

## Q&A With Akin Gump's Michael Asaro

*Law360, New York (March 29, 2013, 11:08 AM ET)* -- Michael A. Asaro is a partner in Akin Gump Strauss Hauer & Feld LLP's New York office. He has litigation and investigatory experience involving matters arising under the federal securities laws. He is a former assistant U.S. attorney for the Eastern District of New York, where he served as deputy chief of the Business and Securities Fraud Section. Earlier in his career, Asaro served as a branch chief in the SEC's New York office. His practice focuses on white collar criminal defense, regulatory investigations and complex securities and commodities litigation. Asaro recently represented Greenlight Capital in a precedent setting lawsuit that successfully enjoined Apple from holding a shareholder vote in violation of the federal proxy solicitation rules.

### **Q: What is the most challenging case you have worked on and what made it challenging?**

A: Some of the most challenging cases that I have dealt with as a defense attorney have been situations where the government threatened to bring charges against my clients and it was my job to convince them to stand down. Every time I face that scenario, it weighs heavily on me because an enforcement action, or worse yet a criminal prosecution, can have life-altering consequences for individuals and will often destroy a business before you even have a chance to go to trial. These situations are usually an uphill battle because the decision makers are not impartial — they are your adversaries. As a result, you need to have something compelling to say, which typically means pointing out the weaknesses in the government's case. This comes with a cost because you will be previewing your defense strategy. The threshold question of whether to even make a presentation is therefore often a tough call. When you succeed, however, it is an incredible feeling because it is an absolute victory.

One such matter that is memorable to me occurred when I first joined Akin Gump. I can't go into the details, which were never made public, but we were advising a hedge fund in connection with what started out as a routine SEC compliance examination. However, the examiners focused on a particular trading practice that was, at the time, a very hot topic for SEC enforcement. In fact, the SEC's Enforcement Division had recently brought a high-profile case against another, unrelated investment firm involving the same practice.

Once the issue was flagged, it was pretty obvious that we were going to have a problem. I convinced the client to let me investigate the facts so that we'd be ready if things elevated to more serious level. That turned out to be the right decision because the client soon received a call from the SEC asking us to attend a meeting with Enforcement. Because we had spotted the issue, we had a solid understanding of the facts and were able to convey that we were taking the matter seriously. We made a two-hour presentation that carefully walked through the evidence and explained why there was no violation of law. There were hawkish questions from the government's side of the table. Several weeks went by and there was a lot of anxiety on our end as to what would happen next. Then, a few days before Christmas, the SEC called to tell me that they would not be pursuing the matter further. It was a wonderful feeling to be able to deliver the good news to the client. Frankly, in this business, you don't get to do that often enough.

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

A: In most SEC offices around the country, there are two distinct groups that handle enforcement matters — an investigative group, which develops the facts and makes the decision to seek authorization to bring charges, and a trial group, which then picks up the ball and takes the case to trial. Attorneys from these two units typically do not collaborate until a case is about to be filed. This is something the SEC should consider changing.

In my experience, investigative lawyers sometimes discount litigation risks that would be taken more seriously by a seasoned trial lawyer. The current structure also creates an accountability problem because the investigative lawyers who drive charging decisions do not necessarily have to live with the consequences of having their theories tested before a court. I think this dynamic has sometimes led to the SEC bringing cases it shouldn't have, which subsequently unraveled when the charges were put to the ultimate test. The SEC should consider adopting a model more like the U.S. attorney's offices where the same lawyers who investigate cases also have to litigate them.

**Q: What is an important issue or case relevant to your practice area and why?**

A: An interesting new piece of legislation that I believe will have an impact is the STOCK Act, which is designed to prohibit members of Congress from enriching themselves based on market moving information learned during the course of their duties. While the STOCK Act was passed in response to public outcry about suspiciously profitable trading by members of Congress themselves, its scope is much broader than that. Third parties who trade on information obtained from a member of Congress in breach of the STOCK Act could also face insider trading liability as tippees.

The STOCK Act is likely to be a fertile ground for enforcement cases over the next few years for a number of reasons. First, the question of when legislative information may be material is a difficult one that has never been examined by any court. Second, the STOCK Act provides the SEC with a mandate to enforce the insider trading rules in this area. Third, the notion that legislative information is confidential is somewhat at odds with the culture on the Hill, where information is often leaked for a variety of reasons, political and otherwise. Fourth, the increased use of so-called political intelligence firms by hedge funds has already gathered headlines, which will undoubtedly lead to scrutiny by the SEC.

**Q: Outside your own firm, name an attorney in your field who has impressed you and explain why.**

A: I would have to say Rich Zabel, the current deputy U.S. attorney in the Southern District of New York. Before taking on his current role, Rich was one of the partners in Akin Gump's white collar group who recruited me to join the firm. During the years we worked together, Rich was one of the hardest working, creative and meticulous lawyers I had ever seen. Watching him bring the same passion to the job of being a defense attorney that I had experienced during my time as a prosecutor shaped the way I feel about my job today. I have also been proud to see what Rich has been able to accomplish since he began his second stint in government service. Since Rich took on a leadership role in the Southern District of New York, that office has had an impressive string of successes, especially bringing white collar and anti-terrorism cases. I think that it is no accident that these are both areas where Rich has considerable expertise.

**Q: What is a mistake you made early in your career and what did you learn from it?**

A: When I was a young prosecutor, a defendant who we were prosecuting for identity theft claimed she was incompetent to stand trial. The defendant was a career con-woman and we were convinced she was malingering. The court held a competency hearing, where I called a psychologist in support of our position. On cross examination, I was surprised when defense counsel confronted our expert with an opinion from several years earlier where a judge had rejected his testimony in a similar case. Our expert hadn't told us about the decision because he was embarrassed about it. At the end of the day, we rolled with the punches and the judge ruled in our favor, so it was no harm no foul. It taught me a critical lesson though. Never leave any stone unturned and always be prepared.

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