The Texas Lawbook

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Reflections on an Acquittal

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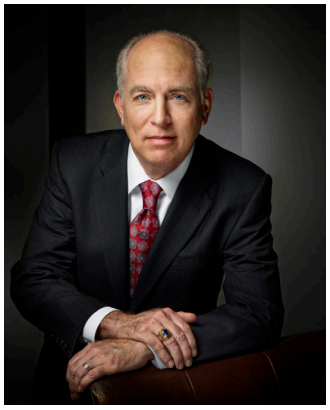
It was a case I might not have won in my 40s.

Certainly, I tried a significant number of high-profile cases during that decade of my life, including complex patent cases and the Risperdal litigation with the Texas Attorney General's office. But this case required more of me than even those very challenging cases did. This case required two things that younger trial lawyers mostly lack – discipline and patience.

A multi-defendant white-collar criminal case in federal court presents unique challenges. First, the sheer number of lawyers on the defense side is a logistical puzzle. Where does everyone sit? Who goes first? How do you put together a coherent defense that singles out your client without implicating, even indirectly, another defendant? Oh, and throw in a visiting judge from Toledo, Ohio, of all places, with whom no one in the courtroom had any experience or firsthand knowledge.



Multiply these problems "times nine" in the Forest Park Medical Center trial, which concluded recently in federal court in Dallas. This closely watched case, which involved a novel application of an organized crime statute known as the Travel Act, ensnared 21 health care professionals and administrators at its peak. Nine defendants, including five doctors, went to trial.

The government's witness list included more than 10 witnesses who had pleaded guilty and were prepared to implicate others in an alleged vast conspiracy involving $40 million in so-called bribes and kickbacks and more than $200 million in insurance claims.

So how did our Winston & Strawn team manage the lone acquittal in the trial, as well as the lone acquittal at any point in the nearly seven-year investigation?

I wish I could say I knew we would prevail immediately after the jury retired to deliberate or right after my cross examination of the architect of the alleged conspiracy. But that would be revisionist history animated more by hubris than discernment.

Over the last few weeks, as our whole team has had time to reflect on what we accomplished on behalf of Dr. William "Nick" Nicholson, a nationally recognized bariatric surgeon and one of the best clients a lawyer could ever have, I have reached some conclusions. They are also lessons in how to manage and try any kind of dispute – civil or criminal.

Lesson one: Be lucky to be hired by the right client.

I don't say this with any intended flippancy. Lawyers do have a say in whom we represent, and sometimes we have to make a choice just as a prospective client does. I was interviewed by more than one doctor who had been indicted in November 2016. I didn't know anything about the case and didn't really promote myself as having any particular health care expertise.

My longtime representation of Dallas Mavericks owner and billionaire entrepreneur Mark Cuban, and the success we had in his highly publicized battle with the SEC, often put me on "the list" of trial lawyers to be considered for any kind of high-stakes case, especially in Texas. But it is often fortune and not skill that leads to one potential client hiring you over another, and with "Dr. Nick," we had a client who had a very defensible case. He had sought the advice of a lawyer before entering into the marketing arrangement the government was challenging as a bribe, and he had been an investor at Forest Park which provided a perfectly legal motivation for using the hospital's facilities for his patients. Plus, he was a very likable and earnest guy with an excellent reputation, personally and professionally. These things matter in life and in lawsuits.

Lesson two: Pick a rabbit.

OK. The old saying is "pick a horse." But I prefer the Chinese maxim: "You can't chase two rabbits."

We had a very full basket of defenses in the case. For example, the "victims" in the government's case were insurance companies, not individual patients. There was no allegation of unnecessary or poorly done procedures, only that the insurance companies, in some instances, had to

pay more under the contracts of insurance. And the truth is, insurance companies don't make appealing victims, or certainly that was the conventional wisdom.

