

PRESIDENT'S MESSAGE

RBG Reminds Us to Forget Work-Life Balance: It's Just Life

By Tara Aschenbrand



Earlier this summer, OWBA hosted a screening of *RBG*, the documentary exploring Justice Ginsburg's exceptional life

and career. Prior to the screening, we enjoyed hearing from Justice DeGenaro and Judge Southern regarding their experiences and advice to female attorneys. At the end of the documentary, I walked out proud of the work that has been done by leaders and trail blazers in the legal profession including Justice Ginsburg, but I enjoyed learning about the support that Justice Ginsburg had from her partner in life.

It reminded me of a CLE that I attended years ago where the moderator asked the typical final question: "What one piece of advice would you like to give to younger female attorneys?" The audience and fellow panelists roared in laughter at the response of one of the panelists as the successful female General Counsel for a large organization responded "marry well." After the initial surprise, she elaborated that her spouse provided the support to enable her to thrive in her career.

Earlier this spring as I prepared

for the OWBA Annual Conference and Meeting and taking on the role of President, I reflected on this piece of advice. In fact, we highlighted the importance of having a supportive spouse at our Conference in the session "Forget Work-Life Balance: It's Just Life!" During the session, Claudia Herrington (JobsOhio Director of Compliance) and her husband Robby Simpson (Columbus Academy teacher) moderated a panel of female attorneys (Kelley Griesmer, The Columbus Foundation; Meghan Hill, Squire Patton Boggs (US) LLP; Jennifer Fuller, The Wendy's Company) who shared their stories on how they balance their life. Being vulnerable and very real, the panelists were then joined by their spouses (Gregory (Greg) Gorospe, Ice Miller LLP; Aaron Hill, American Electric Power; G. Drew Fuller, Battelle Memorial Institute) who weighed in on how their life works. Furthering the topic discussed at this session, I reflected on how my life works and then asked other female attorneys how their life works:

Tara Aschenbrand, Sr. Assistant General Counsel, OhioHealth:

Over the years, I have learned to give myself grace and embrace the village

who helps to make my life work. I have planned the holiday party for my kids' class including games and crafts only to have to bail on it for a client emergency. But thankfully, I can count on my husband to step in. Although arts and crafts are not my husband's expertise, he is willing to follow my detailed, written instructions to ensure that we don't miss a beat as a team raising our three kiddos. We have also learned to take advantage of and be grateful for the quiet, rare moments that we can steal from the chaos of our crazy schedules as a family of five.

(Continued on page 2)

Inside this issue

Member Benefit Highlight: Networking	2
#DoSomethingAboutIt	3
Women in the Judiciary: From Florence Ellinwood Allen to RBG and Beyond.....	6
National Urban League Hosts Pro-Bono Street Law Clinic in Columbus	7
Arbitration Agreements and Class Action Waivers.....	8
FTC's Antitrust Complaint Against 1-800-Contacts	9
Highlighting a Member of the OWBA Leadership Institute - Amber Justice-Manning.....	11
Sustaining Members/New Members.....	12
Celebrate OWBF's 10th Anniversary.....	13



Jennifer Edwards, Partner, Baker & Hostetler: My family and I have worked hard to see the “long game”— a life that is busy

with different things at different times but that also allows us great flexibility. Sometimes we are busy because we are getting ready for a baseball tournament or a dance recital and sometimes it’s because I am in collective bargaining negotiations or trial. We then try to take “noisy” advantage of and focus on the times that we have great flexibility— a random day at the pool or the movies or a quick trip out of town. Our long game is a family that thrives because each of us is able to pursue things that fulfill her or him as an individual while coming together to enjoy this life as a team whenever we can.

Also, as I tell all the young lawyers who ask, I am learning to live my best life by showing myself the same grace that I show others – recognizing that

getting everything done sometimes means that my hair is a mess or my kid shows up to a game in the wrong color jersey, and that’s okay.



Lindsay Ford Ellis, Senior Associate Counsel, Central Ohio Transit Authority (COTA): We have a family calendar in our

kitchen that lists out all of our events/schedules. Additionally, when things get really crazy, I just try to take it one day at a time. I’ll ask myself, what’s the highest priority at this moment? If I think about everything, I get overwhelmed.



Sarah Perez, Perez & Morris: I make it work by embracing the imbalance of it all and not getting bogged down by the stress of wanting

each area of my life to be 100%

perfect, 100% of the time. That’s just not possible. I also refocus daily on my priorities, which are for me, faith, family, firm—in that order. It helps me make healthy decisions and stay grounded on what’s really important to me as a working mom, wife, friend, co-worker, manager and woman.

