

Case: Disney

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Participants:

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Williams: So we're here with Norman Monhait from Rosenthal, Monhait. Norman, you worked with the Milberg firm as their Delaware counsel. Tell me how you came to be involved, you personally, in the Disney case?

Monhait: Sure. The Disney case had a long history before trial, as you know. I am confident I was involved in some ways prior to the trial. Joe Rosenthal was the principal attorney in our office working on it. I don't have any specific memory of doing much with the case before the trial. But shortly before the trial, I don't know at this point whether it was two weeks or a month or something like that. But Joe asked me if I could go to Georgetown for the start of the trial, help get things started and then asked to be excused. He had some reason, I don't recall, that he couldn't be there. So I went down to Georgetown.

Williams: And your thought was that you would ask the judge, which was fairly common at the time, that once the trial got rolling, that you'd ask to be excused, that you didn't have to be there every day.

Monhait: Right. And also Seth Rigrodsky was part of the Milberg team and he's a Delaware admitted attorney. So there was less need for us to be there. [00:02:00] And I went down a few days ahead of time and I immersed myself in providing whatever assistance I could in trial preparation. Milberg had rented a house in Georgetown which they converted into office space and we were sitting around a table in a conference room that he created one afternoon talking about some trial issues. And the conversation turned to preparing for cross examination of the witnesses that the defense would present. And I asked a question about preparing for cross-examination. It quickly became apparent that not much formal work had been done in preparing cross-examination. People had thought about it but really hadn't started work on outlines and things like that. xxx And the conversation turned to how we would accomplish that because at that point we were a day or two before the trial was to start. Now the trial was to start with some of our witnesses so it wasn't an immediate issue, but it was fairly, gonna come on us fairly

quickly. And at some point in that conversation Steve Schulman looked at me and said Norm, you've done some trial work. Can you take some witnesses? And I said, well, if someone can give me some help because I'm a little bit behind the eight ball here, you know, give me deposition transcripts and at least a pack of documents to start from and I'll be glad to do that. And that's how I got involved. And I ultimately wound up doing the cross examinations on Roy Disney, Reveta Bowers and Robert Stern.

Williams: And I say this without any puffery on our side of the V, we were happy that you didn't have more witnesses because you did such a wonderful job with them and were such an experienced trial lawyer. So Norman, now to get involved in a substantive role as opposed to a local counsel role, what was your impression of the case? How high a mountain was it that the plaintiffs had to climb, or how low a mountain was it?

Monhait: Well I think at least Joe and I always regarded it as a difficult challenge. The case as we looked at it at that time would require proving that the board had not made an informed business judgment particularly on the fault termination issue. And there was substantial evidence to support that. [00:04:20] But we also recognized that we would have the bad faith hill was a steep one to climb. So we saw it as a very difficult challenge, Joe and I did. I think the Milberg folks were more optimistic than we were about that prospect.

Williams: Did you draw a distinction in your mind between the sort of the two halves of the case, first the going in or the hiring of Ovitz and the [00:04:42] going out or the termination?

Monhait: Yes. Personally, as I thought about the case and the more I got involved in it, I thought the challenge to the hiring of the contract that was negotiated at the time Mr. Ovitz was hired, was a much more difficult aspect of the case than the termination issue. And we had some conversations about that and the Milberg team felt very strongly that they couldn't successfully challenge the termination without maintaining the challenge to the hiring and the contract negotiation.

Williams: So you were assigned, it was Reveta Bowers, Stern, and who was the--

Monhait: Roy Disney

Williams: Roy Disney. So tell us about each of them. Reveta Bowers, now she was a school teacher. She may have had a more elevated position but I think she originally had been a school teacher, a sympathetic figure. What do you do to prepare to cross a school teacher in a court like the Court of Chancery?

Monhait: Well, for any witness, particularly in the circumstances that I found myself, you have to start at looking of the transcript of the deposition that had been taken of that witness. You have to look at documents that were already marked at their deposition and what other documents might be available. So that's basic to any witness. With someone like Ms. Bowers, she was, as I recall, the head of the school that Mr. Eisner's children attended. [00:06:09] She was not someone who was steeped in corporate finance or governance issues. And you have to handle her with some sympathy and some delicacy, and you certainly don't want to try to portray her as someone who is being mean or anything like that. You simply want to try to demonstrate that she did not have a good grasp on what her responsibilities were and wasn't really given enough information to do the job that's expected of a director.

