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Ex-DaVita CEO's 'Feelings' Drove No-Poach Crimes, DOJ Says

By **Cara Salvatore**

Law360 (April 13, 2022, 11:29 PM EDT) -- Federal antitrust prosecutors closed out a groundbreaking employment antitrust case against DaVita and its former chief Wednesday with a fiery declaration that the dialysis behemoth "stole opportunities" from employees through the emotional pressure of a CEO's "feelings."

The first-of-its-kind criminal trial under the DOJ's initiative to crack down on anti-competitive agreements in the market for employee labor has put the dialysis giant and its former CEO, Kent Thiry, on trial for allegedly coercing three other companies run by DaVita alumni not to proactively solicit DaVita's people and, in one case, for DaVita not to solicit theirs either. Thiry left DaVita in 2019, two years before the indictments.

DOJ prosecutor Anthony Mariano told the Denver jury, which has been sitting for a week and a half, that Thiry abused his preexisting emotional bonds with the three men — the heads or former heads of Surgical Care Affiliates, Radiology Partners and Hazel Health — to force them away from his employees, hurting those employees in the process.

Witnesses from some of those companies "actually said ... that they had to enter these conspiracies because otherwise Kent Thiry would have had feelings. Who cares? Who cares?" Mariano said.

Friendship or hurt feelings "are not excuses. Those are just motives for committing the crime," Mariano said.

Employees were stymied in their careers, he said, naming a handful. "Those opportunities weren't just lost; they were stolen. Stolen. These were potentially life-changing opportunities stolen by DaVita and Kent Thiry from their employees," Mariano said.

There has been plenty of testimony that the agreements didn't create airtight barriers between DaVita and each other company. Sometimes employees were able to jump over their hurdles, prosecutors acknowledged. Generally speaking, the hurdles were that the alumni-led companies could not proactively reach out to DaVita's people, and that a DaVita employee had to tell their boss they were considering leaving before receiving an offer.

"You don't need to find the conspiracy worked perfectly or that they were always successful" in restricting employee movement, Mariano told the jury.

The jury instructions require the jury to find that the agreements stopped "meaningful" competition between each pair of companies at issue in the three respective counts for a guilty verdict.

An SCA recruiter, Bridie Fanning, testified that most executive-level recruiting is done through solicitations — roughly 80% to 90%. Prosecutors said it was obvious that agreements not to solicit would therefore decimate the free movement and free choice of workers. The alleged agreement with SCA applied only to senior-level employees and was the one prosecutors claim went in both directions.

As for Thiry's motivation, he simply thirsted for control, prosecutors claimed Wednesday afternoon. Thiry was known to email the other companies' heads when he would get wind of recruiting efforts. Mariano told the jury the defense has tried to argue Thiry only cared about executives who were part

of his personal circle, caring deeply about them and wanting to shepherd and guide them in their ascendant careers.

But Mariano reminded the jury of one email Thiry sent to Radiology Partners, with the subject line "Belinda Someone." It was a reference, prosecution witnesses said, to a certain rank-and-file HR employee considering a move.

"When we tell you this case is about conspiracies driven by Kent Thiry's need to control his employees, this is what we mean," Mariano said. "The simple truth is that Kent Thiry didn't care about the employee's name; he didn't care about the employee. What he cared about is control."

DaVita and Thiry made their final arguments Tuesday as well, with DaVita's lawyer going first and arguing Thiry's tone with other CEOs regarding employee recruiting may have been "obnoxious" but that there was no intent to allocate a market — and there were no victims.

DaVita lawyer Jack Dodds told the jury the testimony they've seen has been enough to show the government does not have any case that at the time these events happened — various years from 2012 through 2019, depending on the alleged coconspirator company — the people involved had any intent to allocate the market for labor.

"There was pushy conduct, obnoxious conduct, flat-out bad conduct. What there wasn't was any evidence of the only thing that could make all of that a crime: Agreements with the purpose and intent of allocating markets and ending meaningful competition," Dodds said.

