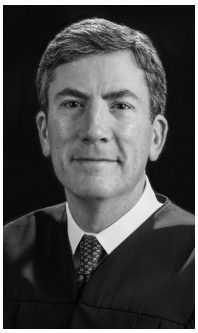
Interview with Judge Jon Tigar, U.S. District Court, Northern District of California

Editor's Note: *The Honorable Judge Jon S. Tigar sits on the U.S. District Court for the Northern District of California. He graduated from Williams College in 1984, and the University of California, Berkeley, Boalt Hall School of Law in 1989. He began his legal career as a clerk for Judge Robert S. Vance of the Eleventh Circuit, and then practiced complex commercial litigation at two different firms, with a break between them to serve as a public defender. He became a judge of the Superior Court of California in 2002 and federal trial court judge in 2013. Judge Tigar also serves as the Judicial Representative on the ABA Section of Antitrust Law Council.*

Lisa Wood and Amanda Reeves interviewed Judge Tigar for Antitrust *on September 25, 2017. We are grateful for Judge Tigar's generosity in sharing his views about how to be effective as an advocate in an antitrust court case.*

ANTITRUST: Could you give us a sense of your experience with antitrust matters, either on the bench or before coming on to the bench?



JUDGE JON TIGAR: After I graduated from law school in 1989, I clerked for a federal appellate judge in Birmingham, Alabama. After that, I went to work at Morrison & Foerster in San Francisco. I worked on a very big antitrust case as a young associate, but my recollection is that with the exception of a couple of research projects, my work on that antitrust case was similar to the work on any very large commercial litigation, and the rest of my cases were not antitrust cases. After three years at Morrison, I left to join the Public Defender's Officer in San Francisco so I could try some cases, because I didn't think I'd get that experience at a big law firm. After a year and a half there, I went to Keker & Van Nest in San Francisco where I eventually made partner. I did a small amount of antitrust work there, but it wasn't something I specialized in.

In 2002, I became a trial judge on the California state court trial court, and I stayed there for 11 years. I did no antitrust at all on the state court. It wasn't until I went on the federal bench in January 2013 that I started really doing antitrust law. Now that I'm doing antitrust work, I really like the cases.

I haven't tried an antitrust case yet, but I've had a large amount of pretrial antitrust practice, including an antitrust MDL case which I inherited. At the time I got the case, there were 100 motions under submission, including 29 motions for summary judgment, so I sort of got a crash course in antitrust law.

I like antitrust cases for two reasons. First, I like the intellectual concepts. I studied economics in college, and I continue to read economics books and articles. Antitrust and economics go hand-in-hand; it's impossible to be involved in antitrust without thinking about economics. That's very satisfying.

The other reason I like antitrust cases is that the bar is so talented. I would say almost uniformly, both in the cases that I've had in my court and in my interaction with the lawyers in the ABA Antitrust Section, there is a quality of rigor and intellectual curiosity that I really enjoy.

The Northern District of California, where I sit, has always been a destination docket for antitrust cases. It's always in the top five districts in the country in terms of the number of antitrust filings. And so, even after just a few years on the federal bench, I have a fair amount of antitrust experience, and I'm confident that will just continue to grow.

ANTITRUST: In your view, do antitrust cases take up more time than they should? As counsel, we're all aware of the time pressures that the court is under, and of course parties are also tremendously concerned about the cost and time associated with litigating antitrust cases. Are there practices that you've adopted over the years to effectively manage antitrust litigation to have it take the appropriate amount of time?

JUDGE TIGAR: First of all, I'm somebody who defers a lot to the judgment of counsel regarding the order of which issues ought to be decided and how they ought to be scheduled and that sort of thing. Lawyers inherently know more about their cases than the judge does. But there are places where the judge sometimes needs to have a firmer hand.

One is discovery. We know that while discovery works very well in the vast majority of cases—and often doesn't need much management from the bench—in very large cases discovery requires more management. I'm not usually involved in that directly because we have a fantastic magistrate judge bench in the Northern District and they normally manage

discovery in my cases. But I do keep discovery in some of my cases, and I stay informed about what's happening when a magistrate is running discovery.

