COMMENTS OF THE ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION ON REFORM OF FTC PART III PROCEEDINGS

Section of Antitrust Law

American Bar Association

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INTRODUCTION

The Antitrust Section of the American Bar Association appreciates the opportunity to comment on the FTC's adjudicatory rules, and to suggest modifications to the Commission's adjudicatory process. These views are being presented only on behalf of the Section of Antitrust Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the ABA.

The comments were prepared principally by a Working Group of members of the Section's FTC Committee and the Government Antitrust Litigation Committee. By letter and telephone, the Chairs of these Committees sought and received the views of numerous counsel (including FTC counsel and private counsel) who participated in FTC Part III adjudications over the last several years. The comments that follow represent a consensus of the views that emerged during that process.

Central to the effectiveness of FTC adjudication is that cases be resolved quickly, efficiently, and on a complete record. There is, however, a general perception that FTC adjudication takes too long, resulting in undue expense to the Commission, the Respondent and third parties. Prolonged delay can also jeopardize the effectiveness and relevance of any relief ordered. The problem of delay relates both to trials at the FTC, and also to the appellate process within the Commission. A secondary, non-trivial and related problem has to do with control by the FTC's Administrative Law Judges ("ALJs") over trials at the Commission.

The Section of Antitrust Law believes that these problems are soluble through a modest combination of implementation of the existing Rules of Practice and Procedure (the "Rules") and through selected changes to the Rules. The following observations and recommendations address both these categories and are solely aimed at the goal of improving the outcome of the process, not to favor one side or another.

I. WHY DO COMMISSION ADJUDICATORY PROCEEDINGS TAKE SO LONG?

The first step in remedying the perceived problem is to understand its roots. A number of factors contribute to the length of FTC proceedings. First, delay seems to be endemic to much civil litigation. Second, FTC cases tend to be unusually complex, at least on the competition side. This is partly because a thorough understanding of an industry is generally a prerequisite to evaluating the implications of a challenged business practice or merger. Third, unlike the typical civil case where a plaintiff is anxious for a resolution in order to recover money, in some instances the parties to an FTC proceeding may not have the same sort of personal stake in a speedy outcome. Since a common form of relief flowing from FTC proceedings is a cease and desist order, a Respondent may have little incentive to expedite the process and may even prefer paying attorneys to keep the process from reaching a resolution, rather than run the risk that the resolution will be adverse. A possible exception, perhaps, tending to show the feasibility of accelerating the pace of litigation, involves merger

cases in which preliminary injunctions have been entered, although such cases, when brought by the FTC, rarely involve a full adjudication on the merits.

II. FEATURES OF FTC ADJUDICATORY PROCESS SUGGEST THE OPPORTUNITY FOR MORE EXPEDITED PROCEEDINGS

Despite the complexity of many Commission adjudications, there are nonetheless aspects of the Commission's adjudicatory process that suggest the possibility of greater efficiency. For example:

- FTC litigation is typically preceded by extensive pre-complaint investigation with the benefit of compulsory process. In the case of mergers, there has also normally been a Hart-Scott-Rodino ("HSR") filing, and typically a submission by the parties in response to a "Second Request."

- FTC Administrative Law Judges and Commissioners are in a unique position to impose tight deadlines upon the adjudicative process, and there exist few of the distractions that can accompany civil litigation in a federal court (e.g., criminal matters with strict statutory deadlines).

- Many time-consuming pretrial procedures required in federal court are irrelevant to Commission proceedings (e.g., jury selection, preparation and argument of jury instructions and motions in limine, interruptions in the trial day for motions, etc.).

- Delay in complex civil litigation may arise from the conflicting schedules and agendas of the numerous parties; most FTC litigation involves one or, at most, only a few Respondents.

- The range of Part III cases is limited and the ALJs are experienced and knowledgeable about antitrust law and consumer protection law in general, as are most counsel who practice before the FTC.

In short, the specialized nature of the FTC's ALJs, the somewhat repetitive nature of the standards applied to varying fact patterns, the absence of juries, and the overall experience of counsel for all sides suggest that modification be considered that would take advantage of the unique nature and expertise of the FTC and its ALJs.

The modifications described below fall into two broad categories: those that, for the most part, only require changing current practices under existing rules; and those that require modifications to the Rules of Practice and Procedure. They are relatively limited in scope, but have the potential to improve the process to the benefit of all concerned.

