Lessons from Real Life

True Stories that Illustrate the Art and Science of Cost-Effective Counseling

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Thomas B. Leary

The lessons recounted here are drawn from my own personal experience. I think they illustrate some of the things I learned as an antitrust counselor and litigator for over forty years.

In their role as counselors, lawyers in private practice bear the primary responsibility for enforcement of the antitrust laws in this country. They deal with the issues day-to-day and get in at the beginning of the movie. As such, lawyers deal with a lot of serious issues before they ripen into serious problems. Those of us who work in government only see a small sample toward the middle or the end. Without the efforts of the private bar, the system would fail.

In looking back at my own years in private practice, certain lessons stand out that I would particularly like to pass along.

Lesson 1: Imagine the View from the Other Side.

The first lesson goes back to my days in the Navy, before I even went to law school. Shortly after I was commissioned as an Ensign in 1952, I found myself at the Naval Intelligence School in Washington. I learned a lot of fascinating things there, but one experience, in particular, has stuck in my mind ever since. Over the years I have come to appreciate its close connection to things I have done as a lawyer.

One of the instructors told us that "the role of a good intelligence officer is to act as the enemy's representative on the commander's staff." The *enemy's* representative! Believe me, you sit bolt upright when you hear something like that in wartime. What he meant, of course, was that it was our job to learn as much as we could, from a variety of sources, about the capabilities and the strategies of the enemy—to try to think like the enemy thinks—to help the commander anticipate what will happen in battle.

It seems to me that a similar thought process is also essential for an antitrust counselor. When you look at a proposed business plan, you need to imagine how a government lawyer, or perhaps a prospective plaintiffs' lawyer, is apt to react—based on precedents, guidelines, speeches, or other sources of information. These people are not necessarily the "enemy" but they clearly have a different perspective, and they may be adversaries someday. A good lawyer needs to scope out their likely reactions and communicate them to the client without fear.

That "without fear" part is important because some clients may not understand what a lawyer's job is all about. You may hear things like: "Whose side are you on?" or "I thought you were part of the team." You will need to explain the difference between an advocate in a public setting and a counselor who gives privileged advice in private. This may not be easy at first, but you do the client a disservice in the long run if you tailor your message to avoid some potential unpleasantness up front.[1]

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Lesson 2: The Rules Are Not Obvious.

Fast forward a few years. I was a young antitrust associate at White & Case around 1960 when news of the multiple conspiracy indictments in the so-called "Electrical Cases" splashed on front pages across the country. The impact was roughly comparable to the accounting scandals in the news recently. I got an agitated telephone call from one of my brothers, who was working for a major company in a marketing capacity. He referred to all the news articles about competitor price discussions and asked in astonishment: "Is that kind of thing really illegal?"

The lesson, of course, is that the commands of the antitrust laws are not intuitively obvious, even to relatively well informed people in the business community. In terms you may remember from law school, antitrust offenses are generally *malum prohibitum* not *malum in se*. Business people may be generally aware today that hard-core price fixing in smoky rooms is wrong—because of extensive publicity over an extended period of time—but the more subtle offenses are still not obvious. Varieties of market division are a particularly good example; a lot of people still think it is somehow unethical to actively solicit business from a competitor's good customers. We in the legal profession cannot be too sanctimonious about all this because in the pre-*Goldfarb*[2] days we acted on the same beliefs.

When you structure and present compliance programs, you need to recognize that there will be some psychological resistance, along with widespread ignorance. These issues also have a bearing on the way violators should be treated after the fact. People who violate antitrust norms are not all rogue elephants (though some surely are). A policy of indiscriminate harshness will be perceived as unfair and, equally important, will shut down the channels of self-reporting that you need to rely on.

Lesson 3: The Dangers of Casual Contacts.

