

*CPI's Cartel Column Presents:*

# Don't Slice the Gordian Knot: Untangling Privilege Protection for Leniency Applicants

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A cartel participant that blows the whistle to the Antitrust Division can receive notable benefits from confessing its sins and those of its partners in crime: non-prosecution of the criminal conduct by the Division, and exposure to only actual damages, rather than treble damages and joint and several liability, in the inevitable civil litigation that will follow. A third benefit is less discussed but no less consequential: the ability to maintain the privileged status of communications between counsel and client even when counsel discloses the substance of those communications to the Division in the necessary course of obtaining a marker for amnesty and perfecting the leniency application.

This benefit – non-waiver of privilege – can also present a quandary when private plaintiffs or state antitrust enforcers target the leniency applicant in their own civil litigation or state enforcement actions. Those litigants will seek documents related to the leniency applicant’s proffer, interrogatory responses detailing the cartel, and a knowledgeable Rule 30(b)(6) witness to depose. Consider the following turn of events that may leave a leniency applicant facing discovery requests in a seemingly intractable situation: The cartel never reduced its agreements to writing, so documentary records are scarce and opaque. The culpable individual executives have pled the Fifth, citing the possibility of state criminal prosecutions. The key information proffered about the cartel was uncovered through *Upjohn* interviews in an internal investigation, and thus is privileged. Not only did the proffer to the Antitrust Division not waive any applicable privileges, but the Division separately has asserted law enforcement investigatory privilege as to the interviews it conducted of the leniency applicant’s key executives. And the actual person most knowledgeable about the conspiracy is the attorney representing the leniency applicant. To all this, private plaintiffs reply: information known to the employees or former employees of a corporation is imputed to the corporation; provide a deponent and answer the interrogatories, or you’ll be deemed non-cooperating and lose ACPERA’s detrebling of damages. What, in all this cacophony of privilege assertions and discovery demands, is a leniency applicant to do? How should a court resolve the inevitable disputes?

First, the situation would be clarified if the Antitrust Division would affirm the strongest legal basis – the common interest privilege – for its position that leniency applicants do not waive attorney-client privilege or work product protection in the course of making and perfecting their amnesty applications. The Antitrust Division should also affirm that proffers by counsel on behalf of the applicant’s officers, directors, and employees, both current and former, are likewise within the common interest. Second, in resolving these disputes courts ought to be mindful that the ultimate stakes are broader than the particulars of a single dispute. The vibrancy of the leniency program requires leniency applicants to receive their end of the bargain – certainly, to be no worse off than those cartelists who do not receive leniency.

### **Stage 1 – Internal Investigation Results in Privileged Information and Communications**

An analysis of privilege is a sequential process: at each step, did privilege attach to protect the communication or material at its inception, and has that privilege been maintained through the course of subsequent events? When the leniency applicant is a corporate entity, the process leading to the initial marker request – and throughout the process of obtaining leniency – is typically an internal investigation, most often led by outside counsel. Much of the information that counsel for a leniency applicant knows about the cartel, and consequentially proffers to the Division, is based on information learned through *Upjohn*

interviews of the leniency applicant's employees and former employees. That information, when provided to an attorney for the purpose of obtaining legal advice, is privileged. While the attorney-client privilege is sometimes said to protect communications rather than facts, the point of the privilege is to permit a client to communicate facts to his or her attorney in a confidential manner, and those facts, conveyed in such a manner, receive protection as privileged.<sup>2</sup> The memoranda drafted by counsel to memorialize these interviews are protected from disclosure both as attorney work-product, and additionally as attorney-client privileged communications to the extent they reveal the communications that occurred in the course of those interviews and the attorneys' mental processes.<sup>3</sup> Admittedly, none of this turns on status as a leniency applicant or corporate status: the privilege protection is equally applicable for the beleaguered ninth cartel member to confess a guilty plea to the Antitrust Division, as well as for the individual person who seeks leniency.

