GCR NEWS

A Q&A with Rick Rule

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12 April 2022

Charles "Rick" Rule spent the last three decades advising high-profile clients on mega-mergers and government probes for Big Law firms, but now he is going small. Rule spoke with GCR USA about why he thinks now is the perfect time to launch an antitrust boutique – Rule Garza Howley – with Deborah Garza, another former head of the Department of Justice's antitrust division.

What motivated you to go out and start this new boutique law firm?

I've thought about launching a boutique for a long time.
Deb reminds me that I've brought it up with her over the years. But I think the time is now in antitrust. The administration has raised the profile of antitrust, making it more important generally across the government. Enforcers simultaneously are trying to broaden the scope of antitrust – the issues that it addresses and its relevance to

more aspects of commerce. As a result, there's never been a time, over the last 40 years that I've been practicing, when there has been a greater need and demand for really focused, experienced, and sophisticated antitrust advice. If I was ever going to start a boutique, now was the time to do it. When Deb and the other folks who are joining in this indicated their willingness to launch with me, it all came together in a way that should be fun and enjoyable. We will no longer be bound by the constraints of a large law firm – in terms of conflicts, bureaucracy and business model – and it should be a really strong proposition for clients.

It’s still early but do you have a sense of what type of work you hope to do?

Big firms have their strengths – diversity of practice, significant support and resources, years of goodwill. There is no big law firm with more pluses than Paul Weiss [Rifkind Wharton & Garrison]. But those strengths can be a negative for a specialty practice like antitrust, particularly in terms of conflicts, focus and flexibility. Frankly, at times, the strengths of a big firm can be negatives for antitrust advisers. In a big, very successful law firm, there's a focus on clients with a broader range of needs that can be serviced by the firm’s diverse capabilities. When potential conflicts arise between clients with narrow, focused needs like antitrust and those with broader needs for general corporate advice, general litigation representation, and the like, the antitrust clients tend to lose out. In addition, big law firms like to stick to their business model and that can inhibit an antitrust lawyer’s ability to offer flexible value-billing arrangements.

I hope and believe that an antitrust boutique can make practice more enjoyable for the lawyers and more productive for clients because we won’t have all the bureaucratic constraints of a big firm. I’ll be working with a select group of lawyers whom I've known for a long time, trust implicitly, and enjoy. I expect that we will continue to work with Paul Weiss. I look forward to helping them with clients we share. But generally, the new firm will no longer be constrained by a

big firm's conflicts, and the new firm will have greater freedom to work with more lawyers and M&A advisers as well as a broad range of clients who previously were blocked by conflicts.

Because we're not built on the same economic and business model as a big law firm, we will have a lot more flexibility to develop value-billing arrangements where the clients pay for the value we create and not simply the number of hours we can generate. I think that's going to be a more pleasant way to practice law. But I also think, more importantly, it's going to be a better deal for clients.

Today in "bet your company" antitrust investigations, clients not only have to deal with multiple jurisdictions, but they also must deal with multiple constituencies – not just regulators, but Congress, the states, NGOs, the media, and so forth. The tendency for big firms is to do everything that they can do internally. Big firms only outsource work where they don't have the resources or people in a particular jurisdiction. We're not going to be in that position. We're going to be able to help clients more effectively manage that process, getting the right people in the right places for the right cost. Given the experience that we've had over 40 years of handling the most complex, multi-jurisdictional investigations, we have a pretty good idea of who the best players are everywhere in the world. We can help clients, other law firms and business advisers navigate all aspects of the investigatory process and put together very powerful teams of the best of the best in all the right jurisdictions and disciplines.

Do you think this is going to be a new trend? Do you see others trying to follow in the footsteps of Axinn Veltrop & Harkrider and the Kanter Law Group?

Jonathan's firm was a little bit unique. It certainly reflected a more aggressive plaintiffs' approach. I think what distinguished his effort was that it was more on the regulatory side. There has been a tradition of plaintiffs' litigation boutiques that have been out there. I'm not going to say we're going to represent solely defendants

First published on the *Global Competition Review* website, April 2022

because we may take either side of the “v” depending on the client and matter.

But our firm is going to be different. I would liken our new firm to what was happening in the 1950s, 1960s and 1970s. Back in those days, there were a plethora of antitrust boutiques. That coincided with a time when antitrust was much broader, had a somewhat higher profile and really reflected the kind of antitrust policies that the current US antitrust regulators are trying to recreate. Many of today’s prominent firms like Arnold & Porter and Covington & Burling actually got their start with a focus on antitrust. They’ve expanded, but there were a lot of antitrust firms that didn’t expand, they died. The number of boutiques began to dwindle when, in the 1980s, antitrust narrowed its focus to consumer welfare. I believe that our new firm could represent the leading edge of a new wave – firms structured to focus on meeting a demand that now exists and will grow in a very similar fashion to the demand in the 1950s, 1960s and 1970s.

The Biden administration has made it clear that it wants to push antitrust enforcement in a different direction. Are you confident your firm will be able to advise clients regarding this shift? Many practitioners are saying these changes are exacerbating uncertainty in making deals.

Because of our longevity, Deb and I are unique. We were involved in the changes that occurred in antitrust back in the 1980s. That thrust us to the forefront of antitrust practice. At a very young age, we were retained to handle major antitrust matters, and we were very intimately involved in the development and evolution of antitrust ever since. Most of the lawyers who were our peers when we started have retired, as have their successors. Because of that early start, we’re on our third generation of peers.

