



CHRISTINE VARNEY

BY KATRINA DEWEY

GOOGLE. FACEBOOK. APPLE.

So few companies. Such vast power.

That's the age we're living in, and no one understands the competitive markets of those companies and so many others quite like Cravath's antitrust ace, Christine A. Varney. She has overseen the greenlighting of numerous deals since joining Cravath in 2011 and worked alongside the firm's corporate partners to ensure smooth sailing on hundreds of transactions.

The only person to have served as both the U.S. Assistant Attorney General for Antitrust and a Commissioner of the Federal Trade Commission, she came to her appreciation of fair play early on. One of six children growing up in upstate New York, she remembers vividly going with her mother from shop to shop for paper towels, meat or milk to get the best price.

She went to Georgetown Law School after working for the United Farm Workers in California, motivated to help protect people's rights. Since then, she's become one of the most respected lawyers in the country, admired for her vast expertise and insight.

Lawdragon: You've achieved so much in the antitrust world in a time of important evolution in those laws and their enforcement. How would you characterize the state of antitrust law and enforcement when you began your career; and how has it changed to now?

Christine A. Varney: Antitrust law is broad and evolves over time to keep up with innovations and technologies that profoundly impact competition. I was at the Federal Trade Commission in the mid-1990s, when we were first starting to see a lot of new, innovative technologies, and also starting to see them combine in ways that were sometimes tricky for antitrust analysis. We had to think about these businesses in different ways, including asking questions about how a merger or certain behaviors are consistent with the antitrust laws.

At the FTC, we created a framework for examining innovation and competition that became known as "innovation market analysis." This baseline methodology examines the impact on competition of a proposed combination of companies that are both innovators. Will the merger enhance competition

because both innovators are coming together and they will get a product to market sooner? Or will it slow competition because the innovators in that particular space are now combined as one company? These questions are more relevant today than ever.

Companies and technologies have evolved, of course, but today much of my work involves helping clients to “see around corners.” Working to anticipate the government’s position is essential to mapping potential issues and advising a company early in the course of a transaction. When I arrived at the Department of Justice in 2009, my priority was to provide businesses with transparency and predictability around merger enforcement at the DOJ and the FTC. That principle was a primary basis for issuing the 2010 Horizontal Merger Guidelines and Guide to Merger Remedies. Those efforts at the DOJ and FTC also facilitated cooperation and transparency among U.S. and international enforcement agencies, and today still help us think about antitrust with our clients. Clear enforcement guidance is a benefit to all parties.

LD: What were your first notions of becoming a lawyer, and were there particular mentors in law school or throughout your career who inspired or guided you?

CAV: Law was something I was very interested in, but I did not go to Georgetown Law with the specific goal of becoming an antitrust lawyer. I had worked for the United Farm Workers for a couple of years in California. I went to law school after that experience because I was motivated by the prospect of working in a system that would protect and promote people’s rights and benefit folks in their everyday lives.

Prior to all of that, though, I grew up mostly in upstate New York in a very politically active household and knew from a young age that I wanted to take part in politics and policymaking. My father was involved with the Robert Kennedy campaigns, both for Senate and President, and my mother was an upstate New York organizer for the Farm Workers.

I remember vividly as a child going with my mother to a particular butcher because the hamburger was cheaper there, and then going to another butcher because the chicken was cheaper there; going to one grocery store because paper towels were on sale, and going to another one because that’s where the milk was on sale. All of that mattered for a family of eight. It was ingrained in me from a very early age that competition deeply impacts the lives of everyday people. I grew up with the understanding that when you have competitive markets, you are

ultimately going to benefit consumers with lower prices, better services and better innovation – although I would not have been articulating those principles as a 12-year-old!

Those early experiences are what sparked my interest in consumer protection, but it was not until I studied antitrust in law school that it became clear that I had grown up living it every day. Because my parents were comparison shoppers, I was able to see – both as a child and later as a law student – the connection between antitrust and its impact on people’s lives.

I have benefitted greatly from a number of very important mentors in my life: Jane Harman, Ron Brown, Vernon Jordan and Bob Pitofsky. I learned so much from each of them, but one thing they all had in common was an abiding commitment to helping others up the ladder – never pull the ladder up behind you.

LD: What advice do you give young lawyers today who are interested in achieving significant leadership responsibilities and impact in government?

