New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 258—NO. 12
WEDNESDAY, JULY 19, 2017

Q & A

Steven Molo Reflects on Silver Reversal in Wake of 'McDonnell'

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THE DECISION by the U.S. Court of Appeals for the Second Circuit reversing and remanding the guilty verdict in the public corruption case against former state Assembly Speaker Sheldon Silver was the highest-profile reversal of such a case over faulty jury instructions since the U.S. Supreme Court's decision in *United States v. McDonnell*.

It was also a setback to the U.S. Attorney's Office for the Southern District, which had made public corruption a signature issue under former U.S. Attorney Preet Bharara.

Silver's case stands in contrast to that of another convicted former member of the Assembly, William Boyland Jr. Boyland recently lost his appeal, in large part because, unlike Silver's trial, objections were not lodged by counsel over the jury instructions.

In the wake of the circuit's reversal in Silver, MoloLamken name attorney Steven Molo and his team were praised by the bar for having the foresight to anticipate *McDonnell*, which the Supreme Court agreed to review during, but not before the end of, Silver's trial.

In a situation increasingly less common, Molo and his team stayed on to handle Silver's appeal after the jury trial. Molo himself presented the case before the panel during oral argument. For Molo, this is just how he and his partner, Jeffrey Lamken, approach cases handled by their firm. As litigation specialists in white-collar defense, business litigation and intellectual property matters, MoloLamken handles cases from the trial courts up to the Supreme Court.

Molo himself sees the two sides of the case as mutually reinforcing: he and the partners and associates at the firm are better trial attorneys because of their appellate work, and vice versa. He spoke about the Silver case and its impact with the Law Journal on Tuesday:

Q: Can you walk through the thinking behind your strategy in the Silver case?

A: *McDonnell* loomed large at the time. We knew it was out there. The government certainly knew it was out there as well. McDonnell had very fine lawyers at Jones Day who had raised this issue below, and preserved it. We took our jury instruction, which was refused, and we modeled that instruction on the question presented in the cert petition in *McDonnell*. We made sure that, if the Supreme Court took the case, our instruction was going to be relevant, and, frankly, spot-on.

AP/LOUIS LANZANO

Steven Molo

We were diligent, and we made sure we were aware of what was going on with the law leading up to the time of the trial, knowing that this was going to be a key issue in our case. The government chose to try the case as they did, and argue it as they did, which was to say that any of the acts would be sufficient to convict. As it turned out, the law as

decided by the Supreme Court clearly said that was not the case, and so the jury wasn't properly instructed.

Q: What impact, in the circuit, do you think the Silver decision may have?

A: It's going to depend on the facts of the case, but I think there's a much clearer picture out there now, for prosecutors, judges and defense lawyers, as to what's illegal and what's not illegal.

Look, the Southern District has a fine tradition of being a great prosecutor's office. It does push the law, as we've seen, and sometimes it gets pushed back. We saw that in the insider trading area, and you're seeing that now in this case. The facts are going to be different. I don't know really very well the facts of the other cases, like *Boyland* or [former state Senate Majority Leader Dean] Skelos or such, but in our case, there were things that I just don't see how a jury could reasonably conclude that some of these met the definition of an official act.

Q: How does your approach to a trial get impacted by thinking about having to handle the appeal in the future?

A: In any trial, we are looking at the legal issues from the outset of the case, and certainly throughout the trial. All the cross-examination that we did we spent hours and hours preparing. The notion of a lawyer just standing up on his or her feet and just asking questions based on the direct, and maybe having read through some grand jury testimony or deposition testimony in a civil case, I'm sure people do that, but not anyone that's associated with our law firm.

We take great pains to tear apart the factual issues, but understanding that the factual issues and the outcome is ultimately going to be driven by the legal issues—how the law is applied to those facts. Working the legal points into the cross or direct examination of a witness is central to successful preparation.

I think fewer lawyers handle trial and appellate work, but I think that's been the case for me throughout my career. I typically argue a couple of appeals a year, but I clearly am perceived to a greater extent in the market place as a trial lawyer, as opposed to somebody who is out there just doing appellate work. There are other people who are like that now, like Bill Lee and David Boies. You'll see them argue important appeals but yet try cases. But the development of the true appellate specialist is something that has come into its own over the last 10 years or so in the profession.

Q: Do you think there's an advantage to those attorneys who handle both aspects of a case?

A: I think that there's a huge advantage because you are, from the very beginning, looking at these issues and saying, how is it going to affect the ultimate outcome? It doesn't do you any good, as a plaintiff, to get a big verdict, and then see it just basically taken away from you because of the result of mistakes that were made in the trial court, whether it was through jury instructions or whether it was through a lack of proof of elements for example. A great example of that was in the fraud suit in Florida state court by Ron Perelman against Morgan Stanley. There the plaintiff had failed to prove a key element and there was a $1.6 billion judgment that was taken away, and not retried.

That was a great example of where the failure of proof resulted not in an opportunity to retry the case, but the judgment was reversed outright and taken away. That suit showed how critical it is to look at the legal issues, and we very much built our law firm around doing that. If you look at the people we hire, you look at the backgrounds of my partners and associates, these are people who understand the legal issues as well as have a great ability to simplify and present evidence and arguments in court in a way that people will understand them. It's having that combination that makes a big difference.

Q: What do you say to litigators who are concerned about making the arguments to preserve issues during trial? Judges can be prickly.

A: You have to pick your spots. Lawyers who just raise every possible issue regardless of the ultimate impact on a case are fools. You need to understand that, especially in a jury trial. The judge's attitude towards the lawyers is going to be perceived and have a great impact on the jurors. So you don't want to be doing something that's going to irritate a judge.

That said, you need to make sure that the key legal issues are preserved, and there are ways that can happen through motions in limine, through issues that are taken up at sidebar, and at times raised before the jury in the course of objections. But I think you really need to think that through as a trial lawyer, to make sure you're not losing sight of how the jury is perceiving you.

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