# Cartel & Criminal Practice Committee Newsletter

Winter 2021



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## Message from the Co-Chairs

By Lindsey Vaala & Beatriz Mejia

The Cartel and Criminal Practice Committee is pleased to publish its Winter 2021 Newsletter. On behalf of the Committee, we thank our contributing authors for their work on this edition as well as those who volunteered to read and review newsletter articles.

In this issue, we cover the cartel pitch meetings, the FTAIA, and cartel enforcement in South Africa.

Going forward, the Committee intends to publish articles on a more frequent basis, often individually. We will then compile articles and publish them together periodically as a newsletter.

We are excited to kick off a new program series focused on cartel enforcement outside the United States. Please join us on February 5 for the first installment of our new Global Cartel Enforcement series. Practitioners from Mexico and Canada will share insight about enforcement news and trends in their jurisdictions. Please also watch for an upcoming program discussing the intersection of antitrust, FCPA, and FCA enforcement and our next Bi-Monthly Updated, planned for late February 2021.

Finally, many thanks to our Committee Vice Chairs and volunteers for their enthusiastic work on behalf of the Cartel & Criminal Practice Committee.

Happy New Year!

# Hitting Your Cartel Pitch Meeting Out of the Park

by Jeff Martino and Ann O'Brien[1]

## I. Introduction

Cartel practitioners who have visited the third floor of the Main Justice Building in Washington, D.C. for a pre-indictment "pitch" meeting with Antitrust Division leadership know it can be their one shot at the plate with the chain of command that holds their client's fate. The ultimate goal from a cartel defense practitioner's perspective is to persuade prosecutors they don't have a winnable case against your client and avoid indictment. In reality, like baseball, the walk-off homerun rarely happens. And, if a pitch meeting is granted but an indictment does not follow, switching to an often-used football analogy, it is usually because the case was already considered very close to the evidentiary 50-yard line that cases must cross to be indicted under the Principles of Federal Prosecution. Pitch meetings can certainly help solidify existing concerns managers and Front Office leadership have and may lead to a case not being brought. Pitch meetings can also lead to the tailoring of an indictment and reduced charges. No doubt, pitch meetings are important in cartel cases and counsel should come prepared and ready to swing for the fences with Antitrust Division leadership. In this article, we discuss tips for hitting your pitch out of the park based on our two decades of experience with hundreds of pitches at the staff, office management, and Front Office levels.

## II. Pitch Meeting Policy

Prosecutors at the Antitrust Division of the Department of Justice must follow two key playbooks: the Department-Wide Justice Manual and the Antitrust Division Manual.

The Justice Manual that binds all Department prosecutors makes no promises of a pitch meeting. Instead, it merely encourages prosecutors to notify "targets" of an investigation "a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury."[2] It cautions that "[n]otification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice."[3] It is very rare that prospective defendants choose to appear before the grand jury as described in the Justice Manual, as their under-oath statements could be used against them affirmatively at trial or for impeachment purposes.

The Antitrust Division Manual states:

> Staff ordinarily will inform defense counsel that it is seriously considering recommending indictment…[S]taff should never inform counsel that the corporations or individuals will be indicted. Rather, counsel should be informed that the staff is seriously considering recommending to the Front Office that the Division seek the return of an indictment. This procedure applies to those corporations and individuals whom staff believe pose close questions, as well as those who may ultimately be recommended for indictment. Unless the indictment will be placed under seal, counsel for both corporate and individual defendants are usually afforded an opportunity to meet with staff and the office chief regarding the recommendation being considered. See Justice Manual § 7-3.400. Counsel should be encouraged to present

[1] Jeff Martino and Ann O'Brien are partners in BakerHostetler's Antitrust and White Collar practices who spent nearly two decades each at the Antitrust Division of the U.S. Department of Justice in various leadership and management positions. The views expressed in this article are those of the authors and not necessarily those of BakerHostetler or its clients.
[2] U.S. Dep't of Just., Just. Manual § 9-11.153 (2018).
[3] *Id.*

> all arguments as to why it would be unwise or inappropriate—for factual, legal, or prosecutorial policy reasons—to recommend indictment of their client.[4]

The Antitrust Division Manual goes on to state that:

> Counsel do not have any absolute right to be heard by the Front Office, although the Director of Criminal Enforcement and the Criminal DAAG will ordinarily give counsel an opportunity to be heard before recommending an indictment to the Assistant Attorney General. Only in very unusual circumstances will counsel be granted a meeting with the Assistant Attorney General. The Front Office will ordinarily consider the arguments of counsel in making a final recommendation, but only after counsel has already met and discussed the issues with staff.[5]

Note, the Antitrust Division Manual refers only to pre-indictment pitch meetings and counsel should not expect meetings above the staff or office management level to be granted in the plea negotiation context.

