INSIDE THE MINDS

Antitrust Law Client Strategies

Leading Lawyers on Best Practices for Compliance, M&A Transactions, and Litigation Proceedings

ISBN 978-1-59622-712-5
Library of Congress Control Number: 2007925495

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First Printing, 2006
10 9 8 7 6 5 4 3 2 1

From Risk Assessment to Risk Avoidance: "An Ounce of Prevention is Worth a Pound of Cure"

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Antitrust Law

The two pillar commandments of U.S. antitrust law are "thou shall not make an agreement in unreasonable restraint of trade" and "thou shall not unlawfully monopolize a relevant market in trade or commerce." An antitrust lawyer must tell his or her client clearly and accurately why there are these laws prohibiting competitive activities that make such good economic sense to the client. The antitrust laws seem counterintuitive to an aggressive capitalist. Why can't I agree with my competitor that I will not try to sell to his or her Customer A if my competitor will not try to sell to my Customer B? Why can't my competitor and I agree that we will not charge less than a certain amount for our similar products, which gives each of us a fair, not exorbitant, profit margin? What's wrong with all of us little guys banding together to buy our raw materials and refusing to buy from any seller who won't lower the price to a level we're willing to pay? What's the benefit of joining a trade association if we can't discuss the problems and solutions facing us in our businesses? An antitrust lawyer must explain the pillar commandments of antitrust law in the context of the client's real or perceived business objectives. His or her job is not just to say, "No, you can't do that, because it's against the law," but to understand the client's business objective and help create a way to achieve it by lawful means. Often, along the way, the client and the attorney redefine the business objective and create alternative structures for success. If the client has already committed a questionable act and is facing an enforcement action or a civil lawsuit as a result, the attorney must explain the law, but obviously the end game of the representation is geared toward defense.

Practicing antitrust law involves risk assessment and risk minimization, if not avoidance. The attorney should add value at all three of these stages, but the focus of attention depends on the situation faced by the client. Is the client contemplating entering into a business transaction with antitrust implications? Is the client feeling hurt by the business activities of others, which may violate the antitrust laws? Has the client engaged in business activities that may violate the antitrust laws? Has the client been served with a civil investigative demand from an enforcement agency (basically a subpoena) related to the client's industry, possibly leading to a proceeding in which the client may be a witness or a party? Has the client been sued for

antitrust violations by the government? Is it a criminal action or a civil enforcement action? Is it a civil treble damages action by a government agency or a private plaintiff? Each of these situations poses different aspects of risk assessment, risk minimization, or risk avoidance.

There is an emotional element in every client situation. The antitrust attorney's first job is to instill confidence in the client in his or her ability to help the client through their legal situation. "Boy, are you in trouble" is less likely to do that than "It is what it is, so let's talk about how to deal with it." It is good practice to always put the client's situation in the broader perspective of business life. Ironically, successful companies draw antitrust attention because the effects of their business strategies may come at the expense of their competitors. The clients' emotional state may derive from their sense of being criticized and possibly punished for pursuing a successful business strategy. Usually, some combination of "big picture" metaphors diffuses whatever emotional element has captured the client before the antitrust lawyer arrives on the scene. Client control early and often is the key to a successful outcome in any attorney/client relationship, especially in antitrust law where the stakes can be enormous.

Components of Antitrust Law

The principal purpose of the antitrust laws is to maintain a free enterprise system by prohibiting business activities that unreasonably restrain trade or lessen competition. In essence, Congress has determined that the public benefits by getting the highest-quality products and services at the lowest prices through vigorous competition.

The three basic federal antitrust laws are the Sherman Act, the Clayton Act (as amended by the Robinson-Patman Act), and the Federal Trade Commission Act. The basic antitrust law is the Sherman Act, which was passed in 1890. Section 1 of the Sherman Act outlaws agreements that unreasonably restrain interstate and foreign trade. Section 2 of that act prohibits monopolization, as well as conspiracies and attempts to monopolize.

In 1914, Congress supplemented the Sherman Act with the Clayton Act, which prohibits specific types of anti-competitive conduct such as certain exclusive dealing arrangements, requirements contracts, and certain mergers and acquisitions. Section 7 of the Clayton Act frowns upon acquisitions, mergers, or other business combinations that have the effect of reducing the number of competitors in a relevant market, to the extent that consumers may pay higher prices or otherwise lose the benefits of economic competition. Section 8 of the Clayton Act prohibits certain interlocking directorates on boards of competing companies. The Clayton Act was amended and supplemented in 1936 by the Robinson-Patman Act, which deals with unlawful brokerage or commercial bribery, and discrimination in prices, services (such as advertising), or facilities.

Finally, the Federal Trade Commission Act declares that unfair methods of competition and unfair or deceptive acts or practices are unlawful.

In addition to these federal statutes, most states have their own antitrust laws, patterned to some extent after the federal statutes, which reach local activity not involving or affecting interstate commerce.

The Sherman Act prohibits conduct that unreasonably restrains, monopolizes, or seeks to monopolize trade "among the several states or with foreign nations." The Foreign Trade Antitrust Improvements Act of 1982 added a new Section 6a to the Sherman Act, broadening the jurisdictional reach of the act specifically to encompass anti-competitive conduct that occurs outside the United States. There are two principal tests for subject matter jurisdiction in foreign commerce cases under the Sherman Act and the Federal Trade Commission Act. With respect to foreign import commerce, the U.S. antitrust laws apply to foreign conduct that "was meant to produce and did in fact produce some substantial effect in the United States." Second, with respect to foreign commerce other than imports, under the Foreign Trade Antitrust Improvements Act, the U.S. antitrust laws apply to foreign conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

The *Antitrust Enforcement Guidelines for International Operations*, issued jointly by the Antitrust Division of the U.S. Department of Justice and the Federal

Trade Commission in April of 1995 ("*International Guidelines*"), make clear the activist enforcement policy of the agencies. The purpose of the *International Guidelines* is to provide the answer to a simple question: What makes international antitrust cases different? The answer lies in jurisdiction, principles of international comity, and the significance of foreign government involvement, all of which the *International Guidelines* address.

In 1991, the United States and the European Union entered into the agreement regarding the application of their competition laws. In addition to notification, cooperation, and information exchange procedures, the 1991 agreement contains a "positive comity" provision permitting either the United States or the European Union to request the other party to enforce its competition laws against anti-competitive conduct occurring within the other party's territory that harms competition in the requesting party's territory.

The U.S. antitrust enforcement agencies have taken an increasingly aggressive approach to international antitrust enforcement in two respects. First, the agencies as well as the courts have taken a more expansionist approach to anti-competitive conduct that occurs outside the United States but harms U.S. domestic commerce, imports to the United States, or a U.S. exporter. Second, U.S. antitrust enforcers have pursued bilateral and multilateral agreements to enhance both formal and informal cooperative antitrust enforcement effort with the competition law authorities of other countries, including positive comity arrangements.

The foregoing is not intended as any more than a basic primer on international application of U.S. antitrust laws. Private firms seeking to understand international application of the U.S. antitrust laws must also be cognizant of the interplay between the antitrust laws on the one hand, and the U.S. and international trade laws on the other.

Practicing Antitrust Law

The first job of an antitrust lawyer is to assess risk, an assessment entirely dependent on the state of client activity when the antitrust attorney is consulted. The following areas commonly catch the attention of antitrust

regulators and potential private plaintiffs: agreements with competitors, refusals to deal, resale price maintenance, tying arrangements, exclusive dealing, requirements, and output contracts, price discrimination, and monopolies.