In my MDL case, my predecessor appointed a private special master to run discovery. So he decided most questions in the first instance, and that was often the end of it because very few things were appealed.

Do I think that antitrust cases take too long? That hasn't been my experience. I think in general, economics acts as less of a brake on large-scale litigation than it might in other cases, but that's true for most high-stakes litigation. Any piece of large commercial litigation can be over-litigated. Let's say that the parties are fighting over a million dollars. At some point, it's no longer worth spending attorneys' fees to conduct the fight, and so pretrial activity is self-limiting. But let's say the parties are fighting over a $600 million a year market with only two players, and a potential result of the litigation is that one of the two parties will be severely crippled. As a judge, you know going into that case that litigation cost is not going to act as a brake on litigation activity. Instead, the incentives will be there on both sides to file every motion that can be filed, take every deposition that can be taken, and so on.

Fortunately, the antitrust cases I've handled haven't been particularly susceptible to this problem. In fact, I would actually say that the antitrust cases I've seen have been among the better managed. Maybe that's the just luck of the draw.

I do think that antitrust cases present opportunities for the judge to decide discrete issues in a way that gets the case to the right size. For example, there may be a dispute over whether conduct in a particular market is appropriately part of the case, which can have an effect on damages. If you can identify that issue and decide it, you can make it easier for the parties to settle. So sometimes I'm looking to the lawyers to come to me and explain how the case can be broken down into component parts to be decided one at a time.

ANTITRUST: Is it your practice generally to use magistrate judges to resolve discovery disputes?

JUDGE TIGAR: Yes. Typically I refer a case to a magistrate judge for discovery purposes, meaning all discovery disputes will be resolved in the first instance by that magistrate judge. In a small percentage of the cases, I do keep my own discovery disputes, but that doesn't happen very often.

ANTITRUST: Do you play any role in promoting mediation and settlement when presiding over an antitrust case or do you defer to counsel to bring that subject up?

JUDGE TIGAR: I'm fairly deferential in all my cases, antitrust and otherwise. I do very often ask lawyers to identify the disputes that are driving differences in case valuation, since resolving those is more likely to produce settlement. But that's not because I want any particular case to settle or not settle; I don't. Honestly, we don't try enough cases. More than enough cases are going to settle, regardless of what I say or do.

We know that while discovery works very well in the vast majority of cases—and often doesn't need much management from the bench—in very large cases discovery requires more management.

But what I do want to do is to be a good case manager, and that means I want to make sure the parties are focused on doing the pretrial work that is either going to help them prepare for trial or is going to give them information about the value of the case in a way that resolves differences of opinion about value, or it does both of those things. If it's not serving one or both of those objectives, then it's a waste of everybody's time, and that's when I have a case management role to play.

ANTITRUST: What are the most important considerations to you when selecting class counsel under Rule 23(g), and how does diversity factor into your analysis?

JUDGE TIGAR: Demonstrated competence and experience, obviously. I also think it's important for a district judge to consider diversity in every instance where it's possible to make a difference. Most of the time, when I'm making a selection, it's between white men. It is shocking to me how few women I see in these roles when I look around the big cases. We've had a very high percentage of women in law schools for a long, long time, so I'm surprised by how few women have leadership roles in large cases, and how much more needs to be done. And I would make the same observation regarding minorities.

ANTITRUST: In the District of Massachusetts, the judges have started to encourage younger lawyers to argue motions. Are there any tools that you've used to try to encourage a range of voices to present before you?

JUDGE TIGAR: I have an order that I issue when I vacate a motion hearing that says I'll put the matter back on calendar if a young lawyer will argue the motion. I include that language most of the time. I have to vacate a certain percentage of hearings because of time constraints. This practice has been successful in providing younger lawyers with opportunities in court.

With regard to issues of diversity, lawyers of color and women in the courtroom, I have very often publicly spoken about how important diversity is to me, and I hope that has

an effect on the law firms and clients who are deciding whom to send to court. I have never told a law firm whom to send, and I don't think I ever would, because I don't think it's consistent with my role as a judge. But I do have the power to gently encourage, and I hope sometimes it works. I also think it's important for judges to mentor younger lawyers, women lawyer, and lawyers of color.

