WHAT NOT TO SAY IN THE COURSE OF ACQUISITIONS AND TRANSACTIONS

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Your Client doesn't need to do the wrong thing to attract the unwelcome attention of regulators and opponents--writing it may be more than enough.

THERE IS NO BAR TO having sinful thoughts. But there are certainly bars to committing sins. And between thinking what is sinful and actually doing it lies a very dangerous middle ground: writing about it. When a client contemplates a questionable deed, no immediate harm is done. The client can always see the light of reason and do something else. At the other end of the spectrum, it is obviously too late to turn back once the client has done the wrong thing. But when the client commits the questionable idea to writing, the harm may be done even if the action never follows. Particularly in the context of business acquisitions and transactions, aggressive ideas, or not-so-aggressive ideas expressed too aggressively, can bring joy to the heart of a zealous regulator or ever-eager opponent--and strike terror into the heart of the client's own lawyer. This article explores some strategies for helping your business clients to find ways to express competitive plans and strategies in words that are less likely to raise eyebrows and legal issues later on. Although careful expression cannot undo questionable conduct, it may at least avoid aggravating the situation and decrease the amount of fodder for opposing counsel. And when the conduct is inherently proper, careful drafting should help avoid creating problems where none should exist.

SO HOW BAD IS IT?

Perhaps more so than in other business contexts, a badly expressed idea can get a client into trouble when it comes to antitrust, merger, or acquisition issues. Consider the following examples:

- "The idea is to buy up free market material to create an artificial demand";
- "We want to coordinate prices with competitors";
- "Our goal is to stabilize prices";
- "It is necessary to introduce an artificial factor to provide the momentum for an upward price adjustment";
- "The strategy is to prevent them from going ahead with the new plant, with the expectation that they might even be forced to cease operating the existing plant";
- "How long will it take to break them and elevate prices?";
- "I tried to tell him what else we could do if they do not sell out to us. I tried to tell him how much we could do with $1 billion. I tried to be non-threatening, but let him know we would do something aggressively"; and

- "We would have a near-monopoly and the FTC/our customers probably wouldn't like it."

When the busy executive writes, dictates, or e-mails something like the above, it is rarely with the intention of breaking, evading, or circumventing the law. More typically, it is to express a way that the executive would like to see the business grow or expand. But when the client actually intends to do something unwise, the lawyer already has a challenge: To try to mitigate the legal fallout from that act. When the client compounds the situation by memorializing the questionable activity, the lawyer's task is only complicated.

The Tyranny of Squirrels

In the best of all possible worlds, clients would not only resist doing unwise things--they would write no bad documents. But even this wouldn't eliminate the written trail, it would only keep it clean. And even if a senior executive writes something litigation-proof, someone else in the organization may not be able to resist writing that, "We have agreed to a joint strategy to buy and sell in such a manner that will cause the price to rise." Once a writing is created, the assumption must be that there will be some copy of it extant. This is particularly the case with electronic communications. They may be deleted from the writer's and the recipient's computers' memories (assuming that all recipients can even be identified in this era of the Internet and instant mass mailings), but it is almost certain that the information systems department has several backup tapes containing the writing to ward against the disaster of a computer system crash. And on a more low-tech level, there is almost always a diligent squirrel in each group, who compulsively retains every scrap of writing to cross his or her view. A few examples:

- In Staples' recent aborted acquisition of Office Depot, the parties' argument that the transaction will not hurt competition was not at all helped by their own documents, which discuss the "[b]enefits from pricing in [newly, as a result of consolidation] noncompetitive markets" and the "potential margin lift overall as the industry moves to 2 players." *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066, 1079 (D.C. 1997);

- When Microsoft, owner of *Money*, was trying to convince the government that it should be permitted to acquire Intuit, the owner of Quicken, if it concurrently divested Money to Novell, that position was substantially undercut by a document which said that "[i]f it was known that we were buying [Quicken and had to sell Money], then I can't imagine anyone would be stupid enough [to buy Money from us . . . they would] be way, way far behind competitively." The situation was only compounded when Intuit gave Microsoft the code name "Godzilla" during the negotiations. The parties' documents described how the transaction would give customers "one clear option," or, in other words, no choice, thus "eliminating a bloody share war," which will in turn "enrich the

terms of trade we can negotiate with customers." They concluded that, "as a combination, we would be dominant";

