith with this reciprocal discovery provision should be raised with the court prior to trial. This is especially relevant in situations where the defendants plan to present substantial expert economic and statistical evidence.

It should be noted that many of these requirements and potential problems can be avoided with some foresight. For example, staff should know early whether it wants to take an "open file" approach to discovery or adhere strictly to the applicable Federal Rules of Criminal Procedure. This judgment will be tempered by local rules and practice. Depending upon the circumstances of the case, it may be appropriate to establish a document depository either at the courthouse in the district where the case will be tried or in the section or field office. Access to this depository can be controlled by a protective order, as can copying documents and further disclosure of their contents. This may be particularly suitable in a large document case. *See* ABA, Criminal Antitrust Litigation Handbook ch. VII (2d ed. 2006).

Another useful device is a written stipulation between staff and defense counsel that addresses all pretrial discovery. Such stipulations can include: a stipulation of facts (e.g., parties, job title, tenure, interstate commerce); waiver of filing a request for a bill of particulars in exchange for a voluntary bill; or negotiated disclosure of all relevant grand jury transcripts required under Rule

16(a)(1)(B)(iii) at a reasonable time after arraignment, of *Jencks* and *Brady* materials, or of trial witness and exhibit lists. Such stipulations usually map out the road to trial with relative certainty and avoid unnecessary intervention by the court. These stipulations, however, rarely avoid motion practice altogether.

d. Reports of Examinations and Tests

Under Fed. R. Crim. P. 16(a)(1)(F), defendants may obtain results or reports of physical or mental examinations and of scientific tests and experiments that are material to the preparation of the defense or intended for use by the government as evidence in chief at trial. In criminal antitrust investigations and trials, such materials are generally not used. However, in the event that materials are available, the government should move for reciprocal discovery under Rule 16(b)(1)(B).

e. Expert Witnesses

Under Fed. R. Crim. P. 16(a)(1)(G), defendants may obtain a written summary of the expected expert testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. The summary must describe the witness's qualifications and opinions and the bases and reasons for those opinions. If the government discloses materials under this provision, it should move for reciprocal discovery under Rule 16(b)(1)(c).

f. Continuing Duty to Disclose

Under Fed. R. Crim. P. 16(c), both parties have a continuing duty prior to trial to disclose promptly upon discovery any additional evidence or material that was previously requested under Rule 16 or ordered to be disclosed.

g. Materials Not Subject to Discovery

Fed. R. Crim. P. 16(a)(2) provides that internal memoranda, reports, or other documents made by or for the government, grand jury transcripts other than those provided for in Rule 16(a)(1), and other statements of potential government witnesses are not subject to disclosure during pretrial discovery except as provided in 18 U. S.C. § 3500.

Written or recorded statements of government witnesses are discoverable under the Jencks Act, 18 U.S.C. § 3500, which has, in essence, also been codified in Fed. R. Crim. P. 26.2. Jencks Act materials are subject to production only after the witness has testified on direct examination at trial. However, arrangements are often made to provide Jencks Act materials to the defendants at some

reasonable time prior to trial. *See* Chapter IV, Part F.5.b. The names, addresses, and prior criminal records of government witnesses also may be produced at trial.

Under Rule 26.2(a), the defense also is required to produce any statement of a witness it calls that relates to the subject of the witness's testimony, after the witness testifies on direct examination. Failure to produce such a statement can result in striking the witness's testimony. *See* Fed. R. Crim P. 26.2(e). This Rule is not intended to discourage voluntary disclosure, which also may be negotiated by stipulation. *See* ABA, Criminal Antitrust Litigation Handbook ch. VII (2d ed. 2006).

h. Motions for Bills of Particulars

Defendants will usually move for a bill of particulars pursuant to Fed. R. Crim. P. 7(f). Generally speaking, defendants' motions for bills of particulars are within the discretion of the court. Although our response to a motion for a bill of particulars is considered on a case-by-case basis, the Division typically opposes requests for bills of particulars on the ground that the indictment provides the defendants with a basic statement of the charges against them. Moreover, courts have not hesitated to deny motions for bills of particulars which are designed primarily as discovery devices. *See*, *e.g.*, *United States v. Hester*, 917 F.2d 1083, 1084 (8th Cir. 1990). Generally, discovery under Rule 16 provides sufficient information for defendants to prepare a defense, avoid surprise at trial, and protect against a second prosecution for the same offense.

Alternatively, the Antitrust Division may prepare a voluntary bill of particulars setting forth information relevant to the case. Defendants have sometimes moved to seal the bill of particulars, if one is voluntarily provided or ordered by the court. The Division will generally oppose motions to seal the bill.

i. Motions to Dismiss the Indictment

There are numerous grounds on which defense counsel may make motions to dismiss the indictment. These include: (a) the indictment does not charge an offense under the statute; (b) the indictment, or the statute, is unconstitutionally vague and indefinite; (c) the indictment does not fully advise the defendants of the charges against them; or (d) the indictment should be dismissed because of grand jury abuse. Motions to dismiss an indictment are limited to allegations relating to the four corners of the indictment, such as lack of jurisdiction, failure to allege the elements of an offense, and vagueness of either the indictment or the statute. In addition, defendants may attempt to establish that there is an insufficient evidentiary basis for the indictment or raise other factual questions

or procedural problems relating to the conduct of the grand jury. Such motions often assert groundless bases to dismiss an indictment because they relate to factual issues that will be developed during the course of the trial. The Division has responded to each type of motion to dismiss.

j. Motions for Severance

Defendants, especially in conspiracy cases involving numerous defendants, will often move for severance pursuant to Fed. R. Crim. P. 14. In Sherman Act cases, defendants usually move for severance on the basis that evidence against co-conspirators will be introduced at trial and the moving defendant will be prejudiced by such evidence. Generally, in a criminal antitrust case, the conspiracy in question involves all of the defendants, and evidence will be introduced that each defendant knowingly joined the conspiracy.

