

Litigators of the Week: With Prosecutors Under Scrutiny, Gibson Dunn Secures No Jail Time for NY Real Estate Developer

By Ross Todd
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Sentencing hearings rarely are good days for defense lawyers.

But last week as Joel Cohen and Mylan Denerstein of Gibson, Dunn & Crutcher sat beside their client, Rochester real estate developer Bob Morgan, a couple of things went their way.

Morgan, whom federal prosecutors had initially charged with inflating the values of residential properties to get outsized loans as part of an alleged \$500 million fraud scheme, received no jail time from U.S. District Judge Elizabeth Wolford of the Western District of New York. He received just a \$2,000 fine after pleading guilty to a single felony charge.

On top of that, the judge started singing the praises of the Gibson lawyers, our Litigators of the Week.

“You are fortunate that you have excellent, excellent attorneys representing you,” the judge told Morgan, according to a transcript of last week’s hearing. “I don’t think I have to tell you that. But they did a tremendous job in advocating for you. And, at the end of the day, I think the resolution here is a fair one.”

We previously wrote about Morgan’s case in October 2020 after Wolford granted a motion to dismiss the superseding indictment based largely on the prosecution’s discovery miscues. In the intervening year-and-a-half, Cohen and Denerstein have kept the spotlight on prosecutors’ actions in the case.

Litigation Daily: Who was your client and what was at stake?

Joel Cohen: Our client is Robert Morgan, a Rochester, New York born and bred real estate developer. Bob has built a large and respected multi-family residential housing business, Morgan Communities. Bob has lived a genuinely admirable life and is an American success story. His parents were Holocaust survivors, and



Courtesy photos

(L-R) Joel Cohen and Mylan Denerstein of Gibson, Dunn & Crutcher.

owned a fish store. A recently released felon entered the family fish market where Bob was working when he was 31 (he is 65 now) and shot him several times during the robbery, leaving him paralyzed below the waist. He persevered to build an impressive business from scratch providing housing in upstate New York. The government alleged Bob was the mastermind of a huge fraud, and he faced being sentenced to life in prison and losing everything he worked so hard to build for his family.

How did this assignment come to you and the firm?

Cohen: In May 2018, the Department of Justice, and dozens of FBI and FHFA agents raided Bob’s offices and took away millions of records, computers and phones. The media somehow was present. A week later, DOJ indicted his son, Todd, (who worked with him) and others. Bob immediately appreciated the onslaught his family and business faced and interviewed several

prominent white collar lawyers at large and boutique law firms. Bob chose the firm after hearing about our team approach to winning.

Who all was on your team and how did you divide the work?

Mylan Denerstein: Joel recruited a team of partners with prosecutorial experience. Over a dozen associates worked on the matter. Some of the key associates were **Timothy Sun, Alyssa Ogden, Lauren Myers, Nina Meyer, Bobby Denault** and **Nathan Eagan**. We played to our strengths and worked collaboratively. We prefer a flat model, where everyone's view is considered, and work flows to whomever can best perform it, regardless of seniority. With so many work streams to manage—including defending against the criminal indictments, the SEC action, several criminal and civil forfeiture actions seeking to freeze over a billion dollars in assets and forfeit over \$500 million in alleged proceeds—each member of the team was responsible for a key work stream. We had regular meetings where we drilled down on discovery issues, and it was at one of those meetings that an associate pointed out that she believed that a recording with exculpatory evidence had not previously been produced, despite the government's assurances that it had, and the associate was right, and that proved to be one of the turning points in the case.

Cohen: The team dived in and became expert in the details of real estate development, both to evaluate the evidence the government turned over in the case, and, equally importantly, to negotiate reduced pretrial property restraint orders with the U.S. Attorney's Office's Civil Division. That work was critical. The government abusively used its enormous power to tie up Mr. Morgan's assets pretrial, including by sending fact-free threat letters to lenders and investors asserting that virtually all of Bob's real estate empire "might" be subject to government seizure "some day," stifling hundreds of millions in negotiated transactions that harmed third party lenders, residents and Mr. Morgan's business. We fought this overreach, demonstrating the government's sloppy pleading and even forcing it to withdraw pretrial restraints it had improperly served on dozens of lenders purportedly on the signature of the court, which it had in fact never obtained. The team frequently joked they were becoming a real estate transactional practice group within the Gibson Dunn New York litigation department!

Tell me about the decision to seek to dismiss the superseding indictment in the case under the Speedy Trial Act.

Denerstein: The government simply failed to comply with its obligations under the Speedy Trial Act by not timely producing its discovery. The Court gave them many opportunities to correct their failures, and they repeatedly missed their chances. Eventually the court tired of their delays and ordered a date on which they had to complete discovery or face the counting down of the remainder of the 70 days allowed to the government to commence trial. Perhaps the root cause was its 2019 decision to search the Morgan offices and seize millions of records without any apparent plan to review and understand what they had taken. Their inability to manage this mass of data impelled their increasingly inaccurate statements to the court to avoid candid disclosure of the sorry state of their preparation. We regularly pressed them in emails, letters, in court, to answer where data was, why search terms were not properly used, to find the evidence, but also to meticulously build a record to obtain what almost never happens: a pretrial indictment dismissal.

