Trial Fundamentals and Courtroom Strategies for the Civil Antitrust Attorney

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"Most Supreme Court cases are won or lost in the trial court."
Justice Antonin Scalia

I. INTRODUCTION

Today, the Antitrust Division, the Federal Trade Commission and state Attorneys General are
suing aggressively to block mergers in courtrooms throughout the United States. At the same time,
deregulated industries are facing consumer antitrust class actions seeking billions of dollars in potential
treble damages, while successful companies like Microsoft and Intel find themselves trying "bet the
company" Sherman Act Section 2 monopolization claims. The stakes today in antitrust could not be
higher!

Trying a civil antitrust case is a daunting challenge. For example, how will you cull tens of
thousands of detailed documents and financial figures into a handful of useful trial exhibits? How will
you prove the relevant market and antitrust injury? How will you prepare your client for the rigors and
challenges of being a witness?

Many attorneys counseling clients in civil matters today have little courtroom or antitrust trial
experience. This is not surprising, as the high stakes and complexity lead most potential antitrust cases to
settle. Furthermore, the high stakes make it difficult for young attorneys to get substantial courtroom
experience. Nevertheless, as dedicated antitrust attorneys, we owe it to our clients and ourselves to be as
prepared as possible to go into the courtroom and argue effectively on behalf of our clients when the
circumstances so dictate. Antitrust cases should be tried by antitrust lawyers - not general litigators who
pretend to be better trial lawyers.

This paper discusses some of the areas you will need to study and master to effectively try a civil
antitrust case in federal or state court, or before the FTC. No single paper, article, or course possibly can
cover all of the situations that may arise in an antitrust trial. Nor will you ever escape from the need to
think quickly on your feet and to be flexible and adaptable when adverse circumstances or unexpected
developments inevitably arise, as they do nearly every day at trial. Nevertheless, a long and continuing
line of outstanding antitrust trial lawyers have proven beyond any doubt that your dedication to antitrust and continuing trial training ultimately will enable you to serve your clients professionally in the courtroom and help them win their next civil antitrust case.

II. PUTTING TOGETHER AND MAINTAINING A WINNING TEAM

No matter how outstanding a trial attorney you are, you are not going to win a civil antitrust case by yourself. The team you put together and work with throughout the trial will determine how powerful of a case you present, and will dramatically impact your chances of winning. Every member of your team, from the messengers and secretaries to the legal assistants and lead trial attorney, must be committed and dedicated to winning.

Great teamwork does not just happen. The team must be professionally and respectfully managed on a daily, and even an hourly, basis. Team members have to get along and treat one another with respect throughout long periods of great stress. Each team member has to understand his or her role at every moment, and be committed to performing it in an outstanding fashion. Each individual must be prepared to jump in and assist with additional unanticipated critical tasks at any time.

We sometimes hear client complaints about attorneys holding too many meetings, or too many people attending meetings. Explain to your client early and often that frequent team meetings can spell the difference between success and failure. When everyone is not on the same page, anguish and disappointment are only a heartbeat away. Team meetings allow everyone to stay focused, and help the team react and adjust to the constantly changing conditions at trial. Remember at all times that there are no stupid questions.

Every member of your team should spend time in the courtroom, and know what is going on while they are out of the courtroom. Feeling that they are an integral part of the daily trial effort helps everyone pull together when the chips are down towards the common goal.

Building and nurturing your team long before you ever get to trial is a recipe for success. Believe it or not, I have been able on a number of occasions to predict the winning side in a complex civil case by watching the interactions of the various team members. Do you really think for a moment that a judge or jury does not see and react to how each trial team functions? Intra-team quarrelling and bickering cannot be tolerated. Poor teamwork guarantees disaster.
III. THINKING ABOUT THE THEMES OF YOUR ANTITRUST CASE BY WRITING YOUR OPPONENT'S CLOSING

Start thinking about trial the instant you are assigned to an antitrust case or investigation. Even if your case settles, as most antitrust cases do, preparing for trial from the beginning will ensure the best possible result for your client. One of the most effective ways to begin preparing for trial is to first outline your opponent's closing argument. Write your opponent's ideal closing from both a legal and a factual perspective. Share this outline with your colleagues and ask for their comments. From time to time throughout the course of your investigation and case work, revise your outline to incorporate new facts and legal rulings, and to reflect ongoing developments such as the emergence of a potentially helpful or harmful witness.

Beyond scaring you into doubling your preparation, this exercise will help you anticipate your opponent's moves, and give you lots of time to prepare your own responses to your opponents' best points.

After you have fully explored your opponents' potential case, prepare an outline of your side's best potential closing. This will help you think analytically and strategically as you conduct interviews and depositions, and read documents. As part of this exercise, assume the worst with respect to possible motions in limine, evidentiary battles, and witness testimony. This will help prevent you from overestimating your own case or underestimating your opponent's. It also will help you create a checklist for missing facts, documents, witnesses or testimony.

