Tips for Agency Practitioners (an Interview with Maureen Ohlhausen)

Editor's Note: This interview with FTC Commissioner Maureen K. Ohlhausen is based on a panel presentation that she participated in at the ABA Antitrust Section's Post-Annual leadership meeting on August 14, 2014.

General Principles for Advocacy before the Commission

Federal Civil Enforcement Committee: Commissioner Ohlhausen, can you start by talking generally about advocacy before the Commission and the value of meetings with individual Commissioners?

Sure. Let me first start with a couple disclaimers. The tips and views I will discuss in this interview are solely my own. Further, most, if not all, of these tips are grounded in common sense and general principles of advocacy. Nonetheless, based on my time on the Commission, they bear repeating.

For me, meetings with outside parties are an invaluable source of information to help me do my job most effectively. In a specific competition or consumer protection matter, I want to hear from the outside parties, including their counsel and, where appropriate, from businesspeople at those companies. And, most of what I will discuss today applies to meetings with parties that are potential respondents in particular cases that staff has recommended the Commission bring.

At the same time, many of my meetings with outside parties and counsel are not matter- or investigation-specific. Rather, I meet fairly often with third parties who are interested in briefing me on industry-wide matters, such as recent developments in technology, emerging business models, or regulatory hurdles that businesses are facing in certain markets. I would encourage both businesses and counsel to come in and update me on significant developments that they reasonably believe are relevant to our enforcement efforts on either the competition or the consumer protection side.

Let me give you some examples of the non-matter-specific subjects that I have discussed recently with outside parties and/or their counsel. They include: (1) suggestions for areas in which the FTC should conduct 6(b) studies; (2) optimal means for conducting consumer and business education, including outreach to certain consumer demographic groups (on the consumer ed side) and to start-up tech companies (on the business ed side); (3) recent developments in China, including merger and other investigations conducted by the three Chinese Anti-Monopoly agencies; (4) changes in technology – including, for example, in the mobile space – and their implications for our various consumer protection efforts; and (5) recently enacted regulations in a particular market that may provide opportunities for the Commission to engage in competition advocacy.

This is just a small sample, but hopefully it gives you a sense of the wide-ranging topics that are fair game for a meeting with this Commissioner. So, at the risk of opening the floodgates, I do want to make it clear that I have an open door policy: if there is something that is relevant to the work of the agency that I may benefit from hearing about, outside parties and counsel should feel free to set up a meeting with me. I'm not saying come in on a weekly or even monthly basis, but please do feel free to pursue meetings outside the context of specific matters. I would also add that, even in these types of meetings, it is useful to have a clear plan for conveying your top points to me. If you've asked for the meeting, don't make me pull the points out of you.

FCEC: Are there any types of meetings that you are particularly skeptical of?

Well, I would say that meetings requested by complaining competitors can sometimes leave me less than satisfied. The biggest issue with these meetings – as with any type of advocacy – is credibility. First, if you come in during a conduct or merger investigation to complain about a competitor, you should have credible, first-hand knowledge of the facts. You should also be able to tie those facts to a viable theory of harm to competition, not just harm to you as a competitor.

Second, and this is more of a substantive point, but you should be careful what you wish for as a complaining competitor. I realize that the attorneys reading this interview are advocates for clients with a wide variety of views and perspectives on competition enforcement. That being said, you should be mindful of the potential consequences of, for example, advocating for an expansive view of Section 5 of the FTC Act – or at least one that is wide enough to cover the conduct of one of your fiercest competitors. One of your other clients could very well end

up being a test case for a new application of Section 5 down the road.

That is not to say that I discount all competitor complaints. There are certainly instances in which harm to a competitor is in fact reflective of harm to competition in a given market. Whether it comes in the form of anticompetitive exclusive dealing, or an abuse of a regulatory scheme to prevent entry by potential competitors, I have seen legitimate complaints from competitors that merited a close look and, in some instances, enforcement action.

What You Should Do *and Not Do* Ahead of Commissioner Meetings

FCEC: What would you recommend that counsel and their clients do ahead of Commissioner meetings?

First, it is always best to give us enough time to read your submissions prior to any meeting we may have scheduled. I realize that you likely will be working feverishly to get us the best possible work product. However, if I do not have time to review the submission prior to our meeting, even the best work product is going to be of limited use. As Judge Sentelle would say when I clerked for him at the D.C. Circuit, "The best bench memo in the world does me no good the day after oral argument."