ANTITRUST: What can advocates do in an antitrust case to maximize their effectiveness in the courtroom?

JUDGE TIGAR: That's a big question, and I don't think there's a one-size-fits-all answer. I think, like anything else, it depends on who your judge is. In a jury case, we are used to thinking about how to present a case to a particular jury pool and a particular jury. We probably wouldn't present a case the same way to a jury in Manhattan as we would to a jury in Galveston. Once we've conducted voir dire, and we know something about a particular jury's collective life experience and outlook, that should frame our presentation to that jury. I think practicing in front of a judge is no different: you have to frame your presentation based on the personality of the judge.

Turning to antitrust, most of the judges that I know like hard challenges and they like complexity, but they have differing amounts of experience with economics and differing amounts of experience with antitrust. So the first thing you have to do to be effective is make sure that your decision-maker understands all the concepts you need him or her to understand to see things your way. The same observation is true for any case with a complicated technical component, such as patent, environmental, and so on.

So, for a judge who doesn't have a lot of experience, counsel might ask if a tutorial session would help the court. I'm a fan of tutorials, and I promote the idea of tutorials generally. We have a very, very large patent docket in the Northern District of California, and most of us have a practice of requiring a tutorial that takes place at least a couple of weeks before the claim construction hearing to make sure that we've given the parties an opportunity to educate us about the relevant science. It seems to me a similar technique might be very effective in antitrust cases, and even though I have some familiarity with economics, I could probably benefit from a tutorial in some of my cases.

There are a lot of benefits from tutorials beyond just the education of the court. For one thing, the tutorial setting is different from the more typical adversarial atmosphere when presented with a contentious motion. It gives you an opportunity to have something closer to a discussion with counsel about the cases. For another, a tutorial forces you to put aside a couple of hours to do nothing but think about this particular hard topic and not in the context of deciding a particular legal issue. A lot of districts, including mine, have very busy dockets. So a tutorial is a way of overcoming the challenge of divided attention.

ANTITRUST: That is a very interesting observation. I'm a big fan of tutorials, but in my experience, judges are not of one mind on the subject. Some are enthusiastic; but some are not. I've had some judges who have a busy docket say they don't have time for a tutorial. These judges state that they need to focus on the pending matters that are before them and that a tutorial is a luxury they cannot indulge in—a morning or an afternoon of undivided attention on issues.

JUDGE TIGAR: That's a fair point. The opportunity cost of time is highly subjective. For me, in the patent context, I learned that tutorials pay off to such an extent that I require tutorials even in cases with very simple mechanical patents. For example, I had a patent case involving a simple mechanical patent for a juicer. I could read the patent in one sitting at my kitchen table. But I had a tutorial anyway. Similarly, I had a patent case about a bicycle seat; I had a tutorial.

Now, in an antitrust case, for basic concepts of market definition or supply and demand or monopoly power, I don't need a tutorial, so I probably wouldn't have one. But I'm positive that the day will come in an antitrust case where the concepts at issue are new to me or ones that I haven't used in a very long time or are particularly math-heavy, which has never been my strength. And in that case, there's no question that I will want a tutorial.

ANTITRUST: Are there other issues suitable for a tutorial in an antitrust case? For example, health care is an unusual market with lots of different players and acronyms. It can be confusing if you haven't been exposed to it.

JUDGE TIGAR: Yes. The health care market has many features that are unique to it that you don't see in other markets. Economists now recognize that there are almost no perfectly competitive markets. But nonetheless there are degrees of difference. Also, there can be markets that are very, very unusual because they have characteristics unique to them. I think the health care and health care insurance markets are good examples. And a tutorial in a case involving those markets could be tremendously helpful.

ANTITRUST: You've made it clear that you're very open to tutorials? How should counsel approach the topic with a judge who isn't as enthusiastic?

JUDGE TIGAR: Probably the best approach is to take your lead from the court and say we have these concepts or we have these principles and in our experience, not every judge has seen these before. We'd like to suggest some possible ways that we could make these concepts more user-friendly, but we're also curious to hear the court's ideas. What is it that we can do for you? At its core, judging is making very important decisions, based on imperfect information, under time constraint. And as judges we are acutely aware of all three pieces of that: (1) that the decisions are important to you;

(2) that our information is imperfect; and (3) that we're laboring under time constraints.

