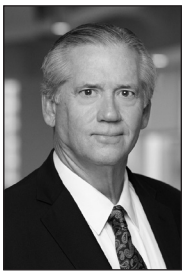
Antitrust Magazine: Judicial Panel on Trial Skills

MODERATORS



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PANELISTS

Judge Denise Cote
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Judge Amit Mehta
Judge, U.S. District Court for the District of Columbia

Judge P. Kevin Castel
Senior Judge of the United States District Court for the Southern District of New York

Judge Lorna Schofield
Senior Judge of the United States District Court for the Southern District of New York

JAMES KEYTE: Let's start with your litigation experience before you took the bench and get some perspective. It could be none or it could be some.

DENISE COTE: I was a federal prosecutor for many years, and then I was in private practice for some years. As a federal prosecutor I tried many criminal cases. We had something we called "second-seating," and I second-sat many younger lawyers over the years.

In private practice I didn't do any trials. I did some arbitrations. In private practice, I worked on an antitrust case, but it never went to trial.

JAMES KEYTE: None of your criminal stuff was antitrust, I assume.

DENISE COTE: No.

JAMES KEYTE: No cartels.

DENISE COTE: Cases brought by the Southern District of New York's U.S. Attorney's office, not the Antitrust Division.

JAMES KEYTE: That is excellent, though. That is plenty of experience.

AMIT MEHTA: I was largely a criminal defense lawyer before I became a judge. I spent five years at the D.C. Public Defender Service and then went to private practice after that, so most of my trial work was criminal and on the defense side. I had a few civil cases in private practice go to trial but certainly a far smaller number.

My antitrust experience extends exclusively to the criminal context, oddly enough in an internal investigation in a territory-allocation and customer-allocation case involving the packaged ice industry. There is such a thing. That was the extent of my antitrust experience before getting on the bench.

LORNA SCHOFIELD: I started out at a big firm. Then I was a criminal prosecutor for four years. That is where I learned to try cases, with Judge Cote as a mentor, and that has been a wonderful foundation for the rest of my career.

I then went back to big-firm life. I was a partner for twenty years at a firm, and my practice was complex commercial civil litigation but not antitrust. I did try cases occasionally, more than many of my colleagues. I was sometimes brought into cases that were not my own cases for trial.

I began learning antitrust law when I became a judge. I have had three pretty significant antitrust trials, and they have been some of my most significant cases.

KEVIN CASTEL: I did jury trials for a couple of my clients in the employment discrimination and products liability areas. I also did tons of arbitrations and hearings. I was national counsel to a manufacturer of asbestos-containing construction products, so I was able to get before juries in that context.

JAMES KEYTE: Looking back, what is the most important thing you have learned as a judge that you wish you knew

when you were litigating whatever kind of case? At the end, we will talk about some advice for young lawyers, but now as a judge, do you think, *Oh, if I were a young litigator doing what you're doing, I wish I had known or thought more about X, Y, or Z*?

AMIT MEHTA: I think I would have exhibited a little more patience. I don't think I appreciated very much the workload that judges have and the demands on their time. I think like a lot of litigators I was very anxious to get decisions and have judges move cases forward. Frankly in hindsight I can see why it took as long as it did when I was working primarily in civil litigation, although the same was probably true as a public defender.

DENISE COTE: I have not thought about that issue before. There are many things that surprised me when I became a judge that I did not understand would be an important component of the project. I thought it would be largely presiding over trials, and that is just one part of the job.

When you are a prosecutor, which was most of my trial work, you are focused on the investigation, framing the case, producing discovery, and preparing your witnesses for trial. The main thing I learned from those who trained me as a prosecutor is an important lesson I think for any litigator, which is that you should be thinking about your summation from the very first. You want to figure out what facts you need to develop and what arguments you are going to be facing on the other side. You want to have the long view of the case from the very beginning. Now, sitting as a judge, it seems to me sometimes lawyers do not have that.

KEVIN CASTEL: I would have advised my clients to go to trial more often. If you are representing a defendant, you can effectively win not only with a finding of no liability but also with a finding of damages well below what you might have paid in settlement. That is my woulda-coulda-shoulda moment there.

LORNA SCHOFIELD: My biggest wish is that I had had the benefit of seeing as many trials and trial lawyers as I now have as a judge, because you learn so much by watching people do it. Whether they are good or bad, you learn a lot—what to do, what not to do. I think, *Gee, I wish I'd known that*.

JAMES KEYTE: My next question is, and we will start with Judge Cote, now that you have done some antitrust cases, in particular *U.S. v. Apple*, the eBooks case, and the *Daraprim* cases, how do you generally view antitrust cases as different than your average litigation or commercial litigation?

DENISE COTE: Of course, in federal court we have the most complex cases and also the simplest, all important to the parties large and small, but the antitrust cases stand usually at the end of the spectrum of the more complex cases, and they are more complex cases that depend very heavily on expert testimony; not exclusively, but I don't think I have had an antitrust case where expert testimony was not a critical component of it along with the factual development that is the basis for the expert testimony. If I think about complex litigation where there is both a component of factual development and the development and presentation of expert testimony, I think antitrust cases are not alone in that, but they are one of the few that have that kind of complexity in both aspects as a prominent part of the lawyer's job and the fact-finder's job.

JAMES KEYTE: Excellent. Judge Mehta, obviously with *Sysco Foods* and more recently with *Google Search*, which takes us into the realm of Big Tech, antitrust, and platform economies and things, how have you seen antitrust cases as different and in what respects?

AMIT MEHTA: I agree wholeheartedly with Judge Cote. Certainly, along the spectrum of complexity they fall on the more complex end. As a result of that, I think they tend to involve greater case management. At least, I have viewed those cases in that way. Certainly, in the two enforcement cases you just mentioned I played a fairly active role in case management and ensuring that from the outset we had a fairly detailed and comprehensive schedule from start to finish.

When you are looking at the other end of this, particularly in these enforcement matters, when you have a judge as a trier of fact, you need to ensure that you stay on track because if, at the end of the day, you are looking at a multiweek trial, it is not something you can just pick up and move to another part of your schedule. It is critically important for the judge assigned to these types of cases to stay on top of the parties to ensure that the cases are proceeding on the schedule that the parties agreed to. That is one.

The other thing I would say is that I think the antitrust bar is a very high-functioning, highly professional, and highly competent group of lawyers. On both the government and defense sides I have been incredibly impressed by the lawyers that have appeared before me, in their courtroom presentations and in their written work. As complicated and as time-consuming as these cases are, from the standpoint of having good lawyering it is always nice to have an antitrust case.

JAMES KEYTE: Judge Castel, moving to some of the antitrust trials you have done as a judge, could you describe a couple of those? There is obviously the *Valassis v. News Corp* case and there is *Euribor* and obviously *Ad Tech*. Could you describe some of those and how they are different from other types of cases and trials?

KEVIN CASTEL: *Valassis* was a monopolization case that went to trial before a jury. After two-and-a-half weeks of

trial, the jury indicated on a Friday afternoon after two and a half days of deliberation that it was deadlocked. I settled it over the weekend, but it went all the way through jury instructions, closing arguments, and the like.

I was the presiding judge in the *In re Set-Top Cable Box* antitrust multidistrict litigation (MDL), and I am presiding now over the *Google Ad Tech* MDL. You mentioned the *Euribor* case as well. It is not uncommon in a patent case or even an intellectual property case for an antitrust counterclaim to be asserted. Over the course of time on the bench, you are going to encounter antitrust claims with some frequency in the most unexpected places.

KELLIE LERNER: Is there anything that is truly different about antitrust trials compared to other types of trials that you have presided over from your view on the bench?

KEVIN CASTEL: The obvious one is because it's a treble-damage claim plus attorney's fees. They typically are well-resourced cases.

However, antitrust cases can have very different dimensions. If you have a price-fixing case, it is going to be a "whodunit" or "did anyone do it?" kind of case where there is going to be an emphasis on code language and emails, or meetings and dinners that are deceptively described in the travel vouchers, individual desk calendars, and the like. Then again, if you have a monopolization case or rule of reason case, it is inevitably going to descend into a battle of anticompetitive and procompetitive features and will be quite dependent on the views of the expert witnesses.

