Guest Column

Déjà vu All Over Again: Re-Trial After Conviction

*By Sharon L. McCarthy**

Every criminal defense attorney lives for the opportunity to try a major case. Trials give us the opportunity to step out of our day-to-day lives of client meetings, desk-work and phone calls and jump into the theater of the courtroom. After all, there's nothing like holding captive an entire courtroom as we deliver a jury address or cross-examine a government witness. Of course, trying a case is exhausting, both physically and mentally, and, particularly in the white collar context, requires a tremendous amount of preparation both before and during trial, often at the expense of other pending matters and one's personal life. Representing a client who, in most cases, faces jail time if convicted, also takes an emotional toll on the trial lawyer, who must stand next to the client in those tense moments when the jury's verdict is announced, count by painful count. Yet if offered the opportunity to try a case, particularly one touted by the government as the largest tax fraud in history, most of us won't hesitate to accept.

In May 2011, after a grueling three-month, five-defendant trial before Judge William H. Pauley III in the Southern District of New York, my partner Caroline Rule and I stood next to Denis Field, the former CEO of BDO Seidman, as the jury foreperson announced the verdict against him: guilty on all counts. Thus ended, we thought, the efforts of our law firm, Kostelanetz & Fink, to spare Denis from what was certain to be a double digit jail sentence for his participation in BDO's marketing and sale to its clients of what the jury had found to have been illegal tax shelters.[1] The government thus had scored its third major victory in tax shelter cases involving major law firms, accounting firms, and investment banks, including its trial victories against executives at both KPMG and Ernst & Young.[2]

The day after the verdict, however, Juror number 1 sent a letter to one of the Assistant U.S. Attorneys in which she was effusive in her praise for the government's efforts and gave some insight into the jury's deliberations. The juror explained that she had "fought the good fight" to convince the other jurors to convict one of the defendants on all counts against him, but she had to "throw in the towel" after the judge provided a specific legal instruction.[3] The letter suggested strongly that the juror had been unduly biased against the defendants. After further digging into her background, we also discovered that the juror had lied extensively during *voir dire* about practically every aspect of her background. Judge Pauley granted the defense's request for a hearing to further explore the juror's bias. At the

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hearing, the juror's behavior was nothing short of bizarre: she refused to appear in court and U.S. Marshals had to be sent to bring her forcibly to the courtroom; in response to questioning by defense counsel, she was combative and curt, but ultimately admitted that she had lied about her background so that the government would choose her as a juror. On June 4, 2012, Judge Pauley granted the motion for a new trial, and Denis Field was given a second chance to prove his good faith belief in the legality of the tax shelters BDO had offered to its clients.[4]

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While we were thrilled for Denis that his conviction had been set aside, the reality of the situation eventually sunk in: a re-trial in a complex tax fraud case after the client had been convicted on every count, where the client was no longer being indemnified and could not afford to pay our fees, was more than our small firm could handle. The court denied our motion to withdraw as counsel and instead appointed me as counsel under the Criminal Justice Act ("CJA"), requiring me to try what turned out to be an eight-week trial at a fraction of my normal billable rate. My request to appoint another CJA attorney, César de Castro, was granted, and we, together with a team of dedicated legal assistants, tackled the task of preparing for the re-trial.

Re-trials have been described as putting on a wet bathing suit. That's because re-trying a case is a painful process in every way. At the first trial, we worked endless hours reviewing the millions of documents produced in discovery and preparing detailed cross-examinations of the government's witnesses, including its four cooperating witnesses, all of whom had been Denis's colleagues at BDO. We put forward our client's good faith defense and held nothing back. As a result, our trial strategy was fully evident to the government. The task in preparing for a re-trial, then, is doubly difficult: trial counsel has to look for new ways to attack the government's case and its witnesses, which requires creativity and a lot of elbow grease. In this article, I will discuss some of the steps we took to create new opportunities for cross-examination and argument in the re-trial.

Motion Practice and Subpoenas

Before the first trial, there had been extensive motion practice, and the court's prior rulings remained the law of the case. We did, however, seek a judgment of acquittal on all counts of conviction from the first trial, because the court had held our Rule 29 motions in abeyance prior to granting a new trial. In the alternative, we sought severance of personal tax evasion counts against co-defendant Paul Daugerdas, who was charged with four counts of tax evasion over a nine-year period in which he earned nearly $100 million but paid only $8,000 in income tax. Both of these motions were denied.[5]

