

SECTION OF ANTITRUST LAW
AMERICAN BAR ASSOCIATION

Curriculum
(as of September 25, 2006)

THE ANTITRUST MASTERS COURSE III

SEPTEMBER 28 – OCTOBER 1, 2006

THE SANCTUARY, KIAWAH ISLAND, SOUTH CAROLINA

KEVIN E. GRADY
PROGRAM CHAIR

Course Materials and all meals are included in the registration fee.

WEDNESDAY, SEPTEMBER 27, 2006

4:00 – 6:00 p.m. MIDDLETON	Pre-Registration
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THURSDAY, SEPTEMBER 28, 2006

8:00 – 10:30 a.m. GRAND OAKS B	<p>WELCOME and INTRODUCTIONS Kevin E. Grady, Alston & Bird LLP</p>
	<p>A. THE U.S. ANTITRUST SYSTEM: FORMATIVE DOCTRINAL AND INSTITUTIONAL FOUNDATIONS – Honorable William E. Kovacic, (Commissioner, Federal Trade Commission)</p> <ol style="list-style-type: none">1. Formative Institutional Arrangements<ol style="list-style-type: none">a. Open Texture of the U.S. Antitrust Statutesb. Central Role of Judicial Interpretationc. Decentralized Authority to Prosecuted. Importance of Administrative Elaboration and Prosecutorial Discretione. Powerful Mix of Civil and Criminal Remediesf. Changing Conception of Antitrust Goalsg. Permeability of System to New Ideash. Coexistence with Other Regulatory Systemsi. Coexistence with other National/Regional Antitrust Systems2. Major Doctrinal Phenomena<ol style="list-style-type: none">a. Inherently Evolutionary Nature of U.S. Antitrust Doctrineb. Bright Lines and Reasonableness: Administrability Considerationsc. Progression from Categories to Conceptsd. Equilibrating Tendenciese. Intellectual Foundations of Modern Doctrine: The Chicago-Harvard Double Helix

	<p>B. A POST-TRINKO ASSESSMENT OF THE LAW OF MONOPOLIZATION – Stephen Calkins (Professor of Law, Wayne State University Law School), and Keith N. Hylton (Professor & Law Alumni Scholar, Boston University School of Law)</p> <ol style="list-style-type: none"> 1. Monopoly power criteria 2. Relevant market determinations/proof of market power without market definition 3. Proof of monopolization 4. “Thrust upon,” efficiency, and other defenses 5. Conspiracy to monopolize 6. Attempt to monopolize 7. “Shared monopoly” theories/EU collective dominance 8. Remedies

10:30-11:00 a.m.	BREAK
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11:00 – 12:30 p.m. GRAND OAKS B	LECTURERS: Stephen Calkins (Professor of Law, Wayne State University Law School), and Keith N. Hylton (Professor and Law Alumni Scholar, Boston University School of Law)
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	<p>C. RESALE PRICE MAINTENANCE – STILL A SLIPPERY SLOPE</p> <ol style="list-style-type: none"> 1. Agreements to fix prices 2. “Simple” refusals to deal 3. Pressures to maintain resale prices 4. Requirement of coercion 5. Consignments 6. Minimum advertised prices – internet and otherwise <p>D. THE ECONOMICS OF DISTRIBUTION</p> <p>E. DISTRIBUTION RESTRAINTS – WHAT’S PERMISSIBLE?</p> <ol style="list-style-type: none"> 1. Price and territorial arrangements 2. Primary responsibility provisions 3. Limitations on the location of a distributor’s place of business 4. Customer restrictions 5. Tie-in sales, bundling 6. Exclusive dealing agreements 7. Terminating dealers
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	<p>F. PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT – Living in a Post-<u>Volvo</u> World</p> <ol style="list-style-type: none"> 1. Elements of a Robinson-Patman 2(a) violation 2. Cost-justification defense 3. Meeting competition defense 4. Buyer liability 5. Elements in Section 2(d) and 2(e) violations
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12:30 – 2:30 p.m. GRAND OAKS A	<p>LUNCH</p> <p>Speaker: Honorable Deborah Platt Majoras, (Chairman, Federal Trade Commission)</p>
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WORKSHOPS