Agreements with Competitors

One way the courts have analyzed unreasonable restraints of trade under Section 1 of the Sherman Act is by distinguishing between "horizontal" and "vertical" restraints. "Horizontal" refers to agreements between competitors who are on the same level of competition in the chain of distribution—such as two manufacturers making similar products. "Vertical" refers to relationships between persons on two different levels of competition in the chain of distribution, such as a supplier and a customer. Horizontal restraints are considered likely to be anti-competitive, and therefore they are frequently treated as "*per se*," or automatically, unreasonable. They are not saved from illegality by proof that, for example, they improved efficiency, were entered into without any criminal or predatory intent, or were the result of agreement among companies with small market shares.

The antitrust laws presume that competition is best served when every company unilaterally determines its prices, levels of production, methods of distribution, customers, territories where it will do business, and similar matters. Agreements or concerted activities among two or more competitors on such matters are almost invariably found to be unlawful. Moreover, they are the most dangerous antitrust violations because they are most likely to lead to government criminal prosecution under Section 1.

Illegal arrangements, agreements, or conspiracies need not be formal or in writing. Mutual understandings, "gentlemen's agreements," and off-the-record arrangements arrived at without explicit promises or assurances may be enough to support a conviction under the Sherman Act. Enforcement agencies frequently compile isolated acts and documents to forge a chain of circumstantial evidence from which they can persuade a court to conclude that an agreement or conspiracy exists. Therefore, it is important not only to act within the law, but also to avoid doing anything

that even gives the appearance of collusion. The kind of agreements that may well be considered as *per se* unreasonable restraints of trade are those that:

- Fix or affect prices or other terms or conditions of sale to customers
- Fix or affect prices to be paid to suppliers
- Divide customers or territories among competitors
- Limit or otherwise control the volume of production or sales
- Boycott or cause others to boycott or refuse to deal with any third parties, such as suppliers, customers, or competitors

Refusals to Deal

Agreements or understanding among suppliers and their wholesalers, distributors, dealers, traders, or customers not to sell to or buy from any particular concern or class of concerns have frequently been held to be unlawful. Even an inference of an agreement with others to act jointly to refuse to deal must be avoided. Any termination of a dealer can be a very serious matter.

Resale Price Maintenance

An agreement or understanding with a wholesaler, dealer, distributor, trader, or other reseller to control resale prices may be held unlawful. In 1997, the U.S. Supreme Court eliminated the *per se* illegality of certain types of "maximum" resale price maintenance. In the 2006 term, the court accepted for review the question of whether it should also abandon the *per se* illegality of minimum resale price maintenance requirements in light of modern economic theory. Generally, a manufacturer may suggest resale prices, but attempting to enforce such resale prices may be problematic. Resale price maintenance agreements may be proved circumstantially and even the barest mention or criticism of price cutting easily can be misconstrued as a threat. If, after such criticisms, a distributor changes its prices, the courts may infer an illegal agreement to fix resale prices.

Tying Arrangements

An unlawful tying arrangement occurs when a manufacturer with a strong market position with respect to one product conditions the sale of that product on the buyer's agreement to purchase other products, which the buyer may not want or would prefer to buy from another seller. Similarly, using the leverage of one product in scarce supply or of unique quality to persuade a customer to buy an additional product is very risky. At the base of the offense is a requirement that a customer purchase a product or service they do not want in order to obtain one they wish to purchase.

Exclusive Dealing, Requirements, and Output Contracts

Contracts that prohibit a purchaser from buying or dealing in the goods of a competitor may be unlawful depending on their effect upon competition. Also, contracts that commit (a) a customer to purchase all or substantially all of its requirements for a particular product from one seller or (b) the seller to sell all or substantially all of its production of a particular product to one customer have been attacked where a substantial share of a local or national market for the product is thereby foreclosed to competitors or potential competitors for a significant amount of time. It is not necessary that the contract itself use the words "exclusive distributor," "requirements," or "output." Arrangements involving quantities that, in fact, will cover substantially all of the party's needs or output should be referred to counsel for advice before execution.

Price Discrimination

The Robinson-Patman Act applies only to situations where sales of goods or commodities are involved. The act does not apply to services, although some analogous state statutes may apply to services. Also, for the sale of goods or commodities to fall under the Robinson-Patman Act, the goods being sold must cross a state line in the course of the sale. Sales to customers outside the United States are not covered.

This statute is very complex, and counsel should be consulted as to its application in any particular situation. The act generally prohibits giving

different prices, terms, services, or allowances to different customers who compete or whose customers compete in the distribution of a company's products. A different price or other allowance may be justifiable in certain limited situations such as meeting a specific competitor's price or reflecting verifiable cost savings. However, the requirements of these situations are difficult to meet, and any departure from a company's established prices, terms, or other policies must have prior approval of counsel and must be carefully documented.

Monopolies

Monopoly power is generally described as the power to control prices in or exclude competitors or potential competitors from the market for a given product in a substantial geographic area. The antitrust laws have been used to attack the maintenance of or the attempt to obtain such power in an improper way. The law does not prohibit the existence of natural monopoly power a company may achieve through normal competition as a result of its superior products, skill, foresight, industry, other superiority, or because of its ownership of important patents. However, attempts by a single firm or a group of firms to achieve or maintain a monopoly position through predatory (i.e., below-cost) pricing designed to have or having the effect of driving competitors out of business, or through the use of business practices designed to exclude others from entering the market, have been attacked even though the use of these business practices might otherwise have been legal in the absence of the intent or tendency to acquire monopoly power.

Care should be taken to avoid any acts or statements that might be misconstrued as or give the appearance of being a power tactic or an attempt to drive a competitor out of the market, especially in those areas where a company has a substantial market share, few competitors, or superior technology.

The Financial Impact

Antitrust plaintiffs in a civil action may, if successful, recover three times their actual damages caused by the antitrust violation and may recover their

attorneys' fees incurred in the lawsuit. This so-called "private right of action" permitted by Clayton Act Section 4 creates a significant financial implication for defendants and historically has been a notable weapon in enforcement of the antitrust laws. The upside for a successful plaintiff is great, but the cost and time involved are great as well for plaintiffs who don't prevail.

For both individual and corporate defendants, the financial implications of antitrust violations can be disastrous. A corporation can be fined up to $100,000,000 per violation if convicted of a criminal antitrust offense. Individuals may incur fines up to $1,000,000, be sentenced to up to ten years in jail, or both. The trend in recent years in sentencing has been that most individuals convicted of antitrust violations have been sentenced to jail time.

Criminal penalties, however, are not the end of the matter. The antitrust laws also provide for injunctive relief, which allows a court to impose long-term or permanent restrictions on the conduct of the corporation and individuals involved. For example, corporations have been required to divest assets, license patents or technology, or change established ways of doing business. Likewise, individuals may be enjoined from engaging in certain types of employment or business activity. As noted above, civil remedies also are available to persons or businesses injured by a violation of the antitrust laws. Under some circumstances, a class action may be filed, in which a person may be permitted to sue on behalf of all other people who allegedly have been similarly injured. The class action device can substantially increase the potential exposure in civil damage suits. In addition, state attorneys general are authorized to seek damages and injunctive relief in certain circumstances on behalf of individual citizens of the various states.

An additional factor is that a company or individual accused of an antitrust violation suffers throughout the entire experience. The disruption in business caused by the loss of executive time in helping to prepare for trial and in testifying may itself be very substantial. Even simple cases can cost enormous sums to defend, while the defense of major cases can cost millions of dollars. Finally, even the accusation of antitrust violations may

cause a loss of reputation and standing in the community both for a company and for individual employees. Acquittals rarely receive the publicity of indictments.

"It so happens, Gregory, that your grandfather Sloan was detained by an agency of our government over an honest misunderstanding concerning certain antitrust matters! He was not 'busted by the feds'!"

Common Antitrust Issues

Some companies over the last decade have invested time and energy in the creation of or participation in what are known as business-to-business Internet exchanges. Such exchanges have drawn the attention of antitrust

regulators because of the collaboration among competitors necessary to establish a meaningful exchange, while not using the exchange to facilitate anti-competitive activity such as price fixing or allocation of markets. The antitrust attorney helps clients assess the viability of the exchanges and, where appropriate, structure such exchanges to minimize the risks of antitrust violations.