The one pre-trial motion that proved to be crucial to our strategy was an *ex parte* motion for permission to issue Rule 17(c) subpoenas for documents in the possession of BDO and two of its outside law firms. In response to subpoenas issued in the first trial, BDO and the law firms had withheld certain information, such as detailed billing records, on the ground of attorney-client privilege. We therefore were hampered in our ability to prove that Denis's good faith belief in the legality of the tax shelters was based, in part, on the involvement of numerous lawyers who provided advice to BDO over the life of the alleged conspiracy. After the first trial ended, BDO entered into a deferred prosecution agreement with the U.S. Attorney's Office for the Southern District of New York, pursuant to which it admitted to its involvement in the crimes charged in the indictment: (1) participating in a conspiracy and scheme to defraud the United States and the IRS; (2) committing tax evasion and assisting clients in committing tax evasion; and (3) making and subscribing false and fraudulent tax returns. In the statement of facts relating to the deferred prosecution agreement, BDO admitted that it "assisted high net worth U.S. citizens in evading approximately $1.3 billion in U.S. individual income taxes on over $6.5 billion in capital gains and ordinary income by participating in and implementing fraudulent tax shelter transactions."[6] Given BDO's admissions, we were granted permission to issue subpoenas seeking material designated as attorney-client privileged on the ground that the crime-fraud exception applied. The material produced to us, some of which arrived in the midst of trial, proved to be quite valuable and opened up important lines of cross-examination. For instance, at the first trial, BDO's prior General Counsel testified that Denis had forbidden him from getting involved in any of the company's tax shelter matters. On cross-examination in the re-trial, the witness re-iterated that testimony, but we impeached him with detailed billing records of outside counsel, which clearly showed that he had been involved in numerous phone calls and meetings relating to specific tax shelter matters.

Trial subpoenas also proved crucial in the re-trial. In the first trial, we had issued trial subpoenas to each of

the government's witnesses who were expected to testify against Denis Field. Among the documents requested were any statements, sworn and unsworn, by the witnesses relating to any of the allegations contained in the indictment, and all communications between the witnesses and the government relating to the charges against Denis. In the first trial, some useful material had been produced in response to those subpoenas, such as e-mails with the government concerning plea negotiations. In the re-trial, the subpoena issued to BDO's prior General Counsel was key to our defense. His attorney responded to the subpoena with exasperation because much of what the subpoena sought was, in his view Jencks Act, or Rule 3500, material, which the government was obligated to produce. One particular document, however, had not been produced to us in the government's 3500 production: the witness's deposition testimony in a civil lawsuit brought by BDO against an outside law firm. When that testimony was produced to us just four days before trial began, we learned that, several months after the first trial, the witness had testified in detail about the very same things he had testified about in the first trial and was expected to do once again in the re-trial. However, in the deposition, the witness said several things that were, in our view, exculpatory of Denis. The transcript opened up a floodgate of additional deposition transcripts that were highly relevant to Denis's good faith defense, which transcripts were not produced to us by the government. We had to subpoena each transcript from BDO.[7]

Limiting Instructions

Five defendants went to trial in 2011. At the re-trial, there were only two defendants: Paul Daugerdas, a former partner at Jenkins & Gilchrist who was alleged by the government to have been the architect of the illegal tax shelters, and Denis Field. The indictment alleged that the conspiracy involved the use of four tax shelters: (1) Short Sale; (2) Short Options Strategy (SOS); (3) Swaps; and (4) HOMER. The government also offered evidence concerning the COBRA tax shelter. BDO participated only in the Short Sale and SOS shelter transactions. There was no proof elicited at the first trial that BDO had any involvement in Swaps, HOMER or COBRA shelters. Indeed, the proof showed that BDO's Tax Opinion Committee had rejected the HOMER shelter.

At the first trial, we did not object to the admission of evidence involving Swaps or HOMER shelters, since both were charged as objects of the charged conspiracy. At the re-trial, we objected every time the government offered a document relevant to Swaps, HOMER or COBRA shelters. In addition, we periodically asked Judge Pauley to instruct the jury that the evidence being offered—whether through documents or testimony—was not to be considered against Denis Field as to any substantive count charged in the indictment. Mr. de Castro and I maintained this position throughout the trial, which proved useful in summation, when we were able to explain to the jury that significant portions of the government's case, and the testimony of 14 witnesses, were completely irrelevant to Denis Field.

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Defense Case

In the first trial, we did not put on an affirmative defense case. Rather, we used cross-examination to elicit testimony in support of Denis's good faith defense. As often happens in criminal cases, potential witnesses rarely want to cooperate with the defense. Witnesses with ties to BDO often expressed sympathy for Denis but refused to meet with us for fear of reprisal. As a result, we had very little hope that anyone would be willing to testify for Denis.

In the re-trial, however, we were able to secure the cooperation of two former BDO employees: Denis's secretaries throughout the time of the alleged conspiracy. Those witnesses were able to humanize Denis for the jury. In addition, while the government's cooperating witnesses testified that Denis Field attended every meeting and was on every call concerning the tax shelter business, these witnesses were able to provide insight into Mr. Field's daily schedule, which was packed with meetings, calls and extensive travel. Their testimony solidified the points we tried to make on cross-examination of the government's cooperating witnesses, to whom Denis, when he became CEO of BDO in January 2000, had delegated the day-to-day responsibility for BDO's tax shelter business.