Elizabeth Trende, Senior Associate General Counsel, The Ohio State University Wexner Medical Center:

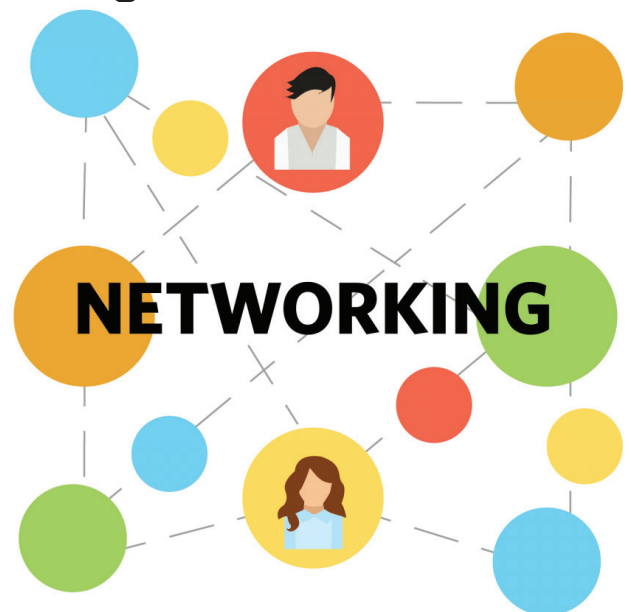
Given that there’s no such thing as balance, here is what has helped me. I try not to think of work versus life in terms of “versus”. If we cast one side as the dark force that we have to counter, we are always going to view that side as negative. I practice graciousness with myself. Maybe I just completed a contract, but there were people at the end of it -- lives, jobs, relationships that would not have been, maybe even cures. The world where my children live will be improved because of my work this day. ■

Member Benefit Highlight – Networking

Are you using all of your OWBA member benefits? From events to education, publications to charity, OWBA offers members amazing benefits. To find a complete list of benefits, please visit www.owba.org/memberbenefits2.

Networking is a common topic of conversation in today’s career and college world. Growing your network is seen as a priority during college, and is to be carried on into your career. OWBA allows members to expand their network with peers around the state and within districts through events and educational seminars.

Networking provides you with connections to industry peers, future and current opportunities, advice and a general sense of community. Stay up-to-date with our calendar of events so you can take advantage of your OWBA network. To find a list of future events, please visit www.owba.org/events. ■



#DoSomethingAboutIt

By Judge Marie Hoover



I have served almost 5 ½ years of my first term on the bench as the first woman to be elected to the Fourth District Court of Appeals. I am currently neck

deep in a campaign for re-election in November 2018. When campaigning in 14 counties, I understand that I have a short period of time to make good and lasting impressions on people that I meet. Being a lawyer, I have been trained to communicate as efficiently and effectively as possible. I break down complex issues and fact patterns into simple concepts. One of the concepts that I have been communicating to others during my re-election campaign is #dosomethingaboutit. I have been explaining to people that whatever your passions may be, #dosomethingaboutit.

Ever since I was a little girl growing up in the 1970s and 1980s, I was trained by my physician father and nurse mother to always work hard. They also taught me to stand up for what I believe and not to be afraid of the unknown. Get educated and gain experience so that the “unknown” becomes the “known.” Prepare well; and take calculated risks. I was reared with the philosophy of #dosomethingaboutit.

When I graduated from law school from the Ohio State University in 1994, my class was approximately 50% male and 50% female. Since then, I have practiced in both Ohio

and Kentucky; however, my practice centered mainly in the Fourth District of Ohio. The equal percentages of males to females from law school have not translated to the bench in the Fourth District. Approximately 91.3% of the judges in the Fourth District are men; while only 8.7% are women. Other than myself, there are only three female judges in the Fourth District: Judge Margaret Evans, Judge Toni Eddy, and Judge Janet Welch. Contrast this with a population of approximately 633,312 with about 50% males and 50% females. Thus, although the population of the Fourth District is approximately 50% female, only 8.7% females are making the judicial decisions in the district.

Out of the 14 counties in the district, only two of the counties have female prosecutors: Highland County has Anneka Collins and Pickaway County has Judy Wolford. The City of Athens’s law director is Lisa Eliason; and the City of Chillicothe’s law director is Sherri Rutherford. There are, however, various magistrates, assistant prosecutors, public defenders, private attorneys, and other women attorneys in the district who have all made impacts on our communities in Southeastern Ohio.

I am fortunate in that I have been able to obtain some insight into a few of the female judges and attorneys from the Fourth District. These women all have something in common: They understand what their passions are; they understand what drives and motivates them. And they #dosomethingaboutit.



Gallia County Common Pleas Judge Margaret Evans

Judge Margaret Evans was elected as the Gallia County Common Pleas

Judge in November

2016. Prior to serving as common pleas judge, she was elected as the Gallipolis Municipal Judge in 2003. Her motivation for being a lawyer and judge stems from the idea set forth by Mahatma Ghandi, “You must be the change you wish to see in the world.” Knowing the law and being empowered to use it to balance interests to accomplish fairness is furtherance of the change that she would like to see in the world. Judge Evans’s first motivation to enter the legal profession was to be able to address inequities in opportunities for women in sports and to use Title IX to require school districts to provide that equity. Judge Evans and her sisters played basketball together in high school in the early eighties. She witnessed strong women and several men, especially her father, use the law to encourage school districts to provide equitable opportunities for girls in secondary school.

