Antitrust Law Deal Strategies
Leading Lawyers on Strategies for Conducting Business Transactions while Minimizing Antitrust Risk
Determining an Antitrust Strategy for the Client

Barbara Sicalides

Partner
Pepper Hamilton LLP
Introduction

As an antitrust lawyer, I counsel and represent companies, private equity and venture capital firms, joint purchasing groups, joint ventures, and standard-setting and trade associations. The client organizations vary in size from small start-ups to very large, long-established international businesses. Their goals range from protecting their organizations from even the perception of wrongdoing to conducting their businesses in as an aggressive manner as possible consistent with the governing legal standards. I also counsel individuals on matters regarding potential criminal and civil exposure for alleged anticompetitive conduct. In addition, I work actively with private equity, venture capital, and other firms considering an initial or increased investment in target companies under investigation by foreign or U.S. enforcement or regulatory agencies for competition-related issues.

I regularly work with clients facing litigation or business decisions regarding the distribution of their products and services, including matters related to terminations or restructuring of distributor networks, pricing, incentive programs, resale price policies, product bundling, exclusive and requirements contracts, and other trade restraints. Generally, my job is to assist large companies, small businesses, and individuals in maximizing their market position without violating the U.S. and various state laws governing restrictions of competition.

Adding Value

How value is added for clients differs depending on whether litigation or counseling services are needed. In terms of litigation, attorneys add value by providing clients strategic advantage, placing their companies in the best possible position to either try their cases or settle in the most cost-effective manner. Attorneys add value by learning their clients’ businesses well enough to provide practical solutions to issues that arise during the litigation or settlement processes. This allows clients to achieve optimal results while minimizing their antitrust risks.

In a purely transactional setting, clients generally know what they want out of the deal and want to play a key role in the negotiations. To add value, the
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An antitrust counselor must understand the client’s long-term and short-term goals as well as the potentially sensitive issues identified by the corporate lawyers handling the negotiations with the client. It is important not to undermine the positions taken by the key negotiators, but it is also important to be credible and maintain positions with the other parties to the negotiations that are based on sound legal principles. Accordingly, early involvement increases the likelihood and significance of the value an antitrust counselor can add. If you have a solid understanding of the client’s business and goals and the sensitivities of the negotiations, you can alert the corporate lawyers and clients to issues that might arise, areas where antitrust expertise might facilitate achievement of those goals, and areas where antitrust concerns could potentially cause frustrations. In some situations you can add value by anticipating the opposing party’s tactics which might implicate the antitrust laws and assist the client with strategies for dealing with such tactics.

Perhaps even more importantly, early involvement allows the antitrust lawyer to determine whether certain types of key internal documents, such as strategic and business planning documents, will raise red flags regarding the effect of the transaction on the industry at issue. Making such a determination will allow you to prepare the client for the potential risks and will permit you and the client to identify the best explanation and perhaps defenses to the issues raised by such documents. Antitrust counselors also add value by educating or reminding clients and the corporate attorneys about the risks of gun jumping and the sharing of certain types of commercially sensitive information in negotiations with competing businesses. Optimum value is added when your advice is legally correct and can be practically implemented.

Often businesspeople and investment bankers excited about a deal’s prospects use unnecessarily inflammatory language. In anticipation of discussions regarding possible business opportunities, there is always the risk of an inadvertent disclosure of confidential business information and the possibility that inappropriate or careless discussions will raise the concern that the meetings or communications could be misinterpreted as having an improper purpose. The exploration of potential business combinations or other relationships is always legitimate, but it is easy to
mischaracterize or misunderstand such discussions. The best rule of thumb is common sense. Until both parties agree to the proposed joint business undertaking, they remain competitors. As such, it would be unwise from a business perspective to divulge sensitive business information that could be used against you in the marketplace. Thus, each party should take care to protect normal business interests and at the same time avoid antitrust concerns.

**Client Pitfalls**

Some of the most difficult and easily avoidable problems arise as a result of a lack of sensitivity on the part of client personnel. Confidence in your position is a good thing, but it is also important, particularly for large, very successful companies, to understand that they can undermine their position or unnecessarily inflame their opposition, and perhaps even a jury, by communicating in a manner that reflects a lack of understanding of the affect that their action or restriction will have on their customers or suppliers. It is not safe or wise to assume that your business practices will not be challenged, even though the practices may in fact be lawful. Businesspeople who think that their company is “unbeatable” or “untouchable” tend to behave recklessly and treat their opponents in negotiations with little respect. Companies operating with this mindset do not always make the best business decisions because they assume that their practices will not be questioned.

