Federal Trade Commission

Can Antitrust Trial Skills Really Be “Mastered”?
Tales Out of School About How to Try (or Not to Try) an Antitrust Case

Remarks of J. Thomas Rosch
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before the

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Good evening. Having spent this morning hopefully fulfilling the Section’s expectation that I be provocative, I thought I’d spend this evening focusing more on the practical and tell you about some of the lessons I’ve learned over the years about how to try an antitrust case. That’s not to say I won’t say some things that might raise an eyebrow (as the Section knows, I’m usually good for that), but I wanted to make sure you come away from this Course with a few tips you’ve not heard before.

thoughts on how to become the best litigator possible. Second, I'll offer some observations about how I believe antitrust cases should be tried. You will note that I use the word "should" there because I'm not convinced the agencies always proceed as I would.

I.

As you've likely heard by now, the FTC recently suffered a major loss when our lead trial lawyer – Robby Robertson – decided to return to private practice. I can't blame Robby – with the exception of my two stints at the FTC,

The first path is by learning from a mentor or from people senior to one. Find someone who has a lot of experience and absorb as much of it as you can, while you have the chance. I was lucky enough to have Federal District Court Judge Bill Schwarzer from the Northern District of California as both a teacher and mentor when I started at the McCutchen firm, and I learned several rules of thumb from watching him (and the really good plaintiff's lawyers) try their cases. I'll go over a few of those rules of thumb now with some examples. These may seem intuitive – and if they are, that's a good sign – but they certainly were not always obvious to me.

First, Judge Schwarzer always said it was better to make mistakes at depositions (or, in the FTC's case, investigational hearings) than at trial and that you should never ask "why" questions because you never know what the answer will be. I recall that in my first deposition I was handling a case for Chrysler Corporation in which I was interrogating a plaintiff who claimed that his car had broken down on the way to Lake Tahoe. The plaintiff's contract for sale of the vehicle boldly warned him that the car was being sold "As Is, Where Is." I asked him whether he had read the contract before he signed it. When he said "no," I asked him *why* he hadn't read it, and he replied "because I can't read." Needless to say, I settled that case fast (and not on particularly favorable terms). In short, Bill was right – get your dumb mistakes out of the way at depositions and, better yet, avoid them all together by not asking dumb questions.

Second, I also learned that if you plan to use a deposition (or investigational hearing transcript) at trial, you should adhere to the trial rules during the deposition. This means no leading questions unless the witness is hostile. At a deposition that occurred in *Jenkins v. Greyhound*, an antitrust case that was tried to a jury for a month in 1979, I

learned Bill was right about that too. The witness was a very hostile witness and should have been terrific for the other side. But the deposition was taken in Hawaii, and the junior plaintiff's lawyer was so anxious to get to the beach that he forgot to lay a foundation for his questions and he continued to lead the witness. Consequently, the plaintiff couldn't use the deposition at trial.

Another rule relating to investigational hearing transcripts is that, unless opposing counsel is present (to cross-examine) when the record is made, it may not be admissible at trial. Staff get riled up about this when I remind them of this rule, but a good federal district judge will treat the transcript as hearsay, and let it in, if at all, only as part of the document or exhibit dump that the staffs of both Agencies insist on doing at the end of trial (and which I think is a horrible practice anyway because the judge generally ignores everything that is being dumped).

Third, I've learned that it's critically important to think long and hard from a legal perspective about whether your witness is friendly or hostile before you get to trial. As I'll elaborate on in a moment, a good trial judge will not permit cross-examination (or asking any leading questions) of non-hostile witness. For that reason, federal district judge Vaughn Walker has called conducting direct examination a substantially harder trial skill than conducting cross-examination. In the *Brand Name Prescription Drugs* case that was tried to a Chicago jury for 12 weeks in 2000, the plaintiffs' lawyers repeatedly asked their own witnesses leading questions.[1] Finally, Judge Charles Kocoras, a veteran federal district judge in the Northern District of Illinois, scolded

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[1] For a detailed summary of the Brand Name Prescription Drugs Antitrust Litigation, see Kenneth G. Elzinga and David E. Mills in THE ANTITRUST REVOLUTION (4th ed.) (2003), *available at*

plaintiffs' lawyers in front of the jury and instructed the jury to ignore the answers that the witnesses had given to leading questions.

