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## Craftsman of a Good Fight Builds Backdating Defense

By Craig Anderson  
Daily Journal Staff Writer

PALO ALTO — Growing up on Long Island, Richard Marmaro enjoyed debating his friends about the merits of New York's two professional football teams, the Giants and the Jets.

The Giants, a team with decades of history, were favored by most of the boys in his neighborhood. Marmaro, though, was a fan of the upstart New York Jets and their celebrity quarterback, Joe Namath, and he loved to argue the merits of his favorite team.

"Mine was the minority position," Marmaro recalled recently during an interview in the Palo Alto office of Skadden, Arps, Slate, Meagher & Flom. "Maybe that's where I got my bent to fight the establishment."

Marmaro, 56, has made his reputation as a white-collar defense attorney for taking on big battles against the government on behalf of executives accused of fraud by federal prosecutors or the Securities and Exchange Commission.

And he has won more than his share, including two recent high-profile victories on behalf of a former chief executive officer of Gateway Inc. and a board member of Fidelity National Financial Inc.

All of that is preparation for Marmaro as he wages his highest-profile legal battle: the defense of Gregory Reyes, the former chief executive officer of Brocade Communications Systems Inc., on criminal and SEC charges related to the backdating of employee stock options.

The Reyes case was the first criminal case filed by the U.S. Department of Justice related to backdating. And while defendants in a few subsequent cases already have reached plea agreements, Reyes — and Marmaro — are battling the criminal and SEC cases hard.

Marmaro filed a motion in February asking that most of the counts in the SEC complaint be dismissed. He reasoned that investors did not care then, and do not care now, about the accounting costs of employee stock options because those grants did not affect Brocade's bottom line.

Prosecutors and defense attorneys involved in stock-options backdating cases and inves-



ROBERT LEVINS / Daily Journal

Richard Marmaro has a reputation as a fighter, and it's growing as his defense takes shape for former Brocade Chief Executive Officer Gregory Reyes, who was the first to be criminally charged over stock-options backdating.

tigations are keeping a close watch on the fate of Marmaro's motion, which calls the SEC complaint an "unprecedented extension of the law of securities fraud into heretofore-uncharted waters."

Marmaro, in an interview, said he has been struck by how many attorneys have asked him for a copy of the motion.

"It is fun to represent a client who is at the cutting edge of a new legal theory that we are challenging," he said. "It's a daunting task to know we are being watched by every lawyer who has a client similarly situated."

Many legal observers suspect the question of whether investors consider non-cash accounting charges to be material will be left for the jury to decide. If so, Marmaro said the U.S. attorney's case boils down to whether his client possessed the necessary criminal intent when granting options that were not accounted for properly. *U.S. v. Reyes, CR06-0556.*

"The crux of this case is whether he in-

tended to commit securities fraud," he said.

Marmaro has kept prosecutors, SEC attorneys, attorneys representing law firms and other potential witnesses busy responding to his motions and demands.

He asked U.S. District Judge Charles Breyer to toss out most of the criminal indictment, alleging that the prosecutors' legal theory was flawed. The judge denied that motion. Marmaro successfully forced law firms that served as Brocade's outside counsel and did internal investigations to turn over written records to the court. He has been blocked thus far, however, in his bid to get deposition testimony from a host of government witnesses — and their lawyers — who say they fear criminal liability.

This month, Marmaro is scheduled to depose Larry Sonsini, the prominent attorney at Wilson Sonsini Goodrich & Rosati in Palo Alto, in the SEC case.

Marmaro said he expects to call Sonsini as a witness. "I assume he will [testify]," Marmaro said. "Larry Sonsini is a critical wit-

ness to the Brocade stock-option governance practice.”

Reyes, months before he was indicted, told *BusinessWeek* that Sonsini — a Brocade board member at the time whose firm represented the company as outside counsel — recommended that he be given sweeping authority to issue stock-option grants to employees.

From the time of Reyes’ indictment last summer, Marmaro has said Reyes relied on the board of directors, including Sonsini, for the power he exercised to grant options.

Marmaro has praised Sonsini in public comments, but his questioning of Sonsini — in the deposition and in the scheduled trial — could be uncomfortable for the Silicon Valley superlawyer, whose judgment and ethics have been in question since the options backdating scandal broke.

None of Marmaro’s tactics come as any surprise to attorneys who have worked alongside him or gone up against him.

“I found Rich Marmaro to be a formidable and aggressive opponent,” said John F. Walsh III, a partner at Hill & Robbins in Denver who squared off against the defense lawyer while a prosecutor with the U.S. attorney’s office in Los Angeles.