In the context of the criminal cases that she handles as a judge, it is important to her, in appropriate cases, to present people with an opportunity to make changes in their lives, which will improve their quality of life and eliminate behavior that is destructive to our communities. Drug court

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(From page 3) and intensive reporting probation are integral components that she implements in achieving these goals. She instituted a drug court in the Gallipolis Municipal Court in 2006; and she continues utilizing a drug court in the Common Pleas court. She remains informed of the best practices, based on research; and she implements those in her policies and procedures.

Judge Evans has the highest respect for the women who fought the fight to be in the legal profession. She admires the courageous women who first battled harassment in classes in law school and in practice to establish the woman's place in the legal profession. Judge Evans feels responsible to continue to represent women as best she can in the profession and to encourage young women to refuse to limit their career ambitions. Although she feels that she has not encountered much discrimination or "glass ceilings" in her career, the fact that she is a part of the only 8.7% of female judges in the district shows the extraordinary accomplishment that she has achieved. Judge Evans continues daily to #dosomethingaboutit.



**Chillicothe
Municipal Judge
Toni Eddy**

Judge Toni Eddy has been a licensed attorney since 2000. Judge Eddy was the first woman to be elected as a judge

in Chillicothe and Ross County. She began her judgeship in January 2012. Judge Eddy was also the first woman to be elected as the law director for Chillicothe. Her career embodies the concept #dosomethingaboutit.

Judge Eddy started her legal career later in her life. She had been the office manager for the Chillicothe Law Director when she decided to attend law school. At the time, she had a 10 year-old son and a husband who was supportive of her decision to become a lawyer.

Judge Eddy has always had a passion for learning. She enjoyed her work managing the law director's office because she liked studying the law and interacting with people; she melded these passions to #dosomethingaboutit and obtained her law degree.

Since that time, Judge Eddy has served the public as a law director, a private attorney, and a judge. Judge Eddy has a need to give back to her hometown that she feels has given her so much. Judge Eddy recalled her new judge orientation prior to serving on the bench. At this orientation, former Justice Evelyn Stratton spoke these words, which Judge Eddy took to heart, "As a judge, you can be a leader in your community; you have the power to convene; the power to ask for collaboration; the power for accountability; and the power to inspire."

Judge Eddy gives back to Ross County by implementing programs that help the citizens such as the annual BMV workshop. This workshop helps people obtain a valid driver's license or driving privileges. Also, the Chillicothe Municipal Court utilizes a drug court to try to help those who have found themselves in trouble with the law due to addiction issues. The drug court tries to focus on the underlying problem of addiction and to solve that instead of simply utilizing incarceration.

Judge Eddy has a passion for learning and a love for people in

general. She focuses these passions to help her whole community. She has also #dosomethingaboutit.



**Assistant Prosecutor
for Scioto County,
Ohio: Julie
Hutchinson**

Julie Hutchinson is an attorney that champions the concept of #dosomethingaboutit.

Julie is an Assistant Prosecutor for Scioto County. She has been practicing law since 2005. Julie tries all types of felony cases; but most notably, she is charged with trying the rape, GSI, sexual assault, and abuse cases. Many of the horrific cases that she has dealt with sear her memories with images that are unforgettable.

But, Julie brazens through cases; that is, she endures difficult situations with apparent confidence. She has earned that confidence through the trial work and the behind the scenes work that she has completed over the

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So, why do the difficult work that she does? Julie has turned down offers for other jobs that would pay her more money. Instead, she works long, hard hours doing heart-wrenching work. Julie establishes relationships with the victimized children and gives them someone in which to place their trust.

(From page 4) last 13 years. Julie is not afraid to try because she is not afraid to fail. She knows that if she falls, she won't break. She will simply dust herself off and get back up. But, what makes her keep getting back up?

What motivates Julie? It's not money. It's not power. Even though Julie makes television appearances on the high profile cases, it's not the fame either. So, why do the difficult work that she does? Julie has turned down offers for other jobs that would pay her more money. Instead, she works long, hard hours doing heart-wrenching work. Julie establishes relationships with the victimized children and gives them someone in which to place their trust. Even after a case is completed, she still maintains contact with some of the children. She gives the children hope and makes them feel special and loved. Making the lives of these children better is what motivates Julie. But again, why does Julie feel the need to do this?

The most important thing in Julie's life is her daughter. Julie is a single mother who is teaching her daughter to stand on her own two feet so that she can have a strong base to pull someone else up that needs help; Julie knows that by choosing to handle some of the most difficult cases, and by pouring her heart and soul into them, she is setting an example for her daughter. She is showing her daughter what a strong woman—a strong person—can accomplish. Julie is not just telling her daughter what to do or how to be; she is showing her by example how to be a strong, kind, caring, and productive person. Attorney Hutchinson is #doingsomethingaboutit.



Assistant Ohio Public Defender: Jessica McDonald

Another lawyer with whom I have worked that I find living the concept #dosomethingaboutit is Jessica McDonald.

She works at the other end of the spectrum in the criminal justice system. Jessica is an Ohio Public Defender in the Ross County office. Like Julie, Jessica's passion in life is her children. Her passion at work is to make the day just a little bit better for those she comes in contact with, even if it is only for a single moment in time. Her passions meet in the hope that making a difference in the lives of the most marginalized citizens will ultimately make the world a better place for her children.