One of the things that follows from that is we, as judges, are always wondering, who's going to give us information that's reliable and useful? Who's going to be honest about the flaws? In other words, whom can we trust? Because when we feel we're in a position of partnership with counsel, our work product is going to be a lot better and everybody in the case is going to enjoy the experience a lot more. A good tutorial increases the judge's stock of trusted information and does it in a way that promotes an atmosphere of trust.

When I was a lawyer, I always wanted to establish a sense of partnership with a court if I could. And I wanted the court to see me as a partner, because I wanted to be a trusted source.

Of course, not every judge can be persuaded to conduct a tutorial. But I think for the vast majority of judges, if you approach this issue that way, you will find yourself in a conversation with the judge. You'll be able to figure out a technique that will let you educate the court. You might even wind up doing things that you didn't expect the judge would want or allow in the beginning, because now you've created a sense of partnership.

ANTITRUST: Let's talk a little bit about opening statements in complex cases. What has worked well and what hasn't worked well?

JUDGE TIGAR: You have to have a compelling story. It should be a narrative that makes sense to a jury, that seems fair and that accommodates all of the facts, good or bad, that the jurors will hear in the trial. And it should also appeal to the values and themes that they have in their own lives. So, your opening should do all of that, optimally.

In your opening, you should tell the jury your compelling story. And you should use the same theme in your opening that you plan on using throughout the trial so that the jurors can start learning that story right away and also so that they can develop a relationship with you from the beginning.

We don't want jurors to make up their minds before they've heard any evidence, but there's no question that the opening is a very, very important framing device. And for the rest of the trial, if you've done your job, the jurors will be asking themselves, is this piece of evidence consistent with this frame that the lawyer gave me or not? And it should be *consistent* with your frame and *inconsistent* with your opponent's frame.

So, the best opening is going to provide a theme from which everything else in your case springs naturally. And it's going to provide that frame. That's the first thing.

The second thing is you have to become the person that the jury likes and trusts. I don't mean you want the jury to think of you as their best friend; some people make that mistake. Rather, you need to establish your credibility with a jury as somebody who is an honest broker of the information, who is defending an important principle, who is going to be a reliable source of the information they need to do their job.

You're competing with the other lawyer: who will be on whose team? And the jurors already can see the tension between these two sides. They're watching that unfold. You want to immediately develop a relationship with the jury; you want to be the person the jury likes and trusts. You want them to feel a sense of affinity with you.

So, if you've done those two things, now the jury's going to be looking forward to hearing from you throughout the case. When your opponent has finished examining a witness, they think, "Oh, good, (Lisa's) going to stand up now. This presentation we've been listening to has not been that clear, but now (Lisa's) going to straighten it out for us." That happens.

ANTITRUST: Have you ever allowed counsel to break up their opening, and provide it in stages during a trial?

JUDGE TIGAR: It's not something I do often. Something that I have had some success with is "mini-openings." Instead of the court reading a prepared statement of the case that both sides can agree on, each side gets not more than five minutes to stand up and address the entire jury pool, before jury selection, about the key facts of the case. It's one of the few times when I'll interpose my own objection because the other lawyer in that moment is too scared to object. But in the right case, that can be a very good tool for getting juror engagement right away. And it's much more interesting than a prepared statement of the case read by the court.

ANTITRUST: Have you permitted counsel to provide interim summaries in a long trial or any other technique for guiding the jury?

JUDGE TIGAR: I've tried so many cases that I honestly can't remember if I've done it, but I don't think so. I would certainly be open to it if counsel jointly suggested it. I can imagine it making sense in a very long trial where there is a big shift in subject matter and a natural breaking point, such as between the liability and damages evidence.

ANTITRUST: Do you have observations about the use of presentation tools generally by counsel in the courtroom, whether it's in the motion practice with you, a tutorial, or during trial?

