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I. INTRODUCTION

Law schools are being pushed by accreditation bodies, law firms, and students themselves to offer additional practical alternatives for students, all in the search for experiential learning. Antitrust law, with arcane concepts like economist's curves, Herfindahls, and two-sided markets, would not seem a good candidate for such learning. I believe, however, that antitrust law offers up several possible ways for professors to provide practical legal lessons useful to all future lawyers, even those who do not end up joining the antitrust community. In addition, antitrust courses can teach lessons about how the economy and businesses operate—and those lessons are valuable to the many students who have no real experience with either.

II. BACKGROUND OF PRACTICAL SKILLS

Fortunately for me, the push for more practice-based offerings fits nicely with my background. I spent more than 20 years as the in-house antitrust lawyer at General Motors. I continue to practice antitrust law, now assisting multiple clients while being Of Counsel in Schiff Hardin's Ann Arbor office. For the last several years, I have also served as an adjunct professor at three different Michigan law schools. At Wayne State University Law School and Western Michigan University Thomas M. Cooley School of Law, I teach the antitrust survey course. At the University of Michigan Law School, I teach two practicums: "Counseling & Advocacy in Antitrust" and "In House Counsel."

I have also written *Antitrust Simulations* for West's Bridge to Practice Series.[2] The book quickly summarizes key antitrust concepts and then provides realistic documents—emails, memos, presentations, deposition transcripts—that can be used to create real-world practice simulations. I use it as a secondary text in my survey courses and as the only text in my antitrust practicum.

III. THE PUSH TO TEACH PRACTICAL SKILLS—BUT WHICH ONES?

I support the move to provide more practical learning opportunities for U.S. law students. I think the three years of law school allows for such training while still leaving time for a broad array of required doctrinal courses, interesting if obscure electives, and otherwise learning to "think like a lawyer." But I fear that too much of this experiential learning is focused on litigation

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[2] More information about *Antitrust Simulations* and other books in the series can be found at http://www.bridgetopracticeseries.com/.

in general and courtroom skills in particular. Arguments for a moot court and briefs for a clinic can show students the end game of many legal disputes; however, even litigators spend much of their time counseling and advocating for their clients in offices, conference rooms, and through email. Those are the skills I try to incorporate while I teach antitrust law.

Beyond those legal skills, many of my students can use an antitrust course to learn needed lessons about how the economy and businesses function. For too many students, such concepts as distribution costs, product development, and even the setting of price through supply and demand are foreign.[3] Even for those students who know an X-axis from a Y-axis, a discussion of a case's facts, history, and context can help them better utilize their economics classroom learning. For instance, I like to emphasize that corporate decisions are made by real people who do not always act like a textbook's rational actors. I offer anecdotes of seemingly irrational pricing assumptions like inelastic demand, mixed personal and profit motives, and bureaucratic inertia that leave in place a program long after its original rationale is forgotten.

I hope that both sets of students leave my classes with a better sense of how to deal with real businesses, whether under the antitrust laws or any others. Below, I give some examples of how skills training can be incorporated into an antitrust law class.

IV. EXAMPLES OF PRACTICAL SKILLS TEACHING THROUGH SIMULATIONS

The concept of "agreement" is important in antitrust law; in some cases, it is the only real question. After covering the classic opinions for the key concepts, I use the material in *Antitrust Simulations* that describes an industry in which all the competitors have put in place the same restriction of their respective dealers. While each competitor has a good pro-competitive reason for this vertical restraint, hypothetical plaintiffs argue that the common action really is a product of a horizontal agreement—and they have some bad documents and evidence of meetings to help prove it.

In my practicum, a few pairs of students use these documents and cases to argue for and against a summary judgment motion to a judge (me) while the rest of the class listens in and later critiques the performances. After all the arguments, the non-participating students vote on the motion—and I have never had a unanimous decision.

In my survey courses, I take the hypothetical back to a time before any lawsuits and at the beginning of a government investigation. Before any of the students read any of the material in *Antitrust Simulations*, I give all the students the basic facts of the industry and the restraints, as well as some hints about where the investigation might be heading. Two of the students play in-house counsel at one of the competitors who are to gather more facts by interviewing another employee (me) who is the expert on the restraints and an attendee of the key meeting of competitors.