Throughout your investigative and pre-trial work, use your closing outlines as a scorecard to keep track of ongoing successes and failures. Your scorecard will help you conduct a costs/benefits analysis as to each potential witness, trial exhibit and argument. It also will help ensure that you start thinking about a legal and evidentiary foundation for each document or piece of testimony sooner rather than later.

Most importantly, your outline will help you create a winning theme that your entire team can follow as its lodestar. It also will put you into the best possible position to foresee and quickly react to your opponent's best themes. Every step your team takes in developing your case and preparing for trial should be aimed at buttressing your key themes.

Of course, you will take apart and put your outline back together over and over before you stand up to make your opening statement. Do not be surprised, however, if much of what you say and present in your opening statement relates to your first outline of your opponent's case.
IV. PREPARING YOUR CLIENT FOR A RIGORS OF AN ANTITRUST CASE

Your trial team must include your client and key employees. Your client must be intimately involved in every aspect of the case from day one. If you are taking a deposition involving potentially confusing technical testimony, consider taking along an employee to help you sort through the jargon and prepare meaningful questions.

Have your clients attend key team meetings as often as possible. They will see for themselves how critical such meetings are and you will benefit from their insights. The more time you spend explaining to your clients what is happening and why, the better they will feel as the case progresses.

Your clients must be fully prepared for the physical and mental challenges of a civil antitrust trial. Keep them on an even keel and constantly remind them that this is a long-term battle that will have numerous ups and downs. Make sure they take some time each day to relax. Having catered dinners for the entire time is a great way to sustain your team’s morale, and allows the client to visit informally with various team members. Many a great spontaneous creative idea has arisen during a relaxed moment at dinner.

If your client is testifying, make sure that he or she is well-rested. They know what happened and why they are at trial. There is no need to exhaust them by trying to make them rehearse every word of a scripted testimony. Let them tell their story in their own words. Allow them to appear natural and credible.

At times, your client and you may have differences of opinion as to strategy. It is their case, and you must always be respectful of their ideas. Nevertheless, do not hesitate to remind them that they hired you because you have dedicated your career to learning how to win antitrust cases. Generally, an antitrust trial lawyer must be allowed to follow his or her instincts to be successful.

V. INVESTIGATING AND DEVELOPING YOUR ANTITRUST CASE WITH AN EYE TOWARDS TRIAL

"The two biggest mistakes trial lawyers make are not spending enough time in their initial interviews, and not thinking enough about their trial themes."

Russ Herman

Your antitrust trial will be a ferocious battle between two or more parties with an unwritten ending. Understanding your own role at trial is crucial to successfully contributing to your team’s winning effort. One of the lead trial attorney’s most important duties is to ensure that from day one of the case,
every member of the team understands his or her role, and is empowered to effectively carry out his or her mission. The lead attorney also should inspire each team member to seek the highest standards of excellence in reading documents, drafting motions, and preparing for and taking depositions.

A. Learning The Industry Inside And Out

Every member of your team should develop a pragmatic and working understanding of the relevant industry. This can be accomplished through plant or facility tours, reviewing trade journals and articles, and talking to industry employees and experts.

No matter what product or service you are dealing with, and regardless of whether you represent a corporate defendant, the government, or an individual, take as many of your team members as is practically possible on a plant or facilities tour. Talk to the people at the plant, including the people working at various machines or stations. Also try to tour a third party's facilities, so you can compare any similarities or differences. The best way to credibly argue product substitution issues is to fully understand how the product is made, handled and used.

Encourage every member of your team to read relevant trade articles, and look at pictures of the relevant operations. This will help your team immensely as they review documents, talk to potential witnesses, and take depositions. You also may want to have industry participants talk to your entire team and answer their questions.

B. Figuring Out Your Case Early On

You cannot start preparing and understanding your opponent's case too early. You need to know their themes in order to craft your own. Figure out the best way to summarize your case in a single sentence.

Read and re-read every case relevant to your own. For example, during a merger investigation, read and re-read every reported merger case. Every attorney on your team should do the same. This will help you to understand the pitfalls and traps that may be waiting, and guide you in crafting your own. It goes without saying that you should understand intimately every relevant case decided in your circuit.

Never forget that your complaint, answer or counterclaim is your most basic trial document. Jim McElhaney appropriately recommends that you develop a proof list that ties each important fact to at least two independent sources. You should constantly ask yourself how you will rebut an adverse witness on each point.
C. Picturing Potential Witnesses At Trial

Each time you interview someone about your case, picture him or her at trial. Test them and push them. Envision how your opponent will exploit or attack them. Keep in mind that non-parties often are the best witnesses because, rightly or wrongly, they may be perceived as unbiased. Recognize that the court or the jury wants to hear from the key executives. Contrast how Bob Crandall of American Airlines dominated David Boies and Joe Jamail in the American Airlines antitrust litigation with Bill Gates' pitiful videotaped deposition testimony in the Microsoft case.

Whether you are preparing a written statement or taking a deposition, do not feel that you have to develop or defend your entire case through the witness. Take what the witness gives you. Recognize where they can harm you. Balance how you want to use or treat them accordingly.

