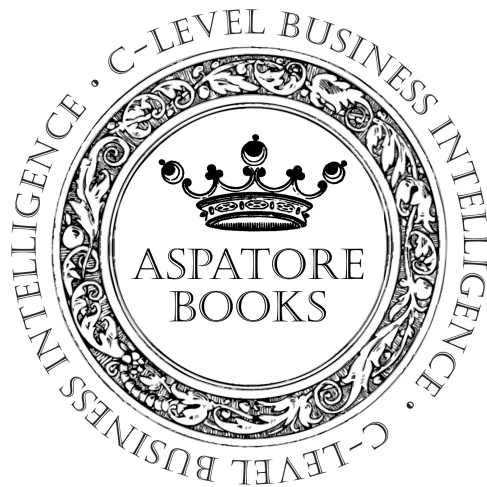


I N S I D E T H E M I N D S

# Inside the Minds: Winning Antitrust Strategies

*Leading Attorneys on Mastering the Laws that Regulate, Promote and  
Protect Competition*



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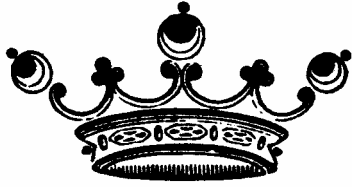
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# Applying Antitrust Law Effectively:

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*The Importance of Simplifying Complexity*

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The importance of obtaining effective antitrust advice and assistance has never been greater for business. Restructuring of industries deriving from numerous sources, including increased internationalization, deregulation, and more rapid evolution of the technological bases of competition, results in more merger, joint venture, and licensing activity. The internationalization of antitrust review by numerous national regulators also has increased the complexity of satisfying competition concerns. Further, the expansion of the range and types of antitrust litigation, particularly regarding cartels, pricing in several high profile industries such as pharmaceuticals, and by state attorneys general, has further increased the prominence of antitrust concerns. The explosion of data, readily available through the Internet, paradoxically adds to the difficulty of properly analyzing situations and providing practical and effective resolutions to competition issues.

All of these developments, and the continued evolution of antitrust analysis and its supporting economics, make simplifying complexity – the ability to understand the data and the dynamics of the industry and develop practical solutions – the overwhelming imperative today for the antitrust practitioner.

### **Essential Capabilities of the Antitrust Practitioner**

An antitrust lawyer needs to have three skills. First, he or she has to have a very high level knowledge of antitrust, which includes both antitrust law and antitrust economics. Second, he or she needs to have knowledge of the company being represented, the regulatory and business environment in which the company operates, and the structure and dynamics of its market. Third, an antitrust lawyer must have the ability to integrate this knowledge and apply it with common sense, to give clear,

helpful and practical suggestions and provide creative resolutions for transactions and litigation.

Seeing through complexity is the hallmark of an outstanding antitrust lawyer. It is easy to become overwhelmed by complicated facts and regulatory environments and simply advise the client that the risks are unmanageable. An effective antitrust lawyer needs to be able to see the way to creative solutions to complex problems in a complex environment.

To a large extent, developments in technology have altered the types of activity engaged in by antitrust lawyers. It used to be that clients would ask us to find information about their industry, how their industry was considered from a competition standpoint, whether there were prior cases which involved their industry, and the current views of the enforcement agencies. We often were asked to find speeches and comments that were recently given about their specific problem by relevant enforcement agencies. Now, clients can and do obtain all of that information themselves on the Internet. Clients simply do not ask us for that type of information anymore. Today, antitrust lawyers instead serve our clients by making sense of the incredibly voluminous amounts of material that they often have already obtained. The antitrust lawyer then organizes, analyzes, distills, simplifies and clarifies this information for the client, and provides proposed resolutions that are practical from a business standpoint.

Presently, the biggest problem for analysis is that there is more information available than people know what to do with. Therefore, while technology has increased our ability to obtain information, the amount of information available actually has made the analytical process more difficult. As a result, that makes “simplifying complexity” the hallmark of a great antitrust lawyer, to a greater degree than ever before.

## The Benefits of a Mentor

There is no substitute in professional development for working with a great antitrust lawyer. It is extremely valuable for junior lawyers to be exposed to how a senior lawyer analyzes a problem, delivers the analysis, and constructs creative solutions. That is the best way to learn.

Miles W. Kirkpatrick founded our antitrust practice group three decades ago. He returned to the firm after having been Chair of the Federal Trade Commission, and his presence was the reason for me coming to Morgan Lewis. A few years later we had a very difficult case regarding predatory pricing that another law firm had lost in district court. The client came to our firm and asked us if we would take the case on appeal.