That gives us a lot of advantages. We have more years of experience. Moreover, we were very familiar with the antitrust policies that the consumer-welfare regime has replaced – basically, the same sort of

antitrust policies to which today's regulators would like to return. We understood the arguments that had led antitrust to become what it is today and the counterarguments that swung the law to a focus on consumer welfare in the first place. Anybody who began practising after that change is not going to have any background or experience or real understanding of the antitrust to which the current regulators are trying to return.

Second, our careers have spanned the spread of antitrust around the world. When I was running the Antitrust Division, the US was really the only antitrust jurisdiction in the world that mattered. Since that time, antitrust has proliferated around the world. Because of Deb's and my background, we observed that evolution first-hand and at times were consulted by the pioneers in other jurisdictions. A lot of the things that the current administration is thinking about are things that those other jurisdictions have thought about and debated. We understand those arguments because we've been in those debates over the past 30 years and know how those issues are approached.

Third, to some extent, we were involved in developing and defending some of the arguments that animate the current regulators' policies. I was involved in defending Microsoft against the DOJ's suit and took a role in its settlement. Subsequently, together with Jonathan Kanter and others, we developed many of the arguments being used against Google today. Deb too played a role in that. So, that experience has given us a lot of insight into the current policy arguments being promoted by regulators today. Consequently, not only does the longevity of our careers make us somewhat unique, but also the level and diversity of our background are hard to match.

Even with our background, of course, there is going to be uncertainty. It's a brave new world. But the uncertainty flows from the fact that frankly, the leadership of the agencies are probably still themselves trying to figure out exactly where they want to take antitrust and how broad the ambit of antitrust should be. But perhaps more importantly for representing clients, the staff at times

don't fully understand what is being expected, and asked, of them by the front office.

To be honest with you, that's not that different from what Deb and I experienced back in the 1980s when we were trying to shift the Antitrust Division to a consumer-welfare focus. A constant issue for us was how to communicate to staff where we were trying to take antitrust and what case-selection standards we were applying. How do you reduce that uncertainty? We had an approach to it that ultimately proved successful. I think it’s yet to be determined how this crew is going to approach that problem and how successful they will be. It’s a work in progress.

Are there changes that the agencies have implemented that you think will be successful? What are you happy with?

When I came out of the Antitrust Division in 1989, one of the criticisms that people levelled at me was that I was an ideologue, locked into a particular rigid perspective on antitrust. That wasn't true. I mean, I did have a view when I was a policymaker of how the law should evolve and how it should be more focused on consumer welfare principles. When I left the division, my personal policy views became largely irrelevant. Since then, my job as a lawyer in private practice has not been to proselytise or promote my personal views. That’s not relevant to clients. What clients expect – or at least should expect – is the effective promotion of their best interests consistent with the state of regulatory policy and the law. They want to get an accurate read on the antitrust risks they face, and they are entitled to effective, zealous advocacy that promotes their interests. That has been the way I have approached private practice and why I have realized some success. It’s also how we will continue to serve the client at the new firm.

What I have focused on for the last 30 years is understanding all the sides of an issue and taking those sides that are in the best interest of my client. I spend less time thinking about whether the agencies are doing the right thing or the wrong thing from the perspective of

my worldview. They're trying to roll back the clock from where it was and what we created in the 1980s. If I were making decisions, I probably would be making different decisions. But that's not really the role of a private antitrust lawyer. My job now is to understand the client's business, understand the client's interests and then determine the best way for the client to achieve its objectives consistent with the law and policy.

What you are seeing in this administration is actually not a 180-degree shift from what the previous administration did. In fact, the previous administration had already begun to shift away from strict adherence to the status quo. The *AT&T/Time Warner* case indicated a newfound interest in vertical theories. The agencies were beginning to look at labour issues. In some ways, this administration is not so much a clean break from the previous administrations, but rather an acceleration of some of those trends. I don't think that trajectory is going to reverse itself anytime soon. Instead of railing at the changes, lawyers need to understand the new reality and figure out how to use that reality to best promote the interests of their clients. But to be clear, the regulators are enforcing laws that are fleshed out by a wealth of precedent; the regulators don't have carte blanche to change those laws or pursue enforcement policies that are inconsistent with them. When the regulators present an obstacle to a client's legitimate objectives that is contrary to the law and precedents, well then it becomes important to use the courts to protect the client from those excesses.

That is not a view antitrust practitioners often share. Can you elaborate?

People know who I am. They know my views, but I never felt that anybody should just take an argument at face value because I'm the person making it. If a lawyer is making an argument, it needs to be credible. It needs to be consistent with the facts. Frankly, it needs to be attractive to the audience. For the most part, our audience is the leadership of the antitrust agencies or the courts. Lawyers need to understand what those policies are and, if possible, present your

client’s interests in a way that is consistent with those policies. The least persuasive argument to a regulator begins with,“Your policies are all wrong and you shouldn't do this as a matter of policy.” Now, sometimes you may have to point out that their policies are contrary to the law and let the antitrust regulators know that you’re prepared to litigate. But, thinking that you can go in and convince Federal Trade Commission chair Khan or assistant attorney general Jonathan Kanter that they're all wet is just not the way the process works.