Trade associations enjoy certain dispensation from antitrust enforcement because of the Noerr-Pennington privilege or the state action doctrine. However, trade associations also present their members with opportunities for joint discussion and activity, and great care must be taken to avoid discussions of individual company or joint company activity in the marketplace.

Some companies over the years have been interested in joint ventures. Such ventures, particularly among horizontal competitors at the same level of the market, pose significant antitrust risks. An antitrust lawyer helps develop appropriate models and specific guidelines for the conduct of joint ventures.

Corporate clients in various industries, including the steel and petroleum products industries, generate questions as diverse as Robinson-Patman Act questions and Clayton Act merger and acquisition issues, the first involving complex issues related to price discrimination and the second requiring complex market share analysis.

Regulated industries pose interesting antitrust issues such as the scope and limitations of antitrust exemption under McCarran-Ferguson given by Congress to the "business of insurance."

With all this is mind, companies tend to get themselves into trouble through direct or indirect contacts with competitors. Contacts with competitors, whether formal or informal, business or social, can be misconstrued and may result in an antitrust challenge. Clients must be educated to be sensitive to the implications of such contacts.

It is not surprising that members of the same industry often respond in a similar or identical fashion to various market occurrences, because they all operate under similar conditions and presumably have similar goods. Parallel actions that affect the competitive marketplace can, however, give rise to an appearance of improper concerted action when coupled with frequent contact among competitors through trade associations. The activities of trade associations are of particular interest to and are scrutinized carefully by antitrust prosecutors and prospective litigants.

Likewise, any exchanges of competitive information among competitors may give rise to an inference of an improper agreement or conspiracy in restraint of trade. The practice of exchanging current business information with competitors presents substantial antitrust risks. Exchange of historical or current non-confidential information may be appropriate and desirable. Such exchange may, indeed, enhance competition, particularly if such information is exchanged through either the offices of a trade association or some other external means, thereby avoiding direct contact among competitors.

Providing Client Value

Antitrust lawyers often prepare written antitrust guidelines for company management to adopt, implement, and provide to employees. They also give seminars to client employees who are in antitrust-sensitive areas, such as the sales force and the executives who attend industry meetings. Where contacts with competitors are necessary, employees should be sensitive to how their remarks might be interpreted in order to avoid any appearance of impropriety. The following guidelines apply to any contacts with competitors:

1. Avoid discussions that might be misconstrued as price fixing, customer or market allocation, attempts to limit research, or boycotting suppliers and customers.

2. Immediately leave any gathering or terminate any discussion with a competitor if the competitor raises any of these topics, after first

emphatically declining to discuss them. If you are in a large group, make sure everyone will remember that you objected and left.

3. Do not feel awkward about appearing "uptight." The stakes are too high to worry about being "one of the boys." Any incident involving an attempted communication on an improper subject should be referred to your supervisor.

These guidelines apply to any gathering of or communication with competitors. They apply to conversations during business meetings, at the bar, on the telephone, on the golf course, and during a "social" dinner. They apply whether the competitor is a stranger or a friend. There are no "off-the-record" conversations with competitors.

Whether in writing or in oral preparations, strategies for clients in antitrust-related issues arise out of recurring business situations. It is useful to give clients practical tips about antitrust compliance and to provide clients with questions and answers that derive from commonly encountered situations in trade and commerce. Representatives include the following:

Question: A customer advises you that it has been offered a lower price by one of your competitors, or a customer informs you of its receipt of notice of a price increase from one of your competitors. May you contact the competitor to verify the accuracy of the price or price increase?

Answer: No! Similarly, if you are contacted by a competitor seeking to confirm or deny a price or price increase of your company, you should immediately advise that you do not discuss prices with competitors. In addition, you must neither confirm the accuracy of the information nor deny the accuracy of the information.

Question: A member of your sales staff comes to you with a competitive price list obtained from a customer. May you utilize it?

Answer: There is nothing wrong with obtaining a competitor's price list from a customer, so long as the customer is entirely independent and is not merely acting as a conduit to relay price information. You should, however,

make a record regarding the source of the price list, the identification of the individual receiving the price list, and the date of receipt of the price list.

Question: You receive a competitor's price list in the mail from that competitor. What should you do?

Answer: You should return the price list with a cover letter explaining that it is against your company's policy to receive such information and insisting that such conduct not be repeated.

Question: You are attending a trade association meeting also attended by competitors. A representative of one of the competitors makes a statement such as, "Our prices are just too low. In my opinion, we need to be obtaining at least a 10 percent margin, and if we all act together we could stabilize the market for the benefit of ourselves and our customers." What should you do?

Answer: You should immediately state that it is entirely improper to discuss the pricing of products, and you should insist that there be no further discussions of prices. If there is any further discussion, you should ask to have your objection noted in the minutes of the meeting, and you should immediately leave the meeting. Under no circumstances should you discuss prices or even listen to a conversation of others regarding prices. The mere exchange of price information among competitors can subject you and the company to a criminal violation of the Sherman Act. It is important that you be assertive in refusing to exchange information or discuss prices with any competitor.

Question: During a telephone conversation or at the time of an informal contact with a representative of a competitor, the competitor advises you of a future price it intends to charge for a product and/or inquires as to the future price of a product by your company. What should you do?

Answer: You must refuse to discuss the subject, and you should advise the other party that it is against your company's policy for you to discuss such information. If necessary, you must literally walk away, hang up the telephone, or otherwise disassociate yourself from the competitor.

Question: A competitor is your next-door neighbor, and he or she inquires over the back fence concerning your company's price to a certain customer. What should you do?

Answer: The company's price to a customer is not only confidential, but the disclosure of such information is illegal. Exchanging price data, including any of its components, as well as production plans, market outlook, sales projections, and so on should always be avoided.

Question: A competitor who is aware of the antitrust implications of directly discussing certain information with you decides to utilize a common customer or broker to relay the information. The common customer or broker contacts you to relay the information, the source of which you are aware. Is there anything improper in obtaining information in this manner?

Answer: The knowing use of a third party, agent, or representative to share competitive information is entirely improper. Information cannot be shared between competitors indirectly any more than it can be discussed directly.

Question: You have been attempting to solicit a prospective customer, and a competitor objects good-naturedly about your tampering with his or her well-established relationship with that customer. May you, as a favor, stop soliciting the customer's business?

Answer: You should first of all never discuss customers with a competitor, and it is entirely improper to refrain from dealing with a customer as a favor to a competitor. Decisions regarding new business opportunities must be made independently, not as a result of any understanding or reciprocal favors with others.

Question: You and a competitor are seeking to obtain the same business. You are attempting to sell the same product to a customer, and you learn that your competitor has submitted a lower price. The customer shows you the competitor's bid, and you lower your regular price in order to beat the competitor's price. Have you violated the law?

Answer: Probably, yes. You may reduce your price to meet the competitive one, but you cannot lower your price to beat the competitive price if to do so would result in price discrimination *vis-a-vis* other purchasers of the same product who compete with the favored customer.

Question: There is a particular account you are seeking to obtain, and the purchasing agent advises you that he or she has received a competitive price from one of your competitors well below prevailing market prices. For various reasons, you do not trust the purchasing agent's honesty, and the agent refuses to provide you with a copy of the competitive quote. May you nonetheless offer a lower price in order to meet the competitive quote?

Answer: It is lawful to discriminate in price when the offering of a lower price is made in "good faith" in order to meet a competitive price. Absent other reliable information that can be documented for future reference, however, the granting of a lower price under such circumstances would probably not be in good faith. You also should keep in mind that it is only permissible to offer a lower price to meet a legally permissible lower price of a competitor, and that the sale of a product at a price below cost (by you or your competitor) is usually improper.