## **Stage 2 – Leniency Applicant's Proffer Does Not Waive Any Applicable Privilege**

Once counsel approaches the Antitrust Division to seek a marker or to perfect an application, status as the leniency applicant is vital, because a leniency applicant can claim that privilege is not waived as to information learned in *Upjohn* interviews and conveyed to the Division. The Division asserts that it “does not consider disclosures made by counsel in furtherance of the leniency application to constitute a waiver of the attorney-client privilege or the work-product protection.”<sup>4</sup> This non-waiver applies to corporate leniency applicants and individual leniency applicants alike.<sup>5</sup> The Division is committed to maintaining the confidentiality of both the leniency applicant's identity as well as the information it provides, and will break this confidence only following the leniency applicant's prior disclosure or with the applicant's agreement, or as required by court order.<sup>6</sup> This position is long-standing Division policy.<sup>7</sup> It is also an exception to the general operation of privilege: “voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.”<sup>8</sup>

Despite the centrality of the non-waiver assurance to leniency applicants' willingness to speak, the rationale behind the assurance has yet to receive a clear articulation. The Division's repeated assurances may ultimately ring hollow, to the detriment of leniency applicants who have relied on them, if the Division remains silent on the reason leniency applicants do not waive privilege. “The Division said so” is unlikely to persuade any court pressed to untangle claims of privilege.

The Division should explain that a leniency applicant's proffer does not waive any applicable privilege because the proffer is protected under the common interest doctrine.<sup>9</sup> This doctrine “extends the attorney-client privilege to otherwise non-confidential communications” in limited circumstances where the parties are united “with respect to a common legal interest,” protecting communications necessary to pursue that interest.<sup>10</sup> In other words, parties may share information and documents protected by attorney-client privilege and the work-product doctrine without waiving those privileges. As such, a leniency applicant's proffer does not waive any privilege as to the information conveyed because the leniency applicant and the Division share “a common interest in the prosecution of common defendants,”<sup>11</sup> namely, the other cartel members, and confidentiality is otherwise maintained.

While antitrust cases have yet to fully grapple with the application of the common interest doctrine to disclosures by counsel to the government, a number of *qui tam* cases are on point.<sup>12</sup> The dearth of antitrust leniency cases on this point is somewhat surprising, as the case underpinning the evolution of the doctrine in *qui tam* cases is a civil antitrust case. In *United States v. AT&T Co.*, the D.C. Circuit found that MCI did not waive work product protection when it shared an analytical database prepared for trial with the Antitrust Division, at a time when MCI and the government were both pursuing separate civil cases against AT&T for monopolization and related offenses.<sup>13</sup> In reaching this result, the court noted that “[t]he Government has the same entitlement as any other party to assistance from those sharing common interests, whatever their motives.”<sup>14</sup> In essence, the doctrine that permits privileged communications among co-conspirators within a joint defense group also permits the leniency applicant and the government to communicate regarding the prosecution of those co-conspirators.<sup>15</sup>

On at least one occasion, the Antitrust Division has affirmed that a whistleblower’s submission to it is protected from privilege waiver under the common interest doctrine as well as the joint prosecution privilege. That case stemmed from a *qui tam* relator’s disclosure to both the Antitrust Division and the Civil Division of a conspiracy to rig bids on USAID contracts.<sup>16</sup> The court agreed with the Antitrust Division and the relator in holding that privilege had not been waived.<sup>17</sup> In other cases, however, the Antitrust Division has cited the law enforcement investigatory privilege, but not the common interest privilege, when defending a leniency applicant’s submissions and its work product from protection to civil litigants.<sup>18</sup> The law enforcement investigatory privilege is a qualified privilege, not absolute, and disclosure of information protected under the privilege may be required if the litigant can show sufficient need for access.<sup>19</sup> In *In re Flat Glass Antitrust Litigation*, the Antitrust Division defended an amnesty applicant’s disclosures to it as privileged pursuant to the law enforcement investigatory privilege,<sup>20</sup> and on appeal, denied that either attorney-client privilege or work-product protection were applicable.<sup>21</sup> In *In re Micron Tech., Inc. Securities Litigation*, the Division likewise cited the law enforcement investigatory privilege as protecting the communications it had received from Micron regarding Micron’s leniency application.<sup>22</sup> But an assertion of the law enforcement investigatory privilege fails to recognize the leniency applicant’s own unwaived claim of privilege over the information it proffers. In order to protect the integrity of its cartel investigations and the attractiveness of the leniency program to would-be whistleblowers, the Antitrust Division should affirm that a leniency applicant’s disclosures are protected under the common interest doctrine. Such an affirmation would be consistent with the Department of Justice’s approach to *qui tam* cases, as well as other recent cases recognizing that confidential disclosures to the Department of Justice do not necessarily waive privilege.<sup>23</sup>

### **Stage 3 – Proffers by Counsel for Individual Employees (Current and Former) Should Also Not Waive Any Applicable Privileges**