Defendants also may move for severance in cases where additional crimes are charged together with an antitrust offense (e.g., mail fraud, wire fraud, tax evasion based on payoffs, perjury).

The Division will generally oppose motions for severance on the grounds that a single conspiracy occurred and that the proof relates to the conduct of all defendants, or that collateral crimes are integrally related to the antitrust offense alleged and that the defendants will not be prejudiced.

k. Motion to Fix the Order of Proof at Trial

Defendants may move to fix the order of proof at trial. Defendants generally will argue that the conspiracy must be demonstrated and each co-conspirator must be shown to be a member of it by independent evidence before any co-conspirator declarations are admitted into evidence against a conspirator pursuant to Fed. R. Evid. 801(d)(2)(E). The Division generally opposes such motions because such a requirement would make orderly presentation of the case difficult, if not impossible. In responding to such a motion, staff should be familiar with *Bourjaily v. United States*, 483 U.S. 171, 178-81 (1987), in which the Supreme Court held that under Fed. R. Evid. 104, the trial court, in making a preliminary determination under Rule 801(d)(2)(E), may consider hearsay, including co-conspirators' statements, and need not rely solely on independent evidence to decide whether the government has established the existence of a conspiracy. The Court also held that the appropriate standard of proof in this instance for establishing the existence of the conspiracy is the preponderance standard. *See id.* at 176.

The various circuits have acknowledged the trial court's discretion to allow the government to present co-conspirator statements on the condition that sufficient independent evidence subsequently demonstrates that a conspiracy existed. Staff should be familiar with the circuit practice in determining the best manner to answer such motions and to present evidence during the trial.

l. Other Defense Pretrial Motions

In general, there are many pretrial motions that may be made in the circumstances of specific cases. Motions for change of venue, motions for materials collected by use of electronic surveillance (*see* United States Attorneys' Manual § 9-7.000), motions under the Speedy Trial Act (*see* United States Attorneys' Manual § 9-17.000), motions to suppress evidence, motions to dismiss on grounds of double jeopardy, and other motions are often made by defendants during the course of the pre-trial proceedings. *See generally* ABA, Criminal Antitrust Litigation Handbook ch. X (2d ed. 2006).

m. Motions Filed by the Government

In certain circumstances, the government may wish to file pretrial motions. Some of the typical motions are discussed below.

i. Conflicts of Interest by Defense Counsel

In many circumstances, defense counsel endeavor to represent more than one defendant or a defendant and a government witness at trial. The Division should attempt to establish the conflict of interest that counsel may have and file appropriate motions, if necessary. Before filing such motions, staff should consult with the Deputy Assistant Attorney General for Criminal Enforcement (Criminal DAAG). Generally speaking, the government will ask for a hearing, at which time the individual defendant may be questioned about actual or potential conflicts of interest. *See* Fed. R. Crim. P. 44(c); *see also United States v. Register*, 182 F.3d 820, 830-32 (11th Cir. 1999); *United States v. Garcia*, 517 F.2d 272, 278 (5th Cir. 1975), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259 (1984). Under most circumstances, the Division will argue that the same counsel cannot represent a corporation and an individual, represent two individuals in the same corporation, or represent a defendant and a potential government witness. *See* ABA Criminal Antitrust Litigation Handbook chs. II & X (2d ed. 2006). By requesting a hearing on the issue, staff should be able to avert post-trial motions based on ineffective assistance of counsel. Staff also should use the hearing as an opportunity to obtain a ruling that the attorney-client privilege available to a witness represented by a defendant's attorney has been waived.

ii. Other Government Pretrial Motions

To avoid specific problems of evidence or procedure at trial, government counsel may wish to raise various issues with the court prior to trial by motions in limine. Such motions may be used to obtain prior to trial a court ruling on the admissibility of certain types of evidence, either testimonial or documentary, or to obtain an order that would prevent or limit certain defense actions during trial. Motions in limine may be especially helpful in assuring the orderly presentation of trial evidence. Rulings may assist the government in knowing what it may comment upon in opening statements and what lines of testimony will be allowed by the court. Such a motion might prove very helpful on the issue of government and defense use of statistical and other expert evidence. For a detailed discussion, see ABA, Criminal Antitrust Litigation Handbook ch. X (2d ed. 2006).

5. Issues Relating to Criminal Trial Procedure

Several significant issues relating to trial procedure and evidence should be considered by staff in advance of trial. These issues and procedures provide staff with a reasonable expectation of what will happen during its trial presentation and what issues may be raised on appeal.

a. The Speedy Trial Act

Antitrust Division staffs should be familiar with the provisions of the Speedy Trial Act, 18 U.S.C. §§ 3161-3174, and the specific local plans to implement the Act established in each district. Staff should consult with the local U.S. Attorney to determine the local practice and should always be cognizant of the time periods applicable under the statute.

b. Disclosing Materials to the Defense

The government is required to disclose prior statements of its trial witnesses, as well as impeachment material, to the defense at or before trial. The Jencks Act, 18 U.S.C. § 3500, governs the disclosure of statements of government witnesses, while the government's obligation concerning impeachment material is defined by the provisions of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.

i. The Jencks Act

The Jencks Act, 18 U.S.C. § 3500, requires that the government disclose to the defense all statements made by a government witness that relate to the subject matters about which the witness has testified after the witness has completed

direct examination. These provisions have, in essence, been adopted under Fed. R. Crim. P. 26.2. Staffs should be aware that the court is without authority to order pretrial disclosure of Jencks Act statements. *See United States v. Feola*, 651 F. Supp. 1068, 1139-40 (S.D.N.Y. 1987), *aff'd mem.*, 875 F.2d 857 (2d Cir. 1989), *cert. denied*, 493 U.S. 834 (1989); *see also United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988) (holding that even discovery of impeachment evidence within the ambit of the Jencks Act is governed by express provisions of the Act). *But see United States v. Snell*, 899 F. Supp. 17, 19-20 (D. Mass. 1995) (holding that if no law enforcement reason prohibiting earlier disclosure exists then concerns undergirding Jencks are not triggered). In practice, however, the government, especially in a complex case, will almost always disclose such materials prior to the direct examination of the witness to prevent unnecessary delay at trial or as a means to obtain early reciprocal discovery from the defendants. Trial staffs should also consult with the local U.S. Attorney's Office to determine that office's practice regarding the disclosure of Jencks material.