Question: A competitor contacts you to advise that a third competitor is purchasing product from a common broker, that the third competitor has been engaged in improper activities adversely affecting the price of the product, and that it believes pressure should be brought to bear on the broker not to deal with the third competitor. May you contact the broker and object to its dealing with the third competitor?

Answer: First, it is generally improper to put pressure on another party not to deal with a competitor. When efforts are made to restrict dealings of this nature as a result of collusion or agreement between competitors, it is unlawful. Accordingly, in addition to the inappropriateness of discussing such matters with a competitor, collusive activity of this nature should never occur.

Question: You are invited to submit a bid to a particular entity. During the course of an informal contact with a competitor, inquiry is made about

whether you will be submitting a bid to that particular entity. For whatever reason, you have not previously bid for that business, and it is not your intention to bid for that business in the future. May you relay that information to the competitor?

Answer: No! It is strictly and absolutely improper to discuss bids with a competitor or to disclose to a competitor the intention to bid or not to bid, irrespective of the reason. Knowledge of the fact that a competitor will or will not be bidding may have an impact on the price bid by another, thereby adversely affecting the integrity of the competitive bidding process. Accordingly, you should never discuss prospective bids with any competitor.

Question: You are advised by management personnel of the company that a subpoena has been received from the Department of Justice looking into the company's practices in connection with the handling of certain business transactions. You are further advised that the record retention policy of the company has been suspended with respect to any documents pertaining to the transaction, and that all such documents are to be submitted to a designated representative. During the course of the particular transaction, you prepared handwritten notes that, upon review, give the appearance of some improper action on your part. Since they are your personal notes and no one else would have a record of the contents or a copy thereof, you would prefer merely to destroy the notes to avoid any potential problems. May you do so?

Answer: Absolutely not! The knowing destruction of any document subject to a formal governmental investigation and subpoena is a crime. The destruction of the notes after receiving notice of receipt of the subpoena, even though the same could have been destroyed prior thereto in accordance with the record retention policy, could result in your criminal prosecution.

The foregoing questions and answers, while representative of areas of common antitrust concern, don't begin to exhaust the topic. What they suggest, however, is that the antitrust attorney and his or her client must be

in frequent and very clear communication about any business issue with antitrust implications.

Defining Success

The first level of success is educating the client about the antitrust risk at hand. The second success is having the client make the best decision about how to proceed in order to minimize or avoid the antitrust risk. As an example, suppose an aggrieved client wants to sue somebody for antitrust violations. Antitrust litigation is time-consuming and expensive. Apart from the horrible aspects of litigation generally, there are additional risks in the field of antitrust. A lawsuit opens the client's industry and its own business practices to scrutiny. An antitrust lawyer must understand the good, the bad, and the ugly of the business activity in question before he or she advises the client how to proceed. The hypothetical client may ask whether it can get the government to go after the villain so the expense and burden is not on the client. The answer is yes, the client may call the Citizen Complaint Center maintained by the Antitrust Division of the Department of Justice. There may be a situation faced by a client where "calling the feds" will be appropriate. In assessing the total picture for the client, however, the attorney may well advise clients to be careful what they ask for, because they may get it. The government may accept the client's view of the world to open an investigation, but as it takes control, the government may go places the client doesn't want it to go and may perhaps discover industry practices in which the client engages that the government finds as unacceptable as the practice the client's competitor engaged in that caused the client to instigate the investigation.

On the other side, for antitrust defendant clients, success is minimizing expense and risk as early as possible without showing fear to the other side. The process of antitrust litigation is slow, except in cases where the government or the private plaintiff is seeking preliminary injunctive relief against the defendant. In such a case, the attorney must assess the risk quickly to determine whether it makes sense to fight the injunction or try to negotiate a workable accommodation of competing interests until the merits of the case are tried. For most disputes, however, there is a lengthy period of time in which to develop and implement a strategy for defense.

A good antitrust attorney must keep current on antitrust trends and the law. He or she should follow industry trends, try to anticipate issues clients might face, and stay ahead of the curve. For example, the insurance industry has, since 1945, enjoyed a statutory exemption from the antitrust laws under the McCarran-Ferguson Act. The exemption applies to "the business of insurance," and there has been much case law defining the parameters of the exemption. One of the reasons for the exemption is that insurance companies are highly regulated by the states in which they operate, and many business practices that raise antitrust issues are best handled as a matter of state regulation. There are several bills in Congress that will affect the insurance industry significantly. One is a bill that will permit companies to opt for federal regulation, which presumably will include application of antitrust laws. The other bills in various iterations call for complete or partial repeal of the McCarran-Ferguson antitrust exemption. Under the current system, insurance companies, particularly in the property and casualty field, engage in joint activities of gathering and sharing data necessary for rate setting and other common matters. The communications among competitors necessary to do this would cause antitrust concerns but for the exemption. It is reasonable to assume the benefits and economies that attend necessary joint activities among insurers will continue to require dispensation from the antitrust laws, but the landscape for insurance company regulation may change dramatically in the near future.

Another significant area involves the relationship between the antitrust laws and the securities laws. In 2006, the U.S. Supreme Court accepted for review a case involving leading investment banks and institutional investors that participated in syndicates to underwrite the initial public offerings of hundreds of technology companies during the 1990s. The district court had held that the defendants were entitled to antitrust immunity because much of the conduct they were alleged to have engaged in was explicitly permitted by the Securities and Exchange Commission. The Court of Appeals reversed the district court and ruled that Congress has granted no such immunity. The issue for the Supreme Court is how the antitrust laws should be applied to the inherently collaborative activity of a securities underwriting syndicate.

Client Strategies

Prior to the first meeting with a new client in an antitrust matter, the attorney wants to know what stage of the antitrust cycle the client is in. "I have been invited to attend a meeting of key players in my industry" is a different situation than "I have been indicted individually for bid rigging in the state highway improvement project." Interestingly, however, the information the antitrust attorney needs may be substantially the same. Who is in the industry? What is the normal business practice in the industry? What are the purposes for communications among the competitors in your industry? Antitrust law is simple to articulate. The Sherman Act paraphrased recites that "thou shall not make an agreement in unreasonable restraint of trade" and "thou shall not unlawfully monopolize." The law is simple, but the facts and the economic environment in which clients conduct business make antitrust cases and situations extremely complex.

Hopefully, the attorney knows more before his or her first meeting than just that a new client is at the door with an antitrust question. If that were all that was known, the attorney would have all of his or her years of knowledge and experience prior to the first meeting but would need much more information to chart a course. Assuming the attorney has obtained the preliminary information discussed above, he or she then expands on that with the client to make sure they have identified the outer boundaries of the framework necessary to construct the framework for analysis.

The key to a successful strategy is to identify the framework for analysis into which all the facts, the economics of the industry, and the applicable law will fit. The framework may be roomy if the client has a loosely defined business objective but hasn't done anything yet. The framework will be more limited if the indicted client did in fact rig a bid with its competitors in the state highway improvement project.

A good attorney formulates a strategy with, not for, the client in an antitrust matter. Antitrust clients are almost always experienced if not sophisticated businesspeople. The attorney must assess clients for their experience, their sophistication, their knowledge of or sensitivity to antitrust issues, and their

emotional investment in the issue at hand. Every strategy and all subsequent discussions are affected by this assessment of the client in these areas. Many antitrust clients are in a situation where expense is not a factor. Their activity has possibly or actually violated the antitrust laws and they want to spend whatever it takes to win a war of attrition. If expense is a factor, as it usually is with an antitrust plaintiff client or a company needing advice on future business activities, the attorney may give the client a "cafeteria plan" with menu items the client may choose based on the time the attorney must spend, the time to completion, and the economic risk and reward of each menu item.