Shortly after the *Electrical Cases* broke, White & Case was one of a number of firms hired to defend General Electric in the myriad private-damage actions. Our particular focus was on turbine-generators and, as a very junior member of the team, I had to learn a lot about these big

[1] Another aspect of the "unpleasantness" issue will be discussed in Lesson 8. This issue may actually be a more difficult one for "outside" counsel than "inside" counsel today, given the breakdown in longstanding client/law-firm relationships and the prevalence of so-called "beauty contests."

[2] *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), of course, was the case that made it clear lawyers were subject to the antitrust laws.

machines—including the way they were custom designed and bid and the competitor discussions of the bids that created the antitrust problem.

It became obvious that a lot of these discussions had occurred at otherwise legitimate trade association meetings, not as part of the formal business agenda but in the uproarious and liquid receptions that followed. I particularly remember a defense lawyers' strategy discussion when someone raised the question of whether we could defend on the ground that Mr. X was unauthorized to speak for the General Electric Company and I, with youthful irreverence, suggested: "Given the circumstances of his communications, we should argue that Mr. X was unauthorized even to speak for himself."

The lesson, of course, is that antitrust offenses can be committed casually, in non-business settings, after hours. Compliance with the antitrust laws is not something that can be reduced to the review of agendas or the preparation of a checklist. You have to rely on peoples' good instincts in settings where they may not be particularly wary or attentive. This is why it is important to go beyond a list of "dos" and "don'ts" and try to explain, on a deeper level, what the antitrust laws are all about.

Lesson 4: It Can Happen Anywhere.

I once was outside antitrust counsel for a good client, which had a number of executives who seemed to delight in skating as close as possible to the edge. It made for a lively, if nerve-racking, practice. One of these executives was fixated on the idea that he should have lunch with his opposite number in a competitive company, who had been newly appointed from outside the industry. There was no obvious business reason: "I just want to find out what kind of guy he is." (Maybe, he had once been to the Naval Intelligence School.) I said, of course, that it was a bad idea, absent a legitimate business purpose—particularly since the client was the market leader in a tight oligopoly. We went around in circles for weeks. Then, he came up with the notion that I should attend the lunch, as well, along with a designated lawyer from the other company. In a weak moment, I agreed.

The four of us had a fine lunch in a neutral city, talking about the usual things you would expect of four men who do not really know one another very well. (Sports, and sports.) I heard nothing that was remotely problematic and, when I returned to my office, I prepared a memo for future reference and mailed a hefty bill, which included the travel time. A happy outcome? Not quite.

About three years later, visiting on another subject, my client said out of the blue: "By the way, did I ever tell you what happened after that lunch as we were picking up our coats to leave the restaurant? When you two lawyers weren't watching, the other guy nudged me and whispered 'You lead.'"

Once I recovered my bearings, the obvious question was: "What did you say?" He replied: "Oh, don't worry; I didn't say anything. I just nodded, like I'd heard." You can imagine the lecture that followed, to the effect that he was very lucky that there had been no unusual price movements that had attracted anyone's attention; that, if there had been, this five-second exchange could supply evidence of a price-fixing conspiracy; that he ought to know better, etc., etc.

The point of this story is not just to confess my own lapse of judgment. The point is to illustrate once more that the antitrust laws can be violated in the most unlikely settings (almost under the nose of two chaperones) and with a moment's thoughtlessness or recklessness. The perp left the company shortly thereafter and, to this day, I do not know whether he was a naive innocent or an active collaborator. It really doesn't matter because the antitrust laws do not distinguish between the two.

Lesson 5: **Words Can Kill.**

Between my tours in the law firms of White & Case and Hogan & Hartson, I was responsible for antitrust compliance at General Motors Corporation. This was in the 1970s, when the company was popularly, if erroneously, believed to have "market power," and was everyone's favorite antitrust target. I always liked to work for clients like this, partly for the same reasons that move me to cheer for the New York Yankees,[3] but mostly because they tend to take antitrust matters very seriously. General Motors certainly did; every business plan of any consequence was vetted with the antitrust lawyers.