The Act defines the term "statement" to include written statements made by a witness that are signed or otherwise "adopted or approved" by the witness, a substantially verbatim recital of an oral statement that is recorded contemporaneously with the statement, and any grand jury testimony of the witness. In addition to prior grand jury testimony, "statements," as defined in the Act, clearly include any depositions, signed statements, or similar materials relevant to the testimony. They do not include, under normal circumstances, the work product of Division attorneys in interviewing witnesses prior to their testimony.

In preparing a witness for trial, staff should be familiar with *Goldberg v. United States*, 425 U.S. 94 (1976), in which the Supreme Court held that any writing prepared by a government lawyer relating to the subject matter of the testimony of a government witness that has been signed or otherwise adopted or approved by that witness is producible under the Jencks Act. In at least one other situation, the notes of a staff attorney who placed alleged witness statements in quotation marks have also been ordered disclosed as verbatim statements of the witness.

ii. Exculpatory and Impeachment Material

The disclosure of exculpatory evidence is governed by *Brady v. Maryland*, 373 U.S. 83 (1963). To be producible under *Brady*, the evidence must be "favorable" and "material" either to guilt, innocence, or punishment. Impeachment evidence relating to any promises of leniency made by the government to its key witnesses (e.g., immunity evidence), is required to be produced under *Giglio v. United States*, 405 U.S. 150 (1972). Disclosure is required even if there has been no request made by the accused. *See Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995);

United States v. Agurs, 427 U.S. 97, 107 (1976); *United States v. Payne*, 63 F.3d. 1200, 1208 (2d Cir. 1995). The Department has adopted a *Giglio* policy that establishes procedures that must be followed whenever a prosecutor requests potential impeaching information from the files of an investigative agency such as the FBI, as well as the Department of Justice Office of Professional Responsibility and the Office of Inspector General. The assistant chief in every Division field office or section that investigates or prosecutes criminal cases must be consulted before any request is made pursuant to this policy.

Favorable evidence has been defined to encompass both substantive evidence and evidence used solely for impeachment that relates to either guilt or punishment. *See Kyles v. Whitley*, 514 U.S. 419, 432-39 (1995). To be deemed "material," the favorable evidence must have a "reasonable probability" of affecting the result of the proceeding. *Id.* at 433. A reasonable probability of affecting a result is shown when the suppression of the evidence "'undermines confidence in the outcome of the trial.'" *Id.* at 434 (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985)). Moreover, evidence of impeachment is not material when it "'merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.'" *United States v. Amiel*, 95 F.3d 135, 145 (2d Cir. 1996) (quoting *United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1996)). Impeachment evidence is material only if "'the witness whose testimony is attacked supplied the only evidence linking the [accused] to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case.'" *Id.* (quoting *Wong*, 78 F.3d at 79).

The good faith or the bad faith of the prosecutor is not considered in determining whether the suppression of favorable evidence has violated the accused's due process rights. *See Brady*, 373 U.S. at 87. A due process violation can be found whether the suppression of the materially favorable evidence was inadvertent or the result of negligence or design. *See Giglio*, 405 U.S. at 154.

Trial staffs should consult the local U.S. Attorney's Office to determine that office's practice regarding the disclosure of *Brady* material. Each staff should also provide the defendant with each government witness's criminal history, along with any plea agreements or immunity information, if applicable. Criminal records can be obtained from the FBI and from OCE (in the case of prior antitrust offenses). The above information should be turned over to the defendant prior to trial.

c. Trial Briefs

In criminal cases, the court may require a brief that sets forth the theory of the government's case, the factual basis of the government's proof, and various legal issues that may arise at trial. On occasion, the brief also may be the proper place to list the government's witnesses and trial exhibits. If unusual issues of law or policy are involved in the case, the trial brief should be submitted to OCE for review prior to submission to the court. The U.S. Attorney in the district also should be consulted as to form and content of the trial briefs submitted to judges in that district.

d. Voir Dire Procedures

Jury selection in the federal system is governed by Fed. R. Crim. P. 24. Because the manner of jury selection varies among the districts and even among judges within a district, the trial staff should consult with the local U.S. Attorney's Office to determine the procedure used by the judge assigned to the case. Staff should also discuss jury selection with the judge at a pretrial conference to determine specific procedures and the manner of inquiry that will be followed. Staff should be prepared to submit proposed voir dire questions to the court if local practice does not permit the attorneys to question prospective jurors directly.

When jury selection begins, a staff unfamiliar with the region from which the jury pool is drawn should ask an experienced local Assistant U.S. Attorney to assist staff in selecting jurors. The *Handbook* prepared by the Attorney General's Advocacy Institute has suggestions for effective jury selection procedures and practice.

e. Trial Procedures

A prosecutor's success in criminal trials is based in large measure on thorough pretrial preparation and on understanding the procedures that will be followed in the courtroom. The *Handbook* prepared by the Attorney General's Advocacy Institute provides samples and suggestions of opening statements, direct and cross-examination, expert witnesses, use of documentary evidence, rebuttal evidence, and closing arguments. It should also be emphasized that the local U.S. Attorney's Office may provide valuable assistance concerning local practices and the manner in which each judge conducts trials. This is especially important regarding the judge's manner of handling opening statements, closing arguments, trial objections, and conferences outside the hearing of the jury.