The best approach in representing a client is situational and depends on the assessment the attorney makes at the outset, reevaluates often, and alters as the client or situation changes. The attorney/client relationship is based on trust. All other factors pale in comparison. A good attorney will not oversell the client. Promising more than he or she can deliver will eventually come back to haunt the attorney. However, the other side of that coin is to be careful not to scare the client away. If the client is contemplating or going through litigation, a balanced message, in words or substance, will include the following:

> "I know you think well of your situation, and I believe we have a respectable, possibly winning, position to assert in this case. I am a trial lawyer and love nothing better than going to trial. But I rarely advise clients that a trial is the best way to resolve their business disputes. This case will cost you a lot of money, emotional energy, and lost productivity. The French philosopher Voltaire made the statement that he had had two horrible experiences in his life—the first was when he lost a lawsuit, the second was when he won one. The way to visualize this process is that you will drag me kicking and screaming into the courtroom and will never be able to say to me that I didn't warn you about the pain. We will try to get the best business result for you and, if all other resolutions fail, I will be your indefatigable warrior in the courtroom."

A trial lawyer loves to try lawsuits, and clients should know that. But putting a client's business fate in the hands of strangers, whether judges or juries or even arbitrators, is more risky than working toward another business resolution in which the client has more control over its fate. Despite what many emotional or less sophisticated clients may think, often based on television or movie portrayals of lawyers, it often takes as much courage for a lawyer to force a settlement as it does to try a lawsuit. If the antitrust attorney and his or her client trust each other, together they will get to the right place.

Another important factor is the side the client is on. It affects everything. Subject to the expense, antitrust plaintiffs have only upside. If the representation involves a class of plaintiffs, the stakes rise, the expense rises, and the upside rises. For defendants, there are mostly downsides. The experience of being an antitrust defendant costs a lot of money, even if the defendant prevails. Expense aside, however, every client expects his or her attorney to advise on the likely outcome on the merits and to advise on how to proceed based on the strengths and weaknesses of the client's position.

The same factors apply to business transactions. It is the rare business deal in which both sides have equal bargaining power. A good measure of bargaining power is the ability to walk away at any time. Antitrust implications increase in importance as the size of the deal increases. A current example is the increasing consolidation in the telecommunications industry of the former "Baby Bell" companies, which, because of the large market shares involved, require antitrust clearance. In 1984, the government broke up "Ma Bell." To see the pieces of a once mighty company coming back together is very interesting from an antitrust perspective. But to address the importance of which side the client is on, the attorney will have greater or lesser leverage in helping the client negotiate depending on whether it is their side or the other side of the deal with the antitrust problem.

An antitrust dispute should be viewed as a business transaction with special rules. The good antitrust attorney's job is to keep the client focused on the risks and rewards of various strategies and tactics while keeping emotions in check.

Determining the Best Strategy

Determining the best strategy to enact is entirely dependent on the type of situation a client is facing. A hypothetical example will illustrate an antitrust dispute. Suppose the client is a freight forwarder in the import-export trade of the United States. Their major clients are foreign shipping companies. Their business is highly regulated by both U.S. law and international tariffs imposed by treaty. The client has received a civil investigative demand from the Antitrust Division of the Department of Justice, requiring the client to produce documents and appear for testimony before a grand jury. Through the client or otherwise, the attorney determines that the focus of attention is on whether small freight forwarders are being excluded from the trade through the Port of Houston and consumers are paying more for imported goods than they would if the industry were more competitive.

Five necessary areas for the attorney to explore are as follows:

1. Immediately stop the destruction of any documents, including e-mail, and introduce the attorney to the employees who can identify the location of all documents the client may have to produce in response to this subpoena.

2. Who in your company is the best person to describe to the attorney the way your business operates?

3. Who is the best person to describe the good, the bad, and the ugly about the overseas shipping trade?

4. Have you ever had a discussion in which a subject was keeping your competitors out of the freight-forwarding business for the Port of Houston? With your shipping company clients? With any competitor? With anyone else?

5. Based on the antitrust laws as the attorney has described them to you, would you invoke your privilege against self-incrimination if called to testify before the grand jury?

Obviously, these questions are more than "general," but they are representative of questions that must be asked when the government enforcement agencies are involved. Similar questions also apply when the client is a defendant in a civil antitrust action. Their purpose is directly to focus client attention on the most important aspects of the antitrust dispute. The questions and answers help the attorney and his or her client assess risk and start the process of creating a strategy.

Each answer helps define the framework for analysis of risk. Depending on the answers, the attorney may want to go to the lawyer on the other side early and openly in a spirit of cooperation, or he or she may advise the client to engage in trench warfare and make the other side fight hard for every inch of turf. The options on opposite ends of the strategy models are always very fact-intensive and will probably take time to develop.

Documentation

No document should be deemed unimportant until the attorney and client have defined the framework for analysis. That's why the first question concerning document location and preservation is critical to ask in every antitrust matter.

Continuing the example from above, suppose the client has a copy of an e-mail its operations manager sent to the client's major shipping company client, complaining that the shipping company was using ABC freight forwarder instead of the client when it shipped widgets through the Port of Houston. This document is important because it relates to the subject matter of the civil investigative demand. Such a document will help in the first instance because it relates to risk assessment for the client. Still unknown is whether it helps or hurts the case for the client on the merits. Hopefully, there will be other documentation that puts this e-mail in a legal context.

Suppose the shipping company replied by e-mail to the effect that ABC provided more efficient freight forwarding service at a better price and ABC would continue to get business. From an antitrust perspective, this is good (even though the client probably didn't like the reply as a business

matter at the time). Suppose instead that the shipping company replied that using ABC was a mistake, apologized, and used the client exclusively thereafter. From an antitrust perspective, this may be good or bad, the attorney still doesn't know yet. The shipping company has a unilateral right to use whoever it wants in the vertical chain of distribution, within reason, and only an agreement in unreasonable restraint of trade will be unlawful. The client has the right to complain to the shipping company. That's part of competition. If further documents show that the client communicated with its competitors about getting all shipping companies to boycott ABC freight forwarding company, the antitrust lawyer's job gets harder because such communications appear to be anti-competitive.

This example demonstrates the complexity of antitrust matters and how approach and strategy must frequently be assessed and perhaps changed. For better or worse, antitrust cases are mostly document-intensive and document-driven. This makes documents all-important and antitrust compliance guidelines about documents essential.

Careful language will not avoid antitrust liability when the conduct involved is illegal, but it is unfortunate when perfectly lawful conduct becomes suspect because of a poor choice of words. Careless and inappropriate language in company communications can have an extremely adverse effect on the company's position in an antitrust investigation or lawsuit. Under modern disclosure procedures, no company documents other than privileged communications to or from counsel are exempt from disclosure. All other documents may be subject to production, including "personal" handwritten notes of individual employees made in the course of their job performance and in drafts of documents. The fact that such notes reflect only internal thought processes will not deter opposing lawyers from seeking such documents and arguing that they show the purposes and intent of the company.

Although it may not seem like it, e-mail is considered a document. Accordingly, an e-mail file can become evidence in a lawsuit. Even after e-mail is "deleted," it is often recoverable by a computer expert. The increasing importance of e-mail is recognized in amendments to the Federal Rules of Civil Procedure, effective in December of 2006. Companies must

be aware and antitrust attorneys must advise their clients of their obligations in the world of "electronically stored information," which include documents produced on word processing systems, spreadsheets, and e-mails. For all documents and e-mails, the following guidelines should be helpful:

1. Do not use guilt complex words such as "please destroy after reading."

2. Do not use exaggerated power words such as "this sales program will destroy competition."

3. Be wary of "tough talk" such as "put a competitor out of business," "do whatever it takes," and "squash them like a bug."

4. Do not speculate as to the legal propriety or consequences of conduct or attempt to paraphrase legal advice.

5. Do not mis-describe competition as something unexpected or improper, such as referring to price cutting as "unethical" or to a lost customer as one "stolen" by the competitor.

