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## Hervé Gouraige: A Unique Perspective Makes For Innovative Defense Strategies

*The Editor interviews Hervé Gouraige, Member of the firm, Sills Cummis & Gross P.C.*

**Editor:** Congratulations on your election as president of the Harvard Law School Association of New Jersey. Please tell our readers about the areas of activity promoted by the association.

**Gouraige:** Thank you very much. The Association seeks to establish networking opportunities for Harvard Law School graduates in New Jersey, strengthen their ties to the law school, encourage recent graduates to come to live and practice in New Jersey, and sponsor activities that provide the occasion for graduates in various leadership roles to address members of the Association on important issues of public interest. For example, recent past speakers include U.S. Supreme Court Justice Elena Kagan, and this past November we hosted Harvard Law School Dean Martha Minow.

**Editor:** What is your agenda for the association?

**Gouraige:** I plan to reach out to recent graduates to encourage them to join the Association, and to that end we plan to sponsor a spring symposium that will be geared to networking for young law school alums.

In addition, we may sponsor cultural events and provide some of our own talented members a chance to showcase their talents. We are also expanding our social media presence. For example, we envision putting the Vanderbilt Lecture on YouTube, and we may seek to create a page for the Association on LinkedIn and Facebook.

**Editor:** Please tell our readers about your educational background.

**Gouraige:** After attending Boston University from 1968 to '72, I spent two wonderful years on a Rhodes scholarship at Oxford University, where I studied philosophy, politics and economics. I then went on to the Harvard Law School. I have had wonderful teachers at all those schools and years of outstanding professional training from very good mentors.



Hervé  
Gouraige

**Editor:** I understand that prior to entering private practice, you served as an assistant U.S. attorney under U.S. Attorney Rudolph Giuliani. Besides handling criminal cases involving tax and business fraud, you were the first assistant to handle healthcare fraud cases in the Southern District of New York. In this area you earned a Superior Achievement Award from HHS. Would you tell us about one of the outstanding cases you handled in this area?

**Gouraige:** One investigation I did early on was of ambulette companies in New York City. New York State was spending in excess of \$400 million a year to reimburse ambulette companies to transport Medicaid patients to doctors office visits, and it turned out that a large chunk of those payments were completely fraudulent. We indicted more than 50 companies, and the state's budget for ambulette company reimbursement soon went down significantly. However, on the flip side, expenses for other items went up.

**Editor:** Your career has been marked by an ability to bring innovative approaches to solving client problems.

**Gouraige:** A basic premise of my approach is that a legal system should not be viewed as a way for individuals to exercise absolute rights as swords to demolish others; life is more complicated than that. Generally, when two or more business persons have a dispute, they'd prefer to resolve their problems by talking it through and negotiating a satisfactory resolution. It needn't be a zero-sum game. I try to find out what, at the core, is troubling the parties, whether it is my client or the adversary, and ask myself, what is the best way to resolve it? Litigation and especially trials are very costly; they have both direct and indirect costs as well as unintended consequences. We're fortunate to have a reliable judicial system in our country, but the more we use it, the more pressures we put on it – and those pressures can overwhelm the process.

**Editor:** Do you sometimes offer arbitration in those cases?

**Gouraige:** I do, but arbitration to me is not an alternative forum where you continue the techniques of litigation. Clients are beginning to find that arbitration can get just as protracted as litigation, and it's very costly – which makes no sense. The whole point of arbitration is to use different techniques in a different forum to shorten the process and resolve problems so everyone can move on.

**Editor:** I understand you often meet with prosecutors early in an investigation. How has this helped to forestall prosecutions and win dismissals?

**Gouraige:** I can illustrate with one example. I represented the president of a company who had testified at the criminal trial of a vice president. During his testimony, the president stated that he had authorized the transaction for which the vice president

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had been indicted. After the vice president was convicted, the prosecutor turned his attention to the president – who then asked me to represent him. He was devastated. I reassured him all would work out well. He then asked if I would call his wife and talk with her.

The next day, I called his wife and reassured her. While my client was extremely upset, chances are his wife was more so. I told my client that my first goal was to keep him and his family structure intact so that he could function. Then I could deal with the legal problems.

I then asked him a simple question: was his testimony at trial, in fact, true? He thought for quite a while and then said, “You know, I’m not sure.” The vice president had been a loyal and trusted employee for many years, and my client had said something off the top of his head that turned out not to be true. I was able to establish that he had not authorized the transaction at issue, and I was able to prove this to the prosecutor, who decided not to bring any charges against my client.