D. Falling In Love With Documents

Antitrust cases often are won or lost on documents. Therefore, it is critical that every team member understand what they are looking for, and appreciate how critical their review is. Try to have every team member involved in the review process, including the lead trial attorney. At the Antitrust Division, we presented a “hot document” award each day to the team member locating the best document to keep every team member enthusiastic, and on their toes. A “worst document” award also can serve a useful purpose, since your trial notebook must include the good, the bad, and the ugly.

Someone on your team should be tasked early on with deciding how to ensure that helpful documents will be admitted into evidence, and how to best challenge harmful documents.

VI. PREPARING FOR AND TAKING DEPOSITIONS IN A CIVIL ANTITRUST CASE WITH AN EYE TOWARDS TRIAL

A. Preparing Your Deposition Objectives

In a civil antitrust case, you must spend hours developing and revising your case theory and themes. Your deposition objectives will be keyed to the theories and themes your team is pursuing. Write your objectives for each deposition down on the front page of your deposition notebook, so that you can refer to them throughout the day. Remember that a key objective at all times is to understand your opponent’s theories and themes. After the deposition, incorporate the day’s developments into your draft of your opponent’s closing. This will help you keep track of what you may have missed or areas requiring more exploration and development in future depositions and document discovery. Prepare an outline of
the deposition's highlights and share it with your entire team. Seek the team's feedback on ways to better prepare moving forward.

Before you take or defend a deposition, spend time thinking about how you plan to meet each of the following objectives:

1. Discovering the story;
2. Laying foundations for documents;
3. Learning the witness's spin or perspective;
4. Obtaining admissions; and
5. Locking-in the witness for trial.

B. Protecting and Exploiting Your Record

Videotaping your depositions for trial should always be discussed as a critical option with your client. Videotaping unfortunately is expensive. However, the payoff can be huge. Invariably, your opponent's witnesses look and sound better at trial than they did at the deposition. The changes in appearance and demeanor on the videotape can have a huge impact on how the finder-of-fact ultimately assesses witnesses' testimony. Moreover, seeing themselves on videotape during the trial can fluster even the most professionally prepared witnesses. We all love television, so the dramatic impact of seeing the witness contradict his or her trial testimony on television can be devastating. You also can highlight helpful video-taped deposition testimony in your opening and closing statements, and use it to break-up the monotony of your own voice.

At each deposition your side takes, make sure at the beginning that the witness is ready, willing and able to testify truthfully. Repeat that particular series of questions at the end of the deposition to further lock-in the testimony.

C. Asking Good Questions

For some reason, young lawyers are never taught the six magic words necessary to take outstanding depositions and present great direct testimonies: what, where, when, who, why and how. Using one of these six simple magic words as the first word of each of your questions will help ensure that you take a strong deposition. Many times, your best deposition question is: “what happened?” You can then follow-up with: “why did that happen?” or “how did that happen?” If the witness is being evasive, you can ask: “what are you not telling me?” or “why are you not telling me everything?”

Keeping these six magic words paramount in your mind also will help you focus on the witness and listen to them. Burying your head or thoughts in your outline or your documents is a sure recipe for failure. You can use the magic words to essentially rephrase the same question over and over again without drawing the tired “Asked and Answered” objection.
At times, you will want to use cross-examination style questions to obtain admissions, lock-in the witness for trial, and tell the story in your own words. Generally, such times will be less frequent than you imagine. However, when they do arise, be sure that your questions are simple short statements that require a yes or no answer. If the witness refuses to answer yes or no, ask them why they are refusing to answer your question.

Continue to exploit the six magic words in authenticating and identifying documents. Your broad questions will help you explore the full boundaries of the witness’ knowledge. For example, ask them: “Why did you write that?” or “Why did you send that?” Follow-up questions like “Who saw this?” or “Who did you talk to about this?” should always be explored. Do not be afraid to highlight a portion of a document and ask “what did you mean?” It goes without saying that you should never be intimidated or bullied by “the document speaks for itself” objection. Remember that this is discovery and it is your deposition. How do you know that “the document speaks for itself?” Have you ever heard a document speak?

D. Dealing With Opposing Counsel's Objections And Interruptions With an Eye Towards Trial

I never cease to be amazed by the endless colloquy between lawyers during depositions. I spent two years as a law clerk for a United States District Judge handling a major antitrust case. We spent hours laughing about some of the things the lawyers said, but I never saw (and I never have seen since) any of the tiresome colloquy substantively impact the Court’s decision-making.

In any event, if you are taking a deposition, you have a severely restricted time period to gain the maximum amount of information and testimony. Therefore, the less you have to say the better. If your opponent makes a good objection, ask a better question. Whenever possible, simply ignore the opposing attorneys and pretend they do not exist. Focus all of your attention on the witness.

Unfortunately, some opponents simply refuse to behave ethically. Videotape all depositions where they appear. Also know your rights and wait for the proper moment to enforce them. Follow Teddy Roosevelt’s advice: “Speak softly and carry a big stick.”

