Department of Justice

COMPUTERS AND COMPLEX LITIGATION: PUTTING THE BYTE IN ANTITRUST ENFORCEMENT

Remarks by

JOHN H. SHENEFIELD
Assistant Attorney General
Antitrust Division

Before the

ABA National Institute:
The Computer in Litigation

Mayflower Hotel
Washington, D.C.

February 1, 1979

A prominent antitrust lawyer testified recently before the National Commission for the Review of Antitrust Laws and Procedures. We heard him speak disparagingly of the lack of self-restraint on the part of counsel in large antitrust cases that led to uncontrolled discovery and the introduction into evidence of millions of documents, so that in the end the entire process was burdened to the point of breaking and the ends of justice proved elusive. In his testimony, this lawyer, in a half-serious way, suggested that the use of computers in litigation should be outlawed, and that no lawyer should be permitted to offer into evidence more documents than he could keep track of in his own mind. No judge and no jury, in his view, could be expected to cope intelligently with many more.

The witness was making a point that we should not lose sight of in our amusement at his facetious condemnation of the computer. That point was that undue protraction of litigation is reaching the point of unacceptability, that neither litigants nor the judicial system can stand the burden and expense of cases that go on for years, and that the legal profession and the justice system are being discredited by interminable litigation characterized by delaying tactics, uncontrolled discovery and chaotic courtroom procedures.

The reality, of course, is less alarming than the perception, but the reality is bad enough. It is clear that unless we as lawyers make an effort to deal with the problem of undue delay in a significant number of complex cases, our legal system will be permanently damaged. We must now realize that the resulting burdens on litigants and courts have grown too great. We can no longer afford the excessive public and private resources that are expended. Most important of all, we cannot permit confidence in the judicial process to be sacrificed and effective law enforcement to be impeded.

And so I would like to talk to you today about two kinds of efforts that the Antitrust Division has made to deal with this problem. I would like first of all to talk about how we use computers in the Division and then I would like to try to elaborate some of the conclusions reached by the President's Antitrust Commission that have direct implications for the subject matter you are discussing in this National Institute.

I am not a computer expert, as you know, but I do know something about litigation. And I manage one of the Nation's largest law offices. I therefore have an obligation to be effective and productive in using the limited public resources at our disposal to enforce the antitrust laws. In that effort I look to computer-assisted tools as a major means of discharging that responsibility.

When I joined the Division in the Spring of 1977, I learned that we had an automated caseload management system--given the acronym "ACES" for Antitrust Caseload Evaluation System--and that we were using computer support for document-indexing and retrieval and analysis of economic data in one case. There was also an automated statute and case law research system--JURIS--available in the Department. But it was perfectly obvious that computer-aided systems were not being used to their full potential.

In December of 1977, after a thorough review of a special task force report and its findings, I established an Information Systems Support Group--inevitably saddled with the acronym "ISSG." Last February, ISSG began drafting a scope of work description for litigation support services, and by the end of August, the Department signed basic agreements with seven litigation support contractors. By the end of September, negotiations were completed and work begun on eleven specific contracts, including document processing support for the AT&T litigation.

With the creation of ISSG, the Division, for the first time, developed a comprehensive budget plan and request to fund the identified needs for systems support. For the fiscal year that begins next October, the Division requested an increase of more than $6,000,000 for this purpose. The Office of Management and Budget has approved the request, but expects us to demonstrate that this is a sound investment of the taxpayers' money. Our budget is now pending approval in the Congress.

I believe that money spent wisely on computer systems support is a sound investment. Let me describe briefly some of our present and planned uses of such support. I mentioned earlier our caseload management system--ACES. The ACES data base includes information on all antitrust matters initiated by the Division since July 1963. It also includes information on other matters, for example, business reviews and regulatory proceedings, and professional time reporting from October 1975. ACES generates various monthly and other periodic reports for use by Division management, section chiefs and our Executive Office in tracking and planning case activity, allocating resources and budget formulation.