This leads to my next point, which is quality over quantity. You don't necessarily have to submit a 100-page white paper to convince me that you're right on the facts or the law. A 20- or 30-page submission with solid evidentiary support may very well do the trick.

I would also encourage you to reach out to my advisors to see if there are any specific issues that I would like you to address at our meeting. There may very well be certain questions, issues, or evidentiary points that I will want to focus on during our meeting. If you've had a chance to prepare for those, the meeting is likely to be more efficient – for all involved.

Finally, although this is an admittedly minor point: please, if you could, spell my name right in communications with me and my office. I know there are a lot of H's in my name, and they may not be where you think they ought to be, but if it's not too much trouble, take a second to make sure you've got my name right. I would appreciate it!

FCEC: What would you recommend that counsel and their clients NOT do ahead of Commissioner meetings?

Going back to the quality over quantity point I made previously, it is typically very telling of your case when you simply repackage your previous submissions to staff several times over in what you send me. In other words, if you are saying the exact same thing just slightly differently in five or six different submissions, you may be better off saying it just once.

I would also encourage you to double check the accuracy of whatever data and materials you are relying on in your submissions. I have seen cases of counsel's calculations being incorrect in their submissions – perhaps that was the economist's fault. We've also seen instances in which counsel cites to certain source materials that in fact demonstrate the opposite of the argument put forth by said counsel.

What You Should Do *and* Not Do at Commissioner Meetings

FCEC: What should counsel and their clients do at Commissioner meetings to be most effective?

A general point I would make is that there typically are no silver bullets in doing advocacy before the Commission. Obviously, we're in the business of doing case-by-case analyses – on both the competition and consumer protection side. And, sometimes you are unlikely to persuade me that you're right, given the facts and the law your client is up against. However, you can help the substantive arguments by setting the right tone and atmospherics in which the substance is debated.

I would also note that Commissioners tend to approach these meetings slightly differently. And, of course, a given Commissioner may approach meetings differently, depending on the posture, facts, or issues in a particular case. In some meetings, a Commissioner may be more interested in gathering information; in others, a Commissioner may be more interested in testing staff's or the parties' theories. You should be flexible in your approach, tailoring your presentation to the Commissioner's particular line of questions or focus. Of course, you may get distracted by a Commissioner full of questions and not necessarily interested in the points that you want to make. That is, as with judges and courts, you may run into a "hot" Commissioner. You'll need to be able to answer her questions and then work the conversation back to your main points.

So, with that backdrop, I would make the following recommendations. First, have a good story to tell. Come into the meeting and tell me why the market is changing or has changed, why the claimed efficiencies really will happen, or why the market should be defined differently. Having a good story that incorporates your best arguments and evidence will always help your advocacy.

Second, know the facts well. I would expect you to know them at least as well as staff is likely to know them. For

example, explain the dynamics of the market at issue. Understanding how the business works and where you see it headed is helpful in framing many of the most important issues under consideration. Here, it may be useful to bring businesspeople to a Commissioner meeting. They may be better positioned than their outside counsel to describe how a particular product or service is marketed, how competition works in the market at issue, or the underlying business rationale for certain conduct. However, just having businesspeople at a meeting who don't provide any information is not hugely helpful. Of course, you also run the risk of businesspeople being too helpful – that is, to the case being built against them. However, they can add real value to a meeting.

Third, I want to hear about the economic evidence. I want to know what the underlying economic analysis, including any econometric work, shows and how reliably it is saying what it says. In certain cases, it will be helpful to bring along your economic expert. There are risks involved there as well. However, an articulate, credible economist can be a valuable asset in these meetings.

Finally, Commissioners, as you would expect, are working closely with staff throughout an investigation. If a party has a new theory or set of facts it wants to introduce into the dialogue, it is helpful for the party to run that by staff first. That is not necessarily a hard and fast rule because, if there is a development at the last minute, I certainly want to hear about it. But, it is typically not an effective technique to come into a meeting with a Commissioner with an entirely new theory or data that has not already been presented to staff.

Speaking of staff: be respectful of agency staff. You may disagree with them – heck, I may disagree with them on the very case you're talking to me about – but you will lose a non-trivial amount of credibility if your disagreement reflects a lack of respect, or even worse, scorn for staff and their views.

