As Seen In

Law 360

March 12, 2013

Q&A With Sills Cummis' Mark Olinsky

Mark S. Olinsky is a member of Sills Cummis & Gross P.C. in Newark, N.J. He co-chairs the firm's health care government investigations practice group. He is a trial lawyer with more than 30 years of complex litigation experience. His practice encompasses business crimes defense, sophisticated business disputes, including defense of civil Racketeer Influenced and Corrupt Organizations Act actions, and health care litigation. He served as a federal prosecutor in New Jersey and is admitted to practice in New York, New Jersey and the District of Columbia.

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

Mark S. Olinsky

A: Obtaining a jury acquittal in an insider-trading case in the Southern District of New York. Going into trial, we knew that the government had strong circumstantial evidence that our accountant client gained access to plans for an international merger, and shared the information with a network of lifelong friends who then traded in options keyed to dates expected for announcement of the merger. The government presented two completely different theories, each by itself credible, of how our client obtained the information from the C-suite.

We capitalized on the government's double-barreled approach by arguing that neither theory was convincing, else the government wouldn't have presented both, and we were able to demonstrate that this merger had been widely predicted in the popular financial press, which our client was known to follow. After the acquittal, we got to talk with some jurors, and they said that our defense established more than a reasonable doubt. And it didn't hurt that, in my summation, I actually got the jury to chuckle at the implausibility of one of the government's key exhibits.

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

A: The standard for corporate criminal liability. A little more than a century ago, the U.S. Supreme Court established the standard based on the tort concept of respondeat superior — a corporation can be convicted of a crime if any employee or agent, even a rogue or low-level one, acts within the scope of his or her duties and with the intent, even if only a little, to benefit the corporation.

There are two problems with this standard. First, it divorces corporate criminal liability from what has historically been a requirement for individual criminal liability — mens rea or bad intent. Second, it gives way too much leverage to prosecutors when an entire corporation can effectively be put out of business by an indictment resulting from the acts of a single employee, who may well have been acting against corporate policy and without the knowledge of senior management.

Several proposals have been floated to integrate an element of moral culpability into the standard for corporate criminal liability. One proposal is to include some of the factors for charging decisions in the U.S. Department

of Justice's Principles of Federal Prosecution of Business Organizations in the test for corporate criminal liability, such as the nature and seriousness of the offense; the pervasiveness of wrongdoing within the organization; history of similar conduct; and the existence and adequacy of a pre-existing compliance program. So far, such proposals haven't progressed much beyond the academy, but they deserve to be taken up and considered seriously by our legislatures and courts.

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

A: The mail fraud statute is often used by the government and by civil RICO plaintiffs as an all-purpose fraud statute, even if the use of the mails is only incidental. A decision by the Court of Appeals for the Ninth Circuit at the very end of 2012, authored by Judge Jed S. Rakoff of the Southern District of New York sitting by designation, shows that there are limits.

In *United States v. Phillips*, the Ninth Circuit affirmed various parts of the case, but overturned the mail fraud conviction. The seven counts of the indictment were all based on the defendant's fraudulent and successful plan to obtain funds for his personal benefit from the company of which he was CEO. The defendant used false invoices to steal money from the company, which he then used to buy high-end watches, invest in a private company, and pay for an expensive condo. Citing the Supreme Court's 1974 decision in *United States v. Maze*, the court stated that the success of the scheme did not depend in any way on the use of the mails. That the watch dealer mailed merchandise in return for the stolen money used to pay for the watches was simply a byproduct rather than a part of the CEO's scheme to defraud the company.

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

A: Michael Chertoff, now of Covington & Burling. Mike was First Assistant to U.S. Attorney Samuel Alito when I was a federal prosecutor in New Jersey. When you spend any time with Mike, you quickly see that he is one of the smartest people you will ever meet. But Mike stands out because he is able to combine those smarts with fantastic courtroom skills. Sometimes, super-intelligent lawyers are not the best communicators or questioners. On cross-examination, Mike was always thinking way ahead of the witness, but questioning in a step-by-step, down-to-earth manner that left the witness no way out and crystallized Mike's point to the jury. I learned a lot by watching his careful and tenacious cross-examinations.

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

A: Coming out of law school, like many if not most young graduates, I thought that success as a lawyer and litigator comes from mastering and applying legal rules. Law school, after all, is (or at least used to be) about reading, interpreting and applying rules, cases, statutes, regulations, etc. What I quickly learned is that practicing law — and trying cases — is not just about rules and such, but about finding and telling your client's story in a compelling way.

Every case involves human beings, and, as a result, every case is a story, a morality play, almost always one in which someone did something wrong to somebody or is being unfairly accused of such. You always have to find and apply the law that governs, but, whatever the particular case is about, winning usually results from being able to convey the essential righteousness of your story. To put it another way, whether the case is civil or criminal, and whether you are advocating to a prosecutor, a judge or a jury, you need to aim not just at the brain that is analyzing the legal rules, but also at the stomach and the heart that are absorbing the story.