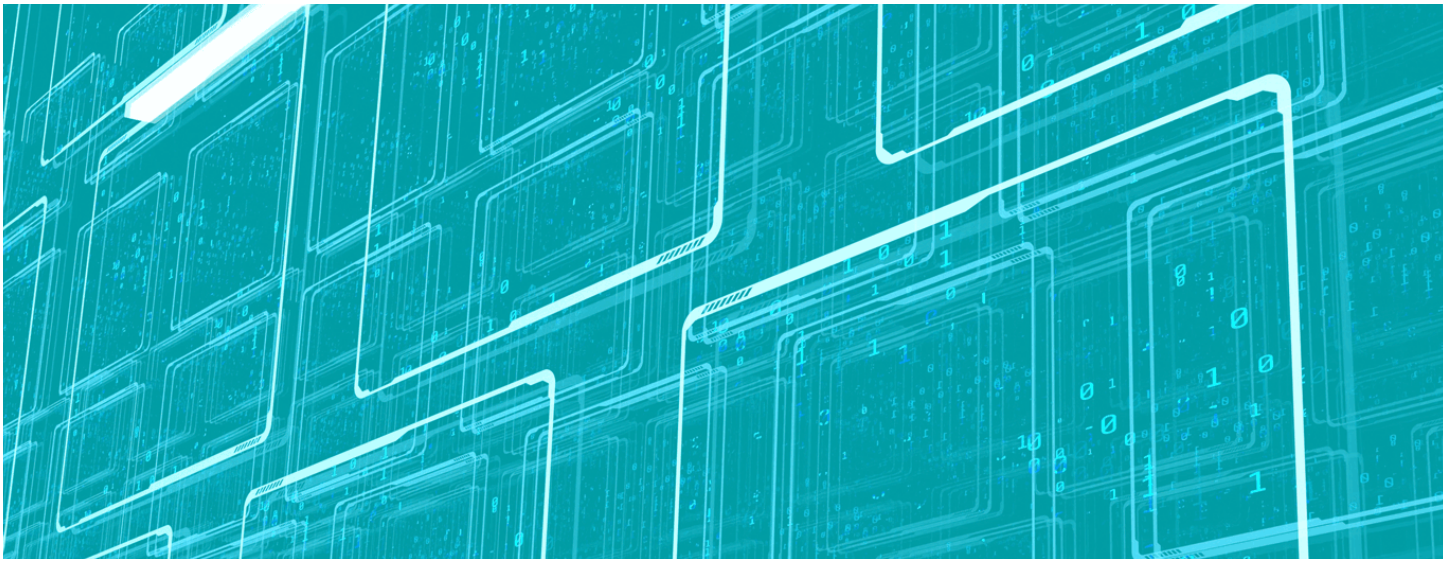


# ABA Mock Trial: Would a Merger of Online Platforms Lessen Competition?

**Dov Rothman** — 4 MIN READ

*An annual highlight of the ABA Antitrust Law Spring Meeting is the mock trial, where teams of lawyers and economists present arguments and testimony before a practicing judge and an impartial jury. For this year's trial, the two sides debated the pro- and anticompetitive effects from a hypothetical merger of two online digital platforms.*

For the mock trial, Managing Principal Dov Rothman was asked to prepare expert testimony on behalf of the defendants. Dr. Rothman is an experienced expert witness, having testified for the US Department of Justice (DOJ) and the Federal Trade Commission (FTC) in merger matters, as well as for private parties in non-merger matters. He was asked to evaluate the FTC's claim that the hypothetical acquisition would substantially lessen competition in a market for online political information.

*The description of one of the other panels at the Spring Meeting noted that "economists' use of increasingly sophisticated theories and methodologies stretches the capacity of jurors, lawyers, and judges to properly apply their conclusions." Does this present any particular challenges when dealing with new and evolving technologies, such as digital platforms?*

One of the things that I've learned from my experience with expert testimony, whether for defendants or plaintiffs, is that it's important to calibrate your communication to your audience. This becomes doubly important when you're presenting to a jury, or even a judge, who may or may not be familiar with competition concepts.

But one of the things about participating in a mock trial is that you get feedback from an actual jury and judge. You can listen in on the jury's deliberations and see if they understood what you were talking about.

And afterward, the judge will tell you whether or not you did a good job. So this kind of exercise can provide insights and ideas that can then be applied in a real-life courtroom.



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*How did that apply in your presentation of expert testimony in the mock trial?*

The case involved two relatively small hypothetical online companies that provide a specialized product – online political information – in a market where many other very large, but nonspecialized, digital platforms provide the same kind of information. Think Facebook, CNN, or pretty much any online news aggregator or social media platform.

As one example of interpreting economic concepts for a nontechnical audience, I needed to explain vertical efficiencies. That's a term an economist would be comfortable with, but probably not a layperson. So I tried to explain what I meant by vertical efficiencies, and why they were important in this case. Basically, many companies are vertically integrated to one degree or another, meaning that they use various inputs to produce a product or service themselves.

This was one of the major points I was trying to get across. While the two companies in the mock trial were horizontal competitors – specifically, they competed with each other to provide online political information, often to the same readers – each company had some in-house capabilities or resources that the other company lacked.

My job was to explain how those capabilities were complementary – that is, how each company brought something to the table that the other would benefit from. In this case, the brief we received ahead of time showed that one of the companies had better ad-selling capabilities and the other had superior fact-checking.

I explained, from an economics standpoint, how this combination would strengthen the merged company's incentives and ability to supply a better product.

### *Market definition is another area that can be especially complex when talking about digital platforms or businesses.*

That's right. Here, the proposed merger involved two digital platforms that specialized in online political information, so the question was whether the relevant product should be narrowly defined as online political information provided by a platform that only provides political information, or more broadly defined as online political information, regardless of the source.

In these situations, a good analogy can help clarify the concepts. I used an analogy from the brick-and-mortar world that I thought the jury could relate to. Suppose there are two children's bookstores on a given street and a Barnes & Noble right across the street. All three bookstores are part of the competitive set because all three bookstores sell the same children's books.

In this way, I was able to explain that the two companies under review were small fish in a big pond. Returning to my analogy, the children's bookstores exclusively selling children's books would be constrained by Barnes & Noble despite the fact that Barnes & Noble also sells books in many other categories.

One caveat: Always have a backup plan. Recently, while I was testifying at trial, the judge didn't buy the analogy I came up with and asked for a different one.

### *How did the mock trial turn out?*

My analogy turned out to be a good one, and the other side had difficulty countering it. A mock trial obviously isn't real, and it's very compressed, but the jury did seem to like my analogy, and they decided in favor of the merging companies. ▪