For a general discussion of preparation immediately before trial, see ABA, Criminal Antitrust Litigation Handbook ch. XIII (2d ed. 2006).

f. Jury Instructions

Under Fed. R. Crim. P. 30, both the government and defendants are permitted to file proposed jury instructions with the court. The Division generally files a rather comprehensive set of instructions, which increases the likelihood that the judge will use the government's instructions and decreases the likelihood of reversal on appeal. It is advisable to consult the pattern jury instructions published by the circuit in which the district court sits. Other helpful sources when drafting jury instructions include ABA, Criminal Antitrust Litigation Handbook ch. XIV (2d ed. 2006) and annual supplements; 1 & 2 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* (5th ed. 2003); ABA, *Sample Jury Instructions in Criminal Antitrust Cases* (1984); *Jury Instructions in Criminal Antitrust Cases 1976-1980* (ABA 1982); ABA, *Jury Instructions in Criminal Antitrust Cases 1964-1976* (1978); and past instructions used by the Division in similar cases. Be aware though that some publications are oriented toward providing suggested instructions to the defense bar, and staff should not feel compelled to adopt language that clearly is slanted toward supporting defense arguments. The local U.S. Attorney should be consulted on the practice of the district, or of particular judges, on requesting instructions and their format.

Because of the significance of jury instructions to the appellate disposition of a criminal case, the Division's instructions should be grounded on established case law and, where possible, on language that has been upheld by the appellate courts. Staff attorneys should be fully prepared to argue for appropriate instructions during instruction conferences with the court and defense counsel, which may be held at any time on short notice. These conferences are very important to the government because deficient instructions that contribute to or result in an acquittal cannot be appealed.

The FOIA Unit maintains copies of some of the Division's past proposed instructions in the docket files of each case. Staffs may also contact OCE, which may know of other cases in which particular instructions may have been given.

g. Defense Motions for Acquittal, New Trial, and Arrest of Judgment

At the conclusion of the government's case, trial staffs should be prepared to oppose a defense motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. Rule 29 motions may be renewed before the case is submitted to the jury. If the jury returns a guilty verdict or is discharged without returning a verdict, a

motion for judgment of acquittal may be made within 7 days, unless the court extends the time for such motions. *See* Fed. R. Crim. P. 29(c).

Generally, defendants will renew their motions for judgment of acquittal after a guilty verdict and make a motion for a new trial under Fed. R. Crim. P. 33. Defendants may also make motions for arrest of judgment under Fed. R. Crim. P. 34 if there is an argument that the indictment does not charge an offense or raises an issue relating to the court's jurisdiction.

These motions may require briefing and oral argument. Courts frequently issue opinions when ruling on these motions; therefore, careful preparation in responding to these motions is important, as they may affect the appellate disposition of the case. Staffs are encouraged to consult with the attorneys in the Appellate Section before filing post-trial briefs.

Sentencing of convicted defendants will not take place until all post-trial motions have been ruled upon by the district court.

6. Sentencing Recommendations

a. Internal Procedures

Soon after the filing of the indictment, staff should begin to consider its recommendations for sentencing corporate and individual defendants. Before formulating recommendations, staff should familiarize itself with this section of the manual; any separate Division sentencing policy directives; the Ashcroft memoranda of July 28, 2003, and September 22, 2003, regarding charging, plea agreements, and sentencing; pertinent provisions of the Principles of Federal Prosecution, *see* United States Attorneys' Manual, §§ 9-27.710 - .745; and the United States Sentencing Guidelines. Staff should also consult with the local U.S. Attorney's Office and the Probation Office to determine the local practice on sentencing recommendations by the government and on other sentencing matters.

After convicting a defendant at trial or upon receiving notice that a defendant intends to plead guilty without a plea agreement (i.e., the defendant pleading "open"), staff should submit to the chief a sentencing memorandum setting forth, separately for each defendant to be sentenced, the recommended sentence and all considerations bearing on that recommendation. Those considerations should at least include the defendant's role in the offense, extent of cooperation, culpability relative to defendants already sentenced or to be sentenced, and financial condition and ability to pay a fine. Staff should set out its calculation of the sentencing ranges under the Sentencing Guidelines, as well as any departures

or other special provisions that are applicable to staff's sentencing recommendation. If the defendant is pleading pursuant to a plea agreement, staff should prepare a plea recommendation memorandum.

After reviewing staff's recommendation, the chief will forward it along with his or her position to the Criminal DAAG. At this point, staff should not inform defense counsel of its proposed sentencing recommendation. The Criminal DAAG and, in appropriate circumstances, the Assistant Attorney General will review the recommendation memorandum and approve the sentencing recommendation of the Division. Upon request by defense counsel, staff may inform counsel of the Division's final recommendation before the recommendation is made to the Probation Office and the court.

If the sentencing recommendation is to be made pursuant to a plea agreement, staff should make sure that the plea negotiations are conducted in accordance with the Antitrust Division Grand Jury Practice Manual ch. IX; any separate Division policy directives; the Ashcroft memoranda of July 28, 2003, and September 23, 2003; and the Principles of Federal Prosecution, United States Attorneys' Manual §§ 9-27.330 - .450. *See also* ABA Criminal Antitrust Litigation Handbook ch. V (2d ed. 2006) (providing an extensive discussion of plea bargaining in criminal antitrust cases).