While the Antitrust Division’s Leniency Program is admirably explicit that leniency applicants do not waive privilege when they disclose violations, it is silent regarding the effect of proffers by counsel for individual employees (and officers and directors) of those leniency applicants. The reason for this silence may be simple: the information contained in a counsel’s proffer is typically echoed in the individual’s interview with the Antitrust Division. Nonetheless, consider

the outcome if counsel for an individual proffers, but the corporation loses its conditional leniency status before the individual is interviewed.<sup>24</sup> That attorney proffer might contain the most damning information on liability against the corporation and the individual. That individual – unlike the corporation – would fear criminal prosecution under state laws if the contents of counsel’s proffer were discoverable, even after having contributed fully but futilely to the corporation’s leniency efforts. The solution is simple: the Antitrust Division should update its policy to aver that proffers of counsel for individuals affiliated with leniency applicants (*i.e.*, officers, directors, and employees) do not waive privilege.

The cooperation and testimony of individuals affiliated with a leniency application is absolutely crucial to the leniency program – indeed, one of the requirements for corporate applicants is for corporate applicants to use best efforts to secure the cooperation of involved individuals. These individuals also have a common interest in assisting the corporation in perfecting its market. Current employees who admit or report their wrongdoing “with candor and completeness” and assist in the Division’s investigation are protected under the corporation’s leniency agreement.<sup>25</sup> Former employees who “provide substantial, noncumulative cooperation” or whose “cooperation is necessary for the leniency applicant to make a confession of criminal antitrust activity” may also receive nonprosecution protection.<sup>26</sup> Proffers of counsel for individuals are intended to further the prosecution of cartelists, are made in the course of that joint prosecution effort, and – should the Division affirm this – are made without waiver of privilege.<sup>27</sup> As such, they are squarely within the common interest privilege.

#### **Stage 4 – Interviews of Individual Employees (Current and Former) Are Protected Under Law Enforcement Investigatory Privilege**

The Antitrust Division frequently seeks to interview key corporate executives and other involved individuals before finalizing its offer of conditional leniency. These interviews are typically attended by attorneys and paralegals from the Division, agents from the FBI, counsel for the individual being interviewed and, less often, counsel for the corporate leniency applicant itself. These interviews are not depositions: per the usual practice, the interviewee is not under oath, there is no cross-examination, and the interview is only recorded informally via the memoranda written by the attorneys and others in attendance.<sup>28</sup> Individual interviewees are asked to speak to their own experience and knowledge, and also to provide hearsay, speculation, and any other information that could potentially shed light on the cartel.<sup>29</sup>

These interviews are protected under law enforcement investigatory privilege, a privilege that only the government can assert,<sup>30</sup> and the memoranda memorializing them are additionally protected as attorney work product. In civil litigation arising from the DRAM cartel, the court weighed the Division’s invocation of law enforcement investigatory privilege and declined to require the Division to disclose its notes of interviews of senior officers of the leniency applicant, Micron.<sup>31</sup> The court found disclosure would impair the integrity of the Leniency Program and impede current and future investigations.<sup>32</sup> In contrast, in civil litigation arising from the vitamins cartel, a court required the corporate defendants – including Rhône-Poulenc, the leniency applicant – to produce handwritten notes taken by counsel during the Division’s interviews, finding these notes were “largely, if not wholly, fact work product,” given that they were attempts to capture, as accurately as possible, the interview questions and

answers.<sup>33</sup> Fact work product is discoverable upon a showing of substantial need for the materials and an undue hardship in obtaining the information through other means: factors which may be satisfied when witnesses are unavailable for deposition after pleading the Fifth or as a result of memories degrading over the years.<sup>34</sup>

Leniency applicants seeking to avoid creating discoverable records may consider the extent to which detailed notes of a witness interview are necessary, as well as how long to keep such records. In the *Micron* case, plaintiffs sought discovery from the Division because counsel for Micron no longer had such records. The Division's notes were summaries, rather than near-verbatim transcripts. An analysis of how an interviewee's statements comport with counsel's existing theory of the case, in which the facts are intertwined with the counsel's opinions and advice, would be more likely to avoid production as "virtually undiscoverable" opinion work product.<sup>35</sup>