This is not to say that an innately skillful trial lawyer can't conduct an effective direct examination. The best I've ever seen do that was my Latham partner, Greg Lindstrom, in the *Chronicle-Examiner* case, which involved the 2000 merger of *The San Francisco Examiner* and *The San Francisco Chronicle*.[2] Without the benefit of a single leading question, he elicited compelling testimony from our expert witness in the *Chronicle-Examiner* case, an investment banker.

Greg also interrogated the government's allegedly "neutral" consultants and competitors in the *Oracle-PeopleSoft* merger case that we tried before Judge Walker for a month in 2004.[3] In his interrogation of each of these witnesses he started out by asking the witness whether he'd ever met or talked with the witness before. When the witness said "no," Greg then proceeded to draw out inconsistencies between the Antitrust Division's case and the experienced views of the witness. It was masterful. In fact, I think the testimony of those witnesses was one of the most compelling evidence for Oracle at the trial. But it takes intuition about what the witness is likely to say, and also judgment about whether the witness is likely to hold up well on cross-examination.

Fourth, there are some very basic – but intensely practical – rules of thumb that Judge Schwarzer taught me and which go a long way towards helping your case at

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[2] *See* Felicity Barringer, *San Francisco Newspaper Can Be Sold, Judge Rules*, N.Y. TIMES, July 28, 2000, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0CE5D9173DF93BA15754C0A9669C8B63.

trial. One is to strictly limit the number of people sitting at the counsel table. This is especially critical during a jury trial, but it is also important when the judge is the trier-of-fact. Our staff at the FTC has sometimes ignored this rule of thumb much to my dismay. For example, in the *Whole Foods* 13(b) preliminary injunction hearing, I specifically reminded staff that no more than two lawyers should sit at counsel table. But at the hearing, our counsel table and the area behind it looked like we had an army staffing the case. This is perhaps understandable. As a number of you know from experience, a cast of thousands (not literally) generally shows up for staff at meetings with a target and sometimes at Commission meetings. But agency staff needs to bear in mind that a trial isn't like those meetings. Judge Schwarzer generally insisted that only he and I sit at counsel table during a trial.

Another practical rule of thumb is to keep a straight face at all times during trial. I confess that I violated that rule myself during the six-week *Ringsby* jury trial in the mid-1980s.[4] In that case, Ringsby, a Denver trucking company, sued the major trucking companies in the U.S. for allegedly conspiring with the Teamsters to drive Ringsby out of business. Unfortunately for me, the Ringsby's were represented by Joseph Alioto, one of the best plaintiff's trial lawyers I've ever known. I began laughing silently at one point at what seemed to me to be a particularly outrageous piece of direct testimony by Mr. Alioto's client, whereupon Joseph immediately turned to the jury and said "Let the record show that Mr. Rosch is laughing at the witness. I'm sure you agree this is no laughing matter." The judge didn't need to say anything. Believe me, I observed that rule of thumb for the rest of the trial – and since. 0 0 7.98 122.15hf8Tm 8 -0.In EMC 0 12 126.7940 T 74

The third path to learning is what I call "learning by bitter experience" or, what others might call "learning by doing." I have two examples here of rules I learned the hard way. The first is "don't exceed your own skill in operating the jukebox." By that I mean, don't get in over your head if you aren't technologically savvy or if you aren't as savvy as you think you are. I learned this the hard way in too many cases to count. Suffice it to say, after many failures with the "newest" technology, I finally gave up and just used an Elmo. Incidentally, that actually worked for me. So my advice to you would be to use technology – but only if you have practiced, practiced, practiced, and are convinced it will add something to your presentation. Otherwise, you're more likely to create an eyesore and are better off focusing on crafting a strong message than a message that is lost by a poor delivery.

