Litigating Against the Grain

THOMAS M. MELSHEIMER

The author is a principal at Fish & Richardson, Dallas.

Trial lawyers are creatures of habit. Despite big talk about how creative or groundbreaking one litigator or another might be, in reality we have a strong tendency to fall back on what has worked for us already. Success breeds repetition. If an approach or technique helped us before, then we're likely to try it again. And if something we tried failed, it will be a long time before we try it again.

Of course, that unscientific approach has flaws. It's often difficult—sometimes impossible—to know why an approach failed or succeeded, or what role a particular tactic played in the outcome. After all, trials aren't a best-of-seven series.

That said, there are moments looking back when I ventured out on the ledge, so to speak; when I did something unorthodox, risky, and against the grain, all in furtherance of my clients' goals. Those moves were made when I thought taking the risk was necessary, either because the case was particularly challenging or because I believed something different was needed to capture the attention of the judge or the jury.

I haven't done this often, but when I have, it has paid off memorably. The cases that come to mind differ but have one noteworthy attribute in common—in each instance, success came after I did something more than one person told me wouldn't work.

Example: The Dallas Mavericks

Here's a good example: I have represented Dallas entrepreneur Mark Cuban since the 1990s, before he was a television star on *Shark Tank* or owned the Dallas Mavericks. In 2010, Cuban was sued by a minority owner of the Mavericks who previously owned the team—Ross Perot Jr. Although Perot was famously uninterested in basketball and bought the team largely as a real estate play for a development he was planning, he retained a small interest in the Mavericks after he sold it to Cuban.

Cuban spent a lot of money in his effort to build the team, including using profits from his ownership in the downtown Dallas arena where the Mavericks play. That decision frustrated Perot, who also had a small ownership interest in the arena and wanted to see some return on his investment. So he sued Cuban—in effect, for mismanaging the Mavericks and causing them to run an annual deficit.

There were many things wrong with Perot's legal theory, but we faced the challenge of being in state court, where outright dismissals without a jury or bench trial are infrequent. The case plodded along for some time with discovery and motion practice.

Then came the Mavericks' highly successful 2010–2011 season and playoff run, which culminated in a National Basketball

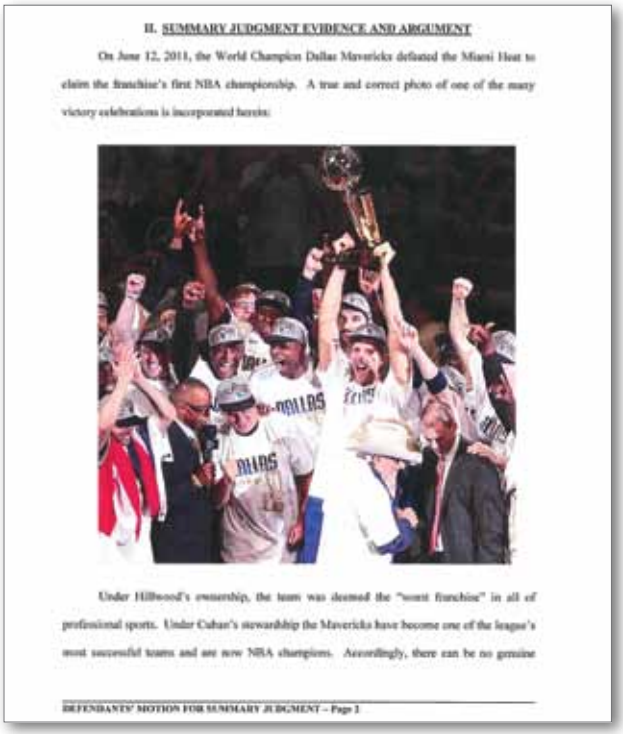
Published in *Litigation*, Volume 42, Number 3, Spring 2016.

Association championship. Although I'd never had an event on a basketball court animate my legal strategy, the Mavericks' championship got me thinking.

Defending against Perot's claim that Cuban mismanaged the team required explaining boring accounting and legal principles, such as the team's going-concern value and the business judgment rule. But the championship seemed to cut through all that—the Mavericks had won before sellout crowds and were crowned "World Champions." How could anyone say with a straight face that the team was "mismanaged"?

The challenge was how to illustrate that point in a compelling way that did not involve the typical legal brief. Bring the championship trophy to court? A bit unwieldy. Produce the confetti from the victory parade in response to a document request? Messy and probably sanctionable.

