

**ABA Section of Antitrust Law May 2018 Interview
of the Federal Trade Commissions' General Counsel Alden Abbott**

1. Can you tell us something about your background?

I'm delighted to be back at the Commission for my third stint, having previously served as a Deputy Director in the Office of International Affairs from 2009-2012 and an Assistant then Associate Director in the Bureau of Competition from 2001-2008. I've served in a variety of senior government positions, including Acting General Counsel for the Department of Commerce, Senior Counsel in the Office of Legal Counsel, Department of Justice (DOJ), and Special Assistant to the Assistant Attorney General of the DOJ's Antitrust Division.

Most recently, I was the Rumpel Senior Legal Fellow and Deputy Director of the Meese Center for Legal and Judicial Studies at The Heritage Foundation. I also previously served as Director of Patent and Antitrust Strategy for BlackBerry.

I've also served as an Adjunct Professor of Law at Scalia Law School at George Mason University since 1990, lecturing on a wide variety of law and economic topics, including the intersection of antitrust and intellectual property law and international antitrust law.

Finally, I've been active in the ABA Section of Antitrust Law's International Task Force since 2014 (after having been an associate editor of the *Antitrust Law Journal* for several years), and was a non-governmental advisor to the International Competition Network (ICN) in recent years.

2. What are your primarily responsibilities as General Counsel for the FTC and what are your initial priorities or agenda?

Pursuant to 16 CFR Section 0.11, the General Counsel is the Commission's chief law officer and adviser who renders necessary legal services to the Commission; represents the Commission in federal and state courts; advises the Commission and other agency officials and staff with respect to questions of law and policy, including advice with respect to legislative matters and ethics; and responds to requests and appeals filed under the Freedom of Information and Privacy Acts and to intra- and intergovernmental access requests.

In short, the Office of General Counsel (OGC), which is made up of top-notch career lawyers, provides "in-house" legal advice and litigation services for the Commission. Our litigators have had a great deal of success in appellate courts (e.g., the recent Ninth Circuit case against AT&T and the DC Circuit case against Soundboard), and in urging the Supreme Court to grant cert in key cases such as *Superior Court Trial Lawyers* and *Indiana Federation of Dentists*.

We also have an active amicus curiae program under which we file briefs seeking to promote sound antitrust and consumer protection policy, often in conjunction with the DOJ. For example, we recently joined the DOJ as amici in supporting a cert petition in the *Apple v. Pepper* case involving the scope of the *Illinois Brick* indirect purchaser rule, as well as a filing before the Federal Circuit in *Intellectual Ventures v. Capital One* on the scope of the Noerr-Pennington antitrust exemption.

I should also note that OGC in recent years has played a pivotal role in working with the Commissioners to help draft their opinions in Part III matters, which helps ensure timeliness and consistency in opinions subject to tight deadlines under Commission rules. Obviously, OGC's drafting efforts reflect the views of the Commission, not the personal predilections of OGC attorneys.

As to my agenda, I don't have a personal one; rather, the policy agenda is set by the Chairman, Joe Simons, in consultation with his fellow Commissioners and supported by staff. I bring to the table a strong interest in the antitrust-intellectual property (IP) interface and international antitrust, and the application of economics to antitrust and consumer protection matters. As such, I will contribute my opinions on these and other issues in consulting with the Commissioners and other senior staff, including the Bureau Directors and the Directors of the Office of Policy Planning and Office of International Affairs. I also hope to play an active role in helping articulate the Commission's established initiatives and policy positions in public forums.

3. Can you describe your (and Joe Simons') view of your role at the FTC? Are you a utility infilder who will play a role in merger review in addition to litigation issues?

Certainly, I will express my views to my staff colleagues and to the Commissioners on litigation risk and policy questions raised in proposed investigations and complaints—merger and non-merger. Given that resources and time are limited, I plan to focus on significant matters in which I believe I have something to add to the discussion. In short, I will “pick my spots,” and work in a collegial fashion. To use an economics term, input from OGC should be deployed efficiently, as a complement to the work of non-OGC staff, not as a substitute. Once the Commission has reached a decision, of course, I will work diligently to support and implement it.