Some helpful articles in preparing for and taking depositions include:

James W. McElhaney, The Deposition Notebook, Vol. 27, No. 4 Litigation 55 (Summer 2001);

Peter L. Winik, Strategies in Expert Depositions, Vol. 24, No. 3 Litigation 14 (Spring 1998);

David M. Malone, Why Most Deposition Preparation Fails, Vol. 24, No. 4 Litigation 27 (Summer 1998); and
VII. USING MOTIONS IN LIMINE STRATEGICALLY

Motions in limine to exclude evidence or argument, or to ensure that key pieces of evidence or arguments will be admissible at trial, are a powerful weapon that should be utilized strategically in an antitrust case.

For example, in merger challenges today, evidence of asserted efficiencies will be proffered by the merging parties. Similarly, the merging parties may seek to introduce evidence of proposed curative divestures or licenses. If you represent the merging parties, file a motion in limine to have the evidence admitted. If you represent the government, file a motion to keep it out. No matter which side you are on, you should consider seriously filing motions in limine to determine before trial what evidence you will have to deal with.

Even if you are unsuccessful, your motion may help educate the busy trial judge about the merits of your case. In non jury cases, the judge may decide to hold the motion, and listen to the evidence. Nevertheless, the ability to refer to your pending motion during closing argument may prove helpful. Your motion also makes an excellent record in case you have to appeal.

Attached as Exhibits are two motions in limine filed by the United States in its Section 7 case against Franklin Electric Company and United Dominion Industries, Inc., in July 2000. The court reserved ruling on each until after trial, and conditionally heard defendants' efficiencies and proffered post-merger license evidence and arguments. Since the Court ultimately ruled for the United States on the merits, no formal ruling ever was rendered on either motion.

VIII. FIGHTING FOR AND TAKING FULL ADVANTAGE OF VOIR DIRE IN A JURY CASE

Voir dire. You hear about it, you read about it, and you study it. But when you get to court, the judge will not let you do it. What can an antitrust trial lawyer do?

Fight for voir dire. As New Orleans trial lawyer Russ Herman says, "A trial attorney cannot practice on his knees." Herman adds: "The right to voir dire is the right to select who the most powerful twelve people in the world at that moment are going to be."

Start fighting for voir dire early in the process through a written motion. Explain in your motion why voir dire is critical. See if your opponents will agree, as a united motion for voir dire is likely to receive serious consideration. Keep in mind that it is difficult to win any case with a bad jury.
Prepare for voir dire as rigorously as for any phase of the trial. After all, this is one of the few opportunities you will have to address the jury. Although they say that 80% of cases are won or lost during opening statements, any good criminal trial lawyer will tell you that many criminal cases are won or lost during voir dire. Use voir dire as an opportunity to get the jury to listen to you, and to open their minds to your case.

If the judge says he or she will ask the questions, make sure you submit a substantial block of written questions you want asked. As voir dire progresses, request the right to follow-up certain questions, and make your record. For example, you might say, “Your Honor, I would like to follow up that question on the grounds of possible bias and prejudice.”

In picking the jury, trust your instincts. If you do not like someone or you start getting negative vibes, use a challenge. On the other hand, if you like someone, and feel you are connecting, keep them - no matter what your expensive jury consultant says. Nearly always, if you like someone, they will like you. On the other hand, if you feel ambivalent about someone, imagine how they probably feel about you.

A helpful article on jury selection is:
Sonya Hamlin, Who Are Today's Jurors and How Do You Reach Them? Vol. 27, No. 3
Litigation 9 (Spring 2001).

IX. FEELING COMFORTABLE AND CONFIDENT IN THE COURTROOM

You have heard the advice to “be yourself” a thousand times. So let me say it one more time—“be yourself.” Honesty, sincerity and credibility—along with intensive and rigorous preparation—are your greatest assets in trial. You gain credibility when you are comfortable with yourself. Of course, you should constantly watch other great trial lawyers, and even steal their tricks. But you should incorporate their tactics in a way that is natural and comfortable for you, and add your own personal touches.

You have to be in control of your emotions at all times in the courtroom. Emotional outbursts almost always look bad. Furthermore, when you are in control, people know you mean business when you finally become more emotional. The best way to start gaining control is to learn to control your emotions in pre-trial discussions with your opponents and depositions. Always take the long view throughout the course of the proceedings. Keep your eye on your trial theme and your closing statement. Take things a day at a time, and keep the constant ups and downs of the trial in perspective.

Judge James McKenna has six rules for trial, which are perfectly apt for the lawyer trying a civil antitrust case:

1. Be concise. Get to your point and stop.
2. Forget lawyering. Use everyday language and be yourself.
3. Be prepared.
4. Be open and honest.
5. Keep your head in the game. Do not be a slave to your yellow pad. Be aware of what is going on.
6. Remember your theme. Exploit every opportunity to drive your theme home.