The procedures for imposing a sentence differ not only from district to district, but also from judge to judge within the same courthouse. It is recommended that staff, in preparing for the sentencing hearing, consult with the local U.S. Attorney's Office, the Probation Office, and the sentencing judge's clerk to learn as much as possible about the judge's sentencing procedures and what sentencing forms must be completed. Fed. R. Crim. P. 32 governs the imposition of sentence in federal cases. Rule 32(c)-(g) sets out the conditions under which the Probation Office must complete a presentence investigation and report. Rule 32(i)(4)(A)(iii) provides that the government must be given an opportunity to make an allocution at the hearing, which staff should take advantage of unless it is the policy of the local U.S. Attorney's Office not to make one. Rule 32(i) specifies a number of actions the judge must take at the hearing to ensure that the defendant's rights are protected. It is advisable for a staff member to check off each of these as they are completed and advise the judge if any are omitted.

b. Sentencing Guidelines

All Division sentencing recommendations, whether or not incorporated in a plea agreement, must comply with the U.S. Sentencing Guidelines and be consistent with the general sentencing objectives of the Guidelines. Although the Supreme Court in January 2005 changed the nature of the Guidelines from mandatory to

advisory in *United States v. Booker*, 543 U.S. 220 (2005), Department of Justice policy requires that prosecutors continue to urge courts to impose sentences consistent with the Guidelines in order to maintain the consistency and fairness promoted by the use of the Guidelines. *See* James B. Comey, U.S. Dep't of Justice, Department Policies and Procedures Concerning Sentencing 1-2 (Jan. 28, 2005) ("Comey memo"). *See* ABA, Criminal Antitrust Litigation Handbook ch. XVI (2d ed. 2006), for a discussion of the impact of *Booker* on sentencing.

Booker's change in the status of the Guidelines was due to the Court's holding that "the Sixth Amendment is violated by the [mandatory] imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) . . . not found by the jury or admitted by the defendant." *Booker*, 125 S. Ct. at 756. The Court, however, found that there would be no Sixth Amendment violation if the Guidelines are applied in an advisory manner. *Booker*, 125 S. Ct. at 750, 756-57. Thus, sentencing courts are still required to consult the Guidelines, but courts can "tailor the sentence in light of other statutory concerns as well." *Booker*, 125 S. Ct. at 757 (citing 18 U.S.C. § 3553(a), which includes as sentencing factors: the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; the need for the sentence to afford adequate deterrence and protect the public from further crimes by the defendant; the need to provide the defendant with rehabilitation; the kinds of sentences available; and the need to provide victims with restitution).

The special provisions for antitrust offenses for both individual and corporate defendants are contained in § 2R1.1 of the Guidelines. Special provisions covering other types of offenses also are contained in Chapter 2, and general provisions applicable to all types of offenses, including antitrust, are found in other chapters of the Guidelines. Special provisions governing the sentencing of corporations and other organizations for all types of offenses, including antitrust, are contained in Chapter 8. *See* Chapter II, Part B.

One of the primary objectives of the Guidelines is to minimize disparities in the sentencing of like offenses across the country. To achieve that goal, the Guidelines set out largely mechanical formulas for each type of offense that can be applied in consistent and predictable ways in each courtroom. Staff should ensure that its sentencing recommendation, whether it is a contested hearing or part of a plea agreement, is consistent with that objective. The government's discretion in choosing an appropriate sentence to recommend will often be limited to deciding where the sentence should fall within the calculated Guidelines ranges for periods of incarceration and fine amounts.

One of the few ways that the government can have a substantial impact on the determination of the sentence is by filing a motion for a departure below the Guidelines range because of the defendant's substantial assistance in the investigation or prosecution of others. Under the Guidelines, such a departure—which is provided for in § 5K1.1 for individuals and § 8C4.1 for organizations—can only be triggered by a motion by the government. The Guidelines permit the government to make a recommendation on how much the court should depart based on the value of the defendant's cooperation and staff should normally take advantage of this opportunity. However, once the motion has been filed, the judge is not bound by the government's recommendation and has wide discretion in deciding how much or little to depart based on the circumstances surrounding the defendant's cooperation. *United States v. Pizano*, 403 F.3d 991 (8th Cir. 2005); *United States v. Pippin*, 903 F.2d 1478, 1485 (11th Cir. 1990). Because of the potential these motions have for greatly reducing the sentences otherwise required under the Guidelines, they should be reserved for situations in which the defendant's cooperation has been truly valuable, timely, and substantial. A recommendation for a substantial assistance departure or any other downward or upward departure under the Guidelines must be clearly set out by staff in the sentencing memorandum to the chief when the defendant is being sentenced after being convicted at trial or is pleading guilty without a plea agreement.

The calculated Guidelines fine ranges for both individuals and organizations may call for amounts beyond the ability of the defendants to pay, even with installment payments. Guidelines provisions (§ 5E1.2 for individuals and § 8C3.3 for organizations) permit the court to impose a fine below the calculated range if the defendant is found to have an inability to pay a fine within the range. Staff should consult with the Division's Corporate Finance Unit whenever a question is likely to be raised about a corporate defendant's ability to pay a fine within the applicable Guidelines range. The financial analyst will normally determine the maximum amount the corporation can afford to pay in installments without substantially jeopardizing its continued viability. Probation Offices and courts tend to rely heavily on the recommendations of our analysts in these situations. The Corporate Finance Unit also may be able to provide assistance in making similar determinations for individual defendants.

The final Guidelines sentencing ranges are determined in part by factoring in a number of upward or downward adjustments based on particular facts or circumstances relative to the offense, offender, or investigation. Such factors include the volume of a corporation's affected commerce, the defendant's role in the offense, whether the defendant attempted to obstruct the investigation, and the nature, degree, and timeliness of the defendant's cooperation. The courts and Probation Offices often rely on the government to provide the underlying facts

needed to support the findings on which these adjustments apply. The Principles of Federal Prosecution state that "the Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the [G]uidelines, he or she should candidly do so and not stipulate to facts that are untrue." United States Attorneys' Manual § 9-27.430(B)(2). Furthermore, prosecutors are not authorized to hide relevant information from the court and should provide all reasonably relevant information to the United States Probation Office whenever possible so that an accurate and complete presentence report can be prepared. *Id.* at § 9-27.720.