As another example, we had the benefit of advice from a very highly regarded health care lawyer who had drafted the marketing agreement at issue not just for our client but also for two other doctors in the case. All the crimes alleged in the indictment required proof of "willfulness," a mental state that means the defendant knew he was acting unlawfully. What could be a better rebuttal to that than having sought the advice of a lawyer before acting?
As appealing as those themes were, there was a better one that was not as exciting or as headline-grabbing. It was simply this: The government's paper trail was extensive but it never touched Dr. Nick. Yes, co-defendants who had pleaded guilty would testify against him, but their testimonies were not supported by contemporaneous documents, especially emails or text messages.

Even better, the admitted conspirators had numerous emails and texts among themselves – speaking freely about their understanding and intent—but none with Dr. Nick. Certainly, we would still bring forth testimony from Dr. Nick's health care lawyer (the one who drafted the marketing agreement at the core of the case) as well as objective data from Nicholson's records that showed behavior inconsistent with participation in a bribery scheme, but the primary thrust of our case day to day was the absence of written evidence specifically linked to Nicholson.

How did this play out? With almost mind-numbing repetition, we examined each witness who had anything to say about Nicholson to highlight the same handful of issues:

The government didn't identify a written communication between you and Nicholson in your direct examination.

The government didn't mention such a communication to you in your preparation.
You can't point us to one among the million-plus documents the government produced.
And so on. Our line of questioning was repeated so often that the government quite literally made a joke about it in its closing.

But we had the last laugh.

Lesson three: Remain disciplined.

This is probably the lesson that my 40-year-old self would have struggled with the most. In this case, the goal was not to "own the courtroom," conduct the most skilled cross-examination or even be noticed at all.

Although I took the most active role in coordinating the defense group outside the presence of the jury, I didn't seek the daily starring role when the jury was present. For many of the 47 witnesses called by the government, we had no questions at all. For others, ones who were on the stand to implicate Nicholson above anyone else (and the government boasted that they called more witnesses to testify about Dr. Nick than any other defendant), we insisted on cross-examining first. And our examinations were focused and often very short.

When it came to putting on our own case, we tried mightily to be the most efficient lawyers in the courtroom. Five witnesses testified in our defense case for a total elapsed time of perhaps three hours. Remember, this was a seven-week trial. We could never come close to the amount of evidence, testimonial and documentary, adduced by the government. So we had to make our three hours count. We also cited a handful of documents – but one in particular carried our most important theme. What we lacked in quantity, we gained in impact.

And our client did not testify. He didn't need to. We didn't make that decision until we absolutely had to, but I had in mind throughout our decision-making process a piece of sage advice from my partner Abbe Lowell, one of the most successful criminal defense lawyers in the country: When the client testifies, the defense case becomes all about him. When the client doesn't testify, the defense case becomes all about the lawyer.

What that translated to for me was that our whole team needed to shoulder the burden of carrying the credibility of Dr. Nick. We would be the truth-tellers, as I often said to my trial partner Scott Thomas (the most disciplined lawyer on the team, for which I and Dr. Nick will be forever grateful) or our crackerjack associate Grant Schmidt. Let other lawyers, including the government, overreach, misstate or create distractions. And they certainly did. We will always be seen as telling the absolute truth. Always, that means speaking with precision. Sometimes, that means saying nothing at all.

Lesson four: Being disciplined is not a synonym for being boring.

A good friend, a lawyer for a defendant who testified against us, urged me over and over that, for my closing argument, I needed to "bring it." I still have a series of two-word texts from him that say simply "Bring it."

I certainly tried to. Like any good closing argument, mine had its share of color and emotional appeal – even a quote from the Bible. At the end of the day, though, what I "brought" during my closing delivered in the early days of spring were the same facts and arguments we had outlined for the jury in our opening statement seven weeks earlier in the dead of

winter. The importance of that consistency cannot be overestimated.

We had no clever punchline such as, "If the documents don't talk, the doctor walks." But we remained disciplined enough to chase our single rabbit, one that led to a career-saving result for our client.

After the verdict, Dr. Nick gave me a hug and said, "Thank you for giving me my life back." Perhaps that is the last and most important lesson: Never forget what is at stake.

Tom Melsheimer *is Managing Partner of Winston & Strawn in Dallas and is co-author of "On the Jury Trial: Principles and Practices for Effective Advocacy."*