4. In your prior positions, you've long been an expert and advocate on antitrust-IP issues. What are your thoughts on the proper antitrust analysis of matters involving IP, including SEPs.

I won't comment on particular positions that the Commission may take, other than to note that antitrust has a role to play in assessing behavior that may involve IP issues, just as it has a role to play in assessing behavior that involves all other forms of property—a point highlighted in the D.C. Circuit's 2001 *en banc Microsoft* decision. Antitrust should be directed against exclusionary behavior, whether or not IP is involved, but it should also respect the right of IP holders to obtain full returns to their legitimate property rights. The FTC has settled a number of matters in recent years that dealt with SEPs and FRAND licensing. Antitrust investigations are very fact specific, and I have nothing to add to the public statements made by the Commission, and individual Commissioners, on prior FTC determinations in this area.

Aside from specifics, there's a large body of scholarly work directed to the antitrust analysis of conduct involving standard-essential patents (SEPs), which a patent holder has made a commitment to license on fair, reasonable, and nondiscriminatory (FRAND) terms. On one side of the debate, academics such as Judge Douglas Ginsburg, former FTC Commissioner Josh

Wright, current FTC Bureau of Economics Director Bruce Kobayashi, and former FTC Counsel for IP and International Antitrust Koren Wong-Ervin have written extensively on these issues, emphasizing the availability of non-antitrust remedies to SEP controversies.¹ On the other side of the debate, stressing the benefits of antitrust remedies, is a large body of literature from antitrust experts such as former FTC Chairman Tim Muris and former DOJ Chief Economist Carl Shapiro.² I commend to you the study of this legal and economic scholarship.

5. As GC you sign the FTC’s briefs in the Supreme Court. (You signed the brief in the *Apple v. Pepper* case on Illinois Brick issues that the SG filed on May 8). Can you tell us about the appellate advocacy process at the FTC? What is the FTC’s role versus the SG’s? Should parties talk to you and not just the SG when the Court calls for the views of the United States? Is the FTC interested in filing its own amicus briefs in private cases? If so, are there particular areas of interest?

The FTC has long had a cooperative and collaborative relationship with the Solicitor General’s (SG’s) Office and with the DOJ Antitrust Division. The SG files briefs on behalf of the United States, but it respectfully seeks our input on amicus matters. Indeed, we are often “at the SG’s table” with the Antitrust Division (and sometimes the Civil Division), and our superb attorneys exchange comments and suggestions on drafts. The full Commission must authorize the filing of amicus briefs, so our work in this space requires internal coordination as well—with the Commission’s staff, the Office of Policy and Planning, the Office of International Affairs, and with the Bureaus, as appropriate. Our career litigators know and have worked productively with their DOJ counterparts, and fortunately, Chairman Simons and FTC senior staff (including yours truly) know and respect the Antitrust Division’s front office personnel.

In short, when we can harmonize our position with DOJ, we will do so, as evidenced by recent amicus filings in *Apple v. Pepper* before the Supreme Court and *Intellectual Ventures v. Capital One* before the Federal Circuit.

That doesn’t mean we’ll always file joint amicus briefs. Amicus filings are discretionary, and the nature and depth of the FTC’s and DOJ’s particular institutional interests are case-specific. Also, litigation resource constraints matter a great deal. Sometimes, instead of one joint filing, only one agency, or none at all, may file.

Outside parties should of course feel free to contact both the FTC and DOJ. A joint meeting by both agencies with outside parties may be appropriate, but separate meetings may work as well.

¹ See, e.g., Jorge Padilla, Douglas H. Ginsburg, & Koren W. Wong-Ervin, *Antitrust Analysis Involving Intellectual Property and Standards: Implications from Economics*, GEO. MASON L.R. (forthcoming 2018); Douglas H. Ginsburg, Joshua D. Wright, & Koren W. Wong-Ervin, *The Troubling Use of Antitrust to Regulate FRAND Licensing*, *CPI Antitrust Chronicle* Vol. 10 No. 1 (Oct. 2015); Bruce Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary, et al.*, 78 ANTITRUST L.J. 505 (2012).

