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Litigator of the Week: A Win on a Silver Platter

Alexandra Shapiro, the co-founder of New York City-based litigation boutique Shapiro Arato, handed federal prosecutors a high-profile defeat in one of the slipperiest areas of the law: Insider trading.

By Jenna Greene
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Our Litigator of the Week is Alexandra Shapiro, the co-founder of New York City-based litigation boutique Shapiro Arato. A former partner at Latham & Watkins (and before that, an AUSA in the Southern District of New York), Shapiro handed federal prosecutors a high-profile defeat in one of the slipperiest areas of the law: Insider trading.

She discussed the case with Lit Daily.

Lit Daily: Who is your client and what was at stake?

Alexandra Shapiro: Sean Stewart was a young investment banker with a promising career. He worked at J.P. Morgan Chase as an analyst in the mergers and acquisitions group. After several promotions, he joined Perella Weinberg Partners, where he became a managing director.

However, his career was cut short in 2015, when he was charged with insider trading for supposedly "tipping" his father Robert about deals before they were publicly announced. Sean readily acknowledged that he was very close to his father, routinely confided in him, and even occasionally mentioned potential deals.

However, he denied that he intended for his father to trade. He testified that he expected his father to keep the information confidential, and that he had not known at the time that Robert was trading. Essentially, his defense was that Robert had betrayed his confidence.

By the time I got involved, Sean had been convicted following a jury trial. My focus was developing a strategy to overturn the conviction on appeal.

Tell us about what happened at the district court level.

The trial was very close. Even though it was very short, the jury deliberated for five days and only reached a verdict after an Allen charge.

Almost none of the government's evidence shed any light on the critical question of whether Sean had intended his father to trade. The government relied principally on a single hearsay statement of dubious reliability admitted over Sean's objection—in which Robert told a friend whom Robert had tipped that Sean had once said he couldn't believe that "I handed you this on a silver platter and you didn't invest." The government relied heavily on this statement in both of its closings.

However, Sean was never permitted to introduce important evidence demonstrating that he never made the "silver platter" comment. He first tried to introduce other statements by Robert denying Sean's involvement. The district court refused to allow that evidence, even though Rule 806 permits a party to attack a hearsay declarant's credibility with "any evidence that would be admissible for those purposes if the declarant had testified as a witness."

Sean next tried to call Robert as a defense witness. But Robert refused to testify; he took the Fifth even though he had already pled guilty and been sentenced for the trading. The court ruled that Robert still had a valid Fifth Amendment privilege and denied Sean's application to compel Robert to testify under immunity. So the jury was not able to consider any evidence rebutting the government's arguments about the "silver platter" statement.

Alexandra Shapiro of Shapiro Arato (Photo: Courtesy photo)

When and how did you become involved in the case?

For the past several years, a large part of my practice has included representing clients who have lost at the trial court level and want to retain an appellate specialist to take a fresh look at the record and handle the appeal. That's exactly what happened here. At some point between verdict and sentencing, Sean asked me to handle his appeal.

I've had the good fortune to obtain successful results in a substantial number of criminal appeals, and have handled a variety of insider trading cases—among others, Newman and Martoma in the Second Circuit, and Salman in the Supreme Court, and others dating back to the 2005 Cassese case in the Second Circuit. It was the combination of my experience handling insider trading cases and my reputation as an appellate lawyer that led to the representation.

What were the key themes of your appeal?

The central theme of the appeal was that the trial was unfair because the district court admitted the "silver platter" statement, but denied Sean any opportunity to rebut it. We had several specific legal arguments—challenges to the admissibility of the silver-platter statement itself, the trial court's preclusion of Robert's

other statements under Rule 806 and the rulings that prevented the defense from calling Robert as a witness.

But the principal theme tying these points together was that Sean was deprived of his constitutional right to present a meaningful defense, because his rebuttal evidence was crucial to the outcome and without it the jury saw a one-sided picture that denied him a fair trial.

How did you prepare for oral arguments? Anything different about this case?

I followed my usual routine. I review key parts of the record, the principal cases, and the briefs. If the appeal raises several distinct issues, I assess which are the one or two I want to focus on during the short time allotted to the argument, and which are the ones I will address only if the panel has questions about them. I develop a strategy for how to make my key points no matter what the questions are.