- And in a transaction in which I represented one of the parties, an investigation was triggered by documents which contained language such as "[a]fter the merger, there will only be one other competitor left, and two non-people should meet and arrange prices where they should be." In fact, only the writer believed that there would be merely one other competitor left, and that any one would be trying to fix prices in any way. Similarly, that writer believed that, "[a] mong the effects of the acquisition will be a major positive impact on product pricing, since both parties' product prices will rise with the combined market power of both companies behind it." Again, only the writer, and no customer, had that view of the transaction. As a result of such over-zealous drafting, a transaction which was ultimately cleared without challenge and which should not have gotten even a second glance, was delayed for almost six months while tens of thousands of documents were reviewed and produced, dozens of interrogatory responses and affidavits were drafted, and witnesses were examined.

WHAT CAN YOU DO ABOUT IT?

In the unfortunate circumstance that the client is not dissuaded from questionable activities, the lawyer's challenge is to educate the client not to memorialize his or her questionable conduct or thoughts. More often, the lawyer's task is to educate the client not to memorialize any conduct in a questionable manner. Not infrequently, a client may write a memorandum, or now, perhaps more commonly, an e-mail message, describing perfectly innocuous conduct in lurid language. It is true that when the potential conduct itself is questionable, the more important task for the lawyer may be to ensure that the client does not engage in such conduct. In those situations, the more urgent task may be to correct the client's policies. A substantive corporate compliance program may need to be higher on the priority list. On the hopeful assumption that the client is generally well-intentioned and in compliance with law, how may a lawyer help the client ensure that its file cabinets, both hardcopy and electronic, do not create spurious issues?

STRATEGIC PLANNING DOCUMENTS AND MARKETING PLANS

With respect to competitive activities, the major areas of concern may be strategic planning documents and marketing plans. For example, the court in the aborted Staples-Office Depot transaction was influenced by the fact that "Staples uses the phrase 'office superstore industry' in strategic planning documents." *Federal Trade Commission v. Staples, Inc.*, *supra*, at 1079. Both strategic planning and marketing documents generally contain competitive review and market analysis. They are among the first types of writings which enforcement agencies seek to review when investigating potentially questionable competitive conduct. Therefore, keeping in mind the government's approach when drafting these types of

materials may lower the chances of the files becoming the source of delay of transactions or the focus of investigations. In ambiguous situations, the written trail may tip the balance.

Educating the Client

Some of the necessary education may best be done by in-house counsel or regular outside counsel as part of continuing preventive counseling. Counsel may want to participate in the strategic planning process, to the extent of providing guidelines on language and format. Appropriate use of language and drafting of documents may also be reviewed in periodic compliance seminars.

What Is Really Happening in the Transaction?

The need for this ongoing preparation of the client may be most apparent in the transaction context. Often the unfortunate language relating to the competitive implications of potential transactions appear in the strategic plans regularly prepared by clients. A strategic plan may speculate that a positive result of a potential transaction will be that "competition will be reduced" or that a "legal monopoly" will be created. Also, many clients tend to define the markets in which they do business in the narrowest terms, so that their market position may be the most substantial possible. Many documents which may create issues are created during the transaction process before counsel is informed of the deal. For example, investment bankers drafting offering memoranda for a transaction may overstate the market position of a business being sold, to enhance its desirability. Client preparation in this area may therefore be needed on an ongoing basis before any specific transaction is even contemplated or brought to counsel's attention.

The Dangers of a Narrow Interpretation

A recent case study of how such a narrow view of the marketplace may place substantial hurdles before a transaction is the TCI-QVC acquisition, which combined the only two national television shopping networks, Home Shopping Network and QVC. The parties' documents discussed the relevant market as television shopping. In part because of that record, the transaction was investigated at length by the Federal Trade Commission staff, and it was not until appeals were made to the Commissioners that a broader view of the relevant market prevailed and the transaction cleared. Clients may also characterize the marketplace in other infelicitous ways. One marketing manager read Michael Porter and began writing reports characterizing competitors as "good" and "bad," the good ones being those who do not compete on the basis of price. That earned the writer a deposition, and contributed to the delay of clearance for the transaction.

DRAFTING APPROACHES

What kinds of drafting approaches might you suggest to clients generally, and particularly in the transaction context? The key principle to convey to clients may be that they should express concepts and facts without using loaded language.