² See, e.g., A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, YALE L.J. (2018); Timothy J. Muris, *Bipartisan Patent Reform and Competition Policy*, AEI Working Paper (May 2017); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1992 (2007).

In other words, there's no hard and fast rule of which I am aware. You should expect, however, that staff from both agencies will find it fruitful to exchange notes on what they have heard.

As to issues of particular interest, the scope of the state action and Noerr-Pennington petitioning exemptions remains a hot topic—see, for our example, our *Apple v. Pepper* brief as to Noerr. Cases that address novel or unsettled antitrust doctrinal questions are also grist for our mill.

6. As GC you are responsible for the FTC's Rules of Practice. Are there any thoughts about changes relating to adjudicative proceedings with the new team at the FTC?

I don't have specific thoughts on the adjudicative rules, or on the rules in general, but I will consult on this topic with the new leadership of the Bureaus, and, of course, with the Commission. If you have specific suggestions or ideas, please let me know, my door is open.

7. The FTC has long been a leader in international antitrust, particularly on issues such as due process. What are your thoughts on the state of international due process and what steps do you think are needed for continued progress?

For many years now, the United States Government (USG) has argued for due process improvements in such forums as the OECD and the ICN. Several recent ICN initiatives are particularly noteworthy. In 2018, the Agency Effectiveness Working Group produced new recommendations on due process in competition law enforcement. The FTC-led project developed Guiding Principles for procedural fairness, recommendations for internal agency practices that support sound decision making, and implementation tips for good agency enforcement process. The group also studied how economic thinking and economic analysis can be incorporated into agencies' investigations and decision-making processes. The working group introduced new video training modules on merger remedies and enforcement cooperation as part of the ICN's online interactive educational center for competition authorities from around the world.

The American Bar Association Antitrust Section has also done its part, issuing in 2015 its Best Practices for Antitrust Procedure. The ABA Antitrust Section's International Task Force, on which I serve, has highlighted those Best Practices in filings, such as a January 2018 Comment on the Korea Fair Trade Commission's amended rules on case handling procedures.

Deputy Assistant Attorney General Roger Alford of the Antitrust Division has publicly stated that competition agency due process improvements are a high priority for the Division, and they continue to be a matter of concern to the FTC. The FTC also will continue to advocate for strong due process protections in its consultations with foreign counterpart agencies.³ All this having

³ Shortly after my presentation, on June 1st, Assistant Attorney General Delrahim announced "a new approach for an improved system of competition enforcement. The goal of this approach is to garner increased confidence and respect for antitrust enforcement globally. Specifically, we intend to achieve agreement among competition agencies around the world on fundamental procedural norms. Toward that end, I am pleased to announce that next week, [at OECD Competition Committee meetings, the United States, in partnership with leading antitrust agencies around the world, will introduce and invite the global antitrust enforcement community to help finalize and join the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement." Assistant Attorney

been said, we recognize that promoting strong due process protections is vital to strengthening the rule of law and ensuring fair and effective competition enforcement regimes, and that this is a long-term, continuing project. We welcome the bar's input on the topic in general and on specific problems that practitioners become aware of.

8. Extraterritorial remedies and comity are important international antitrust topics in today's global economy. Do you have specific thoughts on these questions?

I agree and applaud the Commission's 2017 paper to the OECD (written in conjunction with DOJ and on behalf of the USG as a whole).⁴ In short, that paper sets forth the approach taken in the joint DOJ-FTC *International Guidelines*, which were updated in 2017.⁵ With respect to matters involving IP in particular, the USG OECD submission explains that "the Agencies generally rely on a domestic-only licensing remedy because the license can be tailored to permit use of the intellectual property only in the domestic markets affected by the conduct. However, in rare cases, when a broader license may be necessary to provide effective relief, the Antitrust Agencies seek a remedy that is no broader than necessary." The submission goes on to explain our approach to international comity, as set forth in our *International Guidelines*: "even where there is no direct conflict, 'the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law.'"

General Makan Delrahim Delivers Remarks on Global Antitrust Enforcement at the Council on Foreign Relations (June 1, 2018), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement>.

⁴ Available at [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2017\)41/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2017)41/en/pdf).

⁵ Available at https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.