

Q&A With Gibbons' Lawrence Lustberg

Law360, New York (April 17, 2013, 2:23 PM ET) -- [Lawrence S. Lustberg](#) chairs [Gibbons PC](#)'s criminal defense department in the firm's Newark, N.J., office, and is the director of the John J. Gibbons Fellowship in Public Interest and Constitutional Law. He represents individuals and business entities in criminal investigations and prosecutions, including antitrust, securities, health care fraud and abuse, tax, political corruption, government procurement, foreign corrupt practices, and many other areas.

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

A: My cases are all challenging. Because the criminal cases we handle are often federal, we most often confront a powerful array of prosecution resources in an environment in which the law is increasingly more hostile to defendants' rights. My most difficult cases are always the ones in which, in my heart of hearts, I believe that my client is truly innocent. Make no mistake about it: I fight equally hard for each and every client — though often the fight is about the appropriate sanction and not about liability. But in those cases in which my client is actually innocent, the pressure to win is enormous. In almost all of those cases, I have prevailed, either by dissuading the authorities from prosecuting the case or by winning at trial. But there are exceptions, and in those cases, it is hard to sleep at night knowing that our system of justice has failed, by convicting an innocent person.

This occurred, for example, in a case that I tried for months in Philadelphia in the early 2000s. My client, a banker, was convicted of providing unlawful benefits to a city official in return for favorable treatment, but it was clear that his actions were misunderstood and that he had absolutely no criminal intent. After five weeks of jury deliberations, including initial indications that the jury was hung, prompting the removal of a juror, he was convicted of three out of 11 counts, and while he went to prison for a much shorter time than had he accepted the plea agreement that the government offered him, it pains me to this day that this good and innocent man lost his freedom.

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

A: In a word, discovery. While civil discovery is excessive, prolonged and often heated, in criminal cases, and especially in federal criminal cases, discovery is far too sparse or far too late — few people know that witness statements, for example, are not required to be produced in federal criminal trials until after a witness has testified on direct examination — and trials are often by ambush, especially because the completeness of discovery turns on the responsible exercise of prosecutorial discretion, which is often not forthcoming. Criminal discovery should be far earlier and fuller, especially because liberty, rather than merely money, is on the line.

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

A: More and more, courts are debating whether it is appropriate for innocent people to plead guilty in order to bring matters to a close. This happens all the time, of course, in civil cases: parties agree to pay settlements though they do not admit — and believe they do not have —

liability. And, as a practical matter, those of us in criminal law practice know that innocent people plead guilty because they will, as a result, control their destinies, and in many cases, even achieve their release from custody. Yet our system of justice indulges the fiction that just because a person pleads guilty, that person is guilty, though we all know this is not true. This has significant legal ramifications, which we are parsing in many aspects of our work.

For example, we recently succeeded in persuading a court that a defendant who had pleaded guilty was nonetheless entitled to compensation under New Jersey's Mistaken Conviction Act, arguing that he was actually innocent and only pleaded guilty because admitted corrupt police officers manufactured evidence against him. In other contexts, we are attempting to set convictions aside because they were based on guilty pleas that were not fully informed, because, for example, the defendant was not apprised of the immigration consequences of his plea. But the issue persists and presents important challenges to criminal and constitutional practitioners who wish to achieve justice in the face of resistance to relief by courts that adhere to the notion that the innocent never plead guilty.

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

A: The finest attorney outside my firm with whom I have ever practiced is Ted Wells, now of the [Paul Weiss](#) law firm, but previously with the [Lowenstein Sandler](#) firm here in New Jersey, and before that, a law clerk for my mentor, the great John J. Gibbons. Ted is extraordinary for a number of reasons. Of course, he is brilliant, extremely experienced and uniquely hardworking. But this is not what makes him special. What makes him special is his ability to craft a case before trial, by preparing not only his witnesses but the other side's witnesses, so that what plays out in a court of law is, in essence, a script that Ted has prepared, through relentless preparation, singular persuasiveness with witnesses (without ever crossing or even approaching ethical lines), and amazing sensitivity to what will be effective in a court of law — compelling to lay jurors and doctrinally sound to a judge.

And he does all of this without ever disabling himself from achieving life's proper balance. Throughout a career that has included every possible success, he has never failed to work, with his money and time, to achieve a more just society by electing public officials whose progressive views comport with his own, by dedicating himself to nonprofit organizations that serve the neediest among us, by mentoring (and advocating for) nearly every attorney of color who has joined our profession here in New Jersey, and by never losing sight of his own commitment to and love for his friends and family. Ted is an amazing person as well as attorney; he has certainly impressed me.

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

A: I began my career, after a clerkship, as an assistant federal public defender. Within three months of starting, I began my first trial. I recall being in my office late one night preparing for the next day of trial, by rereading documents and reading new Third Circuit cases. A colleague of mine came in and asked me, "What is your theme?" I realized that, although the trial had begun, I did not have one, that I was focused on making legal arguments regarding individual

issues and questioning specific witnesses regarding particular facts. Let me be clear: Those are all important. But I decided then, and have done my best to maintain this focus throughout my career, to never lose sight of the forest for the trees, to have a way of describing my defense in “25 words or less,” to develop a theory and stick to it.

This lesson applies to civil as well as criminal cases, to appeals as well as trials, to investigations as well as formal legal proceedings. Stay focused, I tell the young lawyers with whom I work, even as you make certain to sweat every possible detail.

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