### **Stage 5 – Respecting Privilege Protection During Discovery Is Key to the Leniency Program**

To private plaintiffs or state attorneys general investigating a cartel, the information provided by a leniency applicant is a roadmap for their own cases. A leniency applicant, after all, is a font of knowledge on the cartel: it knows sufficient details to seek a marker, and often sufficient to perfect the application as well. But targeting the whistleblower in discovery would be an unintended consequence of seeking leniency. As then-Deputy Assistant Attorney General Scott Hammond has stated, "the Division does not consider, however, that leniency applicants would anticipate that the information they provide to the Division will be used for the purposes of private civil litigation, whether a private antitrust action or private securities action."<sup>36</sup> Indeed, as Hammond further explained, the possibility of disclosure to private litigants would both chill cartel whistleblowing and would "place[...] the leniency applicant, who has fully cooperated and subjected its employees to interviews by the government, in a worse position with regard to private civil damage cases than those companies who chose not to cooperate with the government."<sup>37</sup> But the Division's intentions do not always carry the day in discovery disputes, and there is a real risk of whistleblowers losing a significant benefit of the leniency bargain during civil discovery.

Consider the case of Christie's, which received conditional amnesty for its disclosure of a price-fixing scheme between it and the other famed auction house, Sotheby's. Knowledge of the conspiracy lay at the highest level of both companies, but who would speak for Christie's to respond to discovery requests? Its former chair, Anthony J. Tennant, remained a fugitive abroad after his indictment, but its former CEO, Christopher Davidge, was under the protection of Christie's leniency agreement and had cooperated in the Division's investigation.<sup>38</sup> Interrogatory requests asked Christie's to identify persons referenced obliquely in Davidge's handwritten notes, a request that required consulting Davidge, but Davidge had asserted his Fifth Amendment rights. The court found Davidge's knowledge was "within [Christie's] control or otherwise obtainable by it" — in part as Christie's was paying Davidge's legal fees — and required Christie's to pressure Davidge to respond.<sup>39</sup>

This solution was partially appropriate: it avoided probing any privileged conversations. It also respected the practical reality that a corporation may not actually have access to all of the knowledge of its agents that is imputed to it. Regretfully, however, the court questioned whether Davidge's invocation of his Fifth Amendment rights was consistent with his obligation

to candidly admit wrongdoing and assist the Division's investigation.<sup>40</sup> The Division has structured its interview process to avoid placing interviewees in a situation where their statements waive Fifth Amendment protection, and clearly finds the admissions of witnesses sufficient disclosure of wrongdoing.<sup>41</sup>

In other discovery disputes, the path to answering interrogatories or providing a deponent is less straightforward than "Ask Davidge." In these cases, courts confront the dilemma of whether to consult the knowledge of counsel as a practical path to place the defendant's knowledge in the hands of the plaintiffs. As one trial court noted:

[F]acts 'discovered' by corporate counsel during an internal investigation are inherently a part of the corporation's knowledge, because the knowledge of employees is imputed to the corporation. On the other hand, the process by which a corporation 'accumulates' its knowledge—namely, an internal investigation—affords certain protections that can preclude the disclosure of confidential communications and documents created by and recollection of counsel as part of that investigation effort.<sup>42</sup>

The *Linerboard* court did not resolve this tension: it denied the motion to compel defendant Inland to provide a Rule 30(b)(6) deponent educated with the fruits of the corporation's in-house counsel's investigation on the grounds that the deponent provided had been knowledgeable, and plaintiff's demand was tantamount to deposing the in-house counsel.<sup>43</sup> A decade later, another trial court reached a similar result, after concluding the deponent had been well informed and that outside counsel's *Upjohn* memoranda so closely intertwined the attorney mental impressions with facts that the facts could not be segregated for the purpose of educating a deponent.<sup>44</sup> In other cases, where deponents have been ill-informed, courts have required a defendant to provide a Rule 30(b)(6) deponent — educated to the extent necessary with the knowledge of counsel — who can speak to the company's role in the cartel; to educate that deponent, courts have explicitly admitted that the defendant may need to consult the knowledge of its counsel.<sup>45</sup>

This discovery remedy, however, has not been applied to leniency applicants. Nor should it. A leniency applicant should be able to maintain the privileged status of its investigation and request for amnesty, as demonstrated above, and unavailability is not grounds for waiving attorney-client privilege.<sup>46</sup> As the D.C. Circuit has recognized, a practical consequence of retained attorney-client privilege is "that potentially critical evidence may be withheld from the factfinder. Indeed, as the District Court here noted, that may be the end result in this case. But our legal system tolerates those costs."<sup>47</sup>

