



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

GUIDE FROM THE TRENCHES: USING TRAINING AS A TOOL FOR ANTITRUST COMPLIANCE*

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An important part of the job of an attorney is to assist clients in maintaining legal compliance. Business is risky enough. No one who really reflects on the issue wants to increase business complexities by adding in the cost and burden of lawsuits, government investigations, and possibly criminal prosecutions. However, compliance does not happen on its own. You must cultivate it. One tool for handling this job is the use of client training techniques. The details of one specific approach to antitrust training provide not only the nuts and bolts of a particular program but, hopefully, some insight for drawing conclusions on the training process itself.

I. Training - Why Should You Do It?

Antitrust laws cover a broad range of conduct and influence many areas of business activity. No one is born with an innate sense of what the Sherman and Clayton Acts say and mean. Additionally, the application of these laws changes over time as courts shift their understanding in response to changing business conditions and economic theories. In order to comply with the antitrust laws, employees must understand the laws and how they apply to their day-to-day jobs. Every company must have a system for communicating relevant information about antitrust laws to its employees. Otherwise, the business is simply testing its luck in an environment that includes treble damage awards in private litigation and criminal penalties for wrongdoing.

Training is a form of communication that may or may not be appropriate to communicate a given message to a particular audience. Communications techniques include informal briefings, memoranda manuals, handbooks, pamphlets, posters, and stand-alone media (video and audio). Many companies rely on written methods of communication to reach a broad audience with a basic antitrust compliance message. These methods can range from a simple pamphlet to a complex antitrust handbook. Other approaches use nonwritten media, especially video. Written communications very efficiently spread a broad message to a large audience. This may also be the best way to communicate a very detailed message to a smaller audience.

So you still want to train your clients? Training has certain advantages over passive communications techniques. The trainer can observe the students as they work through the material; the students can interact with the trainer and participate actively in the learning process by asking questions or sharing personal experiences. Some lawyers also find training desirable because it creates "face-time" with their customers.

II. Developing Effective Training Programs - One Lawyer's Journey

When I began my in-house legal career, my clients asked me to deliver "training" on antitrust issues.

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Looking through old files, I found examples from past years. These tended to be overhead transparency presentations with mostly text (no graphics or pictures) and many references to statutes and cases. Much work went into preparing these materials, but there was something wrong with this approach. By working with colleagues who had some practical training expertise and by attending nonlegal training courses, the inadequacy of traditional training techniques became obvious. To be fair, it was quite a bit harder to create interesting foils in the days before today's desktop-publishing-quality presentation software. Nevertheless, let's be honest -much of the material used by lawyers for years was absolutely terrible. Just in case you think that I am making this up, here is a portion of the text from a single overhead used in an antitrust training program.

Consequences of Violation Criminal penalties -600 businessmen in last fifteen years named as defendants in Sherman Act prosecutions

Antitrust Procedures and Penalties Act of 1974 imposes three years in prison \$100K fine for individuals \$1M fine for corporations

Felony - loss of voting rights, opportunity to hold public office

Treble damage judgments

Class actions *orparens patriae* lawsuits under the Hart-Scott-Rodino

Antitrust Improvements Act of 1976

This slide contained eight additional items, but by now you get the point. This one overhead included over 100 words and would be extremely difficult to read from the back of a classroom (not to mention from this page). It referenced two statutes by name and even used a little Latin. Other slides were even more difficult to follow because of footnotes and case cites (in Blue Book form) at the bottom of the overhead. As my first step, I purged this type of slide from my presentations. Even without fancy software, you can create a more readable foil. Below is one of my first efforts from 1991 on the same subject as the slide shown above:

CONSEQUENCES OF VIOLATION Potential Large Verdicts, Treble Damages Injunctions, Divestiture and other Penalties, Possible Criminal Prosecution

You can remove most of the verbiage and still make the same point. After all, you need to have something to say. If the teacher just reads his overheads, then perhaps the message could be more effectively delivered by simply mailing a packet of the slides to the students to read at their leisure.