JAMES KEYTE: Judge Schofield, you had *FOREX* and *Sabre*.

LORNA SCHOFIELD: It was *Sabre* twice, I'm sorry to say.

JAMES KEYTE: With that experience, what makes antitrust in jury trials different than other jury trials?

LORNA SCHOFIELD: I would add two things that I don't think anyone else has mentioned. One is that it is not always intuitive to juries that competition is the holy grail. So it is not always clear who is wearing the good-guy hat and who is wearing the bad-guy hat. Just making a jury understand who is the villain and why or why not is a challenge for the lawyers. We all know that is an important part of advocacy, but that is a tough thing in antitrust.

Two, I think another big difference is that, because of the timeframe in these cases, you often get into historical evidence and the challenges that witnesses are gone or have passed away and that sometimes the technology or markets seem anachronistic. I remember in the *Sabre* trial a lot of it was technology-based. People were looking at DOS screens, and I'm sure there were jurors who had never seen one in their lives. So just making it accessible because so much history in the longer timeframes can be challenging.

JAMES KEYTE: Comparing those two cases, those industries obviously are quite different, was there anything about those industries that made one or the other even more challenging for the narrative of who has the good hat on and who doesn't?

LORNA SCHOFIELD: The *FOREX* trial was in some ways pretty easy for the lawyers in trying to portray who was good and who was bad because many people had been criminally prosecuted, so there was a parade of witnesses who got on the stand and invoked their Fifth Amendment right not to incriminate themselves. It was pretty easy to convey that these were not the good people.

Also, they had the advantage that these were young and bragging types. So they would get in their chat rooms, and one chat room they called "the cartel." Lawyers can't create their facts. I think the Plaintiffs' lawyers had a fairly easy time of it in that respect. The *Sabre* case was highly technical and all about technology and market entry, and it was not so accessible.

KELLIE LERNER: I want to kick us off on the pretrial phase of a case. I will frame the discussion in terms of dos and don'ts for lawyers. What are some recommendations that you have for lawyers at the pretrial stage, and does that differ at the trial phase of a case? Judge Cote?

DENISE COTE: I would like to circle back to what I mentioned earlier. I think in the pretrial phase it is very important that the attorneys have the endgame in mind and be thinking about what they need to prove at trial or defend against at trial so they can sum up on that theme, whatever it is. Those facts need to be developed and that throughline needs to be clear and convincing, whether it is the case being presented by the plaintiff or the defenses being presented by the defendant. That should shape your discovery requests, who you prioritize in terms of depositions, and how you argue in the early motions to the judge.

As many judges do, I handle discovery in my civil cases myself, and through any disputes I feel I have an opportunity to learn a lot about what is important to the particular party. They need this evidence because it is critical to this claim or this defense, and they can articulate that and be convincing on that score because they have this vision of the entire case they are presenting.

I think the most important thing at the pretrial stage is to make sure you have thought about the entirety of the litigation and where you want it to end in your summation to the jury or to the judge in a bench trial and let that shape the pretrial litigation.

AMIT MEHTA: Two things: One is that it is critically important in these cases to get off on the right foot with the judge, communicate, and signal that as counselors you are prepared to work cooperatively with one another and that not every

discovery dispute is going to become a wrestling match. Working cooperatively to help develop the case management order, working cooperatively to bring discovery disputes before the judge as to those that actually matter and in a way that facilitates an efficient resolution I think is important, particularly in cases where the judge is the trier of fact.

As I said earlier, ensuring that the case remains on schedule is important, and the one thing that slows civil cases down is discovery battles and extension in discovery. That is not something you can afford if you have to sit as the trier of fact at the end of the day. That is one.

The second thing, and again this is based largely on my experience in dealing with these enforcement matters, is figuring out opportunities to educate the judge on the subject matter of the case and what the key disputes and legal issues will be, so figuring out what mechanisms the judge might be amenable to for presenting what the technology involves, what the market looks like, or what the disputed areas will be at a trial in advance are important because it then conserves a lot of resources when you are both briefing summary judgment. Then, if you get to a trial, you are not there educating the judge for the very first time and your time is being used in the most optimal way to present your case.

KELLIE LERNER: On the opposite side of the coin, taking this advice into consideration, what types of either oral or written advocacy are behaviors that you would discourage lawyers from considering in pretrial practice?

AMIT MEHTA: I don't think this is unique to antitrust. Lawyers spend a lot of time trying to hone what their best arguments are, and that is understandable, but what they probably don't spend enough time doing is thinking about what the weaknesses are of their case and preparing how to address those with the judge, because the reality is that I think the judge is going to recognize it, whether it is raised by the other side or just by the judge's own review. Not being ready to address the weaknesses of your case is probably one of the most common errors I see from lawyers in the pretrial phase of a case.

KELLIE LERNER: That is very helpful. I understand the appeal as an advocate to not want to recognize the weakness in your case, but ultimately I see that is not serving your client's larger interest.

Judge Cote, same question.

DENISE COTE: Like Judge Mehta, I think this is not particular to antitrust. It is critical for an advocate to win the trust of the court. Most judges start from the assumption that they can rely on counsel to give a description of whatever the facts are that need to be the subject of the meeting or conversation accurately and to cite the relevant law on any issue that is important to the conversation.

You want to make sure you don't lose that trust. This is true in the simplest of cases, but it is also true in the most complex, and perhaps it is more devastating in the more complex litigation if you lose that trust. If you overstate the facts, misrepresent the facts, or hide the governing law, you have an adversary, the judge has law clerks, and the judge maybe has been around the block a time or two, so the likelihood is that the judge is going to figure out that you are less than a reliable reporter of the facts or the law, and when you have lost that presumption of trust I think it can be difficult and maybe impossible to get it back, and it will affect everything. When there are jump balls, you won't get the call.

KELLIE LERNER: You mentioned law clerks. They are in many ways the unsung heroes of some of the cases we bring. Judge Mehta, do you have any suggestions to get off on the right foot with the clerks that you can suggest to practitioners?

AMIT MEHTA: To get off on the right foot with a law clerk I think something as simple as taking the opportunity to introduce yourself may be an overlooked skill. That first time in the courtroom, you see who the clerk is who is assigned to the case, go up and introduce yourself. Make sure the clerk has your contact information. Make sure the clerk understands that if there is something that they need, you are in a position to assist them.

Ask the clerk the questions that you think the clerk would want answers to, such: "Would you like hardcopies of the briefs and exhibits? Would you like digital copies of the exhibits? Would you like the briefs hyperlinked, etc.?" If the judge has not addressed those things, certainly they will be on the clerk's mind, it seems to me, and taking that opportunity to communicate with the clerk on those types of administrative matters I think is really important in terms of establishing a good relationship with the judge but also in setting the right course in terms of how the case will unfold and how it can most efficiently get to adjudication because these cases involve such large records. The more lawyers can do to help the court just from a logistical standpoint get their arms around the record is important, and the law clerk is on the frontline of that battle, for sure.

KELLIE LERNER: Antitrust cases can be very technocratic, and that can present challenges with a jury. Have you ever seen a lawyer do a particularly effective job simplifying antitrust concepts for a jury, and was it the way the lawyer presented it or a visual? We have heard from other judges ways that lawyers have made the concepts relatable. Have you seen that in any of your antitrust trials?

KEVIN CASTEL: I am going to start with a negative example which actually arose from a securities fraud trial in front of a jury. This Wall Street lawyer elicited from his client the

entire story of the downfall of a particular company. Near the end of the narrative, he asked, "And would you kindly tell the ladies and gentlemen of the jury the denouement of this story?"

The jurors looked crosswise: *What the heck is a "denouement?"*

Judge Duffy used to say to his jurors, "I'm not going to let the lawyers use a word more complicated than 'delicatessen,'" the keep-it-simple rule.