That last part, ending competition, "is where the rubber hits the road," Dodds said. "Not slowing it down. Not making it harder. Not making it more complicated. Ending meaningful competition."

Referencing the testimony of outside recruiter Jeff Lombardo, who was often called on by Radiology Partners for their executive searches, Dodds reminded them Lombardo had no inkling these agreements could be legally questionable and even asked the FBI and prosecutors to help him understand better.

If someone like Lombardo finds the legalities confusing, "If that's the state of play now, what was in the minds of the people back then?" Dodds asked. "Whatever was in their mind, none of it had to do with allocating the market. None of it had to do with ending competition."

In fact, he said one motive was actually to increase competition. The unique mechanism of requiring DaVita employees to notify their bosses they were looking for outside opportunities gave those bosses a chance to endeavor to keep that person by offering them sweeter compensation packages or other roles.

"It may have been the wrong way to do it, it may have been a messy way to do it," Dodds said, but "it was about giving people the opportunity to compete."

Dodds also pushed back hard against the idea that there were any victims, any employees who got sidetracked or delayed in their career ladders because of this.

"For the government to tell you there were victims is — well, let me just say, it isn't right," he said. Prosecutors have listed off as alleged victims a handful of people who haven't testified, and some who weren't even interviewed by the FBI, Dodds said.

There has also been one alleged victim who did testify. The young former DaVita senior analyst Elliot Holder was the government's final witness, and told jurors he balked in 2016 when Radiology Partners blindsided him with the news, before a seemingly imminent offer, that Holder would need to notify his bosses he was looking around. Fearing losing both jobs, he instead withdrew from candidacy.

Dodds said Holder has done very well since that episode, continuing to get promotions and be paid handsomely before moving to another company a few years after. "The one person they could find to actually bring in here to present as a victim is actually not a victim at all," Dodds said.

Thiry's own lawyer, going third in closings, deployed an extended metaphor to describe Thiry's experience. Just like some accused in the Salem witch trials, defense lawyer Juanita Brooks said, Thiry has been undergoing a "trial by ordeal."

In the 1690s, a "tribunal with too much time on their hands" would call citizens before them and say, 'You are a witch. Admit you're a witch, and name other witches,' Brooks said. The authorities would do that "until they get to one person who says, 'No. I will suffer trial by ordeal.'" That's how the DOJ did its work in this investigation, Brooks said.

One company led to another and people flipped one by one until the last person, Thiry, chose to fight back. The majority of the witnesses called by the prosecution were parties to immunity or leniency agreements that could be revoked at the DOJ's sole discretion if they found serious issues with the testimony given, she said.

Brooks reminded the jury as well that the case over the second count, relating to the company Hazel Health, was made largely through an FBI investigating agent presenting texts and emails. No one from that company was brought as a witness.

According to Brooks, a "cofounder of Hazel was interviewed and said as far as he knew there was no agreement about not hiring from DaVita or any conditions about not hiring from DaVita. And again, he was not brought to court."

In the DOJ's final rebuttal, prosecutor Sara Clingan again reminded jurors of the sway Thiry had over the three other CEOs, their long relationships and the mentorship he had given them.

"We know Mr. Thiry leveraged his friendships and all of the access ... his friendship conferred to coerce these agreements into existence," Clingan said. However, she said, "There's not a bro code exception to the Sherman Act."

The government is represented by Megan Lewis, Sara Clingan, William Vigen and Anthony Mariano of the U.S. Department of Justice.

DaVita is represented by John Walsh III of WilmerHale and John Dodds of Morgan Lewis & Bockius LLP. Thiry is represented by Juanita Brooks of Fish & Richardson PC and by Thomas Melsheimer of Winston & Strawn LLP.

The case is U.S. v. DaVita Inc. et al., case number 1:21-cr-00229, in the U.S. District Court for the District of Colorado.

--Additional reporting by Matthew Perlman, Craig Clough and Bryan Koenig. Editing by Emily Kokoll.