Had that case gone to indictment and trial, my client likely would have been acquitted, but at tremendous costs – in terms of the prosecutor’s time, my time, the cost to my client, the public cost of having the trial, the consequent impact on his family and business and, perhaps worst of all, the loss of reputation, which so often cannot be regained. By having a very candid and direct dialogue with the prosecutor, I was able to achieve the right and just result.

In the criminal justice system, we tend to view each other with jaded perspectives. Some defense lawyers think of prosecutors as people who care far more about getting an indictment and conviction than they do about justice, while many prosecutors think of defense lawyers as people whose goal is to obstruct justice and to block the prosecutor from finding the truth. I have been both a prosecutor and a defense lawyer, so I know that these stereotypical characterizations are neither entirely true nor entirely false. Many people on both sides care deeply about justice and fairness.

**Editor: Healthcare fraud is one of the subjects you have written and spoken about a great deal. Will this be one of your areas of concentration at Sills?**

**Gourai:** Yes, and in fact one major reason I joined Sills was the firm’s combination of excellent practices in healthcare and in litigation. We have an outstanding group of healthcare lawyers and an excellent group of six former assistant U.S. attor-

neys. With a leading litigation practice, we are able to combine these resources to conduct significant internal investigations in the healthcare industry. My sense is that despite the efforts to bring the cost of healthcare down, for the foreseeable future we will have rising costs, increasing government investigations and enforcement, and major litigations in the healthcare industry.

**Editor: What are some of the key compliance issues facing directors and trustees of healthcare companies?**

**Gourai:** From my perspective, the notion of holding individuals either on the board or in senior management personally accountable is a major trend. In my view that is a good thing. Companies are made up of a lot of individuals, and I believe individuals should be held responsible for their conduct. My criticism about recent government enforcement efforts in this area is that it is appropriate to hold individuals accountable *only* when they are personally culpable or responsible; I’m very troubled by the notion of holding someone accountable otherwise.

Even more troubling is the effort by regulators from the Office of Inspector General (OIG) to exclude individuals from the government program when such individuals are not personally in fact (as opposed to legally) culpable. If you are in the healthcare industry and you cannot participate in Medicare, Medicaid, or TRICARE (the military’s healthcare program), you really can’t earn a living. Imagine the FDA claiming that a drug your company was marketing was misbranded and that you, the chief compliance or medical officer, should have put a stop to this misbranding even when you were not aware of it. The FDA may charge you personally with a criminal act despite your having no mental state of culpability. If you are convicted, the OIG will likely exclude you from all federal healthcare programs for as many as 20 years. If you’re a senior management person in your mid-50s, that amounts to a professional death sentence.

**Editor: How are the federal and state False Claims Acts used in the healthcare industry?**

**Gourai:** Unfortunately, in the past those statutes have been used essentially to raise an enormous amount of money from healthcare companies. Minor errors have been turned into potential False Claims Act

violations where the company faces treble damages, civil monetary penalties and legal fees. The sums are so astronomical that the board and senior management are extremely reluctant to try those cases, which may be good neither for the company nor for healthcare. We need to think about how we refine the use of that statute in the future to enforce healthcare laws against core fraudulent conduct while dealing with less troubling conduct with a different paradigm.

**Editor: Hasn’t the False Claims Act been revised more sharply so that it’s much more draconian than it used to be?**

**Gourai:** Yes, it is being increasingly tightened, lowering the standard for the government and raising it for defendants. Difficult and crucial policy decisions about healthcare are not being made, and increasing enforcement is being used as a way to solve the ever-increasing costs of healthcare. Criminal or civil FCA enforcement is a blunt instrument. We need to think of a different paradigm when we want to control the costs of healthcare that focuses on compliance. Under existing law, your company may have a great compliance program, but a few rogue people may commit a violation, and then the government will prosecute or bring a civil FCA case against your company. Your excellent compliance program will be considered by the prosecutor merely as a discretionary criterion mitigating against indictment.

I believe that companies in those circumstances should be given a pass the first time and that the individuals should be held responsible for their conduct. This would encourage companies to build robust compliance programs, and it would reduce the enormous resources we spend in litigating these cases.

**Editor: Please tell our readers about your other community and bar activities.**

**Gourai:** I have been blessed by a wonderful family and by people who have gone out of their way to help me. I don’t believe I’ve “made it all on my own.” I try to repay the assistance I have received by helping others, which I do by getting involved in public interest organizations, by teaching trial advocacy to younger lawyers, and by being involved in various community activities. Frankly, I find that I gain from those experiences as much, if not more, than I give.