THE AMERICAN ANTITRUST INSTITUTE: THE FIRST FIVE YEARS OF A VIRTUAL PUBLIC INTEREST NETWORK

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With the launching of an international network of public interest competition advocates in Geneva, Switzerland, in early 2003, it may be useful to provide the public interest community with a short history of the American Antitrust Institute ("AAI")[2], focusing on features and issues that might offer insights to others around the world who desire to influence the evolution of competition policy. In particular, we can introduce a model of a virtual public interest network, a development that would have been impossible ten years ago.

INCSOC is the non-euphonious acronym for International Network of Civil Society on Competition.[3] Its purpose is to facilitate the development of public interest and other civil society organizations in nations with competition policy laws, of which there are now over one hundred.[4] The AAI, begun in 1998, is, as far as we have ascertained, the first and perhaps the only public interest organization dedicated to support of the laws and institutions of antitrust in the U.S. or elsewhere.

In any society, the opponents of antitrust are likely to be well-organized, well-funded, and represented by high quality advocates who forcefully present their clients' reasons for why antitrust is irrelevant, inappropriate in the circumstances, and/or counterproductive for business development, if not downright dysfunctional for the society. The AAI embodies the idea that the laws and institutions of antitrust are generally beneficial and if they are to work well for consumers, there is a need for a focal point around which antitrust supporters can rally. Organization is necessary in order to stake out positions on policies, procedures, and cases, and to coordinate support for antitrust. Our belief is that decision-makers can better function in an objective,

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[2] The AAI's website is http://www.antitrustinstitute.org. I would like to thank Robin Brown, Stephen Calkins, Warren Grimes, Robert Lande, Hiromitsu Miyakawa, Diana Moss, and Kwame Owino for commenting on an earlier draft. While I hope this history is fair and objective, it can only be a personal memoir. If anything sounds like boasting, it is done with the hope of communicating useful information. I have adopted a chatty tone in the hope that this will be more enjoyable to a wide range of readers.

[3] INCSOC's website is http://incsoc@incsoc.net/.

[4] In this paper, I will generally speak of 'antitrust,' recognizing that in most other countries the more usual term is 'competition policy.' To my way of thinking, antitrust relates to maintaining competition under the antitrust laws (in the U.S., principally, the Sherman Act, the Clayton Act, and the FTC Act, as well as State equivalents), whereas competition policy implies the adoption of antitrust principles to regulatory matters in sectors of the economy where there is a combination of regulation and competition.

professional manner if they hear expertly crafted arguments from supporters as well as opponents, of enforcement actions and policies, and if they know that there is a public interest watchdog looking over their shoulders.

The paper begins with a short history of the AAI's origins. It then describes the unfolding of our basic strategies, the importance of the first sally into public policy, the building of an Advisory Board, the creation of a website, and the AAI's emergence as a virtual public interest network. We then turn to the crucial questions of any non-profit organization: fundraising and spending. We next discuss the role of our Fellows and of volunteers. A section outlines (often in quantitative ways) our accomplishments. Because certain problems have cropped up that may occur in other public interest contexts, we discuss a series of issues that have led to the adoption of operating guidelines. Finally, we indulge in a few thoughts about the future.

Not in a Garage: A Short History of AAI's Origins

I incorporated the AAI in 1998, after conversations with consumer advocate Ralph Nader and antitrust law professor Robert H. Lande.[5] The plan was to build an

[5] For those interested in more detail, I was 52 years old in 1998 and had been away from antitrust law since 1981, except for teaching the subject three times as an adjunct professor. From 1975-1981, I had been an attorney at the Federal Trade Commission's Bureau of Competition, starting as an Assistant to the Director of the bureau, becoming Assistant Director for Special Projects, and finally Acting Deputy Director. These had been years in which the FTC's authority grew to an historic peak, crested, and came under severe political attack even before the election of Ronald Reagan brought its anti-regulation drive to Washington.

At the FTC, I was deeply involved in a wide range of policy issues, including the political defense of the agency's jurisdiction and powers. Although I was a charter member of the Senior Executive Service and therefore had some degree of job protection, it seemed prudent to disappear soon after the Reagan Administration launched its Chicago School takeover of antitrust. I joined a law firm and was building a commercial law practice when my father had a heart attack and his business partner had a stroke, so after eighteen months I exited the field of law and entered my father's business. For the next thirteen years I was a hands-on Chairman of the Board of a mid-sized regional chain of retail jewelry stores named Melart Jewelers. I benefited greatly in this role from a diverse advisory council that I had established, and one of the most helpful members was Joan Claybrook, the President of Public Citizen, one of Ralph Nader's consumer advocacy organizations.

Joan introduced me to Ralph. As I thought about things to discuss with Ralph, I remembered my experience at the FTC in the second half of the 1970's. In particular I recalled that when the FTC had exercised the muscle that had been given to it by statutes, this had triggered an ugly, effective political backlash. Plenty of well-funded opponents of the FTC mobilized on Capitol Hill and aimed grassroots campaigns against the FTC ("the national nanny"). Michael Pertschuk, the FTC Chairman whose aggressiveness precipitated this activity, described it in a book called Revolt Against Regulation (1982). When we tried to find supporters of the agency to counter this 'revolt,' it turned out that there were very few and they were anything but organized or effective. Antitrust seemed to have no constituency. And in the generation after that, things grew worse. The "Chicago School," with the help of well-financed conservative think tanks, took control over the intellectual side of antitrust and made dramatic progress in cutting back the role of antitrust policy in the American economy.

Ralph said he would try to introduce me to some people who might help fund the effort. He also put me in touch with Robert Lande, an influential antitrust professor and writer at the University of

organization around a multidisciplinary expert corps within the antitrust community. The group would perceive itself as occupying the center and the center-left of the antitrust spectrum, neither libertarian nor populist, but believing in an affirmative role for antitrust necessary to maintain competition and to protect consumers. We would be a counterweight to conservative think tanks that often oppose antitrust.

On April 15, 1998, better known as Income Tax Day in the U.S., I filed the corporate papers with the District of Columbia and established The American Antitrust Institute, Inc., as a 501 (c)(3) tax-exempt organization. The founding Directors (and still the Directors today) were Lande, myself, and Jonathan Cuneo, a politically savvy antitrust lawyer whose clients include the Committee to Support the Antitrust Laws (COSAL), a group made up of antitrust litigators who often represent plaintiffs.

The original plan was to find foundation funding to open a typical 'think tank' …with office, furnishings, secretary, and employees. While we had intended to make major use of e-mail, we had not imagined the option of a virtual organization. Our imagination was called into play when it looked like the necessary funding would not be obtained.[6]

Baltimore Law School, whom I had known when we were both at the FTC. Lande had previously advised Nader that he was available to volunteer some time to the cause of consumer-oriented antitrust.

Bob Lande, when I called him up, was immediately eager to help. Together we began formulating the American Antitrust Institute. For me it quickly became a full-time albeit unpaid job, working in my home. Bob was always available to edit a draft or talk through an issue. Ralph, during the first several months, was in close contact, providing advice on organization and funding. Only three of the people he introduced me to actually came through with money, and the money didn't arrive for well over a year, but these gifts definitely helped get us off the ground. These key donors were Fred Furth, a plaintiffs' attorney in San Francisco; Sol Price, the retired founder of the Price Club; and Bernard Rapoport, founder of an insurance company and contributor to progressive causes.

