Martin G. Weinberg

by David E. Frank

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Lost in the aftermath of former House Speaker Salvatore F. DiMasi's honest-services fraud conviction was the fact that his co-defendant, accountant Richard Vitale, walked out of the courtroom a free man.

Vitale, DiMasi and lobbyist Richard McDonough were accused of conspiring to award lucrative state contracts to a Burlington-based software company in exchange for illegal kickbacks.

With veteran criminal defense attorney Martin G. Weinberg at his side, Vitale sat in U.S. District Court Chief Judge Mark L. Wolf's packed courtroom on June 15 and wept as a jury found him not guilty on all charges.

DiMasi and McDonough, the latter whom Weinberg now represents on appeal, were both convicted and recently began serving eight- and five-year prison terms, respectively.

Although across-the-board acquittals in federal court are rare, Vitale's verdict did not come as a complete shock to those who watched Weinberg navigate the high-stakes case. Whether it was his surgical cross-examination of co-defendant-turned-cooperating-witness Joseph Lally or his homerun closing argument, the Boston lawyer established that the evidence against Vitale simply was not there.

"This was not your quintessential bribery case," he says. "This was not a cash-for-votes situation. The conduct was in many respects similar to what happens in 50 State Houses around the country and at the United States Capitol."

In addition to handling the Vitale case in 2011, Weinberg secured a seminal 6th U.S. Circuit Court of Appeals victory in U.S. v. Warshak, in which the court held that a criminal defendant had a reasonable expectation of privacy in the more than 27,000 emails stored on his internet service provider. The court further found that prosecutors no longer could obtain emails through ex-parte secret subpoenas.

A few weeks later, Weinberg found himself in Youngstown, Ohio, securing a dismissal for Anthony Cafaro, a CEO charged with 73 criminal counts in connection with a public corruption scandal.

Q. How did Warshak expand the rights of future defendants?

A. We successfully changed a 20-year Department of Justice policy of seizing the content of one's emails through secret subpoenas. It's really affected the nature of privacy and the scope of the Fourth Amendment around the country. It was shocking to me that this policy had been allowed to exist and that no defendant had raised and succeeded in persuading the court that it conflicted with the foundation of the Constitution.

Q. How is it that no one raised the issue until now?

A. We're at the dawn of the intersection of criminal justice and the electronic age. There was great secrecy that prevented customers from even knowing their records had been subpoenaed. It was akin to a secret search. That's all changed now because of the decision.

Q. How hard was it to shift out of trial mode on Vitale and move on to the next case?

A. It's a great question because it is very hard. It's akin to a writer offering a great novel or an artist doing his absolute best to paint his best art. Lawyers throw all of their creative abilities and intellectual energies into the defense of the client, and when that defense completes there is a momentary void until you can get engaged in the challenge of the next case. I had almost no breathing room because I had the Cafaro case following right on the heels of Vitale.

Q. If you had the option before trial of severing Vitale's case from DiMasi and McDonough, what would you have chosen?

A. It's such a hard question to answer. A single trial allows you to be less inhibited in individualizing your own client's innocence, but the dynamics of a joint trial often work in favor of the least involved defendant.

Q. Was Vitale the least involved defendant?

A. I would say he was because he had absolutely nothing to do with the foundational relationships between Lally and some of the other witnesses. The case against Vitale rested on a jury's belief in Lally and Lally alone. Lally was simply not a person, by history and character, absent corroboration, to support a verdict under a beyond-a-reasonable-doubt standard.

Q. How do you feel about the 18-month prison term Lally got in comparison to the sentences of DiMasi and McDonough?

A. I think the disparity between those that went to trial and the person who pleaded guilty and cooperated, unfortunately, and perhaps unintentionally, created a disincentive for people to go to trial.

Q. How so?

A. Judge Wolf was clear that he was rewarding cooperation. The corollary of that is that it sends out an unfortunate message that people are safer buying an insurance policy by cooperating. That, in my judgment, is a troublesome precedent.

Q. How different would the trial have been if Lally had been in the defendant's chair as opposed to the witness chair?

A. It would've denied Vitale the ability to crystallize the case based on whether an uncorroborated informant of Lally's history should be the basis of judgment, and it would have been a far more circumstantial case.

Q. Why did you think the 1st Circuit denied the requests to let McDonough and DiMasi remain free pending appeal?

A. Judge Wolf is an enormously respected judge, and when he denied bail and set forth the basis for his reasoning in a 40-page opinion, it created a steep uphill challenge in the absence of full briefing, oral arguments and the Court of Appeals having even a significant, much less complete, record. This is a case that fell in the gray, rather than the black and white. With the record and fuller briefing and argument, we have a whole new opportunity to persuade the court that the conviction should be reversed. That is my mission on behalf of Mr. McDonough going forward.

Age: 65

Education: Harvard Law School (1971); University of Wisconsin (1968)

Bar admission: 1972

Professional experience: Sole practitioner, Boston (1996-present); Oteri, Weinberg & Lawson (formerly Oteri & Weinberg), Boston (1975-1996); Crane, Inker & Oteri (1972-1975)

Martin Weinberg on …

His most memorable moment at law school: "Working with Alan Dershowitz, who is now my close friend, on the defense of the Chicago Eight. Alan was deeply involved in trying to protect the lawyers who were involved in contempt hearings brought by a federal judge in Chicago."

Highlight of his legal career: "Having the privilege to address juries in over a dozen states and stand between charged citizens and their federal government."

One thing about him that might surprise other people: "I have run 10 marathons. Nine Boston and one New York. They were all slow but steady. My first was 1990, and my last was 2004."

Favorite book or film: "My wife and I read classics out loud at night. We just finished George Eliot's 'Middlemarch.' It was an absolute masterpiece."

What has kept him in the practice of law: "Every day I wake up and there are new challenges where the criminal defense lawyer alone gets to vindicate his own client's liberty rights and, as a result, is often able to literally expand the rights of others."