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# Gary A. Bornstein

## Cravath, Swaine & Moore

**You successfully represented Epic Games in antitrust litigation, *Epic Games, Inc. v. Google LLC*, challenging Google's app store policies. In December 2023, a California federal jury rendered a verdict against Google, determining, in part, that Google engaged in anticompetitive behavior in mobile app distribution. This was followed by a three-year permanent injunction requiring Google to offer third-party app download options. Can you tell us about your trial strategy?**

As always at trial, the key was keeping it simple and letting the evidence speak for itself. For the most part, the facts of the case were not in dispute. Google's app store rules are what they are, and its agreements with app developers say what they say. The key was giving the jury enough information for it to see the effects of what Google had done. For that, we had documents and testimony from Google's own witnesses showing what they intended and expected. We had evidence from others in the industry describing how they had been harmed. And we had fantastic expert witnesses who could tie it all together. We were also fortunate enough to have a smart and attentive jury.

Antitrust cases are very complex and technical, but when it comes time for trial, the task is to make sure the real-world market dynamics come through, so the fact finder can see what is really going on.

**Can you describe a major hurdle that happened during the course of *Epic Games, Inc.* How did you overcome it?**

During discovery, we figured out that Google had deleted—and was continuing to delete—internal communications on its Google Chat instant messaging system. Even though the company had issued a hold notice to preserve documents for the litigation, it chose to exempt some types of Google Chats from the hold. The evidence showed that Google employees knew that these Chats were not being preserved and intentionally diverted sensitive communications to Chat for that reason.

The court took this issue seriously and ultimately gave jury instruction relating to it, but even so, Google's actions forced us to prove our case without what surely would have been some of the most significant documents.

**When did you first know you wanted to be a trial lawyer?  
What clicked for you?**

I was late to the law. In college, I majored in architecture and spent my free time as a theater nerd. I had an offer to join a repertory company as an actor after graduation. I applied to just two law schools, not really

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expecting to go, at least not right away, but I am very glad I did. From the first day in class—civil procedure—I was hooked. I still remember the first case we discussed, *Goldberg v. Kelly*, which is a due process case about the importance of evidentiary hearings. As a trial lawyer, I still get to be on my feet, but in a very different way, subject to rules and tied to the evidence.

## **What are the major keys to winning over a jury or a judge?**

Credibility is the number one rule. Be yourself. Tell the truth. Don't mislead or pretend. Over time, judges and juries always spot inauthenticity, and they never forgive you when you breach their trust. We are advocates, but we cannot advocate effectively if our audience does not believe what we say.

## **What is the best advice you give young trial lawyers?**

"Say yes. When opportunities arise, take them. Even if you think you're not ready, grab the chance to learn. At the beginning of your career, every time you speak in court, you get better at it."