Williams: And Roy Disney as I recall was sort of the spitting image of Walt Disney. It was almost as if he were Walt Disney sitting up there. What do you recall of your cross of Roy Disney?

Monhait: What I remember most about Roy Disney is that he was a true gentleman, an old school gentleman. He was someone who at that time was at odds with Mr. Eisner and the rest of the board. I believe he had some litigation going against them at the time and was threatening a proxy contest. So that was... there was some tension between him and the other defendants, I suspect, and we sought to exploit that. But of course he wanted to make it clear that he felt he had done his job in connection with Mr. Ovitz's hiring and termination. [00:07:32] One of the things that I distinctly remember about Mr. Disney is that when his testimony was completed, he went around the courtroom and shook hands with virtually everybody; the court clerk, the court reporter, me, I think I'm one of the first people he approached. He was a real gracious man.

Williams: And so you were there for most of the trial before Christmas, correct? You stayed and participated?

Monhait: My memory is sometime into November.

Williams: Ok. And you were there obviously for the Ovitz and Eisner testimony. Ovitz was the first witness that we called. Tell me your impression of watching Ovitz testify.

Monhait: That was a remarkable experience. My overwhelming impression of Michael Ovitz was that this was a classical entrepreneurial personality and anyone who thought that this man could function in the bureaucratic environment, a large corporation, necessarily had made a serious misjudgement.

Williams: And when you saw Eisner testify did you form an impression?

Monhait: Larger than life person, clearly someone very self-assured, a person who liked to be the dominant figure in the room.

Williams: Yeah my recollection is after I had witnessed is after I had witnessed the two men testify, you know, it was one thing that I was completely sure of which was the two could not work together, that made perfect sense to me. So as the trial progressed Norman and you see the witnesses come and go, what was your attitude and the attitude of the plaintiffs' team? Did you think it was going well? Was it an upbeat attitude?

Monhait: Well, I think different people had different attitudes. As I said, at the start of the trial our objective was to demonstrate that the board had not made an informed business judgement with respect to the non-fault termination of Michael Ovitz. And we felt we were proving that as the case went along, but it was increasingly becoming clear that the defense... and I should step back and say up until the point of trial, the defense had been, the board had made an informed business judgment with respect to the non-fault termination. It became increasingly clear as the trial progressed that the defense was going to be that the board did not have to have any role in making that decision, that it was one that Mr. Eisner could make on his own, and that was a much more substantial defense. And I was concerned about the development of that defense.

Williams: And tell us about the dynamics of the plaintiffs' team? There were some very interesting dynamics on the defense side, as you can imagine, we had Roy Disney and Stanley Gold who were in the dispute with Eisner and then you had the outside directors. On the plaintiffs' side of the v. did Steve Schulman run it sort of from the top with a firm hand or was it more of a democratic process among the plaintiffs' lawyers?

Monhait: There was free and open discussion, and certainly disagreement on any number of subjects as one might imagine, and how do you cross-examine this witness, do we use that document, do we try this approach? So no discussion. Let me rephrase it. Anything was a fair game for discussion but Steve was ultimately in charge of the team and made decisions about who would do what and what approaches would be in various circumstances. I don't recall that he gave me any particular instruction about the witnesses I was asked to cross examination except the thrust would be to demonstrate that the board hadn't been adequately informed and hadn't really participated in the decision to grant Michael Ovitz a non-fault termination.

Williams: And it was, I believe, Steve's first major trial.

Monhait: [00:11:31] I recall his saying that he had not previously tried a case and I was surprised to hear that.

Williams: And roughly how long after the trial did the Milberg legal problems arise?

Monhait: Well I think they became public in early 2006. That's the best to my memory. Around the time that the appeal was argued or maybe shortly thereafter. And one of the things I thought about as I looked back on the trial is this: Steve had an office on the second floor of the house that had been rented, and there were any number of evenings when he retreated into that office and closed that door with the explanation that he had to participate in a discussion with other people at the New York office about firm issues. He was on the management committee, it didn't strike me as that remarkable that he would participate in discussions of that nature. But the frequency of them and the length of them was a bit surprising because usually when someone is involved in an intense trial, he's relieved of those responsibilities. I didn't think that much of it at the time. Looking back on it I suspect, without knowing, that they were probably talking about this problem.