III. STEPS THAT CAN BE TAKEN WITHOUT MODIFYING EXISTING RULES OF PRACTICE AND PROCEDURE.

The proposals set forth in this section could, in the main, be adopted without modifying existing Rules. Nonetheless, we do mention in this section two matters that would require some change to the Rules (adoption of the Federal Rules of Evidence and expanding the authority of the ALJs to impose limited sanctions).

A. The Commission Should Articulate That The Expedition Of Administrative Adjudication Is Its Highest Priority

The Commission should articulate unambiguously that its highest priority is the expeditious resolution of administrative litigation. In addition to stating this priority, highly visible steps should be taken toward accomplishing this goal.

B. The Administrative Law Judges Should Be Encouraged To Exercise More Control And Discretion In Moving Cases Towards Resolution, And Should Be Provided With The Tools To Do So

In general, the ALJs are perceived to have made great strides in increasing the pace of adjudicative proceedings. Nonetheless, further progress is possible. A formal program should be undertaken to encourage ALJs to view their role as experts in case administration, and actively to strive to develop procedures that would render the process more efficient. Considerable literature has been developed over the past few years evaluating the results of experiments in state and federal courts in expediting the process of civil litigation.[1] Various techniques should be actively explored to develop appropriate methods for implementation of adjudicatory procedures to expedite that process. Many states have mandated continuing education for practicing attorneys. A similar requirement can be imposed by the FTC on its own ALJs with particular emphasis on procedural, evidentiary, and substantive antitrust education. However, if such a requirement is imposed, the FTC must provide funding to underwrite such continuing education.

The best intentions may be useless without the tools to do the job. Under Rules 3.38 and 3.42, the ALJ is given the power to impose certain sanctions in order to enforce scheduling and discovery orders. The range includes issue sanctions and suspension or

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[1] For example, the U.S. Administrative Office maintains a publicly-available compendium of numerous state and federal efficiency studies and analyses of various civil procedure reform initiatives. Moreover, The Committee on Court Administration and Case Management to the Judicial Conference similarly made extensive studies of the implementation of numerous experimental reforms undertaken by designated district courts throughout the U.S. See also S. Subrin, Federal Rules, Local Rules, and State Rules, Divergence and Emerging Procedural Patterns, 137 U. Penn. L. Rev. 1999 (1989); Symposium: The Appellate Judiciary -- Its Strengths, Its Woes, and Some Suggestions For Reform: Expedited Procedures for Appellate Courts: Evidence from the California Third District Court of Appeal, 42 Md. L. Rev. 696 (Summer 1983).

disbarment of counsel from further proceedings in the matter.[2] It is our impression that these sanctions are so severe that they are rarely, if ever, imposed, leaving the ALJ powerless to control less egregious dilatory or contumacious conduct. The Commission as a public agency is understandably loathe to have issues determined in a sanctions context rather than on the evidence. Disbarring an attorney is obviously a draconian sanction, and one that becomes a very personal battle between the ALJ and the attorney. The rules therefore should be amended to empower the ALJ to award monetary sanctions against a party or its attorney for failure to cooperate in discovery, inappropriate disruption of depositions or other proceedings, frivolous failures to stipulate, and other dilatory conduct that does not rise to the level of warranting issue sanctions or disbarment.

C. The Pre-Trial Process Should Be Expedited

Whether by rule or by practice, the pre-trial process can be accelerated. As under the Federal Rules of Civil Procedure, simultaneous discovery should be the norm. This will reward the party prepared to move expeditiously while preventing the slowest party from retarding all progress on the case.

Rule 3.21 provides for evidentiary hearings to begin within six months of entry of the scheduling conference order, unless the ALJ determines that the complexity of the case requires otherwise. An analysis should be undertaken to determine whether the exceptions are swallowing the rule, resulting in extending the discovery period. If any party objects to a request for extension, the ALJ's order should include a rationale which supports his or her ruling in this regard, bearing in mind that the burden for extending the discovery period lies with the party requesting the extension. Consideration should also be given to directing complaint counsel to press for a hearing in accordance with Rule 3.21.

Rule 3.21 provides that the ALJ may hold prehearing conferences. These conferences can be a useful tool to keep the discovery process on track and to remind the parties that the court intends to abide by the six month discovery period. Consideration should be given to regularly scheduled pretrial conferences during the discovery period.