6. Use particular care when discussing competition and prices. Avoid giving the false impression that the company is not competing vigorously, that its prices are based on anything other than its own business judgment, or that its public statements are "signals" to competitors.

7. When discussing the prices or plans of competitors, clearly identify the source of your information so there will be no false implication that the information was obtained under a collusive arrangement with a competitor.

8. Avoid giving any impression that special treatment is being accorded to a customer or class of customers, such as by use of the phrase "for you alone."

9. Take care to avoid use of words that might imply falsely that a course of action was being pursued by the company as a matter of "industry agreement" or "industry policy" rather than as a matter of the company's individual self-interest.

10. Avoid using "canned" wording in memoranda that may sound as though you are writing for sake of appearance rather than to create an accurate record.

Antitrust lawyers have seen documents that violate these guidelines. Based on initial meetings with the chief executive officer, the attorney may believe that both the chief executive officer and the company are sophisticated in the antitrust laws. Documents that violate these guidelines may cause the lawyer to revise his or her assessment of the company, which is the "client." In a manufacturing company or a distributor, the sales force is prone to communicate in the undesirable fashion described in these guidelines, thus making antitrust sensitivity training necessary in these areas.

Case Theory

Case theory develops from the mix of facts and law. The antitrust lawyer must develop a thorough understanding of the parties' intentions and actions and the competitive effects of those actions. He or she then applies the antitrust laws to those actions and effects and develops a theory within the framework of analysis that accounts for all the material facts and the law. Representing a plaintiff, the lawyer develops a case theory supporting a violation of the antitrust laws by the defendant. Representing the defendant, he or she develops a case theory to avoid liability or minimize damages.

The client is involved every step of the way. Developing case theory is just another way of identifying the problems and opportunities in the situation presented and setting achievable goals. No matter how sophisticated the client, antitrust implications are often subtle or counterintuitive to the client's perception of a rational business objective. To use a prominent recent example, a pure capitalist can't understand how a company such as Microsoft, which revolutionized and personalized computers so everyone can use them, could be criticized for wanting every user purchasing its

operating system also to buy its Internet browser. The same economic system that permits the Microsofts of the world to emerge and prosper apparently punishes them for their success. Well, the antitrust laws say Microsoft cannot tie its monopoly product, its operating system, to a requirement of using its non-monopoly product, the Internet browser. The antitrust laws want innovation, product improvement, and competition in Internet browsers, and thus they impose the anti-tying rule discussed above. From the public record, it appears that high-level Microsoft employees made some unfortunate statements in intra-company memos and e-mails that apparently no antitrust lawyer pre-approved. However, the end game of the antitrust dispute could only be achieved with an informed client assessing risks and adjusting strategy and case theories to the facts and applicable law as the case evolved.

Establishing the Attorney/Client Relationship

An attorney should always try to establish a positive client relationship in an antitrust matter. Because antitrust is high-stakes, this area of business law is not for the beginner. A recent law school graduate shouldn't hang out a shingle and profess to be an antitrust lawyer. More to the point, however, is that a sophisticated business client recognizes quality in this field. If the client likes his or her attorney, that is good. If the client respects the quality of the attorney's advice, that is a better foundation for a positive working relationship.

Understanding the Client

Discovering a client's motivation is important to developing a strategy in an antitrust dispute. Walking a mile in the other side's shoes helps in every legal matter, transaction, and dispute. At an appropriate time in developing a relationship with the client, the attorney may ask what he or she would do or think if on the other side. The client may describe what motivates the other side more easily than what motivates the client if asked directly for his or her motivation. "Why would your St. Louis distributor be angry enough with you to sue you?" "Because he's greedy and doesn't like the price increase I had to make." "What might the distributor say about why you increased the price?" "He would probably say I was weak and caved into

industry pressure to raise the prices." "When I get information about the price changes from the suppliers in your industry to their distributors, might I see any parallel timing or behavior?" "You might." This is a privileged attorney/client dialog that helps the attorney and client in risk assessment and strategy creation.

"Why" is a powerful question, and the answers to the "why" questions help develop the strategy. The attorney may conclude that motivation is important but not the driving factor in the case. Motivation may be a negative component of the mix and, as with emotion, the attorney should try to eliminate motivation as an important factor in the strategy. In the example above, the attorney identified "greed" and "fear" as possible motivators for the behavior involved in the lawsuit. Whether the client's fear becomes a motivator in the strategy to be followed remains to be seen.

The client's ultimate goal in any antitrust dispute is to "win." It is not uncommon at the beginning of the antitrust matter for the client to define the win in a different way than the attorney does. As in all attorney/client relationships, the client and the attorney must eventually agree on the definition of "win." The attorney should identify and describe a number of goals and rate the chances of achieving each goal. Through this process, which is ongoing as more facts reveal themselves, the client hopefully will suggest the realistic goal that both the attorney and client can endorse. It is fundamental to successful implementation of any strategy.

The best strategy to help most clients understand the reality of their case is to give them a direct and honest appraisal of the application of the antitrust laws to their situation. If appropriate to that task, the "walk a mile in the other side's shoes" scenario may help. Clients also need educating about why their rational business objective is either illegal or, if legal, can only be achieved by illegal means. "I want to be the only source of supply in the country for X, the critical component of Y product." "That business objective is legal, but you must use legal means to achieve it. Do you have a patent on X as a product or on the process to make X? If so, our laws give you a lawful monopoly for seventeen years. If not, you may achieve a monopoly by superior innovation or process that will generate in your X a 'brand' no one can compete with. That is also legal." "I want to agree with

A, B, and C, my potential competitors for X, that they will stay out of X in exchange for my making only X and not expanding into their markets for W and Z." "That activity poses significant antitrust problems. What will your competitor D think or do in reaction to the proposed agreement among competitors A, B, C, and you?" "They won't like it." "Would competitor D's reaction be reasonable? How would you feel if you were competitor D?" And so on. A walk in the other person's shoes often redirects a client's thinking and understanding of business practices in relation to the antitrust laws.

Since there are such high stakes involved in antitrust disputes, the proceedings can be quite emotional. However, some clients respond to the proceedings with ambivalence. Ambivalence may not be a negative reaction once various options are explored. Ambivalence is to be expected when there are both good and bad possibilities from different options. After discussing all the factors in the mix of fact and law, the client and the antitrust attorney will choose what appears to be the best option, have confidence in it, but remain flexible and open to new strategies if they are presented.

A good antitrust lawyer wants the same thing the client wants: a good result and, if possible, a "win." Both client and lawyer should evolve to the point where they make a good team. Clients and lawyers may place importance on different issues, facts, possibilities, and probabilities. They speak a different language, feel different emotions, and have different stakes in the outcome. A lawyer with experience has much to draw upon, including instinct, to chart a course of action in which both lawyer and client can have confidence.

If ambivalence is a function of time and expense, the right strategy may be to do nothing different, just stay the course. The "millions for defense, not one penny for tribute" wealthy corporate antitrust defendants can choose to stay the course for years, possibly decades. They may win a war of attrition. They may wear the other side down sufficiently to make possible a settlement they deem acceptable. Particularly in civil cases in federal court, systemic problems permit cases to linger on the docket for years, possibly decades. The main problem in every antitrust situation, however, is

managing what the client "wants" in the context of a multi-faceted situation. Every client wants a win in the fastest time at the lowest cost. Antitrust matters rarely produce a win as the client might define it. They take a long time and are very expensive.

In the worst case, antitrust attorneys are all about minimizing antitrust risk because they cannot avoid it. The antitrust laws permit a corporate violator to confess and mitigate the seriousness of its conduct through the Department of Justice leniency and amnesty programs. This may be the best a corporate client can hope for. Sometimes it is difficult to adopt because it may involve incriminating the individuals in the company who have violated the antitrust laws. The leniency program involves a relationship of trust between antitrust attorneys representing the corporation seeking leniency and the antitrust enforcers of the government. A recent case out of the U.S. Court of Appeals for the Third Circuit suggests that the antitrust attorney and his or her corporate client should be very careful and attentive to every detail in invoking the leniency program.