I remain grateful to Ralph Nader for his advice, contacts, and most importantly, his conviction that if I started it, it would work. But as I had discussed with Ralph from the outset, what I wanted to create would have to be entirely separate from and independent of, and not even necessarily on the same wave length as Ralph Nader. Ralph is not on the Advisory Board and has not played an active role since the launch.

[6] One of the first efforts we made was to seek financial support from the Stern Foundation. Stern helps new public interest groups with a 'pioneer grant.' We made it to the finals, seeking $100,000 toward a budget of $300,000, which would have covered an office and small staff for the first year. But Stern ultimately turned us down, on the belief (as I understood their explanations) that I was either asking for too much or far too little. They gave me, instead, a $5,000 planning grant that helped with expenses already incurred.

At this point, after months of work, there seemed no hope for funding and I was depressed about the prospects. My wife, who was earning a respectable income as a public relations executive, and our children (all romantics) knew that this was what I wanted to do and they told me that nobody would starve if I took a year to see what would happen. With this encouragement, I committed myself to going forward without office or staff or income. Family help would be crucial in the establishment of the AAI.

Given a budget of zero, the question was now how to ramp up the AAI into a going concern. Physically, we put my computer and printer in the library of our home, and added a telephone and fax machine.[7] This was our Secretariat, a word not often used in the U.S., but familiar to civil society organizations around the world.

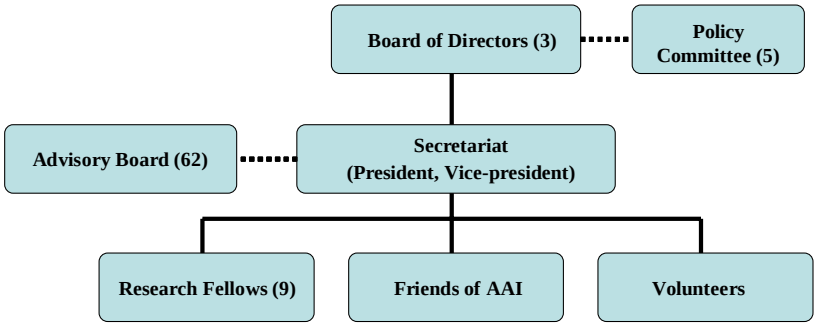
A Strategy Unfolds: The First Action

The first year strategy evolved by my wife, Lande, and me had these elements for simultaneous action: (1) putting out substantive work product; (2) building an advisory board; (3) developing a website; and (4) persistently pursuing fundraising efforts. We chose not to become a membership organization because the transaction costs would be too great for our circumstances, and the core problem seemed to be that not many people other than experts care deeply about antitrust.[8]

[7] In the ensuing five years, the only change was to substitute a cell phone for a stationery phone to take business calls. I've come to relish working in my home—the commute down the stairs is one of the most desirable in the Washington metropolitan area-- and would now think long and hard before moving to a regular office.

[8] Education must be one of the prime functions of an antitrust advocacy group. In many countries new to the antitrust idea, fundamental education will be needed at all levels: consumers, legislators, courts, the media, the bar, and even (perhaps especially) the enforcement officials. The importance of finding a highly knowledgeable antitrust attorney or industrial organization economist who can be the group's spokesperson and educator cannot be overstated. Also, given the dearth of information about antitrust that will be available in most countries, great benefit can accrue to a public interest website that makes antitrust information widely available in a consumer-friendly way.

Chart 1:
AAI as an Organization



We sensed that our first sally out of the gate would be important. AAI's first substantive product was a comment to the Department of Transportation endorsing the DOT's efforts to deal through rulemaking with predation at airline hubs. This was selected for several reasons. First, I was personally interested in the airlines and had been aware of examples of new low cost airlines trying to enter a dominated hub market and being killed off by a price-cutting strategy on the part of the dominant airline. Second, predatory pricing was one of the foremost issues separating a Chicago School from a post-Chicago approach to antitrust.[9] Chicago School analysis had rendered the doctrine of predatory pricing, in the sense of melting it down to the disappearing point. Intervention here would be an opportunity to make a statement in favor of the idea that price predation should remain a viable theory of antitrust violation.

After filing comments, I was invited, along with representatives of several small airlines, to a meeting with DOT officials. When I was introduced, DOT staff, including an Assistant Secretary, sought me out, making it clear to me how delighted they were with this new source of support for what they considered a long-overdue administrative initiative that was being thoroughly blasted by the major airlines.

[9] An excellent example of a post-Chicago analysis of predation is Joseph F. Brodley, Patrick Bolton, and Michael H. Riordan, "Predatory Pricing: Strategic Theory and Legal Policy," 88 Georgetown Law Journal 2239 ((Aug. 2000). This work received the Jerry S. Cohen Award for Antitrust Writing at the AAI's 2002 annual conference. The award is made possible through a trust set up by the law partners of an influential attorney who stood for strong antitrust policies. The trust cooperates with AAI, utilizing a committee of academics to select the awardee.

We posted our DOT comment on our new website in July, 1998, and also informed the antitrust world through e-mail that we were up, alive, and producing.

This became our normal modus operandi. When we produce something, we post it on the website and then send notices by e-mail to three lists: the American Bar Association Antitrust Section E-Mail Listserv; the media contact list we have compiled; and a list we call 'friends of aai'. Our notification usually provides the headline and invites the recipient to visit our website (www.antitrustinstitute.org) for the details.

The Growth of the AAI Advisory Board

The idea of an Advisory Board materialized naturally from my earlier life as a retailer, when I had found a group of diverse outside advisors to be extremely useful. It also was critical to the concept of an expert-based public interest organization. Antitrust is in many ways a closed community of experts. For a public interest group to affect antitrust decisions (and to be sufficiently self-confident to try), it must have a level of expertise that is comparable to that of the government decision-makers and the private advocates who dominate the community. Our Advisory Board provides us with both real expertise and a cloak of credibility.

The question at the beginning was, whom to recruit to the AAI Advisory Board and how.[10] Attracting high-profile "endorsers" early on was one of our tactics. A by-product of our initial venture into airline wars was attracting Alfred E. Kahn to join our new Advisory Board. Kahn, the 'godfather of deregulation,' was the nation's expert on airline deregulation, having been responsible for it as the last Chairman of the Civil Aeronautics Board.[11] Kahn became aware of our comment to the DOT and in an email he sent to a different consumer group, which that group forwarded to me, complimented the AAI's statement. When I learned of this, I immediately phoned his retirement office at Cornell, introduced myself, told him what we were trying to do, and asked if he would help us. I recall that he said he wouldn't join unless he thought he could give it enough time to be useful and I responded that we had yet to break an Advisory Board member's kneecaps for failing to do enough. With that limited assurance, he agreed to work with us and his presence provided credibility with other prospective Advisory Board members.[12]

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[10] This is where Bob Lande was especially helpful. I had been away from active participation in the antitrust community long enough that I only knew a few of the people personally whom we thought could be most helpful. Most of the people we approached immediately responded that the AAI was an idea whose time had come and they were glad to join us.

[11] See chapter 7 of Thomas K. McCraw, Prophets of Regulation (1984), "Kahn and the Economist's Hour," which describes Kahn as a "national celebrity" whose "success rested on the power and timeliness of his ideas, combined with a magnetic personality, which won him a series of political appointments." (Page 223.) At our 2003 conference, we presented Kahn with the AAI Antitrust Achievement Award.