I test the students' interview skills by comparing the information they gleaned to the "deposition transcript" of that same employee in the later litigation. One of the key facts this witness reveals is that the meeting of competitors was organized by a group of dealers. This

[3] It is not true of all students—when one of my students also owned two gas stations, I was the one learning about vertical restraints and supplier power over distributors.

witness claims that he attended only to "show the flag" and placate his dealers. The class learns about the importance of supply and distribution relationships and then debates whether they believe the proffered explanation for the meeting or the conspiratorial one.

Rule of reason and *per se* are two concepts that antitrust lawyers must grasp and, like many complicated legal issues, then explain to clients without resort to legalese. Here, I use documents that describe a research and production joint venture between two competitors. In my survey courses, we explore the sections of the joint venture agreement and press release that an antitrust lawyer probably inserted. Then the students create either a short presentation or one-page handout to explain to the engineers of one of the participating companies what they can and cannot do—and why.

In the practicum course, teams of students prepare both of those documents and then actually present them to a group of company engineers, played by the other students, and a chief engineer, played by me. While all the students/engineers are allowed to ask questions, for each presentation I plant at least one difficult but realistic question. One such "engineer" remembers attending an earlier compliance presentation where he was told never to talk to this competitor and so demands to know why the law has changed. In another example, a sales executive has snuck into this meeting of engineers and asks how she can get the competitor to "play nice on the price" of the joint venture product. The participating students get a chance to practice preparing and providing a memorable yet professional compliance presentation.

Even though only a subset of antitrust lawyers regularly participate in merger reviews, I cover merger law in all my classes because it provides an opportunity to teach several important antitrust concepts as well as practical skills. As to the former, it is an obvious way to teach the important concept of market definition and, through both the Hart-Scott-Rodino ("HSR") procedures and the Horizontal Merger Guidelines, illustrates how "law" often is made outside the courtroom. As for the practical skills, in my practicum course we simulate the first meeting between two merging parties and the reviewing agency as a way to practice the persuasion skills necessary in many regulatory and negotiation settings.

After studying recent merger opinions, HSR procedures, and agency guidelines, the students are assigned to represent either the buyer or seller. They then prepare for an initial meeting with the lead attorney at the reviewing agency (usually played by me). The students learn to cooperate with other attorneys as they present their best story based on company documents, confidential information memos, and other typical HSR Item 4(c) and (d) documents.

To add some variation and provide more teachable moments, I often add a few wrinkles to the exercise. For some "meetings," another student plays an agency economist who arrives at the meeting halfway through and loudly slams the door and sits down. To mimic the sometimes less-than-complete cooperation provided by the other side, I sometimes secretly tell one of the student/lawyers to be unavailable to meet with her counterpart until the day before the meeting (after the meeting, I explain my instructions and take the delay into account in my evaluation).

Finally, most of the students expect the agency lawyer to be antagonistic—if not hostile—which I think is unrealistic for this initial meeting. To drive home that point and show that other forms of behavior might upset the best-laid plans, for one of the presentations I play an overly-

friendly reviewing attorney who talks a lot and wastes time telling the parties how interesting their products and industry are.

V. PRACTICAL EDUCATION WITHOUT FULL SIMULATIONS

Not all the practical points need a simulation to expose them to students—some can be illustrated through a discussion of key facts in the opinion or the context of the case. For instance, I tell all my classes that to understand antitrust law you must pay attention to facts, context, and history. Before extracting a phrase from an old opinion and blindly applying it to today's situation, you should understand the facts surrounding that opinion because facts change.

This point is illustrated every semester when I stare out at my students' sea of Apple products and explain how, not very many years ago, Microsoft was considered the most dominant firm in the world as it fended off various challenges, including an existential one from a now-forgotten Netscape. (It still surprises me how "old" the U.S. and EU Microsoft cases[4] seem to my students—I can more easily understand IBM, AT&T, General Motors, and Standard Oil seeming like ancient history.) Of course in the merger context, we have an even more recent set of matters to show the importance of new facts: I contrast the DC Circuit's 1997 blocking of the Staples/Office Depot merger with the 2013 Federal Trade Commission approval of the Office Depot/Office Max merger.[5] (As of this writing, we do not yet have a Staples/DepotMax approval.)