JUDGE TIGAR: Let's talk about juries first. I think it's almost always a good idea to use PowerPoint or something similar because jurors now expect a visual component; that's the reality of their daily lives.

I would say it's usually a mistake now for somebody to think that they can just walk around and talk without any visual aids. Especially if there's a lot of complexity in their case. I say usually, not always; there's no one size fits all.

Some lawyers know that their most effective tool is their voice and that's all they want to use. But I think for most lawyers, they will benefit from having a visual component.

On the other hand, the biggest mistake I see, and I see it often, is people putting too much information on the screen at once. It's cognitively counterproductive. We know that human beings all learn in a variety of different ways. Some of us are taking in more information by listening; some are taking in more information by reading or watching, and many of us are benefiting when we can do both because they reinforce each other. But there are limits to anyone's ability to absorb visual information. You can't ask a juror to read a lot of dry text on a slide while simultaneously listening to what someone is talking about and then process and synthesize it all. It's not realistic. It can actually move the ball backwards.

ANTITRUST: So, just to continue on that same topic, could you give some observations about best practices and pitfalls for counsel using document presentation technologies with a witness?

JUDGE TIGAR: Most lawyers that I've seen do this very well, so when we talk about pitfalls, we're not talking about most lawyers. But the biggest pitfall that lawyers fall into with the presentation of information and trial generally is not thinking about it far enough in advance. Lawyers need to cull down the documents in big cases, and I can tell that is not happening enough in some of the cases tried before me. It's a tedious task, but it's necessary. No matter how many documents your legal team has coded as "important," there will be at most 100 or 200 really important documents even in the biggest case. Sometimes there are really only ten. Someone has to go through the documents and think very carefully about whether each document is substantively necessary to connect the dots or has a lot of sizzle. Sometimes it doesn't have much substance, but it adds an emotional, atmospheric element to the case. And doing that well takes a long time, so you have to start very far in advance.

Similarly, you have to be very fluid with the technology, or have someone who is, and you have to know the document very well, so you're not fumbling around and emphasizing to the jury the third most interesting part of the document, and then realizing in the middle of the presentation you actually wanted to show them something else.

It's not the end of the world if that happens, and even the best lawyers do that occasionally. But the jury can tell when you know the document well and when you don't, and they can often tell when you're giving them the information that's really crucial to them and when you're not. And sometimes even the witness will start to show a little exasperation, because of course the witness often knows the document very well. When your own witness starts to get a little exasperated with you, that isn't good.

ANTITRUST: The technology can be great to zero in on a key part of a document, but I think the jury still likes to have a binder of the key documents so they can make their own assessment during deliberations of what's important and how this all fits in. In your courtroom, do the jurors all still get a hard copy of the document to look at, even if it's posted up on the screen? Or do you leave that to counsel?

JUDGE TIGAR: I would say my own practice varies. We now have an evidence presentation system in my court that is very easy for jurors to use when they're deliberating. It consists of a computer that has no connection to the outside world, and the only software is what is needed to look at the evidence. That allows the jury to look at any document or image or video that's in evidence in the case whenever they want to.

ANTITRUST: You still have an exhibit binder, in effect, but it's electronic.

JUDGE TIGAR: Yes. And that's on top of anything else they have. I would say more often than not the jury—the jury as a whole—also has binders with hard copies of every paper exhibited in the case. So, I'm trying to make it as easy as possible for the jury to look at the evidence they want in whatever format they want. And with regard to jurors having individual binders of the important documents in the case—that can be useful. But frankly, sometimes the disputes among counsel as to what constitutes an important document take up so much time, the fight isn't worth it.

Something else that I think is useful in any lengthy trial is a binder of pictures of individual witnesses with their titles and a brief description of the witness. And that will help the jurors remember the various people as the trial goes along. And also in a case, like a patent case or an antitrust case, a glossary of the terms that they are likely to hear in the trial that we know they're probably not familiar with.

ANTITRUST: What about timelines? Have you seen those used effectively?