I spent a lot of time researching and reviewing the trial record, and came up with what I thought were some really good theories for the appeal. The case had been decided against our client based on an inference from certain indirect evidence. Miles looked at everything I had done and at what had gone on below in the trial court, and simply said, "It occurs to me that there is actual evidence here that there was no effect on pricing. Doesn't that trump all of the inferences and all the cases cited and record data, and isn't that the way to attack the judgment below?" He was absolutely correct, and his analysis ended up being accepted by the United States Court of Appeal for the Third Circuit. Significantly, it is still the legal standard for predatory pricing analysis today, twenty years later.

That is an example of how, if you know the antitrust field and the industry, and you have well-honed practical judgment, you can simplify your analysis to the point where you can say, "This is a way through all of this case analysis and facts and documents that have been produced below. And this is the way to present it." You learn that only by working

with the best. It is something that you have to experience in process. You cannot simply be told what to do, because it doesn't mean anything until you see it generated by a great antitrust lawyer in a particular context.

### **Antitrust and Economic Policy and Analysis**

Antitrust law is a fascinating way to become involved with public economic policy and analysis. I have always enjoyed the study of politics and economics and business history. In practicing antitrust, a lawyer is able to keep abreast of developments in economics and, in a small way, participate in the structuring of the future of the American economic system. I can see this participation in little ways every day, whether by working on distribution agreements or mergers, representing clients in antitrust litigation, or assisting in developing strategic responses to fundamental changes in an industry.

Antitrust analysis can be applied to any industry, so antitrust lawyers need not focus on just one industry. For example, insights that I glean from my work in past industry restructurings, such as natural gas, airlines, trucking, or cable television, are hugely useful in analyzing and advising on industry restructuring in other areas, such as life sciences and energy. Further, the knowledge of and facility with economic analysis that is a basic requirement for an effective antitrust lawyer is of immense utility in working with industries with complex and rapidly evolving economic structures, including life sciences/healthcare and energy at present.

Antitrust is also an area of the law that is always changing. The approach and base of knowledge of antitrust lawyers today is quite different from the analysis, economics, and approach used by antitrust lawyers in 1980. It is a fascinating way to stay involved with the immense changes that take place in American business.

## Counseling the Client

When counseling a client, an antitrust lawyer must know the industry's structure, its dynamics, and its regulatory environment. For example, if you are involved in a pharmaceutical industry matter, you must understand the impact of the Food and Drug Administration (FDA) regulation on the process of new drug approvals, and of healthcare regulation that affects the pricing and reimbursement of products by the Centers for Medicare and Medicaid Services. You likely also will need to understand the effect and operation of the Waxman-Hatch Amendments to the food and drug laws regarding patent term extension and market exclusivity protections for drugs. You have to know the particular business and regulatory environment of your client. You simply cannot give antitrust advice in a vacuum and fail to take into account the specific context of the industry, which may radically alter conventional antitrust advice. Responding at such a high level of abstraction fails to give the practical assistance that the client needs.

It is also vitally important to make the complexity of antitrust understandable to the client. Antitrust lawyers can speak in a language that is fairly incomprehensible to our own clients, let alone others, who are not involved in the field. There are a lot of specialized terminology and concepts used in this area of the law, such as cross-elasticities of demand, game theoretic models, and market concentration indices, such as the Herfindahl-Hirschman Index. As an antitrust lawyer, you have to be able to translate the law for the client so that he or she understands it, and interpret the law so that the advice you provide is both helpful and practical.

## Dealing with Regulatory Agencies

When representing a client involved in an industry that is subject to many regulators, antitrust lawyers must adapt and balance the story we are telling -- that the transaction is pro-competitive and efficiency enhancing -- to a variety of audiences. Some agencies look at competition issues much differently than others. For instance, in an energy industry merger, not only will the Federal Trade Commission or the Department of Justice Antitrust Division be involved, as likely will the Federal Energy Regulatory Commission, but state attorneys general from several states and state public utility commissions and their associated consumer advocates may also be involved. If there are nuclear units, the Nuclear Regulatory Commission may be relevant. The Securities and Exchange Commission may be involved, if the company is governed by the Public Utility Holding Company Act of 1935. Further, there may be foreign government agencies to deal with, since international operations may be involved.

To deal with all these agencies, the antitrust lawyer must balance and coordinate the competitive effects presentation. Sometimes, of course, simply answering just one regulatory agency can be a challenge. Having five or fifteen to respond to, and trying to decide how to balance and sequence the responses, is tougher. More significantly as an antitrust lawyer, you have to think about what concessions you are willing to make in order to get the deal through. What might be acceptable as a concession to one regulatory or enforcement agency may be totally meaningless to another. The ability to deal with multiple agencies and move the process along for a client is very challenging, requiring creativity, knowledge of the regulatory environment, and practical judgment.

