

Q&A With Bradley Arant's Stephen Spivack

Law360, New York (December 14, 2010) -- Stephen R. Spivack is a partner in the Washington, D.C., office of Bradley Arant Boult Cummings LLP and leader of the firm's white collar practice group. Spivack specializes in white collar criminal investigation and defense matters, including the conduct of internal investigations. He has served as a federal prosecutor and supervisor in the Washington U.S. attorney's office.

Spivack has handled a wide variety of complex white collar cases and in 2009, after a 10-week trial in federal court in Montana, all charges were dismissed against his client, a division president of W.R. Grace & Co., in what the U.S. Environmental Protection Agency had claimed was one of the most important environmental cases ever brought. As a federal prosecutor, he prosecuted many important white collar cases in the office, including two Abscam prosecutions and supervised the work of 21 assistant U.S. attorneys, including the Pollard spy case.



Stephen Spivack

Q: What is the most challenging case you've worked on, and why?

A: Although I have worked on a number of challenging cases in my career, the one that without doubt presented the biggest challenge is a case I tried in 2009 in Missoula, Mont. I represented the former division president of W.R. Grace, Robert C. Walsh, in a highly publicized case about asbestos exposure from a mine owned and operated by Grace. It is always difficult to represent an individual in a criminal case because the stakes are so high and a person's liberty hangs in the balance. However, when you represent a truly innocent client, as I did, the pressure, at times, is beyond anything I have experienced in private practice. Every strategic move you make is dissected and analyzed in your own mind hundreds of times because you know that if somehow the jury gets it wrong, you will relive every decision you made for years, if not your entire career.

In the Grace case, there were six excellent law firms separately representing five individuals and the company. To coordinate your defense with other lawyers, whose trial strategy did not always mesh with yours, could be frustrating and challenging. I was lucky to have worked with some of the finest lawyers I have ever known and our ability to work together even though at times our strategies differed was a real testament to the professionalism always on display in front of the jury during the trial. Because of the paltry amount of evidence the government had against my client, my strategy differed greatly from that of my co-counsel, who attacked the government's case at every turn. I asked very few questions throughout the trial and concentrated my efforts on convincing the judge that most of the evidence against my client was irrelevant and inadmissible.

It was difficult as a trial lawyer to not jump into the fray and attack the government's case in front of the jury but such strategy would run contrary to my primary goal, which was to convince the judge at the end of the government's case that he should grant our MJOA (motion for judgment of acquittal). Although, as it turned out both strategies worked to perfection, our strategy was the first to succeed and it succeeded beyond my wildest expectations. After presenting evidence for nearly 10 weeks, the government's response to our MJOA was to concede that the government had not proven its case against our client and dismissed the indictment against him with prejudice.

Q: What accomplishment as an attorney are you most proud of?

A: That's an easy question to answer because it involves the same case I described as my most challenging. Robert Walsh, my client in the Grace case, was one of the nicest, smartest and most down-to-earth clients I have ever represented and every lawyer who got to know him in the case agreed with that sentiment. When we went to trial, he had just turned 71 and I knew that a conviction could be tantamount to a life sentence. I had represented him for almost five years and had gotten to know him and his family fairly well over that time. Because of the enormous negative pretrial publicity and his position as president of the Grace division in the center of the controversy, a guilty verdict of an innocent client was always on my mind.

We were most fortunate to have had assigned to the case a courageous trial judge, Donald Molloy, whose well-reasoned pretrial opinions and rulings from the bench during the trial leveled the playing field considerably and allowed all of the defendants to receive a fair trial. I had great support throughout the trial from a group of very dedicated professionals from my firm who all believed in our client's innocence and worked tirelessly to achieve the best result possible. And, indeed, that result was achieved when the government conceded after 10 weeks of trial that they had insufficient evidence for the case to go to a jury. The case was dismissed with prejudice and my client went home a free man, to spend time with his family, especially his grandchildren who lived close by, and to relax for the first time in nearly five years. There could be no better feeling for a white collar lawyer to know that all the hard work culminated in the only fair and just result possible and this case immediately became my proudest accomplishment as an attorney.

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

A: Rule 16 discovery violations and concealing exculpatory (Brady) evidence in criminal cases is one of the biggest challenges and one that is in need of reform. In the Grace trial there were numerous discovery violations that would take too long to catalogue in this interview. Every day you read about major prosecutions failing because of discovery and Brady violations. I applaud the efforts of Attorney General Holder and Lanny Breuer, the head of the DOJ's Criminal Division, in attempting to meet the the problem head on and for taking appropriate steps to change the mindset of some prosecutors — that the criminal justice system is a competition about winning and losing rather than what it should be — seeing that justice is done.

Q: Where do you see the next wave of cases in your practice area coming from?

A: That's always a tough one to answer because it involves a bit of crystal ball gazing. I think FCPA and antitrust prosecutions will continue to be on the front burner for most white collar practitioners for years to come. If I were a betting man, I would say that government contract fraud would be the next big area for me and others who work in firms representing government contractors. The new disclosure requirements found in the FAR and incorporated into all contracts over \$5 million certainly will incentivize contractors to ferret out fraud in any of its contracts and report what they find to the government.

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

A: There are many lawyers who have impressed me the over the years but if I had to pick one, it would be Larry Urgenson at Kirkland & Ellis [LLP] for his intellect, organizational skills, advocacy and calm demeanor. I worked closely with Larry in the Grace case and also consider him a friend. Watching him over the years it took to get the case ready for trial and observing firsthand his substantial role in developing the successful defenses perfected at trial by his co-counsel David Bernick impressed as much as anything I have experienced in over 20 years of private practice.

When the case began in 2005, there had been 10 years of extremely negative pretrial publicity against Grace and its executives, plus our assigned trial judge had not exactly been enamored with Grace's role in the Libby tragedy due to the way a companion civil case had been handled. The judge was rightfully skeptical of our case and the legal positions we took leading up to trial. However, Larry, through the strength of his intellect, advocacy and calm demeanor won over the judge and convinced him that there was another side to the Grace story that had never been told. Because of Larry's advocacy in the years leading up to the trial, our job at trial was made immeasurably easier.

Q: What advice would you give to a young lawyer interested in getting into your practice area?

A: If you are truly interested in practicing white collar law, you must spend some time early in your career as a federal prosecutor. Although some have had successful careers without such experience, the vast majority of the most successful white collar practitioners have been federal prosecutors at some point in their career. To work with prosecutors and understand what it takes to convince a prosecutor to decline a prosecution, requires you to think like a prosecutor and it is difficult to do that if you have never experienced the decision making process that every prosecutor goes through before exercising his/her prosecutorial discretion.



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