

## Q&A With Vinson & Elkins' Cliff Thau

*Law360, New York (May 24, 2013, 1:44 PM ET)* -- Clifford Thau is the managing partner of Vinson & Elkins LLP's New York office. He also serves on the firm's management committee. His commercial litigation practice includes representing issuers, underwriters, officers, directors and accounting firms in securities class actions. He also represents securities and private equity firms and senior management in federal and state regulatory proceedings and audit committees in internal investigations and SEC investigations into allegations of accounting irregularities. Thau has represented media and real estate corporations in commercial litigation and accounting firms in malpractice actions, bankruptcy court proceedings and SEC investigations.

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

A: My most challenging case was the representation of The Shaw Group, a major construction firm headquartered in Baton Rouge, La., in a multiyear Securities and Exchange Commission investigation, the disclosure of which led to the filing of a securities class action in district court in New Orleans alleging securities fraud. The class action plaintiffs alleged that Shaw engaged in a multiyear scheme to misrepresent our client's true financial condition and to inflate its stock price and also alleged that some of Shaw's officers had engaged in insider trading.

We obtained two important rulings in the securities class action. First, we convinced the district court while plaintiff's counsel was conducting its "investigation" before filing an amended complaint, to restrain plaintiffs' counsel from contacting or requesting documents from any current employee, directed plaintiffs' counsel to immediately return to Shaw documents it had obtained and precluded plaintiffs' counsel from discussing any privileged matters with Shaw's former employees.

Second, after the district judge denied our motion to dismiss the complaint, we were able to convince her to grant our motion to certify the denial of the motion for immediate interlocutory appeal to the Fifth Circuit.

We won the case on appeal in the Fifth Circuit. In reversing the district court's denial of our motion and dismissing the case, the circuit court provided guidance on the weight that should be given to allegations attributed to confidential witnesses and the analysis required of sales of stock by insider

defendants alleged to be a basis for inferring scienter. Regarding confidential witnesses, the court held that courts must discount allegations from confidential sources and that such witnesses afford no basis for drawing the plausible competing inferences required by the Supreme Court's decision in *Tellabs*.

Regarding the insider sales allegations, the circuit court emphasized that both culpable and nonculpable explanations for stock sales must be considered. Where the identified sales were not out of line with the insider's past actions or timing, no inference of scienter follows.

I also worked with my colleagues at Vinson & Elkins to successfully represent Shaw in the related three and one-half year inquiry by the SEC into Shaw's accounting for two significant acquisitions and subsequent accounting for contracts acquired through those acquisitions. During that investigation, we represented several former and current Shaw executives and employees in many days of testimony. In addition, we submitted memoranda to the SEC explaining Shaw's accounting and responding to the SEC's concerns. We were very satisfied when we heard from the SEC staff that it would recommend no enforcement action against Shaw or any member of its management.

In securities litigation, the successful representation of a client simultaneously in a SEC investigation and securities class action is among the most challenging and rewarding aspects of the practice.

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

A: While many cases should and need to be adjudicated on the merits in support of a client's principles and to protect important business interests and personal reputations, there are certain commercial disputes that would benefit from early judicial intervention. If I were a judge, I would require a conference of counsel with mandatory attendance by their clients in most commercial cases within three or four months after an answer is filed. I think conferences attended by counsel and clients would result in settlement in many cases and avoid the potential for disruption of business operations.

I also suggest a modest reform of law school education to require all students to take a class in public speaking. Most law schools require moot court and greatly encourage working in clinics, both of which offer opportunities to speak in public. The ability to organize one's thoughts as an attorney and to speak persuasively in small or large groups is a critical skill.

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

A: An issue of great significance in defending clients alleged to have violated the federal securities laws is the aggressive enforcement of insider trading by the Department of Justice. There is an emerging trend in bringing criminal prosecutions where enforcement of these laws had in the past principally been the role of the SEC. This trend makes it even more important for firms in the financial services and other sectors to be increasingly vigilant in implementing rigorous policies, requiring periodic training and strictly enforcing their anti-insider trading policies.

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

A: I have been extremely fortunate in my career to have worked with legal giants: as a young lawyer for Milton Gould, then later with Howard Squadron and most recently with Harry Reasoner. But the lawyer who has had the greatest influence on me has been my father, Paul Thau. My dad worked most of his career in a storefront office in Williamsburg, Brooklyn (long before the hipsters moved in), and handled many kinds of matters but mostly personal injury cases, frequently for families of modest means. I learned from him that to be a successful lawyer you have to care greatly about your clients, maintain your integrity and be exceptionally well prepared. I also inherited from him a great pride in being a lawyer, which I have tried to pass along to the younger lawyers I work with today.

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

A: Be careful and know the rules!

When I was a young associate in the 1980s, I drafted a brief in an important appeal but did not take the time to proofread it before submitting it to a senior partner. One argument related to "excited utterances," an exception to the hearsay rule. My secretary typed utterances as "uteruses" and when I was called into the senior partner's office after he read my draft, he bellowed "excited uteruses, excited uteruses, what are you writing about here?" I was incredibly embarrassed and vowed to always carefully proofread my work from that day forward.

While still a young lawyer at the same firm, I failed to carefully read CPLR 3212 before filing a summary judgment motion and had the clerk of the court bounce my motion papers for failing to attach "a copy of the pleadings" in the case as the rule specifically requires. I learned from that painful experience that you may not know all of the substantive law in your practice areas, but you had better know the applicable procedure and governing rules in all of your cases.

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