Some helpful articles include:
Gerald R. Orbals, John W. Moticka, and Jane E. Eueker, Preparing for Spontaneity at Trial, Vol. 27, No. 1 Litigation 15 (Fall 2000);

Howard D. Scher, Lessons From Winning and Losing, Vol. 26, No. 3 Litigation 25 (Spring 2000); and

Robert M. Callagy and Joshua M. Rubins, Keeping It Simple in the Court TV Age: Is Less Sometimes More? Vol. 27, No. 1 Litigation 10 (Fall 2000).

X. WINNING YOUR CASE WITH YOUR OPENING STATEMENT

Experienced trial lawyers and highly paid consultants tell us over and over again that juries (and even judges) often subconsciously decide cases during opening statements. Whether they are right or wrong, you can be sure that you have a unique opportunity to grab the jury's or the judge's attention in the first few minutes of your opening. This is your moment. Step up to the lectern and take control of the room. Hook the decision makers with your theme. No matter how complex your antitrust case is, present it in a few simple but passionate and persuasive sentences. Make your case real. In United States v. Franklin Electric, a Section 7 case, I sought to summarize the United States' case in a couple of sentences:

The United States today seeks to stop FE Petro and its parent, Franklin Electric, from monopolizing the design, manufacturing, and sale of submersible turbine pumps used in retail gas stations in the United States, by pre-emptively buying its only competitor-Marley Red Jacket, a subsidiary of United Dominion Industries. We ask this Court to enjoin Franklin Electric from acquiring its low-cost and aggressive competitor, Marley Red Jacket, and from achieving its plan to become the sole supplier in this small, but critically important, product market, so that it can raise prices above competitive levels.

After you have grabbed the room, proceed with your highly-structured and purposeful opening. Share the coming highlights of the trial with the judge or the jury. Showcase your best documents, and play or recite brief highlights of gripping deposition testimony.

Take on the hard and tough issues up front, and present your most compelling evidence. Do not overstate any of your case, or make any promises you cannot keep. Return to your theme over and over again.

Some other helpful articles on opening statements include:
James McElhaney, The Sense of Injustice, Vol. 14, No. 3 Litigation 47 (Spring 1988);
Weyman I. Lundquist, Shaping the Case, Vol. 16, No. 3 Litigation 6 (Spring 1990);
Michael E. Tigar, Jury Argument: You, the Facts, and the Law, Vol. 14, No. 4 Litigation 19 (Summer 1988);
James McElhaney, Goals in Opening Statements, Vol. 16, No. 2 Litigation 47 (Winter 1990); and
Brent O.E. Clinkscale, Riche T. McKnight, and Kenneth C. Gibson, Home Field Advantage: The Opening Statement That Closes, Vol. 27, No. 1 Litigation 6 (Fall 2000).

XI. WINNING YOUR CASE ON DIRECT

We all love cross-examining witnesses. But powerful direct examinations are more likely to win your civil antitrust case. Terry MacCarthy feels that some of the keys to strong direct examinations include personalizing the witness, asking open-ended questions (who, what, where, when, how and why) that elicit short and succinct answers, and using effective transitions and demonstrative aids. MacCarthy also focuses on primacy and recency-making a compelling point at the beginning of the examination and another at the end. Looping to emphasize and highlight important points is a powerful and effective technique ("After Mr. Jones told you his company was going to squash your business like a bug, what did you do?")

In framing your direct questions, always try to use the six magic words. It is difficult to draw a sustainable objection when you use one of the six magic words to begin your question unless the question is outrageous (e.g. "When did you stop harassing your employees?") or irrelevant (e.g. "What do you think about our antitrust laws?").

Remember not to get greedy on direct. Do not put your witness in a position where they provide excellent sounding direct testimony that will blow-up on cross. Your diligent work on your opponent's closing statement throughout the case can help you greatly here.

Some helpful articles on direct examination include:

J. Patrick Hazel, Direct Examination, Vol. 14, No. 1 Litigation 6 (Fall 1987);

David Farnham, The Lost Art of Redirect, Vol. 16, No. 4 Litigation 27 (Summer 1990); and

Ronald Jay Cohen, Powerful Witness Preparation, Vol. 27, No. 1 Litigation 1 (Fall 2000).
XII. KILLER CROSS-EXAMINATIONS

"Never interfere with an enemy who is in the process of destroying himself" - Napoleon

Terry MacCarthy, the Federal Public Defender in Chicago, Illinois, is one of the great masters of cross-examination. Terry’s article on “Look Good Cross” is attached for your reference. I must confess to being a strong disciple of Mr. MacCarthy. Mastering Mr. MacCarthy’s rules of cross-examination will enable you to prepare and execute killer cross-examinations in a complex civil antitrust case.

Cross-examination provides you with an opportunity to argue your case to the judge and jury during the trial. Through carefully planned cross-examinations, you can show opposing witness’ bias, prejudice and interest, and soften the impact of their direct testimony by highlighting weaknesses and inconsistencies.