[12] In addition to Kahn, some of our earliest recruits were Howard Metzenbaum (former chairman of the Senate Antitrust Subcommittee, now chair of Consumer Federation of America), to whom Ralph Nader introduced me; Arthur Amolsch (publisher of FTC:WATCH); law professors William Kovacic (now the

As we approached additional potential Advisors, we strove for a balance of professional and political backgrounds, excluding only current federal employees and those whose ideology did not seem generally compatible.[13] Eventually, the Advisory Board grew to over 60 and included business people and business school professors as well as eminent antitrust experts trained in law and economics. The majority are probably Democrats, some are Republicans and some probably have no party affiliation.[14]

The early recruiting revealed a problem: too many of the people we wanted were attorneys or economists with clients. The potential conflict of interest was resolved from our perspective by agreeing that an Advisor would either give no advice if there was a conflict, or would reveal the conflict to the AAI. But from the Advisor's perspective, there was a different problem, namely that the client might be very unhappy to learn that the Advisor contributed to a position that would be contrary to the client's interest. The solution we adopted was to agree that Advisors would not vote on anything and that their names would not be used in conjunction with a substantive position of the AAI, unless specific permission were granted. This arrangement also assures that Advisors will not bear a risk of liability that might attach if they voted or had authority over AAI actions. Responsibility lies totally with the Board of Directors.[15]

General Counsel of the FTC), Warren Grimes, Harvey Goldschmid (now a Commissioner on the SEC), Stephen Calkins, Spencer Waller, Harry First, and James May; economists David Penn and Philip Nelson; and attorneys Kevin O'Connor (then Assistant Attorney General of Wisconsin and immediate past chair of the Antitrust Task Force of the National Association of Attorneys General), Lloyd Constantine, and Kenneth Adams.

[13] In many countries, finding antitrust experts will not be as easy as it is in the U.S. The absence of private rights of action in many countries means that there is only a small bar with antitrust expertise. In some countries, such as Japan (I am told), once an organization advocates antitrust enforcement or consumer protection, it will be categorized as plaintiff-side or left-side. We have tried to avoid this by characterizing ourselves as centrist and incorporating a wide range of perspectives, but this may prove difficult to replicate in other systems. We excluded federal employees from our Advisory Board and have not sought funding from government agencies, to avoid conflicts of interest. In many countries, it may be that government funding is the only way for a civil society antitrust advocacy group to proceed, but the group will need some guarantees that it is free to bite the hand that feeds it: a difficult trick to master, all the more so in that one of the most important functions of an antitrust advocacy group in developing nations will be to advocate pro-market policies within entrenched regulatory (governmental) settings.

[14] In talking to the media, we have emphasized that antitrust has a history of bipartisan support in the U.S. One Republican who has been especially helpful is Art Amolsch, whose encyclopedic knowledge of the FTC and whose public relations acumen helped at key moments. Art's subscription newsletter, FTC:WATCH, publishes 'the aai column' whenever we offer a text that is fitting. Often, we will surface a position in this column, because it offers access to a goodly portion of the antitrust community without a long waiting period. We reprint it, with permission, on our website and give it even broader circulation in this way.

[15] We have never confronted two issues relating to the Advisory Board: whether there should be a total number of members beyond which we will not climb; and whether members should serve for a stated term. It will be necessary to weed out some who do not carry their weight and this would be made easier if such members could simply not be reappointed at the end of a term.

Sometimes the recruiting of Advisory Board members led to a financial contribution.[16] Often one recruit led us to another. A virtual public interest network grows by nodes linking up with nodes in this way.

Becoming a Virtual Organization

The AAI can be seen as the offspring of the new economy models of business development, e.g., Internet-based communications, globally dispersed 'production' nodes, etc.[17] At the center of our network, linking the nodes, is the Internet. We were fortunate to be able to develop an excellent website quickly and cheaply.[18] The website is accessed from all over the world. We are receiving around 200,000 "visits" per month, or about 14,000 "sessions".[19] In our second year, the Legal Times of Washington reported that ours was the best one-stop website for antitrust information. One of our features has been a daily report on antitrust in the news, which has been dredged up automatically at no cost by a search engine.

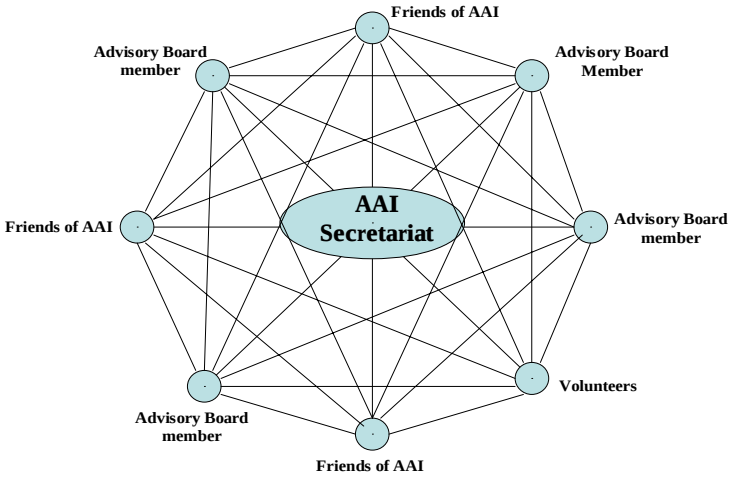
[16] Our first money came from Lloyd Constantine, an antitrust lawyer who had once headed New York State's antitrust division. When I went to a lunch to meet with David Penn, a former FTC economist who is Executive Vice President of the American Public Power Association, it was to get to know someone new who had been touted as a great supporter of antitrust. By the time lunch ended, Dave had committed the APPA to contribute to the AAI for the next two years (that has since been extended annually), without my even mentioning anything about money. Dave became an early member of the Advisory Board and introduced the AAI to several others with an interest in the electricity industry. David Mohre, an engineer with competition policy responsibilities at the National Rural Electric Cooperatives Association, joined as a result.

[17] There are network economies present. The larger the number of experts having in-put (within limits), the more valuable is the AAI product to users. Additionally, the more materials we place on our website (e.g., archives of our activities and research sources), the more valuable the network is to users. Presumably, the more users, the more influence the AAI has and the better its chances of fundraising success.

[18] The development of the website is another family story. My youngest son, Josh, was fourteen years old when AAI was born. But he was a computer maniac who had summered at several computer camps, wrote programs, piloted jet planes, space shuttles and civilizations on simulators, and was then working for his second summer as a professional website designer. Josh set up our website in pretty much the form it is still in. More than that, he has acted as AAI's pro bono Chief Information Officer from the beginning, handling the updates that I feed him each week. Our total expenses in setting up and operating a website, for five years, are probably still under $700. (Since Josh has gone off to college, AAI has paid him at the rate of $25 per hour, which would be a rip-off but for the free Yale education my wife and I throw into the kitty. AAI also pay a small monthly fee to a company called Hostcentric for its hosting services.)

[19] I'm told the latter measure, sessions, is a better indication of how many people are actually spending time on the site. The entire ABA mailing list for its Antitrust Section is approximately the same as this monthly number. Of course, some people visit the site repeatedly during the month and so the sessions number does not tell how many different site users there are.