This system, however, does not leave plaintiffs utterly bereft. While they cannot demand disclosure of the results of a leniency applicant's privileged investigation, the applicant has substantial incentive to ultimately provide that information. Under ACPERA, an amnesty applicant who provides "satisfactory cooperation" to plaintiffs avoids treble damages and joint and several liability for the cartel's harm; instead, its liability is reduced to single, actual damages.<sup>48</sup> ACPERA does not require a leniency applicant to identify itself at any particular point in the civil litigation.<sup>49</sup> Instead, after the close of discovery, the court may weigh the value of cooperation provided against the costs of discovery borne by plaintiffs, and the extent to which those costs could have been ameliorated by earlier or more fulsome cooperation.<sup>50</sup> Leniency applicants may choose to go to great lengths to cooperate, even providing attorney proffers to plaintiffs, in an effort to obtain the benefits of ACPERA.<sup>51</sup> ACPERA is the other prong

to the leniency bargain, and a sufficient mechanism to induce the leniency applicant to be timely in disclosing all potentially relevant facts in civil discovery.

Alternatively, it should also be recognized that neither ACPERA nor the leniency program require a leniency applicant to identify itself in civil litigation, or ever. A leniency applicant may elect to decline to cooperate with plaintiffs. Educating plaintiffs' counsel through iterated proffers, interpreting internal documents, and translating foreign-language materials, contribute to the cost of civil litigation. A leniency applicant may prefer to avoid these expenses, plus the certainty of damages the plaintiff will be able to prove against it, and take its at trial against less prepared plaintiffs. A leniency applicant must be able to select its own litigation strategy – even to mount a vigorous defense rather than seek shelter under ACPERA – in order to not be in a worse position than other cartel members.



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- <sup>1</sup> Amanda L. Butler is an associate, and Robert B. Bell is a partner, at Hughes Hubbard & Reed LLP in Washington, DC.
- <sup>2</sup> See, e.g. *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981) (noting attorney-client privilege “exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice”); *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943 (2d Cir. 1992) (“Because the attorney-client privilege remains an exception that may withhold relevant information at the pre-trial or the trial stage of a criminal prosecution or civil proceeding, it may be invoked to hold secret only those communications made in confidence to a lawyer to obtain legal counsel that would not have been made without the existence of the privilege.”); *Fed. Trade Comm’n v. Boehringer Ingelheim Pharma., Inc.*, 180 F. Supp. 3d 1, 16 (D.D.C. 2016) (“[P]urely factual exchanges between attorney and client merit protection when those facts are provided to the attorney at his request for the purpose of enabling him to provide legal advice”).
- <sup>3</sup> For the seminal statement, see *Upjohn*, 449 U.S. at 401 (“The notes and memoranda sought... are work-product based on oral statements. If they reveal communications, they are... protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorneys’ mental processes in evaluating the communication.”). While the holding in *Upjohn* was restricted to interviews of current employees, see *id.* at 394 n.3, subsequent decisions have held the privilege also applies to interviews of former employees. See *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust*, 658 F.2d 1355, 1361 n.7 (9th Cir. 1981); see also *Sandra T.E. v. South Berwyn School Dist. 100*, 600 F.3d 612, 621 n.4 (7th Cir. 2010); *In re Barbara H. Allen*, 106 F.3d 582, 606 (4th Cir. 1997).