The second example I have of "learning the hard way" involves picking juries. I learned two rules of thumb this way. The first is to never allow someone to sit on the jury who will turn into a jury of one. I learned this the hard way in *Polara v. United States Golf Association*, an antitrust case that was tried to a jury for a month in the mid-1990s before Judge Schnacke, a veteran trial judge. There was a Mills College alum in that case – juror #5 to be precise – who I let on the jury. Every time I spoke she shook her head as if to say "no." She did this from the opening statements through the first several witnesses. Finally, as I seperated with her, I went to Judge Schnacke and asked that she be removed from the jury on the basis of her poor judgment. Judge Schnacke puffed on his pipe and said to me "Tom, I wondered why you left her on." Needless to say, he denied my request and she wound up dominating the jury, serving as the foreperson and ruling against my client.

The second rule of thumb that I learned about picking juries is that you should never seat a juror who lusts to be on a jury. This is the painful and colorful lesson of John Grisham's *The Runaway Jury*, in which juror Nicholas Easter gets on to the jury, convinces the big tobacco defendants that he can – for a price – orchestrate a defense verdict, and then turns the defense attorneys into the punch line when he becomes the foreperson and orchestrates a victory for the plaintiff including a $400 million punitive award. None of my trials were that colorful, but suffice it to say

Drugs case. Bill (and I) took the deposition of one of the named plaintiffs, a retail pharmacist in Seattle just before trial. Bill told me had some surprises for her, but he didn't tell me what they were and he didn't unveil them when he deposed her. But when she showed up as plaintiff's first witness at trial and blamed a conspiracy for the fact that she was paying higher prescription drug prices than hospitals and others with formularies, Bill asked her whether she'd ever blamed any factor other than a conspiracy for the pricing disparity. When she said "no," he promptly rolled a tape of an earlier interview she'd given on PBS in which she'd said the pricing difference resulted simply from the differences in demand. That tape blew the socks off of the jury, the judge, and the plaintiffs' class action lawyers who were trying the case.

Also, as I've said, thanks to Bill Schwarzer I think I can do a pretty good job of cross-examining a witness at trial if I have good impeachment materials – like the witness's deposition transcripts or documents. But what if a trial lawyer lacks those kinds of impeachment materials or wants to go beyond them (and hence is more risk averse than I am)? A good example of that also occurred, again, in the *Brand Name Prescription Drugs* trial. There Chuck Douglas, then Partner Chair of Sidley & Austin, spent one morning absolutely *gutting* a plaintiff witness's direct examination by confronting the witness with a host of inconsistent statements he'd made in documents the witness had authored. At the noon break, he asked all of us other defense lawyers whether he should just stop cross-examination. We unanimously said "yes." But after lunch, Chuck asked the witness whether, reflecting on his morning's testimony, the witness would agree that he had misled the court and the jury in his direct examination. I turned to my colleague, Peter Huston, and said under my breath, "Don't do that Chuck.

Don't step out on the diving board any further because you've already destroyed this witness." But after a long pause, the witness said "Yes, I would agree with that." I never would have had the instinct to ask that additional question.

A somewhat less dramatic example occurred during the *Binsby* trial. In that case, Jim Baumgartner, a skilled Texas trial lawyer and fellow defense lawyer, asked plaintiff's star witness whether he'd falsified a key document. Again, after a long pause (during which the witness nervously sipped a cup of water and dropped the document on the floor) the witness admitted he had done so. I never would have had the innate ability—or the courage—to ask that additional question.

These anecdotes are illustrative, not exhaustive. But they illustrate the difference between innate (or instinctive) skills and those that I had, which were pretty much taught by others and which require, in the case of cross-examination, some excellent impeachment material and, in the case of direct examination, inside knowledge about what the witnesses are going to say and whether they can avoid skillful cross-examination.

II.

The next topic I'd like to discuss is how, more broadly, an antitrust case should be tried. As a trial lawyer myself, I've had the luxury in my time as a Commissioner to think about this topic more so than I ever could when I was in private practice where I was constantly putting out fires and responding to deadlines.