I would add that this tip applies not just during presentations before Commissioners (and of course staff themselves), but afterwards as well. In at least one instance that I'm aware of, counsel for a complaining third party who was not able to convince the Commission to take action in a particular case felt the need to belittle FTC staff while participating in an Antitrust Section program a few weeks after the case was closed. You're certainly not winning any friends at the Commission level with those tactics.

FCEC: What should counsel and their clients NOT do at Commissioner meetings?

First, fight the temptation to overreach in your facts or legal arguments. You may have a legitimate point, but if it is exaggerated or inaccurate, it tends to undercut your credibility. At the same time, trying to hide the ball is even worse than overplaying your hand, in my view.

Second, I would encourage you to minimize your reliance on PowerPoints. Reading from a 40- or 50-page slide deck is not the most effective form of advocacy. PowerPoints are good as leave-behinds and for use as jumping-off points, but that's typically it for purposes of Commissioner meetings.

Third, your presentation to the Commissioner will be better received by said Commissioner when you're actually presenting to her – as opposed to her attorney advisor or someone from staff who is attending the meeting. Having the presenter engage with someone else in the room for a significant portion of the meeting is not going to be fruitful for the presenter.

Fourth, no matter how much you are enamored of your arguments and no matter how little you may think of staff's or the Commissioner's arguments, you do yourself a disservice by expressing your astonishment or shock with the case that is being laid out against your client. There is zealous advocacy, and then there is overzealous advocacy.

There is also the fairly basic point that you ought to know your audience. When you are meeting with me to try to convince me that the Commission should not act against your client, you may be better off thinking of me more as a judge than a prosecutor. There have been multiple occasions in which attorneys I'm meeting with clearly have shifted into litigation mode and are arguing as though we are already in court. Using litigation tactics in a meeting with a Commissioner is not terribly effective, in my view.

Finally, while I would encourage you to familiarize yourself with my views on specific issues, you don't necessarily want to make substantively different presentations to each of the five Commissioners. You can and should tailor your presentations. However, staff is typically at each of the Commissioner meetings, and quite often Commissioners will ask about the other meetings with the parties. You also don't want to be overly ingratiating in your presentation. At the very least, try not to be overt in your attempts to ingratiate yourself with me. Yes, I'm a Republican Commissioner. That doesn't mean, however, that I'm looking for a minimum number of references to the Chicago School in your presentation. And, yes, I am a mother of four. That doesn't mean you should try to appeal to my maternal instincts in pitching your arguments. Try not to be so obvious!

Best/Worst Presentations?

FCEC: Without revealing any confidences, of course, could you describe the most effective presentation you've seen – perhaps one that caused you to change your mind?

While it did not necessarily cause me to change my mind, the most effective presentation that I have seen was given by an outside counsel to a firm under investigation. This counsel came in alone and coherently and convincingly walked through the alleged conduct, talked about what the firm was in fact doing and why it was not unlawful, and then cogently summarized the relevant case law. This attorney told a simple, yet compelling story that synthesized the evidence and the law.

More generally, I would say that presentations are likely to be effective if they meet the following criteria: (1) they include carefully reasoned, plausible arguments – but at the same time recognize any weaknesses in their arguments; (2) they offer a compelling, but fair and not misleading use of the evidence, including any data or econometrics; (3) they utilize businesspeople and/or economic experts, where appropriate; (4) they address staff's arguments and answer all of my questions – or at least get back to me very soon after the meeting on any that they weren't able to answer at the meeting; and (5) they employ zealous advocacy that shows a strong conviction in the arguments being offered, but that stays respectful and doesn't cross the line into overzealous advocacy.

At bottom, a presentation that pulls together the law, the relevant facts, and the economics and leaves me with a cohesive picture at the end is most likely to persuade me.

FCEC: And on the same condition of confidentiality, what is the biggest mistake that you have seen – something that could lose ground for the presenters?

Well, here a specific meeting – in a consumer protection matter – does come to mind. And it likely didn't change my vote in that matter, but it was an unfortunate meeting for the party at issue. Let me put it this way: if you bring in a businessperson to talk about how your product or service works, and how it works is central to the case, it is not in your client's best interest to get stumped by a Commissioner's fairly basic, yet ultimately important question on the functioning of the product or service. The net impression I got from that meeting was that the company clearly was not taking the allegations against it very seriously. That was unfortunate and certainly did not help their defense.

What Happens after Commissioner Meetings?

FCEC: So, what happens after the parties leave your office?

