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Litigators of the Week: The Defense Team that Fended Off Criminal 'No Poach' Charges at Trial for DaVita and Its Former CEO

Lawyers at Morgan Lewis and WilmerHale represent the Denver-based dialysis company and a team from Winston & Strawn, Fish & Richardson and McDermott represent former CEO Kent Thiry. A federal jury this week acquitted the defendants on all counts of conspiring with three companies run by DaVita alumni to avoid competing for employees.

By Ross Todd
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In the first trial where the government was seeking criminal antitrust convictions tied to no poach agreements, our Litigators of the Week scored an across-the-board acquittal last week. Federal prosecutors brought three conspiracy charges apiece against Denver-based dialysis company DaVita and its former CEO Kent Thiry, claiming non-solicitation agreements with competitors headed by DaVita alumni amounted to criminal violations of the Sherman Act.

The company's trial team was led by **Jack Dodds** of **Morgan, Lewis & Bockius** and **John Walsh** of **WilmerHale and Dorr**. **Tom Melsheimer** of **Winston & Strawn** and **Juanita Brooks** of **Fish & Richardson** were lead trial counsel for Thiry alongside a team from **McDermott Will & Emery**.

Litigation Daily: Who were your clients and what was at stake?

Jack Dodds, Morgan Lewis: Morgan Lewis, along with WilmerHale, represented DaVita Inc., a Denver-based dialysis company in this first criminal no-poach jury trial in the United States. DaVita faced potential penalties up to $100 million per count and potential impacts on its business and reputation.

John Walsh, WilmerHale: DaVita was facing not only $100s of millions in potential fines, but possible negative impacts on brand and its relationships with regulators and payor partners.

Tom Melsheimer, Winston: We represented Kent Thiry, the former CEO of DaVita, Inc.

Courtesy photos

Clockwise from top left: Juanita Brooks of Fish & Richardson, John Walsh of WilmerHale Cutler Pickering Hale and Dorr, Tom Melsheimer of Winston & Strawn and Jack Dodds of Morgan, Lewis & Bockius.

How did this case come to you and your firms?

John Walsh, WilmerHale: WilmerHale and I myself have represented DaVita in other cases, as has Morgan Lewis and Jack Dodds. We teamed up with Morgan Lewis because the two firms brought complementary strengths to the table: Morgan Lewis had in-depth knowledge of the facts and the investigation. WilmerHale had critical experience in the legal issues in criminal antitrust cases and I brought familiarity with the U.S. District Court here in Colorado – I was U.S. Attorney for Colorado from 2010 to 2016.

Jack Dodds, Morgan Lewis: DaVita has been a key firm client across multiple practice areas for many years. We have worked closely with the client on prior government enforcement matters and are fortunate to be a trusted advisor to the company. We were gratified that DaVita called on us in this matter.

Tom Melsheimer, Winston: I was hired by **Jeff Stone** of McDermott, Kent Thiry's close friend, when we thought the case would be indicted in Dallas. When it was indicted in Denver, I made the travel team and helped to recruit my longtime friend and trial partner, Juanita Brooks, to try the case with me.

Who all was on the defense teams and how did you divide the work?

John Walsh, WilmerHale: Jack Dodds at Morgan Lewis and I were trial counsel for DaVita in the case. We informally divided responsibilities between Morgan Lewis, with its command of the facts and witnesses, and WilmerHale, with a focus on the legal issues, motions and jury instructions, including the critical motion to dismiss which was briefed and argued by WilmerHale partner and former U.S. Solicitor General **Seth Waxman**. The two teams worked extremely well together and in practice, this division was not rigid – Jack and Morgan Lewis also participated in the briefing and legal arguments, I (with the WilmerHale team's critical support) handled voir dire, cross examinations of witnesses and jury instructions and Rule 29 arguments at trial. Our WilmerHale team included counsel **Dan Crump**, senior associates **Erin Ladd**, **Lauren Ige**, **Kelsey Quigley**, **Sophie Cooper** and **Margarita Botero**, associates **Aretha Frazier** and **Avi Bakshani** and **Stan Maderich**, senior case management, and **Taryn McCarthy**, senior paralegal.