Chart 2:
AAI as a Network



Our website has several other features to note. Most importantly, we post every new activity that the AAI undertakes. After some time, this is moved to our Archives section, where materials can be searched on the basis of any word in the text. Our Who's Who in Antitrust contains contact information for the FTC, DOJ, NAAG, and others. Our Links section, which will soon be renamed as the Research Gateway, provides what we think is a very complete, user-friendly way of finding information about antitrust.[20] Finally, the website offers ways for readers to sign up as (1) a "Friend of the AAI," which costs nothing and entitles them to be alerted by email to what we post; or (2) as a journalist, with the self-same benefits; or (3) to make contributions by credit card, using a free system provided by an organization called Network for Good. The latter has unfortunately not proved to be productive.

I will comment later on some limitations on the use of e-mail as the principal mode of communication within the virtual public interest organization.

<u>On Raising the Funds—and Spending Them</u>

As I said, early on we decided not to spend our time on growing and servicing a membership, where donations would be small and record-keeping large. Our fundraising has focused, instead, on gifts ranging upward from $5,000. ($50,000 has been the

[20] This section is the special pro bono project of David Giacalone, an attorney who long ago worked with me at the FTC.

largest.) We've had many smaller gifts, but I cannot spend much time in search of the smaller gifts. Indeed, I spend much too little time on any fundraising.[21]

Our funding has come from individuals, foundations, law firms, corporations, and associations. The foundations have generally been private foundations for wealthy individuals or their families rather than the larger institutional grantors. Law firm contributors have been both plaintiff-oriented and defense-oriented, and some of their contributions have come in the form of buying tables at our annual conference.[22] It is worth saying more about the contributions that have come from businesses and associations, if only because this is the first thing our critics like to talk about.[23]

At the very beginning, I assumed that our revenue would come primarily from foundations. So far, this has not been the case. I found that few if any foundations were willing to assist a start-up and that no foundations had any identifiable interest in our brand of antitrust.[24] This was explained to me by a sympathetic program manager at the Ford Foundation: "Who do you think sits on the boards of foundations? Not people who think well of antitrust!"

Jonathan Cuneo, as a Director, brought in his client, the Committee to Support the Antitrust Laws, as a contributor. He also led us to Monroe Milstein, the Chairman of Burlington Coat Factory. Monroe understood that his enormously successful discount retail outlets would never have survived, much less flourished, without the intervention of the antitrust laws to assure that his supply lines would not be cut off by manufacturers threatened by full-price retail customers. By the time I met Monroe, Burlington was too big to need antitrust help, but antitrust was in his blood and every month a check has come in as if the AAI were one of his landlords.

Another big help was having Fred Furth, a fabled plaintiffs' attorney and vineyard owner in Northern California, pledge $50,000, provided we could raise another $250,000

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[21] This is a problem of time availability, not avoidance. I actually enjoy fundraising more than most people I've met, because I find that it is almost always substantive in nature and my skin is too thick to worry about rejections. But the AAI's mission is to put out work product, not to raise money, so my time spent on revenue is certainly less than ten percent and probably less than five.

[22] We have found it difficult to raise general funds from defense-oriented law firms, despite the obvious, if cynical, fact that to the extent that AAI succeeds in its program, there will be more legal work for the firms. They say that their clients would probably not like what we do. On the other hand, the large firms are often willing to help underwrite our annual conference, which they can justify as an educational expense for their associates and summer interns. Our program is accredited by the Virginia Bar for continuing legal education credits that are also recognized by many other states.

[23] There is a wonderful irony in the fact that large corporations have been underwriting conservative think tanks for thirty years and more, but consider it unseemly that a public interest firm should accept donations from corporations. We discuss this topic later in the paper.

[24] In other words, foundations do not appear to be a viable source for general funding. Although we have yet to succeed, we continue to propose specific projects to a few foundations that appear to be interested in designated sectors of the economy or certain types of social problems where competition could be a factor.

first. This result of Ralph Nader's work was helpful in approaching other potential contributors during the critical first two years.

In our original planning, I had underrated the role of private money from special interests. It should have been obvious that there are at least two sides to every antitrust battle and that a lot of money can be on the table in an antitrust contest. Often, one of these sides is working (perhaps unintentionally) for the interests of consumers and its position is one we would take in any event, but because of our credibility, some interests who find that we are taking a congenial position (or who hope we will do so) may make a contribution to our general treasury. We have never taken or changed a position because of money, but later I will talk about the difficulties that are inherent in accepting private contributions and how we have attempted to protect ourselves.

When we analyzed our sources of revenue from inception in 1998 through the end of 2002, the result was surprising in terms of how much derived from corporations, trade associations, and defense firms. We had received gifts of $1,000 or more from 58 different contributors, including those who bought $5,000 patron tables at our three annual conferences. About 27% of the total of over $1.33 million had come from corporations; 23% from' law firms that do a lot of plaintiffs work (or COSAL); 18% from individuals and private foundations; 15% from defense-oriented law firms; 10% from trade associations; and the remainder from public interest organizations, public relations firms, and miscellaneous. No single contributor gave as much as 10%.

This revenue permitted us to spend $250,000-300,000 each year--not a whole lot when top first year law students are paid over $150,000, but enough to pay me on a full-time basis pegged to a senior civil servant or law professor's rate;[25] and one or two others, typically professors either on a one-half time basis at their normal pay or full-time while on sabbatical, with AAI paying half and the university paying half. Apart from what we paid for labor, overhead has been budgeted for only $20,000 per year.

Our Jolly Good Fellows and Friends

As a 'virtual organization,' we have few employees, many volunteers, and a network that operates principally through the Internet. The only employees, in fact, are the President and Vice President. Important to our success have been the Senior Research Fellows. At any given time, one or two Fellows are paid as consultants, while others are volunteers. They have been eminent antitrust scholars or practitioners: Robert Lande, the Venable Professor of Law at the University of Baltimore; John Kwoka, former president of the Industrial Organization Society, then an economist at George Washington

[25] This is approximately the same Senior Executive Service level I was paid by the FTC seventeen years earlier—my late mother would have been unhappy to see this lack of progress. Our Fellows, when not volunteers, have been compensated at their market rates rather than at traditional public interest discounts. By the nature of our function, we depend on highly qualified, self-motivated professionals who operate with minimal oversight at a distance. The traditional public interest model of hiring young college graduates at low salaries doesn't fit.

University and now at Northeastern University; Rudolph Peritz of the New York Law School and author of Competition Policy in America, the outstanding history of the field; and Warren Grimes of Southwest University Law School, co-author of a leading antitrust treatise.

In addition, James Langenfeld, a former deputy director of the FTC Bureau of Economics and now a consultant at LECG, and Gregory Gundlach, a business professor at the University of Notre who combines interests in antitrust law and marketing, were named Fellows because of the substantial on-going commitments of time that they have made. Diana Moss initially came on as a Fellow, from her position as a senior economist at FERC, and later moved into the position of Vice President. Norman Hawker, a business professor at Western Michigan University, who is also a lawyer, has worked as a paid Fellow during several summers and a volunteer during the school year. Jonathan Rubin, a lawyer with a Ph.D. in economics, is the most recently appointed Fellow, and we have had the benefit of three different summer Fellows who have been antitrust attorneys from Israel, Scotland, and Japan, respectively, seeking exposure to American antitrust law.[26]

The Fellows are often the presenters at our annual conference, dedicating a substantial portion of their AAI time to prepare papers that will eventually be published (at no cost to us, of course) in a law review symposium issue.[27] In this way, we are building a strong basis in the legal literature for the post-Chicago positions that we are trying to develop.