## III. Pitch Meeting Tips

Based on our almost two decades each at the Antitrust Division and our participation in hundreds of pitch meetings, we offer the following practical tips for making your most effective pitch:

### 1) Respect the Process

If you are informed or believe that Antitrust Division staff is considering recommending to the Front Office the criminal indictment of your corporate or individual client, you can ask for a pitch meeting with the staff, then for a meeting with the office chief, and ultimately a meeting with the criminal Front Office. The Antitrust Division Manual lays out these possibilities, and if your client would like to utilize each step, you should do so in turn. You can email written submissions or white papers addressing specific issues in advance of the meeting.

The Antitrust Division has a generous history of providing the opportunity for pre-indictment pitch meetings that often exceeds what other DOJ prosecutors might be willing to offer. However, Antitrust Division pitch meetings in criminal cases have always been discretionary, with no absolute right in law or policy to a meeting.

Some counsel who have been denied pitch meetings have incredulously insisted they have a right to a pitch meeting. This tone of entitlement is rarely well received or effective. While at various times in Antitrust Division history, more or less, meetings have been held in criminal cartel cases at various levels within the division, such meetings were always considered discretionary and not a right, as pointedly stated in the Antitrust Division Manual. Counsel are much better served to rely on their powers of persuasion to convince the Antitrust Division that a pitch meeting will be beneficial rather than trying to insist they are entitled to a pitch meeting.

You can expect to meet with the Director of Criminal Enforcement and the Criminal Deputy Assistant Attorney General (DAAG) at your Front Office meeting. As the Antitrust Division Manual states, a meeting with the Assistant Attorney General is very rare. Meetings higher up within the Department, such as with the Associate, Deputy, or Attorney General are even more rare. Such higher-level meetings are saved for rare instances when there are perceived novel legal theories, serious collateral consequences, very large volumes of affected commerce, or matters presenting other major policy implications or issues of national importance. When such issues arise, the submission of premeeting white papers can be important to tee up those issues in advance.

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[4] *See* U.S. Dep't of Just., Antitrust Div. Manual III-120 (2020); these antitrust-specific provisions are also contained in the Justice Manual at § 7-3.400.

[5] *See id.* at III-121.

At times, counsel will immediately request going straight to the top for a meeting with the Front Office criminal leadership or Assistant Attorney General, or even higher up in the DOJ, and skip staff or office management meetings. Counsel may even preface the request with a (perhaps inadvertent) dig at the credibility of the staff, saying they already know staff's view, making a staff or office management-level meeting meaningless.

There are a few reasons this is not a smart strategy. First, the posture of a pitch meeting is different from an investigation or even a negotiation with staff. The pitch meeting is a good time to show the strength of your defense case and may have a real impact on staff or office management in changing their recommendation or narrowing the scope of the charges recommended. Also, pitch meetings with staff or office management allow counsel to gauge the government's interest in various issues based on questions posed or reactions. Staff may even tip their hat a bit, mentioning compelling evidence or witnesses they may rely on. Therefore, such meetings can be strategically helpful in knowing what to expect in the government's case in chief or preparing your defense case.

Finally, on a basic human level, going to the manager before addressing the issues with staff is rarely well received. One need not go further than the many "I would like to speak to the manager" memes mocking "Karens" or "Kens" going viral these days to drive this point home. If you end up going to trial against Antitrust Division staff, it will be a long journey that starts with the pitch meeting process, so careful thought should be given about when to start asking to see the manager.

**2) Who and What to Bring to the Pitch Meeting**

**a) Bring the client or expert only if they further an important point**

Counsel often wrestle with whether to bring the client to a pitch meeting. Individuals facing possible indictment rarely attend pitch meetings primarily due to concerns about the client making statements that could later be used against them, and because it is often hard for them to keep their emotions in check when their liberty is potentially at stake.

Individuals may want to speak on their own behalf to prosecutors, and this is likely to be most effective if the individual has a personal story to tell – for instance, personal or family circumstances leading to their conduct or those that will be collateral ramifications of a prosecution. In a best-case scenario, prosecutors could see what that individual may look like to a jury if they took the stand, and that could potentially move an otherwise close case below the prosecution threshold. This can also cut the other way – as prosecutors we saw individual defendants say outlandish things or act inappropriately, only reinforcing that the prosecution had a winnable case.

With respect to corporate clients, a representative of the corporation often accompanies outside counsel to a pitch meeting. This can be an in-house counsel or a business representative. These attendees can be helpful in addressing business-specific issues or questions, and they typically understand the dynamics of the setting and are used to presenting. Corporate representatives can be particularly helpful in addressing the Principles of Federal Prosecution for Business Organizations by discussing compliance, remediation, cooperation and/or collateral consequences to office management and staff. Other specialized legal or compliance executives or technical or industry experts can occasionally be helpful too.

Sometimes, it is helpful for a client to attend a Front Office meeting in Main Justice since it drives home the gravity of the impending charges and sometimes precipitates a newfound openness to settlement discussions.

**b) Forget the color-coded charts and fancy PowerPoints**

Fancy PowerPoints going through the posture or players in the investigation are often wasted on prosecutors who know the facts very well. It is typically most effective to make your key points orally and provide one or two key examples in support. In addition, providing charts with lots of pricing data in a cartel investigation is rarely as effective because the focus of proving a per se criminal cartel case is on the existence of an agreement rather than its effectiveness.

