

## Balancing the system for the defense

### Retired government agents help a Portland law firm match the expertise of federal prosecutors.

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The witness wasn't home, so investigator Peter Vinton waited. For the whole weekend, he kept an eye on the Pennsylvania home, waiting for her.

She came home, Vinton scored an interview on the run and what he learned added another piece in the defense case built by lawyers at the Portland firm of McCloskey, Mina & Cunniff. What the investigator found discredited testimony from a key government witness, and the attorneys used it and other findings to dissuade the U.S. attorney's office from charging their client, a Maine company, with health-care fraud.

Vinton's unusual determination didn't surprise attorney Jay McCloskey. McCloskey, the former U.S. attorney for Maine, had worked with Vinton for years when he was a badge-carrying Drug Enforcement Administration agent. The two worked on some of the biggest marijuana smuggling cases on Maine's coast in the 1980s, McCloskey said, and Vinton once spent an entire summer doggedly checking every single phone booth from Cape Cod to Boston while investigating an organized crime figure.

"This particular former drug agent was able, through his persistence and tenacity, to interview the witness that got us some information that I think ultimately had an influence on the prosecutors," said McCloskey. "We knew if there's any rock to be turned over, he'll turn it over."

Vinton is one of a dozen retired government agents who are affiliated consultants working with McCloskey, Mina & Cunniff. The whole firm, from the founding partners through the consultant program, is set up in a mirror image of the federal government's prosecution team. The idea is to match the U.S. Department of Justice, prosecutor with former prosecutor, agent with retired agent, to defend white-collar cases.

McCloskey was an assistant U.S. attorney for Maine for 14 years and was the U.S. attorney in the state for eight years, leaving the office in 2001. Thimi Mina was a former assistant U.S. attorney in Washington, D.C., and Maine from 1985 to 1995. And the last partner, Michael Cunniff, was a special agent for the Department of Justice from 1972 to 1999, serving as the supervising DEA officer in Maine before he left the government.

The retired agents come from various branches of government, from Health and Human Services to the Internal Revenue Service, FBI and Customs. If a client is being investigated for health-care fraud, the retired HHS agent's expertise will be tapped into. Ditto for tax cases and the IRS alumni, and so on. The agents all worked in Maine and are based here or in a nearby state, and in some cases were in charge of the entire region for their respective agency. While retired prosecutors will often become defense attorneys and former agents sometimes become private consultants, the extent and focus of McCloskey, Mina & Cunniff's strategy appear to be unique in Maine.

The group has been in business only since 2003, but its members' backgrounds and the extensive consultant network have brought the boutique firm recognition on the legal scene, with numerous other firms referring business to it thanks to its specialization, McCloskey said. And the combination of attorneys and former agents who know the government's systems and strategies has proven "interesting" for prosecutors, said U.S. Attorney Paula Silsby.

"Hell has no fury like a former prosecutor when it comes to doing defense work," Silsby joked. "It's been interesting. They're clearly, clearly very competent lawyers and they're long-term friends - and they are now advocates that are on the other side from this office. They know the office, they've worked with people in the office, they know what they're doing, they take it very, very seriously, and they're very, very strong advocates."

Being able to counterinvestigate a government investigation as early as possible is crucial, said McCloskey. The resources the government will bring to investigate a business are enormous, he said, increasingly with both civil and criminal aspects explored in a case with agents from several agencies. A government investigation could last three years, producing between 50,000 and 100,000 documents and 100 or more witnesses.

"If you start once your client has been arrested, you have no chance of doing anything other than working out a deal where your client pleads guilty," said McCloskey. "It's like an implacable force."

The consultants, teamed with the attorneys whom they knew as prosecutors, help balance the system, said McCloskey. That's attractive to the consultants who want to see the entire judicial system working, he suggested.

Jim Osterrieder talked to McCloskey about working as a consultant even before he retired last year as the supervisory FBI agent for Maine. When he did retire, they talked again and Osterrieder joined as a consultant.

"I saw that they really cared about leveling the playing field. Having been a part of the federal prosecutorial team, I saw how overwhelming it can be," said Osterrieder.

"There are a lot of resources there and they do a great job. The U.S. attorney's office wields a lot of power and (have) discretion of what power is brought. A lot of times it's a regulatory issue that is really in that gray area and charges may be brought, rightly so," said Osterrieder. "But being in the system, I kind of saw that a little better defense work possibly could have assisted the defendants a little bit better.

"I just felt there was a need out there to enhance the work being done on the defense side - I have no qualms about that."

Providing some legal resistance to the government has become more important as the Department of Justice increasingly investigates what used to be regulatory infractions as criminal matters, said Mina.

"The law enforcers are changing the way they're doing business. Far more things are being called fraud; it's hard to stay abreast of pitfalls," he said. "We're seeing far more inadvertent violations which are ripening into full-blown charges."

Under the Clinton and Bush administrations, the Department of Justice has given greater attention to criminal investigations in the business world, said Mina. Government prosecutors are also using all the tools at their disposal to investigate the criminal cases, including electronic surveillance, search warrants and certain procedural rules that keep a government witness's testimony secret until just before a trial starts, said Mina.

"All we really want is a level playing field," said Mina. "We know, having been on the other side, how to combat this, to the extent it can be combated."

Cunniff said the government was pushing the envelope with regards to what rights businesses had in the United States, and that firms like his were helping to define boundaries.

"Truly, there is a constitutional frontier that we operate in," he said.

And while some former colleagues joke that the attorneys and retired agents have "gone over to the dark side," Cunniff said he and his colleagues have a different take.

"In actuality, what we're doing is defending the Constitution," he said.

Silsby said there is a reason that the government brings so many resources to bear on an investigation - prosecutors bear the burden of proof.

"You have to know not just what your case is about, but you have to be able, at the time you file charges, (to have) a good-faith belief that you're going to be able to prove it beyond a reasonable doubt," said Silsby. "The resources are designed to meet that burden of proof."

As to the idea of pushing criminal investigations too far into the business world, Silsby said the government is merely looking for fraud where the money is.

"I don't think anybody can argue that the approach and the initiative that the Department of Justice has taken wasn't much needed. All we have to do is look at Enron," said Silsby. "Enron was just the tip of the iceberg."

Players on both sides, prosecution and defense, said they appreciated the work their counterparts do. The system needs both sides to work, a reality sometimes lost on the public.

"In terms of having bright, competent counsel on the other side, it always is a benefit," said Silsby. "It makes you check and recheck and rethink and re-examine your position - as you hope they will do with respect to their position. You can sort of really make sure you know what the issues are, as opposed to wasting a lot of time with irrelevancies and posturing."

The same goes for agents who find retired colleagues - in many cases former bosses - investigating the same witnesses for the defense, said Osterrieder.

"Nobody has any heartburn with it, because they all know what the system is and how it works," he said. "As long as they do the best job they can and present their cases to the U.S. attorney's office, they don't care who's on the other side. At least they shouldn't . . ."

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