As a public defender, Jessica meets people at one of the lowest points in their lives. Many of Jessica's clients could be described as "difficult people." Many distrust the judicial system or have suffered trauma in their lives. Jessica makes it a point to understand them and to try to ease their anxieties as she helps them with their legal problems. I recently saw Jessica at a seminar that was discussing trauma and how people who have been traumatized may react differently. Jessica did not have to be at that seminar; it was not a continuing legal education seminar that would require her presence. Instead, she was taking her time to educate herself to help her understand her clients better.

Similar to Asst. Prosecutor Hutchinson, Jessica is not doing public defender work for the money. Something else drives her. Jessica knows that even the most difficult person, who has committed the most

heinous crime, has something positive to offer. The positive side is what she seeks in her clients; and then she tries to present that side to the courts.

Jessica is painfully aware of how easy it is to get stuck in the negativity that is around us every day. Jessica feels that being a lawyer puts her in the unique position to truly make a difference in the lives of others – whether it be in successfully defending their case, filing a motion to challenge the evidence to be used against them, or just sitting and listening to their position. Truly making a difference in the lives of others helps Jessica get up every day and face what many believe is a challenging career choice. For Jessica, she cannot imagine doing anything else. Jessica is doing her part in making our community a better place. Attorney McDonald is #doingsomethingaboutit.

These are only glimpses into the lives of four women attorneys and judges in the Fourth District who give so much of themselves to others. None of them are in it for the money, the glory, or the power. Instead, they all genuinely care about their families and their communities. They are following their passions and they are #doingsomethingaboutit. What are you passionate about? What are you going to do? #dosomethingaboutit. ■

Judge Marie Hoover is Presiding and Administrative Judge of the Fourth District Court of Appeals encompasses Scioto, Pike, Ross, Pickaway, Highland, Adams, Lawrence, Gallia, Meigs, Hocking, Jackson, Vinton, Athens, and Washington counties. She holds a J.D. from The Ohio State University, and a B.A. in Political Science from Miami University.

Women In the Judiciary: From Florence Ellinwood Allen to RBG and Beyond

By Jennifer A. L. Battle



On June 5, the OWBA hosted a screening of the new documentary RBG, a portrait of United States Supreme Court Justice Ruth Bader Ginsburg. The screening was prefaced by a

discussion with Ohio Supreme Court Justice Mary DeGenaro and ODAR Judge Noceeba Southern on the important role women play in the judiciary today. As the film reminded us, it was not always so. Until 1978, women could be fired from their jobs for becoming pregnant. Women could not apply for their own credit cards until 1974. No court recognized sexual harassment in the workplace before 1977.

More relevant for our profession, the United States Supreme Court in 1873 had upheld an Illinois state law blocking women from admission to the bar. The concurring opinion, written by Justice Joseph P. Bradley, noted:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life... The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

That sort of gender-based distinction was not overturned by the U.S. Supreme Court until 1971, in Reed v. Reed, a case briefed by Ruth Bader Ginsburg. It was not until 1981, when Justice Sandra Day O'Connor was confirmed, that

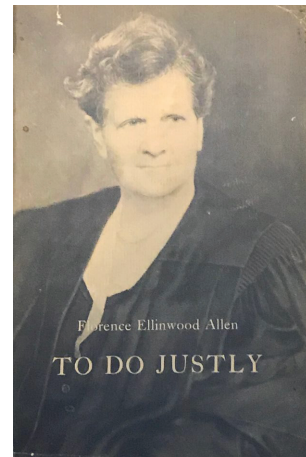
a woman served on the nation's highest court, and it would be another 12 years before Justice Ginsburg joined her (around the time marital rape was finally recognized as a crime in all 50 states).

Today, the United States Supreme Court is the most diverse it has ever been. The Ohio Supreme Court currently has more female justices than males ones, and this is the fourth time that has occurred. (The first was in 2003.) Many may not realize, however, that Ohio's Supreme Court has a long and rich history of female representation, dating back decades before Justices O'Connor and Ginsburg entered the national scene, and 50 years before the women's rights movement gained momentum across the country. In 1922, just two years after the ratification of the 19th Amendment, Judge Florence Ellinwood Allen was elected to the Ohio Supreme Court, and became the first female Supreme Court justice in the nation. She would hold that title for nearly 40 years – no other state elected a woman to its highest court until 1961.

Judge Allen had a remarkable career of firsts. Born in Salt Lake City, Utah, she moved to Ohio to attend Case Western Reserve University. When she graduated, CWRU did not admit women, so she pursued her legal studies at the University of Chicago and NYU School of Law before returning to Cleveland to begin



Judge Florence Ellinwood Allen circa 1917



practicing law. Before her election to the Supreme Court, she had earned the distinction of becoming the first woman county prosecutor in the country in 1919. Two years later, running as an independent, she became the first woman judge – at any level – in Ohio, where she served as a common pleas judge for a year before running, successfully, for a seat on the Supreme Court. And she did not stop with the Supreme Court. In 1934, Franklin Delano Roosevelt appointed Judge Allen to the Sixth Circuit Court of Appeals. She was unanimously confirmed by the United States Senate, making her the first female Article III judge in the country. She went on to become, in 1959, the first female Chief Judge of a Court of Appeals in the United States.