To put my views succinctly, I believe that for far too long the antitrust agencies have tried their cases the *wrong* way, relying to a fault on consumer witnesses, competitor witnesses, and economists. The best way to win an antitrust case is not to start

with repetitive testimony from people who are complaining and then back it up with complicated econometric analysis that a judge or jury will be at a loss to understand.[5] Instead, I believe that the way to win a case is to think about how the very best plaintiff's trial lawyers would do it – and, by that, I mean not those steeped in the technicalities of the merger guidelines or Section 2 law, but just good old-fashioned plaintiffs' lawyers. I have three observations in this regard.

First, the very best plaintiff's lawyers consider it imperative to tell a short but comprehensible story. In the first antitrust trial that I participated in, *England v. Chrysler*, which was tried to a San Francisco jury for about a month in 1968, Bill Schwarzer and I tried to tell three stories. None of them sold, and we had to rely on a successful JNOV motion to bail us out. For this reason, in recent years, in closed-door Commission meetings to consider a complaint recommendation, I've taken to pressing the staff litigating a case and the Bureau of Competition to spell out for me in detail what the storyline at trial will be before I'll agree to vote out a complaint. If the lead attorney can't summarize a compelling storyline that plays up our strengths and responds to our weaknesses in a few concise sentences, I won't vote out the complaint. It's as simple as that.

In telling a story, it's critically important to remember that the law suggests that the best way to frame the storyline is around competitive effects and not to get caught up in the nuances of market definition. The legal story consists of (1) the Sherman Act

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[5] *See generally* Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, 5 Competition Policy International 1 (Spring 2009) (arguing that generalist judges lack economic training (and often interest) and that, as such, if economic evidence is to be persuasive, it must be communicated in a way that a generalist can understand and must be consistent with other evidence).

jurisprudence, which holds that the competitive effects story is more important than a precise market definition (though at least the rough contours of a market must be identified at some point in the process[6]); (2) then-Judge (now Justice) Clarence Thomas's holding in *Baker Hughes* that Section 7 liability turns in the end on competitive effects[7]; and (3) our own new Horizontal Merger Guidelines, which also emphasize the competitive effects story line and how that story can be effectively told by empirical evidence[8].

Second, the very best trial lawyers also do a terrific job of figuring out *how* to tell that story – in other words, which witnesses and documents will be the most persuasive.

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[6] *See, e.g.*, *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) ("The share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration."); *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir. 2002) ("Whether a company has monopoly or market power 'may be proven directly by evidence of the control of prices or the exclusion of competition ... .'"); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (stating that in a Section 2 case, if "evidence indicates that a firm has in fact [profitably raised prices substantially above the competitive level], the existence of monopoly power is clear."); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 98 (2d Cir. 1993) (market power "may be proven directly by evidence of the control of prices or the exclusion of competition, or it may be inferred from one firm's large percentage share of the relevant market."); *Todd v. Exxon Corp*, 275 F.3d 191, 207 (2d Cir. 2001) ("use of anticompetitive effects to demonstrate market power . . . is not limited to 'quick look' or 'truncated' rule of reason cases").

[7] *United States v. Baker Hughes*, 908 F.2d 981, 991-992 (D.C. Cir. 1990) (recognizing that the ultimate issue in merger cases is whether the merger is likely to create or facilitate the exercise of market power, and observing that while proof of a high market share was one way to prove that, where there were other kinds of evidence supporting that prediction, they could and should be used).

[8] U.S. Dep't of Justice & Federal -0.0iE.24 0n <<ited St.eilsrving that wrkTd (of m)8(a)-1(ree)8crf n

That's why I generally ask trial teams at the Commission to describe, their order of proof, as well their storyline, That's also why I generally advise our trial teams to begin with the CEOs or the most senior knowledgeable representatives of the company or companies under investigation. In a *merger* case, this means focusing on the Chairmen of the two merging firms. In a *conduct* case, this means going straight for the jugular and putting on the testimony of the CEO whose firm is under investigation. There are a number of advantages in this approach.

For one, it means that the first time the CEOs testify, they are not leading off with canned testimony that they have rehearsed a thousand times over in which they have perfected their explanation for why their conduct or transaction is so clearly procompetitive. Instead, they are in a defensive posture from the get go. That can only be good from my perspective.