## Agency Investigations

Antitrust issues are more likely to arise in two kinds of industries: one is industries that deal in commodities, because such products are sold based on price. Steel beams, aluminum ingots, or bulk vitamins are examples of commodities where price is the only differentiating factor. There will always be a concern that there is price-fixing and price signaling in such industries and, as a result, antitrust issues can be expected to arise on a recurrent basis.

A second area where competition questions commonly can be expected to arise is in industries that are undergoing restructuring. When an industry is undergoing restructuring, its member companies may respond very differently. Some companies will sell off assets, restructure, and may become involved in other areas. Others will attempt to consolidate in the core industry area. As a result, all sorts of competition issues will arise due to the increase of mergers and acquisitions, joint ventures, licensing and other transactions. In addition, there will be new pricing and distribution issues, and other competitive disputes that will likely result in antitrust litigation.

Regardless of the source of competition concerns, the most important thing to do for a client that is facing questions about an activity or transaction is to let the client know that it is possible to respond effectively if it has a good business rationale for the challenged activity. I tell our clients that if what they are doing makes sense from a business perspective, if they have a good business justification for making the decision, then, nine times out of ten, that reason will be deemed pro-competitive. The agency reviewing the transaction or activity will likely conclude, "Yes, that enhances efficiency, that is pro-competitive, and that is allowable."

If a client can explain with clarity what it was thinking when it made its decision -- why it is proposing to do this joint venture, why it is asking to make this acquisition, why it undertook pricing in that way -- then it will probably be defensible from an antitrust perspective. In many cases, however, the client's decisions have not been clearly thought through. The role we play then is to pull together an explanation, to simplify and clarify what the business wants to do and why it is important to that business and that industry, so that a coherent and compelling legal and business rationale can be presented.

### **Risk: Making Sense of It for Clients**

The best service an antitrust lawyer can provide is to give the client alternative solutions that are practical from a business standpoint. The easiest thing to say is, "You can't do that because it will create an antitrust issue." There is always going to be an antitrust risk. The conservative approach of just saying no is very tempting, because then you never have to go out on a limb as an antitrust lawyer. You will never be criticized, because nothing will ever happen. However, an antitrust lawyer who does that is not serving the client very well. When we are training our junior lawyers, we try to show them that the real service we provide is coming up with alternatives to risky transactions that still get our client as much as possible of what it wants. The best antitrust lawyers know the antitrust laws well enough, and know the industry and its structural environment and dynamics well enough, that they can present creative alternatives for clients.

By being involved at the front end of a project, we can suggest alternative structures and approaches, which might fare better in terms of any review or challenge. Obviously, it is much more difficult to help the client if we are brought in at a later stage. We tell our clients that antitrust

considerations are as important as business and financial considerations when planning a deal. If the client incorporates the antitrust considerations into its business analysis, then responses will be readily available to competition questions if the transaction is challenged.

### **Client Misconceptions**

Some clients seem to conceive of antitrust as a set of defined rules, which can be set out in detail and evaluated, like FDA or tax regulations. Unlike those areas of law, there simply are rarely categories, rules or cases in antitrust that can govern specific situations. Rather, antitrust is a mode of analysis, relying heavily on economics. In antitrust law, unlike other areas of the law, you cannot easily or readily rely on prior case law to determine the outcome of your case in your market situation. Past cases simply provide an illustration of the way antitrust law principles were applied to that market situation, to that set of facts. That gives great creative scope for antitrust lawyers, but also creates massive uncertainty for clients.

It helps greatly in simplifying both analysis and recommendations to understand that antitrust is, at its core, simply following the price. That is what I tell all of the clients and junior lawyers. It is the way to analyze the competitive effects of any proposed transaction on claims in litigation. You could have the most restrictive distribution or licensing agreement, or questionable proposed merger imaginable, but if there is no effect on price, it will not have any adverse antitrust consequence.

### **Recent Major Trends**

One of the major changes in antitrust in recent years is the increasing interest in and focus on antitrust issues by other countries, which until now has been virtually nonexistent or widely different. The involvement

of the European Commission and some of the national authorities like the German Federal Cartel Office, in antitrust regulation has significantly increased. As a result, today, antitrust lawyers must be aware of the impact of international competition rules and regulators. For an antitrust practice or practitioner not to have a significant transnational component and capability will mean an increasing inability to provide effective assistance.