The ACES data base has also been invaluable for specialized projects. The Division has underway a systematic examination of concentrated industries to determine the existence of prosecutable shared monopolies. By combining ACES data on past antitrust cases and investigations with data on industry size, number of plants, volume of sales and concentration ratios from commercial data bases we've purchased, we have been able systematically to narrow the universe of concentrated industries that warrant shared monopoly study. Without ACES, and without the automated commercial data bases, this project would have required the commitment of an enormous amount of time and personnel--a commitment that I'm not sure we could have afforded.

We are using the computer to assist our economists in analyzing such things as market shares and pricing and distribution patterns in specific investigations and cases, as well as for general investigatory usage. Computer assistance in the analysis of economic data frequently is necessary because the volume of data is unmanageable in a manual form or the type of analysis required cannot realistically be accomplished manually. A recent merger investigation illustrates the point. Data for a five-year period from 32 companies for 70 products and sales in all 50 states had to be analyzed to determine whether the combination of previously independent companies would significantly alter market structure or otherwise create anticompetitive conditions--an unmanageable project without the aid of the computer.

We are also in the process of developing a system to combine word processing tools with computer tools to provide our attorneys ready access to the best of the Division's briefs and legal memoranda. There is no point in forcing our attorneys to "reinvent the wheel" because prior work product cannot readily be located and retrieved from manual files. In a small law office this may not be a problem. In an organization of some 400 attorneys located in three buildings in Washington and in eight field offices around the country, it is a very substantial problem. With the availability of word processing

equipment that produces a computer-readable media when the hard copy is typed, the cost of creating an automated full-text attorney work product file of selected material is more reasonable than the cost of reproduction, file cabinets, space and manual indexing to create an accessible hard-copy research capability.

The lion's share of our systems support budget--and the most necessary for dealing with protracted, complex litigation--is, of course, for computer support in managing documents, depositions, exhibits and transcripts in litigation.

I am reminded of the truism that it takes longer to write a short speech than a long one. Boiling the issues of a complex case down to an essential core for decision by a court is more difficult and takes more preparation than to throw everything into evidence and leave it up to the judge. In a jury trial, the problem is even more compelling.

A systematically constructed litigation support data base can help. If a focused development of the issues produces much more than about 10,000 relevant documents, a good lawyer is not going to be able to put it all together in his head, at least not well enough to be able to respond quickly and effectively to the expedited issue-narrowing process just recommended by the Antitrust Commission. But with the aid of indexing and retrieval capabilities, a lawyer can swiftly and flexibly formulate and reformulate issues and contentions as discovery, and even the trial, progresses.

But lawyers, as you are discovering today, must learn new vocabularies and adapt to new litigation schedules. It means spending long hours working out an indexing strategy, sitting down with indexers and perhaps lexicographers to review and structure vocabulary. It means that the lawyer must do some indexing himself so that he has a first-hand feel for the kind of thing he's going to get back later on when he searches the data base. It means doing all these things early on and according to a schedule that gives them priority over more conventional legal work. And it means exercising self-discipline to avoid including all documents in the data base, whether relevant or not.

I don't want to imply that in the Division we have reached the ultimate in effective use of computers in expediting litigation. We haven't, but we're learning, and we're learning fast. And our litigation efforts show the effects of this new knowledge.

Just as each litigant and each lawyer need to look close to home for solutions to the problems of protracted litigation, as lawyers we must also look to the system itself. That was the task of the National Commission for the Review of Antitrust Laws and Procedures. Part of the Commission's charter from the President was to study and make recommendations on the means of expediting complex antitrust cases. In a nutshell, the

problem addressed by the Commission is that too many antitrust cases spend too much time getting nowhere.

There are over 20 recommendations in the first six chapters of the report covering judicial management and control, use of time limits to expedite litigation, control of discovery, methods for early focusing and resolution of issues, sanctions and disincentives for dilatory behavior and other procedural recommendations. A number of procedural techniques and management practices are suggested. Several federal rule changes and model local rules are endorsed.