Our resources are also expanded by the Advisory Board and a network of "friends" who are not formally on the Advisory Board, but who help out on special projects. Advisory Board members are expected to read a lot of AAI e-mail. I send out a minimum of two or three messages each week to our Listserv, sometimes an article or a piece of information, often an inquiry or a request for comments on a draft. Several of our members have said that what they enjoy most is the give and take of argument that occurs in the e-mail traffic.

Not all members read their e-mail all the time. Not all read it most of the time.[28] I have come to assume that approximately 10-15% of the Advisors will respond to any particular message, and this is workable in terms of trying to ascertain that there is a general consensus on an issue (if a member didn't respond one way or the other, I assume he or she either agreed with the message or didn't care!).

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[26] The latter, Oded Pincas, Anita Srivastava, and Hiromitsu Miyakawa, have each worked in an office in the basement of my home. Oded was hired away by the Federal Trade Commission.

[27] Each of our conferences has yielded up such an issue. The first three were the law reviews of the University of Pittsburgh, Case Western Reserve, and New York Law School. The next will be Buffalo Law Review.

[28] At least one member whom I will not identify almost never reads e-mail and brags that he is 8,798 e-mails behind.

We ran a test once to see how many were reading the e-mail and found about 90% responded. Nonetheless, I worry. How long can a virtual network like the AAI's, dependent on volunteers, continue to function as the quantity of communications grows? Spam is a problem, of course, but even if spam were exorcised, the e-mail addressee receives so much that he or she increasingly succumbs to the temptation to ignore everything. Given the organizational structure we are working with, we cannot communicate with our Advisory Board except by e-mail and an occasional telephone conversation. There just isn't enough time to fax items or send hardcopy letters to a portion of the list…assuming these would be read by the same people who do not read their e-mail. It may simply become necessary to limit membership on the Advisory Board to those who commit to reading their e-mail.

One challenge we face as a virtual organization, which is indeed faced by all consultants who work outside of an office environment, is maintaining a sense of belonging to a community, with the sharing, stimulation, and easily accessible critical mass that can be generated in a well-functioning office. To some extent this is accomplished through the large e-mail correspondence that is at the heart of AAI.

There are a few other techniques that we have used to bring Advisory Board people together. We invite them all to our annual conference and waive the registration fee, also inviting them to a reception that my wife and I host in our home the night before the conference. Between one-third and one- half generally attend. We also have a social lunch in Washington each year while the ABA spring antitrust conference is going on, and about one-third of the Advisory Board members participate. Finally, we have held one full-day retreat and approximately half were able to attend (at their individual expense).

What Has AAI Accomplished?

Measuring the effectiveness of a public interest group is not easy, especially if, as in the case of AAI, the objective is a long-term changing of the climate. Even if one knew exactly what to measure, causation would likely be impossible to attribute. What follows is an effort to count what can be counted. It shows conclusively that we have been active. Perhaps five years from now others will be in a position to explore whether we have been effective.

In five years, the AAI has generated a large quantity of writings that can be researched in our website's archives.[29] I counted 79 short columns, op-eds, and prepared speeches; 48 larger works including monographs and published articles; 21 statements to

[29] http://www.antitrustinstitute.org/activities.cfm. We recently subscribed to a search engine that permits the user to search through both our archives and our research base by keyword. In an effort to increase the usefulness of our database, we have provided summaries of what can be found at many of the links to which we are connected.

Congress or the White House, including live testimony[30]; 14 amicus briefs[31]; 35 comments to regulatory agencies including the DOJ, FTC, DOT, FERC, and other federal agencies.[32] We ran 3 annual national conferences; 3 annual electricity restructuring workshops; and co-sponsored with universities or public interest groups workshops and roundtables on network access, defense procurement, supplier joint ventures, and marketing and antitrust. In June, 2003, we will host our fourth national conference and co-sponsor a roundtable on antitrust and category captains.

It is impossible to count the number of interviews we have given to the media, because these range from providing leads to experts all the way to national televised appearances and radio broadcasts. I have probably talked to the media on average twice a day, which amounts to something like 3,000 communications. But the media also contacts some of our Advisory Board members with regularity and while there is no "party line" for them to push, they are more likely than not going to be informed by AAI circulations and be inclined to take positions that are consistent with what the AAI would say. Thus, we have been able to make sure that the media hears a view that is likely to be different from what the largest companies and the critics of antitrust are putting forth.[33]

We considered the Microsoft case to be the most important antitrust case since the AT&T breakup in the 1970's, and a polling of our Advisory Board showed that most members were strongly of the view that Microsoft had violated the antitrust laws in a way that required a serious remedy. We filed what the Court called a "major brief" against the DOJ settlement.[34] We also launched our one (and so far, only) lawsuit to challenge the compliance of Microsoft and the DOJ with the Tunney Act's requirements for disclosures relating to the DOJ settlement with Microsoft.[35] While this was unsuccessful as a suit, it gained important publicity for the points we were concerned about, and the Court that was handling the settlement permitted the AAI to argue as amicus curiae.[36]

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[30] Testimony has been delivered by me, other Directors, and various Advisory Board members.

[31] Amicus briefs have often been prepared and signed by volunteers. In some cases, multiple Advisory Board members have signed.

[32] In some countries, such as Japan, it is very difficult for third parties to intervene in pending cases or investigations if the third party does not have concrete stakes in the matter. Obviously, the role of the public interest advocate will be different in each country, but a common theme ought to be developing mechanisms whereby such advocates can (1) obtain timely and useful information about government antitrust activities (the transparency issue), and (2) intervene formally or informally in a timely manner (the standing issue).

[33] We do not subscribe to a clipping service, although this might be another way to "count" activities and perhaps throw light on impact.

[34] http://www.antitrustinstitute.org/recent2/163.cfm.

[35] http://www.antitrustinstitute.org/recent2/164.cfm.

[36] http://www.antitrustinstitute.org/recent2/177.cfm.

Among the testimony and statements we provided to Congress, I will mention three. The earliest was our first effort to affect the appropriations process. We knew that Congress rarely heard from outsiders in regard to the budgets of the FTC and the DOJ, and we knew that the appropriations staffs were not particularly well-briefed on antitrust. So we provided a 40-page discussion of the history of antitrust, antitrust budgets, and antitrust performance, emphasizing all the activities that needed to be done and the urgent need for more funding.[37] We convinced a large number of organizations to sign a letter conveying this report. Suddenly and for the first time, there was a public display of support for an antitrust budget increase. And an increase occurred.

In June, 2000, I testified before a Senate committee on the proposed acquisition by United Airlines of US Airways. Through something of a fluke, I ended up in a discussion with a full panel of Senators for approximately an hour, during which I was able to talk at length about merger policy, the evolution of the airline industry, and why the proposed merger seemed anticompetitive. [38]

A third example of an AAI effort to influence Congress came in September, 2002, when we presented a statement to the Senate's Antitrust Subcommittee, which was conducting oversight hearings.[39] We examined in detail the records of the FTC and DOJ in the Bush Administration and found that the FTC was performing far more productively than the DOJ. Not long afterward (though we are not claiming causation), the Assistant Attorney General for Antitrust resigned.