Many aspects of Judge Allen's career path were echoed in RBG: both justices had the experience of being virtually the only women in their law school classes. Both graduated from law school in New York, ranking near the top of their

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(From page 6) classes, and yet were unable to find employment with any prominent New York law firm. Both had long served as advocates for women's rights before beginning their service on the bench. And both considered it a privilege to be able to participate in the administration of justice for all, men and women. As Judge Allen wrote in the preface to her memoir, *To Do Justly*, "To be given an opportunity to aid in administering justice is a privilege. To be given this as a woman by the men and women of your state working together is something of a miracle."

Our profession still struggles with gender equality, most notably in the areas of law firm leadership, advancement and pay equity. One study revealed "no statistically significant shifts in narrowing the pay gap in the past two decades." Justice Ginsburg's granddaughter reports in the film that her Harvard Law School class was the first class that was 50% female, and other reports show that the numbers of women law school

graduates has hovered over 40% for more than 30 years. Yet women still comprise fewer than 24% of law firm partners, and hold just 12% of top leadership positions at firms. It is dismaying that these disparities have not been overcome in the nearly 50 years since Diane Schulner Abrams (a professor of Women and the Law at NYU School of Law, Judge Allen's alma mater) wrote, in 1970, "[S]tatistics on earnings still reveal appalling discrepancies between (in descending order) the salaries of white men, black men, white women, and black women." Implicit bias studies make clear that we have yet to shed the assumptions about women captured by Justice Bradley's remarks about the "timidity and delicacy" of women, or their "destiny and mission" to fulfill roles as wives and others. Much work remains to be done.

Here in Ohio, however, as we continue to work towards equity and representation in our profession's leadership, we can take encouragement and inspiration from the examples of

Judge Allen, Justice Ginsburg, and so many others who have paved the way for where we stand today. ■

Jennifer A.L. Battle is a partner at the law firm of Carpenter Lipps & Leland LLP, where she represents clients around the country in business, financial, trade secret and class action litigation. Carpenter Lipps & Leland is the proud recipient of the OWBA's 2016 Family Friendly Award and a long-standing supporter of the OWBA. Ms. Battle joined the firm in 2009 after practicing in Philadelphia for more than eight years, and currently serves as a member of the Board of Trustees for the OWBA.

Special thanks to Justice Mary DeGenaro for the use of photographs of Judge Allen from her personal collection, and for her guidance on the history of Judge Allen and the Ohio Supreme Court. A full copy of Judge Allen's memoir, "To Do Justly," can be found here: <https://www.supremecourt.ohio.gov/LegalResources/LawLibrary/resources/doJustly.pdf>

National Urban League Hosts Pro-Bono Street Law Clinic in Columbus

The National Urban League, one of the nation's oldest civil rights organizations, dedicated to economic empowerment, is hosting a Pro-Bono Street Law Clinic for residents of the Greater Columbus Area (Columbus, Ohio) on Saturday, August 4, 2018 at its Annual Conference, which will be taking place at the Greater Columbus Convention Center.

The organization is in need of volunteer lawyers barred in Ohio and/or legal materials on a wide array of legal topics: landlord-tenant,

consumer law, family law / domestic relations, probate, expungement, law enforcement interaction, school discipline, voting rights, civil rights, employment and school discipline etc... to disseminate at the Pro Bono Event. To participate, contact:

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**National
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Arbitration Agreements and Class Action Waivers. Just Because You Can, Doesn't Mean You Should

By Lynn Reynolds



Chances are that you've heard about the U.S. Supreme Court's decision that employers are free to not only require employees to sign an agreement mandating

that all employment disputes go to binding arbitration rather than courts, but that employers are also free to include class action waivers in those arbitration agreements. As a result, *Epic Systems Corp. v. Lewis*, 584 US ____ (2018), is being extolled as a boon to employers, and experts predict that many more employers will adopt mandatory arbitration agreements. However, just because employers can seek mandatory arbitration agreements from their employees doesn't necessarily mean that they should.

Don't get me wrong. Arbitration certainly holds benefits for employers, the most significant being privacy. Arbitrations are private proceedings, conducted out of the public eye (and news headlines) that can come with a lawsuit in state or federal court. Individual arbitration is also most definitely speedier than litigation, and less costly than a class or collective action lawsuit.

However, arbitration may not necessarily be less costly than individual litigation. The American Arbitration Association and JAMS rules for employment arbitration provide for a very similar process – from discovery to dispositive motions – as litigation. While arbitration may be speedier to reach a resolution than litigation, it may not necessarily come with the cost savings one might expect. Speed

alone is not necessarily a benefit to the employer. To the contrary, an employer is typically in a better position to wait out a decision than an individual employee.

Plus, arbitration decisions can be appealed only in very limited circumstances, which is a benefit only if you are on the winning side. If not, or, if the arbitrator issues a decision which "splits the difference" (as many lawyers believe arbitrators routinely do), then limited appeal rights are most definitely a risk.