- <sup>4</sup> Antitrust Division, “Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters,” #17 (orig. pub. Nov. 19, 2008; updated Jan. 26, 2017), <https://www.justice.gov/atr/page/file/926521/download>; cf. *United States v. Stolt-Nielsen S.A.*, 524 F. Supp. 2d 609, 613 n.3 (E.D. Pa. 2007) (recognizing that a conditional leniency agreement may “expressly preserve[]” the leniency applicant’s “attorney-client and attorney work-product privileges”).
- <sup>5</sup> Both model leniency letters note “[i]t is further agreed that disclosures made by counsel for Applicant in furtherance of the leniency application will not constitute a waiver of the attorney-client privilege or the protections of the work-product doctrine.” See Antitrust Division, “Model Corporate Conditional Leniency Letter,” (Nov. 20, 2018), <https://www.justice.gov/atr/page/file/1112911/download>; Antitrust Division, “Model Individual Conditional Leniency Letter,” (Nov. 20, 2018), <https://www.justice.gov/atr/page/file/1113031/download>.
- <sup>6</sup> “Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters,” #33.
- <sup>7</sup> See Scott D. Hammond, “Dispelling the Perception that Legal Privilege Impedes Antitrust Enforcement – The US Experience,” 11(2) *Competition Law Int’l* 118, 124 (Oct. 2015).
- <sup>8</sup> *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1427 (3d Cir. 1991).
- <sup>9</sup> Some decisions use the terms ‘joint-defense’ and ‘joint-prosecution’ synonymously with ‘common interest,’ depending on the parties involved, see, e.g. *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990), while others attempt to maintain a conceptual distinction. See, e.g. *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 28 (D.D.C. 2002) (noting that the “overarching principle” behind both the joint-defense privilege and the common-interest privilege is the same).
- <sup>10</sup> *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007); see also *In re Sealed Case*, 29 F.3d 715, 719 n.5 (D.C. Cir. 1994) (adopting three-part test to determine if communications between counsel for multiple parties are within the joint defense or joint prosecution privilege: “(1) the communications were made in the course of a joint defense [or prosecution] effort; (2) the statements were designed to further the effort; and (3) the privilege has not been waived”) (citing *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3d Cir. 1986)).
- <sup>11</sup> *Miller v. Holzmann*, 240 F.R.D. 20, 21 (D.D.C. 2007).
- <sup>12</sup> See, e.g. *United States ex rel. Landis v. Tailwind Sports Corp.*, 303 F.R.D. 419, 422 (D.D.C. 2014) (concluding that a written *qui tam* disclosure, which the relator provided to the government and which memorialized attorney-client privileged information, could not be compelled for production in discovery); *United States ex rel. Pogue v. Diabetes Treatments of America*, 2004 WL 2009413, \*6 (D.D.C. May 17, 2004) (finding common interest privilege applied); *Ex rel. Purcell v. MWI Corp.*, 209 F.R.D. at 27 (holding “that in FCA cases in which the government intervenes, a joint-prosecutorial privilege exists between the government and the relator”).
- <sup>13</sup> *United States v. AT&T Co.*, 642 F.2d 1285, 1300-1301 (D.C. Cir. 1980) (*discussed in Ex rel. Purcell*, 209 F.R.D. at 25-27).
- <sup>14</sup> *AT&T*, 642 F.2d at 1300 (*quoted in Ex rel. Purcell*, 209 F.R.D. at 27).
- <sup>15</sup> *Ex rel. Purcell*, 209 F.R.D. at 25 (“To allow this important privilege to protect a joint defense without extending similar work-product protections to a joint prosecution would not be fair.”).