Williams: He could well have been distracted.

Monhait: Yes

Williams: Well on the defense side we certainly, at least I felt much more vulnerable on the termination issues and the lack of a board process in the traditional sense. What was your impression of the Sandy Litvack testimony about his consideration of the for-cause issue? He testified, generally, I would say that he looked at whether you could terminate Ovitz for cause. He called up an attorney whose name is escaping me, from... I'll think of the name, but a prominent attorney in a New York firm and asked him for some advice on whether there was grounds for a for-cause termination and testified that he was told there was not such advice. What was your impression of that testimony?

Monhait: [00:13:45] My impression at the time was that very little meaningful consideration was given to the fault non-fault issue. I felt that they had determined understandably that the problem with Mr. Ovitz had to be resolved by having him removed from the company, and they simply wanted it to be dealt with as quickly and simply as possible. There's certainly no documentary support for the contention that Mr. Litvack did any real research on the issue or talked with anyone. It is possible that he had a phone conversation. It's very thin evidence to support a determination that resulted in a liability of an excess of a 100 million dollars for the corporation.

Williams: Yeah. I always felt that the case would have been radically different had there been a board meeting to approve the termination, had there been some documented or at least preserved in some way legal advice to the board and a decision had been made. I thought that that would have really obviated the need for a trial. But we didn't have such a meeting. There were one on one conversations between Michael Eisner as the board chair and different directors regarding this issue. Did you guys ever consider whether to jettison the outside directors and simply go after Eisner and Litvack on a bad faith theory?

Monhait: I don't recall discussion to that effect. I think as the case evolved they necessarily became the focus of the plaintiffs' attacks, but the rest of the directors were kept certainly in the scope of the case.

Williams: Tell us about the media. Had you ever been involved in a case with this type of media attention?

Monhait: Absolutely not.

Williams: And so you must have had the same experience we did particularly in the early stages of the trial where you would arrive at the courthouse and it was as if you were at least a B-level star because there were a dozen photographers or so snapping pictures. Did you guys talk to the press during the trial? On the defense side some people did and some people didn't.

Monhait: I think Steve did from time to time, I did not. But I was always amused by one particular incident. I got tired of running the media gauntlet on the way to the courthouse, so one day after, as the lunch recess was winding down, I decided I would leave earlier than the rest of the team and I figured I would be ignored. And as I approached the courthouse one photographer jumped out from under this awning they had there to protect them from the elements. And he sort of got in my face and took maybe ten or twelve pictures of me walking into the courthouse without saying a word. And I just wondered to myself about the conversation that would occur that evening between this photographer and his editor, which would be something like who is this guy? And the photographer would say, I don't know, just some guy with a briefcase.

Williams: And a suit on.

Monhait: Yeah

Williams: Yeah it was really hilarious. Dominick Dunne was in our hotel. And so he would be sitting and sort of pretending to just be eating but in fact he would be trying to listen to

whatever conversation was happening next door. So during the trial, this long trial, good camaraderie among the plaintiffs' team. You were somehow braving the difficult conditions of being in a luxury hotel in Rehoboth Beach?

Monhait: [00:17:12] We all got along well. You have to have some fun, you have to blow off some steam. I heard about some incidents--I did not personally participate in them--where people went jumped in the ocean at midnight and stuff like that on some warmer evenings. But certainly we enjoyed meals together and laughed a lot while we were working.

Williams: There was a common room at your hotel, I seem to recall the backdrop as sort of red, that was like a big room. It wasn't the hotel lobby but it was a room that you guys often... but we walked by. We took walks in the evening and sometimes we'd look in and see Seth and others lounging around. And you seemed to be having a good time. As the defendants did. It was one of the dirty secrets of the Disney trial, that actually being down in Georgetown for a couple of months was not hard duty, it was an enjoyable experience. So as the trial came to a conclusion, Norman, how did you handicap the odds?

Monhait: Oh personally I thought it was a longshot for the plaintiffs to be successful. Again, I think the Milberg team was more optimistic than I was.