Usually I will start with fairly detailed bullet points and notes, but by the end of the process my ideas have been reduced to a few short bullets on a post-it note that I take to the podium as a reminder of the key 2-3 points it's most important to touch on.

I also try to think of every conceivable question I might get asked and how best to answer it. Usually I do a moot court and invite lawyers who have no prior familiarity with the case to do the mock questioning. It's helpful to get their more objective reaction to the arguments. We'll generally do Q&A for a while and then discuss the case and the best strategy for answering the questions I'm likely to get from the panel. This is in some ways the most helpful part of the preparation.

What were some of the stand-out moments during oral argument?

As I mentioned, Rule 806 permits impeachment with "any evidence that would be admissible for those purposes if the declarant had testified as a witness." I always thought that if we focused on that language, we would prevail, because it seemed obvious that if Robert took the stand and said Sean made the silver-platter statement, he could be cross-examined about the inconsistent statements, which would have undermined that testimony.

Judge [Pierre] Leval asked a series of questions to the prosecutor with hypotheticals about this, and then asked me in my rebuttal what questions we could have asked on cross had Robert testified. This was a very helpful way for us to frame the issue, and I had a chance to elaborate on it in a supplemental brief the court ordered the parties to file after argument.

Preet Bharara (among others) has complained that insider trading rules are stacked against investors and favor the rich and powerful. What's your take?

Economists and policy-makers can debate what the rules should be, but the real problem is that the rules are not clear because there is no insider-trading statute. Insider trading is prosecuted under anti-fraud statutes that do not even mention insider trading, much less define its elements. The crimes of insider trading (and tipping) were created and defined by the courts.

But we are not supposed to have common law crimes in the U.S., for good reason. There is a long line of Supreme Court precedents, dating back to the early 1800s, holding that only the legislature can define what is a crime. This rule reflects two important constitutional principles: separation of powers and due process. Congress—not prosecutors, not courts, not the SEC—is supposed to decide what insider trading (or tipping) is criminal and define the elements of such crimes.

People need to know in advance what is criminal. They need to be able to look at a statute and figure out, before deciding whether to trade, what they can and can't do. Investors and investment professionals need clear guidance so that they can comply with the rules, whatever they are. We don't have that now, because insider trading law is defined by the courts—which keep changing the rules from case to case.

What made this case unique? And what impact do you hope it might have?

From a legal perspective, the most interesting issue was probably the evidentiary issue that led to the reversal.

The district court ruled that to be proper impeachment under Rule 806, the statements the defense was trying to introduce had to be directly inconsistent with the "silver platter" statement. The district court reasoned that that Robert had never "specifically denied" that Sean made the silver-platter statement. But, as the Court of Appeals recognized, statements don't need to be "diametrically opposed to be inconsistent"; and here, it was clear that the excluded statements varied from the admitted statements in ways that "cast a different meaning" on Robert's discussions with Sean, and suggested (contrary to the government's interpretation of the silver-platter statement) that Sean did not expect Robert to trade.

The distinction between the district court's interpretation of Rule 806 and the Second Circuit's is important. The government can often introduce hearsay using rules that defendants can't rely on, such as the rule permitting the government to introduce hearsay by co-conspirators. The defense might be able to point to other statements by the co-conspirator that undermine the government's hearsay. But it would be a rare case in which the two statements were the exact opposite of each other.

The Second Circuit's more flexible interpretation of Rule 806 recognizes that as long as the gist of the impeachment material sheds doubt on the reliability of the original hearsay statement, the evidence should be put before the jury.

Your firm will turn 10 next year. To you, what have been some of the best things about leaving Big Law to hang up your own shingle?

Starting and building a successful small firm has been extremely rewarding for me in a number of ways. It enabled me to take on many interesting cases, and especially criminal cases representing individuals, which I could not have handled at my old firm.

It's hard to represent individuals who are targets or criminal defendants from a big firm for two reasons: there are often conflicts with large institutional clients such as accounting firms and banks, among others, and also if the individual is not extremely wealthy or indemnified, he or she probably cannot afford the fees charged by big firms.

At a small firm, there's rarely a conflict in those situations, and you can be much more flexible about rates if client has limited resources, but you want to take the case because it's interesting or significant. I have found representing individuals in criminal cases to be among the most rewarding aspects of my practice. It's extremely challenging, but very rewarding if you can persuade a court to overturn a verdict that was unfair or unjust.

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