Thus, staff attorneys, as officers of the court, must present sentencing facts as fairly and accurately as possible and must disclose to the court all readily provable facts that are relevant to Sentencing Guidelines calculations. *See* John Ashcroft, U.S. Dep't of Justice, Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003) ("July 2003 Ashcroft Memo"). However, when a good-faith doubt exists concerning the existence or provability of certain facts, staffs may discuss with defendants the extent to which the government will present such facts to the court and Probation Office for use at sentencing. Staffs may negotiate to limit the effect that certain facts have on sentencing calculations where Guidelines provisions (such as §1B1.8) expressly permit such limiting agreements. Staffs must oppose sentencing adjustments, including downward departures, not supported by the facts or law, whether requested by a defendant or made *sua sponte* by a court. Thus, a prosecutor may not agree in a plea agreement to "stand silent" regarding a defendant's request for an adjustment not supported by facts or law. *See* July 2003 Ashcroft Memo, *supra*.

If a sentence is imposed below what the staff attorney believes is the appropriate Guidelines range, the attorney must oppose the sentence and make sure the record is sufficient for any appeal. If the sentence is below the Guidelines range and, in the judgment of the Assistant Attorney General, does not reflect the purposes of sentencing, the Appellate Section, in consultation with OCE and staff, should seek approval from the Solicitor General to file an appeal. *See* Comey Memo, *supra*, at 2-3. Staffs should report all sentences imposed to OCE, via the ATR-CRIM-ENF mailbox, with a cc:/ to the Criminal DAAG, the Director of Criminal Enforcement, and the appropriate senior counsel. Staffs should report the sentence that they recommended, the Guidelines range, the sentence the defendant recommended, and the sentence imposed. In addition, if a sentence is imposed outside the appropriate Guidelines range against the recommendation of the prosecutor, if the sentencing court refuses to calculate the Guidelines range, or if the court sentences below the prosecutor's recommendation for a substantial assistance downward departure, staff should

also submit, through their chief, the Booker sentencing report form to the appropriate senior counsel. *See* Comey Memo, *supra*, at 2-3 (Jan. 28, 2005).

c. Special Statutes for Fines

There will be cases in which the maximum potential fine under the Sentencing Guidelines exceeds the statutory maximum fine provided for in Section 1 of the Sherman Act. However, it may be possible to increase the available statutory maximum in particular cases by applying the provisions of 18 U.S.C. § 3571. That statute provides that the court may impose a fine up to twice the gross pecuniary gain derived by the conspirators or cartel (not just the defendant) from the crime or twice the gross loss suffered by the victims of the crime, unless the court decides that the imposition of such a fine would unduly complicate or prolong the sentencing process.

Another statute related to fines, 18 U.S.C. § 3572, lists a number of factors that the court must consider in determining the amount of the fine, provides that the amount of the fine should not interfere with the ability to make restitution, and sets forth a number of technical provisions regarding the imposition and payment of a fine.

7. Protecting Victims' and Witnesses' Rights

a. General Requirements

Victims of, and witnesses to, federal crimes, whether individuals or organizations, are entitled by law to receive a variety of services and assistance from federal prosecutors. The first federal victims' rights legislation was the Victim and Witness Protection Act of 1982 (VWPA).Congress amended and expanded on the provisions of the VWPA in subsequent legislation, primarily the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, the Victim Rights Clarification Act of 1997, and the Justice for All Act of 2004. In addition, in the VWPA Congress instructed the Attorney General to develop and implement guidelines for the Department of Justice consistent with the purposes of the Act. Congress set forth the objectives of the guidelines, which include the provision of services to victims; notification about protection, services, and major case events; consultation with the government attorney; a separate waiting area at court; the return of property; notification of employers; and training for law enforcement and others. The most recent version of the Attorney General Guidelines for Victim and Witness Assistance (AG Guidelines) was issued in May 2005.

The AG Guidelines set forth in detail the obligations of all Division prosecutors toward crime victims and witnesses. All Division attorneys (and appropriate support staff) engaged in criminal law enforcement activities should be fully conversant with these Guidelines. Article I of the AG Guidelines summarizes the rights of victims of crime and the obligations of Department prosecutors.

The Justice for All Act of 2004 provides crime victims, as defined in article II.D.1, with two mechanisms for enforcing their rights. First, crime victims, or the government on their behalf, may move in federal district court for an order enforcing their rights. 18 U.S.C. § 3771(d)(3) ("The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus."). Second, a crime victim may also file an administrative complaint if Department employees fail to respect the victim's rights. The Attorney General must take and "investigate complaints relating to the provision or violation of the rights of a crime victim" and provide for disciplinary sanctions for Department employees who "willfully or wantonly fail" to protect those rights. 18 U.S.C. § 3771(f)(2).

Under the statutes and the AG Guidelines, a limited amount of discretion exists with respect to implementing certain provisions concerning the protection of victims' rights and the furnishing of victim and witness services. For example, many Division cases will present responsible officials with the need to exercise discretion in determining to whom or when victim and witness services will be provided. The AG Guidelines also recognize that the right to consult with an attorney for the government must be limited in some cases (e.g., to avoid jeopardizing an ongoing investigation or official proceeding). Other provisions of the AG Guidelines also require judgments on a case-by-case basis of how they should best be implemented, consistent with both the purposes of the statutes and the law enforcement needs of the Department.

Nevertheless, all Department of Justice officers and employees engaged in the detection, investigation, or prosecution of crime are required to make their best efforts to ensure that all victims of federal crime who have suffered physical, financial, or emotional harm receive the assistance and protection to which they are entitled under the law. In addition, each litigating Division of the Department is required to report to the Attorney General each year on the "best efforts" it has made during the preceding fiscal year in ensuring that victims of crime are accorded the rights to which they are entitled, which means that each field office and section within the Division engaged in criminal law enforcement activities must also report internally on an annual basis concerning its own best efforts to implement the requirements of these Acts and the AG Guidelines.

b. Responsible Officials

Under the AG Guidelines, with respect to criminal cases handled entirely by a litigating division of the Department, the chief of the section having responsibility for the case is responsible for determining to whom, when, and the extent to which victim and witness services should be provided. This authority may be delegated.

