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Litigators of the Week: In Case Prosecutors Described as Silicon Valley's Biggest Corporate Fraud, Two Complete Defense Verdicts

By Ross Todd
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Our Litigators of the Week are **Brian Heberlig** of **Steptoe**, **Christopher Morvillo** of **Clifford Chance** and **Gary Lincenberg** of **Bird, Marella, Rhow, Lincenberg, Drooks, & Nessim**. Heberlig and Morvillo represented former Autonomy CEO Mike Lynch and Lincenberg represented former vice president of finance Stephen Chamberlain in a three-month trial where the men were charged with inflating revenues in the run-up to the software company's $11.7 billion acquisition by Hewlett-Packard in 2011.

HP took an $8.8 billion writedown on the deal in 2012. Federal prosecutors branded it as the largest corporate fraud in Silicon Valley history. But last week a federal jury in San Francisco found both Lynch, who testified on his own behalf, and Chamberlain, who did not, not guilty of all charges.

Litigation Daily: Who was on your teams and how did you divide the work, both in the run-up to trial and at the trial itself?

Chris Morvillo: How much time do you have? Mike Lynch was jointly represented at trial by Clifford Chance and Steptoe and Steve Chamberlain was represented by Bird Marella. In addition to myself, the Lynch trial team consisted of Clifford Chance partners **Dan Silver**, **Celeste Koeleveld** and **Tony Candido** and Steptoe partners Brian Heberlig, **Reid Weingarten**, **Michelle Levin**, **Jonathan Baum**, **Nicholas Silverman** and of counsel **David Fragale**. We were fortunate to be supported at trial by an exceptional group of associates and staff from both firms, including **Kylie McLaughlin**, **Harriet Slack**, **Oriane Green**, **Ayla Ronald**, **Julia Krusen**, **Catherine Tanner**, **Mina Juhn**, **William Lanier**, **Larysa Kern**, **Natalie Hoehl**, **Erica Lignell**, **Julia Bruns**, **Naomi Flores Urrutia**, **Jackie Lee** and **Trish Keats** from Clifford Chance, and **Galen Kast**, **Drew Harris**, **James Purce**, **Caroline Covington**, **Meredith Lewis**, **Samantha McCarthy**, **Elena Chun**, **Riley Segal** and **Mikaela Aaland** from Steptoe. As for the Chamberlain team, over the past 10 years a number of attorneys worked on the case, including Gary Lincenberg, **Ariel Neuman**, **Ray Seilie**, **Michael Landman** and **Avi Rejwan**. Ray and Michael co-tried the case with Gary and handled several important

Courtesy photos

L-R:Gary S. Lincenberg of Bird, Marella, Rhow, Lincenberg, Drooks, & Nessim, Brian Heberlig of Steptoe and Christopher J. Morvillo of Clifford Chance.

witnesses all with wonderful support from paralegals **Rachel Capata** and **Cassidy Capata**.

At its essence, the indictment alleged a conspiracy to defraud investors in Autonomy (a UK public company acquired by HP in 2011) through a variety of alleged accounting improprieties and disclosure failures occurring between 2009 and 2011. With more than 16 million documents, 80 potential witnesses and mountains of exhibits and testimony from numerous prior proceedings and investigations stretching back more than a decade, the case presented a daunting management challenge. The long tail of the case, however, also provided natural borders that made the task of dividing and conquering fairly obvious. On the Lynch side of the house, Steptoe and Clifford Chance truly operated as one seamless team. Going into trial the plan was for Steptoe to handle the witnesses relating to the accounting and the HP acquisition and for Clifford Chance to cover the witnesses to the underlying transactions at the core of the case. We shifted some witnesses around as the crush of the trial required, but in the end each firm handled roughly half of the 41 witnesses that hit the stand. On the legal strategy, we fielded a dedicated cross-firm team who were instrumental in winning some key skirmishes, including obtaining a judgment of acquittal on the sole securities fraud charge against Lynch after the close of the government's evidence on a Rule 29 motion. Throughout the case, we were also closely coordinated with the crack Bird Marella team and divided legal issues and the questioning of witnesses as appropriate given the distinct roles our respective clients held at Autonomy.

Former Autonomy Chief Financial Officer Sushovan Hussain had already been convicted of wire fraud in 2018 in a trial before Judge Breyer. Were you able to pick anything up about how to try your client's case from how the government prosecuted Mr. Hussain's case?