Also, leading with the defendant's witnesses more generally is also useful because they are hostile, meaning the agencies get to cross examine them and control the testimony. For this reason, I recommend leading with the CEOs and then following with the authors or recipients of the most damaging emails or other documents. There is, of course, the risk that these witnesses will try to explain or disown statements that they made in those emails or documents. But so what? The purpose of these witnesses is simply to authenticate the documents so that they can be thrown up on the screen for the trier(s) of fact (and the media) to see.

Dan Wall did this very effectively during the *Oracle* trial when he cross-examined one of PeopleSoft's star witnesses. There, the witness had authored or received some

allegations. Dan called the witness as part of Oracle's case-in-chief, but did not conduct a traditional cross-examination. And you can be sure that the witness either explained or disavowed everything he had written. But Dan didn't care one whit. All he wanted the witness to do was to authenticate the documents, which he threw up on the screen for Judge Walker, the assembled media, and all of the world to see.

In my view, only after the staff have called the parties' CEOs followed by the senior executives responsible for the most incriminating documents should the staff present customer or competitor witnesses and/or economists, and they should be presented as frosting on the cake. The reasons for that are fourfold.

First, as I've indicated, customer and competitor witnesses are not easy to control. Customers and competitors are generally adverse witnesses and thus leading questions are a no-no. Indeed, I was thinking of that rule in the six-week *Polara* jury trial. There Polara, the producer of a "hook, slice, and slideless" golf ball sued my client, the United States Golf Association, for banning the Polara ball from tournament play. When I began to cross-examine the representative of another golf ball producer, federal Judge Schnacke asked me if I had ever spoken with the witness before. I confessed that I had. At that point, Judge Schnacke ruled that I could not ask the witness any leading questions, which certainly reduced the effectiveness of my examination.

Second, courts tend to perceive customers as having a built-in bias against a merger because customers generally favor lower prices and are inclined to think that mergers lead to higher prices. This is reflected in the *Oracle* decision, where Judge

Walker expressed reservations about the foundation for the customer testimony.[9] Indeed, the first inkling we had that we would win the *Oracle* trial was when Judge Walker asked the DOJ's lead counsel who his best witnesses were, and he replied "the customers."

Third, it's very hard to present customer testimony in a fashion that is not cumulative, on the one hand, and is representative, on the other hand.[10] In *Oracle*, for example, the agency presented more than a dozen customers witnesses, and the district court obviously got bored with hearing the same thing over and over again (e.g., whether the customer would change its buying practices if confronted with a small but significant

Fourth, customer witnesses can very rarely be used to present documentary evidence. They're generally not knowledgeable enough to authenticate or testify about party documents. And, because they can't be treated as adverse witnesses, courts are reluctant to permit introduction of their own documents through them, and even when that is permitted, the documents are often perceived as being self-serving and the product of selection.

Nearly all of these same considerations militate against the use of *competitors* as primary story-tellers. They are 'wild cards' who are not adverse witnesses and therefore can't be led. Those who oppose the transaction may be perceived as having axes to

Match and the *Staples* trials, complex economic formulae were presented in the form of simulation studies and in all three instances the courts (including some pretty sophisticated judges) virtually ignored them.[13] If you want to win, you're better off keeping it simple.

III.

In conclusion, as I reflect on it, I've neglected to mention the three most important lessons a trial lawyer has got to learn. The first is that trials are almost never predictable – there are "up" days and "down" days – and it's critically important to anticipate that will happen so that you won't get too low after a "down" day or too high after an "up" day. The second is that if a jury comes in with an adverse verdict, remember too, this is just one milestone in an entire process that includes post-trial motions and appeals. The third, and maybe the most important lesson is that for that reason, it's critically important that you get on the horse again as soon as possible and ride it to the next case and trier-of-fact.

[13] *Oracle*, 331 F. Supp. 2d 1098; *FTC v. Swedish Match N. Am., Inc.*, 131 F.Supp. 151 (D.D.C. 2000); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).