To assist in this process, each criminal section and field office will appoint a victim-witness coordinator. The victim-witness coordinator is responsible for: (1) keeping abreast of Department and Division policy regarding victim-witness services, (2) ensuring that these services are being appropriately provided, (3) maintaining liaisons with the victim-witness coordinators in the local U.S. Attorneys' Offices when necessary, and (4) making sure that records are sufficient to permit the Division to report annually to the Attorney General on the "best efforts" it has made during the preceding fiscal year in ensuring that victims of crime are accorded the rights to which they are entitled.

The AG Guidelines further require that each Department component with responsibility for implementing the Guidelines specifically designate one individual to ensure that the victim-witness requirements of the Acts are being carried out within the component. For the Antitrust Division, this person is the assistant chief of the Legal Policy Section, with whom any questions that arise concerning the implementation of the AG Guidelines relating to services to victims and witnesses, or any other provisions or requirements of the Acts or Guidelines, should be discussed.

c. Cases with Large Numbers of Victims

Although implementing the AG Guidelines is relatively straightforward in cases in which the number of victims is limited, doing so can present challenges as the number of victims grows into the hundreds and thousands. Division employees should consider the possibility of using new technology in order to provide victims in large cases with the same rights and services as victims in smaller cases. Responsible officials should use the means, given the circumstances, most likely to achieve notice to the greatest possible number of victims. If the responsible official deems it impracticable to afford all of the victims of a crime any of the rights enumerated in 18 U.S.C. § 3771(a), the attorney for the government should move the appropriate district court at the earliest possible stage for an order fashioning a reasonable procedure to effectuate those rights to the greatest practicable extent. 18 U.S.C. § 3771(d)(2).

d. Restitution

Congress has continued to extend and strengthen criminal restitution. First, it passed the Violent Crime and Law Enforcement Act of 1994, which, among other provisions, requires a court to order a defendant to pay a victim mandatory restitution in four classes of federal crimes (domestic violence, sex crimes, sexual exploitation and other offenses involving abuse of children, and telemarketing fraud), none of which would likely be prosecuted by the Antitrust Division. Then, in 1996, Congress passed the Mandatory Victims Restitution Act of 1996 (MVRA), once again expanding the classes of crimes subject to mandatory restitution. The MVRA mandates restitution for: (1) victims of a crime of violence, as defined in 18 U.S.C. § 16, (2) victims of an offense against property under title 18, including any offense committed by fraud or deceit, and (3) victims of offenses defined in 18 U.S.C. § 1365, relating to tampering with consumer products. *See* 18 U.S.C. § 3663A. The Division does charge violations of Title 18 property offenses involving fraud and deceit. However, restitution for such offenses is not mandated in cases where the court finds that "(A) [t]he number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 3663A(c)(3).

Although none of the statutory provisions authorizing restitution apply directly to antitrust offenses, the Justice for All Act of 2004 provides that victims have the right to "full and timely restitution." 18 U.S.C. § 3771(a)(6). Restitution may be ordered in any criminal case to the extent agreed to by the parties in a plea agreement. *See* 18 U.S.C. § 3663(a)(3). In addition, the U.S. Sentencing Guidelines require courts to order restitution as a condition of probation or supervised release in cases in which restitution would be appropriate under 18 U.S.C. §§ 3663-3664 except for the fact that the offense of conviction is not a Title 18 or covered Title 49 offense, unless full restitution has already been made or the court finds, from facts on the record, that "(A) the number of identifiable victims is so large as to make restitution impracticable; or (B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." U.S.S.G. §§5E1.1(b), 8B1.1(b). Finally, the AG Guidelines state that Department employees working at each stage of a criminal case must give careful consideration to the need to provide full restitution to the victims of the offenses.

The Division can be expected rarely to encounter a case combining the prosecution of an antitrust offense and an offense in which restitution is truly mandated. Insofar as restitution being sought pursuant to the balancing standards of 18 U.S.C. § 3663A(c)(3) or the Sentencing Guidelines is concerned, restitution has not been ordered (directly or as a condition of probation) in many cases brought by the Division as the result of several factors: in many of our criminal matters, civil cases have already been filed on behalf of the victims at the time of sentencing, which potentially provide for a recovery of a multiple of actual damages; the complexity of antitrust cases and the resulting difficulty of making any accurate estimate of damages; the *per se* nature of antitrust criminal violations, which relieves the prosecution from having to introduce evidence of harm resulting from the violation to secure a conviction; and the availability of treble damages (plus costs and attorneys' fees) to victims of antitrust offenses when the court does not order restitution. Nevertheless, Division attorneys should consider seeking orders for restitution in cases in which victims are unable or unlikely to seek treble damages or where the fashioning of such an order would not unduly complicate or prolong the sentencing process, and should also consider including restitution as part of plea agreements, particularly in circumstances where it appears that a defendant has insufficient resources to pay both a Guidelines criminal fine and damages to the victims of the violation. *See* 18 U.S.C. § 3572(b); U.S.S.G. § 5E1.1(c).

G. The Appellate Process

The Appellate Section should be contacted as soon as possible when a final judgment has been entered in the district court, even when the Division prevailed. When staff believes that an appeal is likely, the Appellate Section should be contacted even prior to the entry of a final judgment. Finally, the Appellate Section should be contacted immediately with respect to (1) any interlocutory order that the Division should consider appealing, if possible, or that opposing counsel may attempt to appeal; and (2) any sentence in a criminal case or judgment in a civil case that contains unlawful conditions.