The client and a good antitrust attorney will define and redefine the "win," discuss ways to accelerate or decelerate the time involved, and frequently discuss the economics and cost/benefit of the strategy they are implementing. In the final analysis, the Rolling Stones expressed in their music the philosophy of success in an antitrust matter: "You can't always get what you want, but if you try sometimes, well you might find, you get what you need."

Boundaries of the Attorney/Client Relationship

The attorney/client relationship is based on trust that develops over time and may necessitate certain boundaries. In a criminal antitrust proceeding, the attorney will have to advise the client as to whether the client should give testimony before a criminal grand jury. If an individual client's answers to questions the attorney knows will be asked may incriminate the client in an antitrust violation, the attorney must advise him to invoke his Fifth Amendment right to refuse to testify on the grounds that the answer may tend to incriminate him. Some attorneys ask their client whether the client believes he or she may need to refuse to testify, and other attorneys

constantly assess their client and process information from all sources in order to determine whether they should advise the client to refuse to testify. It is a cliché in the legal profession that many criminal lawyers never ask their clients if they are guilty of the crime charged. The defense attorney's job is to provide a zealous defense against the party with the burden of proof, and actual knowledge of guilt or innocence may not be necessary to accomplish the representation. White-collar crimes such as antitrust may well call for similar boundaries. An antitrust attorney feels his or her way through the information gathering process and may determine a need to establish such a boundary. His or her job, within the ethical rules that guide the legal profession, is to represent the client zealously but never to facilitate fraudulent or criminal activity. Antitrust law is not for beginners, and it is not for the meek.

An antitrust lawyer must sometimes help shape a client's attitude. A client at the outset of an antitrust situation may be in denial or combative. The lawyer's early task is to educate the client about the legal situation in a way that will help the client arrive at a more reasonable or productive attitude. The attorney's sworn duty is to represent the client "zealously" in an ethical and lawful manner. As long as client and attorney trust each other, their individual attitudes merely become additional factors in the mix of ingredients with which they each must deal.

A client's willingness to settle is a matter of education and evolution. On the one hand, manna from heaven to an antitrust lawyer may be the antitrust defendant who says "millions for defense, not one penny for tribute." A bad antitrust lawyer will accept that as a directive and never question it. A good antitrust lawyer will say, "Fine, let's start with that perspective and test it as we go along." After discovery and consideration of the applicable law, the attorney may determine the prudent course of action for the client would be to settle the case. As the client's understanding of their circumstances evolves, settlement may appear to be acceptable if not desirable.

Antitrust matters tend to be high-stakes. In large corporate acquisitions or mergers, billions of dollars of assets are transferred and billions of dollars of assets may have to be divested to get antitrust clearance for the rest of the deal. In big antitrust cases, millions, if not billions, of dollars in damages may be at stake. There is no such real event as a small antitrust matter, because even if smaller absolute dollars are involved, the amounts are probably still large relative to the size of the parties involved. Risk/reward analysis in antitrust matters may involve betting the client's company on the outcome. This necessitates staying as flexible in approach for as long as the circumstances permit and keeping alive as many client exit options from the dispute as the attorney possibly can.

Discovery Issues

In dealing with "bad facts," as previously mentioned, telling the client "Boy, are you in trouble" is less helpful to a good resolution than "It is what it is, so let's deal with it." The attorney/client privilege does not shield bad facts from discovery, but it does protect communications between attorney and client about the facts. Assume that in a hypothetical case a memo containing bad facts had been destroyed just after it was written and sent to various individuals in the company. How did the antitrust attorney retained later know that? The company employee who had taken it upon himself to get the memo destroyed had succeeded except for his copy on which he had written in his own hand "all copies retrieved and destroyed." Ironically, the bad facts in the memo may not be as bad as he thought, but his willful and unsuccessful attempt to suppress the facts would be bad. This event will probably be important, but not dispositive, to the ultimate outcome of the case. In terms of the relationship of trust between attorney and client, it is much better that the attorney know about such an event early, because it needs to be considered in establishing approach and strategy.

For the most part, almost every bad fact can be put in the context of "better" if not "good" facts. This may not be true if there is an unlawful conspiracy involving all major executives in a bid rigging case. However, for most businesses, the bad facts can usually be compartmentalized. They may be isolated in time. They may be attributable to an unschooled, lower-level employee. There is usually a context, the whole of which puts a bad fact in

a larger and better framework. The strategy invariably involves some way to isolate and minimize the significance of the bad facts. These strategies advance the goals of risk assessment and risk minimization if not avoidance.

Assessing the Non-Legal Ramifications

No antitrust lawyer is worth his salt if he doesn't both understand and appreciate non-legal ramifications of his client's antitrust matter and take them into account in planning a strategy for the client. Non-legal ramifications are often the key to the emotional or motivational aspect of the matter, and the attorney must quantify their importance in the big-picture framework of analysis the client and attorney must construct.

The extent to which a non-legal ramification is important depends on what the non-legal ramification is. Suppose the client's chief executive officer will be out of a job as soon as the client is acquired. Suppose the client will be required to divest an entire division of its business in order to get approval. Suppose the author of the bad fact memo is the son-in-law of the chief executive officer. Any of these types on non-legal ramifications may affect the strategy. Technically speaking, the other non-legal ramifications to consider are the financial, productivity, and emotional drain of an antitrust matter.

There is an axiom among business litigators that the case will settle before the chief executive officer has to give his or her deposition. Such a one-event settlement impetus is unlikely in an antitrust case, but the concept of non-legal ramifications implicating, if not driving, strategy must be recognized. That is why getting into the soul of the chief executive officer or other affected officers is an imperative in antitrust matters. Because so much is at stake, a secret motivation, desire, fear, or deed must be discerned by the antitrust lawyer. Sometimes the antitrust attorney must be the bad guy to discern it, provoking an emotional response from the client in order to get to the truth. Once discerned, however, the secret, non-legal ramification must be put into the strategy matrix.

Developing a Winning Strategy

In developing a winning strategy for the client's antitrust dispute, remaining flexible allows the attorney to keep as many options alive as possible in what will be a very fluid situation. There are many key factors to keep in mind when developing a strategy. For example, the client's financial status is very important. It is important to try to identify an end game for the client as early as possible. To a business with concerns for the expense in an antitrust matter, launching an effective legal plan within the limits of its financial ability is a paramount objective. If the antitrust issue threatens the demise of the client's business, the attorney's job is to find the earliest and most successful exit strategy possible. On the other end of the scale, a client with unlimited financial resources presents many more strategy options.

Many businesspeople spend more time, energy, and creativity on entrance strategy than on exit strategy. An antitrust attorney on the transaction side helps clients create a new product or service or acquire assets. Antitrust advice helps structure the deal. The skill set for an antitrust litigator involves playing the hand with the cards he or she is dealt. There usually are more alternatives in structuring a transaction than in playing a dealt hand. But remaining open to alternative measures is important in both endeavors.

On the transaction side, antitrust may be a major or minor factor. Tax implications may predominate, for example. Where antitrust is a major factor, it may kill the deal at the end of the day because to solve the antitrust problem eliminates the economic benefit to the client or the other side. In most transactions, however, there is a lawful way to achieve the major objectives and eliminate the antitrust risks. In the telecommunications mergers mentioned earlier, the likely outcome is that current posturing by both sides will evolve into more compromise and an eventual approved merger.

On the dispute side, keeping alive alternatives to create as many "win" scenarios as possible is the antitrust litigator's role. Since settlement can often be a win, litigation strategy should be geared toward strengthening the client's settlement position. Happily, the litigation position strengthens as well. A plaintiff's attorney may try to take a key deposition earlier in the

case, and the defendant's attorney may try to keep the client's deposition from occurring until later in the case. Each of these strategies depends on the situation the attorneys are facing. Usually, but not always, an antitrust plaintiff will push and an antitrust defendant will try to slow activities down. These strategies are usually compelled by expense, because the plaintiff wants the money the defendant has and the defendant is in no hurry to give it up.

