MEMORANDUM

TO: Brian Henry, ABA Antitrust Section Vice Chair  
    Long Range Planning Committee

FROM: Joint Conduct Committee  
      Chair(s): John Delacourt and Joanne Lewers  
      Vice Chairs: Kellie Lerner, Sarretta McDonough, Jeff LeVee, Justin Bernick, Perry Lange, and Joel Mitnick  
      YLR(s): Ross Demain and Lisa Danzig

DATE: December 11, 2017

RE: Long Range Plan, 2017-19

I. Current State of Your Committee

   A. The Committee is responsible for agreements between or among competitors, including ancillary restraints, joint ventures, information sharing, boycotts and other collective refusals to deal, and agreements between or among supply-chain members, including distribution restraints. The Committee also monitors developments regarding interlocking directorates, hybrid arrangements (e.g., hub-and-spoke), and professional associations.

   B. The Joint Conduct Committee currently has 613 members. The Committee’s most recent Long Range Plan, from March 2015, indicates that membership was 551 at that time, so we have grown by 62 (+11%). Along with this strong rate of growth, the Committee has remained very diverse. Committee members include law firm practitioners, government lawyers, in-house counsel, academics, as well as individuals from the non-profit, policy, and think tank communities. Like the Section at large, much of the Committee’s growth has been fueled by new members from outside the United States.

   C. The Committee regularly interacts with other Antitrust Section committees by co-sponsoring Spring Meeting sessions, brown bag programs, and teleseminars. We work particularly closely with the Cartel and Criminal Practice, Pricing Conduct, Federal Civil Enforcement, Distribution and Franchising, and International Committees. The Committee contributes to Section comments on pending legislation and international developments that involve joint conduct issues. The Committee works with the Antitrust Law Developments team to prepare the chapter on restraint of trade for the new editions and annual update volumes to the current ALD edition.

   D. The Committee’s 3 most significant accomplishments since the last long range plan are: (1) re-launch and re-branding the Committee newsletter as “Cartel & Joint Conduct Review.” (2) publication of the Second Edition of “Joint Ventures: Antitrust Analysis of Collaborations Among Competitors,” and (3) development of “Joint Conduct 101” series geared toward younger lawyers and those new to this area of practice.
II. Major Competition/Consumer Protection Policy or Substantive Issues within Committee’s Jurisdiction Anticipated to Arise Over Next Three Years

A. Implications of “Better Deal”/New Brandeis Movement for Joint Conduct Analysis

Concerns about market concentration – with particular focus on the tech sector and such issues as use of, and access to, consumer data – have generated renewed interest in a Brandeisian approach, which has also found its way into the Democratic Party’s “Better Deal.” Has the time come for this New Brandeis Movement or is it merely, as others would have it, “hipster antitrust”? Should antitrust enforcement encompass such concerns as jobs, wages, data privacy, and viewpoint diversity in media, or is the consumer welfare standard’s narrower focus on prices and consumer choice still appropriate? The Committee will work to stay abreast of how these developments will potentially impact the evaluation of joint conduct.

B. Implications of Government’s Increasing Role as Primary (or Exclusive) Payer for Joint Conduct Analysis in the Healthcare Sector

Government’s role in health care, especially as payer, substantially complicates competition analysis. The distinction between policy and pricing discussions is critical from an antitrust perspective, but becomes blurred when the policy at issue concerns pricing. What are the rules for trade groups and legislative coalitions? How far do antitrust exemptions extend and where are the risks? To what extent will joint conduct analysis evolve as various components of the ACA are repealed or, alternatively, proposals like Medicare for All gain steam?

C. Convergence or Divergence Between FTC and DOJ on Joint Conduct

The precise reach of Section 5 of the FTC Act continues to be subject to debate. Some lower courts have been critical of the FTC’s efforts to expand the reach of Section 5 beyond the scope of Section 1 of the Sherman Act, but the FTC has continued to explore a variety of theories (e.g., invitations to collude, unfair trade practices). What is the universe of business conduct that might potentially be reached by Section 5 but not by Section 1? The Committee will continue to closely monitor developments in this area.