1. Procedures When the Division Did Not Prevail in the District Court

If the Division did not prevail at the district court level, staff should prepare a concise memorandum discussing the critical facts of the case, the proceedings in the district court, and the reasons why staff believes appeal is either warranted or unwarranted. The issues upon which an appeal, if any, would be based should be discussed in terms of the applicable standard of judicial review. The staff memorandum should be reviewed by the section or field office chief who should attach his or her own recommendation. One copy of the memorandum should be

sent to the chief of the Appellate Section and another to the appropriate Director of Enforcement. Copies of all relevant court orders and pleadings should accompany the memorandum. Finally, a copy of the transcript, if available, should be sent to the Appellate Section attorney assigned to the case. If a transcript has not yet been obtained by the trial staff, then staff should consult with the Appellate Section attorney assigned to the case to determine if the transcript should be ordered.

If there appear to be appealable issues in a criminal case (and in every civil case), an Appellate Section attorney, after reviewing the recommendations of the trial staff and obtaining the views of other interested persons within the Division, will prepare a draft memorandum for the Solicitor General, either recommending an appeal or recommending against appeal. The trial staff will be given an opportunity to comment on the draft before it is sent forward. This draft memorandum, along with whatever memoranda have been prepared by the trial staff or others, is then sent to the Deputy Assistant Attorney General who has supervisory responsibility for the Appellate Section.

Final reviewing authority within the Division is exercised by the Deputy Assistant Attorney General with supervisory responsibility for the Appellate Section or, in certain circumstances, the Assistant Attorney General. The views of other Deputy Assistant Attorneys General may also be requested by the Assistant Attorney General.

After the Division decides whether to recommend appeal, the Appellate Section prepares the final version of a memorandum to the Solicitor General, for the signature of the Deputy Assistant Attorney General or Assistant Attorney General, and transmits it to the Solicitor General's Office. There, the Antitrust Division's recommendation generally is reviewed by an Assistant to the Solicitor General and a Deputy Solicitor General. They, in turn, make a recommendation to the Solicitor General. The reviewers in the Solicitor General's Office may ask for additional information or may meet with Appellate Section attorneys and the appropriate Division personnel.

In situations where the review process will take some time, the Appellate Section will file, or request the trial staff to file, a protective notice of appeal with the appropriate district court so the Department does not allow the filing period set by the Federal Rules of Appellate Procedure to expire before a decision regarding appeal has been made. *See* Fed. R. App. P. 4.

2. Appellate Activity Where the Division Prevailed in the District Court

Where the Division prevailed in the district court in a criminal or civil case, or where the district court issues any order that another party might attempt to appeal, the trial staff should immediately notify the Appellate Section. At the same time, the Appellate Section should be informed of the general nature of the case and provided with any relevant pleadings by the trial staff. The transcript, if one exists, should immediately be made available to the Appellate Section, and the assigned attorney from the Appellate Section and the trial staff should discuss the matter.

The Appellate Section should be notified immediately when the trial staff receives a copy of a notice of appeal or learns that one has been filed.

3. Preparing Court of Appeals Briefs

Once an appeal has been filed, trial staff normally will be asked to assist the Appellate Section attorneys assigned to the case in designating the record on appeal and determining what parts of the record will be reprinted in the appendix, if there is to be one, as well in ordering any needed transcripts. The trial staff also normally will be asked to review the draft brief. Finally, in certain emergency situations, the trial staff may be asked to prepare or assist in preparing briefs or other appellate pleadings under Appellate Section supervision.

As a general matter, attorneys from the Appellate Section will handle the briefing and argument of appeals at the circuit court level under the supervision of the chief or one of the assistant chiefs in the Appellate Section.

The chief or an assistant chief in the Appellate Section and the Appellate attorney assigned to the appeal will be designated as the attorneys of record in the matter. As such, Appellate Section attorneys should be informed of all relevant issues relating to the appeal and all conversations between the trial staff and opposing counsel regarding issues in the case and the appeal. All documents received by the trial staff relating to the appeal should be forwarded at once to the Appellate Section; in the early stages of an appeal, such documents often are mailed only to the trial staff. Conversely, the trial staff should be advised of any substantive meetings between Appellate Section attorneys and opposing counsel concerning these matters.

In normal circumstances, the Division's brief and reply brief (if any) will be discussed with the trial staff, provided to the appropriate Director of

Enforcement and Deputy Assistant Attorney General, and reviewed by the chief or an assistant chief of the Appellate Section. Finally, the Deputy Assistant Attorney General with supervisory responsibility for the Appellate Section will approve the brief. At times, the Assistant Attorney General, other appropriate Deputy Assistant Attorneys General, and other interested persons within the Division may become involved in the review process when certain issues of policy arise in the appeal or where conflicts must be resolved.

4. Amicus Curiae Participation by the Antitrust Division

The Appellate Section welcomes recommendations from section or field office staff, as well as third parties, concerning *amicus* participation in a private case. Such recommendations may take the form of a memorandum or less formal communications. Recommendations may concern issues that require *amicus* participation by the Division or where the Division's views may clarify, strengthen, or advance the law in areas affecting the Division's policy goals. *Amicus* participation in any appellate court (state or federal) and the Supreme Court must be approved by the Solicitor General. Other formal appearances before federal or state appellate courts, such as the filing of comments or proposed bar rules affecting competition, must also be approved in advance by the Solicitor General.

5. Supreme Court Review

Once a court of appeals has decided a case, the Solicitor General may petition for *certiorari* to the Supreme Court or will respond to a petition from the other party in a case in which the Division prevailed. The government may also file an *amicus* brief in a case for which a petition for *certiorari* is pending before the Supreme Court or an *amicus* brief on the merits. Appellate Section attorneys, under the supervision of the chief or an assistant chief of the Appellate Section, are responsible for drafting petitions for *certiorari*, briefs in opposition to petitions for *certiorari*, and briefs on the merits in Antitrust Division cases, as well as any *amicus* briefs on antitrust issues.

In Supreme Court cases, the Solicitor General's Office reviews the briefs and argues most antitrust cases before the Supreme Court. The Appellate Section works closely with the Solicitor General's Office in the preparation of the briefs and arguments before the Supreme Court and may request the assistance of the trial staff as well.