WHEN SHOULD YOU start thinking about the trial of an antitrust case? The instant you are assigned to it. Even if your case settles, as most antitrust cases do, or is never even filed, preparing for trial from the beginning will ensure the best possible result for your client.

Going about this takes some planning and foresight. It is very easy, in the crush of litigation activity, to focus on taking the next deposition, drafting the next motion, fielding the next phone call, or preparing the next document request. But in all litigation, the idea is prepare the

"Most Supreme Court cases are won or lost in the trial court."
—Justice Antonin Scalia

"The two biggest mistakes trial lawyers make are not spending enough time in their initial interviews, and not thinking enough about their trial themes."
—Russ Herman

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strongest case for the client’s position. The best way to do this is to think about trial at every step of the process. This article will discuss the ways to keep your preparation directed toward the most important part of the case (even if it never happens): the trial.

WRITE YOUR OPPONENT’S CLOSING STATEMENT • One of the most effective ways to begin preparing for trial is to first outline your opponent’s closing statement. Write your opponent’s ideal closing from both a legal and a factual perspective. (Beyond scaring you into doubling your preparation, this exercise will help you anticipate your opponents’ moves, and give you lots of time to prepare your own responses to your opponents’ best points.) Share this outline with your colleagues and ask for their comments. From time to time throughout the course of your investigative and case work, revise your outline to incorporate new facts and legal rulings, and to reflect ongoing developments such as the emergence of a potentially helpful or harmful witness.

Outline the Best Possible Argument
After you have fully explored your opponents’ potential case, prepare an outline of your side’s best potential closing. This will help you think analytically and strategically as you conduct interviews and depositions, and read documents. As part of this exercise, assume the worst with respect to possible motions in limine, evidentiary battles, and witness testimony. This will help prevent you from overestimating your own case or underestimating your opponent’s. It also will help you create a checklist for missing facts, documents, witnesses, or testimony.

Your Scorecard
Throughout your investigative and pretrial work, use your closing outlines as a scorecard to keep track of ongoing successes and failures. Your scorecard will help you conduct a cost/benefit analysis as to each potential witness, trial exhibit, and argument. It also will help ensure that you start thinking about a legal and evidentiary foundation for each document or piece of testimony sooner rather than later.

Your Theme
Most importantly, however, your outline will help you create a winning theme that your entire team can follow as its lodestar. It also will put you into the best possible position to foresee and quickly react to your opponents’ best themes. Every step your team takes in developing your case and preparing for trial should be aimed at buttressing your key themes. Of course, you will take apart and put your outline back together over and over before you stand up to make your opening statement. Do not be surprised, however, if much of what you say and present in your opening statement relates to your first outline of your opponents’ case.

TRIAL-FOCUSED INVESTIGATION AND CASE DEVELOPMENT • Your antitrust trial will be a ferocious battle between two or more parties with an unwritten ending. Understanding your own role at trial is crucial to successfully contributing to your team’s winning effort. One of the lead trial attorney’s most important duties is to ensure that from day one of the case, every member of the team understands his or her role, and is empowered to effectively carry out his or her mission. The lead attorney also should inspire each team member to seek the highest standards of excellence in reading documents, drafting motions, and preparing for and taking depositions.

Learn the Industry Inside and Out
Every member of your team should develop a pragmatic and working understanding of the relevant industry. This can be accomplished
through plant or facility tours, reviewing trade journals and articles, and talking to industry employees and experts.

No matter what product or service you are dealing with, and regardless of whether you represent a corporate defendant, the government, or an individual, take as many of your team members as is possible on a plant or facilities tour. Talk to the people at the plant, including the people working at various machines or stations. Also try to tour a third party’s facilities, so you can compare any similarities or differences. The best way to credibly argue product substitution issues is to fully understand how the product is made, handled, and used.

Encourage every member of your team to read relevant trade articles, and look at pictures of the relevant operations. This will help your team immensely as they review documents, talk to potential witnesses, and take depositions. You also may want to have industry participants talk to your entire team and answer their questions.

**Figure out Your Case Early on**

As discussed earlier, you cannot start preparing and understanding your opponents’ case too early. You need to know their themes to best craft your own. Figure out the best way to summarize your case theory in a single sentence.

You also should read and re-read every case relevant to your own. During a merger investigation, read and re-read every reported merger case. Every attorney on your team should do the same. This will help you to understand the pitfalls and traps that may be waiting, and guide you in crafting your own. It goes without saying that you should understand intimately every relevant case decided in your circuit.

Never forget that your complaint, answer, or counterclaim is your most basic trial document. Jim McElhaney appropriately recommends that you develop a proof list that ties each important fact to at least two independent sources. Also, you should constantly ask yourself how you will rebut an adverse witness on each point.

**Picture Potential Witnesses at Trial**

Each time you interview people about your case, picture them at trial. Test them, and push them. Envision how your opponent will exploit or attack them. Keep in mind that non-parties often are the best witnesses because, rightly or wrongly, they may be perceived as unbiased. But also recognize that the court or the jury wants to hear from the key executives. Contrast how Bob Crandall of American Airlines dominated David Boies and Joe Jamail in the American Airlines antitrust litigation to Bill Gates’ pitiful videotaped deposition testimony in the Microsoft case.

Whether you are preparing a written statement or taking a deposition, do not feel that you have to develop or defend your entire case through the witness. Take what the witness gives you. Recognize where they can harm you. Balance how you want to use or treat them accordingly.

**Fall in Love with Documents**

Antitrust cases often are won or lost on documents. Therefore, it is critical that every team member understand what they are looking for, and appreciate how critical their review is. Try to have every team member involved in the review process, including the lead trial attorney. At the Antitrust Division, we presented a “hot document award” each day to the team member locating the best document to keep every team member enthusiastic, and on their toes. A “worst document” award also can serve a useful purpose, since your trial notebook must include the good, the bad, and the ugly. Someone on your team should be tasked early on with deciding how to ensure that helpful documents...