Cross-examination is the complete opposite of direct, and should almost always be treated that way. You are the boss and the real witness. The actual witness is nothing but a puppet or a prop. Put away your magic open-ended words. Use leading questions that state simple facts about which there is little doubt and make sure you know the answers you deserve. Whenever possible, use the witness’ prior precise words from documents, depositions, or written statements.

Occasionally, you will get lucky and the witness will try to walk away from their earlier words. For example, in a hospital merger case, one of the CEOs paid a heavy price on cross by forgetting about his own earlier recorded statement to his Medical Executive Committee about the merger ending the stresses of competition:

Q: Can we agree that competition is stressful?
A: No.

Q: You have sometimes referred to the stresses of competition, haven’t you?
A: Obviously you must have somewhere where I did so I will have to wait to let you produce it. I don’t know that I did.

Q: Competing with North Shore Manhasset has been stressful, hasn’t it?
A: No.

Q: Competing with the North Shore Hospital network has been stressful, hasn’t it?
A: You have to define. Stressful to me, stressful to the hospital, to the trustees, to the physicians, to the staff.

Q: All of the above, hasn’t it?
A: No.

Q: You testified yesterday that Long Island Jewish's financial pressures have made the competitive environment confronting Long Island Jewish much more intense, didn't you?

A: That's correct.

Q: Isn't one of the stresses of competition not being able to jointly set prices with your competitors?

A: No.

Q: Isn't one of the stresses of competition between hospitals having to compete for patients?

A: You still have not - I still haven't agreed it is stressful, so I don't know how I can say yes or no to these questions....

Q: Turning to page 5 of this exhibit, the second paragraph, that describes your presentation to the medical executive committee, doesn't it?

A: That's correct.

Q: It says in the second sentence, quote, amalgamation will free both hospitals from the stress of competition, unquote; is that right?

A: That is right.

Q: By both hospitals you meant Long Island Jewish Medical Center and North Shore Manhasset, didn't you?

A: That's correct. Actually the whole North Shore system, but that's correct, that's okay.

Q: You referred to both hospitals; isn't that right?

A: Yes.

Q: And you referred to the stress of competition; is that right?

A: It appears I did, yes.

Q: You did, didn't you?

A: Yes.

Q: Stress of competition is a phrase you have used; is that right?

A: I used here, yes.
In preparing your cross outline, keep in mind that your objective is not to rehash the direct testimony or to help your opponent by referring to its highlights. Forget trying to get the witness to admit your ultimate point. Instead, use the admissions you obtain to argue your ultimate point in your closing. For example, in the testimony above, the hospital executive was never going to admit that the merger was designed to reduce the stresses of competition. But he had to admit that he had told his Medical Executive Committee that before he knew there would be a trial.

You should always keep your simple case theory foremost in mind in developing your cross. In the case above, the witness’ own written words provided a perfect theme for the United States. The hospitals were merging to “free both hospitals from the stresses of competition.” What better way to argue that theme than to have a key witness admit he used those exact words to justify the merger?

During your cross-examination, you should break the jury’s or the judge’s focus on the witness, and get them to watch you. Positioning and gestures can help greatly. The time to refocus them on the witness is when the witness is squirming. Dramatic pauses can be very effective.

Your attitude during cross is critical. As MacCarthy says: “Never be cross on cross.” Do not get angry with the witness unless the jury on the judge will be shaking their heads in anger or disgust with you. Indeed, if you get to that point, it may be more effective to lighten up. When you see the fact finders laughing at a witness, you will know that you have hit pay dirt.

The witness on cross invariably will try to take control away from you. If your questions are not tight and precise, they probably will succeed. Popular control techniques include: 1) highlighting the difference in your question and the question they actually answered (Jerry Spence); 2) saying “I must have confused you,” and repeating your question (Racehorse Haynes); 3) repeating your precise question until they answer (Terry MacCarthy/Mike Tigar); and 4) reminding the witness gently of their obligations (“If the truth is a simple yes, can you tell us that?” - Jack Olender). Master cross-examiners like Terry MacCarthy sometimes set the ultimate trap by briefly letting the witness think they are in control, and then pouncing. In such a case, it may be appropriate to mix-in a few open-ended questions, as long as you have strong documents to support your point:

Thomas Horton, Assistant Special Counsel: Did anyone at Marquette Credit Union ever ask you to make a political contribution?

Paul O. Sheahan, Vice President and Director, Marquette Credit Union: I made some political contributions, yes.

Q. Did you ever get them reimbursed by Marquette?

A. Yes, they were.
Q. Okay, how did that come about?

A. I really don't remember the mechanics of it. I do know that there were one, or two maybe, contributions that were made.

Q. By you.

A. By me.

Q. Now you were an employee of Marquette, is that right?

A. That's correct.

Q. Did anyone ask you to make those contributions on Marquette's behalf?

A. Yes, it would have been Charlie Paquin.

Q. What did Charlie Paquin ask you with regard to political contributions?

A. He asked me to make a contribution to a particular candidate.

Q. Did you do that?

A. On one or two occasions.

Q. Why did you do what he asked you?

A. I really didn't give it that much thought, Mr. Horton.

Q. Why didn't you give it much thought?

A. I just didn't.

Q. Was one of the reasons you didn't give it much thought that Marquette was going to pay you back for making the contribution?