One good example that illustrates the overall philosophy of the report is the Commission's recommendation for an amendment to Rule 16 of the Federal Rules of Civil Procedure and for a related model local rule. The rule change would allow a party, rather than only the court, to trigger a Rule 16 pretrial conference. The Commission suggested that the list of topics for consideration at such a conference be expanded to include the submission of a plan and schedule for discovery; the setting of pretrial time limits, cutoff dates, and a trial date; and the imposition of Rule 37 sanctions for failure to follow orders entered pursuant to Rule 16. A change in the portion of the Rule describing Rule 16 orders was also suggested to make clear that they should include "the time limits and cutoff dates set" and should "define the legal and factual issues" for trial.

The Rule's current flexibility for modification of these orders where necessary would be retained. The message to litigants and courts, however, is clear: become knowledgeable about the cases early, start defining issues on a continuing basis early, plan discovery and establish cutoff dates, set a trial date and work backwards for credible, but firm, interim deadlines.

The Commission recognized that these principles in several respects run counter to the Manual for Complex Litigation in which it is suggested that discovery precede issue definition and that discovery be conducted in "waves"--first, to determine background information, such as location of documents and witnesses; second, to gather information on the merits; third, to complete remaining discovery needs such as amount of damages suffered.

The report takes issue with this approach as a model for most complex antitrust cases. It can, the Commission concluded, unnecessarily complicate, layer, and multiply discovery. It subordinates the need for judicial involvement in the specific allegations, theories, and actual discovery needs of the parties in particular cases. It is, the Commission found, at the same time too arbitrary and too passive a model for complex case management.

The model local rule intended to be used in tandem with the new Rule 16 also emphasizes judicial involvement and discovery flexibility, both within firm guidelines as to overall amount and time of discovery. For instance, the pretrial time limit set should not exceed 24 months, except where manifest injustice would result. To guard against this period becoming an unintended norm, it is provided that 24 months should be allowed only rarely, where extreme and unusual complexity is involved.

To complement these suggestions, the report also recommends that courts balance the burdensomeness of particular discovery activity against its materiality in order to reduce discovery of tangential, immaterial matters. To make time limits work, for example, the notion that liberal discovery means open-ended discovery must be resisted. To send a signal to courts that reasonable discovery controls are permissible, the Commission recommended a revision of Rule 26(b) to relate discovery to the "issues raised" or the "claims of defenses" of the

parties, rather than the "relevance to subject matter" standard now employed. Changes to make Rule 37 and other sanctions more workable and more utilized were also recommended to complement the suggestions for time limits and strong judicial control.

Running through these specific suggestions is a common thread: in complex antitrust cases, the traditional model of the judge as a passive umpire, rather than active manager, is inadequate. The inescapable truth is that there is no substitute for the early, active, and knowledgeable involvement of the court.

Judges of course, are not the only part of the problem or of the solution. The Commission concluded that lawyers must share the blame for undue protraction for several different reasons. Many lawyers are simply too timid in the face of high-stakes antitrust litigation. Their instinct is to discover, litigate and bicker endlessly over every conceivable point. It may not be efficient, but it seems safe. Other lawyers, including government lawyers, may seek delay because of resource shortages, inexperience, or uncertainty about some part of their case.

The Commission's report reflects an even more fundamental diagnosis--the notion that the gamesmanship, win-at-any-cost philosophy of some antitrust litigation raises ethical as

well as procedural and judicial management issues. While strong judicial control buttressed by strengthened management tools is a promising partial solution to the "big case" problem, the root causes, including overly litigious and indeed perhaps unethical lawyering, also should be squarely faced. Purposely jumbled documents and evasive discovery responses, dilatory motion practice, settlement negotiations entered into for reasons of delay and not settlement--these and other uninspiring examples were virtually unanimously conceded to have no redeeming social purpose.

As with several other areas of the report, legitimate questions were raised as to whether particular procedural or rule changes aimed with good intentions at these practices might actually provide a vehicle to ingenious procrastinators for still more delay. We think the reforms suggested by the Commission will not cause added delay, but concede that all the recommendations depend for their potential to be realized fully on the cooperation of courts and lawyers. Especially in the area of sanctions and ethics, changes in attitude will ultimately be more important than amendments to rules or professional codes.