D. The ALJs Should Exercise More Control Over The Adjudicatory Process

1. Cumulative Evidence Should Be Excluded

The fundamental job of the ALJ is to build a record for the Commission's de novo review. Lumbermen's Council v. F.T.C., 115 F.2d 178, 183 (9th Cir. 1940). Effective

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[2] For example, if a party fails to comply with a subpoena or discovery order, the ALJ may rule that any pleading, motion or other submission "concerning which the order or subpoena was issued, be stricken or that a decision of the proceeding be rendered against the party, or both." Rule 3.38(b)(5). Similarly, the ALJ has the authority to suspend from proceedings any attorney acting in "dilatory" or "obstructionist" manner. Rule 3.42(d).

performance of that job requires that the Commission receive relevant and probative evidence it needs to render its final decision, but also that the record not be so overburdened with marginally relevant or cumulative materials that the reviewing authority can not do its job expeditiously. The ALJs should therefore be encouraged to exercise discretion in excluding unnecessarily cumulative material and evidence that is not admissible pursuant to the Rules of Evidence, unless there is a carefully considered and articulated rationale for the admission of the material.

2. Greater Adherence to the Federal Rules of Evidence

An often-heard criticism of the ALJs is that they accept hearsay and other inadmissible evidence "for such weight to which it is entitled". Although such an open evidentiary approach does reduce the risk that useful information will not be available to the Commission, it can also result in a bulky and cumbersome record that is extremely unlikely to be mastered by the reviewing authority in a timely and efficient manner. Careful consideration should be given to complete adoption of the Federal Rules of Evidence in Commission adjudications, bearing in mind that FTC proceedings must conform to the requirements of the Administrative Procedure Act. While it may be argued a restriction on hearsay evidence precludes relevant and probative information, Federal Rule of Evidence 803 provides for the admission of hearsay if demonstrated guarantees of trustworthiness and other criteria are satisfied. Requiring the ALJ to articulate why otherwise inadmissible material is sufficiently trustworthy to be considered probative will help focus critical evidentiary issues, and ensure decisions on a firm evidentiary footing. At a minimum, greater adherence to the Rules of Evidence and vigilance in excluding cumulative evidence might help to speed up the adjudicatory and review processes, and is likely to result in decisions based on a more solid evidentiary footing.

The safeguard of a "rejected exhibit" file ensures that any erroneously excluded material is still available to the Commission.[3] Rule 3.43(g). A more rigorous standard of admissibility would also discipline the parties to think through what evidence is really probative and what is not, and to limit proffers to significant information.

3. Presentation of Witnesses Should be Expedited

The expedition of the presentation of evidence can be implemented to a considerable extent within the present Rules. While the rigorous schedules imposed by some federal courts in civil litigation need not necessarily be imposed by the ALJs (although even this approach may have merit in some cases), it ought to be the rule rather than the exception that trials proceed continuously through the case-in-chief and through the defense case with the only break being between the two. The ALJ and the parties should attempt to estimate the number of witnesses and the length of testimony at the outset of a trial, and make every effort to stick to the schedule set. The ALJs should at all times strive to ensure that each court day is used

[3] The Commission should only consider such materials if a party specifically appeals an evidentiary ruling and if the Commission finds that such evidence is wrongly excluded.

to maximum advantage, and that witnesses are scheduled so as to minimize dead time. Section members report that, in their experience, valuable trial time is often consumed by recesses or evidentiary issues that could have been addressed in advance of trial.

There seems to be little reason why the presentation of expert witnesses' direct testimony should not be by declaration, followed by a brief direct examination during which the expert summarizes his or her conclusions and allows the ALJ an opportunity to assess the expert's credibility before cross-examination. We believe this approach would expedite the presentation of evidence and ensure effective and complete cross-examination and a fair joining of the issues. This procedure is used in many federal courts[4] and takes advantage of the absence of a jury. Requiring seriatim exchange of expert reports well in advance of trial would tend to assure adequate time for pretrial cross-examinations as well, so that the cross-examinations at trial could be efficient and limited.

4. Proposal Findings of Fact Should Be Exchanged Prior to Trial

The current Rules contemplate that Complaint Counsel and Respondent's Counsel stipulate to matters not legitimately in dispute. Rule 3.21(b). The Rules also provide for the exchange of "non binding statements" shortly after filing of the complaint. Rule 3.21(a). Requests for admissions and interrogatories also are designed in part to isolate the facts that legitimately must be tried. Nonetheless, there remains the perception that, in practice, much of the testimony and documentary evidence eventually introduced addresses points not seriously in dispute or not central to the case.

In some cases, a better means of ferreting out the issues upon which there is legitimate dispute, and identifying the contrary positions of the adversaries, may be to require that proposed Findings of Fact and Conclusions of Law be submitted and exchanged prior to trial. This method, which would be imposed at the ALJ's discretion, appears to have several advantages:

- It would provide a vehicle for the ALJ to focus the issues upon which evidence must be received, and would provide a context in which the ALJ can actively seek reasonable stipulations or limit the time available to the parties on peripheral issues.

