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By Hill B. Wellford, Editor *

Interview with Federal Trade Commission General Counsel Willard K. Tom



Willard (Will) Tom was appointed in May 2009 as the FTC's General Counsel. Prior to his appointment, he was a partner at Morgan, Lewis & Bockius LLP in Washington, DC, concentrating on antitrust law, and he previously held several government antitrust posts. He also has

served in a number of positions within the ABA Section of Antitrust, including as the editorial chair of the 2004 Annual Review of Antitrust Law Developments. The Federal Civil Enforcement Committee caught up with him in February for a short interview.

Federal Civil Enforcement Committee: *Congratulations on your appointment as the FTC's General Counsel. Can you tell us about your background and your goals as GC, and what drew you back to government service?*

Will Tom: Thanks. I've been an antitrust lawyer for 30 years, about ten of those at the FTC and DOJ, and the rest in private practice. I suspect that just about everyone who has ever served at either agency would find it hard NOT to answer the call to return to public service. The opportunities to have a positive impact on the lives of consumers and on the effective functioning of the free market truly are unparalleled. To take just one example, on the morning of January 13, two cases were

argued in the Supreme Court. One was an antitrust case; the other was a Fair Credit Reporting Act case. In both cases, the FTC had joined the Solicitor General's amicus brief and been actively involved in its preparation.* The General Counsel's office is responsible for the Commission's appellate work, and thus takes the lead role in such matters. Not many lawyers outside of government get the chance to have that kind of impact.

As to goals, the General Counsel's office is involved in such a wide range of the Commission's activities that it is hard to generalize without sounding like a laundry list run amok. But I think I would summarize by saying that the Commission is our client; that our goal as its trusted advisor is to help it "see around corners" as it carries out its missions of maintaining competition and protecting consumers; that our goal as its zealous advocate is to win its cases in court; and that we are committed to a process of continuous improvement to carry out those goals a little better each time we re-examine what we are doing and how we are doing it.

FCEC: *Some of our readers may not be familiar with the duties of the General Counsel's office within the FTC. And the role can differ to some degree depending on how the GC and Commissioners wish to use it. Would you please explain the basic tasks of the office and any new functions created by the current administration?*

Tom: Probably your in-house readers will understand our duties right away, because the role of the Office of General Counsel is very much like that of the in-house legal

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* See the *American Needle* antitrust brief [here](#) and the *Jerman* FCPA brief [here](#) – eds.

department of any organizational client. We provide the legal advice and legal representation essential to the organization's mission. But we don't carry out the mission—the business units do that. The only difference is that we are a law enforcement organization, and therefore the business units—the Bureau of Competition and the Bureau of Consumer Protection—are almost entirely made up of lawyers. A great deal of our work deals with institutional matters: ethics, the Administrative Procedure Act, the Freedom of Information Act, the Sunshine Act, the Paperwork Reduction Act, and so on. If an employee files a grievance or complaint, we work with Human Resources and the Equal Employment Opportunity office to deal with it.

We are also the Commission's appellate lawyers. In addition, if the Commission is sued, we represent the agency where the Commission has the authority to represent itself in court—as in the ABA's suit to enjoin the application of the Red Flags Rule to lawyers*—or we are the principal interface with the Department of Justice in cases where we have to be represented by DOJ.

As you suggest, different Chairmen and different Commissioners can also use the office in a variety of ways, just as some CEOs and boards of directors rely on their lawyers for business advice and others do not. I think the tradition around here is that the Chairman and Commissioners are very interested in what OGC has to say about complaint recommendations, policy initiatives, etc. That has certainly been the case since I have been here. OGC can also be called on to assist in writing Commission opinions and for a variety of other tasks. For example, Dave Shonka, my principal deputy, led the recent revision of the [Part 3 rules](#), and heads a task force to review Part 2 rules and procedures.

FCEC: *Could you give us an estimate of the amount of time your office spends on*

* An ABA overview of the Red Flags Rule is available [here](#) – eds.

competition issues versus consumer protection issues, broadly defined? It appears from the outside that consumer protection issues occupy a larger percentage of your time, and if that's correct, why is that the case?

Tom: It's probably true, but not by much. On appellate matters, BCP has a much larger number of cases that get appealed, but when there is a competition case, it sucks up a lot more time. And the amicus activity tends to be heavier on the competition side, as does the Part 3 administrative adjudication, where we can be called upon to assist in opinion-writing. On what I've referred to as institutional or administrative matters, there tends to be more activity on the consumer protection side because there tends to be more rule-making, which means having to meet various OMB and other requirements.

FCEC: *The General Counsel's office under your predecessor, Bill Blumenthal, had a large role in policy and international affairs. This hasn't always been the case, and there are separate FTC offices for those areas. How does your office coordinate or split work with those other offices? What specific U.S. and international policy issues most interest you, personally?*

Tom: The coordination is pretty informal, but it works extremely well. As your question suggests, there are some issues on which I or others in my office have particular interest, experience, or expertise. Intellectual property has been a particular interest of mine for at least the last 15 years, and I have worked closely with Suzanne Michel, Deputy Director of the Office of Policy Planning (Susan DeSanti's office) on a number of matters. The whole set of issues around potentially exclusionary practices such as bundled discounts, market share discounts, and so on, is another area of interest, as is the scope of Section 5.