I use the 1977 *Sylvania*[6] opinion as a jumping off point to discuss different distribution methods and restraints and the customer benefits and antitrust issues each might provide. Given my background and the latest headlines, recently those discussions have ended with Tesla and its quest to sell cars directly to consumers.

1985's *Aspen Skiing*[7] offers a variety of practical lessons, especially when combined with Priest & Lewinsohn's article on the surrounding facts in Fox and Crane's *Antitrust Stories*.[8] For instance, the case and article can show that a company's actions often are driven by multiple motives. Did defendant Ski Co. effectively end its joint effort with Highlands because it wanted to put Highlands out of business? Or because Highlands' down-to-earth product and image hurt Ski Co.'s appeal to upscale destination skiers? Or because the Highlands owner seems to have been a difficult person? Or some combination? Of course, another practical legal lesson from *Aspen Skiing* is that, while all facts are important, the most important facts are those that make it into the court's opinion.

The most important practical lesson of all is that these lawyers-to-be will not be using this antitrust knowledge just to opine on some theoretical possibility—they will be using the knowledge to help some client meet its goals. So in the context of advising a business, it is not

[4] U.S. v. Microsoft, 253 F.3d 34 (D.C.Cir. 2001); Microsoft v. Commission, (T-201/04), 2007 WL 2693858 (CFI 2007).

[5] FTC v. Staples, Inc., 970 F.Supp. 1066 (D.D.C. 1997).

[6] Continental T.V. v. GTE Sylvania, 433 U.S. 36 (1977).

[7] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 US 585 (1985).

[8] *Aspen Skiing*: *Product Differential and Thwarting Free Riding as Monopolization* in ANTITRUST STORIES (E. Fox & D. Crane eds. 2007).

appropriate to just say "no, you cannot do that because there is antitrust risk." Instead, the lawyer needs to understand the law, the facts, and the client's business goals well enough to offer advice like "that way raises serious antitrust risk but this other method can still meet your goals."

One case I use to help the students practice this art is the 1941 *Fashion Originators' Guild of America*[9] case. You might recall that there the U.S. Supreme Court upheld the FTC determination that this trade association and its members—designers and manufacturers of dresses—violated the antitrust laws when they agreed to boycott retailers who sold knock-offs of their creations. So, I ask my students, if this trade association or group of competitors came to you after the case and asked how they could get the word out about "genuine dresses," what options would you offer? The students eventually come up with several possible industry image campaigns, like the dancing California Raisins campaign.[10] In some classes, I get students old enough to at least remember the "look for the union label" song when they find it online.[11] (I know the campaign was on behalf of the International Ladies Garment Workers Union but I think the example still works.)

We then move to another action that competitors must join together to accomplish—standard-setting—and discuss how and why auto companies might work through the Society of Automotive Engineers to develop standards for using flammable materials in the engine compartment. All these discussions are designed to get students thinking like antitrust lawyers and applying the lessons of the cases to other sets of facts in ways that clients would find useful.

VI. PRACTICAL CONCLUSIONS

The argument here is not that antitrust law should join, say, contracts as a required course for all law students; however, I do think that for students who plan to deal with companies in their careers, antitrust law is as important as enterprise organization and commercial transactions because, when taught properly, it can introduce the students to how the economy and businesses operate.

Beyond those practical points, antitrust law courses taught with simulations can provide experiential learning opportunities that go beyond the litigation focus of many clinics and moot courts. A practice meeting to discuss a proposed merger with the Federal Trade Commission will help the future environmental lawyer years later when she meets with the Environmental Protection Agency. Boiling down complicated antitrust topics for a simulated antitrust compliance program will help later when explaining the Foreign Corrupt Practices Act to a roomful of executives. Offering alternative pricing programs to a pretend General Counsel to fend off complaints of anticompetitive bundling will help years later when counseling with a real General Counsel about the terms of a supplier contract.

Those who teach antitrust law—tenured or not—serve their students best when they connect antitrust law's concepts to the real world and prepare their students for the types of work almost all of them will do, whether or not those students ever practice antitrust law.

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[9] Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

[10] If you have forgotten, *see* http://en.wikipedia.org/wiki/The_California_Raisins.

[11] If you are not old enough to remember these ads, check out an example here. Trigger warning—you might end up whistling the tune the rest of the day: https://www.youtube.com/watch?v=7Lg4gGk53iY