The Commission also believed that an important cause of undue delay and expense in complex cases brought by the government was the denial of access to materials already produced in actions initiated by private parties. The Commission concluded

that the duplication of past discovery should be avoided, except upon the court's determination that it would be grossly unfair or unjust to allow the government access to these materials.

To dispel the present ambiguity concerning government access to materials discovered in private antitrust actions, the report recommends amendment of the Antitrust Civil Process Act to authorize the issuance of civil investigative demands for the products of private discovery. These products of discovery would include depositions and documents, and indices, digests, compilations and analyses of such depositions and documents. A computerized litigation support data base, together with the documentation that makes it usable, fits within the definition.

The proposed amendment recommended by the Commission also provides that the disclosure of discovery materials does not constitute a waiver of any right or privilege to resist discovery of trial preparation materials. The implication here is that such privileges could not be used to resist the CID itself. However, the courts would retain the power to deny production if warranted by the circumstances. If litigation data bases are constructed in such a fashion that attorney work product, as opposed to indexer work product, is separately fielded, I should think the burden of masking out privileged materials from the data base would be much reduced.

The report also suggests that resources available to judges handling complex cases may be inadequate and that attention should be given to providing judges handling such cases more support services. In testimony before the Commission, Judge Alvin B. Rubin suggested creation of a small resource and research staff to assist judges facing complex litigation. Judge Rubin suggested that this resource might be centralized in Washington and linked by computer to the various circuits.

The Federal Judicial Center has a program--called COURTRAN --for automated support to the federal courts. This program currently has four parts. First, administrative matters such as budget and personnel are automated. Second, COURTRAN provides automated legal research services to the courts. Third, caseload management--updating calendars, listing priorities, and the like--is automated. As part of this effort, the Judicial Center is now in the process of implementing an electronic docket sheet. Court clerks will use a computer terminal to record each event on the docket of each case. Computer usage by federal court personnel has increased dramatically in recent years. In 1974, there was no online usage of COURTRAN data bases. In 1978, court personnel logged 85,000 hours connect time, plus an additional 8,000 hours using LEXIS.

The last area in the COURTRAN program is automated assistance in the management of specific litigation. The Judicial Center has not yet put together a concrete program in this area, beyond a review of what commercial vendors can provide. Those in charge of systems development at the Center believe they will probably seek help from the private sector for this part of the COURTRAN program. If the Commission's recommendations are followed, I would anticipate that the Judicial Center will soon implement some concrete programs in this last area. However, such programs may well require cooperation between the courts and the litigating parties.

Let me suggest some avenues that such cooperation might follow in the future. One use of computers in litigation involves the full-text storage of the trial transcript for research and retrieval. It must follow that allowing access to that data base by the judge and his law clerks not only during the trial, but more particularly, while the court's opinion is being written, offers significant time-savings over paging through hard copy transcripts. Similarly, computer data bases are used for identifying and cataloguing the exhibits introduced in lengthy, complex cases. Allowing the court access to this information might also expedite the process. There must be a myriad of other ways in which the litigating parties and the court might cooperate in the use of computer tools without compromising the rights of the parties.

There are, of course, practical and legal problems connected with the sharing of computerized data bases, but I do not believe they are insurmountable. If judges take a more active role and litigating parties are forthcoming, we may anticipate not simply a coordinated effort by the court and its officers to control and expedite complex litigation, but also constructive development and use of computerized litigation data bases to assist these processes. I do not, of course, advocate the sacrifice of our adversary system to the efficiencies of the computer. But I do challenge all of us to find ways to use computer technology to resolve complex cases fairly and expeditiously--an effort that will take innovative lawyering and technical work if the ends of justice are to be served adequately.

As a litigator and a litigant, I have no inclination to make a complex case out of a simple one or a big case out of a small one, or to go to trial with a case that should have been settled. But I believe that big and complex cases are possible, indeed sometimes necessary to preserve a competitive economy. With proper use of the tools of the lawyer's trade--including the computer--these cases can and should be resolved through the judicial process, justly and expeditiously.