It is important to consider long-term business interests, including carefully documenting the business reasons for your decisions, the impression that your communications and documents send about your company to the outside world, and the affect of your decisions on those with whom you deal over time. Businesses should consider whether simply exercising their legal rights to the fullest without concern for customers and distributors will ultimately be the most efficient method of dealing with the issues and whether such a posture will achieve the most beneficial results. At the same time, businesses must maximize their profits, and in most, but not all, situations they can find effective ways to do so without creating evidence and documentation that complicates defending the actions.
This principle also applies to negotiations. Even if my client is committed to a particular position it is helpful, when possible, to allow the opposing side to feel that it has been treated fairly, to listen to their concerns, and to explain the bases, both business and legal, for the client’s position. There is really nothing to be lost by such an approach and often much to be gained.

Another common problem can arise when clients assume that solutions to issues are simple, or that one solution will work for every situation regardless of the business involved. It is important to keep in mind that every situation is unique; every company has its own way of determining prices, distributing its products and services, communicating with customers, selecting or negotiating with suppliers, and handling other key business matters. For example, merely adopting the form of agreement or policy that your competitor of another firm has implemented can often result in unanticipated problems. Such problems can readily be avoided by consulting with knowledgeable counsel. Companies should not assume that there is a simple method that will work in every scenario.

**Strategies for Success with Clients**

Through my experience in working with clients, I have developed two major strategies. First, I listen carefully to what clients tell me they need from a business perspective. Second, I brainstorm with them to come up with the best strategies for fulfilling their business needs. Although I am not a businessperson, I have enough experience in the transactional area to make suggestions to my clients. For example, if a client has a distribution problem or a particular restriction they want to enforce, I probe to find out why the issue is important to them and what they hope to accomplish with the restriction. With this information, I can offer suggestions, alternatives, and brainstorm effectively with the client until we discover the best solution.

Clients often have legitimate objectives in mind and find it more helpful to hear suggestions from their attorneys rather than hard-and-fast formal legalistic answers that ignore the practical problem faced by the business. The process of analyzing each suggestion or alternative allows attorneys and clients to find the most effective solution possible while considering all
nuances of the case at hand.

Through this process, as a counselor, I learn a great deal about the client’s tolerance and attitude toward risk and the confidence that the client has in the ability of its businesspeople to implement properly the chosen strategy. In some cases, the best right answer for a particular client must take into consideration the client’s willingness to take on antitrust risk and the ability of its personnel to communicate and manage the process.

**Knowledge in the Area of Antitrust**

It is also critical to keep abreast of the legal and policy developments in the antitrust area to provide real-time, high-quality advice. Attorneys should ask their clients to identify useful journals in their industry. Counseling clients on a regular basis also provides opportunity for attorneys to sharpen their skills and increase their knowledge of various areas of business. Reading industry journals and having a fundamental understanding of the clients’ businesses can significantly increase the value an attorney can provide.

Engaging in discussions with the staff and leadership at the enforcement agencies as well as other competition lawyers helps to keep you well-informed about the practical as well as legal developments. It is always helpful to read the statements and speeches made by the agency personnel. Finally, keeping up with the most recent cases in the field is essential, as there are issues that continually arise in antitrust law, and it is helpful to have as much knowledge as possible on how the courts or agencies might handle them.

**Goals, Challenges, and Determining the Best Course of Action**

To determine the best strategy for each client’s situation, the antitrust attorneys should review the pertinent publicly available information about their client’s industries. That information will be available to the government agencies and any opposing counsel. Thus, it is important to understand how it might support or undermine your client’s position.

Next, it is always helpful to sit down with the client’s business personnel
working in the key areas of the client’s business. Such conversations allow you to explain to them the issues that might present areas of concern and the way in which the government, disgruntled customers, and competing bidders might seek to portray the proposed transaction. During this discussion, the antitrust counselor also learns details about the products and services the client provides, how the customers make their buying decisions, and what competitive restraints might exist.

The point at which attorneys become involved in transactions greatly affects the strategies employed for the transaction. When brought in early, lawyers can be much more direct in their approach and much more practical in the advice. Additionally, attorneys can help clients avoid certain problems if they are involved in the case early on. For example, attorneys who are brought in early can help clients understand how to communicate with their customers about the transaction, providing customers a sense of the positive benefits that will result from the transaction. Early antitrust attorney involvement allows you the opportunity to shape the way the clients and customers think about the deal.