CAV: I encourage young lawyers to seek out opportunities for significant responsibility and take ownership of your work as early as possible. Take pride in your work, and embrace challenges as opportunities to learn.

At the same time, don’t shy away from collaboration – it is key to successful outcomes, especially when an answer is not immediately evident. As you work through a complex issue and see that things may be not going as you would like, having a team you can rely on is essential. Both while in government and now at Cravath, I have always been fortunate to have the full backing of everyone with whom I have worked, and consequently the full benefit of true collaboration.

LD: What matters have you recently worked on that you can discuss and what were some of their particular challenges?

CAV: On the regulatory clearance side, we work with clients on many of the world’s largest transactions. I am working with a team advising Mylan in its pending \$50B combination with Upjohn, Pfizer’s off-patent branded and generic medicines business, and in 2019, we advised Occidental Petroleum in its \$57B acquisition of Anadarko Petroleum Corporation, the largest U.S. oil and gas merger in more than 20 years. The latter deal was also one of the largest contested takeovers in the past decade, as our client topped Anadarko’s original agreement with Chevron. I am also currently advising Illumina in its pending \$8B

acquisition of GRAIL, a healthcare company focused on multi-cancer early detection, and Just Eat Takeaway in its pending \$7.3B acquisition of Grubhub, which will create the world's leading food delivery company outside of China.

Cravath has also played a central role in many of the most significant, industry-shaping antitrust litigation matters in recent history, including *U.S. v. AT&T*. That was a particularly rewarding case for me, as I had the opportunity to work on the Cravath team that helped achieve that milestone victory for our client. In terms of other high-profile work from the practice, Cravath recently achieved a full defense victory before the U.S. Court of Appeals for the Ninth Circuit in favor of Qualcomm, with a decision that vacated a California federal court's May 2019 judgment in favor of the FTC and reversed a permanent, worldwide injunction that prohibited several of Qualcomm's core business practices. This had been one of the largest technology-related legal battles of the last few years, and we represented Qualcomm at every stage.

We are now actively representing Blue Cross Blue Shield members in consolidated multidistrict antitrust class litigation – one of the largest class actions in the country – in the U.S. District Court for the Northern District of Alabama. These cases, brought by separate putative classes of healthcare providers and health insurance subscribers, comprise multifaceted arguments and a number of moving pieces that challenge certain foundational aspects of the Blue Cross Blue Shield system.

The firm is also currently representing Epic Games in two separate actions against Apple and Google, alleging that the companies are engaged in anti-competitive behavior in the distribution of certain apps on smartphones and in the processing of in-app purchases. Our client, the creator of the enormously popular game Fortnite, alleges that Apple and Google are placing unnecessary and anticompetitive restrictions on users' ability to download apps in violation of the Sherman Act.

LD: You joined Cravath as a rare hire from outside the firm to help lead a practice that has contributed to shaping modern antitrust law. Was building on this history part of what drew you to the firm, and how do you reflect on that decision nearly a decade later?

CAV: I had been leading the Antitrust Division of the Department of Justice for a couple of years when Cravath approached me. I thought they were coming to talk about a case, and I was very surprised when they said they were interested in having me come to the firm. Cravath is a venerable institution – it has

been around for over 200 years, and the firm has evolved with the times and also helped shape them. That history was certainly relevant when I decided to join the firm, and it has been an exciting platform to build from and grow.

Today, we continue to work with clients who are facing significant and complex antitrust challenges in litigation and advise on many of the largest and most transformative deals happening across industries. At the moment, antitrust law is quite focused on the role and rule of law for technology, so at the firm, we spend a lot of time thinking through these important issues and counseling clients on how to stay within the bounds of antitrust law while continuing to grow as a company. It is not always easy, but the Cravath team is never deterred by challenges or new frontiers, and being able to lead clients through this landscape is extremely rewarding.

LD: Cravath has been involved in countless high-stakes, high-profile antitrust matters since you began leading the practice. What, in your view, makes the firm unique in this area?

CAV: Before I even came to the firm, Cravath attorneys had appeared before me both when I was at the FTC and the DOJ, and I can say without hesitation that they were some of the best lawyers I had ever seen. With law firms, generally speaking, you will find certain great lawyers; the difference with Cravath was that every single partner I met was equal to the one I had met previously. The quality and caliber of lawyering across the board was consistent and distinctive.