Use "Market" Sparingly

For example, generally, the word "market" is a word to be used sparingly, since it is one with a lot of legal baggage. Moreover, businesses are continuously re-evaluating their views of the market place, so the characterization of one group of activities as a "market" when drafting a document may no longer reflect the reality or their view of the market place when, perhaps only months later, the government, or opposing counsel, is challenging a transaction or some course of conduct.

In many instances, when business people speak of a market, they are in fact speaking more of "demand," "sales," or "business." For example, the suppliers of parts to the big three automakers probably do not compete in a "Ford market," they are trying to compete for Ford business. When the phrases "total market" or "market size" are used, the speaker usually means "total sales" of a particular product or service, whether or not there are substitutes for that product or service. "Market growth" may really mean "sales growth." And, similarly, "the market is strong" or "the market is soft" is probably more accurately conveyed by "demand is strong" or "demand is weak."

Products Are Not "Markets"

In an excess of enthusiasm for their own products, some business persons may characterize their particular products as a market. For example, a business person may write that he or she is competing in the "nylon yarn market." Yet, a questioner may be told that this businessperson is facing stiff competition from rayon yarn and that a substantial portion of customers have switched to this new material, so that nylon sales have suffered. Nonetheless, the client's documents may show that it accounts for a substantial portion of the "nylon yarn market" without any reference at all to rayon. Especially given the questionable ultimate accuracy of the client's view of the market, it may be prudent in general for clients to be educated to drop the word "market" in such contexts. In other words, the client should be able to discuss the subject adequately by speaking of "nylon yarn" and not the "nylon yarn market." It can accurately report its strong position relative to other nylon yarn makers by discussing its position in nylon yarn sales, not in the nylon yarn market. The addition of the word "market" may only make it more difficult to demonstrate the reality that rayon yarn is part of that "market."

A significant motivation for clients' overuse of the word "market" may be their desire to claim "market share." However, for example, it may be more accurate to claim that they account for a large "percentage of sales" of nylon yarn in North America, not that they control a large "market share" in the North American nylon yarn market.

Fighting Words

Also, clients may be carried away by the competitive spirit, and use what might be characterized as "fighting words." They may want to "dominate," "own," "monopolize," or "control" a "market," rather than "be a major competitor in the business." They may want to "eliminate an aggressive or

disruptive competitor," rather than "compete vigorously against an aggressive competitor" or "acquire a vigorous business." They want to "eliminate the only competition" and not only "acquire a substantial competitor." They feel there is "ruinous" or "excessive" competition, rather than "vigorous" competition.

"Stabilization" and "Noncompetition"

In the face of competition, clients may feel that the appropriate response is to "stabilize industry dynamics," do a deal which "will let us raise prices" or otherwise try to "stabilize, support or maintain prices." Perhaps it would be equally accurate, and less legally sensitive, to say that the industry is restructuring and that they want to increase or at least maintain profitability. Rather than try to effect a "market segment consolidation," it may be more accurate to say that the clients want to "increase their market presence."

Similarly, clients may want to be careful before they characterize an area as a "noncompetitive market," as the parties did in the Staples-Office Depot situation in referring to geographic areas which did not have office superstores but did have warehouse club, consumer electronics, or mass merchandiser stores. It might be equally accurate to say that there are few known competitors in the particular geographic area.

CONCLUSION

In summary, the guiding principle may be, if you were a disgruntled customer, or an embattled competitor, or a law enforcer, how would you react to the language that is being used? Would you feel that you now have evidence to use against the writer? If yes, redrafting, if not re-thinking, may be in order.

Practice Checklist for What Not To Say in the Course of Acquisitions and Transactions

Even the most well-meaning business client can find itself in a lot of trouble by doing nothing more than expressing a business acquisition or transaction plan a little too aggressively. What can the client do to avoid the possibility of inviting trouble?

- First and foremost, if the client does not already have guidelines for document retention and drafting, propose them.
- Next, suggest some specific drafting tips:
  - Don't overuse the word "market" in describing "demand," "sales," or "business," or a product;
  - Stay away from fighting words such as "dominate," "own,"

"monopolize," or "control"; and

- Avoid loaded terms with legal significance like "stabilize prices," "consolidate a market," and "noncompetitive market."