Many of these issues have an international component, and Randy Tritell, who heads the Office of International Affairs, is not shy about

calling on me and my staff as needed. I get involved myself when I can help, and my staff contributes regularly to FTC and U.S. position papers for the OECD, ICN, and other important international antitrust and consumer protection fora. I also think it is extremely important to assist where we can in the development of some of the newly emerging competition regimes, such as China's.

FCEC: *Of course, one of the ways to shape policy is through court decisions, including those where the FTC is not a party. Can you tell us about the FTC's amicus program?*

Tom: The FTC has long had an active amicus program, and I expect that to continue and, indeed, increase. So I encourage all of your readers to let us know when they see promising amicus opportunities—but remember to do so early! There have been a number of occasions in the past when we have learned of cases only after appellate briefing was underway, and there just wasn't time for us to get involved. I should also mention that we have a terrific relationship with the Antitrust Division and the Solicitor General's office in the amicus area, and I expect we will continue to do a lot of work together, as we did in *American Needle* and (with the SG's office) in *Jerman*.

FCEC: *The General Counsel's office has a role in compliance and enforcement issues, particularly with regarding to compliance with Civil Investigative Demands in investigations. Can you speak to any trends regarding document production and compliance issues, and any tips for practitioners to ensure that the compliance process is a smooth one?*

Tom: Obtaining complete, timely responses to our subpoenas and CIDs is an extremely high priority for us, and we will not hesitate to ask the courts to enforce respondents' obligations. In investigations of unconsummated mergers subject to HSR waiting periods, respondents generally have the incentive to cooperate in a timely way so that we can complete our

investigation and they can move forward with their transaction. Outside that area, however, there is no doubt in my mind that in some cases, respondents and their counsel perceive it to be in their interest to string out our investigations by taking patently unreasonable positions and then offering partial and unsatisfactory compromises at the last minute to stave off court action. I don't think that should be tolerated, and I think we should be getting into court much sooner to make sure that doesn't happen.

Dave Shonka has addressed this topic on many occasions, including at a [recent ABA Antitrust Section teleseminar](#). And counsel who practice before this Commission should recognize their obligation to deal ethically and in good faith with the Commission and its staff. That's not only the most effective way to accomplish the client's objectives in the long run, but it's also a requirement of our rules.

FCEC: *You were one of the principal drafters of the 1995 joint [FTC-DOJ Antitrust Guidelines for the Licensing of Intellectual Property](#). Those Guidelines are now 16 years old. The agencies released their major report on [Antitrust Enforcement and Intellectual Property Rights](#) in 2007, of course, but we've learned from the Merger Guidelines process that the existence of commentaries and reports doesn't necessarily remove the need to update formal guidelines. Is there any consideration being given to updating the IP Guidelines? If not, how does the FTC keep its guidance up to date in this important area?*

Tom: I agree it's a hugely important area, and I agree it's important to keep our guidance up to date. But the IP Guidelines have held up pretty well as a statement of general principles, and I think that further guidance needs to come in the context of specific factual circumstances—through actual cases (and careful, scholarly opinions by the Commission in such cases), through amicus briefs, through closing statements where appropriate, and through studies, reports, and

speeches on specific topics. The Horizontal Merger Guidelines are a little different because the sheer volume of activity makes it possible to generalize in fairly specific ways, if that's not too oxymoronic for you. With lower volume activities, such as intellectual property, vertical mergers, and vertical restraints, I think we need to proceed in a much more common-law, case-by-case manner.

FCEC: *Turning now to a broader question, we note that you previously served in front office positions at both the FTC, under Chairman Pitofsky, and the DOJ Antitrust Division, under AAG Bingaman. How does enforcement practice differ at today's FTC from your previous tenures at the Commission and the Division?*

Tom: Well, first of all, there's a tremendous amount of continuity at both agencies. At both agencies, you have a mission that is clear and sensible, and a terrific career staff that is very dedicated and great at what they do. That said, each leader—and at the Commission, each Commissioner—does put a stamp on the place. At the risk of huge oversimplification, I would group those imprints into three categories: things that were thrust upon the leader by the times, things that involve some imaginative leaps to see a bigger picture out of the pointillism of daily events, and then what might be called “improving the plumbing”—the nearly invisible changes that simply make the institution run better.

For Anne Bingaman, I think the biggest thing thrust upon her was the rapidly changing telecommunications landscape. For a variety of reasons—some technological, some involving major evolutionary changes in the business environment, some involving the AT&T Consent Decree simply getting a little long in the tooth—the tectonic plates were starting to shift. Perceiving that shift, Anne devoted resources along a number of fronts. DOJ was actively engaged in dialogue with all the major players in the business community, the courts, the state regulators, the FCC, the

White House, and especially the Hill. Among other things, DOJ ended up playing a major role in the Telecommunications Act of 1996. In terms of the plumbing, I think perhaps Anne does not get enough credit for things like the honors paralegal program and the dictation system. The paralegal program met with some skepticism initially, but demand for paralegal services exploded as Section Chiefs and lead attorneys saw the tremendous value that these bright, eager recent college graduates had to offer. The person running the program described feeling a bit like the manager of a pizza shop: the phone would ring, and it would be yet another Section Chief asking if he could deliver a dozen paralegals by Monday.