You have to remember that antitrust trials call for trial skills. There are antitrust lawyers who are great creative thinkers and are very comfortable with economic theory and analysis. They have the case law on the tip of their tongue. But they may not try cases very often. One critical tool of the smart trial lawyer is a top notch jury research consultant. They use them not, as some people think, solely for the purpose of figuring out what kind of jurors they want for the case, but they help the trial lawyer think about the case in terms of themes to be presented to the jury.

Say the plaintiff has consistently exaggerated its damages, suggesting a greedy plaintiff. You work this theme into your opening, your closing, and your cross-examinations. But it is a theme. It is not a legal issue or an element of a case:

"My client is a good businessperson, open and honest in all dealings, and not secretive. The defendant, on the other hand, has changed its story over time. The defendant was acquired by a foreign conglomerate, and since then the bad acts became apparent." There is a lot of theme to it.

When we talk about experts, you want experts who are great communicators. They have to have the brainpower, but they have to be great communicators. Having the credentials, the awards, and the accolades of co-professionals is going to have a limited impact on the jury. They are going to tend to identify with the better communicator. Communication is the trial lawyer's art, but it has to be extended to the expert witnesses as well.

KELLIE LERNER: Judge Cote, I would love to ask you about the use of demonstratives in your courtroom. Do you have views on a best-use case and a less helpful use case for demonstratives, and I ask as a lawyer who loves a demonstrative and may at times overdo it? I would love to hear your thoughts.

DENISE COTE: We are so advantaged now by having digital courtrooms. The smooth presentation of evidence digitally to witnesses, to support opening statements or summations, the demonstratives that help in one visual capture everything, is wonderful.

I don't think PowerPoints, certainly not detailed PowerPoints, are that useful. You want the person who is listening to you to listen to you, not reading a screen at the same time. A PowerPoint can have the topic, but you don't want it to have the detailed bullet points of everything you are saying. I think that is a poor use of a demonstrative.

I think the best demonstratives are those that are graphic presentations, charts, things that show the flow of funds, or the connections between different components of a conspiracy. A visual that captures a lot of evidence in one picture is helpful, I think.

KELLIE LERNER: That's helpful to hear. Judge Mehta, do you have any different views on the use of demonstratives?

AMIT MEHTA: Certainly not different. I would simply add that, and this is again from the perspective of someone who has had to be the trier of fact, when the judge is the trier of fact the demonstratives that are presented in court—often times it is with an expert witness and there is a slide deck in which you are going through to present the expert's opinions—I will often go back and look at the demonstratives to help jog my memory as to what the expert had to say or what the particular witness had to say about a particular subject area. Thinking broadly about a demonstrative and not as just something that is pictorial but also informative and can provide the trier of fact—and this is true whether it is a jury or judge, although typically the demonstratives won't go back to a jury—would give the trier of fact a bit of a roadmap into your case and the ability to find where key evidence can be found.

For example, if you are going to refer to exhibits in a demonstrative, make sure the exhibit number is on there because that is a simple way of making life a little easier for the trier of fact who is going to look at this demonstrative and then will want to look at the exhibit itself, or going to a particular piece of testimony that was included in a demonstrative that the expert may have relied on. So think about it not just in terms of its function in the courtroom but its function after the fact when the trier of fact may be relying on it to make a decision.

KELLIE LERNER: My question is about storytelling and antitrust. As you intimated earlier, just laying the groundwork for what we are talking about in antitrust cases is a challenge.

Can you share two things: What type of witness do you think is the best type of storyteller, and what is the best method of telling a story? I will caveat my question with the fact that there is often a march of documents that happens, and people try to tell their story through their documents. I would like to hear your views on that versus other ways to tell the narrative of what the case is about.

LORNA SCHOFIELD: I think there is a hierarchy of evidence for trials. At the first level, it is visual. If you think about what people do, we are used to looking at our screens, we are used to looking at stories told on screens, and we are used to the pace of that kind of storytelling, so visual and relatable demonstrative aids—I hate to say it—and not humans can sometimes be the most powerful because you can shape them.

In the *Sabre* trial there were wonderful slides of little stick figures in Central Park, but it was a wonderful way to bring New York City into it, to bring a diverse group of people who looked like the jury into it, and to make it all more relatable. I think something visual and relatable is the first level.

On the second level are likable live witnesses. It seems like an obvious thing, but again we don't choose our facts and we don't always choose our witnesses, but some witnesses we do choose, and you can pick and choose among the corporate representatives and experts. The person who is the most brilliant may not be the best on the stand. So having someone who is likable and can speak in plain English and not be condescending is level two.

The third level, and now we are down in the dregs, is videotaped depositions. I hate them, I think the jury hates them, and everybody sleeps, but at least you have a human being.

The fourth level is documents. The problem with the way some lawyers come to trial is that many lawyers are not used to trying cases; some are, but many aren't. They have just come off summary judgment with their million documents, and that is the way they are thinking about the case and what they are tied to. That is the least effective, most time-consuming, least efficient, and most boring way to present a story. That is my hierarchy.

KELLIE LERNER: One follow-up for Judge Cote on the question on pretrial skills: Do you see a shift or difference in terms of what skills the advocate has to lean into between pretrial and then trial before a jury? Are there certain skills that are needed for the pretrial phase and a separate or slightly iterative different set of skills at the jury phase of a trial? Judge Cote?

DENISE COTE: One thing that comes to mind is that it is more apparent to me in the pretrial phase whether counsel are being cooperative and respectful of the counsel for their adversary and whether there is a good working relationship. I think judges respond well to counsel who are cooperative and respectful and treat the litigation process as a professional experience where everyone is able to talk in a serious and productive way with each other.

If at the other end of the spectrum you have someone who is arrogant, aggressive, and not open to communication with their adversary, that becomes very apparent early on in the pretrial process. That is not helpful to your client's case from a judge's point of view.

KELLIE LERNER: Judge Mehta, do you have any additional advice on how an advocate's skills may have to flex differently between pretrial and trial before a jury?

AMIT MEHTA: I will just hearken back to something Judge Cote said earlier. I think one commonality between pretrial and trial is the importance of credibility. In the pretrial phase credibility is largely being built up with the court, but then at trial there is also the importance of building up credibility with the jury.

Lawyers should appreciate that jurors are always watching them, watching how they sit at a table, how they respond to the court, how they handle themselves in the courtroom, and those kinds of sometimes more subtle cues that you don't have to worry about in a pretrial phase become important at trial because jurors will go back and start talking about things in ways that bear on a lawyer's credibility and the credibility of the case that will surprise you. I think that is something to keep in mind while you are in trial. It is not just about how you question a particular witness or cross-examine them, although those are obviously important, but doing the little things to show respect for the court and respect for your opponent is quite important at the end of the day.

KELLIE LERNER: We spoke a lot with Judges Cote and Mehta about credibility. Do you have any immediate thoughts, Judge Schofield, that come to mind about lawyers or witnesses losing credibility during an antitrust trial that you would be willing to share with us? This falls into the category of "don'ts" for our audience, to make sure, as you alluded, that your witnesses aren't arrogant or talking down to the jury. Is there anything else you have noticed where a witness or a lawyer loses credibility?

LORNA SCHOFIELD: I don't think there is anything unique to antitrust in this area, and I must say that, in the antitrust cases I have had, the quality of lawyering, both from the skills aspect and also just how to deal with the court, has been very high and excellent. I have seen plenty of lawyering that could be better, but the antitrust lawyers—maybe I have just been lucky—have been excellent.

KELLIE LERNER: That is great to hear both personally and on behalf of our leadership.

JAMES KEYTE: Let's talk now about where the rubber hits the road with the actual trial. I will preface this by admitting, not necessarily in a bad way, that in antitrust cases in discovery, whether it is fact witnesses or experts, you go down rabbit holes, get into the complexities, and get into the details, whether you are looking for things or trying to pin somebody down or understand the basis of a potential notion, then when you are talking to a judge or jury in the context of the trial itself it is a different ballgame in terms of understandability and clarity that helps build trustworthiness with the court and with the jury.