It finally struck me that the old adage "a picture is worth a thousand words" was the path to getting our point across. We filed a bare-bones motion for summary judgment with a one-paragraph background section and the following argument section:



II. SUMMARY JUDGMENT EVIDENCE AND ARGUMENT

On June 12, 2011, the World Champion Dallas Mavericks defeated the Miami Heat to claim the franchise's first NBA championship. A true and correct photo of one of the many victory celebrations is incorporated herein:

Under Hillwood's ownership, the team was deemed the "worst franchise" in all of professional sports. Under Cuban's stewardship the Mavericks have become one of the league's most successful teams and are now NBA champions. Accordingly, there can be no genuine

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT – Page 2

There were naysayers in my office about doing this. Some suggested we risked angering the judge for what might look like a stunt. Others wanted to stick with a more conventional approach because we thought we had a good case on the merits. But, to me, this was a risk worth taking. We would be able to show the judge (and maybe even the other side), in a powerful way, that the case was a silly waste of judicial resources. And we knew we could always dot our i's and cross our t's with something more formal and standard before the matter was set for hearing.

The motion was filed a mere 10 days after the Mavericks won the championship, and it quickly gained notoriety. The local media picked up on the public filing quickly, and it was soon reported by media outlets all over the country. I was interviewed by ESPN, the *Wall Street Journal*, Bloomberg, and others. Later, the brief was noted by academics for its compelling message and brevity. What was more important than the publicity, the court granted our motion and dismissed Perot's case. We beat back a contentious lawsuit involving two very high-profile local billionaires in a way that made perfect sense.

Would I do it again? In a heartbeat. Whenever you consider venturing outside the box, you have to weigh the risks, and we did. But in doing so, we also saw what we advocates sometime miss—the upside of capturing the merits of our position in a wholly unique way.

Example: Patent Lawsuit

Here's another example: a patent lawsuit in the Eastern District of Texas. The district is unfairly notorious for being a dangerous place for defendants when, in fact, it is only a dangerous place to try a weak case regardless of the side of the docket you're on.

In 2012, we worked to defend a group of airlines and a national ticketing company in a case involving an alleged invention for an online seating chart that permitted the passenger or concert-goer to select seats using the Internet. It was a good idea and our clients were assuredly using the technology, but it was equally apparent that the alleged inventor had not been the first to come up with the concept, which made his patent invalid.

A common defense approach is to throw as many roadblocks as possible in the way of the plaintiff's case. Concede nothing and make the plaintiff prove every element. This is especially true in patent cases, where there are more defenses available than in almost any other area of law. Consequently, it is sometimes hard to convince the client to give up on any of those defenses.

But in this instance we had a terrific invalidity story, which I thought we could win even under the "clear and convincing" burden of proof that applies in such cases. Given my belief in the supremacy of the invalidity argument, we convinced our clients to ride that one horse for the entire trial. And, sure enough, we rode it all the way to a finding of invalidity on all the asserted patent claims.

A one-defense trial in a patent case goes against the grain, but after receiving a lot of advice about how to deal with the infringement issue, we decided to take it one step further. Most frequently, we heard that we needed to confront the topic before the jury and say explicitly that our client was not contesting infringement. To do otherwise, we were told, would hurt our credibility with the jury.

Instead, I never mentioned it one way or the other. We told our story and put on our evidence as if infringement wasn't even an issue, because it really wasn't. Political campaigns call it "staying on message"—and we did just that. I'm convinced that if we had offered multiple defenses or spent any time on the infringement case at all, we would have lost more than credibility. We would have lost the case.

Example: Pharmco Liability

A final example of an unorthodox approach encompasses more than the decision to file a provocative motion or the implementation of a single-defense theory. It involves pursuing a theory of liability against one of the largest pharmaceutical companies in the world for seven long years.

Starting in the early 2000s, we began representing a former employee of the Inspector General's Office of the state of Pennsylvania. The client came to us with a story of small-scale corruption at the Janssen division of the pharmaceutical giant Johnson & Johnson that hinted at something far broader. Eventually, his work helped us and the state of Texas uncover a multibillion-dollar scheme to promote the antipsychotic drug Risperdal for uses the government never had approved.

We were not the first to file a lawsuit targeting Risperdal. Many had been filed alleging personal injuries or even wrongful death. But those claims hinged on the idea that Risperdal was unsafe in some way or that the risks of the drug had not properly been disclosed to patients.