As to big-picture items, the biggest by far is the revamping of the leniency program, perhaps the most successful antitrust enforcement initiative in history. Another one that comes to mind—somewhat idiosyncratically, and probably because of my personal involvement, as you mentioned earlier—is the IP Guidelines. It was, of course, a time of rapid technological change, and daily events, such as the pendency of the *Microsoft* investigation, put intellectual property issues in the forefront of our minds. And, of course, Anne had the good fortune—as well as the skill in recruiting and selecting senior staff—to have Rich Gilbert as her economics deputy. Rich, of course, had done an enormous amount of academic work in the intellectual property area. So a combination of daily events, imagination, and having the talent at hand led, somewhat serendipitously, to the IP Guidelines.

For Bob Pitofsky, I would put in the “thrust-upon” category a number of cases that left their imprint on how we approach certain types of cases doctrinally. *Staples-Office Depot* (decision [here](#)) had a real impact, I think, on a number of levels—the agency's willingness to litigate, the elevation of competitive effect evidence over market definition, how one tries cases involving

counter-intuitive markets, how one deals with econometric evidence. *Toys R Us* (decision [here](#)) had a significant effect on the application of raising-rivals'-costs theories, especially in the recognition of the importance of the horizontal component implicit in such theories. *Time Warner-Turner* (FTC docket [here](#)) was noteworthy for connecting foreclosure theories in vertical cases (whether merger or non-merger) to the issue of economies of scale or scope, especially in its recognition of the importance of the percentage of available cable subscribers to the viability of launching a new programming service.

The “plumbing” aspect is a little harder to articulate than in Anne’s case, but I think we saw in BCP the creative use of strategic planning, and in BC the uses of tight day-to-day management. Probably the biggest “big-picture” contribution in Bob’s tenure was the revival of the Commission’s intended role as an expert body—using workshops, hearings, and Section 6 authority to explore cutting-edge issues, thus providing a much broader knowledge base for its own work as well as that of Congress, other agencies, and the business community.

For Jon Leibowitz, while it’s early in his Chairmanship, he has been a Commissioner for a number of years, so I think his impact is already somewhat visible. In the “thrust-upon” category, the financial meltdown may be at the top of the list, as it has resulted in an incredible number of scams related to mortgage foreclosure, credit repair, job scams, and so forth—a major challenge that BCP is rising to admirably. Perhaps number two on the list has been on the antitrust side: the rising tide of what the Commission has dubbed “pay-for-delay” patent settlements in the pharmaceutical industry. Significant efforts have gone into legislative and judicial solutions to that problem; time will tell how—or if—those efforts will be rewarded. In the “plumbing” category I would put Part 3 and Part 2 reform—the former completed; the

latter on the way. I would also, oddly enough, put the Horizontal Merger Guidelines in this category. It is, of course, a highly substantive undertaking, but a major driver in that effort is simply that the Guidelines have gotten out of sync with what the agencies actually do in merger reviews. Offering better guidance is, in that sense, largely a “good government” initiative—a matter of transparency, rather than major substantive change.

As to “big picture” items, it would be an act of great chutzpah to try to predict what those will be—but why stop now? First, I do think that the “pay-for-delay” problem will be resolved one way or another and that, if resolved well, it will be a major testament to Jon’s creativity and persistence. Second, I think we will continue to see the judicious use of Section 5, where necessary and appropriate, beyond conduct already covered by the Sherman and Clayton Acts. Over the course of his years as a Commissioner, Jon has made clear that he wants to carry out the intent of Congress in using the full range of tools Congress gave to us, where necessary to protect consumers. And finally, I think you will see a willingness to tackle some of the tough doctrinal issues that have been vexing the courts for years in the world of private litigation, such as the proper treatment of bundled discounts and loyalty discounts.

***FCEC:** On a more personal note, you were an antitrust and trade regulation expert before you took the job, and as you just mentioned, you’ve been in the agencies before. Do you find anything left to learn from the General Counsel position? What is old hat to you and what presents a new challenge?*

***Tom:** A big reason I took this job is that it is full of new challenges. As I have often said, only half facetiously, what exactly about 30 years as an antitrust lawyer is supposed to prepare you to be responsible for FOIA, ethics, administrative law, the Paperwork Reduction Act, employment litigation, and all the other issues that end up in the hands of OGC? And*

of course, one of the joys of being an antitrust lawyer is that, after 120 years, the antitrust laws are still constantly renewing themselves.

FCEC: *Finally, we'd be remiss if we didn't ask you for some tips on what to watch for in the near future. Can you share your thoughts on*

any interesting developments that we should be anticipating from the FTC?

Tom: [laughter] I think I'll just have to put in a plug for your committee by telling your readers to watch this space.