JUDGE TIGAR: Yes. I think a timeline can be very powerful in the right case. I used timelines effectively as a lawyer, and I've seen them used effectively as a judge. A good timeline has been prepared, as we've been discussing, far in advance. It only has factual matters on it, and no argument. Any objections from the other side have been worked out in advance. And because all of those things have happened, you can use the timeline in opening statement. Because this is the core of your story, right? This is the part of the book that goes behind the flyleaf. This is what you want the reader to look at and to be able to refer back to when they're in the midst of your novel. And so, I think you want to put something together that you can start using right away.

Lawyers also like to use timelines in closing argument, and there obviously you have more latitude. You can be argu-

mentative. But if your timeline is argumentative, it means it's not the one you used in opening, and you will have given up something important. If you can bring out the same timeline in closing that you used in the opening, you can say to the jury, "See? I told you it was going to be like this." That technique can be very powerful.

ANTITRUST: Are there techniques that you have seen used that make economic testimony more useful or accessible, either to you or to the jury? I mean, recognizing that you follow economics, it may be very accessible to you, no matter how it's presented. But have you seen techniques that make it easier either for you or the jury to understand?

JUDGE TIGAR: Well, first of all, most of the economics testimony that I've seen has been in writing. Frankly, that's actually how most of the economics testimony in the country is received, when you think about the percentage of the proceedings that occur in pretrial motion practice, actually.

So, why is that relevant to what we're talking about now? Because I never have as much time to devote to a particular thing as I want to. So if your expert submits a 120-page report and the other side's expert submits a 120-page report, will it be physically possible for the district judge assigned to the case to read every word of every report in every case? Let's leave that question hanging for a moment.

At a minimum, I'm going to read every page of all of the briefs, and those portions of the record and those cases that I feel I must read in order to audit the arguments in the briefs, if that's the right phrase, and make sure that I am clearly grasping the concepts in the way counsel want me to. My law clerk is going to read everything, and I'll get some additional guidance there about what's useful in the record.

So, it's not so much how should the expert present her work, at least as far as my own reading is concerned. It's how should the lawyers describe that work to me. And the answer is you should point me to the parts of the work you think I need to read. The lawyers should be clear in pointing me to the parts of the declaration that they think will support their arguments. Or pointing me to the parts of the other side's declaration that they think undermine the other side's arguments.

And you need to do it with a degree of specificity that acknowledges what's happening in the judge's chambers. A suggestion that I read an 85-page "excerpt" of an even longer, single-spaced declaration is less helpful than something focused. Counsel might say, "The heart of the dispute is laid out in this 10-page section, and in particular, on this one page, there are two paragraphs and if you read those paragraphs, you'll see that the rest of this expert's theory cannot hold water." That's useful. Because I want to be as prepared as possible every time I take the bench so I can do a good job for the parties.

Another thing that I want counsel to tell me is where is there really a clash between these experts. That's useful. I'm very interested in what one recognized authority in the field thinks about something that another recognized authority in the field has done. And it's also helpful to know when the experts agree on something.

I guess what I'm trying to say is that I hope counsel will figure out how to really use the expert testimony as a tool to educate the court, and not just stuff the information channel with information that hasn't been tied to the core arguments in the case. An expert declaration is only great to the extent it drives the legal arguments in the case.

ANTITRUST: I recognize you're saying that most of the expert economic testimony you've seen was presented in writing, through reports or declarations. When you have seen cross-examination of an expert on a complex subject, what have you found to be particularly effective by counsel and what traps are there for counsel when cross-examining an expert?

JUDGE TIGAR: What works is to break things down into bite-sized pieces, to proceed at a pace that acknowledges that the jury is intelligent—juries don't like being talked down to—but also allows them to digest one bite-sized piece before counsel moves to the next one. Also, to use analogies that make sense to jurors and allow them to tether what you're telling them to a context from their own personal experience.

And obviously there's the danger of oversimplification. Sometimes you might feel that your opponent's analogy is unfair because it fails to capture some relevant criteria. But when you have an economics expert or another expert in a complicated area, you're trying to teach the jury a lot more substance in a shorter period of time than one would expect in a classroom setting. And you're not generally giving them worksheets or doing the other things we associate with good pedagogy. You're not letting them practice the concepts.

ANTITRUST: Right, no homework.