- It would help assure that issues are joined early, and that the parties' evidence is focused on matters of importance, and not cumulative or peripheral.

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[4] See e.g., United States v. IBM, Civ. Action No. 72-344 (S.D.N.Y.) (court preliminarily determining that consent decree termination hearing to proceed by direct affidavit, followed by oral cross-examination); Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc., 869 F. Supp. 1130 (S.D.N.Y. 1994) (testimony introduced through affidavit, followed by oral cross).

- It would focus the ALJ on the importance of proffered testimony, and facilitate the exertion of more control over the admissibility of evidence, minimizing concern that excluded evidence may become significant to the parties as they draft their proposed findings after trial.

- It would help impose discipline on counsel, and reduce any incentive by a party to make an unbalanced evidentiary presentation at trial on the off chance that the information might somehow become important to a finding of fact after trial.

Implementation of some or all of these proposals could help to accelerate the pace of administrative trials. Certainly, accelerating trials through these techniques seems preferable to setting rigid time limits for the presentation of evidence or limiting the number of court days per side, although such approaches may also be warranted in some limited circumstances.

IV. SPECIFIC MODIFICATIONS TO THE RULES OF PRACTICE AND PROCEDURE

A. Rules Should Be Promulgated Requiring The Commission To Decide Cases And Issue Its Opinions Within Specified Time Periods

Delay is not solely the province of the adjudicatory process, but includes the Commission's own handling of appeals from the ALJ's decision. It is not unusual for the appeals process to take longer than the entire trial, post-trial briefing and issuance of the Initial Decision. The time periods in the rules applicable to the ALJs seem to have been effective, at least to some degree, in expediting the Initial Decision. The Commission should consider imposing similar requirements upon itself. See, e.g., Rule 3.51 (fixing entry of initial decision within 90 days after completion of hearings).[5] It should be unacceptable for the Commission to take a year or more after oral argument to issue its Decision. As noted, given the limitations on the type of relief available to the Commission, it is absolutely critical to the effectiveness of the Commission's mission that cases be decided quickly.[6] It should be

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[5] Various appellate courts, via internal operating procedures, similarly impose time deadlines upon themselves to assure speedy disposition of appeals. For example, Third Circuit judges are expected to draft assigned opinions within 60 days. United States Court of Appeals for the Third Circuit Internal Operating Procedure Rule 5.6.3. Moreover, each panel participant must communicate disapproval of any draft opinion within eight days of circulation, or such failure will be deemed approval of the opinion as drafted. I.O.P. Rule 5.6.2. Similarly, while not binding, the Fifth Circuit has stated in its Internal Operating Procedure rules that the "median period for rendering an opinion after the case has been orally argued ... is 60 days." United States Court of Appeals for the Fifth Circuit Internal Operating Procedure Rule 47.5.3.

[6] It has been suggested that the Initial Decision become final if the Commission has not issued its Decision within 180 days. Such a rule would create an incentive on the part of a Commissioner dissenting from a majority in favor of reversal to impose road blocks to issuance of a Commission Decision, and therefore is not favored by the Section.

noted that the suggestions set forth above, to the extent that they may result in a trimmer record, also facilitate speedier review.

B. Rule 3.36(b) Should Be Modified So That Respondents Can Gain Full Access To Evidence Gained In Complaint Counsel's Pre-Complaint Investigation As A Matter Of Course

Rule 3.36(b) provides that a prerequisite to issuance of an inspection demand on Complaint Counsel is a showing that "the information or material sought cannot reasonably be obtained by other means." Pursuant to this rule, ALJs can exercise wide discretion as to the circumstances under which a Respondent can obtain substantive discovery of the information collected by Complaint Counsel during its precomplaint investigation. We recommend that this rule be modified so as to allow discovery of third party information collected during the course of the Staff's pre-complaint investigation as a matter of course.