Typically, I provide staff the opportunity to stick around and address with me any new issues or arguments that the parties just made. In a sense, they get the opportunity for some ex parte rebuttal. Of course, as is often the case, the parties may have scheduled back-to-back Commissioner meetings, and so both the parties and staff are running off to the next meeting. That reminds me – if I'm the fourth or fifth Commissioner that you've given your presentation to, it better be darn good by that time!

I also have a couple recommendations for after any Commissioner meeting. First, please don't spam me afterwards. If you have subsequent submissions on a particular matter, by all means send them to me or to my attorney advisors. But, please be judicious in sending me emails after a case is over – particularly if those emails amount to just FYIs on various topics that may or may not be of interest to me as an FTC Commissioner.

Second, you're not going to do yourself or your client any favors by complaining to my advisor after a meeting that I only spent 45 minutes listening carefully to everything you had to say – particularly when you spent a good amount of that time patronizing me, rather than making a compelling case for why the Commission should act against one of your competitors.

Competition Versus Consumer Protection Meetings

FCEC: You are privy to meetings in both the competition and consumer protection areas. Are there any notable differences in those meetings? How do they compare?

There are many similarities in those meetings, including a highly fact-intensive analysis and the use of experts. However, there are some key differences. For one, you have expert economists on the competition side, but often you will have scientists on the consumer protection side – at least in advertising substantiation cases. They're both experts, but they provide very different types of information.

The other main difference between these two types of meetings is the interaction with the businesspeople that may be in attendance. On the competition side, you will typically have a businessperson or two talking about the business rationale for certain conduct or the types of efficiencies that a merger is likely to yield. The businesspeople are usually pretty staid. On the consumer protection side, we often see businesspeople or owners of a business who are perhaps too vested to provide objective information. They are true believers in the product at issue.

They also want to focus on the company's many satisfied customers, or the company's strong environmental record, or some other non-consumer protection argument, rather than the deceptive advertising they engaged in. In those cases, it would be useful for outside counsel to exert some control over the businesspeople – as difficult as that may be – so that they keep their emotions in check and don't stray too far away from the relevant legal arguments and evidence in a particular case.

Concluding Thoughts

FCEC: Do you have any concluding thoughts or recommendations for those who practice before the Commission?

Let me finish with a couple tips from a former Commissioner that have stood the test of time in terms of their applicability and usefulness. In 2000, former Commissioner Sheila Anthony gave a speech in which she laid out her tips for those practicing before the Commission.

One of Commissioner Anthony's tips was to educate your clients so that they have reasonable expectations regarding the Commission's investigatory and deliberative processes and the time involved in those processes. I think that remains good advice today. Staff does a good job of letting counsel know about the time it can take for a Commission vote. We do have a large number of matters – both competition and consumer protection – in front of us at any given time. Putting unnecessary time pressure on the Commission to act typically is not helpful.

Now, the timing for a Commission vote is most typically an issue for parties who want to close their mergers following a recommendation to close or the reaching of a consent agreement with staff. If you are running into a hard deadline, I think it is more effective to submit a letter to the staff or the Commissioners explaining your specific timing issues and the consequences of missing your deadline. If those are compelling, I and my colleagues will do our best to prioritize your matter. Of course, all merging parties want to close their transactions as soon as possible. However, if you significantly miscalculated the amount of time the investigation would take and negotiated a ticking fee that kicked in too soon, that's not the most compelling reason to prioritize your matter over others. If you truly believe staff unreasonably extended the investigation, you can talk to us about that. Otherwise, sit tight; we will move as quickly as we can on your matter.

A second tip from former Commissioner Anthony also relates to the interactions between counsel and the Commissioner offices toward the end of an investigation. Apparently at the request of her attorney advisors, Commissioner Anthony requested that practitioners not ask for inside information regarding the status of their case. That tip rings true today – at least according to my attorney advisors. If you have pertinent information that you want to convey to my office, or if you want to make yourself available to answer any questions that we may have, great. However, there are restrictions on what we can tell you regarding Commission votes, including when the matter will be moved for a vote and when the vote is expected to be completed. Of course, you are free to ask for that information – and I'm fairly certain you will continue to do so – just know that my advisors likely won't be able to answer all the questions you have.

Speaking of advisors, I would put in a plug for treating them with respect as well. After all, you likely will have more access to them than you will to me on any given matter. You should also be prepared to occasionally get pushback on your arguments from the advisors. Each of the Commissioners has their advisors on leashes of varying lengths – some short and some long. (No comment on the length of my leashes.)