III. Specific Long Term Plans to Strengthen Your Committee

A. Potential Modifications to Charter

We do not believe that any modifications are needed at this time. The Joint Conduct Committee takes “primary” responsibility for those issues that lie at the heart of our mission (e.g., joint ventures and other collaborations) and “secondary” responsibility for issues that lie at the heart of another committee’s mission (e.g., RPM with the Pricing Committee or pay for delay litigation with the Healthcare and Pharmaceutical Committee). Obviously, the characterization of particular issues as primary or secondary will require careful thought and
discussion with other committees, which we will pursue. Ultimately, no bright line delineations may be possible. Nonetheless, the exercise should at a minimum serve as a means to identify those substantive areas on which our Committee will focus in the coming years.

B. On-going Activities and Plans for Growth

a. Expansion of Membership

We will continue the Committee’s successful Joint Conduct 101 series, in conjunction with the Young Lawyers Division, which targets attorneys new to the antitrust practice area. We will provide numerous opportunities for new volunteers to participate in our program and publication projects. We will also seek additional involvement in the committee activities on the part of FTC, DOJ, and state AG attorneys.

b. Diversification of Membership

The Committee plans to continue and expand four related initiatives to maintain, and even further strengthen, its commitment to diversity:

(i) Attract non-U.S. members – Increase coverage of non-U.S. developments in our programs and publications and coordinate with International Committee.

(ii) Diversity in program participation – Continued attention to opportunities for women, minority, and young lawyers in all areas of programming.

(iii) Designing programming to highlight government and plaintiff perspectives – For example, we are currently developing a committee program on identifying and responding to cartel activity as a victim, which will feature government and plaintiffs’ bar perspectives.

(iv) Recruit young lawyers through programming directed to more junior lawyers – Include “basics” programming in committee activities and programming, such as a “Joint Conduct 101” program in the works on interlocking directorates.

c. CLE/Committee Programs

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1 Please consider diversity goals identified in the ABA’s Diversity Plan (https://www.americanbar.org/content/dam/aba/global/ABA_Diversity_Plan_May_2011.pdf) and the Section’s Diversity and Inclusion Plan (https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/diversity_inclusion_plan.authcheckdam.pdf).
Recently completed and “in the works” Joint Conduct Committee CLE/Committee programs include:

- **Tech-Savvy and Talented: Competition in Employment Practices**
- **Transatlantic Views on Licensing and “Economic Liberty”**
- **Joint Conduct 101: Sports & Professional Associations**
- **Dangerous Diversification: Can Investor Ownership in Competing Firms Produce Actionable Antitrust Effects?**
- **Blurred Lines: Assessing Sherman Act Exposure for Hub-and-Spoke Arrangements**
- **Envt’l Collaborations: The Legal Mosaic Mixing Envt’l Needs and Policies with Antitrust**
- **Policy or Prices? Pharmaceutical Sector Reimbursement Discussions**
- **Communicating Without Signaling: Antitrust Compliant Public Communications**
- **Joint Conduct 101: Information Exchange**
- **Defendants’ Analysis of the Profitability of Price Increases and the Detection of Collusion**

d. Publications and Newsletter (consult Long Range Publications Plan)

As mentioned previously, within the past two years we have completed a major overhaul of the Joint Conduct Committee newsletter, which was re-launched and re-branded as “Cartel & Joint Conduct Review.” The feedback has been overwhelmingly positive. The most recent edition of “Cartel & Joint Conduct Review” was published (i.e., distributed via the Committee’s listserv and posted on Connect) on December 6, 2017. In addition, the Committee provides annual assistance with Antitrust Law Developments.

The Committee is also currently working on two book projects:

- **Proof of Conspiracy under the Federal Antitrust Laws** – This book is currently nearing completion. A (hopefully) final draft is currently being reviewed by the Section Council. It is expected that publication will take place in late Q1 or early Q2 of 2018.