Let's start with openings, and I will start with you, Judge Cote. What do you find most effective in openings, whether it is before you or a jury, and what do you find where people miss the mark? Then we can talk about whether there is any difference between antitrust and other cases.

DENISE COTE: I am going to preface this by telling you I have not had an antitrust jury trial. I have considerable experience with antitrust bench trials, and my procedures for all non-jury proceedings have pretrial submissions in which the direct testimony of the witnesses is submitted by affidavit along with all the evidence in chief, so I come to the bench trial with a draft opinion. Generally speaking, the litigators know there will be no posttrial briefing. This is all discussed.

This affects the opening statement in my antitrust bench trials just like it would at any bench trial. They hopefully understand that I have read everything, thought about it, I think I know what I understand, and I certainly know what I don't understand, what my questions are, where I think the difficult hinge points are in the testimony or legal theory. An opening statement that is helpful to me is one that presumes I'm already fairly well-informed and takes the presentation further. Probably it is more thematically based and it is going to highlight a few principal things that they particularly want me to focus on as they cross-examine the other side's witnesses or do redirect for their own witnesses. It is a very different kind of opening than in a jury trial.

JAMES KEYTE: Even in non-antitrust cases when you have had jury trials, because I think it applies to all trials, what is your advice for how to conduct a good and strong opening for juries in any kind of trial?

DENISE COTE: I think probably the opening is one of the most significant parts of the case for an attorney. It is their introduction to the jury. Picking up on what Judge Mehta said, it is your first opportunity to establish your reputation for the jury, so you want to make sure you deliver on any factual representations that you make.

The main task is to give the jury the framework to understand the evidence as it comes in witness by witness. You want your themes to be clear, you want the key witnesses to be named and identified so that jury members understand their roles in the case, and you want to seem very respectful of their time and service. That is what comes to mind in the jury opening address most readily.

JAMES KEYTE: Judge Mehta, I am trying to have you morph your experience with antitrust and jury trials that you have done other than antitrust. In antitrust cases in particular do you have any kind of advice with respect to openings, assuming you might have a different process than Judge Cote in terms of organizing the narrative, themes, witnesses, evidence, and how to work in the role of experts and anticipate jury instructions if it is a jury trial, and these kinds of things?

AMIT MEHTA: Like Judge Cote, I have not had an antitrust jury trial. The two antitrust cases I have had went to bench trials. Those openings I think can be different, even if the format of the trial is more traditional as they have been in my case. I have not taken the approach that Judge Cote has, and she is probably doing it much more efficiently than I am. We have a full direct and a full cross, so there is not a submission of writing in advance other than a pretrial statement.

I think of openings and closings in slightly different ways. Openings are an opportunity to tell a story. That is story time. That's how you want to frame your case; those are the themes you want to convey. If there is a good narrative to put forward, for example, about how your company started out small and grew into this different-sized company, that is what you want to do in your opening, particularly in front of a jury. Closing is less about story time than marshaling evidence and marrying it to the elements, at least in my view.

The big difference between an opening before a jury and before a court is that, while before a judge it is important to ensure that you are getting your themes and narrative across, you must also remember that the judge is also thinking about the endgame a lot sooner than the jury will be. They will be thinking about concepts like market definition, market concentration, and whatever defenses that a company may have. Ensuring that the judge knows what your case is going to look like in addition to the story you want to tell makes openings in bench trials different than before a jury trial.

JAMES KEYTE: Especially when we were getting ready for a jury trial, I would go home and try to explain the case to my mother-in-law and then I would also try to explain the case to a close high school friend who didn't know the industry and may or may not have gone to college. Especially in the antitrust context you would find yourself needing to lose the jargon and lose the technical talk yet still have a story that would capture what are going to be complexities. It is an interesting and significant challenge, especially if by chance you have a jury trial.

KELLIE LERNER: I would like to share with our readers some dos and don'ts on direct examination of fact witnesses. I can start with Judge Cote. I would ask if you could share, from antitrust trials but also from other types of trials, any tips for our readers on what they should be thinking about when they do a direct examination of a fact witness and anything you've seen in the past that has tripped up lawyers that you would caution lawyers against for the future?

DENISE COTE: One thing that is important, and I expect Judge Mehta would agree with this from his criminal background and experience, is not to only present a clear explanation of the facts or the expert analysis on direct but also to anticipate what the cross will be. Particularly in a jury trial, you do not want the jury for the first time during cross-examination to hear some very disturbing facts.

One of the first assessments you must make is, when those difficult facts are brought out is it toward the beginning of the direct or toward the end of the direct, and it depends on

who the witness is and how bad those facts are, but you are presenting someone to the jury that you want the jury to rely on, someone you are going to be arguing is a truth teller when it comes time for summation. If they learn, not from you but from somebody else, that they are not as credible as you made them out to be in your direct examination, that is a problem for you.

Besides the obvious aspects of preparing a direct in an organized fashion so that the factfinder can absorb all of the information in the most obvious way and it is not difficult to understand the throughline of the testimony, you have to also analyze or anticipate the cross or perhaps negative information from another witness later on. You have to build that into your direct testimony.

AMIT MEHTA: I don't think there is any more important advice than what Judge Cote just gave. There is no question that that is the most important thing to keep in mind when you are crafting your direct examination.

I will tell you what drives me crazy in direct examinations, particularly in document-heavy cases, as antitrust cases can be, and that is building direct examinations based on the idea that, "I've just got to get all my documents in." You see these direct examinations, where it is, "Let's look at Exhibit A, let's look at Exhibit B, let's look at Exhibit C," and it is just a march through the documents. That is boring for the judge and for the jury. The temptation is to do that because getting the exhibits in is a bit of a crutch if you are not used to being up in court and examining witnesses.

You can get your records in and present a pretty interesting case if you keep in mind that you are telling a story with the assistance of the documents rather than the other way around. Asking a few other questions that surround a particular meeting, particular creation of a record, or why this record is important are important additional questions to think about asking a witness if for no other reason than it keeps the jury or judge interested. Examinations where it is just one record after the next, no matter how important the records are, are just not that captivating, and at the end of the day you want to honestly make sure your evidence gets in, but you want to make sure it is also coming in in a way that is compelling to the trier of fact.

KELLIE LERNER: On the plaintiff's side, one of the challenges we often face, particularly if you are representing, say, a direct or indirect purchaser, is that you don't have that fact witness to put on who is going to tell the story of your case. It is often told through the defendant's documents, so finding that compelling narrative is especially challenging on the plaintiff's side.

I will now go to cross and stick with Judge Mehta. Any dos or don'ts that you can share?

AMIT MEHTA: The one advantage you have in cross-examination in a civil case is that you should know the answer before you ask the question. In theory you have deposed the witness, you have all the records, so there should not be a question you ask in cross-examination that you don't already have the answer to.

Given that fact, it is important to construct any cross-examination in a way that is geared toward eliciting the facts that are most important and then being done. Cross-examination is not an opportunity just to hear yourself speak at length, and cross-examination does not need to be and frankly shouldn't be as long as the direct. You want to think in advance of the examination exactly what you want to get out of this witness, how you are going to get it out of him or her, and then sit down as soon as you have accomplished that.

This comes from the perspective of somebody who was a criminal defense lawyer for most of his pre-judge life, and the biggest mistake you see lawyers make is trying to get too much out of a witness, and it really comes back to hurt them. The great thing in the civil context, as I said, is that you should have all the answers in advance of trial, so there should be no mystery about what your cross-examination is going to look like, what it is going to take, and how long it should be.

DENISE COTE: Just to build on that, you have to know the rules of evidence and you have to be proficient with the digital presentation of evidence. As you are doing this cross, again to build on Judge Mehta's comments, which I absolutely agree with, it is masterful when you have that backup for every answer you expect from the witness such that if they don't give you that answer you can crisply and quickly impeach them or refresh their recollection, whichever is important or appropriate in the circumstance, and display the passage promptly.

It disciplines the witness. They come to understand that for every question you ask you understand and anticipate the answer, and if you don't get it, you are going to demonstrate to them that they have shifted their testimony in a certain way. To see it done in a masterful way is a work of art. It is like a choreographed dance that is beautifully done.