2:30 – 5:30 p.m. HERON I	<p>Antitrust Litigation – Pre-Trial</p> <p>Leaders: William J. Blechman (Kenny Nachwalter PA) Honorable J. Thomas Rosch, (Commissioner, Federal Trade Commission) Margaret M. Zwisler (Latham & Watkins LLP)</p> <p>Pleadings, Motions and Strategy (2:30 p.m. – 4:00 p.m.) Fact and Expert Discovery (4:00 p.m. – 5:30 p.m.)</p>
2:30 – 5:30 p.m. GRAND OAKS B	<p>Antitrust Counseling – The Essentials</p> <p>Leaders: Roxane C. Busey (Baker & McKenzie LLP) Kevin E. Grady (Alston & Bird LLP)</p> <ul style="list-style-type: none"> • Assessing Risks in Common Counseling Scenarios • Educating Management on Unexpected or High Risk Matters
2:30 – 5:30 p.m. TERRACE A	<p>Dealing with Competition Regimes Outside the USA</p> <p>Leaders: William J. Baer (Arnold & Porter LLP) Simon Jones (Legal Advisor, UK Competition Commission)</p> <p>I. Cartel Investigation</p> <ol style="list-style-type: none"> a. Case study with US firm implicated in international cartel. <ul style="list-style-type: none"> • Initial dealings with competition authorities – US, UK, EU and elsewhere. • Amnesty considerations: who to approach and in what order? • Strategic considerations if amnesty is not available. • Other practical advice.

	<p>II. Merger Control in Europe</p> <p>a. UK case study.</p> <ul style="list-style-type: none"> • Filing requirements and jurisdictions. • Phase I, the Office of Fair Trading. • Phase II, the Competition Commission. • Remedies. • Appeals. <p>b. Practical hints on evidence, procedure, the way to approach the authorities, managing expectations and the lawyers' role.</p>
<p>2:30 – 5:30 p.m. HERON II</p>	<p>Economic Principles and Methods</p> <p>Leaders:</p> <p>Joe England (Heller Ehrman LLP)</p> <p>Kenneth Heyer (Acting Deputy Assistant Attorney General, Antitrust Division, US Dept. of Justice)</p> <p>Keith N. Hylton (Professor & Law Alumni Scholar, Boston University School of Law)</p> <ul style="list-style-type: none"> • Critical loss analysis • Restraints of trade: the Chicago view and the rejoinder • Models of perfect and imperfect competition • Measuring market power • Dealing with the opposition's economic expert
<p>2:30 – 5:30 p.m. TERRACE B</p>	<p>Antitrust and Intellectual Property – An Advanced Perspective</p> <p>Leaders:</p> <p>Honorable William E. Kovacic, (Commissioner, Federal Trade Commission)</p> <p>Daniel M. Wall (Latham & Watkins LLP)</p> <ul style="list-style-type: none"> • Impact of <u>Illinois Tool</u> • U.S. v. Other International Enforcement Agencies

<p>6:30 – 9:00 p.m. TERRACE FOYER & LAWN</p>	<p>RECEPTION AND DINNER</p> <p>After Dinner Remarks: Gary R. Spratling (Gibson, Dunn & Crutcher LLP)</p>
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FRIDAY, SEPTEMBER 29, 2006

<p>8:30 – 12:00 p.m. GRAND OAKS B</p>	<p>LECTURERS: William E. Kovacic, (Commissioner, Federal Trade Commission) and Keith N. Hylton, (Professor & Law School Alumni Scholar, Boston University School of Law)</p>
	<p>G. MERGERS AND ACQUISITIONS</p> <ol style="list-style-type: none"> 1. FTC/DOJ Merger Guidelines; key economic concepts; Agencies' Commentaries; Judicial Reactions 2. Current enforcement policies, priorities, and nuances 3. Vertical and conglomerate mergers / “portfolio” effects 4. State enforcement 5. Private enforcement <p>H. JOINT VENTURES</p> <ol style="list-style-type: none"> 1. Joint ventures under the Sherman and Clayton Acts; key economic concepts 2. The FTC/DOJ guidelines 3. Specific antitrust problems in the establishment and operation of joint ventures – domestic and international