Jack Dodds, Morgan Lewis: I handled the opening statement and closing arguments for DaVita working closely with counsel for Mr. Thiry to address issues that were common to both him and the company and to present a unified defense. My partner **Clay Everett** shaped the legal strategy around the antitrust laws, working closely with our co-counsel at WilmerHale. Clay and I were privileged to work with a dedicated, outstanding team of colleagues, including litigation associates **Erica Jaffe**, **Bradie Williams**, **Al Hassani**, **Mike Hacker**, as well as eData associate **Elizabeth Gary**, and paralegals **Barbara Robinson** and **Tanya Milton**. Our team brought passion, intensity, and a commitment to the case. We worked hand-in-glove with the WilmerHale team, who are truly a class act.

Tom Melsheimer, Winston: For Mr. Thiry the Winston & Strawn team was led by me and included **Scott Thomas** and **Alex Wolens**. Included on the Thiry team were Juanita Brooks and **Roger Denning** of Fish & Richardson, and **Justin Murphy**, Jeff Stone and **Dan Campbell** of McDermott Will & Emery.

Juanita and I were co-lead trial counsels for Mr. Thiry. I gave the opening statement, cross-examined several of the government's cooperating witnesses, and conducted the direct examination of the only defense witness, an economist. Juanita conducted the voir dire, cross-examined multiple government witnesses, and did the closing argument.

McDermott served as quarterback for the Thiry defense, they argued critical motions and issues with the judge during trial, and Jeff Stone was sitting next to Kent Thiry when the acquittal verdict came back.

What were your key trial themes? And how did you highlight those themes as the government put on its case?

John Walsh, WilmerHale: Our themes were simple and straightforward: We acknowledged there were emails and texts from former CEO Thiry that the jury wouldn't like and shouldn't have happened. But those emails, texts and informal agreement simply were not crimes. There was never a conspiracy to "allocate the market for employees" among the companies – which was the antitrust crime charged. And we argued that employees might have been affected by the informal agreements, but that there was no evidence of employees being harmed – in fact, the stories of individual employees showed they were benefited by DaVita offering pay raises and promotions to get them to stay at DaVita. And meaningful competition always remained: Sometimes the employees stayed, and sometimes they left. We also made clear in our presentation that the government had overreached in charging this case criminally – and from the jury's questions, that theme seemed to have resonated.

On cross-examination, every government witness had to acknowledge aspects of these themes, because they were rooted in the truth.

Jack Dodds, Morgan Lewis: Dodds: We acknowledged the existence of the agreements and the other

less attractive facts in the case and tried to focus the jury on simple, pivotal questions, the most important of which was whether the agreements had the purpose and intent of allocating the relevant employment market. The jury's one question during deliberations told us that we had succeeded in having them focus on the right thing.

Tom Melsheimer, Winston: Our key theme was that, whatever happened, it wasn't a market allocation as defined by the antitrust laws. The agreements had pro-competitive benefits and were made, not to allocate the market, but to manage long-term relationships between business colleagues and to create transparency in the hiring process. We emphasized this in our cross-examinations of nearly every cooperating government witness. The simple truth is that the witnesses wanted to agree with us because, by and large, they didn't agree with the government's theory. This was one of the best examples of the maxim that cross-examination need not be "cross," and it was important that we draw out the right testimony without being unnecessarily aggressive. That's not easy.

I gather there was a lot of back and forth over the government's contention that an alleged no poach agreement could constitute a per se violation of the antitrust laws. Why was that such an important issue and where all did that fight play out?

John Walsh, WilmerHale: If an agreement is a per se violation of the antitrust law, the defense evidence and arguments that can be presented are greatly limited – in effect, the agreement itself is the crime. The government charged the three nonsolicitation agreements alleged as per se violations, and admitted that if the agreements were not per se violations, the indictment would have to be dismissed. Our motion to dismiss argued that the indictment should be dismissed because it did not properly allege a per se offense – in other words, that the "non solicitation" agreements alleged were not a per se offenses. [U.S. District] Judge [R. Brooke] Jackson did not grant the motion, but he found that not all non-solicitation agreements are actually per se violations, and that to establish that the non-solicitation agreements alleged were in fact per se offenses, the government would have to prove beyond a reasonable doubt that the purpose of the agreements was to "allocate the market for employees," in other words, the purpose was to agree to "cease meaningful competition" for those employees. This was a critical ruling and the basis for our defense – there was never an agreement with the purpose of "ceasing meaningful competition" for DaVita employees, and meaningful competition never ceased.

Jack Dodds, Morgan Lewis: The legal arguments continued well into trial, with the court weighing what instructions the jury would be given right up to the closing arguments. The lack of precedent meant that the instructions had to be carefully curated, and that we had little certainty on where they would end up until right before closing.

Tom Melsheimer, Winston: The intent piece was the hook for our entire defense.