Gary Lincenberg: The **Keker** firm conducted a number of effective cross-examinations in the Hussain case and we were all able to stand on their shoulders to adapt to the government's proof in that trial. These helped lock in some key witnesses and give us a better sense of the government's strategy. Like in the Hussain trial, the government questioned some 50 accounting decisions during the trial. It was critical that the jury understand that the case did not turn on whether the decisions could be challenged, it turned on whether our client performed his work in good faith, openly disclosed the underlying evidence to the auditors, and that these decisions generally involved "judgment calls" under the UK accounting principles, which differed from U.S. accounting principles, and where different accountants and experts could reasonably come to different conclusions. We drove that home by getting all of the government witnesses to acknowledge this.

What were your key trial themes and how did you drive them home with the jury?

Brian Heberlig: We argued that Mike Lynch and Steve Chamberlain acted at all times in "good faith." Judge Breyer gave a strong jury instruction making clear that good faith was a complete defense to all charges. We argued that Mike and Steve acted in good faith by reasonably relying on the highly competent professionals who made the accounting decisions at issue in the case, including Autonomy's Chief Financial Officer, the Audit Committee, and the outside auditors at Deloitte. We embraced the accounting decisions approved by Deloitte in real time by eliciting evidence on cross-examination of the auditors that their accounting decisions were correct and they were not misled on any significant issues. We also called a defense accounting expert who agreed with the contemporaneous accounting decisions made by Autonomy and approved by Deloitte. As a non-accountant, Mike Lynch had no reason to doubt those decisions and relied upon the experts he surrounded himself with. Steve Chamberlain was an accountant, but he was an honest broker who ensured that the ultimate decision-makers had all relevant information. Although Mike and Steve were differently situated, both had compelling good-faith defenses.

Another important trial theme was "it's just business." We believed the government overreached by trying to convert ordinary business decisions into accounting fraud. Among other things, the government challenged Autonomy's decisions to accelerate revenue, buy products from its software customers, and manage earnings to hit the analysts' consensus expectations every quarter. We elicited unrebutted evidence from many government witnesses demon-

strating that those decisions were "just business," not accounting fraud, and were entirely within Autonomy's commercial prerogative. In closing argument, I belittled many of the government's allegations as "just business," which was a common refrain that the jury had heard from witnesses throughout the trial.

Dr. Lynch testified in a 2019 civil trial in the U.K. How did that experience help him prepare for testifying here? How did testifying in these criminal proceedings in the U.S. differ for him?

Morvillo: I had the privilege of putting Mike on the stand at trial. And while calling a defendant to the stand in a criminal trial is a harrowing decision for many reasons—including the perception that doing so subtly shifts the burden of proof to the defense—it was a much easier decision in this case. In fact, we told the jury in our opening statement that Mike would testify. We did that for three reasons. First, to encourage the jury to keep an open mind throughout the government's case knowing that they would hear from Mike before they retired to deliberate. Second, Mike is a fantastic communicator and we knew he would make a terrific witness, particularly because we had watched him endure 21 days of rigorous cross-examination during the U.K. civil trial in 2019. Third, because of his civil trial testimony (and the three separate witness statements he submitted in that case) we knew the government planned to introduce portions of his prior testimony as admissions that he would need to contextualize. His experience testifying in the U.K. civil case allowed him to understand the rhythm of cross-examination, learn how to answer questions and foresee where a line of questioning was headed. Mike knew the case and the evidence cold; one of the challenges for him was separating out what he knew during the relevant time period and what he had learned across the 12 years we have been defending the cases. The big difference between his testimony in the U.S. versus the U.K. proceedings is that his direct testimony in the U.K. civil case, as is the practice there, was submitted in written witness statements long before trial. Thus, his actual civil trial testimony was almost entirely cross-examination. In the U.S., however, Mike and I spent two full trial days telling his side of the story during his direct examination. It allowed him to get comfortable on the witness stand in front of the jury, contextualize and compellingly rebut the prior 11 weeks of government evidence and argument and also provide a glimpse into his personal backstory and humanize him for the jury. It also beautifully teed up Brian's masterful closing. In the end, the decision obviously paid off in spades as the jury acknowledged after the fact that they viewed Mike's testimony as largely unimpeached.

Mr. Lincenberg, I heard that you were prepared to call Mr. Chamberlain as a witness on his own behalf but made a game-time decision to pivot. What went into that decision? Did it feel like a risk with Mr. Lynch testifying in his defense?