That was not the case we thought we had. In fact, the statute under which we brought our claim—the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code Ann. § 36.001 *et seq.*—did not even cover the kind of "failure to warn" allegations being filed all over the country. Our focus, instead, was on the payments Texas made under its share of the Medicaid program on behalf of mentally ill patients whose doctors prescribed Risperdal.

Every other case alleged in some way that there was something wrong with Risperdal. While it seemingly made sense for us to join that chorus, we had serious concerns about doing so. Risperdal had helped a lot of mentally ill people and was recognized by groups such as the National Alliance for the Mentally Ill as a breakthrough drug. It could be argued there was nothing truly "wrong" with the drug.

On the other hand, we had compelling evidence that the defendant promoted the drug illegally to children and the elderly, but there was one hitch. In the middle of our case, the Food

Illustration by Gabriela Zurda

and Drug Administration approved Risperdal for limited use in children and the elderly. While that didn't absolve Janssen of previous illegal promotion, it did take the wind out of our sails a bit in terms of how that activity would play in front of the jury. What's worse, state officials who approved the drug for use in the Medicaid formulary had no real interest in helping us. For them to admit that there was something wrong with Risperdal would be akin to them saying they made a mistake in approving the drug.

With the help of co-counsel in the Office of the Attorney General for Texas, we formulated a novel theory that fit both the facts and the statute. Instead of saying there was something wrong with Risperdal, we argued it was as good as—but no better than—older, cheaper antipsychotic drugs like Haldol, which sold for pennies per dose. Instead of making the more typical fraud claim that the state lost money when it bought a worthless product, we argued that it had essentially paid for a Cadillac but got a Yugo. Yes, it was still a car, but not nearly the one the defendant promised. Our measure of damages would be the difference between what the state paid for Risperdal and what it would have paid for older, less expensive drugs.

Success came after I did something more than one person told me wouldn't work.

We pursued our client's claims over many years without any clear statutory guidance supporting our theory. After surviving multiple attacks on summary judgment and the state law equivalent of a *Daubert* challenge, we eventually made it to trial in Texas state court.

During the opening statements, I immediately told the jury that Risperdal was fraudulently marketed and no better, and sometimes worse, than older and less-expensive alternatives. I went on to note that Janssen had sold $34 billion in Risperdal prescriptions during the previous 17 years at a profit margin that sometimes approached 97 percent. I then spelled out exactly what Janssen had done wrong, including funding and manipulating treatment guidelines in order to sell more prescriptions and promoting the drug for use in children though the Food and Drug Administration had told the company not to do that very thing. Never did I say that Risperdal was a bad drug. On the contrary, we acknowledged it had helped many patients.

After about a week of trial, Janssen settled the case for $158 million. That was far less than we were seeking, but in settling, the State and I had accomplished something against the norm. We settled knowing we had Janssen on the ropes. Our evidence was coming in cleanly, and though Janssen had yet to mount a defense, the story of our case was very compelling against the backdrop of greater-than-usual mistrust of large corporations by juries. Some on our team thought we should hold out for more or continue the trial. But the settlement was going to be far more than the company had ever paid in a Risperdal case and twice the size of the largest settlement Texas had ever received for a Medicaid fraud claim. It remains the second largest settlement involving the much-litigated drug.

Conclusions

So what do these experiences teach? First, "conventional wisdom" is exceedingly useful but not a directive in and of itself. Rather, it's a measuring stick by which to gauge nuanced decisions based on individual professional judgment. In other words, what is "conventional" is often so because it is the right approach in most circumstances, and only a foolish or arrogant lawyer would think otherwise. But, by definition, the words "most cases" and the "typical case" do not fit every circumstance. Being open to taking a risk is something every good trial lawyer must be willing to do.

Second, these experiences teach the critical importance of collaborative thinking in successful trial teams. While each of the "outside the box" examples I've given was characterized by people saying we should not, or could not, do what we eventually did, it's also true that the debate and discussion that surrounded each decision helped refine them and gave us the confidence to step out on the ledge of the unorthodox or unusual.

This makes sense. Doing something unexpected always takes more explaining to colleagues and clients than the same old same old. That process of justification is one of the best side effects of thinking outside the box because it entails far more examination.

It is often said that "luck is the residue of design." And yes, there's always some luck in winning a case—a different judge or jury and the whole thing might turn out differently. But it is also true that a thoroughly examined strategy pays dividends that can't always be appreciated in advance. When the trial lawyer decides to do something unconventional, more deliberation has probably accompanied that decision. In that sense, ironically, a successfully unconventional approach owes more to extra effort than to luck. ■