Against this backdrop, then, each employer should evaluate its risk profile, culture, and values, as well as the disruption to the workforce, to determine whether mandatory arbitration is the right solution for its workplace disputes.

Does your risk profile warrant arbitration agreements?

A large, national employer juggling compliance with multiple local, state, and federal laws is definitely a bigger target for class or collective actions. But, depending on the industry, even small or regional employers can be targets for certain types of class action claims, such as wage and hour collective actions. In those cases, individual arbitration agreements can be an effective tool to manage the risk (though defending a deluge of individual arbitration demands could be costly).

Is arbitration consistent with your organization's culture and values?

If your organization, for example, says that transparency is a core value then requiring your workforce to submit

their disputes to arbitration might undermine your commitment to that ideal given the private nature of the process. If your organization has just reinforced its commitment to providing a work environment free of harassment in response to the #MeToo movement, then a broad arbitration agreement that does not exclude harassment and discrimination claims, may be perceived as hypocritical.

What type of disruption will it cause in our workplace?

Employers are not going to have an enforceable arbitration agreement by just adding a policy to their handbooks and going under the radar. It's more likely that each new hire or current employee will have to sign a separate arbitration agreement as a condition of employment. For new hires, this means that employers must be prepared to withdraw the offer and not hire the candidate if they refuse to sign the agreement. It also means that employers must be prepared to terminate the employment relationship if a current employee refuses to sign the agreement. If you're not prepared to do either, then you may want to consider other options, such as rolling the agreements out at the time of a bonus payment or other benefit to secure the agreement. You might even consider limiting the pool of employees you have execute the agreements to the most senior level. There is never a one-size-fits-all solution for employers, and arbitration agreements are no different. There are significant benefits that come with Epic Systems, however, and employers should be taking the time to evaluate whether arbitration agreements are right for their workplace. ■

FTC's Antitrust Complaint Against 1-800-Contacts – Clear or Blurred Vision of Antitrust Scrutiny of Settlement Agreements Entered to Protect Trademarks in Advertising?

By Melinda K. Burton, Esq.



Have you ever gone online and put in a certain brand name in a search engine, and then after conducting the search, you see, in addition to a link to the brand you

are searching, links to that brand's competitors in advertisements? This was what 1-800 Contacts was trying to stop when it entered into settlement agreements with its competitors covering online search engine advertising in order to protect its valuable trademarks. The settlement agreements prohibited competitors from bidding on 1-800 Contacts' trademark terms in search advertising on the Internet and also required competitors to employ "negative keywords" directing search engines not to display the competitors' advertisements in response to any search inquiry that included 1-800 Contacts' trademarks. These settlement agreements were the product of 1-800 Contacts' cease-and-desist letters to and several lawsuits filed against competitors beginning in 2004 that asserted that the competitors' search advertisements that appeared in response to a user's query on Internet search engines containing the term "1-800 Contacts" or variations thereof constituted trademark infringement. The Federal Trade Commission, however, saw 1-800 Contacts' settlement agreements as something else entirely and filed a complaint challenging as a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) and as an unfair

method of competition 1-800 Contacts' settlement agreements with its competitors.

On October 27, 2017, Chief Administrative Law Judge D. Michael Chappell rendered an Initial Decision upholding the FTC's complaint, finding that the FTC "met its burden of proving that the Challenged Agreements unreasonably restrain trade in violation of Section 5 of the FTC Act... The evidence in this case demonstrates that the advertising restraints imposed by the Challenged Agreements cause harm to consumers and competition in the market for the sale of contact lenses online. This is sufficient to establish [the FTC's] prima facie case that the agreements are anticompetitive. The evidence fails to prove that the Challenged Agreements have countervailing procompetitive benefits that outweigh or justify the demonstrated anticompetitive effects... Initial Decision, p. 7. The Initial Decision ordered 1-800 Contacts to cease and desist from entering into any new agreements or enforcing its existing agreements with competitors restricting the competitors' search advertising. Initial Decision, pp. 203-04. The Initial Decision resulted from a month long evidentiary hearing (hearing began on April 11, 2017 and ended on May 12, 2017) where "[o]ver 1,250 exhibits were admitted into evidence, 43 witnesses [included experts] testified, either live or by deposition, and there [was] 4,554 pages of trial transcript. The Parties' post-trial briefs, proposed findings of fact and conclusions of law, reply briefs and replies to proposed findings of fact and

conclusions of law total 3,514 pages." Initial Decision, p. 3 & n.2.