A. That possibly could have been the reason.

Q. That was the reason, wasn't it?

A. It was also helping out the credit union.

Q. How was it helping the credit union for you to make a contribution in your name to a politician?

A. I was asked by Charlie Paquin if I would make a contribution and I did.

Q. What did you say to Charlie Paquin when he asked you that?
A. I probably said I would.

Q. Why did you so agreeably do that?
A. I really don't remember, Mr. Horton.

Q. Did Mr. Paquin tell you that you could be reimbursed by Marquette?
A. Probably did.

Q. Well did he or didn't he?
A. I would say yes.

Q. And you in fact sought reimbursement from Marquette didn't you?
A. They gave it to me, yes.

Always keep in mind the key trial principles of primacy and recency. Be sure to start and finish your cross-examinations with a powerful point. And never get greedy!

Some helpful articles on cross-examination include:

David Berg, Cross-Examination, Vol. 14, No. 1 Litigation 25 (Fall 1987);

Vance Barron, Jr., The Poisoned Question, Vol. 16, No. 4 Litigation 31 (Summer 1990);

Stacey J. Moritz and Marcy Ressler Harris, Cross-Examining the Accomplice Witness, Vol. 14, No. 1 Litigation 31 (Fall 1987);

Leonard M. Ring, Cross-Examining the Sympathetic Witness, Vol. 14, No. 1 Litigation 35 (Fall 1987);

Scott Turow, Crossing the Star, Vol. 14, No. 1 Litigation 40 (Fall 1987);

James W. McElhaney, Make Something Out of It, Vol. 16, No. 1 Litigation 51 (Fall 1989);

Vance Barron, Jr., A Probing View of Cross-Examination, Vol. 16, No. 1 Litigation 41 (Fall 1989); and
XIII. HANDLING OBJECTIONS

A. The Art of Making and Meeting Objections

Like so much else at trial, effectively making and meeting objections requires you to combine science and art, and think quickly on your feet. The reasons you might raise an objection are simple, and include: 1) stopping problems before they happen; 2) keeping the trial focused and on track; 3) keeping inadmissible evidence out; 4) protecting privileged communications and information; and 5) making a record for appeal.

In making or meeting objections, you should speak quickly and courteously using one sentence or less where possible. You must scrupulously follow the Court's guidelines (e.g. some Courts only allow you to say "Objection"), and you need to be specific.

Knowing when to object can be a tough call. In some cases, you can avoid having to repeatedly stand-up by entering a continuing line of objection. Make certain, however, that the Court acknowledges and accepts your continuing objection on the record. You must be persistent. Never let yourself be intimidated by the judge or opposing counsel into not objecting if you believe it is in your client's best interests. Sometimes, however, the best thing you can do is to simply keep quiet. For example, in a bench antitrust trial, the defendants called their economist after a particularly draining set of examinations filled with objections and rulings. I noticed that the Judge's eyes were glazing over, as the economist droned on and on, so I simply sat quietly, raising no objections, and kept my cross-examination brief. The Judge actually thanked me for helping to keep the economist's testimony brief.

B. What Are the Basic Objections?

The basic objections generally are not taught well in law school or after an attorney enters practice. Unfortunately, most antitrust trial lawyers will have to learn them on their own. The basic types of objections include form, foundation, fairness, and privilege.

Form objections generally can be avoided by asking simple questions. On direct, use your six magic words. Foundation objections tend to be the toughest. You need to make sure that the non-expert testimony is based on personal knowledge. Obviously, all proffered testimony must be relevant. Having a partner ruthless object during practice testimony can help you sharpen your trial questions.
Fairness objections demand that you follow your instincts and your heart. If something feels unfair, make a record. You should be able to anticipate many such issues before trial, and handle them through motions in limine. Such motions also are valuable in handling privilege objections.

C. Dealing with Difficult Counsel

The best way to handle difficult counsel at trial is through crisp and short questions. If they are correct about an objection, quickly rephrase your question.

Angry opponents actually are a blessing, since “whom the gods would destroy, they first make mad.” By staying relaxed, you make them look bad. Humor also can be used discreetly to disarm them. No one likes a bully -- especially judges and juries.

Occasionally, you will have to deal with “the sneak.” Seeking in limine rulings before trial can help you disarm them. Make sure to move to strike any sneaky answers as non-responsive, and then ask for appropriate instructions. Moving for a mistrial can be a powerful antidote if used judiciously.

Surprisingly, facing inexperienced counsel can be frightening. Judges and juries often are sympathetic to them, so never patronize them. Stay courteous and professional at all times. Watch out for the “interrupter” and the “sideshow.” Protect your witness’ right to fully answer each question and discreetly ask the Court to put a stop to any antics by counsel or the audience. Do not be afraid to look for antics or showboating by opposing counsel in the hallway or in the presence of the jury.