Lincenberg: I wanted to call Mr. Chamberlain because he was credible, had no prior contradictory statements, and believed he would come across as a straightforward, honest guy. After Dr. Lynch testified so effectively, I had the added concern that if Mr. Chamberlain did not testify some jurors might subconsciously hold it against him. After the close of the government's case, we reassessed and decided not to call him for three main reasons. First, we concluded that since every government witness conceded on cross that Mr. Chamberlain acted honestly and in good faith, there was nothing we needed to dispute. In fact, by closing arguments, even the government acknowledged that Mr. Chamberlain was a "good guy". Second, we had successfully moved in limine to exclude certain evidence; if Mr. Chamberlain testified, however, that evidence would come in. Third, given that events took place 13 to 15 years ago, I was concerned that an honest 'I don't remember' answer might be viewed by some jurors as evasive.

I heard that some jurors spent about an hour with you after the trial asking and answering questions. What did you learn from them about what led them to go your client's way?

Heberlig: It was fascinating to spend an hour with all 12 of the jurors immediately after they returned the not guilty verdicts. They were unbelievably attentive during the trial and remarkably insightful following the verdict. Most importantly, they found Mike's testimony credible. The prosecution failed to cross-examine Mike on more than 20 important topics that had been the focus of the government's case-in-chief. Taking that gift, I argued in closing that the jury had no choice but to find Mike truthful and deem those

issues conceded by the government. It was gratifying to hear the jury say that argument resonated with them. The jury also concluded that Deloitte had approved the relevant accounting decisions based on complete information, which supported our good faith defense. I had also argued in closing that the government had bet its case on Autonomy whistleblower Brent Hogenson, who we showed was biased and not credible during cross-examination. The jury told us that it rejected Hogenson's testimony based on his lack of complete information and his "Jekyll and Hyde" transformation from a cooperative witness on direct to a combative and evasive witness on cross-examination. On the lighter side, the jury was also entertained by Chris Morvillo's many stylish pairs of reading glasses and Jonathan Baum's colorful socks.

Have you heard anything from the prosecutors about whether they intend to proceed with the severed conspiracy count related to post-acquisition allegations? They have until June 21 to make a call, right?

Morvillo: We have not yet heard from the government with respect to their intentions on the severed count (Count 17). We are hopeful, however, that the government will dismiss the count (which largely charges a coverup) in light of the acquittals on the allegations relating to the underlying conduct. As Judge Breyer noted when he severed the count: if the defendants are "acquitted of all the other counts, I think that it becomes somewhat academic as to what would happen to Count 17. I've not heard the government ever prosecuting a case solely of a coverup when the individual case has been found not worthy of liability."

What can other defense lawyers take from what you were able to accomplish here?

Heberlig: Never give up, no matter how difficult the odds. Fanatical preparation is absolutely critical, and Mike Lynch was a master at motivating our team to prepare for every possible angle at trial. Our trial mantra was "you cannot outwork us" and it showed. And be willing to take risks. We put Mike Lynch on the stand, called a defense expert witness, and called the Audit Committee chairman. Each of those witnesses proved hugely important but they all posed major risks. Our gambles paid off in a major way.

What will you remember most about this matter?

Heberlig: I will never forget the camaraderie and teamwork among the exceptional trial teams at Clifford Chance, Bird Marella, and Steptoe. Everyone came together and played their own important part in securing this amazing victory that saved our clients' lives.

Morvillo: After 12 years on this matter, it is hard to pick just one memory. But, I know for sure that I will never forget the dramatic moment the words "not guilty" rang out in the courtroom and how those two words instantly released more than a decade of bottled fear and anxiety from our clients, their families and the defense teams. There was not a dry eye on our crowded side of the courtroom. I will also never forget the trust and confidence that Mike placed in his legal team; he pushed us all beyond our own perceived limits to accomplish this result. Mike never gave up the fight and his fortitude inspired us to work tirelessly and creatively which, when coupled with our unwavering belief in his innocence, enabled us to obtain justice for him at long last.

Lincenberg: First, my client Steve Chamberlain and his wife Karen. Some lawyers maintain a certain professional distance from their clients. I did not do that here. I have always believed in Steve's innocence and felt personally invested in the case. Second, we had a courtroom full of talent. The bench is fortunate to have brilliant, caring jurists like Judge Breyer. The lawyers at Clifford Chance, Steptoe and on my team at Bird Marella worked together as seamlessly as possible, ironing out issues beforehand in a way that allowed each defendant to present their themes with the support of the co-defendant. The prosecutors were talented and ethical. Even the jury was remarkably intelligent, attentive and responsible—difficult to find for a three-month trial. It was gratifying to see the wheels of justice roll as they should.