A good antitrust lawyer won't work for long with a client that wants to follow a strategy the lawyer thinks is not in the best interest of properly resolving the antitrust matter, is possibly unethical, or has other negative consequences for the client or the lawyer. Antitrust law generally brings sophisticated clients together with sophisticated attorneys, none of whom persists for long in unethical or illegal behavior. Most antitrust clients are sophisticated and educable enough to understand the terrible consequences of illegal conduct. An antitrust attorney describes, early in the attorney/client relationship, that there are criminal penalties for individuals who violate the antitrust laws. If a corporation breaches a contract or negligently injures someone, there may be monetary consequences. If a corporation agrees with a competitor to fix prices, the individual who made the agreement may go to jail. The most likely situation to put client and attorney in peril involves retention or production of documents.

One of the most important areas to explore with clients, early and often, deals with document retention policies and implementation of these policies. Antitrust attorneys need to identify right away (a) if they have a problem they can't cure, as in documents already destroyed, or (b) if they have a situation they can manage, as in what to do about existing documents, good or bad. Every lawyer faces ethical dilemmas in the practice of law. Business litigators face most of the ethical issues on the subject of document production. Both the attorney and the client need to sleep well at night. An ugly fact dealing with documents will affect their ability to do so.

An effective technique for developing and implementing a proper strategy that is practiced by trial lawyers is to start planning their closing argument to the judge or jury as early in the case as possible. What evidence will they

point to, and what applicable legal principles apply? They then work backward from closing argument to plan every aspect of the case to give them the evidence to make that argument. As their strategy changes along the way from new information, so does their planned closing argument. An antitrust business lawyer may visualize how he or she would describe the transaction to the shareholders, the board of directors, the Internal Revenue Service, the Securities and Exchange Commission, or the Department of Justice. Lawyers tend to be linear and think in terms of how to get from A to B to C. An antitrust lawyer should try to step out of that box and visualize the end game. He or she should remain flexible and adjust the strategy to the facts and the law. The most important aspect is managing client expectations so the client's vision is realistic and in agreement with the attorney's vision.

Finally, in an antitrust lawsuit, what jurisdiction the case is in and who the judge is are often important factors in developing the strategy. The competence and experience of opposing counsel are important factors. These factors are important because, unless and until the case is settled, the client's fate is to some extent out of the control of the client and the attorney. The motions the other side makes, the discovery the other side seeks, and the rulings of the court on these matters all affect both the ongoing strategy decisions and the outcome of the case.

Consequences of an Improper Strategy

There can be negative consequences to developing and following an improper strategy, or not truly learning the client's motives and desires in the antitrust dispute. A strategy of negotiating with the same intensity on minor points and on major points may cause the other side to abandon the transaction. If the strategy in an antitrust criminal case is to go to trial and keep the offending employee out of jail, the negative consequence is that it doesn't succeed. Individuals may not be impressed with your all-or-nothing strategy and may question why you didn't advise them to bargain for a plea in which they might have gotten probation instead of incarceration. Not learning the client's true motives and desires might lead to such a result. Employees won't often admit their complicity in the violation. This is why in many cases, particularly criminal cases, employees should have their own lawyer. One of the jobs of antitrust

counsel for a corporation is to discern whether there are conflicts of interest of such significance that separate counsel is required for employees.

To avoid negative consequences, the antitrust attorney constantly revisits his or her client and strategy. As long as the attorney and client are open, honest, and flexible, they can manage most negative consequences.

Negative consequences often occur because humans are fallible. "Oh, is that important?" "Didn't I tell you that…?" "What difference does it make that…?" A late revelation that begins with those words usually comes after the negative consequence occurs. A privileged document inadvertently produced to the other side is not good. A client's volunteered information in a deposition may lead to negative consequences. Negotiating too hard on too many points in a merger agreement may cause the other side to walk out on the deal. Most problems are tactical, not strategic. The negative consequences of flawed tactics can usually be ameliorated. In the most difficult situation, the best antitrust lawyer keeps his or her cool and identifies an exit strategy from negative consequences.

The Ultimate Attorney/Client Relationship

Attorneys are usually not trained psychologists, but psychology is extremely important to the practice of law. Lawyers tend to be people pleasers. The biggest mistake attorneys make is accepting the client's view of the world at face value. Every good antitrust lawyer cross-examines the client. Hopefully, he or she can do this diplomatically. "Are you crazy?" is not as diplomatic as "Just to play devil's advocate, suppose…"

Antitrust lawyers must find out the facts, good or bad, in order to advise the client clearly and accurately in an antitrust matter. If they are afraid to ask the client hard questions, they won't be successful. If they are afraid to give the client bad news, they aren't capable of doing their job. The client is most likely a smart, decisive, and successful person who doesn't suffer fools or sycophants gladly. Lawyers are agents, suffered by their clients as a necessary evil and terminable at will. Antitrust practitioners should take small steps and not rush to giving advice too soon on ultimate issues. They should try to develop a rapport and instill confidence by their knowledge and experience.

References

Antitrust Guidelines for Collaborations among Competitors, Federal Trade Commission/Department of Justice, April 2000

Antitrust Enforcement Guidelines for International Operations, Federal Trade Commission/Department of Justice, April 1995

Citizen Complaint Center, Antitrust Division of the Department of Justice, www.usdoj.gov/atr/contact/newcase.htm

United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact describing company e-mails and memos), *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law), *aff'd in part*, reverse in part and remanded, 253 F. 3d 34 (D.C. Cir. 2001) (*en banc*)

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 305-308 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (discussing "bizarre" episode concerning documents)

United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966) (not a violation of Section 2 for a business with monopoly power to achieve growth or development as a consequence of a superior product, business acumen, or historic accident)

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (conspiracy requires proof that tends to exclude the possibility that the alleged conspirators acted independently)

McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (1945) (exempting "the business of insurance" from the antitrust laws)

Parker v. Brown, 317 U.S. 341 (1943); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (antitrust immunity from restraints clearly articulated and affirmatively expressed as state policy that is actively supervised by the state itself)

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (antitrust immunity for concerted efforts to influence public officials, legislation, and law enforcement practices)

State Oil Co. v. Khan, 522 U.S. 3 (1997) (vertical maximum resale price maintenance to be evaluated under the rule of reason)

Leegin Creative Leather Products, Inc. v. PSKS, Inc., No. 06-480, reviewing *PSKS, Inc. v. Leegin Creative Leather Products, Inc.,* 2006 U.S. App. LEXIS 6879 (5th Cir. 2006) (whether in light of modern economic theory, the *per se* illegality of "minimum" resale price maintenance agreements should be changed to case-by-case evaluation under the rule of reason)

Credit Suisse First Boston Ltd., et al. v. Glen Billing, et al., No. 05-1157, reviewing *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005) (whether the inherently collaborative activity of a securities underwriting syndicate violates the antitrust laws)

Federal Rules of Civil Procedure 16, 26, 34, and 37, amended effective December 1, 2006 (discovery of "electronically stored information") www.uscourts.gov/rules/ediscovery

Stolt-Nielsen, S.A. v. United States, 442 F.3d 177 (3d Cir.), *cert. denied*, 127 S.Ct. 494, 75 USLW 3235 (2006) (leniency program of Antitrust Division of Department of Justice involving parcel tanker shipping industry)

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Dedication: *I dedicate this chapter to Merrell E. Clark Jr., my mentor and the best antitrust lawyer I ever knew.*

Acknowledgment: *I acknowledge the editing skills of my wife, Mary Poe Reynolds, for helping make this chapter readable by and understandable to people who are not antitrust attorneys.*

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