THE NATIONAL LAW JOURNAL
JUNE 21, 2010
An ALM Publication

Litigator doesn't abide the conventional wisdom

His refusal to entertain a plea bargain paid off when McKesson HBOC's former general counsel won acquittal.

BY RICHARD ACELLO

Mark Topel has heard all about the conventional wisdom that white-collar defendants should take a plea when confronted by sharp federal prosecutors with high conviction rates. He rejects it out of hand.

"My entire career has been a disagreement with that," said Topel, a partner in Kasowitz, Benson, Torres & Friedman's San Francisco office. "You can win white-collar cases, and unless a defendant can get a really good deal, they're looking at walking into a federal penitentiary."

So it was in Topel's latest courtroom victory, a November 2009 jury acquittal in U.S. district court in San Francisco of Jay Lapine, the former general counsel of McKesson HBOC Inc., accused of financial fraud in a securities scandal that resulted in a $9 billion loss for shareholders. The verdict was the climax to a decade of investigation and litigation involving one of the most prominent corporate general counsel to be indicted for financial fraud.

"Every day you open the paper and there's another Bernie Madoff, and it has a cumulative effect on the population," Topel said. "Lapine was the highest lawyer in the company and, given his proximity to the events and the general atmosphere we're operating in, it was a huge challenge" to separate Lapine from his co-defendant, former Chairman Charles McCall, who was convicted on five of six counts.

The federal investigation began in 1999, and McCall and Lapine were indicted in 2003. The government alleged that top executives of HBO & Co. made up sales shortfalls before the company's merger with McKesson Corp. by falsifying letters that allowed customers to pull out of sales contracts and then hiding those letters from company auditors. Lapine drafted some of the controversial documents.

SEATING A LAWYER

Although Topel can be a pit bull in the courtroom, this time he mounted a "less is more" defense with a few unconventional moves. Topel had to combat the general societal dislike for the legal profession and the public perception that attorneys—especially general counsel—should know everything about the law, no matter how arcane or esoteric.

"The first thing we did was put an active litigation attorney on the jury, which is something I haven't done in 35 years of practice," Topel said. "She's a land-use litigator and she looked like a tough sell, but I knew she would not think all lawyers are crooked—and that she would understand that, in a large corporate environment, Lapine could be involved in negotiating a deal without determining how the revenue would be treated by his superiors. She was a very good juror and at the end of the day really put the government to its test."

Another element of Topel's less-is-more strategy was to have the CEO take center stage whenever possible. In fact, McCall's presence allowed Topel to present Lapine as the "little guy." He made the most of it, arguing that Lapine was excluded

MARK TOPEL

KASOWITZ, BENSON, TORRES & FRIEDMAN

TOPEL: Absent an exceptional deal, the client is "looking at walking into a federal penitentiary."

from actual involvement in the fraudulent scheme but was swept up in the general investigation because of his executive position.

"We didn't cross-examine unless it was absolutely necessary," Topel said. "We didn't put Lapine on the stand. It was an old-style trick from my days in the federal defender's office, where we'd stand on reasonable doubt, and sometimes that's the way you do it. The message to the jury was: 'This guy was doing his job and was not responsible for whatever finagling his superiors might be doing,' and that was accepted."

He continued: "Other testimony revealed Lapine had raised questions about the financial dealings. All white-collar fraud cases are tough and they've gotten tougher in the last 15 years. I knew we had to thread the needle and avoid any idea that Lapine was being reckless and turning a blind eye to wrongdoing."

In interviews following the verdict, jurors said they liked Topel's style. Several said he came off as an approachable "country lawyer." The jurors' not only liked his presentation, they ended up liking Lapine, while expressing dislike for the co-defendant.

As Lapine held silent, Topel relied on appearances to help create his case. For example, he said, McCall was conspicuously surrounded by a team of attorneys, but Topel entered the courtroom with just one junior partner. "I think optics are very important in a trial, and they start with how the lawyers behave," he said. "I can be a pit bull and I can be a velvet glove, and this was more the velvet glove."

This assessment was shared by Topel's opponent in the case, federal prosecutor Dave Anderson. "Mark won an acquittal and did so in the nicest possible way," Anderson said. "He was low profile—and knowing Mark, that's not his usual role. He usually fills the courtroom. But he did a nice job of rightsizing his usual tricks and tactics for our case."

Topel gets a kick out of defending the unpopular. "For me, it's like Wheaties for breakfast," he said. "Good defense attorneys are motivated by a basic desire to represent the underdog. It's a strong psychological pull."

Richard Acello is a freelance reporter in San Diego.

COURTROOM TIPS

Leave your arrogance at the door. "In the Lapine case, we had a trial team of five attorneys, but we presented a small profile compared to the co-defendant, who had numerous lawyers coming into the courtroom."

Don't be afraid to take unconventional approaches, such as seating a lawyer on the jury. "If you know how to dance, sometimes you can make up some steps."

If you can, get the judge on your side. "It's important that the judge send endless signals to the jury as to how he's viewing the defendants and the lawyers." It doesn't have to be verbal. "Sometimes even just subtle things like body language. If the jury likes you and likes your client it matters a great deal, because it's an uphill battle to get an acquittal."