In December, 2017, 1-800 Contacts filed a Brief on Appeal, arguing first that the challenged agreements were commonplace settlement agreements to protect trademarks and as such were not subject to antitrust scrutiny at all under *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2233 (2013). Brief, pp. 1-3. 1-800 Contacts argued, among other points, that each of the settlement agreements "was a standard non-use agreement whereby a party agreed not to use another's trademark, which is 'the order of the day' in trademark infringement actions." Brief, p. 11. In addition, "while the outcome of the settled claims was uncertain, the challenged settlements provided for relief that a court could have ordered if 1-800 Contacts had prevailed," and that was the proper focus, not whether 1-800 Contacts actually prevailed or would have prevailed in litigation. Brief, p. 12 (The ALJ rejected 1-800 Contacts' argument that the settlement agreements were procompetitive as protecting trademarks, highlighting that one competitor of 1-800 Contacts – Lens.com – did not settle and eventually was granted summary judgment in its favor, with the court in that case finding that the conduct which 1-800 Contacts believed constituted trademark infringement actually did not (Initial Decision, pp. 46, 147-51, 169-71). 1-800 Contacts argued that antitrust scrutiny of settlements like the ones it entered into with its competitors to protect against trademark infringement would lead "to

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(From page 9) a regime that presumptively condemns intellectual property settlements, turning on its head a century of precedent instructing courts to uphold settlements ‘whenever possible.’” Brief, p. 3.

Then, 1-800 Contacts argued (Brief, pp. 3-4) that even if the agreements were subject to antitrust scrutiny, they did not violate the antitrust laws for multiple reasons, including (1) there was no evidence that the agreements had any anticompetitive effects, i.e., no evidence that they “resulted in lower output or supracompetitive prices for contact lenses,” (2) 1-800 Contacts did not (and does not) have market power – “it accounts for only 10% of contact lens sales in the United States” if the market is defined as such, and even if the market was only just online sales of contact lenses (the market as defined by the ALJ in his decision), there were no barriers to entry or expansion so 1-800 Contacts 50%+ share of online sales did not prove market power, and (3) there was no showing that the challenged settlement agreements “were not reasonably necessary to obtain the procompetitive benefits of settling litigation and protecting trademarks” because there was no proof that there was any other practical way for 1-800 Contacts to settle and at the same time protect its trademark rights. 1-800 Contacts also argued that the Initial Decision was unconstitutional because “[i]t invades Article III courts’ inherent power to supervise the existing settlements and retroactively deprives 1-800 Contacts of the ability to enforce its trademark rights in violation of the Fifth Amendment.” Brief, p. 4.

The FTC’s Complaint Counsel thereafter filed an Answering Brief to 1-800 Contacts’ appeal of the Initial Decision. In its Answering Brief, the FTC’s Complaint Counsel argued that Initial Decision should be affirmed as is, but in the alternative, to affirm

on other grounds including “that the Challenged Agreements are inherently suspect” (per se illegal); and “that the settling parties [not just 1-800 Contacts] collectively have power in the relevant market [which is just online contact lens sales].” Answering Brief, pp. 4-5. Complaint Counsel also asked for “findings affirming the anticompetitive effect of the Challenged Agreements on search engines (separate from the anticompetitive effect on consumers of contact lenses).” Id. at 5. In addition, Complaint Counsel requested that the Commission modify the consent order to prohibit 1-800 Contacts from entering into similar settlement agreements or obtaining court orders approving agreements with terms similar to the Challenged Agreements unless it is done “at the conclusion of a contested litigation.” Answering Brief, pp. 5, 47-50; Appendix B (proposed red-line changes to consent order), pp. 3-4.

With respect to 1-800 Contacts’ argument that the Challenged Agreements were settlement agreements entered to protect trademark rights and therefore should not be subject to antitrust scrutiny, Complaint Counsel not surprisingly disagreed, arguing that trademark rights do not justify the agreements because, according to Complaint Counsel, the case law does not support 1-800 Contacts’ position and because 1-800 Contacts “failed to identify a single other agreement in which all three of the salient characteristics of the Challenged Agreements were present.” Answering Brief, pp. 40-42 (emphasis omitted). (The three “salient characteristics” were (1) a rival cannot bid on the trademarks even if consumers would not be confused, (2) a rival has to designate negative key words, and (3) the terms are reciprocal. Answering Brief, pp. 39-40). However, there were some interesting takeaways in the Answering

Brief including the FTC’s Complaint Counsel,

- Admitting that “online sale of contact lenses accounts for about 17 percent of all contact lens sales in the United States” (Answering Brief, p. 6) yet contending that online sales of contact lenses was the appropriate market
- Recognizing that “1-800 [Contacts] was quite concerned about competitors advertising against its trademarks” (Answering Brief, p. 8)
- Stating that it did not need to establish market power because the agreements are or should be treated as “inherently suspect” (Answering Brief, 27), but in any event, if one looks at the total sales of all of the parties involved in the Challenged Agreements – not just 1-800 Contacts – the entire group makes up 79% of online sales (Complaint Counsel did not contest that 1-800 Contacts accounts for only 10% of all contact lens sales in the United States)
- Asserting that the Challenged Agreements were per se illegal because they constitute “bid-rigging” and thus “are a form of price-fixing” (Answering Brief, pp. 35-36) and
- Arguing that the Commission should find that there was harm to search engines because a reduction in the number of businesses bidding on advertising auctions reduces the amount of money that the search engines can make (and diminishes the quality of search engine product) (Answering Brief, p. 36).

1-800 Contacts thereafter filed a Reply Brief on Appeal, highlighting why in its opinion the FTC’s Complaint Counsel has viewed this case all wrong from the beginning. According to 1-800 Contacts, this case is about normal trademark litigation settlement

(Continued on next page.)