Sometimes our contribution is to put new issues on the antitrust table or to be a megaphone for good ideas that have not been considered sufficiently. For example, we have tracked the development of "category captains" in the consumer goods industries, identified antitrust issues, and called them to the attention of the FTC, DOJ, and general public.[40] We have also devoted substantial resources to demonstrating the relevance of what is being taught in the business schools to antitrust, with the intention of generating

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[37] "The Federal Antitrust Commitment: Providing Resources to Meet the Challenge," http://www.antitrustinstitute.org/recent/23.cfm.

[38]Testimony before the Commerce, Science, and Transportation Committee of the U.S. Senate, June 22, 2000. Http://www.antitrustinstitute.org/recent/74.cfm. The fluke was that I showed up on the appointed date but the Committee had also scheduled the CEO's of the airlines ahead of me and, running out of time, asked me to return the following day. The only other person testifying with me on the next day was the General Counsel of the Transportation Department and she was conflicted from answering most questions because the merger was before both D.O.T. and D.O.J. I ended up conducting a seminar on merger policy in the presence of a dozen Senators and a person involved in the formal decision-making process. At a later date, I was invited by Senator Wellstone to give him a personal seminar on merger policy. We had one session, but his fatal airplane accident intervened before the second session.

[39] http://www.antitrustinstitute.org/recent2/203.pdf.

[40] E.g., see Albert A. Foer, " Category Captains and Divestitures: New Considerations in Merger Remedies" at http://www.antitrustinstitute.org/recent/153.cfm. AAI and the Journal of Public Policy and Marketing co-sponsored an all-day workshop on "Antitrust and Category Captains" on June 23, 2003, bringing together a variety of stakeholders.

curriculum reforms in the business schools and a higher level of "realism" in the enforcement agencies.[41]

Relatively few of our activities have gained widespread press coverage. There are only a few reporters who have an "antitrust beat." Mostly, the reporters who cover antitrust stories are assigned to the business page or to a general legal beat, and need to learn about antitrust when a story arises affecting a business or industry they are writing about. Our website is largely aimed at providing these reporters a resource, so that they will not be so largely dependent on those with a vested interest. Apart from the Microsoft case, which was by far the story that generated the most attention to the AAI, our most covered statement was an attack we made on the Voters News Service, a joint venture set up by the major news media to handle exit polling during the presidential election, and whose misreporting, we said, was likely caused by the lack of competition.[42]

A Few Issues We Have Faced

Toward the end of our fifth year, following a retreat of the Advisory Board, we adopted formal Guidelines of Operation that are posted on our website.[43] These are intended to respond to certain areas in which we have had to make decisions about how to operate. Because the issues may arise for other public interest organizations that deal with competition policy, it is worthwhile to explore several of these areas.

Should AAI Intervene in Particular Cases and Investigations?

Perhaps the first big question is whether we should be in the business of taking positions during the pendency of cases or investigations in which there are specific private parties.

The argument against this is twofold. First, lacking a government's power of discovery, we are not likely to have as much information as the government and therefore should not try to influence a governmental decision. Our answer to this has been that although we must be modest and not purport to know more than we are sure of, in many situations, especially where the issues tend to focus on policy rather than facts, we are able to learn enough about a situation in order to make a credible presentation. Although we have only intervened in cases a few times per year (it is usually resource-intensive), our experience has been that we are able to raise issues that are not otherwise getting

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[41] In spring 2002, the AAI co-sponsored with the Journal of Public Policy and Marketing and the University of Notre Dame's Mendoza School of Business, a workshop and conference on Marketing, Competitive Conduct, and Antitrust Policy. See http://www.marketingpower.com/content/JPPM2G.qxdI.pdf. This was a trial run of the 2002 national conference of the AAI, the results of which will be published in the New York Law School Law Review in spring, 2003.

[42] Robert H. Lande, "Break Up the Voters News Service," FTC:WATCH #657, Dec. 18, 2000, hhttp://www.antitrustinstitute.org/recent2/203.pdf.

[43] http://www.antitrustinstitute.org/recent2/236.cfm, adopted by the Board of Directors on Jan. 30, 2003.

sufficient attention and that our lack of subpoena power has not been a significant impediment.

For example, AAI has been deeply involved in at least three mergers where I believe we have raised useful points not only about the merger in question, but about merger policy, which, after all, is not a matter of simply applying clear-cut rules to clear-cut facts, but requires substantial balancing of various perspectives that do not necessarily get represented by the parties themselves or even by competitors.

Our work on the Alcoa-Reynolds merger was detailed and painstaking.[44] We presented our analysis to the DOJ staff doing the investigating, about six months into their investigation. In conversations with DOJ after the case was over, we were told that our factual and analytical understanding was approximately the same as theirs and that our communications with them helped focus their inquiries and reach a policy decision that, they say, would have been the same even without us. Who knows? As it happened, DOJ approved the merger, conditioned on the sale of certain key assets, but the settlement did not say who would buy the assets. Because of our deep understanding of the case, we believed that there was only one satisfactory buyer who could preserve competition, and DOJ knew we knew. They made the right decision.[45]

In the Nestle-Ralston merger, we raised issues that the FTC had not considered, relating to the newly emerging role of category captains and how this factor could be changed in anticompetitive ways by the merger.[46] We had access in that merger to information that the staff did not obtain. The staff did not issue the subpoenas we drafted (in great detail) and the Commission did not take the action we recommended, but several Commissioners have since communicated their hope we will keep developing the category captain issue, and we will be co-sponsoring with the Journal of Public Policy and Marketing a Roundtable on Category Captains and Antitrust, to bring together stakeholders for a full day, in conjunction with our 2003 annual conference.

In the cruise line mergers case, I had to recuse myself because my wife did public relations work for one of the merging companies. To avoid a conflict, AAI established a committee of four AAI Fellows, supplemented by work of two other Advisory Board members and reviewed by two Directors. The committee learned enough to write a detailed analysis of two important issues: market definition and likely competitive effects

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[44] We assigned an economic consultant with an MBA degree to spend four months on this, working half-time. He read what was available on the Internet and elsewhere, but gleaned much of his information from conversations with investment analysts. See http://antitrustinstitute.org/recent/56.cfm

[45] We wrote a Tunney Act comment making the point that the public could not intelligently comment without being informed of who would buy the divested assets. http://www.antitrustinstitute.org/recent/75.cfm. DOJ's knee-jerk response denying an obligation to disclose this information generated an AAI interest in transparency, which is one of our topics at the 2003 annual conference.

[46] See http://antitrustinstitute.org/recent/138.cfm.

under a yield management system of pricing.[47] In subsequent conversations with the FTC staff, we became convinced that we were analyzing issues that they had either overlooked or misunderstood. The Commissioner handling the case invited us in to discuss it, after receiving our letter. Our position against the mergers was eventually rejected by a vote of 3-2, but by bringing outside scrutiny to the case, we helped precipitate a detailed explanation of the Commission's thinking in a public document and in subsequent on-the-record discussions by the heads of the two bureaus that handled the case, a virtually unprecedented expansion of transparency that we hailed as a very positive development.[48] Two of the AAI Fellows subsequently published an article evaluating the Commission's handling of these mergers.[49]

A second objection to our taking a side in a case is that it may appear that we are *de facto* agents for a private party, thereby creating a perception that we are not independent. We have been aware from the beginning that private interests will try to manipulate us, just as government agencies are aware when they are approached. As the government views private submissions with great skepticism, so do we; but just as the government makes use of information that it believes is credible, after weighing various sources, so do we. Nonetheless, the appearance problem will be used against a public interest advocate and must be coped with. I will discuss it in the following section after further explaining why we concluded it is important to intervene in on-going court and administrative proceedings.