JUDGE TIGAR: Yes, we actually have a system that frowns on homework, giving the jurors homework. They're not even supposed to talk about the case once they go home. So, you have to figure out how to make them familiar with the topic as quickly as possible. And I think for many experts, the way to do that effectively is by drawing analogies to things that the jurors already understand or already have in their own life experience.

ANTITRUST: Do you think that the increased use of social media has changed the way in which we should present things to jurors because they have a shorter attention span?

JUDGE TIGAR: There's no question that not just social media, but Internet culture in general has shortened everybody's attention span. So counsel's presentation has to adjust accordingly, and the need to focus on juror engagement goes up. There are a variety of ways of getting that result, of get-

ting juror engagement. But one easy takeaway is that in the complicated areas, simply having a witness on a witness stand talking for long stretches of time about something dry without interruption or some kind of visual component is not going to be a successful strategy.

ANTITRUST: Have you approached jury selection in a unique way in complex cases over which you've presided at trial?

JUDGE TIGAR: I don't think complexity has driven any changes. I think length of trial has driven some changes. I would say that compared to most, I have somewhat more liberal voir dire policies than many other judges. I'm a believer in voir dire. I do put time limits on counsel, but I have always allowed counsel to conduct voir dire. And I will sometimes permit longer voir dire in a longer trial. In a long case, I also think written questionnaires can be helpful.

And I can think of at least two instances where the trial was going to be so lengthy and the issues at stake were so important that I told counsel that I was not going to place any time limits in advance on voir dire; that we would see how it went. And in both of those cases, I thought counsel conducted themselves extremely well and I wound up allowing them to simply conduct all the voir dire they wanted, which was a very reasonable amount under the circumstances. And in both of those cases, I would say we had very, very solid juries.

Not every case needs that kind of voir dire. But even in the shortest case, I will allow counsel to have some time to talk to every potential juror who's going to sit on their panel.

ANTITRUST: I would like to follow up on your observation about the importance of counsel developing a relationship of trust with the court. How does counsel demonstrate to you that she is an honest broker?

JUDGE TIGAR: By deciding that being the most trustworthy person in the room is more important than anything else. I will very often ask a question for the purpose of obtaining a concession from counsel. And the question will often take the form, "Well, isn't it true that," or, "If we were to adjust the facts just slightly," and I'll offer a hypothetical in which the facts are worse than the ones I have before me, "Isn't the following true?" Or, "Isn't there the following testimony in the record," and the testimony I'm asking about is undermining a position the counsel is taking. These kinds of questions.

And sometimes, I would say maybe even much of the time when I ask these questions, I am not trying to get the concession because I'm going to use the concession. I'm trying to figure out can I believe this lawyer.

And if somebody is unwilling to concede something that I know they have to concede, that makes it more difficult for me to believe them. We already know, because you and I talked about it earlier, we live in a world of imperfect information. So I'm constantly trying to figure out—and I think many judges are trying to figure out—whom can I trust? And that means at least some of the time, at the margin, the lawyer I trust will win a point.

I had a lawyer in a real estate fraud case in a post-trial motion say—in a footnote—that he had located authority that his opponent had not cited but that he felt his opponent should have cited because it was helpful to his opponent's position. He did not believe that the case was controlling; he felt it was distinguishable. But nonetheless, because it was relevant to the issue in front of the court, he thought I should be aware of it.

This is exactly the thing that you're told in ethics class you should do and no one ever does it. He did it. I still remember that hearing.

And that hearing occurred at least 10 years ago.

And at the hearing, the lawyer said, "I know Your Honor reads all of the briefs and I'm not meaning to suggest otherwise. But I did bury it in a footnote and I wanted to make sure that the court was aware of this case."

I don't think that lawyer had any idea what a positive event that was for his credibility. And I will look forward to that lawyer being in my courtroom for the rest of my career.

So, I think counsel should view opportunities to show the court how candid and credible you are exactly as that; not as tests with a lot of risk or downside, but as opportunities to demonstrate to the court that you're exactly the kind of lawyer the court needs. And if you go into it with that attitude, you're going to have a lot more fun and you're going to win.

ANTITRUST: That's a great note to end on. Thank you very much for your time. ■