SECURITIES LAW360

Portfolio Media, Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Q&A With Sheppard Mullin's Bob Rose

Thursday, Oct 25, 2007 --- Securities litigation continues to be a redistribution-of-wealth scheme, says Sheppard Mullin's Robert D. Rose in our series of chats with high-profile securities lawyers.

Q. What's the most challenging white-collar case you've worked on, and why?

A. My most recent trial ended with a jury verdict for the SEC, but a posttrial motion sweep for my client on all fraud charges. The charges were generated by a restatement. None of the claims had enough substance alone to justify a suit but all were deemed worthy of enforcement when grouped together. The SEC needed to establish qualitative materiality because the dollars involved were not impressive.

The defense strategy involved isolating the evidence by transaction so as to show how insignificant each was to the financials. The issuer settled with the SEC for nothing, but its cooperation pledge gave it the freedom to restate liberally. It was a challenge to overcome the common perception that a restatement can only mean the correction of knowingly false financials.

My client, the ex-CFO, was targeted as an architect of an accounting fraud. In contrast, he was neither a lawyer nor an accountant. The case had no insider trading, no personal gain, no obstruction, no payoffs, no side agreements and no smoking gun memos. But it did have available witnesses whose business strategies differed from the defendants.

The trial became a battle of “it can't be accurate it was restated” v. “we made business judgments guided by professional advice.”

Interviews revealed the jurors didn’t understand the accounting, but the trial judge did. The SEC's appeal is pending.

Q. Which aspects of securities law do you think are in need of reform, and why?

A. Securities litigation continues to be a redistribution of wealth scheme. It is a question of fact for a plaintiff to establish what a reasonable investor needs to know before making a decision.

But a novice lawyer can ask any victim — or any analyst — "Would you have liked to have known X before you invested?" and the answer will always be "Yes." The follow-up question (“If you had known X ...”) is as predictable, as is its answer.

The ease of proving this "fact" question allows investors to speculate at the courthouse, while it forgives greed, rash judgments and minimal investigation.

Q. If you were in charge of the Securities and Exchange Commission, what changes would you make?

A. Hire trained investigators, rather than lawyers. Hire lawyers with practical, real-world experiences — either before or after law school. The SEC needs more decision makers who have been around the decision makers they critique.

Treat the Wells submission as more than a device to identify defenses at trial. In light of the awesome powers that have been bestowed on them by Congress, regulators need always to be reminded that winning isn't what it's all about.

When an investigation ends, say so. It's bad enough that a person or business, once targeted, will remain tainted. Be as public and prompt with news of the case closures (and defeats) as the SEC is with its announcements of accusations.

Q. How do you think the problems associates with options backdating will play out over the long term?

A. Options backdating is a regrettable fad. Having been reminded now that "everyone's doing it" still isn't a recognized defense, issuers should know not to use backdating as an employee incentive. Underlying this cycle of abusive behavior are classic examples of lying, concealment, self-dealing — acts which will always be prosecutable.

Q. Where do you see the next wave of white-collar and securities cases coming from?

A. Recession and pre-recession conditions usually bring out the worst in people. New financial instruments will be devised to keep returns high and may cut corners to achieve results — or the illusion of results. Ponzi schemes and penny stocks seem to thrive in low-interest conditions. War profiteering and FCPA violations will become headline news.

Q. Outside your own firm, can you name one securities lawyer who's impressed you and tell us why?

A. Bill Grauer of Cooley Godward is a long-time colleague and friend who I would turn to when I needed the best securities lawyer. We tried two cases together. Nothing compares to trial work for assessing another's skills, resourcefulness and judgment. Bill considers all options and tries them all, at just the right times.

He can treat defeat as nothing more than a step in the road to victory. He gets the best deal he can possibly get for this client.

Q. What advice would you give to a young lawyer who's interested in getting into securities law?

A. The odds are against a young lawyer becoming a securities trial lawyer or developing a securities litigation practice without spending time in a United States attorney's office, the SEC, or their state counterparts. Develop an interest in various types of business organizations. Start a business. Learn the basics of accounting. Read, a lot.

Q. I'm a general counsel with a Fortune 500 company facing a major SEC investigation. Why should I hire your firm?

A. Sheppard, Mullin, Richter & Hampton LLP has counsel with the key attribute for defending an SEC investigation: criminal and civil experience in the same lawyer. The level of cooperation between prosecutors and regulators has never been better. The approach to one differs from the other. A misstep on one side will be exploited by the other. At least one recent study concluded that better resolutions occur if the defense takes the SEC to trial. Being able to try cases can deter an unfavorable resolution. We can try cases.

Robert D. Rose is a partner in the firm's San Diego office and the leader of the white collar and civil fraud defense practice group.