Further, if the attorney has not already done so, in one of the initial discussions with the client, the counselor should provide guidelines for limiting exchanges of information related to the transaction with other competitors involved in the transaction, as well as general guidance on issues of which they should be aware of drafting documents related to the deal. Under the antitrust laws, the acquiring and the acquired will be treated as separate economic entities until consummation of any merger or acquisition. The mere execution of a purchase or sale agreement does not justify pre-merger coordination between rival firms. The government agencies have two principal concerns regarding pre-closing activities—the parties should not “jump the gun” by effectively transferring some indicia of beneficial ownership (operational control, shifting financial risks and benefits) and the parties should not coordinate their competitive activities or exchange competitively sensitive information that could result in a reduction of competition.

The parties obviously must avoid any agreement regarding prices, allocation of customers, or division of territories. Employees should transact business
in the normal course as though the transaction was not contemplated and the parties should continue to operate each of their divisions or subsidiaries as they have in the past. Where the merging parties are competitors, they must continue to act as competitors and should not deal jointly with customers, suppliers, or any third parties. To the extent the buyer and seller have competed for business, they must continue to do so until the actual consummation of the transaction. Where bids are used to get business, the parties should not share with each other either their costs associated with or their prices for that business.

Many attorneys have clients they counsel on a regular basis, and these clients will tell their lawyers right away when they begin seriously considering a transaction. Clients often request guidelines or advice right away, and ask the attorneys to sensitize them to any issues that might be problematic. Sometimes clients feel they have too many things to juggle and, therefore, wait to call their attorneys for information. When this happens, the transactions have already built momentum and it can be more difficult to avoid certain complexities.

**Communicating with Clients about Risk**

In significant transactions, the laws that are generally involved include the Clayton Act, the Sherman Act, and the Hart-Scott-Rodino Antitrust Improvements Act. There are several risks involved in deals that have antitrust implications. Some of the risks have already been discussed, including gun jumping and the inappropriate exchange of commercially sensitive information. Additionally, engaging in a transaction that will be investigated by the agencies raises a number of difficult issues for clients, from delays, substantial transaction-related expenses, distraction of management and personnel, loss of customers, the possibility that some portion of the business be divested or that the transaction cannot be consummated. If the number of competing firms is small and the client’s industry has had any significant antitrust inquiries, it’s important to communicate all of these risks to the client.

Clear communications between attorneys and clients about the risk involved in transactions at hand is important to achieve the best result.
Businesspeople do not tend to look at issues in the same way as the enforcement agencies, and because of this, conversations with clients about troubling areas in their transactions are vital. Once attorneys are able to identify which areas of concern might exist, they can provide accurate information on the various levels of risks involved in those transactions. Open conversation between clients and lawyers promotes constructive dialogues about potential areas of risk, various levels of risk, and ways of approaching the transaction to minimize those risks that may be present. Attorneys sometimes provide clients with a sliding scale of risk, which they can then use to make decisions about how to move forward with the transaction. Risk is almost always involved. However, if there are sound business reasons for a particular goal, in spite of these risks deals can usually be structured in such a way that the antitrust laws are not violated.

While attorneys provide clients with important information about antitrust laws and other areas of risk, clients make the ultimate decisions about the goals. Attorneys must know their clients well in terms of how risk averse they are and what their concerns are in order to provide useful advice on whether the risks are manageable, and if so, the best way to do so and set achievable goals. When working with clients on deals that have antitrust implications and before the government begins an inquiry, the greatest challenge can often be convincing the clients of the seriousness of the antitrust issues, explaining why certain characteristics of or ways in which they describe their businesses are viewed with suspicion by the agencies. Indeed, for certain types of issues it can sometimes be effective to have your expert economist assist with explanations and the necessary client communications.

Clients tend to focus on finalizing the transaction, integration, and the next stage in the life of their business. Convincing clients to slow down to gain perspective and analyze their decisions can be difficult.

**Structuring the Deal**

In my experience, tax implications are the principal factor that structures a transaction. Indeed, even in those transactions where the structure could affect the likelihood of a pre-merger filing, it is usually the tax ramifications
that drive the structure ultimately chosen by the client and deal team. In some transactions, the nature and magnitude of the antitrust risk lead the parties to address risk-sharing, breakup fees or other mechanisms in the transaction documents in an effort to ensure that the expectations of the parties will be met. In other transactions, where a reasonably identifiable remedy exists for the antitrust problems, the “fix” might be built into the principal transaction and affect the transaction structure chosen.