<p>12:30 – 2:30 p.m. GRAND OAKS A</p>	<p>LUNCH</p> <p>Speaker: Honorable Thomas O. Barnett (Assistant Attorney General, Antitrust Division, US Dept. of Justice)</p>
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WORKSHOPS

<p>2:30 – 5:30 p.m. HERON I</p>	<p>Litigation – Trial of an Antitrust Case Plaintiffs' Case (2:30 p.m. – 4:00 p.m.) Defendants' Case (4:00 p.m. – 5:30 p.m.)</p> <p>Leaders: William J. Blechman (Kenny Nachwalter PA) Honorable J. Thomas Rosch, (Commissioner, Federal Trade Commission) Margaret M. Zwisler (Latham & Watkins LLP)</p> <p>The high stakes of antitrust trials puts trial strategy and tactics at a premium. A panel of experienced antitrust litigators will discuss a number of different aspects of litigating a large antitrust case in a courtroom. The panel will address a number of different issues from the tactical to the strategic, among them are:</p> <ul style="list-style-type: none"> • Preparing to litigate; trial themes, mock trials, rehearsals, witness selection, motions in limine, and jury selection. • Opening Statements: from the logistical to the strategic. • Presentation of evidence including economic evidence.
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<p>2:30 – 5:30 p.m. GRAND OAKS B</p>	<p>Analyzing Tough Horizontal and Vertical Issues in Counseling Horizontal (2:30 p.m. – 5:00 p.m.)</p> <ul style="list-style-type: none"> • “Conscious parallelism,” “plus factors” and circumstantial evidence – What is conspiratorial behavior? • Information exchange with competitors. • Analysis of joint purchasing risks. • Structuring and implementing joint ventures to avoid antitrust problems. <p>Vertical (4:00 p.m. – 5:30 p.m.)</p> <ul style="list-style-type: none"> • How should dual distribution claims be evaluated? • How can suppliers deal with discounters without engaging in resale price maintenance? Are you sure that use of <i>Colgate</i> is right for your client? • Minimum Advertised Pricing (MAP) policies and the Internet: Is it just advertising that’s involved? • Exclusive dealing, bundling and volume discounts – separating competition on the merits from anticompetitive exclusionary conduct. • Price differentials and the Robinson-Patman Act – defining and minimizing risk. <p>Leaders: Honorable Pamela Jones Harbour, (Commissioner, Federal Trade Commission) Robert T. Joseph (Sonnenschein Nath & Rosenthal) Richard J. Wallis (Microsoft Corp.)</p>
<p>2:30 – 5:30 p.m. HERON II</p>	<p>Handling the Merger Preliminary Injunction Case Leaders: Debra J. Pearlstein (Weil, Gotshal & Manges LLP) Phillip A. Proger (Jones, Day) Daniel M. Wall (Latham & Watkins LLP)</p> <ul style="list-style-type: none"> • Process Issues (timing, venue, scheduling orders) • Discovery process issues (obtaining documents already collected by DOJ/FTC, third party discovery, written discovery, confidentiality) • The P.I. standard (contrasting standards in FTC and DOJ prosecutions; establishing and rebutting the prima facie case) • Discovery strategy (sources of proof, obtaining favorable testimony in depositions) • Customer testimony and alternative methods of proof. • Economic testimony re market definition, competitive effects and efficiencies. • Briefing challenges (trial briefs, proposed findings of fact and conclusions of law, closing briefs) • Self-help remedies after Libby.

<p>2:30 – 5:30 p.m. GRAND OAKS C&D</p>	<p>Antitrust Compliance Programs</p> <p>Best Practices in Compliance Programs (2:30 p.m. – 4:00 p.m.)</p> <ul style="list-style-type: none"> • Antitrust compliance training for the multinational corporation. • Internet based compliance programs. • Role of antitrust audits as part of compliance programs. • Training the trainers—Antitrust training for in house law departments. <p>The Sarbanes-Oxley/Ethics Challenges (4:00 p.m. – 5:30 p.m.)</p> <ul style="list-style-type: none"> • Conflicts of interest in multiple representation. • Maintaining privileges in simultaneous government investigations and private litigation. • Investigations and private litigation. <p>Leaders: Kathryn Fenton (Jones, Day) Donald C. Klawiter (Morgan, Lewis & Bockius LLP)</p>
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<p>6:30 – 9:00 p.m. TURTLE POINT GOLF RESORT</p>	<p>RECEPTION AND DINNER</p> <p>After Dinner Remarks: Thomas B. Leary (Hogan & Hartson LLP)</p>
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SATURDAY, SEPTEMBER 30, 2006