The apparent rationale for the existing rule is the dual desire to prevent unwarranted intrusion into deliberative materials and to protect the confidentiality of third parties. The first concern can be addressed by limiting discovery to non-privileged third party evidence, such as business records or investigational hearing transcripts and withholding letters of complaint or notes of informal interviews, until such time as the informant has been designated a witness.[7] The second concern is more problematic. The Commission has a legitimate purpose in ensuring precomplaint cooperation from third parties. Such cooperation may be jeopardized if informants cannot be assured that their identities will be withheld from the Respondent, or that the confidentiality of their business records will be maintained. On the other hand, the Respondent has an interest in obtaining relevant information, and the public has an interest in expediting the proceeding. Requiring the Respondent to subpoena from third parties information already in the possession of Complaint Counsel is time consuming and wasteful. An acceptable compromise may be to permit Respondent access to relevant business records of third parties after affording those third parties notice and an opportunity to seek a suitable protective order. This compromise protects the Commission's legitimate concerns while affording open discovery to the Respondent. We also note that this modification to the Rule will bring Commission practice closer to that of the Department of Justice, which is governed by the Federal Rules of Civil Procedure. Open discovery has not appeared to hinder the ability of the Department to obtain necessary information pre-complaint.

V. WHAT CAN BE DONE TO AMELIORATE THE PERCEIVED UNFAIRNESS IN THE DUAL ROLE OF THE COMMISSION AS BOTH PROSECUTOR AND JUDGE?

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[7] Under current procedures, interview notes are considered Complaint Counsel's work product unless they constitute so called "Jencks" statements, i.e., virtually verbatim transcriptions of the witness' statement. We see no reason to modify this rule.

While there has always been debate as to whether the dual role of the Commission as both prosecutor and judge is appropriate, that debate is well beyond the scope of these comments. Nonetheless, within the context of changes to the Part III Rules, proposals can be made to segregate these roles more clearly, thereby improving the perception of fairness while further reducing delay in the adjudicatory process.

Rule 3.25 (c) provides that if Complaint Counsel, "including the appropriate Bureau Director" executes a settlement agreement, the Secretary "shall" issue an order withdrawing the matter from adjudication. Rule 3.25 (d) provides that the ALJ may certify to the Commission a settlement proposal that has been rejected by Complaint Counsel if the ALJ determines that there is a likelihood of settlement. If the question is certified, the Commission has discretion as to whether to remove the matter from adjudication, based upon its assessment of the likelihood of settlement. Once a matter is removed from adjudication, the rules governing ex parte communications with Commissioners no longer apply, and the proceedings are generally conducted as though they were pre-complaint. Respondents are then free to meet with individual Commissioners, and Complaint Counsel may also meet in private with Commissioners with no representative of Respondent present. If the settlement is rejected, the matter returns to adjudication, with the Commissioners presumably required to disregard what was said during settlement talks, and limit themselves to the record in deciding the matter.

These procedures raise a number of issues. First, there is no time limit on the Commission's decision to remove the matter from adjudication. If the adjudication has been stayed pending the Commission's determination, lengthy delays may occur. Second, the Commission seems to have taken the position that Subsection (c) requires unanimity among the lawyers actually trying the case and their managers and policy makers in the Bureau, before the matter is removed from adjudication automatically. As a result, a matter that the Bureau Director and other senior managers believe can be settled may languish in litigation because there is not agreement by a minority of the litigating staff to accept a settlement. Conversely, a settlement proposal opposed by all Commission Counsel up to and including the Bureau Director can be certified to the Commission by the ALJ.

The current Rules presumably are designed to ensure that a meritorious case supported by Complaint Counsel is not abandoned based on the judgment of the Bureau Director alone. Conversely, the Commission should not be denied the opportunity to consider relief thought to be effective by the neutral ALJ just because the relevant Bureau disagrees.

Leaving aside the question of whether these goals are worthwhile, they come at the cost of interjecting the Commission's prosecutorial role into the middle of an adjudication. In the event that Bureau Counsel disagree with the proposed settlement, they create the uncomfortable position of a Respondent negotiating directly with the Commissioners who will eventually be deciding the case if it does not settle. Similarly, removal from adjudication allows Complaint Counsel the opportunity for ex parte communications with Commissioners during the middle of the adjudicatory proceeding, and much closer to the time that the case will be decided. A rule that would require the Bureau Director to approve any settlement

before a matter is removed from adjudication may resolve this issue, as would precluding ex parte communications during this period and a rule requiring the Commission's consideration of settlement agreements to be on the record. Such procedures would bring Commission practice closer to that of the federal courts in conducting Tunney Act hearings. We believe the Commission should consider them.

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The Section of Antitrust Law appreciates the opportunity to comment on the Reform of the Federal Trade Commission's Part III Proceedings. We are submitting separately a list of the names, addresses, and telephone numbers of counsel who, to our knowledge, have been significantly involved in Part III adjudication in recent years. We invite you to communicate with some or all of them, in their individual capacities, on the subjects addressed herein or on related subjects.

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