At some point in the 1970s, the threat of Japanese import competition first became very serious, and management was challenged to come up with innovative strategies. I was once called upon to review a particular proposal at the headquarters of one of our divisions. To fire up the troops, the conference room was festooned with posters dating from World War II, like "Remember Pearl Harbor!" and other more incendiary slogans.

The proposed strategy might indeed have had a serious impact on some imports, but it was genuinely innovative and therefore carried very slight antitrust risk (though it was later abandoned purely for business reasons). After I delivered a reassuring antitrust opinion, however, I added that all of the posters had to come down and people were not to voice any such sentiments, even alone in their closet at home. As you can imagine, this advice was greeted with stares of stupefaction.

I went on to explain that these childish slogans were not likely to be seriously cited as evidence of predatory intent but that they were evidence of a mindset that was dangerous for any company vulnerable to antitrust attack. The operative slogan should be what the company can do *for* customers not what the company can do *to* competitors. If people view the world through this prism, they are much less likely to get into trouble. An emphasis on words is not just a semantic exercise.

The story also illustrates the value of shock-therapy. I do not think the listeners will forget the time they were told to pull their posters down, and the reason why. At another meeting with another client,[4] a questioner identified himself as the "manager of sales for the Seattle market." He initially bristled when I said there was no such thing as a "Seattle market," because he assumed I was belittling his job. He calmed down when I went on to explain why it is dangerous to use the word "market" as a noun. The reason is that the word (like the word "agreement") has specific legal overtones that the speaker might not fully understand or intend. Examples that may seem overblown are memorable and help to make a larger point.

Lesson 6: **Be Realistic.**

In the Li'l Abner comic strip, a character named "Marryin' Sam" would offer a barebones wedding for one dollar, with added embellishments at added cost. As I recall it, the five-dollar wedding would conclude as he was fired from a cannon, or some such rousing finale.

I used to talk about Marryin' Sam's sliding scale of weddings whenever I was asked to design a compliance program for a client. The reason goes beyond the usual caveat that it is a good idea to agree on costs up front. When you launch a compliance program, you want to be sure that the client will follow through on the steps that have been included. Like it or not, you may be deemed

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[3] Red Smith, the great sports columnist, once wrote that rooting for the New York Yankees was like rooting for United States Steel. I remember thinking that's exactly right—I root for U.S. Steel, too. In fact, I still root for great enterprises and also for lawyers who help their employees understand and comply with the law.

[4] This is just an example, and does not count against the quota of stories.

to have established a standard of care, and the company may suffer if management later decides that the whole thing has become too burdensome.

Let me give you a specific example. When we printed an antitrust compliance booklet at General Motors, we had to decide which employees would be given a copy. If the distribution was too restricted, those who needed to know might not get one; if it was too broad, it might not be taken as seriously. We wanted people to believe that they had been particularly selected for the advice, and went through our organizational charts in detail to identify the job descriptions of people who might possibly get the company in antitrust trouble. We identified 40,000 of them! Big company.

If we had gone further and said, for example, that everyone in this category had to receive a specified number of lectures—or even sign annual affidavits—we knew that we would be launching a program that would not be continued across the board. There is never going to be a 100 percent fail-safe antitrust compliance program (see Lesson 4), and it is better to have a realistic program that management will support and honor than a more comprehensive one that will gradually be abandoned.

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In fact, this is true of law compliance generally. Your antitrust education program has to compete with education on safety, environment, SEC, EEOC, foreign payments, and the myriad other regulations that govern corporate behavior. Counselors need to practice triage analysis with sensitivity and common sense or management people will be spending all their working hours listening to lawyer lectures.

Lesson 7: What Is the Client Really Trying to Do?

One of the advantages of an ongoing counseling relationship—either inside or outside—is that you get to see business proposals at an early stage, before implementing steps have been taken. I remember when the president of a regular client made a speech in which he noted that the antitrust authorities were now apparently much more tolerant of joint ventures[5] and that people should think about them. Very shortly thereafter, I was asked to review an avalanche of joint venture proposals.