Cravath's antitrust practice is unique because we have dedicated antitrust lawyers who are both experts in the specific field and have extensive experience in other areas of legal practice. The depth of expertise that Cravath lawyers bring in across different areas of law, such as in the areas of securities or intellectual property, makes the firm uniquely qualified to handle high-stakes antitrust work that invariably intersects with these other disciplines. Our ability to develop that level of talent and expertise stems from the firm's commitment to generalist training. Our training model ensures that all of our lawyers have a broad perspective, as well as the versatility to be creative in devising solutions to complex issues that are consistent with our clients' long-term business and strategic goals.

What I love about practicing at Cravath, and what I believe to be a product of these unique attributes, is that our clients get the best of the whole firm and we are able to go "all in" on every matter. For example, we represented Time Warner in its combination with

AT&T - we did the underlying deal and the related antitrust work and then through litigation to finally get the transaction approved and closed, despite the government's attempt to block the merger. Working with a talented team of lawyers from many firms, AT&T and Time Warner prevailed after a six-week trial in what was the government's first challenge to a vertical merger in almost 40 years. That was a tremendous effort that involved our corporate and litigation lawyers all working toward a monumental decision for our client. It was particularly special given our history with the company (Cravath started representing Time Inc. in the 1920s), a relationship reflective of the trust we are afforded by our clients every day.

LD: Antitrust law, as with many areas of enforcement, seems to have a malleability with politics and economics, increasingly on a global scale. Is this something you view as a good or bad thing?

CAV: Antitrust law will continue to intersect with politics and economics into the foreseeable future, and those factors undoubtedly influence the marketplace and how the government views competition. These considerations are critical to take into account when crafting solutions for clients - they reflect the world we live in, which I think makes them inherently important for clients to think through as they plan for their businesses.

LD: What industries or areas might pose new antitrust questions in the next decade, and where should companies expect enforcement to focus?

CAV: Companies today must contend with an increasingly global environment and the considerations that come with it. As more businesses operate internationally and countries continue to create robust antitrust policies, U.S. companies and lawyers must keep in mind how such transactions will reach beyond domestic borders. Deals are analyzed in multiple jurisdictions, and there is not one standard approach for clearance. Regulatory scrutiny remains challenging as a result of the growing number of moving pieces, and the best solutions will ultimately be what will meet the intersecting interests of the government, consumers and companies.

As far as areas that may see continued focus from enforcers and new questions, I expect we will see continued activity and change in the "technology platform" space.

LD: What antitrust considerations or concerns have come about for clients related to the pandemic?

CAV: In March, just as the U.S. was starting to really feel the impact of the pandemic and both the

courts and market ground to a halt, Cravath worked to outline antitrust considerations for clients as they considered the months ahead for their businesses.

We examined in particular the review processes implemented by the FTC and DOJ in response to the pandemic, as updated Hart-Scott-Rodino filing and merger review processes implemented changes suspending early termination of the waiting period, as well as new e-filing and telework procedures. We also looked at the difficulty of conducting market tests, and likely delays in merger reviews conducted by foreign antitrust regulators as a result of updated measures and policy changes that came about in response to Covid-19.

Another area we expected the DOJ or FTC to target - and we may see more of this play out - was whether competitor companies would decide to cooperate in endeavors related to the pandemic. These could include benchmarking best practices for safe distribution of products, joint production of medical equipment and supplies, or joint research and development initiatives for a vaccine or antivirals. The firm examined which types of collaborations might be considered immune from antitrust scrutiny and which were unlawful, and outlined several "dos and don'ts" of collaboration along with examples of laws that may form the basis of an antitrust defense.

As our country and countries around the world continue to navigate the effects of the pandemic, I expect we will be seeing various market repercussions and examining new antitrust questions for our clients for quite some time.

LD: Where have you been spending your time during Covid, and would you talk a bit about your life this year? How are you doing? What do you look forward to most when whatever a new normal is returns?

CAV: I have been spending a lot of time at home adapting to the "new normal," but one thing that hasn't changed is how busy we remain with client matters. Cravath attorneys and staff have been working remotely since March, and though we have all pulled together brilliantly to make the transition relatively seamless, I look forward to being back in the office once it is safe to return. In a way, these circumstances have united all New Yorkers toward a common cause - I feel a great sense of shared resilience and determination that we will get through this together. I believe our city and our country will recover and build back stronger than we were before.