KELLIE LERNER: It is definitely what every lawyer hopes for when they get in that moment. The tech skills are the unsung hero at trial, the person who can pull up impeaching testimony or a document at a moment's notice. You have to have them on your team.

AMIT MEHTA: That is an important point. Antitrust cases tend to be better resourced, so having somebody who has that experience is often not an issue. I am sure Judge Cote would agree because she probably sees this all the time when lawyers who have fewer resources are either trying to do the tech themselves or have somebody who is not terribly experienced at it, and there is nothing worse in terms of building your credibility with a jury than a lawyer who doesn't know

how to use the tech. It is hard to watch and undermines your credibility with the court and jury if you don't know how to bring up exhibits on direct or cross-examination.

JAMES KEYTE: Let's talk a little more about experts. Obviously, in non-antitrust cases there are some complicated expert issues depending on the case with causation and some other things, but in antitrust what have you found to be particular challenges involving experts, whether it is market definition concepts and counterfactuals and but-for worlds? There are so many different things. I certainly understand the need for communication skills, but in terms of presenting an expert or crossing those kinds of experts what have you seen that is effective or not effective?

KEVIN CASTEL: First of all, on something like definition of a product market, that is something that jurors can grasp pretty readily. That is explainable and not as abstract as trying to create a but-for world.

You want comparators in that but-for world. You want to be able to say, "Gee, this is the closest analogy to what it would have looked like had there not been this anticompetitive conduct." That is going to be essential in persuading a jury.

The jury is going to be very attentive. But if you get into esoteric debates over economic theory, you are going to lose them. Practical analogies are going to make it much more understandable to a jury.

In antitrust cases, you have extremely comprehensive expert reports covering market definition, antitrust injury, causation, counterfactuals, and but-for worlds. It can be challenging for the lawyers and the judge to grapple with a *Daubert* motion. But the trial lawyer has to figure out how to make sense of it in front of a jury.

JAMES KEYTE: What are some of the challenges you have seen and experienced with antitrust experts and how they have been dealt with in a good way and not necessarily in a good way?

LORNA SCHOFIELD: I think a model that works well is one I saw in one of my trials, and that is an expert who is well-supported. By that I mean this was an expert who was a Nobel Prize-winning economist—I think we had two in this trial—and the people who did most of the work were in the organization behind him. So there was a lot of number crunching and a lot of technical work, producing highly complex and long reports. And although the expert's name was on it, and I'm sure he went over it carefully and blessed it, he was not the person who had to stay up until 2:00 in the morning for months on end doing the work.

This particular expert was a professor. He had a very avuncular, professorial presentation. He knew how to talk to people because of being a professor, and it was not out of keeping with who he was. He didn't seem like a paid hack, the way some experts can. He seemed very much in the role of who he was, but he had the advantage of having had all these other people do a lot of the foundational work. For people who have a lot of money to finance their antitrust trials, I think that is a model that is very effective for experts.

JAMES KEYTE: Judge Cote, what do you see as some of the challenges, again whether it is in front of a judge—the same would be true with a jury and probably more so—of presenting from a lawyer's perspective expert testimony? We will talk first on direct and presenting and cross after that.

DENISE COTE: I would like to begin by talking about how to choose an expert. First, you want someone obviously who is truly an expert in whatever field it is, someone who can easily be qualified as an expert. Secondly, I don't think they have to be someone who has won the Nobel award in their field of expertise because it is as important to have someone who can explain whatever the expert issues are in a way that can be understood by the bench or jury. The third point is that it has to be someone who will do the work, so they know the record, they have thought about it, and their testimony is their own. It is not testimony created by the consulting group that is backing them up or, even worse, the lawyer who is putting them on. It is something that they can stand behind because they have done the work and thought it through. I think that helps the second point, being an effective advocate. They have to have an expertise that is justified and easy to explain, they have to be articulate in a way that makes them understandable, and they have to have done the work so they seem knowledgeable, and that helps make them persuasive.

Of course, in fashioning their direct testimony you are going to draw all of that out. You will probably start with their expertise, but you might start with the bottom line, whatever it is, and then their expertise, how they arrived at it, what they did to get themselves there, and why they believe in whatever it is. This comes back again to the use of demonstratives, which we talked about earlier, which is critical in almost every expert's testimony.

JAMES KEYTE: Judge Mehta, let's focus on the practical presentation of expert testimony in a way that, whether it is a judge or jury—it is much harder for the jury—to remember what they are talking about and what their opinion is. Later it will be tied in to how it fits in, but how do you both simplify and communicate in plain ways that are understandable and capture what needs to be captured, when sometimes it can be quite sophisticated in terms of market definition and causation, counterfactuals, and but-for worlds? It gets quite complicated in antitrust cases.

What is your advice on how to address those on direct?

AMIT MEHTA: The other pet peeve I have about direct examinations in addition to the document-by-document

examinations is just letting an expert run wild. You see these examinations where the lawyer just winds the expert up and lets them go, which I think is a huge mistake. Particularly in front of a jury if you allow an expert to simply provide answers in a stream-of-consciousness fashion, there is so much nuance that will be missed.

There is a lot of opportunity to follow up and ensure the basic fundamental building blocks and principles—particularly if it is an economics expert, as there often is in antitrust cases—are explained in ways that are accessible and easy to understand, using everyday analogies as an effective way of communicating those types of principles. If you just let an expert drone on as often happens, that is a huge lost opportunity.

Whether it is the judge or jury, if an expert provides an answer that goes uninterrupted for a good period of time, the testimony is less effective. People's attention spans are dwindling off the longer somebody speaks, so it is important to remember that you still have a role as the lawyer who is directing the examination of an expert, and that is to walk the expert through, and if you find the expert is going on too long, to interrupt your expert and bring them back to where you want them to go.

JAMES KEYTE: When you are at the discovery stage and talking about economic concepts, for example, and there is antitrust and economic jargon that is meaningful, but when you are at a trial level and particularly in a jury trial, how important is it to translate those into plain English whether by analogy or otherwise? Even as a judge, do you find that more useful than a discussion of critical loss and own elasticity?

AMIT MEHTA: Of course. Most of us have no prior background in economics or antitrust. Just because we are wearing the robe does not mean we will understand the concepts any more readily than somebody who is coming off the street to serve as a juror. Maybe we have had experience, and obviously you will know that based on whatever due diligence you do, but the bottom line is you want to make sure the concepts you are getting across are readily understood, whether it is by a judge or a jury.

I think if you are in a bench trial you can probably anticipate that the amount of educating you need to do as a matter of total time will be less. I think a judge is more likely to grasp these concepts more efficiently and effectively than perhaps twelve jurors or eight in the event of a civil case. Nevertheless, don't assume that these technical concepts and principles are readily understood just because you are trying your case to a judge.

The real benefit, of course, in a bench trial is that judges are not shy about asking questions, and asking for clarification.

JAMES KEYTE: What is the best use of demonstratives? There is so much data and so many things that can be turned into complex charts. What are some good uses of demonstratives and those that maybe lose the jury?

LORNA SCHOFIELD: Let me say a couple of things about demonstratives. Demonstratives are not only for juries. I had lawyers in a case who never came to court for an oral argument before me without some demonstrative aids. It might have only been a summary of their argument, but they always used something visual. I like to think I don't necessarily need that kind of crutch, but in the end it is very effective just to be able to explain yourself in another way.

The most effective demonstratives, as I alluded to before, were those demonstratives of Central Park. It was about people selling water in Central Park and basic lessons about competition. There was a stand with somebody selling bottles of water and a competing stand with someone selling bottles of water and all the various people who were buying it.

What was interesting was that the people who created these slides were very savvy because we had young, old, handicapped, male, female, and multiracial people represented in all the little stick figures. This is New York City; this is what our juries look like. The other side, mostly out-of-town lawyers, came in with demonstratives full of people who don't look like New Yorkers. I think that was a real mistake. I noticed; I don't know if the jury did.