In one pitch meeting often recounted by Antitrust Division prosecutors, counsel spent the entire meeting going over a complex multipage, color-coded chart showing pricing anomalies. After the conference room doors shut behind counsel, the room of Division prosecutors discussed that they did not find the chart persuasive – particularly the Director and Criminal DAAG at the time who were both colorblind and couldn't follow the color-coded chart.

**c) Leave the electronics**

Anyone who has recently been in for a pitch meeting in the Antitrust Division Assistant Attorney General's large conference room has seen the ornate wooden box outside. This is a box (purportedly with Faraday-like blocking capabilities, although typically left open) that you must leave your electronics in before entering the conference room. So, you should assume you will not have access to your phone while in the pitch meeting. Even if you are taken to another conference room, or the mysterious box eventually disappears, it is very distracting if counsel is looking at their devices during the meeting. Providing your undivided attention to those at the meeting is more likely to get their attention in return.

**3) What to Cover at the Pitch Meeting**

**a) Hit 'em with your best shot**

If you are granted a pitch meeting at any level, carefully and strategically consider how you will present your arguments. Preparedness and presentation matter, and you want the government prosecutors to leave that meeting fearing you can persuade a jury to acquit your client. This is another good reason to go through the staff and office management meeting process because you can test out different points and approaches before getting your one shot at the Front Office.

It is also helpful to lay out a road map at the beginning of the meeting to make sure you get through all the intended content before your time is up. Your pitch meeting will likely be scheduled for an hour or less, and you should assume the time allocated for the meeting is all you will get.

Start with your strongest point. If you have evidence that looks better for your client than for the government, lead with that. If you think you have a strong legal argument, raise it right away. There is no sense in building up to your strongest point and having weaker points before it dull the punch. Also, you want to make sure you get your best stuff out while everyone is in the room and engaged. Front Office pitch meetings often involve the coordination of many people at the Division and, when we all return to in-person meetings, will often involve the tight scheduling of scarce conference rooms (yes, this is an actual issue). You should assume the meeting will need to end on time, and it is not uncommon for meeting participants to be called out of the room during a meeting.

It is also a good idea to leave time for questions and discussion. Staff frequently engage on facts and management on policy and practice, and these discussions can provide valuable insight into Division thinking.

**b) Think about how many cards to show**

When we were prosecutors, the best thing that could come out of a pitch meeting was the opportunity to see a version of the defense's opening statement and hear the defense's theory. Going through each of your arguments or counterpoints will rarely be a case-killing strategy, but doing so can often provide a great road map for the prosecutors to follow in preparing their case in chief and possible rebuttal case. Defense counsel have tipped their hat to previously unknown defense witnesses or evidence in pitch meetings, giving the prosecution more time to prepare for them before trial.

**4) What Not to Cover at the Pitch Meeting**

**a) Don't sandbag**

Counsel sometimes try to save their best arguments or evidence for the big pitch meeting with the Front Office, hoping for a "gotcha" moment. This is not a helpful strategy. Antitrust Division criminal Front Office leadership will typically receive a detailed briefing from staff and office management about what to expect before a pitch meeting. They often

already have a case recommendation memo from staff laying out anticipated defenses. If something new is raised in a pitch meeting, it will be discussed among Division staff, management, and leadership after the pitch meeting.

While counsel might find it entertaining to put Division staff on their back feet in a meeting with their bosses, the staff will have the last word with their chain of command and may know other evidence that makes your "gotcha" point seem irrelevant or misguided. Raising that point in earlier meetings with staff or office management can let you gauge their reaction to it. If it is good enough to be an actual case killer, then the staff won't have a persuasive response when you raise it with their bosses.

**a) Don't waste your time on credibility attacks**

Defense counsel spend an inordinate amount of time in pitch meetings dwelling on the shortcomings of potential government witnesses or leniency applicants. Blanket arguments that leniency recipients or pleading witnesses won't be believed by juries are even less compelling. Some Antitrust Division prosecutors even use the acronym "SHD" as shorthand for "sweetheart deal" because these defense arguments are so expected and commonly overcome that they don't typically merit independent assessment during the case recommendation process.

If you are at a pre-indictment meeting, Division prosecutors likely know a lot about their own key witnesses and their baggage, and have already factored witness credibility issues into their recommendations. In addition, what you hear from your client may contain their spin on the flaws of their accusers and is probably better saved for your cross-examination than to spend valuable time on in a pitch to prosecutors.

## III. Conclusion

If you are granted a pitch meeting, a carefully drafted submission and dialogue can make the difference for your client. The Antitrust Division Manual provides sound advice that any submission and meeting should focus on factual, legal, or prosecutorial policy issues, and not devolve into a debate on the credibility of witnesses or the leniency applicant. This is your client's shot to avoid or minimize their exposure, so developing a strategic presentation and delivering it in a respectful and professional manner is the best way to hit your pitch out of the park. You will be better served saving your Oscar-worthy performances, attacks on credibility, and parsing of facts for the jury.