Judge Jackson allows jurors to submit questions for witnesses. How did the questions from the jury shape the tenor of the trial? And what can you do to prepare a witness for them?

John Walsh, WilmerHale: The juror questions offered an invaluable glimpse into the issues the jurors were focusing on. They were extremely helpful. We did our best to pivot our cross-examinations and presentation to help address the questions and concerns the jurors were raising. We were also heartened by the fact that the questions revealed that jurors were paying very close attention and asking key questions to get to the bottom of the issues being presented. It was an impressive jury.

Jack Dodds, Morgan Lewis: Our defense strategy was to present only one witness, an economist who is the president of Analysis Group Inc. He received at least 60 questions from the jury after the cross-examination was finished. He provided his three-point analysis to demonstrate findings that there was no difference from what other companies are doing with respect to hiring from DaVita. Overall, the jury's questions told us that we had a thoughtful, insightful jury.

Tom Melsheimer, Winston: I have handled a number of trials where the court permitted the jurors to ask questions. It's a great idea that keeps the jurors engaged in the trial. It also gives the lawyers a window into what the jurors are thinking, so it's invaluable in that regard. In this case, the juror questions came to define the trial because there were so many of them—over 100. We only called one witness, but we prepared him for a barrage of questions, which he ended up

getting. He managed very well. In fact, he was on the stand answering juror questions longer than he was on the stand during my direct examination.

What can other defendants facing potential no poach-related charges take from this case and your trial experience?

John Walsh, WilmerHale: The government was out over its skis on its legal theory here, alleging that non-solicitation agreements are automatically per se violations of the Sherman Act. Judge Jackson concluded that the law does not support that view, and required the government to prove that the purpose of the agreements was to allocate the market and cease meaningful competition for employees. That's a powerful message to the government – and a powerful argument for other defendants facing aggressive enforcement in this area from the government.

Jack Dodds, Morgan Lewis: This case is one with significant impact and will surely have a ripple effect. It was the first test of the DOJ's assertion, reflected in its 2016 Antitrust Guidance for Human Resources Professionals, that such "no poach" agreements constitute "per se" violations of the Sherman Act. The DOJ policy is from 2016 and they went five years without bringing a criminal prosecution. It will be difficult to push the boundaries of Section 1 of the Sherman Act, particularly involving employment non-solicitation agreement cases. There's also a higher burden of proof to demonstrate the parties "knowingly entered into the conspiracy with the purpose of allocating the market".

Tom Melsheimer, Winston: An antitrust case is like any other case. You have to pick a winning theme and discipline yourself to stick with it. Here, we didn't try to defend every email our client sent. Instead, we sought to argue that the government could not prove any intent to allocate the market — as opposed to some other intent. The jury understood that and agreed.

Juanita Brooks, Fish: We can all promise ourselves we will never commit a crime, but we can never be sure we will not be accused of one. That is particularly true in cases involving the Sherman act. The murkiness of the statute leaves everyone in peril.

What will you remember most about this matter?

John Walsh, WilmerHale: When the judge read the not guilty verdicts, there were gasps and tears at the defense table. I looked over at the jury and saw that many of the jurors were red-eyed and tearing up as well. It was an emotional moment. This was a hard-working, thoughtful jury and I will never forget their service and dedication.

Jack Dodds, Morgan Lewis: I think it's safe to say any trial lawyer will fondly remember successfully trying a case of "firsts," but I will always treasure the trust DaVita placed in us and the strength the company and its leadership showed to see the battle through to the end. Most of all, I'll remember the emotion of the moment the judge read the first "not guilty"; sharing that moment with **Kathleen Water**s — DaVita's Chief Legal Officer and a dear friend — and co-counsel was the highlight of my career. Our entire teams' ability to work together to develop and execute the trial's winning strategy was critical to our success. Morgan Lewis and WilmerHale truly leveraged each other's strengths to score the win.

Tom Melsheimer, Winston: There was a lot at stake here for a celebrated former CEO and for a large health care company that provides lifesaving medical care to very sick people. So, there was enormous pressure on us every day to win and to do so while working with a large team of lawyers. Trust me, that's not easy. But we all got along well and never wavered from our agreed-upon trial theme. I'll remember that because it worked.

Juanita Brooks, Fish: I will never forget when the verdict was read. Knowing that Kent's entire future was on the line I could hardly breathe, but when I looked at the jury and saw that some of them were in tears I knew they too felt the magnitude of the moment and had done the just thing by acquitting on all counts.