JAMES KEYTE: There is always a debate among lawyers about experts in particular using slide decks that outline the opinions and the basis of the opinion. Some people think that is a good thing to organize thoughts, and it is an organized process to go through out. Others, judges and even those who are advising juries, say, "Well, no, then you have people trying to read and follow that and they are not really listening to the witness." Where do you come down on the standard slide deck with, "Here are my opinions and here is the basis," and then you walk through them.

LORNA SCHOFIELD: I think the answer is, it depends. It depends on what the other side is doing. If the other side has some slick and glitzy presentation, it could be a mistake not to have something like that yourself. It might look like you care less or prepared less, even though that may not be the case.

I think it also depends—and we haven't really talked about this—on what kind of jury you want and what kind of jury you have. In one of my trials, it was very clear that one side wanted a very savvy jury and the other side wanted one that was not so sharp. So we ended up with one that was in the middle. It depends who your jury is.

In the first *Sabre* trial, for example, I think all but one person had been to graduate school. We had two lawyers, we had somebody who had an economics background, and we had somebody who had an accounting background. It was a very sophisticated jury. Unlike I think all of my colleagues I allowed the jurors to submit written questions at

the end of each witnesses' testimony. It was very clear from the questions that they understood what was going on, and they asked intelligent questions. I think the lawyers loved the practice because they knew what they were and weren't communicating and what the jury was thinking about and worried about.

JAMES KEYTE: Judge Cote, taking everything that was already said by both of you very usefully on cross-examination, what is particularly effective or needs to be thought about differently on cross-examination of experts, where you might have more angles of attack, for example?

DENISE COTE: I have had some complex civil litigations in which the expert did not actually do the work, and that came out on cross-examination very effectively. The report was not in the final analysis their work product, and that became apparent during cross-examination, that they hadn't thought through the issues, they were not familiar with parts of the record, and they had no response to some analysis presented by the expert from the other side. To me this is a failure of counsel, that they have chosen an expert who didn't do the work or didn't make sure that their expert did the work before they put them on the stand.

When you think about cross-examination, what is more fun as a lawyer?

JAMES KEYTE: Nothing.

DENISE COTE: The most enjoyable part of the case is cross-examination, and it doesn't get better than cross-examining an expert.

JAMES KEYTE: I will just interject here and say that when you cross-examine a fact witness in a sense it is a person taken usually out of their normal jobs and families and they don't want to be a witness, so perhaps it is a little more delicate. But when you get an expert up there, this is what they do often, and they are a little more fair game, and it does make it quite interesting. Those are all extremely fundamental and well-taken.

Judge Mehta, what about the use of prior statements or cases? What do you find as other effective ways to cross, whether it is the subject or style, with experts?

AMIT MEHTA: I think the hardest thing that is done as a trial lawyer is cross-examination of experts. I don't think there is any more challenging thing to do in a courtroom because the person you are questioning has more knowledge, understanding, and experience than you do of the particular subject. Also, they oftentimes are very difficult to control. It is nearly impossible to get yes-or-no answers from experts.

I think the most effective way of cross-examining an expert starts at the discovery phase, making sure you use those depositions not just to understand the sources of information, the work the expert has done, and the opinions, but to also lock them in on testimony that you know is going to be critical at trial so that you have that deposition ready to go if the expert starts to do the dances that experts do on the witness stand. Locking the expert in as well as you can I think is really important.

Once you actually get to trial, you have to remember that you are the one in control. It is the same side of the coin I was talking about earlier on direct examination with experts and even on cross-examination lawyers forget they are the ones in control and that it is not the expert's show but yours, so don't be afraid to interrupt, don't be afraid to redirect the expert. You have got to control that witness. As I said earlier, the expert is the slipperiest of all witnesses who show up at a trial, and you have to be on your game to do a good cross-examination of an expert.

JAMES KEYTE: In terms of cross, there is always the debate in antitrust and probably in any case over whether you are attacking credibility, how much to do, or how much to get into the weeds. What have you seen in antitrust, or it could be in non-antitrust, as the most effective types of cross of experts and those that just aren't very effective?

KEVIN CASTEL: First of all, in a well-resourced case, you are likely to have pretty decent experts on each side. Can we begin with that? Accusing somebody of résumé fraud unless you absolutely and positively have them dead cold tends to fall flat on jurors' ears, or quibbling over how they phrased something at a deposition versus how they are phrasing it now. You are not going to connect with the jury.

An effective cross often appeals to the, if you will, the purported fairmindedness of the expert, by asking: "Professor, wouldn't you agree with me," and then state a principle that is helpful to your client, and get him to agree with as much of your case as possible. That doesn't sound like cross-examination if you think of cross-examination as tearing somebody down, but it is very effective. After you do that, then you can go for the heart of it.

I know the temptation to play "Gotcha!" on differences between the report and what they are saying on the stand or the difference between the deposition and what they are saying on the stand, but unless it goes to the substance of the witness's testimony the impact can be marginal. Jurors tend to identify with witnesses. They don't see themselves as the trial lawyer or the judge, but they can see themselves as a witness.

KELLIE LERNER: In an antitrust case so much depends on believing the narrative, and this ties in somewhat to your earlier remarks about themes. Who have you seen be the most effective storyteller in an antitrust case? It could be on either side, but is it the CEO of a business that has been harmed? Is it the expert? Is it an industry expert? It can be challenging to tell a clear antitrust story. Have you seen it done effectively and by what type of witness?

KEVIN CASTEL: Maybe I will surprise you with my answer, but my answer is sort of none of the above. If I am representing the plaintiff, I would start off with the guy or gal who has worked with the company for thirty years and maybe worked on the floor of the factory and worked his way up and can explain how life was before the big bad monopolist came along. That I think is going to get the jury more focused than playing into flattering your own client by making them the lead witness, the CEO, the CFO, the C-suite guys.

Maybe they're in the C-suite now, but think about the person whose roots are in that industry, the up-from-the-bottom guy or gal who can tell the story and the impact of how, "We had to close doors, we had to lay off employees, we had doors slammed in our face by would-be customers," things of that sort. That would be my vote.

JAMES KEYTE: Let me follow up on that.

It is very interesting because when you think about it intuitively the themes for the plaintiff, as you said, are often easier to tell. It is about greed. It is about power. It is about somebody not wanting to compete, whether it is in cartel or monopolization cases.

For the lawyers on the defense side sometimes the themes are harder. How is a jury going to understand freeriding or your justification of, "I made it, so I should be able to exploit it?" Have you seen cases where it is more challenging for defendants to develop themes, and have you seen ways they have done it that are effective given that it is a little bit imbalanced in terms of things?

KEVIN CASTEL: They have to figure out a valid basis to get their "good company" story into evidence. That is number one.

It can be very effective I believe for defense counsel to point out that the plaintiff has exaggerated their damages. This is a point where you can get down to nitty-gritty simple details, for example, that they included in their damage calculation a new 3D printer, a retreat for the executives at a golf resort, or whatever will raise an eyebrow with the jurors, even if—and I have seen this done—the plaintiff wises up at the last minute and withdraws it from the damage calculation. You can persuade that judge: "Yes, it's withdrawn, but I should be allowed to cross-examine on the fact that in this case they previously sought this." It goes to exaggeration on the part of the plaintiff.

Listen. We are talking in the abstract. We are not talking about the facts of a specific case, so necessarily our discussion is a little bit in generalities, but those are some ideas.

JAMES KEYTE: Whether it is experts or fact witnesses, what do you find to be most effective in cross-examination? The options include obviously going for things that affect credibility. It can be too complex; it can be too simple. What do you find to be most and least effective in cross-examination with both fact witnesses and experts?

LORNA SCHOFIELD: Again, I think it depends. One of the most important things during all the phases of the trial is to remember your theme, whatever it is for that trial, and to find ways to come back to it even with the expert witnesses. There is a tendency with experts to get buried in the details, and I don't think the jury appreciates or always follows that. Juries also sometimes just tend to pick whoever they like more if they don't understand what's going on. I think not trying to do everything, keeping it at a fairly high level, and remembering themes are important.