In addition to what has already been said, we focus on three points. First, policy is often made in the course of individual cases. Given that the agencies rarely disclose sufficient information for the public to comment meaningfully after a case has been settled or dismissed, it is often necessary to be "at the table" in order to influence an outcome.

Second, it is natural that interests which agree with our position may sometimes want to send us contributions. We would be foolish to turn these down, provided that we can maintain our independence and the perception of our independence.

Third, while the AAI has not pushed particularly hard for publicity, we have found that public awareness of the AAI goes up substantially when we take a position on a pending matter. Let me quote from a law review article by Robert M. Langer, a

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[47] See http://antitrustinstitute.org/recent2/194.cfm.

[48] Warren S. Grimes, Norman Hawker, John E. Kwoka, Jr., Robert H. Lande, and Diana Moss, "The FTC's Cruise Lines Decisions: Three Cheers for Transparency," FTC:WATCH No. 599, November 18, 2002, http://antitrustinstitute.org/recent2/217.cfm.

[49] Warren S. Grimes and John E. Kwoka, Jr., "A Study in Merger Enforcement Transparency: The FTC's Ocean Cruise Decision and the Presumption Governing High Concentration Mergers," The Antitrust Source, May 3, 20003 http://www.abanet.org/antitrust/source/may03/metstudy.pdf, also available at www.antitrustinstitute.org.

respected antitrust attorney in Connecticut.[50] "[The AAI] is already having quite a significant impact in this country. I know, personally, because one of my clients (who will remain anonymous) asked me during the course of an evaluation of an appellate court decision, what was the likelihood that Bert would enter the case as amicus curiae? The American Antitrust Institute is now on the radar screens of some very large institutions in this country."

As one of our academic members pointed out at our retreat, antitrust policy is largely formulated through the handling of specific nonpublic matters. To stay away from these would be to cease being an advocacy organization.

> Our Guidelines of Operation take the position that AAI *may participate in court and administrative proceedings, including matters pending before federal, state, or international authorities.*

Limitations on Contributors

Should the AAI accept contributions from special interests? What should we disclose about contributors? These questions bothered us from the beginning. Basically, we have felt that we do not wish to function as a law firm or a consulting firm, and thus will not accept payment for services rendered. On the other hand, we will accept contributions to the general treasury from anyone who appreciates our positions and recognizes our independence.

What has evolved into our general practice is that when we are approached by a special interest, we make an independent determination of whether we agree with the position being presented and whether it is one we wish to spend our time on. If so, we say that (1) we will get involved and (2) we hope that the interest will one day contribute to our general treasury, but that we are not soliciting a promise or commitment. There is no agreement, there is no amount specified. And money is certainly not always forthcoming. Until money is promised or contributed, it is not budgeted, it is not a receivable, and therefore there is nothing to be disclosed. Because there is no nexus between what comes in and what is spent, and money often comes in a year or two after activity that might be relevant, it would be impossible to associate a given project with a given contribution.

Let's not forget where we stand. The corporate community that dislikes antitrust has been funding think tanks handsomely for years and has been essential in obtaining the kind of advocacy they want. The argument that is made by conservative think tanks goes, "Our contributors don't tell us what to say. They contribute because they agree with the kind of things that we say." If this has been acceptable for so long when conservative organizations say it, why should it be unacceptable to turn the tables and find funding to allow a pro-enforcement organization an opportunity to speak out?

[50] "Symposium Introduction: U.S. v. Microsoft," 31 Connecticut L. Rev. at 1247 (1999).

On the other hand, perceptions are important and we have from the beginning taken the position that we will disclose on request a list of all contributors who have given $1,000 or more, cumulatively since the formation of the AAI. This goes beyond most other public interest groups whose policies we have been able to study.

Our Guidelines for Operation provide:

Contributions and Disclosures.

a. AAI will accept contributions to its general treasury and will maintain a list, available to anyone on request, of all contributors who have given $1,000 or more, cumulatively [including tables], since formation of the AAI. This is in addition to disclosures of Form 990 that may be required by law. This policy will be made known in advance, wherever possible, to contributors.

b. AAI will not disclose amounts of funds received from its contributors, except as required by law.

c. AAI will not accept earmarked funds from private sources for specific positions, research or statements. The AAI shall not function as a law firm or consulting firm.

Should There Be a Policy Committee?

We are a small organization without a staff and our participants are widely dispersed. To make most decisions on whether to engage our resources, the decision is made by the three Directors, all of whom are currently located in Washington. We have thought of enlarging the Board of Directors, but we reject that in the interests of the ability to reach decisions quickly. Normally, however, the background for a decision is circulated to the entire Advisory Board or to members with specially relevant expertise, and the feedback that is received gets close attention.

Here is the official statement on our website that lays out the role of the Advisory Board:

The AAI Advisory Board consists of outstanding experts in the fields of antitrust law, economics, and business. Although decisions are made by the Board of Directors, Advisors are consulted from time to time as positions are developed and their views are taken into account. They do not vote and do not assume responsibility for the positions of the organization either as a group or individually. Typically, the President circulates information or queries to the Advisors via an e-mail listserve, and those who desire to respond will do so, either directly to the President or to the entire listserve. Advisors also participate on special projects in small groups (e.g., in drafting an amicus brief) or

individually (e.g., in presenting a paper at our national conference). Sometimes Advisors recuse themselves because of a conflict of interest resulting from a client matter or present or past governmental role, or because of lack of relevant expertise or time. Nonetheless, the Advisory Board provides a unique resource of great experience and wisdom that can be counted on to participate influentially as the AAI operates from day to day.

There probably comes a time in any organization's development when it is necessary to adopt guidelines for the handling of conflicts of interest. When my recusal from the cruise merger case did not satisfy proponents of the merger, we decided that for the future it would be helpful in maintaining the perception of independence if we were to create a special Policy Committee for the types of decisions most likely to raise questions of conflict. The Committee would consist of five members of the Advisory Board, serving an appointed term, and it would make recommendations to the Board of Directors. If the Board rejected a recommendation, it would prepare an explanatory memo that would be shared with the Advisory Board and placed in the minutes. Committee deliberations are expected to be completely independent of any financial implications either for AAI or for the members of the Committee. Committee members shall not participate if they have a personal conflict.

The largest problem in using a Policy Committee is expected to be that it could slow the decision process and that it will use up too much time of the members, who are busy volunteers. Experience will reveal whether this is a workable technique of governance.

What Matters?

In trying to give guidance to the Policy Committee, the Advisory Board considered what factors should be weighed in determining whether to employ AAI resources. The Guidelines for Operations provide:

In determining whether to employ AAI resources on a matter, the Committee and the Board will consider, among others, the following factors:

a. Whether the issue is important for consumers and competition.

b. Whether AAI is likely to have access to important facts relative to taking a position.

c. Whether the activity is likely to involve new or particularly interesting legal or economic issues.

d. Whether the activity is likely to provide an opportunity to defend or explicate a post-Chicago perspective.

e. Whether the issues we are interested in are otherwise likely to be well-covered by capable advocates.

f. Whether we are likely to have access to well-qualified talent eager to work on the matter with sufficient time-availability to complete the assignment within the necessary time frame.

