

Litigator of the Week: When the Feds Say ‘Uncle’ in a Fraud Case

By Colby Hamilton
August 11, 2017

It took five years for the government to decide to halt its securities fraud prosecution of international financier Benjamin Wey. But for his attorney, Haynes and Boone partner David Siegal, the problems with the feds’ case were baked-in from the start.

“We always were troubled by the face of the warrant,” Siegal said.

Earlier this week, those problems metastasized. Federal prosecutors from the Southern District of New York filed a nolle prosequi notice with U.S. District Judge Alison Nathan, alerting her that, thanks to an earlier sweeping evidence suppression order, they were no longer able to pursue their case against Wey.

It’s rare enough to see prosecutors abandon a securities fraud case. It’s even more remarkable that they would do so over evidence issues. For Siegal, who spent nine years as an assistant U.S. attorney in the SDNY before joining Haynes and Boone in 2009, the win is a combination of timing, a receptive judge and remaining dogged in the face of prosecutors’ missteps.

“Our strategy was just to firmly establish the basic unfairness of this sort of investigatory approach. From a fundamental level, grabbing somebody’s



Courtesy photo

David Siegal of Haynes and Boone.

entire life history and sifting through it for unspecified crimes is just, in my view, problematic at a gut level,” he said. “That’s what we wanted to make clear to the judge.”

The end of Wey’s journey was certainly not a foregone conclusion. By the time charges were finally brought against him in 2015, investigations by both the U.S. Securities and Exchange Commission and

the Department of Justice had been quietly ongoing for two years.

The initial raid on Wey's New York Global Group offices and personal apartment occurred in January 2012. Investigators walked away with a trove of material. On top of thousands of pages of documents, computer hard drives and employee cell phones, the authorities also captured drug prescriptions, X-rays of Wey's family members, his children's test scores and divorce papers from his first marriage.

The judge would later blast the government for executing an "essentially limitless" warrant.

Not long after the raid, the investigations "went dark for about a year," Siegal said, which led him to believe the government may have closed its files in the case. The arrest, then, was not something he or his client was expecting.

"It came as a great surprise to me at 6:30 in the morning on September 10, 2015, when my client's wife called me on my cell phone, which was sitting beside my head, to tell me that Mr. Wey had been arrested and taken into custody," he said.

Despite the shock at the charges, lingering concerns over how the government executed its warrant against Wey, what evidence it captured and how long it held on to that evidence quickly moved to the fore. Once the warrant application was handed over about month later, Siegal said they finally got a good look at the government's case theory, or lack thereof.

"What struck me was the sweeping breadth of the warrant's language and the fact that no one, certainly not me for the two or three years prior to the indictment, could discern from the face of the warrant what the investigation was about," he said.

From this kernel, he and his team built their challenge to the constitutionality of the government's search and seizure. They were aided in no small way by the U.S. Court of Appeals for the Second Circuit ruling in *U.S. v. Ganius*. Coming in between the raid and the indictment, it established a strong Fourth Amendment protection for seized digital files.

"That case provided us with a foothold for making some of our more cutting-edge arguments relating to electronic evidence, which the courts have really just begun to grapple with, the complications of those issues," Siegal said.

This was one of a number of recent decisions that Nathan relied on in her decision in favor of Wey. The carefully considered but scathing ruling found that federal agents "disregarded well-established constitutional principles that provide a bulwark against the execution of general warrants," and were guilty of, "at the least, gross negligence or recklessness as to the potential for violation of the Fourth Amendment."

With all of the evidence from the 2012 raid now suppressed, prosecutors said they had little choice but to call of their prosecution of Wey.

Going forward, prosecutors will continue to face the kinds of warrant and evidence issues raised in the Wey case, Siegal said.

"I think they're going to have to find a way to more clearly define what they're looking for and how they're going to limit their searching techniques—which is going to be a challenge for the government," he said. "It's not that easy to fix this problem."

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