A second major change is the increasing involvement by state attorneys general in antitrust enforcement. In the last 15 years or so, states have become more involved in antitrust than ever before. Their positions are sometimes congruent with prevailing federal interpretations of antitrust law, but sometimes they are different. The approach to negotiating and litigating, and settling with state attorneys general is different from that with the FTC or DOJ, particularly when actions are brought on a multi-state basis, and antitrust lawyers increasingly must be familiar with the nuances of counseling and litigating in the state enforcement context.

### **Fairness and Antitrust**

Another trend affecting antitrust lawyers is an increasing effort to use state unfair competition laws to challenge business activities. Many complaints now are based more on whether a practice or pricing structure is fair, such as challenges to pharmacy pricing practices or pharmaceutical pricing. It is difficult to deal effectively with challenges from this perspective. To many antitrust practitioners, it seems improper to even have to deal with it because “fairness” is not a concept easily analyzed or dealt with from an economics perspective, as is antitrust law.

There will be struggle in creatively developing modes of economic analysis to assist in responding to unfairness challenges, but it probably

can be done. My partners and I have had some success in getting courts to understand that, while a company's business practice may not be one that everybody applauds, it still may be efficient and pro-competitive and that, therefore, it should not be prohibited as unfair competition. The FTC's standards and approach in this area is of help in developing effective responses. If the activity is one which society nonetheless wishes to control, then the proper course is to control that activity by legislation, not by saying that it violates antitrust or unfair competition law. The role that antitrust lawyers can play on this issue is to help develop a competitive analysis, and show that activities that are seemingly unfair or differently applied, may nonetheless be efficient and procompetitive.

### **Internationalization and Harmonization**

Another important trend is the increasing harmonization occurring amongst the international antitrust enforcement agencies. Today, we see cooperation among U.S. agencies and the European Commission and different authorities in the U.K. and Germany that we have not seen in the past. I think everyone has an interest in cooperating. It is certainly frustrating for companies to be faced with conflicting modes of competition analysis and disparate procedures and inconsistent data requests. Companies want a license or distribution arrangement to be assessed similarly in all major jurisdictions. They want an acquisition to be assessed similarly and with similar data. In some respects, it does not matter so much whether the harmonization is the best possible, as long as approaches are harmonized.

We also will see continued pressure for standardization of antitrust rules from both large companies and, increasingly, smaller companies as they become just as international. From the government side, there is the recognition that it does not benefit anyone to simply point fingers and

say, "Well, you analyzed it this way because you were favoring your country's manufacturer at the expense of ours." Such harmonization of competition rules is inherently difficult; progress will be slow and fitful. But there is every reason to expect, in view of the economic and political dynamics supporting it, that international harmonization of antitrust standards and approaches will progress.

### **Consumer Protection and Antitrust**

One of the biggest challenges in antitrust remains how to deal with consumer protection issues. Such issues as Internet privacy, telemarketing practices, and direct-to-consumer (DTC) drug advertising have been focuses of enforcement activity by the FTC and the states, and of significant public and political interest. To address consumer protection issues effectively, antitrust lawyers need to become more familiar with, and encourage further development of, information economics. Questions that need to be better addressed include: How do consumers get information? How do they process it? How should they receive it? What are the competitive consequences of providing it? Information economics needs to play a greater role in consumer protection challenges so that advice and decisions can become more analytically sophisticated. Right now, very little economic analysis is part of consumer protection challenges in many instances, and we are left with plaintiffs or consumers who say an activity was unfair, while defendants or sellers say it is fair. That is not a very productive or coherent dialogue to have. A more objective and dispassionate economics-based analysis, that looks at the consequences of information provision in particular contexts, is needed. In consumer protection, as with antitrust analysis a quarter-century ago, we need to develop a framework for economic analysis and a ranking of the importance of the variables involved in the analysis.

The most significant advance in antitrust analysis in the past few decades was the incorporation of sophisticated economic analysis into the decision-making of the antitrust enforcement agencies and the courts. While disputes remain, particularly with respect to analysis of some vertical merger and distribution issues, the general analytical economic framework that has been developed facilitates both analysis and well-accepted, procompetitive conclusions. The extension and development of such an accepted analytical framework in the international and the consumer protection contexts is the challenge for antitrust lawyers for the future.

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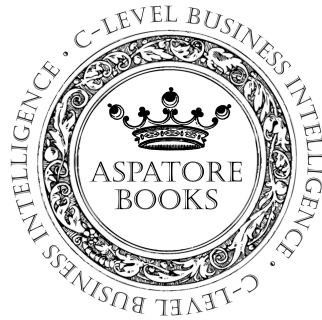
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