Many lawyers supplement their materials by showing videotapes. Commercially purchased materials, such as "The Price" and "Connections" from Commonwealth Films, provide "real life" drama by placing you in the world of a salesman or a buyer. Both films demonstrate the problems that both a company and an individual can face by failing to comply with the antitrust laws.

I began teaching antitrust programs by using transparencies carefully created to improve their readability

(large font size, graphics, and no legalisms) and using one of these films. This can be a very good way of conducting antitrust training; however, I believe it has weaknesses. Observing nonlegal training courses that actively engaged the student increased my suspicion. Someone was on to something. One of my colleagues, Susie Hoeller, helped to develop a training program to teach contract law to purchasers. She did this in collaboration with training professionals, and it revolutionized my whole concept of good legal training.

The students actively participated. They formed small groups and discussed hypothetical situations. They also scrutinized descriptions of actual cases, trying to determine how a court would analyze the situation. Case studies foster class participation. Familiarity with the process, by both the students and lawyer/teachers, promotes participation. The examples become more realistic when tailored to the audience's needs and experiences and can be quite memorable (especially compared to remembering the exact name of a given antitrust statute).

Case studies also encourage discussion and interpretation, which is exactly why both law and business schools use this method as their primary form of instruction.

III. Rules for the Trainer

The next step in my development was to attend a "train the trainer" class. Not every lawyer wants to use

some of his professional development time and resource for this purpose, but I highly recommend it. Among other things, I learned to pay attention to the following rules.

Rule 1

Course design is critical, not just a matter of putting together slides. It should involve a detailed process of determining your objectives, building a design model, developing activities, and then creating your material.

Rule 2

Administrative details and creature comforts must not be forgotten. Training simply will not happen if the equipment does not work. Just like babies, students are happiest (and learn best) when they are warm, dry, and full.

Rule 3

Teach at adult levels. Make sure that you incorporate adult learning concepts into your program. Adult students want useful information to which they can relate. They may also have valuable experiences they want to share with the class. Adults respond best to informal instructor relationships and retain more when they participate in the process.

Rule 4

Develop skills as a presenter, a facilitator, and a teacher; they are critical to success. Not every lawyer skillfully practices these arts; nonetheless every lawyer can improve such abilities.

Rule 5

Develop some form of measurement system to gauge student reactions, both to the course and to the instructor.

Only through disciplined use of a metric and an analysis of the data over time can you accurately determine if you are continuously improving both your materials and your own skills. I decided to take my earlier version of an antitrust training class and rework it, following the above rules. The result of that effort formed the basis of the course that I have used ever since. I will explain how it works by describing a fictional day in the life of a lawyer-trainer.

IV. A Day in the Life - Seeing How a Program Works

Woke up, got out of bed, dragged a comb across my head. From there it was on to work - this time at a regional office of one of my company's businesses. Following Rule 2, I had earlier taken care of all the administrative details, such as room and equipment, by coordinating my class with the human resources person who handles training activities at that site. Smaller companies may have fewer people to lean on; the point is to enlist some help.

My Antitrust Workshop was to begin at 9:00 a.m. to a group of twenty-four businesspeople, which included engineering, marketing, and sales managers. When the class arrived, I greeted them and passed out a sign-in sheet - a simple first step towards data collection, as in Rule 5.1 then began to finalize my preparation steps. The night before I carefully reviewed my materials, even though I had developed them and had taught the workshop many times. An effective teacher must be prepared, following Rule 4.

Because I teach this course to different businesses, I have developed slightly tailored variations in the material. (Part of Rule 1 is to constantly improve, modify, and customize the design and materials.) I always try to begin the class with something to get the audience's attention. It makes sense to use varying approaches and to try to keep them timely. On this particular day I used a favorite - I pulled out the day's newspaper. It just happened to contain an article on a government antitrust investigation of a well-known company. (When writing fiction, you can craft remarkable coincidences. In real life, I would suggest building a file of starters). Video clips might also prove attractive. I have a video from a conference where Anne Bingaman spoke on Department of Justice enforcement actions. I have often thought that showing just a couple minutes of her speech might be a wonderful way to get people's attention. I am somewhat skeptical of the value of full-length, thirty minute films. However, I believe that video clips can be an excellent device for illustrating and dramatizing certain points.