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- <sup>16</sup> *Miller*, 240 F.R.D. at 22. But see *In re Aftermarket Filters Antitrust Litig.*, 2010 WL 4791502, \*4 (N.D. Ill. Nov. 18, 2002) (rejecting whistleblower's claim that common interest applies to information provided to Division after concluding that whistleblower was not motivated by joint investigation of a potential criminal case but instead obtaining leniency in the DOJ's separate investigation of the whistleblower for false statements and obstruction of justice).
- <sup>17</sup> Brief of Plaintiff United States Regarding Common Interest Privilege, *United States ex rel. Miller v. Philipp Holzmann A.G.*, 2006 WL 6179612 (D.D.C. Dec. 18, 2006) (1:95-cv-01231) (contending that both the common interest doctrine and the joint-prosecution privilege applied to protect the communications from disclosure); Relator Richard M. Miller's Brief on Privilege Issues in Response to the Court's Order of Dec. 12, 2006, *United States ex rel. Miller v. Philipp Holzmann A.G.*, 2006 WL 6179613 (D.D.C. Dec. 18, 2006) (1:95-cv-01231).
- <sup>18</sup> The law enforcement investigatory privilege protects information regarding criminal investigations, past and present, as well as law enforcement techniques and procedures. See, e.g. *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010); *In re Sealed Case*, 856 F.2d 268, 271-72 (D.C. Cir. 1998). It has been found to protect information obtained by the Antitrust Division and the FBI in price-fixing investigations. See, e.g. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125-26 (7th Cir. 1997).
- <sup>19</sup> See *In re Sealed Case*, 856 F.2d at 272 (quoting *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973)).
- <sup>20</sup> Brief for the United States as Amicus Curiae Opposing Discovery of Amnesty-Related Materials, *In re Flat Glass Antitrust Litigation*, at 7-12, 97-md-550 (W.D. Pa. Mar. 26, 1998), <https://www.justice.gov/atr/case-document/file/496526/download>.
- <sup>21</sup> See Brief for the United States at 26, *In re Nelson v. Pilkington*, 98-3498 (3d Cir. Dec. 7, 1998), <https://www.justice.gov/atr/case-document/file/496521/download>.
- <sup>22</sup> See The United States' Opposition to Plaintiffs' Motion to Compel, at 2, 11-19, *In re Micron Tech., Inc. Secs. Litig.*, 1:09-mc-00609, (D.D.C. Nov. 20, 2009). The plaintiffs also sought copies of interview memoranda, which the Antitrust Division also opposed on the same grounds. *Id.* at 2, 19-21.
- <sup>23</sup> See, e.g. *In re financialright GmbH*, 2017 WL 2879696, \*7 (S.D.N.Y. June 22, 2017) (concluding that oral briefings made by Jones Day to the DOJ in the course of Volkswagen's cooperation with the DOJ's criminal investigation of dieselgate, "made pursuant to non-waiver agreements[,] do not waive the protections of the work-product doctrine or attorney-client privilege"); *In re Natural Gas Commodities Litig.*, 232 F.R.D. 208, 211 (S.D.N.Y. 2005) (upholding magistrate judge's determination that defendants did not waive privilege via "voluntary disclosure of privileged documents to government agencies [FERC, CFTC, and DOJ] pursuant to an explicit non-waiver agreement").
- <sup>24</sup> In *In re Flat Glass Antitrust Litigation*, Libbey-Owens-Ford ("LOF") and Pilkington, its majority owner, had sought leniency, a fact which the two companies ultimately publicly disclosed, and the Antitrust Division confirmed. See Brief for the United States at 10, *In re Nelson v. Pilkington*, 98-3498 (3d Cir. Dec. 7, 1998). The leniency application was unsuccessful, reportedly because LOF's disclosures were insufficient. See 385 F.3d 350, 363 (3d Cir. 2004).
- <sup>25</sup> "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters," #22.
- <sup>26</sup> *Id.* #24.
- <sup>27</sup> See *In re Sealed Case*, 29 F.3d at 719.
- <sup>28</sup> See, e.g. Decl. of Niall E. Lynch, ¶ 6, *In re Micron Tech., Inc. Secs. Litig.*, 1:09-mc-00609 (D.D.C. Nov. 30, 2009) (stating, with respect to the interviews of the Micron witnesses in the DRAM price-fixing investigation, that "[t]he interviews were not taken under oath, and there was no cross-examination").
- <sup>29</sup> See, e.g. *id.* (noting that the Micron "witnesses were encouraged to provide all information they had, including rumors and suspicions"); Decl. of Scott D. Hammond, ¶ 14, *In re Micron Tech., Inc. Secs. Litig.*, 1:09-mc-00609 (D.D.C. Nov. 30, 2009) (noting that witnesses in a grand jury investigation "are asked to provide the Division with the full range of their knowledge, observations, and suspicions because investigation of inadmissible information might lead to the discovery of admissible evidence).
- <sup>30</sup> *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996) (noting that the D.C. Circuit requires the Assistant Attorney General for the Antitrust Division, or comparable person for other departments within government, to formally claim the privilege after having reviewed the documents); see also Reply Brief for the United States at 9, *In re Nelson v. Pilkington*, 98-3498 (3d Cir. Jan. 19, 1999), <https://www.justice.gov/atr/case-document/file/496516/download> ("It is highly unusual for the United States to appear in a private antitrust suit in the district court, particularly on a discovery issue, let alone then to intervene and appeal.").
- <sup>31</sup> *In re Micron Tech., Inc. Secs. Litig.*, 264 F.R.D. 7, 10 (D.D.C. 2010).
- <sup>32</sup> *Id.* at 11.
- <sup>33</sup> *In re Vitamins Antitrust Litig.*, 211 F.R.D. 1, 3-5 (D.D.C. 2002).