- **Joint Ventures: Antitrust Analysis of Collaborations Among Competitors** – This new edition of the book is being produced on a
fairly aggressive schedule (as noted above, the publication of the prior edition was one of the Committee’s most notable accomplishments since the last Long Range Plan). Both the Committee and Books & Treatises agreed that this was justified based on the pace of developments in the area. A revised proposal and outline has now been reviewed and approved by B&T. Initial drafts from most authors were received at the end of November.

e. Joint Activities with Other Committees/Entities

The Committee has always prioritized co-sponsorship of programs, both to ensure the best quality content and to solicit the largest possible audience (out of respect for the substantial time and effort contributed by the program organizers and participants). The Committee’s “Joint Conduct 101” brown bag series is a good example. From its outset, the series has been conducted as a joint project of our Committee and the Young Lawyers Division. Other recent examples include programs on antitrust analysis of pharmaceutical reimbursement discussions (co-sponsored by the Healthcare & Pharmaceuticals Committee), joint conduct issues arising from environmental collaborations (co-sponsored by the ABA Section of Environment, Energy & Resources) and our numerous international programs conducted jointly with the International Committee.

f. Development of Future Leaders

Since the time of the last Long Range Plan, we have sought to strengthen and expand Committee leadership by seeking out fresh faces of all sorts – junior/senior, government/private sector, plaintiffs’/defense bar – to staff Committee projects. Our current slate of projects, including the ALD Annual Review, the new edition of the joint ventures book, and the re-vamped committee newsletter continue to provide a host of opportunities for new and emerging leaders to fill. The formation of an Editorial Board to support “Cartel & Joint Conduct Review,” as well as to develop timely content for Connect, is an especially notable initiative in this area, as it provides emerging leaders with ongoing roles and repeated opportunities to demonstrate their value to the Committee. We are also focusing on younger members and diverse members in programs.

g. Other Recommended Resources, Support, or Initiatives?

The Committee was recently (and unexpectedly) granted a second Young Lawyer Representative, who has been a big help with our current workload. Other than that, we do not foresee a need for additional resources or support. We have staffed each of our ongoing activities with people who have supported the same or similar activities in the past, and so have a firm understanding of the resources required. In addition, we have actively sought to identify volunteers from among the
Committee’s membership to fill key roles in supporting our programs, book projects, newsletter, and ALD. We are hopeful that many of the people now filling those roles will continue to play an active role in the Committee’s future activities.

C. Principal Challenges, Weaknesses, or Impediments to Operation of Your Committee – And Plans to Address

The Committee has experienced a number of challenges that on occasion have impeded or delayed the timely completion of projects, or otherwise made the Committee’s work more difficult. Some of these include:

- Non-responsiveness to electronic mail requests for volunteers – In this regard, we will attempt to make greater use of targeted and personal outreach in addition to electronic mail and Connect platform posts. We also plan to seek volunteers for projects well in advance of deadlines to encourage participation.

- Periodic (at this point chronic) non-acceptance of Committee Spring Meeting session proposals – This has gone from a peripheral Committee morale issue to a year-after-year problem. Indeed, the problem has now been going on for so long that it is somewhat of a self-fulfilling prophecy (this past August, for example, the perception that the exercise of drafting and submitting proposals is futile led to a lower number of submitted proposals than ever before). The problem appears to stem from the fact that, due to the Committee’s broad remit, almost any submitted session proposal will be on a topic to which a more issue-specific Committee will have a “stronger” claim. We will continue working to develop innovative, timely proposals that, to the greatest extent possible, do not re-visit subject matter covered by recent Spring Meetings. In recognition of the challenge presented by the presence of more issue-specific committees, we will also work hard to pursue joint proposals and co-sponsorships.

- Identifying the best use for technology resources available to the Committee (e.g., Connect and social media) and integrating those resources into the Committee’s work.

With the exception of the Spring Meeting concern, we do not believe that these issues are unique to the Joint Conduct Committee. As a volunteer organization, these types of challenges are to be expected, and we have managed them in the past through active communication with the responsible leadership and the provision of timely and ample support where needed. As to the issue of technology resources, we are continuing to explore options for the best use of social media through internal discussions within the Committee and discussions with other committees.

cc: Responsible Council Member: Darren Tucker
    Committee Operations Representative: Amanda Wait
    Long Range Planning Committee Representative: Paula Render