The antitrust program I used in this presentation contains six sections - four substantive, plus an

introduction and conclusion. Each section, including the introduction and conclusion, had an exercise. Through these exercises, plus question-and-answers, I implemented Rule 3. Exercises are critical to the success of a workshop. During the brief introduction, I began asking the students what they expected or wanted to gain from the session and then briefly explained the antitrust laws and why the students should care.

Next, I introduced the "foundation exercise." I returned to this same exercise at the conclusion and referenced it throughout. The exercise uses a tricolor graphic of a bull's-eye. The red inner circle represents per se illegal conduct. The surrounding yellow circle represents "rule of reason" analysis. Finally, the green background represents conduct that does not raise antitrust issues. I then explained to the students my four factors of antitrust. This model simplifies antitrust analysis by making it accessible to students and easily memorable to students. The four factors are:

- (1) horizontal versus vertical,
- (2) price versus nonprice,
- (3) conspiracy versus unilateral conduct, and
- (4) market power.

Each factor contains a higher risk alternative:

- (1) horizontal,
- (2) price,
- (3) conspiracy, and
- (4) high market share - using this as a surrogate for market power.

According to my model, if any of these higher risk factors exists, then the situation moves from the "green" to the "yellow" category. If two or more of these factors are present, the situation moves from "yellow" to "red." Just like the familiar, and universal, traffic signal, red means stop and yellow means caution (or in this case, talk with your friendly legal counsel).

I then gave each student a card describing a hypothetical situation. A couple of the examples that I used follow:

BRASS TACKS: "A company makes and sells five of every six nails in the United States. Their Vice President of Marketing implements a plan to sell nails only to those customers who also buy screws from the company."

WALKING COMPENDIUM: "Your manager tells you to obtain intelligence about competitive pricing from marketplace sources. You obtain the information from customers, third-party sources, and published information."

I then asked each student to write down the color green, yellow, or red - based on the risk factor. We then put those answers aside to return to them at the end of the program. During the session, I make continuous reference to this model, often using a color overhead or even a poster-sized version.

The next four segments of the training program focused on business relationships. They are

- (1) dealing with competitors,
- (2) dealing with customers and suppliers,
- (3) special situations, and
- (4) on our own.

I used a few overheads, generally four per section, with just a few comments on each slide. A brief outline of the overheads follows:

Introduction:

- (I) Purpose of Class;

- (2) Antitrust Laws: What and Why;
- (3) Consequences of Violation; and
- (4) Decision Making Model.

Dealing with Competitors:

- (1) What Is a Conspiracy;
- (2) Restraint of Trade;
- (3) Price Restraints; and
- (4) Nonprice Restraints.

Dealing with Customers and Suppliers:

- (1) Vertical Price Restraints;
- (2) Vertical Nonprice Restraints;
- (3) & (4) Examples Covering Exclusivity, Refusals to Deal, Tying, etc.

Special Situations Section:

- (1) Trade Associations;
- (2) Standards;
- (3) Intellectual Property Licensing;
- (4) Joint Ventures and Alliances; and
- (5) Mergers and Acquisitions.

On Our Own:

- (1) What Is Monopoly;
- (2) Market Definition; and
- (3) Abuses.

Conclusion:

- (1) Miscellaneous Issues (examples include state enforcement, extraterritoriality, etc.); and
- (2) Using the Legal Department.

The overheads above could be customized for each audience by deleting or adding additional overheads.

While presenting the material, I tried to supplement it with examples, stories, and other information to elaborate on the brief text and help make the information relevant and interesting to the students. Such examples can come from cases, newspaper reports, or actual company experiences. At the end of each

section, we did an exercise. I try to vary exercises over time and make them imaginative, both for variety and freshness. Critical factors for a successful exercise include brevity, relevance, and the opportunity for student participation.

