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Letter to Hon. John H. Shenefield

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102
September 14, 1978

CHAMBERS OF
WILLIAM W. SCHWARZER
UNITED STATES DISTRICT JUDGE

Honorable John H. Shenefield
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
Washington, D. C. 20530

Dear John:

I understand that you are the channel for submission of suggestions and ideas to the National Commission for the Review of Antitrust Laws and Procedures and that is the purpose of this letter. My suggestions fall into two categories: those requiring no legislation and those requiring legislation.

1. SUGGESTIONS FOR REFORMS UNDER EXISTING LAWS

I believe that under the present state of the law, including the existing Federal Rules of Civil Procedure, judges have ample authority to exercise substantial control over the scope and magnitude of antitrust cases. The principal problem in my view is the lack of inclination of many judges to use the available tools to control the litigation. I am convinced that where antitrust cases have gotten out of hand and assumed gargantuan proportions, the cause has largely been the trial judge's failure to exercise appropriate control. What is needed therefore is an educational program to make judges aware of how cases can be justly and efficiently managed and to convince them of the benefits of doing so.

Many judges, including myself, have successfully employed a variety of devices to control pretrial and trial proceedings in complex cases such as antitrust cases. Among these devices are the following:

(1) A series of discovery orders establishing the sequence and permissible limits of depositions, interrogatories and document demands, based on a foundation showing establishing the existence of particular factual and legal issues at which the discovery is directed. Depositions and document inspections may be limited in time and depositions and interrogatories may be limited in number. Where numerous parties are involved, particular counsel may be designated to take particular depositions.

(2) An ordered program of motions, avoiding piecemeal briefing and hearings, to eliminate extraneous controversies from the case.

(3) An early exchange of damage data and studies to avoid lengthy proceedings where no adequate proof of damages exists and to promote a more rational and better informed approach to the damage phase of the trial.

(4) Hearings to consider and rule on evidentiary issues prior to commencement of trial.

(5) Early and ongoing definition of issues requiring trial, including fixing specific time and geographic limits.

(6) Occasional settlement conferences.

(7) Pretrial limitation on the number of trial witnesses. Summaries of the proposed testimony of each witness should be exchanged by the parties. Review and discussion of these summaries with the judge will tend to eliminate redundant or superfluous witnesses.

(8) Pretrial limitation of exhibits. Voluminous documents should be excluded from the record. Only key documents and summaries should be received, with the underlying records, files and documents available for examination by the adverse party and for use during cross-examination. All exhibits should be exchanged well in advance of trial.

The foregoing are some obvious suggestions. Other ideas suggest themselves as the case goes along. The problem lies in getting judges to think along these lines and to take the lead in implementing measures of this kind.

I suggest two steps. First, the preparation of a manual for the trial of antitrust cases which would begin where the Manual for Complex Litigation leaves off. This manual would incorporate various methods by which judges have dealt with problems that can be anticipated and would be organized so as to provide ready references for use by the trial judge as the case goes along.

Second, the holding from time to time of seminars for judges for the purpose of helping them develop better ways to handle antitrust litigation. These seminars might be conducted by the Federal Judicial Center and would be attended by judges experienced in this field and those seeking to prepare themselves. The Center has for some time been conducting very useful programs for judicial education and would be well qualified to undertake such a project.

2. SUGGESTIONS FOR REFORMS REQUIRING LEGISLATION

Aside from the lack of judicial control, the major problem is the use of juries to try antitrust cases. That a right to a jury trial is recognized at all may be a quirk in the law; antitrust cases could reasonably be considered to be equitable rather than legal actions, rendering the Seventh Amendment inapplicable. The concepts which juries are asked to apply in these cases, such as unreasonable restraint of trade and attempt to monopolize, are totally foreign to most persons, and extremely difficult even for judges to manage. Antitrust cases have nothing in common with the usual negligence, contract or criminal case in which jurors are able to apply their experience in resolving the issues. On the other hand, the right to a jury trial does protect a party from being bound by the views and attitudes of a single judge which could be a significant factor in the outcome of a case; the application of the antitrust laws to particular facts is inevitably influenced by economic and political predispositions.

My suggestion, therefore, is that antitrust cases be tried before two judge panels, consisting of the regularly assigned district judge and a senior district judge, preferably from another district, assigned by the chief judge of the circuit. Both judges would be expected to hear the evidence but they could, of course, divide the work of preparing findings and conclusions. The district judge would normally preside and in the event of disagreement, his findings and conclusions would control. In case of any disagreement, however, the senior district judge could prepare dissenting findings and conclusions which would be available to the appellate court as part of the record.

The advantage of this procedure would be to subject the facts and the law to analysis by two judicial minds and, through the exchange between the judges, to tend toward a more balanced outcome. Although having two judges sit might appear to require a large expenditure of time, there would be offsetting savings because the trial would be shorter without a

jury and the assigned district judge would have help in preparing the decision.

I commend these ideas for consideration by the Commission. With best regards.

Sincerely yours,
William W. Schwarzer
United States District Judge