The Texas Lawbook

Free Speech, Due Process and Trial by Jury

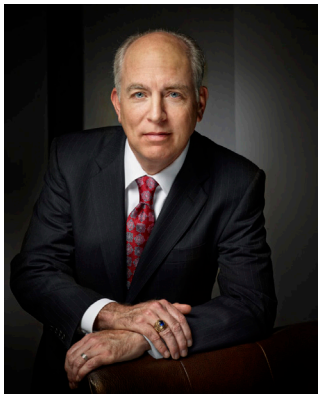
Lessons from the DaVita Win

APRIL 20, 2022 | **BY TOM MELSHEIMER**

On Some of my trials have been conducted in relative obscurity. Sure, all were absolutely important to the participants but not always so to the outside world.

I've had a few that attracted a fair amount of attention. The I-30 condo case had so much attention it had to be moved out of Dallas. The Risperdal trial in Austin was streamed for viewing over the internet. And, of course, the *SEC v. Cuban* case attracted every outlet from ESPN to *The Wall Street Journal*.

But *United States v. DaVita, Inc. and Kent Thiry* in Denver was a different animal altogether. It attracted an intensely focused interest on a very particular world – antitrust. It was the first criminal case alleging an illegal conspiracy involving a nonsolicitation or "no-poach" agreement. The Department of Justice has amped up its efforts in investigating and prosecuting cases involving labor markets – as opposed to product markets – and this unprecedented case was the debut of this strategy.



The courtroom was full every day, and every day there were close to 100 people listening in to the trial on the court's dial-in number. I came to know this well when a friend from out of town texted me at a break and said, "I can hear you ordering lunch. When did you go vegetarian?"

The trial featured a crack team of young prosecutors from the DOJ's elite Antitrust Division. What they sought to prove was a horizontal market allocation of a market for employees. In essence, they alleged that my client, Kent Thiry, a celebrated and honorable ex-CEO from healthcare innovator DaVita, Inc. — whom I came to respect immensely — conspired with three former DaVita colleagues, now CEOs at their own companies, to divide the market for employees so that DaVita employees would be denied opportunities at those other companies. There was no allegation of wage-fixing, which made this case quite different from *United States v. Jindal* tried last week in Sherman, Texas. Wage-fixing is essentially price-fixing. But nonsolicitation agreements are not plainly a market allocation.

On our side was a team of some of the best firms in the country, including McDermott, Fish & Richardson, Wilmer Hale, and Morgan Lewis. Besides me, the Winston & Strawn team also included Scott Thomas and Alex Wolens.

Given that this was the first case alleging nonsolicitation agreements that were per se criminal, and that the Antitrust Division was retroactively prosecuting alleged agreements starting a decade ago, there were serious questions of the whether the case violated the due process rights of DaVita and Mr. Thiry. Those arguments were raised in our pretrial motion to dismiss. That motion was unsuccessful, but in denying it the Denver court held that the government had to do more than prove the existence of a nonsolicitation agreement. Judge R. Brooke Jackson ruled the government had alleged a market allocation agreement. But to make such an agreement a per se violation of the antitrust laws, the government had to prove at the trial that the three alleged agreements were entered into by the participants with the intent and purpose of allocating the market for employees.

So this case had cutting-edge issues in an area of law that is unfamiliar to most trial lawyers, primarily because there simply aren't that many antitrust jury trials. But as I quickly learned, this case had all the same challenges of any defense case, civil or criminal, and required the same approaches as any successful defense strategy.

First, we had emails that the government tried to use as the linchpin of its case. And the emails superficially aligned with at least one half of what the government needed to prove — an agreement between individuals to not solicit each other's employees. But the emails didn't tell the whole story. Far from it. In fact, as to one of the companies, it wasn't clear that there was any agreement at all. As to another, the evidence was an "agreement to disagree."

How to respond? It's the same thing I would recommend in any case. Embrace the emails. Acknowledge them. Clear the underbrush

by saying what is not in dispute, and don't look back. We did that here and were careful to say that what was said in an email 10 or more years ago is not the same thing as engaging in criminal conduct. Because here, it plainly wasn't. And it was of continuing utility to exploit the government's decision to immunize nearly every witness who testified before the jury.

Second, we had a case where the underlying big-picture theme for the government — affluent men allegedly making deals in private that limited employment opportunities for others — had a very broad populist appeal. But this was, again, a very one-sided and ultimately inaccurate portrayal.

How to respond? Look for ways to take that away from the government. Show how the government was overreaching. Here, that was a particularly powerful point. We emphasized that the involved employees weren't nurses or technicians but senior executives, most making very comfortable six-figure salaries, exclusive of bonuses and equity. We also tried to normalize the whole idea of a "nonsolicit" agreement as a fairly limited restriction and one that could be worked around by an ambitious employee. We also tried to show, where appropriate, that the involved companies were either doing business together or sought to foster ongoing procompetitive relationships. Finally, we brought out the unbridled admiration that nearly every witness felt for our client.

Finally, we had an unusual, but ultimately very useful, circumstance in this court. Judge Jackson allowed the jurors to ask questions after every witness and gave them preprinted forms to do just that. And the questions flowed like a Colorado trout stream. By the end of the trial, after eight witnesses called by the government and one witness called by the defense, the jury had asked over 100 separate questions of the various witnesses. The expert economist we called to the stand testified longer in response to jury questions than he did in response to my questions on direct examination. Some questions were alarming to our defense, some were very encouraging, and many were neutral.

How to respond? Make the questions your friend. I reserved my opening on behalf of Mr. Thiry until after the government's case concluded. I spent time highlighting the importance of jury questions and how we had done our best to digest them and use them to inform our own questions. And I told the jury to ask questions of our economist witness as I thought that his answers would reveal reasonable doubt in plain sight all throughout the government's proof. In closing, counsel for DaVita used specific jury questions, and the answers to them, as the roadmap for an acquittal.

By treating this "groundbreaking" case no differently than any other defense case, we prevailed. As I've said many times in the patent context, if you set out to try a "patent case," you will likely lose a patent case. But if you set out to try a case about innovation or betrayal or overreach, you may well win. Here, we didn't set out to win an antitrust case. Instead, we tried a simple case where we admitted many of the operative facts and simply tried to say that those facts didn't prove a crime. The jury agreed.

The moral of the story is simple. No matter how groundbreaking a case may be, the winning strategy is likely an approach you've used successfully before in a previous case, perhaps one where no one was watching.

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