

## DOJ's Gelfand Helped Boost Antitrust Trial Readiness

By Jeff Zalesin

*Law360, New York (June 9, 2016, 8:23 PM ET)* -- Deputy Assistant Attorney General David Gelfand, who is departing from the U.S. Department of Justice's Antitrust Division after leading its litigation efforts for three years, leaves behind an enforcement team that is better prepared and more willing to take cases to trial, former colleagues said.

Former attorneys at the Antitrust Division described Gelfand as an engaged mentor who focused on improving the division's litigation skills and conquering any fear of the courtroom. Those efforts are reflected in recent victories for the DOJ, particularly in the defeat of several proposed mergers that the department saw as anti-competitive, the former colleagues said.

"Just in his three years, I am confident that there are more people who could litigate cases at the division and more people who think about litigation strategy," said Ethan Glass, a partner at Quinn Emanuel Urquhart & Sullivan LLP and former assistant chief at the Antitrust Division. "People who were good before are even better."

Glass, the lead trial attorney in the DOJ's successful challenge last year to General Electric Co.'s proposed \$3.3 billion sale of its appliance business to AB Electrolux, counted himself as one of the lawyers who benefited from working with Gelfand. He credited Gelfand with teaching him techniques for taking depositions, examining witnesses and presenting arguments to a judge.

"Particularly in the GE-Electrolux merger, he was integrally involved in every aspect of the litigation and trial," Glass said. "He sat through the entire trial and gave me incredible advice and guidance throughout the process."

Gelfand left his job as a partner at Cleary Gottlieb Steen & Hamilton LLP to join the DOJ in 2013 as deputy assistant attorney general for litigation. The position had been created several years earlier by President Barack Obama's first DOJ antitrust chief, Christine Varney, in a bid to ramp up the watchdog's litigation capabilities.



The list of nixed mergers during Deputy Assistant Attorney General David Gelfand's U.S. Department of Justice career speaks to the Antitrust Division's ability to win in court, and its resulting ability to present itself as a credible threat. (Credit: Law360)

During Gelfand's DOJ tenure, the Antitrust Division was active in both criminal and civil enforcement, targeting a range of alleged evils from health care market allocation to overconcentration of an airport's takeoff and landing slots under a single airline's control. But Gelfand's highest-profile achievement may have been the impressive series of victories the division racked up in merger enforcement cases.

"His time at the division coincided with a string of contested and litigated merger cases in which the division prevailed, and I don't think that was a coincidence," said John Snyder, an Alston & Bird LLP partner who previously worked as counsel to the head of the Antitrust Division.

The division took Bazaarvoice Inc. to trial in 2013, arguing the online product review platform provider should have to undo its then-recent \$168 million acquisition of rival PowerReviews Inc. A California federal judge agreed in early 2014 that the deal violated antitrust law, and Bazaarvoice then agreed to sell PowerReviews in a settlement with the DOJ.

Last year, the DOJ was in the midst of a trial challenging the GE-Electrolux deal when GE walked away from the transaction.

The Antitrust Division also won some of its merger cases without going to trial. Most dramatically, Halliburton Co. and Baker Hughes Inc. abandoned their proposed \$34.6 billion merger this year, weeks after the DOJ sued the oil field services giants.

A smaller example came last year, when movie theater advertising company National CineMedia Inc. dropped its plan to acquire rival Screenvision LLC for \$375 million. The DOJ had sued to stop the deal and was scheduled to go to trial less than a month after it was pulled.

William Stallings, a Mayer Brown LLP partner who worked on the National CineMedia case while serving as head of the Antitrust Division's transportation, energy and agriculture section, said that Gelfand was "a driving force" behind the challenge. He described the case as an example of the DOJ's vigilance about opposing anti-competitive mergers of any size during Gelfand's tenure.

"The deal size was small, but it did show that a deal being small was not an excuse," Stallings said.

On the other end of the size spectrum, Gelfand and his colleagues at the Antitrust Division managed to scuttle at least one megadeal without even filing a complaint. Comcast Corp. and Time Warner Cable Inc. ditched their proposed \$45 billion merger last year in the face of DOJ opposition.

Glass, who worked with Gelfand on the DOJ's investigation of the Comcast-Time Warner deal, called the companies' decision to drop the tie-up "a great success for consumers."

And when a DOJ investigation leads to the abandonment of an anti-competitive deal, that outcome is just as much of a win for the government as a courtroom victory would be, he said.

"I do think that's a somewhat underappreciated part of what [Gelfand] has done," Glass said. "Had that gone to trial and had he won at trial, I think it would have gotten an incredible amount of press, and the result was just as good as that."

The list of nixed mergers during Gelfand's DOJ career speaks to the Antitrust Division's ability to win in court, and its resulting ability to present itself as a credible threat to companies weighing whether to defend their merger plans through trial. But it also speaks to the division's sheer willingness to bring

cases — an attitude that Gelfand helped to cultivate, former colleagues said.

"He's improved the nuts-and-bolts litigation capabilities of the division, but I think he's also given attorneys up and down the line, from junior to more senior attorneys, added confidence in their ability to litigate successfully," Snyder said. "That is probably one of his important legacies."

In merger cases, Stallings said, Gelfand was unafraid to sue over deals that the division believed would harm competition, even if the staff's investigation could not answer every possible question about the deal.

"He was able to recognize that there are some things you just might not know, but if a deal was anti-competitive, we should be ready to take action without being able to answer every unknown," Stallings said.

Gelfand, who declined a request for an interview on Thursday, has not yet announced plans for his next career move.

"It's a huge loss for the Antitrust Division," Glass said of Gelfand's departure. "But it's a big gain for his future clients."

--Additional reporting by Melissa Lipman. Editing by Katherine Rautenberg and Kelly Duncan. Photo by Jimmy Hoover.

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