

How They Won It

Winston & Strawn Wins Sole Acquittal In \$40M Kickback Row

By Daniel Siegal

Law360 (April 30, 2019, 11:30 PM EDT) -- The world was moving in slow motion for Winston & Strawn LLP partner Tom Melsheimer as he sat in a Dallas courtroom in early April listening to a district judge read out "guilty" after "guilty" while he waited to find out if he had successfully defended his client, one of several surgeons accused of taking kickbacks from a hospital.

When U.S. District Judge Sidney Fitzwater got to the sixth defendant, Dr. William Nicholson, he paused and then punched out the words Melsheimer was hoping for: "Not guilty." Melsheimer turned and asked his partner Scott Thomas, "Did that just happen?" Thomas was too stunned to reply, according to the duo.

In that April 9 verdict, the jury found four doctors and three others guilty of participating in a \$40 million bribery scheme aimed at steering surgical patients to Forest Park Medical Center in Dallas and deadlocked on charges against one more defendant. Only "Doctor Nick" was acquitted.

Melsheimer and Thomas said that dramatic result was secured by their team's focus on making sure the jury did not lump Nicholson in with the other defendants tangled in the trial's web.

"We certainly would have hoped everyone would be acquitted, but we couldn't act like that and we couldn't act like that in front of the jury," Melsheimer said. "We had to make our own independent decisions."

Another defense attorney in the case, Christopher Lewis of Crain Lewis Brogdon LLP, praised the work Melsheimer and his team did at trial, saying they "did a fantastic job of accentuating all of the positives with regard to Dr. Nicholson's case."

"His group of lawyers did a very good job of tracking all of the dollars and showing there was no ruse here whatsoever," said Lewis, who represented Forest Park investor Dr. Shawn Henry, who was convicted of participating in the bribery conspiracy at the trial.

Prosecutors alleged in 2016 that 21 people, including the hospital's founders, had engaged in a fraud in which the hospital used sham marketing agreements as cover to give doctors millions of dollars in kickbacks for sending surgical patients to Forest Park. Ten defendants pled guilty. Charges were dropped against an 11th individual and a 12th defendant was severed from the group and is awaiting trial.

In February, a trial commenced against the remaining nine defendants: five doctors, a nurse, a former hospital administrator, a former staffer and a man accused of handling some of the payments.

Nicholson, like several other defendants, faced charges of conspiracy to pay and receive health care bribes and of using interstate commerce to facilitate bribery.

Melsheimer is an experienced trial lawyer, but he wasn't an expert in health care law or in representing doctors before this case. He ended up with Nicholson as a client through a mutual acquaintance at his kids' elementary school.

While that meant Melsheimer and his team had to take a crash course in bariatric surgery, Nicholson's specialty, it also meant the only thing that colored how they saw the evidence was their need to win.

"We didn't come into it with any preconceptions or biases," Melsheimer said. "We were able to look at it with fresh eyes. That is sometimes the hardest thing to get in a trial lawyer."

In preparing for trial, the defense team discovered two key "objective facts" separating Nicholson from the other doctors, Melsheimer said. First, there were no incriminating emails, texts, letters or other documents from Nicholson, and second, Nicholson's clinic had actually sent more patients to Forest Park after the marketing program ended than it had while it was active.

Lewis, the defense attorney who represented Forest Park investor Henry, noted that perhaps because of the dollar amounts in play, with each doctor accused of reaping \$3.4 million to \$7 million from the scheme, the jury in the case seemed to hold the defendants to an exceedingly high bar, and said that Nicholson's team went on the attack to clear that threshold.

"They went out and I think they clearly showed their client was innocent, and I think that was something that this jury required," Lewis said. "This was not a reasonable doubt jury. If it were, several other defendants would have been acquitted."

That aggressive approach involved not just emphasizing the lack of hard evidence against Nicholson, but also finding a way to cast doubts about the credibility of the witnesses supporting the prosecution's case, according to Melsheimer.

"We knew that the evidence against [Nicholson] was going to have to come out of people's mouths. It wasn't going to be told with the documents," he said. "If you just have witnesses, there's just a lot more you can do with that, with people's recollections, with people's biases, their motivations to shade the truth."

That came into play when a "star witness" for the prosecution, Dr. David Kim, took the stand, according to Melsheimer. Kim, also a bariatric surgeon, had already pled guilty, and "put words in Dr. Nick's mouth" that could have proven him guilty if believed, Melsheimer said.

Melsheimer worked to cast doubt on Kim's credibility. For instance, Kim had claimed he was a close friend of Nicholson's, only to admit on the stand that he'd never been to Nicholson's house and didn't know the names of his children, Melsheimer said.

"That demonstrated: Here was a guy who came in and had a lot of good reasons to exaggerate things,"

Melsheimer said. "He knew he had to sell this testimony, and so he decided to color it with what turned out to be some exaggerated statements."

Thomas' cross-examination of the government's financial analyst, Melissa Parks, was also crucial, according to Melsheimer.

Thomas said that after reviewing the multiple gigabytes of spreadsheets they received from Parks the night before her testimony, he was able to show that she had "cherry-picked" much of the data she presented to the jury.

Without restricting the data, Parks couldn't have argued that Nicholson sent more patients to Forest Park while he was getting the marketing payments than otherwise, according to Thomas.

"She came as close to admitting that as an expert is going to do on the stand," Thomas said.

Because of their need to keep Nicholson separate from the other defendants in the jury's mind, however, Melsheimer said Nicholson's defense team sometimes had to let other government witnesses go unchallenged.

"We did not want to be seen as taking the lead for the case. We wanted it to be all about Dr. Nicholson," he said.

Despite this approach, Melsheimer added that it was important not to let their defense of Nicholson turn into an attack on the other defendants, saying, "One of the biggest challenges in a case like this is to not turn it into a circular firing squad."

Sarah Wirskye of Wirskye Law Firm, who represented money middleman Jackson Jacob, who was convicted at the trial, said that Nicholson's team managed to walk this fine line.

"I think if you try to pull down the other defendants, the risk is the whole ship goes down as well," she said. "It's a tricky strategy to maneuver, but they did it very well."

Asked for comment about the Nicholson verdict, the U.S. attorney's office directed Law360 to an earlier statement in which it thanked the jury for its service.

The government was represented by Andrew Wirmani, Kate Pfeifle, Mark Tindall and Marcus Busch of the U.S. Attorney's Office for the Northern District of Texas.

Nicholson was represented by Thomas M. Melsheimer, Scott C. Thomas and Grant K. Schmidt of Winston & Strawn LLP.

The case is U.S. v. Beauchamp et al., case number 3:16-cr-00516, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Todd Hutchinson. Editing by Jill Coffey and Michael Watanabe.