Finally, the witnesses identified Mr. Field's credit card bills, which we offered into evidence. Our final witness was one of our legal assistants, who created a time-line from the credit card bills. That time-line was a powerful visual tool for us to argue that the government's witnesses had stretched the truth by placing Mr. Field at every meeting and on every

call, which would have been physically impossible given the demands of his position as CEO of a major accounting firm.

Argument

In my opening statement to the jury, I talked about the passage of time and the fact that witnesses' memories, like everyone's, fade over time. The key events in this case had taken place between 11 and 15 years before the re-trial began. Many of the chinks in the witnesses' stories upon which we were able to capitalize in the re-trial were, I argued in summation, attributable to the failure of human memory, not any venal purpose of the witnesses to hurt Denis Field. In the end, the jury, which had been incredibly attentive during the eight-week trial, believed and embraced Denis's good faith defense. On October 31, 2013, the jury gave us the best Halloween gift ever: it returned a verdict of not guilty against Denis Field on all counts in the indictment. Denis's nightmare, which had been his reality for over four years, was finally over.

ENDNOTES

* Caroline Rule, a Partner, and Usman Mohammed, who is Of Counsel at Kostelanetz & Fink, were co-counsel in the first trial. Co-counsel in the re-trial was César de Castro, a member of the CJA panel in the Southern District of New York who practices at his own firm in New York City, The Law Firm of César de Castro, P.C.

1 The indictment in *U.S. v. Daugerdas, et al.*, S3 09 Cr. 581(WHP), charged the defendants in 31 counts with the following crimes: (1) conspiracy to defraud the IRS through the design, marketing and sale of illegal tax shelters, in violation of 18 U.S.C. § 371; (2) aiding and abetting the tax evasion of various clients, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2; (3) corrupt endeavor to obstruct and impede the Internal Revenue laws, in violation of 26 U.S.C. § 7212(a) (Paul Daugerdas only); (4) person tax evasion, in violation of 26 U.S.C. § 7201 (Paul Daugerdas only); (5) mail fraud, in violation of 18 U.S.C. § 1341.

2 *3 Convicted in KPMG Tax Shelter Case,* NY Times, Dec. 17, 2008, available online at *www.nytimes.com/2008/12/18/.../18kpmg.html*. *4 Ernst & Young Employees Convicted of Tax Charges*, The Associated Press, May 8, 2009, available online at *www.dailyreportonline.com/.../4-Ernst-%26am*. The Second Circuit later reversed for insufficient evidence the convictions of two Ernst & Young defendants, Richard Shapiro and Martin Nissenbaum. *See U.S. v. Coplan*, CA-2, 2012-2 USTC ¶50,695, 703 F3d 46.

3 *U.S. v. Daugerdas*, DC-NY, 867 FSupp 445, 452 (June 4, 2012) (quoting portions of juror letter).

4 *Id*.

5 *U.S. v. Daugerdas*, DC-NY, 2013 WL 3055264 (May 22, 2013).

6 *Manhattan U.S. Attorney Announces Agreement with BDO USA LLP To Pay $50 Million To Resolve Federal Tax Fraud Investigations,* Press Release issued by the United States Attorney's Office for the Southern District of New York, June 13, 2012:

> As BDO has admitted and as alleged in the Information: Between 1997 and 2003, BDO participated in a fraud that generated at least $6.5 billion in phony tax losses for its clients, which resulted in the evasion and attempted evasion of approximately $1.3 billion in taxes. Specifically, through a group within the firm known as the "Tax Solutions Group," BDO and its co-conspirators developed, marketed, sold and implemented illegal tax shelter products targeted to wealthy clients with expected income or gains exceeding $5 million. The Information focuses on two shelters – "Short Sale" and "SOS" – which BDO and its conspirators concealed from the IRS by: (a) falsely characterizing them as "investments," (b) using false and fraudulent correspondence, legal opinion letters, consulting agreements, and other documents to mask the products and associated fees, (c) filing false tax returns on behalf of the clients, and (d) providing false information and documents to the IRS during the course of BDO's promoter penalty examination and client audits.

7 By letter dated Oct. 6, 2013, we moved to preclude the government from offering the testimony of two of its witnesses whose deposition transcripts had not been provided to us as Rule 3500 material on the ground that the government deliberately refrained from physically obtaining the transcripts in order to avoid producing them to the defense. That motion was denied on the record on Oct. 10, 2013. *U.S. v. Daugerdas*, S6 09 Cr. 518 (WHP), Trial Transcript at 5002-5005.