Some helpful articles on trial objections include:

John C. Conti, Trial Objections, Vol. 14, No. 1 Litigation 16 (Fall 1987);

Steven C. Day, Getting More Than You Asked For: The Nonresponsive Answer, Vol 14, No. 1 Litigation 18 (Fall 1987);

The Honorable James B. Zagel, United States District Judge for the Northern District of Illinois, What To Do When a Judge Makes a Mistake, Vol. 27, No. 1 Litigation 3 (Fall 2000); and

James W. McElhaney, Trial Notebook: Get It Admitted Some Other Way, Vol. 27, No. 3 Litigation 53 (Spring 2001).

XIV. WINNING CLOSING ARGUMENTS

Anyone who has watched a mock jury decide a complex civil antitrust case knows that the jury almost always tries to cut through the legalese and decide the case on equitable grounds. The jurors' various implied values and assumptions generally guide their initial reactions to the case. In the case of
bench trials, the Judge's long-term values and assumptions are especially critical because he or she does not have to persuade other jurors that he or she is right. Therefore, your case must be designed to appeal to the fact-finders on an emotional level. You must make them feel that they will best adhere to their personal implied values and assumptions by deciding in your client's favor.

This, of course, takes you right back to the beginning: establishing and adhering steadfastly to your theme. Think about the implied values you are advocating. Are you appealing for fairness (e.g. "This was a backroom deal designed to put X out of business")? Competition (e.g. This merger is designed to help X and Y avoid the "stresses of competition")? Cooperation (e.g. "This joint venture is a win-win that will create new products and lower prices for consumers like you")?

Everything you say in closing and everything you point to should relate directly back to your theme. For example, "Dr. X admitted that he wants to merge the hospitals to avoid the stresses of competition."). Design your closing statement to give your friends in the jury room the ammunition they need to persuade the other jury members. If it is a bench trial, give the judge the ammunition he or she needs to write a strong opinion that will survive appeal. Pay particular attention to any questions the judge asks and answer them fully and completely. Keep in mind that the judge may be asking you a particularly tough question because he or she needs more ammunition to draft a strong opinion in your favor.

Emphasize your power words. Highlight your best exhibits and emphasize compelling testimony. Stick to your themes and outline, and never allow your opponent to euche you out of your positions of greatest power. Show your passion and your belief in your case.

Additional helpful articles on closing argument include:
Patricia Lee Refo, Closing Argument: A String of Pearls, Vol. 25, No. 1 Litigation 37 (Fall 1998);

Stephen B. Bright, Developing Themes In Closing Argument and Elsewhere: Lessons From Capital Cases, Vol. 27, No. 1 Litigation 40 (Fall 2000);

James W. McElhaney, Persuasive Organization, Vol. 26, No. 1 Litigation 51 (Spring 2000);

Benjamin Reid, Trial Lawyer as Storyteller: Reviving an Ancient Art, Vol. 24, No. 3 Litigation 8 (Spring 1998); and

Peter D. Baird, Persuasion 101, Vol. 27, No. 4 Litigation 25 (Summer 2001).
XV. CONCLUSION

Being an antitrust attorney is a demanding and consuming profession. It takes a lifetime to master
the subtle complexities and intricacies of antitrust. On top of that, we antitrust attorneys owe it to our
clients and ourselves to develop into capable, if not outstanding, trial attorneys.

Take the time from your busy and demanding antitrust practice to read trial strategy and
courtroom skills articles and books. Attend NITA and other trial skills training courses. Accept a pro
bono case that forces you to stand on your feet in the courtroom.

In choosing to become an antitrust litigator, you have chosen a noble and fulfilling way to serve
your clients, your profession, and your country. Seize the initiative and make the extra effort necessary to
become a capable antitrust trial attorney. You will never regret experiencing the challenges and joys of
trying and winning a civil antitrust case.
Antitrust Library: Antitrust Litigator's Corner

› Trying an Antitrust Class Action
By Jerry L. Beane

The title got your attention, right? Surely it must be a misprint. No antitrust class action cases are tried! Like every generalization, however, there are exceptions. Antitrust class actions are sometimes tried. This article draws upon personal experiences in trying antitrust class actions in both federal and state courts. Although focused on the defense of an antitrust class action, hopefully the article will also be of interest and assistance to lawyers prosecuting a class action. Furthermore, the suggestions in this article are not limited to antitrust class actions. They apply to the trial of any type of class action. READ MORE »

› Trial Fundamentals and Courtroom Strategies for the Civil Antitrust Attorney
By Thomas J. Horton

Today, the Antitrust Division, the Federal Trade Commission and state Attorneys General are suing aggressively to block mergers in courtrooms throughout the United States. At the same time, deregulated industries are facing consumer antitrust class actions seeking billions of dollars in potential treble damages, while successful companies like Microsoft and Intel find themselves trying "bet the company" Sherman Act Section 2 monopolization claims. The stakes today in antitrust could not be higher! READ MORE »

http://www.abanet.org/litigation/committee/antitrust/articles.html

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