KELLIE LERNER: I am curious, Judge Mehta and Judge Cote, what your views are on the utility of getting the lawyers out of the way and doing what some people call a "hot tub" expert day, but let's just call it "expert day," and having the opportunity to parse through yourselves where the vulnerabilities may be with the expert and to dispense with some of the advocacy that you are seeing from the lawyers and just get to the heart of it? It is obviously done with frequency in the Northern District of California but less often on the East Coast. What are your views of using that as a method to cut through and get to the heart of an expert's testimony at the pretrial stage?

AMIT MEHTA: I can simply say I personally have not done it, and that is not because I have a particular philosophy against it. I just have not done it, and I don't know what that looks like as a matter of how it unfolds in a courtroom. Maybe Judge Cote has a better understanding of it than I do.

DENISE COTE: What you are talking about, of course, is a non-jury proceeding. I have to say I did something like that in my FHFA litigation against Nomura. It was not an antitrust case, but it was a non-jury trial, a civil trial out of the 2008 financial crisis about securitizations of mortgages, mortgage-backed securities, and it was complex with many issues, so I got the parties to agree that we would do issue by issue as opposed to the plaintiff presenting their whole case and then the defendant presenting their whole case.

I had on the particular set of days the experts from both sides back to back. They were not talking to each other, but everyone in the courtroom was focused on one issue together, and because they were experts they were sitting in the courtroom and listening to each other's testimony. It became very responsive because of that, and because I take direct by affidavit I knew for each expert where I found it most helpful to ask follow-up questions.

Even though the lawyers were somewhat resistant to the idea in advance—of course they were cooperative; lawyers are wonderfully cooperative usually with the court—I think everybody came to appreciate it, that we could focus on this one technical aspect of the case fully and then move on to another very complex aspect of the case and do that in depth.

In terms of hot tubbing, as I understand the concept, I have not felt a need for it in a pretrial context. If I need—and this more often would occur in a patent context—a tutorial so I understand the underlying science before I get to claim construction or something, how something works, a piece of electricity, a piece of coding, whatever it is where I don't understand the basics, it is not so much hot tubbing as setting aside half a day or a day for the parties, and usually it is very cooperative, to present the technology to me so I can be up to speed on the terminology and the underlying science so then they can be advocates for the other points they want to make.

My lack of experience with hot tubbing is that I don't know how it would be useful for me. If I feel a need for something, I feel free to ask the parties to help me out, as I did in the FHFA litigation.

JAMES KEYTE: You have done both, so how would you see the differences in antitrust trials with judge trials and jury trials in terms of approach, effectiveness, and things that aren't effective?

KEVIN CASTEL: Night and day. First of all, I'm going to tell you about a common practice in my District in bench trials. It may delight you or may horrify you depending on your perspective.

We typically have direct testimony of a witness done by affidavit. If it is a witness within your control, you are going to prepare the direct testimony in affidavit form with its exhibits, and it is going to be subject to live cross-examination and some live redirect.

There may be some questions not in the direct testimony by affidavit that the judge may allow you to do, but that is going to change the dynamic. The judge will have needed to read all of this before taking the bench.

You may also find that in lieu of opening statements the judge may say: "I read your trial brief. Instead of an opening statement, what I would like you each to address are these three questions. Counsel, I have the gist of your case. I could recite some of your facts at this point by heart because I've read it. I did the summary judgment motion six months ago. Remember that? I know something about your case."

The judge is going to get to the heart of it. I think judges are more likely to be active in questioning witnesses in a bench trial. This is not to say that they wouldn't be active in a jury trial but certainly less so whereas I think they would feel greater latitude in a bench trial. I think the dynamic is very different.

The same is true with closing arguments. The judge may say: "Well, I'll tell you what. Come back in a month and we'll do the closing argument," and again with the closing argument you are going to get six words out of your mouth and the judge is going to say: "Well, really this is what I would like you to focus on." So you don't have the rhetorical highs and lows that you might have in a jury trial in a bench trial.

The other thing to keep in mind is that where there is a bench trial there are findings of fact and conclusions of law written by a judge, and that can be the basis for an offensive nonmutual collateral estoppel motion down the road by some other plaintiff. There are some risks in going in that direction.

KELLIE LERNER: Do you employ any practices in your antitrust trials that are a result of prior experience in these trials when you have implemented something new to make them go more efficiently and more effectively that some of your peers on the bench may not incorporate?

KEVIN CASTEL: I have one that comes to mind, and I am still evolving on this. When a civil trial has been on a while, if it is a multiweek trial, I will start to instruct the jury on at least the preliminaries before the day of closing arguments. I may do it in bits of ten or fifteen minutes at a time.

Certainly, I would have advised counsel of how I am going to instruct the jury and have heard any objections. They would have received the typed text of the jury instructions and had the opportunity to object and make their arguments. On the day of closings, I may just turn to the substantive elements of the case. I probably would hold back and not do the substantive elements, but the preliminary instructions would be out of the way. That is a little different.

JAMES KEYTE: We have heard from different judges on antitrust trials and trials in general about when to give jury instructions and to what extent. I have been involved in trials where the jury instruction was given, and you are essentially saying: "Okay, there is what I promised at opening, and here is how it fits into what you've just been instructed."

Other judges we have heard from say: "No, I don't want that. I want them to listen to the evidence and then apply the jury instructions they get afterward." The flexibility is interesting, and the choices are also complex.

KEVIN CASTEL: What I say to the jury before summations and before my instructions is: "I have told the lawyers how I plan to instruct you as a jury, and they may refer to that in their closings." Usually what they will say is, "I expect that Judge Castel will instruct you that, et cetera."

Then of course I tell them: "If any lawyer states a principle of law different than what I tell you, you have to follow the Court's instruction."

However, I absolutely do not—and do not agree with—foreclosing lawyers from referring to the expected instructions. You are entitled to show how your evidence, particularly in an antitrust case, fits into the legal theories, doctrines, and defenses that exist in an antitrust case, in my view.

KELLIE LERNER: I was once advised that to keep a jury engaged you should engage their senses in terms of hearing,

visual senses with demonstratives, and tactile senses as well. Have you ever seen effective use of anything being passed around in an antitrust trial? When someone recommended that, I thought, *Well, how does that work in antitrust?* I am just curious if you have ever seen it in your courtroom.

LORNA SCHOFIELD: I am trying to think if I have ever seen anything tactile used in an effective way in a civil trial. Diamonds in a criminal trial, guns in a criminal trial, yes. It is really hard to do that in most civil trials. I guess it depends on what the issue is, what the product is, and what the market is in the antitrust trial.

I do want to add one thing that follows up on what you said. In an antitrust trial the main thing is to get the jury to listen because if they tune you out, it doesn't matter what your theme is or how artful your questions are. So the most important thing is how to keep them engaged, how to get them to listen.

JAMES KEYTE: Regarding listening, how do you see the best way lawyers can build trust with a jury during the course of a trial because at the end of the day whether it is likeability or credibility who they trust shows who they are probably going to listen to and what narrative they are going to believe?

LORNA SCHOFIELD: I think two things there: One is obvious. Don't take preposterous positions and expect the jury to buy it. That is condescending. The other has to do more with interaction with witnesses. Don't just be a gratuitous bully. If you are going to bully someone, they need to earn it. You have to elicit misbehavior on the part of the witness first before you can bully them, because otherwise the jury is not going to like you.

JAMES KEYTE: Then you are the bully.

LORNA SCHOFIELD: Exactly. I think those are all elements of trust.

KELLIE LERNER: You mentioned jury questions after hearing from a witness. Do you implement any other practices that you learned from another judge or that are different from the standard that have helped you manage antitrust trials more effectively?

LORNA SCHOFIELD: First of all, I will say that these are all from the ABA's so-called "jury innovations," which are now quite old but are still innovative because lots of people don't use them, like the questions, for example.

Two things I tried was mini-summations and grouping testimony. If you put the fact witnesses together and then put the expert witnesses together so it is not all at different times in the trial, I think it is easier to follow.