Three Minor Concerns

To what extent should the AAI engage in lobbying? This is both a legal question, since there are statutory limitations on the amount of lobbying that a 501(c)(3) charitable institution is permitted to do, and a policy question, since we are a 501(c)(3) organization by choice rather than by some necessity. It is also a question of what constitutes lobbying. We have testified before Congress and we have written letters to Congress urging more money to the FTC and the DOJ. We have also visited with staff on Capitol Hill to discuss antitrust policy and with officials of various federal agencies. All of this is appropriate to the AAI, none of it requires registration as a lobbyist, and *in toto* it amounts to a minimal part of the time that is spent on AAI activities. With more resources, we would probably do more along all of these lines, but at this point, we are satisfied that we can do our job without violating the lobbying rules concerning a 501(c)(3) organization.

To what extent should we work jointly with other organizations? We have recruited other non-profits to sign onto our letters to Congress supporting the federal antitrust budget and we have occasionally signed onto policy statements by other non-profit organizations. Nonetheless, our institutional preference is to act alone. Our Operating Guidelines provide:

The AAI will generally act independently of other nonprofits and private companies. This will not preclude co-sponsorship of specific events such as symposia, workshops, etc., or participating in programs, rallies, etc.

One last item covered by our Guidelines deserves mention. On one occasion, when no ground rules were established in advance, we confirmed to the press our impressions of where the FTC staff was headed in an investigation, based on our conversations with the staff. This undermined our good will with the staff and led us to adopt the following guideline:

When the AAI meets with government officials, we will attempt to establish ground rules for later discussion of the meeting with the press and others, and will abide by any agreement made as to confidentiality, in accordance with law.

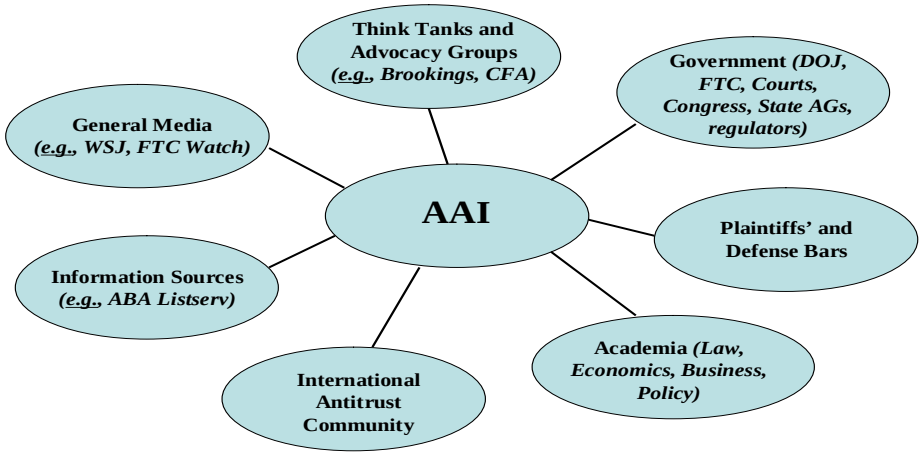
This is consistent with what we see as our dual role of being both an advocate for consumer-favorable antitrust policies AND an advocate for the laws and institutions of

antitrust. Although we will criticize the agencies from time to time when they do not live up to our expectations, we are not the press, whose role requires an on-going antagonism, and we are not the political enemy but more of a loyal opposition that both praises the good and calls attention to the bad, by our lights.

Future Dreams

In five years, we have achieved a substantial degree of recognition in the American antitrust community. Many of the most qualified people in the profession participate in our deliberations and provide volunteer services. A large portion of the community reads our website regularly, we are sought out by the media, and the current Chairman of the FTC has used his public platform on several occasions to call attention to what he perceives to be our policy failings.[51] In other words, we are taken seriously within the government.

Chart 3:
AAI in the Antitrust Community



What we have not yet achieved, however, is true institutional status, comparable to the large and well-funded think tanks that have supported a more conservative approach to regulation and antitrust intervention in the economy. This will take the passage of time in combination with funding that is more substantial and predictable. Funding is needed because much more can be achieved with experts who are on payroll or retainer than through volunteers, however wonderful our volunteers have been. Funding must be predictable because the experts we have hired tend to be academics who

[51] We have also been praised in public by an Attorney General of the U.S., an Assistant Attorney General for Antitrust, and a Chairman of the Federal Trade Commission. As it happens, they were all Democratic appointees.

need assurance of our future ability to pay more than a year in advance, if they are to negotiate for periods of absence from their universities so that they can work with AAI while on leave or sabbatical.

It is not clear where this type of funding will come from. The usual philanthropic sources need to be cultivated: foundations, bequests, contributions from ideological friends and from grateful special interests. One unusual potential source is *cy pres*, a power that a court has to award left-over money to a charitable institution. In class actions, there is sometimes a residue of remedial money that cannot be distributed to the members of the class. Usually, the lead attorneys for the plaintiffs bear some influence in advising the Court how to utilize this money. The Court has a high degree of discretion, although in some states the award of cy pres money must be linked to the underlying cause of action, e.g., if it was an antitrust case, the residue should be used to foster competition. We have received one grant of cy pres thus far.[52]

Substantively, there are many new directions that will need our attention. Last year we focused on what the business schools have to offer to antitrust analysis, in an effort to move antitrust lawyers and economists in a more empirical direction that pays greater attention to corporate strategies. This year we have emphasized two particular problems: transparency in antitrust enforcement and access to networks. For these three topics, we set up projects, engaged a variety of participants, and used our annual conference as a showcase for the work.

There are many candidates for future work: the growth of buyer power; a redefinition of price discrimination in light of new methods of pricing; the meaning and role of efficiency in antitrust; the implications of concentration; how antitrust and regulation can work together in various contexts; and so forth. There is also a need for developing more specialized expertise, e.g. in the communications sector. A new Antitrust Modernization Commission, established by Congress but not yet funded, will—if funded-- certainly require our close attention over the three years of its expected existence. Finally, we would like to be able to devote more time to issues relating to the globalization of antitrust, particularly the building up of public interest advocacy for competition policy in the transition and developing nations that have recently adopted competition policy laws.[53]

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[52] Law v. National Collegiate Athletic Association, Civ. Act. No. 94-2053-KHV, U.S. District Court for the District of Kansas, ordering that residual funds remaining in the fund created from settlement of the Restricted Earnings Coach Antitrust Litigation, consisting of approximately $278,554, be distributed *cy pres* to several designated non-profit organizations, including $50,000 to the American Antitrust Institute.

[53] See Albert A. Foer, "On Launching an International Network of Public Interest Organizations for Competition Policy," FTC:WATCH No. 605, March 3, 2003, http://www.antitrustinstitute.org/recent2/237.cfm.

Conclusions

AAI demonstrates that it is possible with the help of the Internet to build from scratch, with little funding, and in a relatively short time an influential public interest organization dedicated to research, education, and advocacy in the field of antitrust. Obviously, circumstances will be different in each nation, but the need for developing a constituency for competition policy will be similar in each nation where competition policy is being given its day to prove itself.