

Q&A With Hughes Hubbard's Marc Weinstein

Law360, New York (April 29, 2013, 1:20 PM ET) -- Marc Weinstein is a partner in Hughes Hubbard & Reed LLP's criminal and regulatory defense and investigations, securities fraud litigation, and professional liability groups in New York. He has represented both corporate and individual clients at all stages of proceedings with federal and state law enforcement authorities and numerous regulatory agencies including the U.S. Securities and Exchange Commission, Commodity Futures Trading Commission and Public Company Accounting Oversight Board. He served as an assistant United States attorney in the Southern District of New York for more than eight years, during which he was the chief of the Major Crimes Unit, a member of the Securities and Commodities Fraud Task Force, and a founding member of the Computer Hacking and Intellectual Property Crimes Unit.

Q: What is the most challenging case you have worked on and what made it challenging?

A: Each case has its own challenges, and on the defense side one of the main challenges is how best to convince law enforcement and regulators that an issue is not as black and white as an email might make it appear. But as far as the most challenging, the first case that comes to mind is a case I handled when I was at the U.S. Attorney's Office for the Southern District of New York dubbed "Operation Wooden Nickel," which was a multifaceted, 18-month-long undercover FBI operation in the foreign currency and securities markets.

We were originally trying to ferret out a certain scheme that was known to be taking place in the foreign currency markets called "points for cash," but as a result of the efforts of the undercover agent, cooperating witnesses and others, the operation ensnared players in various commodities and securities schemes.

And the challenges were, one, to bust the points for cash scheme because it had gone undetected for many years and could not be proved merely through trading records. Two, balancing the needs of the various agencies involved, including the FBI, the CFTC and the SEC, to ensure that their goals were advanced. Three, monitoring on a daily basis the undercover operations to make sure we didn't cross the line on what was permissible but also ensuring that we were obtaining the kind of evidence we needed to bring the case to fruition. Four, determining, out of a wide cast of characters, who ought to be criminally charged and rather than just getting as many as you can, ultimately winnowing that down to really the most culpable.

And last, protecting the safety of a cooperating witness during and subsequent to the arrests in the case. In all, approximately 50 people were arrested, resulting in a large number of guilty pleas. Five of the cases went to trial, and I tried the three of those which focused on the points for cash scheme. Each trial resulted in conviction.

Q: What aspects of your practice area are in need of reform and why?

A: Perp walks. We had to deal with this head-on with our client, Ralph Cioffi, one of two former Bear Stearns hedge fund managers who were the first Wall Street executives to face criminal charges in connection with the financial crisis. In advance of any indictment, we tried to arrange for him to appear voluntarily. But the U.S. Attorney's Office refused and insisted on that the FBI physically arrest him and process him at the FBI building in lower Manhattan, which is standard. But then they literally led him and his co-defendant down the street to the courthouse in handcuffs, and, not surprisingly, there were swarms of media there. Obviously they had alerted the media ahead of time.

And underscoring how insensible it was, the Eastern District of New York had jurisdiction over the case so the presiding courthouse was not in Manhattan; it was in Brooklyn. It wasn't as though they actually had to walk him down the street because they weren't actually going to the courthouse in Manhattan. They could've just gotten in their cars and driven him where they had to go. There is no way the media would have known to appear in Manhattan, as opposed to Brooklyn, without law enforcement staging the whole show. Those perp walk photos were constantly in the media for years. The acquittal, years later, although satisfying, doesn't let the clients take that moment back. If law enforcement believes that perp walks are so critical to their goals, then at best they should stage them only after someone is proven guilty, rather than while a person is still presumed innocent.

Q: What is an important issue or case relevant to your practice area and why?

A: The recent case brought by the U.S. Department of Justice against Standard & Poor's. It's a massive civil case brought in conjunction with state authorities, suing S&P for its ratings of various collateralized debt obligations and securities during the subprime meltdown. And it's just an extension of the government's recent aggressive measures with civil statutes as opposed to criminal statutes in areas where they have not been able to establish criminal wrongdoing. Without having to meet criminal standards of proof, the government can finally say it is taking strong action against the financial services industry, while browbeating massive amounts of money from these companies.

Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.

A: Barry Berke, Kramer Levin Naftalis & Frankel LLP. I tried an attempted murder case against him while I was a prosecutor. Barry was assigned from the Criminal Justice Act panel and gave the guy as good a courtroom defense as the best paying clients might get. Since then, we have worked together on the same side in defense of various cases in connection with the Bear Stearns matter. Barry has the respect of almost every circle you run into, and he walks into any courtroom with an air of credibility, sensibility and visibility. And whether friend or foe, he greets all with the same smile, handshake and friendly chatter.

Q: What is a mistake you made early in your career and what did you learn from it?

A: As a young associate on the road for depositions with the partner and the client, I forgot to check on whether the alarm clock in the room resets itself automatically (as the one I had at home did) or if you had to reset it. When the partner and the client showed up at my door 10 minutes before the depositions, I was in my boxers. It was an embarrassing lesson but as a litigator its key to know everything about your surroundings — from the community that your jury pool comes from, to the intricacies of the courtroom, to, yes, even the alarm clock in the hotel room. You can never prepare too much in advance.

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