I tried the mini-summations. In other words, we would have one part of the trial and then I would give both sides an opportunity to sum up a little bit. I did that twice during the trial before the final summations.

I am not sure it was that effective. You know how trials are; they don't always tell a chronological, cohesive story, so it wasn't that easy for lawyers to sum up in a way that was that useful. Plus, I think the idea of doing that was totally new to them, but that was one other innovation that I tried.

KELLIE LERNER: Going to summation and closings, do you have any advice for our readers on what you have seen work particularly well or not well? I will start with Judge Mehta, as he probably had the most recent antitrust trial.

AMIT MEHTA: Closings, at least the way I have done them in my two trials, don't resemble typical closings. They are not standing up before a jury, uninterrupted, and speaking for however long the judge allows you to speak. My closings have been very lengthy. In *Google*, for example, in the liability phase we had closings over two days, very structured about all of the various issues that came before me, and it really was more of an oral argument than a closing in which the parties were prepared to make argument, but none of them got very far into their PowerPoint presentations and more often than not they were left on the cutting room floor because I viewed it largely as an opportunity for me to ask questions and press the parties on their cases.

That is a very different form of closing obviously than what you do in front of a jury and one you would have to prepare for very differently. You prepare for it much more in the style of a traditional oral argument than you would a closing to a jury.

If cross-examining experts is the toughest thing a lawyer gets to do in a courtroom, I think closing is the most fun you can have as a lawyer in a courtroom because it is the opportunity to tie all of the evidence together in a way in which you can demonstrate your passion, knowledge, and your command of all that came before. Hopefully you are in front of a judge who gives you a little bit of leeway in what you can say during closing, so you have to know who your judge is, but it is an opportunity to have a little bit of fun and show a bit of your personality. Whether it is an antitrust case or any other type of case, I think jurors appreciate seeing a lawyer's personality, their passion, and that they care deeply about their representation.

I don't mean to suggest that there is one style of being a trial lawyer and doing a closing that is the paradigm. Far from it. I think there are so many different ways to do effective closings.

You can have lots of different personalities. You don't have to be Perry Mason; you don't have to be a lawyer who bangs their fist on the table. You can be very effective by demonstrating your command of the facts, your understanding of what the evidence is, and gaining the jury's respect by your credibility.

As I said, there are lots of different ways to do it. Particularly—and I think we will probably talk about this in a

moment—I think young lawyers get caught up in the idea that, "I have to appear a certain way in a courtroom in order to be an effective advocate," and that is simply not the case.

KELLIE LERNER: I am looking forward to circling back to that, but I also want to comment that at every stage of trial practice all roads go back to credibility, and I just want to point that out for our readers.

Judge Cote, anything else you would like to add on closings?

DENISE COTE: Let me talk a little bit about closings in a jury trial context. I have one tip for people to consider, and that is, whoever the plaintiff is, presenting their story, pulling everything together, making it fit together, and emphasizing the strengths, should also anticipate the summation that will follow, and in essence ask the jury: "What's the answer to all this evidence? I suspect you are going to hear 'ba-ba, ba-ba, ba-ba,'" and anticipate, explain, and confront it.

You may have a judge who will give the plaintiff a rebuttal, but the rebuttal is not the chance in my mind—and I won't let lawyers to do this—to be the first time as a plaintiff that you are responding to the defense case. I don't think that's fair. You have to figure out a way to fit that into your initial summation.

In a defense summation, obviously you have your theme or themes, whatever the defenses are to the plaintiff's case that has been presented. More often than not, it is attacking components of the plaintiff's case, but I think the most helpful defense summations I have heard are those in which they also have a story. It is not just responsive; it is stepping back and giving a framework for the defense, whatever it is, and pointing out the failures of the plaintiff's proof wherever that is appropriate but thinking about how you can have a persuasive story to present in which you bring together the trial's evidence to support your defenses.

JAMES KEYTE: How important, if at all, for both of you in jury trials is it for either side to make specific reference to jury instructions? "This is what you are going to be faced with when you go back and consider the evidence."

DENISE COTE: I don't let them do that.

JAMES KEYTE: You don't let them do that. I have been in cases where in a sense it was done indirectly or directly.

DENISE COTE: Let's say an element of the case is intent. Of course you can sum up on intent: "Ladies and gentlemen of the jury, you know that Mr. Smith intended to do that. Let me point you to these three pieces of evidence." But I don't let them give the jury charge.

JAMES KEYTE: No, not the charge. I understand.

DENISE COTE: It can seem like a subtle difference, but I don't let them put up a PowerPoint—

JAMES KEYTE: Anticipate the charge, exactly. Fair point.

AMIT MEHTA: It's important to know in what order—perhaps this is a question you want to ask earlier—the judge instructs and closes. I have always instructed first, and then the closings follow, so I am actually okay with lawyers incorporating the jury instructions into their closings, and that is because I charge first, so we know what the instructions are and so there is no question about misleading the jury as to what the principles of law will be.

KELLIE LERNER: We are always thinking about the next generation of lawyers, and we want to set them up for success. What tips do you have for young lawyers today? Shout it loud if some of the senior lawyers need to hear these tips to help those young lawyers reach those goals.

DENISE COTE: Don't be shy. I think most judges are happy to have young lawyers stand up in the courtroom and speak for the first time in pretrial proceedings or take their first witness during a jury trial. Young lawyers will not get those opportunities unless the more senior lawyers talk to and assure their clients that the senior lawyer will be working with a newer, younger, less senior lawyer every step of the way so that the client can trust that there will be a very competent presentation of the issue, but a young lawyer should ask for those opportunities. I don't think the judge will be an impediment to that in most courtrooms.

AMIT MEHTA: Judge Cote is 100 percent right. The worst that will happen is if you ask the answer will be no, but even if the answer is no the senior partner or more senior lawyer will know it is something you want to do, and perhaps next time the answer will be yes.

The reality is, of course, in antitrust cases, because they don't go to trial that often, it is hard to get trial opportunities because the trials don't come along that often. As a young lawyer, you do need to look for other opportunities where you have chances to get on your feet. If you are at a firm, that probably means looking out for pro bono cases and pro bono representations. It may mean leaving a firm and going into some type of public service where you are more often in court, and if that is not an option there are always opportunities for training and looking for those opportunities to go to trial advocacy skills classes. Those opportunities will at least make you feel more comfortable when the opportunity does arise.

Trial work is no different than shooting baskets, hitting a baseball, or what have you, any number of tired sports analogies you want to think about. It really is a matter of repetition and practice until it becomes like muscle memory. Until you have those chances it is very hard to become an experienced trial lawyer.

KELLIE LERNER: I can't remember which judge it was, but a judge in the Southern District of New York had a number of types of motions that she would decide on the papers that she would hold oral argument if you put forward a lawyer in his or her first decade of practice, and I thought that was a great way of getting more lawyers stand-up experience in court.

JAMES KEYTE: Do you have any advice for young lawyers out there just entering practice and maybe wanting to be an antitrust litigator and trial lawyer?

KEVIN CASTEL: I will answer this way. First of all, my advice to the young, budding antitrust litigator is try any case you can. See whether the local judiciary has cases that are in want of a trial lawyer. Try them. Even if they are losers, do it. Get up in front of a jury and start feeling relaxed. That is my advice to the young lawyers.

I have advice to seasoned lawyers that relates to young lawyers, and that is, it is in your client's best interest and in your best interest to peel off a witness or two and let a younger lawyer, an inexperienced lawyer, do it.

You know what? The jury loves it. It breaks the monotony of the trial. It may be a document custodian, or a witness on a collateral issue in the case. Let the younger lawyer do it. The jury is going to recalibrate the examination and say, "Well, gee, if this young lawyer got this out of the witness, can you imagine what another lawyer might do?"

Of course, in an antitrust case, a responsible trial lawyer does not do this without first consulting with their client, but if you sit down with a rational client, they are going to say: "That's a smart idea. Let's get a different face up in front of the jury to spell the lead lawyer and give the jury a little variety, et cetera." Sometimes it proves slightly embarrassing to the other side, which was not prepared to show off its young talent. ■