Williams: Seth told us that they had actually planned a victory celebration, which I think had it planned, I guess somehow we knew when the decision was coming out. I was surprised to hear that. From the defense standpoint we certainly didn't consider it in the win column but we didn't feel bad about the way things went. When you got the opinion what was your reaction to it?

Monhait: I was certainly disappointed, we put a lot of effort into it. As I said earlier, I did not think there was any substantial evidence that meaningful consideration had been given to the fault versus non-fault termination issue. Whether that arises to the level of bad faith which is necessary to substantiate a claim I suppose is debatable. But I think something that disappointed me about it the most was the amount of credit that was given to the testimony that was presented in support of the assertion that that had been seriously considered.

Williams: The Litvack testimony?

Monhait: Yeah. Back in Eisner testimony that they had given some evaluation to the fault, non-fault issue.

Williams: So you got the opinion and now you folks are gathering on appeal. As the then senior lawyer on the team from Delaware, were you given sort of a particular role in terms of advising about the appeal, arguments to be made, not made, etc?

Monhait: I don't recall that I was. I do recall reviewing drafts, a number of drafts of briefs and offering comments on them, a number of which were accepted and some of which were not.

Williams: And so then we have the argument. I'm sure you attended the argument?

Monhait: I did.

Williams: And tell me your recollections of the argument if you have any.

Monhait: My one recollection is that I came away from it concluding that the Supreme Court was not sympathetic to the issues that we had raised. And of course it's different at the appellate level because you having findings of fact to deal with. [00:20:27] There had been a long trial and the Chancellor's opinion certainly evidenced a close consideration of the record that had been developed before him, and the Supreme Court was certainly going to show that considerable deference.

Williams: In your mind, Norman, were the issues in Disney worth all of the attention? This became a mega case, you know, trial of the decade. Was it that important a case?

Monhait: It was significant simply because of the star power, some of the personalities involved. I believe that it did have some long term influence on corporate governance. There was a lot written at the time about the inadequate corporate governance practices at Disney that were exposed publicly through the trial. And I read any number of articles later about how boards were reforming their own governance practices so they would not appear to be doing what had happened at Disney. And my impression was that--and remains--that the case had some considerable influence on board practices around the country. And to that extent I think it was a significant effort.

Williams: It was in some ways sort of chapter two to the book that Van Gorkom had started about giving the courts the ability to speak out about best practices. And we kind of knew this was coming. We knew the best scenario for us was we win, but that there would be lots of criticism in the opinion of the way that the board had conducted itself. In fact, there was. I thought the Chancellor was quite, you know, quite clear in saying this is not a blueprint to follow, it's just that these folks didn't act in bad faith. And ultimately that was



the key to the case. You had an interaction with the Chancellor about his having watched the appellate argument.

Monhait: Yes, it's a great illustration of the wonderful sense of humor that Bill Chandler has. The appeal was argued in late January, and a few weeks later on President's Day weekend we were both guests at a destination wedding on Paradise Island in the Bahamas. And at a pre-wedding party we were standing on the beach having a pleasant conversation. And in the course of that, I said, Chancellor did you happen to watch the argument of appeal? And he said, yes, I did. It was rather like watching my own autopsy, I didn't like it very much.

Williams: Must be difficult. Norman, what other recollections can you share with us of the trial? I want to make sure we get whatever you have to give us.

Monhait: I'll give you one other story quickly that always amused me. It was after one of the cross examinations I did. Actually it was during the cross examination that I noticed that retired Justice Henry Horsey was in the courtroom seated on the plaintiff side of the courtroom which I thought was a bit of surprise. And after the cross examination was done, I went over and said, hi Justice Horsey, how are you and inquired why he was there. And of course in that short conversation he said something like what these guys did was terrible, you really got to get them.

Williams: And there was some element of that in Justice Hartnett's opinion when he wrote his. I can't remember now if it's concurring or dissenting, but it was a separate opinion that he wrote on one of the appeals, where he really sort of had the sense that there's something wrong here. And I think that motivated Chief Justice Veasey, told us, that it motivated their Supreme Court's expressed direction that the plaintiff should be able to re-plead and try again because they were concerned that there was something there as well. So anyway, Norman, I greatly appreciate it, as always.

Monhait: Thank you very much.

[00:24:29 end of video]