(From page 10) agreements, which are enforceable and not subject to antitrust scrutiny (or at a minimum not inherently suspect (or per se illegal)). 1-800 Contacts emphasized that the name recognition of 1-800 Contacts “is a paradigmatic sign of successful competition” and one that “is protected by an uncontested and valuable trademark.” Reply Brief, p. 1. To protect that valuable trademark, 1-800 Contacts sued competitors for infringement arising out of paid search engine advertising and the parties entered into settlements that provided 1-800 Contacts relief that it could have

obtained had it won at trial. Reply Brief, p. 2.

1-800 Contacts argued that the FTC Complaint Counsel’s attempts to undermine these settlements and find them inherently suspect under the antitrust laws should be rejected for at least three reasons: “First, Complaint Counsel’s theory requires the Commission to create new trademark law or adjudicate settlement trademark claims in hindsight.” Reply Brief, p. 2 (emphasis in original). “Second, . . . IP settlements should not be subject to antitrust scrutiny unless they are ‘unusual’ or not ‘commonplace.’”

Reply Brief, p. 3 (emphasis in original). “Third, Complaint Counsel asks the Commission to ignore settled antitrust principles, finding anticompetitive effects without evidence of reduced output, supracompetitive prices, barriers to entry and expansion, or empirical evidence defining the market.” Reply Brief, p. 3 (emphasis in original). Indeed, 1-800 Contacts reiterated that it only “sells roughly 10% of [all] contact lenses sold in the United States. Reply Brief, p. 1.

Oral argument is scheduled for June 26, 2018. It will be interesting to see what the final result will be. ■

Highlighting a Member of the OWBF Leadership Institute: Amber Justice-Manning, Faruki Ireland Cox Rhinehart & Dusing PLL



What did you enjoy the most about the Leadership Institute?

The connections I made with all the inspiring women in my class. Each of

the women in the group came from a variety of fields and careers paths and brought unique experiences to the table. Despite our different experiences, it was great to see the common bonds shared and all of the meaningful relationships that were formed among the class members.

What is something that you learned that you implemented into your career/life?

To always be authentic. Recognize that what works for one person may not work for you. Learn from others, but incorporate and rely on what works best for you. People will always appreciate authenticity – it builds

respect, trust and credibility.

Do you stay in contact with anyone from your class?

Yes. There are some people from my class that I am in contact with more often than others, but I am definitely in contact with many women from the group. Several of us remain in contact via social media, email, and OWBA events.

What piece of advice would you give to someone who is just beginning the Leadership Institute or who is considering applying?

Be present and enjoy every moment. I realize it is difficult to set work aside for large chunks of time, but recognize that you are making an investment in your career. To get the most out of the valuable information presented in each session, actively participate and leave distractions at the door.

How did participating in the Leadership Institute change you and/or make you better?

The Leadership Institute reinforced the idea that you should not be afraid to ask for what you want, and to be direct about it. Don’t just assume others know what you want.

Where do you work?

Faruki Ireland Cox Rhinehart & Dusing PLL

Do you specialize or have a niche?

Commercial Litigation

If you weren’t a lawyer, what would you be?

A doctor.

What is your dream job?

A travel writer.

What would you like to tell us about yourself? (i.e. your family, hobbies, etc.)

My husband and I have been married for 11 years, and have two sons, ages 9 and 3. I spend most of my free time watching my sons play sports, spending time with family and friends, and reading. ■

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News

Celebrate OWBF's 10th Anniversary!

Join us in celebrating a decade of promoting diversity and advancing women in the law through extraordinary education and leadership training at OWBF's 10th Anniversary Gala and Fundraiser! Hosted at The Vault in Downtown Columbus on September 14, you won't want to miss this opportunity to support the educational and leadership efforts set forth by the OWBF.

From dancing to the upbeat tunes of the Bluewater Kings Band, to participating in the silent auction, there is something for everyone to enjoy!

Visit www.501auctions.com/owbfgala to find more information about the Gala and available sponsorship opportunities. ■

SAVE THE DATE | FRIDAY, SEPTEMBER 14, 2018



The image is a vertical rectangular card with a purple and white color scheme. At the top, a purple banner contains the text "SAVE THE DATE | FRIDAY, SEPTEMBER 14, 2018" in white. Below this, the OWBF logo (a stylized woman's head) is on the left, followed by "OWBF" in large purple letters and "OHIO WOMEN'S BAR FOUNDATION" in smaller black letters below it. To the right of the logo, the number "10" is rendered in large, 3D-style white letters, with "th" in a smaller font to its right. Below "10th", the word "ANNIVERSARY" is written in large, white, sans-serif capital letters. Underneath that, the text "CELEBRATING A DECADE OF PROMOTING DIVERSITY AND ADVANCING WOMEN IN THE LAW THROUGH EXTRAORDINARY EDUCATION AND LEADERSHIP TRAINING" is written in smaller purple capital letters. At the bottom, a purple banner contains the text "THE VAULT | COLUMBUS, OHIO" in white. The background of the card features a pattern of light blue and white circles of varying sizes.

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