**Documentation: Another Antitrust Consideration**

Aside from communicating the seriousness of risk to clients, the biggest issue in antitrust law is how clients’ internal documents are written. These documents are often composed in ways that create problems when transactions are being negotiated. Lawyers often have to explain that the documents do not mean what they seem to, or that the documents are actually wrong.

Generally, as part of a government investigation, the parties are required to disclose documents related to the proposed transactions or information regarding competition. At a minimum, documents related or referring to any evaluation or analysis of a potential acquisition, which include information regarding market shares, post-transaction pricing, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, are required to be filed with the party’s HSR pre-merger notification and are known as 4(c) documents.

Such documents are not limited to formal written presentations, but include all written documents, handwritten notes, videotapes, or information contained on computers, including e-mails. The files of the officers as well as the files of persons who have been or are likely to have been asked to assist in analyzing or evaluating the acquisition are the most likely sources for such materials. Documents prepared by outside consultants and investment bankers are also subject to scrutiny by the government or a private litigant.

Because such sensitive internal documents relating to the possible competitive effects of any proposed transaction may eventually be
disclosed, care should be taken in the preparation and wording of such materials. Such documents are not the proper forum for expressing exuberance about the competitive advantages that will accrue from a combination. Thus, while all documents should of course be accurate and truthful, they should be prepared with sensitivity to the issues that the competition authorities will be examining. With this in mind, I provide clients with written general guidelines that are useful for avoiding the creation of unnecessarily inflammatory documents.

**A Common Mistake**

A common mistake made by antitrust attorneys is that they do not always consider the international nature of transactions. If international issues are not considered, problems they are not prepared to handle may arise later. Thresholds for reporting transactions vary by jurisdiction, and the attribution rules are different depending on whose revenues and assets are relevant to the determination of whether a reporting notification form is required. Further, the timing of the transaction can be dramatically altered if the parties have not collected and analyzed the data necessary to determine whether foreign filings are required. Additionally, the length of the antitrust review period differs from jurisdiction to jurisdiction. Accordingly, to plan properly, the parties must be informed about the expected time necessary to clear all pre-merger notification requirements. Certain jurisdictions, such as Brazil, specify the time period within which a pre-merger filing must be made. For such countries, it is important to know that the filing thresholds are triggered in advance so that the pre-merger notification can be properly compiled and filing deadlines are not missed.

It is also important to recognize and identify for the client when a transaction might be of special interest to a particular state. A number of states will initiate their own or parallel investigations of transactions. Clients need to be prepared for such eventualities so that they are not blindsided or feel unprepared.

Another significant mistake can occur when lawyers do not recognize the substantive differences among the laws of various countries. For example, there are several vertical restrictions that are perfectly lawful in the U.S. but
not in other jurisdictions. This must be taken into consideration when deals are structured in order to avoid potentially major problems post-closing.

**Advice and Perspectives**

Antitrust law is a complex and dynamic field that involves working with many different types of businesses. Lawyers in this field must never assume they have all the answers to questions regarding business, and should do their best to educate themselves on their clients’ businesses in order to provide the best possible advice. Antitrust lawyers must also be aware of the difference in perspectives where the government and businesses are concerned. While a business might view certain conduct as logical and reasonable, the government might hold the opposite view. Identifying this divergence in perspective is critical to avoid conflicts and allow transactions to progress smoothly. To be effective, and provide the most value for their clients, antitrust lawyers must familiarize themselves as much as possible with their clients’ businesses, and must always communicate openly and honestly with their clients.

The parties should remain focused on the pro-competitive reasons and benefits of the proposed transaction and these benefits should be communicated, after consultation with knowledgeable counsel, to the employees and the customers.

**Barbara Sicalides**, a partner in the Philadelphia and Washington, D.C. offices of Pepper Hamilton LLP, is vice chair of the firm’s Commercial Litigation Practice Group and head of that group’s Antitrust Section. Ms. Sicalides’ practice covers the full range of antitrust litigation and counseling matters. In addition, she handles a wide variety of distribution disputes and arrangements, class actions, and complex litigation for various domestic and international companies. She routinely assists clients grappling with complex antitrust and distribution issues in the chemicals, bio-pharmaceutical, building products, flat glass, high-tech and various other industries by providing them with day-to-day, real-time advice. In addition, she represents companies in connection with investigations by the Federal Trade Commission, Justice Department and Securities and Exchange Commission.
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