Case studies make excellent section-ending exercises. Other techniques, such as document review, are also useful. Try to develop a form document, *e.g.*, a letter from a distributor complaining about certain practices and a follow-up letter back from the supplier. Have the class divide into smaller groups, review the letters, and suggest modifications to the response letter. After a few minutes, have one group present its result to everyone. Use this time to draw out opinions and reinforce the lesson. Another exercise is to ask small groups to develop an overhead (either on paper or with transparencies and markers) for a future management briefing based on given facts. They must present their information on a single foil. You can fill the facts with lots of market data and market share estimates from both internal and third-party sources.

Have one group present their creation to the class and then use it to discuss the issue of market definition, market share, and the importance of these concepts in evaluating a variety of antitrust issues. You can also make points about the danger of creating documents that could later prove harmful in litigation.

I also have a more unorthodox training exercise. If the trainer really wants to bring home the point of the risk of criminal prosecution for price fixing, one option is to try to make it seem real. I have created a short "play" exercise for this purpose. Select from the students a few volunteer "actors" and give them cue cards containing their lines. Set the stage: they are all members of a trade association and are at their annual awards dinner. Introduce the characters and then have them read the script. In the script, you will create circumstantial evidence of a price-fixing conspiracy, perhaps having some actors being gung-ho, others silent but consenting, and one radical who speaks out against the discussion. Conclude the performance and continue the exercise by announcing that the U.S. Department of Justice has just announced indictments against the alleged conspirators in a price-fixing cartel. I have actually dramatized this point by preparing mock legal papers and "serving" them on the students who acted in the play. This illustrates the risks of falling into a conspiracy, and then the implications of being involved in a criminal prosecution can be discussed.

Finally, we reached the conclusion of our session (do not forget Rule 2 - a restroom break at some point) and returned to our foundation exercise. I asked the class to again look at their example and written answer - green, yellow, or red. A couple of students read their examples, and the class discussed their proposed answers, letting as many students as possible participate as time allowed. We discussed specific questions and compared the examples to actual situations facing the audience. The students then handed in their two guesses. (This data can be read by the trainer at a later time to be used as an informal pre- and post-test to measure the knowledge gained.)

I completed the session by handing out a brief evaluation form, asking a couple of questions each on both the course and the instructor. A database of the evaluation forms can prove helpful in analyzing the strengths and weaknesses of a training program.

V. Variations on the Theme

Attorneys can use many other approaches. The one discussed here is simply the one I know best. This antitrust program adapts easily, and can be used as a "game" by actually conducting a contest between different groups of employees. It can also be taught in modules, tailoring it for a specific audience and time allotment. With limited time and a large audience, the foundation exercise can be used as a stand-alone presentation. Volunteers can be chosen from the audience, the decision factors explained, and their answers used as the basis for the trainer's comments. There are many possibilities.

VI. Conclusion

I have attempted to offer practical advice on designing, developing, and delivering antitrust training programs. Although the discussion focuses on a single methodology for training students, the tips offered should prove helpful in a variety of situations. Readers should experiment with their own ideas and develop programs that work with their clients.

[Author's Note: Since I wrote "Guide from the Trenches" in 1996, based on my experiences teaching antitrust awareness courses during the first part of the 1990s, I have continued to work on the techniques discussed in the article and have delivered programs for both American and European students. One critical addition to this material is needed. A weakness of the program described in the article is that it remains, however participatory and interactive, removed from the day-to-day tasks of the students. In some instances, particularly where a compliance problem (or high potentiality) exists, instructors may want to focus more specifically on areas of concern (skipping, if necessary, less urgent topics) and increase the "realism" of the program. The latter is a difficult task.

One suggestion is to use a modified version of the "play" exercise discussed in IV. Either scripted or partially unscripted "plays" simulating "the trenches" of business practice can provide meaningful "real world" simulations. One quick example illustrates the concept. Sales people could be put into a "play" situation where they confront a buyer (played by an instructor) trying to pressure the students to cut-off a discounter and impose resale price minimums. Scripted roles for the students could illustrate recommended and nonrecommended conduct in the situation, and unscripted roles would let the students show how they would react in the situation. Used to train new sales people, or to refresh veterans, this program would be a useful supplement to an antitrust compliance program built around the principles discussed in this article.]

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