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- <sup>34</sup> *Id.* at 3; see also *In re General Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 533 (S.D.N.Y. 2015) (indicating that interview memoranda may be available to be produced if a witness who was interviewed is unavailable for deposition).
- <sup>35</sup> *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (citing Fed. R. Civ. P. 26(b)(3) and *Upjohn*, 449 U.S. at 401-402); see also *Fed. Trade Comm'n v. Boehringer Ingelheim Pharma, Inc.*, 778 F.3d 142, 151 (D.C. Cir. 2015) (“Opinion work product protection is warranted only if the selection or request reflects the attorney’s focus in a meaningful way.”).
- <sup>36</sup> Decl. of Scott D. Hammond, ¶ 15, *In re Micron Tech.*
- <sup>37</sup> *Id.*
- <sup>38</sup> See Brief for Appellee United State of America at 2, *United States v. A. Alfred Taubman and Anthony J. Tennant*, 02-1253 (2d Cir. June 19, 2002), <https://www.justice.gov/atr/case-document/file/512786/download> (noting Tennant was a fugitive); Christopher Davidge’s Memorandum in Support of Motion for Protective Order, *In re Auction Houses Antitrust Litig.*, 2000 WL 34528711, \*3 (S.D.N.Y. Oct. 13, 2000) (00-cv-0648).
- <sup>39</sup> *In re Auction Houses Antitrust Litig.*, 196 F.R.D. 444, 445 (S.D.N.Y. 2000).
- <sup>40</sup> *Id.* at 447 n.7.
- <sup>41</sup> See, e.g. Decl. of Niall E. Lynch, ¶ 6, *In re Micron Tech.* (noting that interviews did not occur under oath); *United States v. Allen*, 864 F.3d 63, 77 n.50 (2d Cir. 2017) (observing that statements at such interviews are typically granted use immunity); *ALCI Int’l Commodity Servs., Inc. v. Banque Populaire Suisse*, 110 F.R.D. 278, 287 (S.D.N.Y. 1986) (finding that “statements [that] were not made under oath” and not verified by the interviewee did not waive the privilege against self-incrimination).
- <sup>42</sup> *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 380 (E.D. Pa. 2006) (citations omitted). Linerboard antitrust violations were not uncovered via a leniency application, but rather an FTC investigation.
- <sup>43</sup> *Id.* at 385.
- <sup>44</sup> See *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL 12953930, at \*3 (N.D. Cal. July 22, 2015) (declining to compel such discovery from defendant Thomson). Chunghwa was the leniency applicant for CRT.
- <sup>45</sup> See, e.g. *In re Vitamins Antitrust Litig.*, 216 F.R.D. 168, 172 (D.D.C. 2003) (requiring Bioproducts to provide a witness “thoroughly educated about the noticed deposition topics with respect to any and all facts known to Bioproducts or its counsel, regardless of whether such facts are memorialized in work product protected documents or reside in the minds of counsel”); *In re Vitamins Antitrust Litig.*, 217 F.R.D. 229, 234 (D.D.C. 2002) (requiring same as to defendant Takeda); *In re Air Cargo Shipping Services Antitrust Litig.*, 2012 WL 1129852, \*2 (E.D.N.Y. Mar. 27, 2012) (requiring Nippon Cargo to provide a witness informed as to details learned by counsel through *Upjohn* interviews). Rhône-Poulenc was the leniency applicant for the vitamins cartel, and Lufthansa was the applicant for air cargo.
- <sup>46</sup> See *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1494 (9th Cir. 1989).
- <sup>47</sup> *In re Kellogg Brown & Root*, 756 F.3d 754, 764 (D.C. Cir. 2014).
- <sup>48</sup> Antitrust Criminal Penalty Enhancement and Reform Act, § 213, 15 U.S.C. § 1 notes.
- <sup>49</sup> *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 618 F. Supp. 2d 1194, 1196 (N.D. Cal. 2009) (finding no authority under ACPERA to compel a leniency applicant to identify itself, and noting that a leniency applicant’s cooperation would be evaluated at the conclusion of the case when judgement was rendered).
- <sup>50</sup> *Id.*; see also *Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128, 1133 (N.D. Cal. 2011); *In re Polyurethane Foam Antitrust Litig.*, 314 F.R.D. 226, 290 (N.D. Oh. 2014); *Morning Star Packing Co. v. S.K. Foods, L.P.*, 2015 WL 3797774, \*7 (E.D. Cal. 2015).
- <sup>51</sup> See *In re Aftermarket Automotive Lighting Prods. Antitrust Litig.*, 2013 WL 4536569, \*3, \*5 (C.D. Cal. Aug. 26, 2013) (detailing the assistant provided, including nine attorney proffers and responses to all discovery requests, but ultimately denying ACPERA benefits after finding that the TYC defendants’ tardily disclosed the true start of the conspiracy, too late for plaintiffs to amend their complaint).