<p>8:00 – 10:30 a.m. GRAND OAKS B</p>	<p>LECTURERS: Hon. Diane P. Wood (U.S. Court of Appeals for the Seventh Circuit) and Stephen Calkins (Professor of Law, Wayne State University Law School)</p>
	<p>I. THE TOUGH ISSUES IN AGREEMENTS BETWEEN COMPETITORS</p> <ol style="list-style-type: none"> 1. Analyzing horizontal agreements – indirect price fixing; price “tampering”; agreements to limit production; agreements to limit hours of business operation 2. Invitations to collude; “signaling” as to price and output 3. Facilitating practices 4. E-Commerce and B2B relationships

	<ol style="list-style-type: none"> 5. Conscious parallelism and circumstantial evidence of agreement 6. Antitrust risks in trade association activities 7. Joint ventures – spillover concerns 8. Sales agencies involving competitors <p>J. GROUP BOYCOTTS AND REFUSALS TO DEAL</p> <ol style="list-style-type: none"> 1. Horizontal Agreements 2. “Vertical” Boycotts 3. “Noncommercial” Boycotts 4. Essential facilities vs. free riding 5. What triggers “<i>per se</i>” analysis (if anything)
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10:30-11:00 a.m.	BREAK
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11:00 a.m.-1:00 p.m. GRAND OAKS B	LECTURERS: Donald C. Klawiter (Morgan, Lewis & Bockius LLP), Gary R. Spratling (Gibson, Dunn & Crutcher LLP), Scott D. Hammond (Deputy Assistant Attorney General, Antitrust Division, US Dept of Justice)
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	<p>K. HANDLING A CRIMINAL ANTITRUST INVESTIGATION -</p> <ol style="list-style-type: none"> 1. Dealing with the DOJ 2. Developing a global strategy 3. Planning for the state AGs 4. Amnesty strategies 5. Anticipating private litigation 6. Dealing with conflicts – co-defendants and corporate witnesses/ethical rules 7. Attorney-client privilege issues – multinational traps
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1:00 – 2:30 p.m. GRAND OAKS A	LUNCH Speaker: Hon. Diane P. Wood (U.S. Court of Appeals for the Seventh Circuit), “Effective Appellate (and other) Advocacy”
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AFTERNOON	Freedom to Choose: Golf or Other Client Development Exercises Returning Calls and E-mails Seeking Sanctuary at The Sanctuary
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7:00 p.m. MINGO POINT	DINNER Antitrust Tall Tales Contest Host: Kevin E. Grady , Alston & Bird, LLP
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SUNDAY, OCTOBER 1, 2006

**THE ESSENTIALS ---
WHAT EVERY ANTITRUST PARTNER MUST KNOW**

8:00 a.m. GRAND OAKS B	The intersection of intellectual property and antitrust	Honorable William E. Kovacic, (Commissioner, Federal Trade Commission)
8:30	What to keep in mind in handling the “hot” criminal matter	Gary R. Spratling (Gibson, Dunn & Crutcher LLP)
9:00	The Significance of the Supreme Court’s Recent Decisions	Stephen Calkins (Professor of Law, Wayne State University Law School)
9:30	Dealing with Competition Regimes Outside the USA	William J. Baer (Arnold & Porter LLP)
10:00 Break		
10:30	Attracting and keeping a Fortune 500 client	Richard J. Wallis (Microsoft Corp.)
11:00	The five major antitrust developments to advise your clients to anticipate	Robert T. Joseph (Sonnenschein Nath & Rosenthal)
11:30	Reprise – What We’ve Learned	Honorable William E. Kovacic, (Commissioner, Federal Trade Commission)
	Closing Remarks	Joseph Angland (Heller, Ehrman LLP)
12:00 p.m. GRAND OAKS A	Lunch	