It soon became obvious that people were proposing joint ventures because the company president had mentioned joint ventures, but neither they nor he had given sufficient thought to whether a joint venture structure was really necessary to accomplish the business objective. In most cases, it turned out that some kind of long-term supply or customer relationship would be just as effective—or nearly as effective—and involve considerably less antitrust risk.

In my experience, clients will frequently opt for the “less restrictive alternative,” once the risks are explained. When clients say they appreciate lawyers who are helpful rather than obstructionist, do not assume they are asking for dishonest advice. Your experience as antitrust counselors will have made you familiar with a variety of business arrangements—innovative ways of getting from here to there. Your clients may not have the same familiarity with different legal forms or appreciation of different legal risks, and they genuinely appreciate counsel who can solve problems in a way that will avoid legal complications.

[5] Presumably, this was about 1984, the year that the first version of the National Cooperative Research Act was passed and the GM-Toyota joint venture was approved by the FTC.

Lesson 8: Make Clients Take Responsibility.

Once, on an otherwise fine day, the president of General Motors called me over to his office. The top executive offices were large, richly appointed, and altogether intimidating. The president did not come out from behind his desk to greet me in his usual friendly fashion. In fact, the reception was downright chilly.

The conversation started something like this: "I understand that you have advised that General Motors cannot do . . . [something he had proposed]. Is that correct?" I answered to this effect: "No, that is not quite right. What I have advised is that if the company did this, the chances of litigation were very high, the chances of winning were very low, and the amounts at stake were very large. The proposal is not illegal on its face, however, and you can do it if you want. The choice is yours."

It was amazing how the atmosphere changed! Like a balloon deflating, he settled down, smiled, and said: "Maybe you'd better explain to me what is at stake here."

Absent a per se or criminal offense, it is not counsel's job to decide whether a company will take antitrust risk; that is what line managers are paid to do. The lawyer's job is to explain the risks in the most objective way possible. If the lawyer attempts to shade the advice, in order to avoid momentary unpleasantness (or win a "beauty contest"), the client is not well served. (See Lesson 1.)

In fact, I would go further and suggest that realistic appreciation of the proper roles of counsel and client should actually reduce client conflicts. Anytime you find yourself arguing with a reluctant client, stop and think. The argument likely results from a blurring of roles; someone has moved over to the wrong side of the desk. The client may be second-guessing unwelcome legal advice, which is really silly. (You might not want to follow your doctor's recommendations, but would you argue about the diagnosis?) Alternatively, a risk-averse lawyer may be usurping a management function. (That is why the GM president was mad when he got a garbled version of my advice.)

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When I was in private practice, I found that a useful analogy to use with clients is a televised weather report. Like everyone else, I listen to weather reports because the announcers know a great deal more about the subject than I do. At the same time, however, I realize that weather patterns are complex, predictions are inherently uncertain, and there is always the possibility that the predictions will be wrong. Even more important, I understand that it is up to me, not the announcers, to decide whether I should wear my raincoat.

So it is with legal advice. Clients pay antitrust lawyers for advice because they understand the lawyers know a lot more about antitrust law than they do. They also expect predictions, even expressed in percentages like weather forecasts. I was willing to do that but always emphasized that even the most careful and informed predictions may be wrong and that, in the end, it is up to the client to decide what action to take.

This lesson also has a bearing on who is responsible for corporate law compliance generally. During the 1970s, it was fashionable for lawyers to annoint themselves as the "conscience of the corporation" or some such high-sounding title. This is a dangerous idea. If managers believe that compliance is primarily the lawyers' business, they will treat "approval" of lawyers as just another hurdle to be cleared. They will inevitably be tempted to slant the facts in order to get the needed clearance and they will get bad advice. If they are held accountable for compliance themselves, their own survival instincts will encourage candor and lead to better business decisions. ●