We wrote about the case back in 2020 when the judge dismissed the charges without prejudice after finding the government mishandled discovery. What all has happened in the case since?

Cohen: When Judge Wolford dismissed the first indictment in October 2020, although she roundly criticized the DOJ's sloppiness, she declined to find that they acted in bad faith and thus dismissed without prejudice. DOJ took five months to "reevaluate" their options and reindicted in March 2021. They represented to the court and defense that they were finally confident they had not missed anything in discovery. Then they produced over a million additional documents never shared with the defense during the first indictment. When we pressed why, they cryptically claimed the new material was not in fact relevant but they were sharing "to be cautious." We didn't buy that, so we began to methodically review what supposedly was "new" and quickly found evidence discussing how Bob Morgan was being blamed for events he wasn't responsible for. They had not ever produced huge volumes of discoverable evidence, because they ran out of time to review it, and so simply "set it aside." Yet when they were asked about this evidence, they misleadingly asserted it had "gone missing."

Denerstein: Our team creatively devised a “motion for reconsideration” arguing that had the court known when considering the earlier motion to dismiss all that the government had withheld and hid, she would have dismissed with prejudice, barring the new indictment. Judge Wolford was at first skeptical but when she saw what our team unearthed, she ordered the government to respond. Their reply became a turning point because it was inconsistent with prior statements they had made. Judge Wolford ordered the government to produce over 6,500 internal communications, involving over a dozen prosecutors up to the senior levels of the U.S. Attorney’s executive staff. This was extraordinary. Such an extensive peek beneath the government’s internal machinations had never before been ordered. Now the tables truly were turned. We identified emails where several prosecutors earlier discussed that they were not “even close” to meeting their discovery obligations just as they told the court they were “almost completed” with them; how laptops and phones they were obligated to produce didn’t “go missing” but rather were purposely set aside and never reviewed or disclosed to create the appearance they had met the court-ordered discovery deadlines. The court ordered a two week hearing in April 2022 at which we—the defense—would call and cross examine prosecutors, their supervisors and FBI and FHFA agents about the broad range of their misrepresentations. The government tried briefly to avert the hearing by belatedly refusing to produce the witnesses on the basis of specious government executive privilege claims, but the court had none of that, and ordered that if the witnesses did not appear she would consider finding their actions evidence of bad faith.

Cohen: The new U.S. Attorney, **Trini Ross**, commendably recognized the dire circumstances and personally negotiated a global settlement. They agreed to terms that reduced their years-long claims for incarceration for Bob and his son and \$500 million in forfeiture to pleas to insignificant transactions where both were promised no jail, no supervised release, no additional forfeiture. DOJ agreed to finally acknowledge what we had argued for years, that no lenders experienced any losses. The final step was sentencing, which occurred on July 22. Judge Wolford approved all of the sentencing terms, and for first time in five years Bob and his family could breathe easily.

Why is the outcome—a felony plea with no jail time—a positive outcome for your client?

Denerstein: Consider where this started, an alleged \$500 million dollar fraud heralded by DOJ as the biggest mortgage fraud case since the financial crisis, and it ended with a fizzle. Now, four years later, the government has dismissed the indictment and virtually all the charges, and the judge determined that a fair sentence was no jail time, no supervised release, no probation and a \$2,000 fine. Bob’s plea agreement was extraordinarily unusual, allowing him the right to withdraw his plea if the court did not impose a term of no imprisonment. It was a remarkable turnaround from demanding he go to jail for basically the rest of his life.

What can other defendants take from Mr. Morgan’s experience in this case?

Cohen: Those charged with crimes have rights, including to timely receive and review the discovery the government has obtained. Sadly, sometimes prosecutors don’t fully respect those rights. We hope other counsel can use our motions and the judge’s decisions as a roadmap to raise these types of challenges to ensure the government is meeting its obligations and proceeding fairly.

What do you hope that prosecutors take from their experience here?

Denerstein: We both are former prosecutors and maintain enormous respect for their critical function. We are encouraged that the DOJ has now implemented training for all its prosecutors nationwide regarding discovery to avoid another Morgan mess.

What will you remember most about this matter?

Cohen: Bob Morgan. It has been an honor to represent him. He is a decent, hard-working, amazing individual with an incredibly inspiring life story. Throughout this ordeal, he was steadfast and confident and never complained. For me, there is no greater satisfaction than knowing that Bob can continue his life and spend time with his loving family and business pursuits.

Denerstein: This case is an important reminder about the importance of team work and constant diligence. We would not have been able to accomplish this without our great associates who left no stone unturned and were not afraid to ask the government hard questions. They were fearless. And as a result, we were able to obtain a fantastic result for our client.