**M**armaro and co-counsel Brad Brian, a Los Angeles-based lawyer with Munger, Tolles & Olson, worked together to win the acquittal of Thomas Spiegel, the former chief executive of Columbia Savings and Loan, on 60 counts of fraud, bribery and other charges for using company assets to purchase things for himself.

Before the Spiegel trial, Walsh said Marmaro and Brian filed a raft of motions, almost all of which were rejected. Walsh said the effort paid off later, though.

“It sensitized the judge,” Walsh said. “What they did very effectively is to set the stage and put the government on the defensive.”

After a two-month trial featuring arguments that Spiegel’s purchases were for legitimate business, and testimonials of the defendant’s love for the bank, a jury acquitted Spiegel after three hours of deliberation.

Spiegel praised Marmaro’s skills as a trial lawyer, but he was most grateful for the lawyer’s understanding of the emotional issues he was going through.

“Getting indicted is a little like a doctor saying you have cancer,” he said. “I found [Marmaro] to be thoughtful and really have great sensitivity. It’s not just sitting around having a legal discussion over facts.”

Last year, Marmaro persuaded U.S. District Judge Margaret Morrow to throw out SEC insider trading claims against another

client. Tom Talbot made \$67,000 off a stock tip he learned at a Fidelity National Financial board meeting about a possible takeover of LendingTree, of which Fidelity had a minority stake.

But the judge concluded that Talbot owed no duty to LendingTree because officials with the company discussed the possible acquisition before getting a confidentiality agreement.

Talbot said he interviewed three law firms before settling on Marmaro because of his ability to present his arguments simply and concisely. He also was impressed with the defense lawyer’s work ethic, noting that Marmaro would often call him about something he thought about at night or while driving in his car.

“He’s absolutely dedicated and devoted to his clients,” Talbot said.

Reyes, Marmaro’s high-profile current client, said he appreciates those same qualities.

“He’s brilliant, he’s principled, he has tireless energy, and he’s aggressive,” Reyes said.

Prosecutors who have dealt with Marmaro said he can be too aggressive at times, litigating every single issue. His frequent public comments attacking the government’s case, and slashing rhetoric even in pretrial briefs, can be “annoying,” said one former prosecutor.

Another former prosecutor said Marmaro’s hardball tactics work best when counterbalanced with a co-counsel who smooths out his rough edges.

“The thing about Rich is that he can be overly aggressive, too,” the attorney said.

But Reyes appreciates his advocacy, saying Marmaro — like a doctor — has given him “a diagnosis, a prognosis and a treatment plan.”

“I really believe that many of the other attorneys are more concerned with their relationship with the SEC and the Department of Justice than with their client,” Reyes said.

Marmaro said he has no “natural instinct to fight,” saying he has made a lot of deals to settle cases during the course of his career.

He has followed a familiar career path for top-flight litigators, from college in just three years, to graduating from New York University School of Law in 1975, to a couple of years as a clerk for U.S. District Judge Irving Cooper in New York.

Marmaro spent three years at civil litigation firm Hughes Hubbard & Reed, got married and in 1980 moved to California and joined the U.S. attorney’s office in Los Angeles, his home base ever since.

His goal was simple. After observing a lot of trials as a clerk, “I wanted to learn to try

cases,” Marmaro said.

Marmaro spent four years with the U.S. prosecutor, serving as assistant chief of the criminal division and making contacts he has maintained ever since. He left the office in 1984 to join Hochman Salkin & Deroy in Beverly Hills.

His mentor there was Stephen Wilson, a former federal judge whom he credits with teaching him how to persuade a client to hire him and of the critical importance of “not accepting things at face value.”

“You’ve got to look deeply into situations to find out what happened,” he said.

Marmaro, who has served as president of the Los Angeles chapter of the Federal Bar Association, established his own firm in 1998, which merged with Proskauer Rose in 2000. He joined Skadden Arps early last year, saying the size and resources of the firm made it “very difficult to say no” when they called.

“It presented a unique opportunity to work at a major international law firm with a brand name second to none,” Marmaro said.

Married in 1978, Marmaro has two sons who are attending college. His brother, Marc, is co-chair of the litigation group at Jeffer, Mangels, Butler & Marmaro in Los Angeles.

Jim Sanders, a partner with McDermott Will & Emery in Los Angeles who defends corporate executives in fraud cases, said Marmaro is able to walk the fine line of being a tough advocate while not alienating judges or juries.

“He is an aggressive guy but can get away with being aggressive because he has a way of not rubbing people the wrong way,” Sanders said.

Munger, Tolles & Olson attorney Brian, who has worked with Marmaro on a number of cases and is playing a small role assisting in the Reyes cases, praised the attorney’s tenacity and preparedness.

“He knows every document in the case,” Brian said. “He is somebody who will think outside the box.”

Because of his record of success, Marmaro is attracting more clients who want to take their cases to trial instead of settling.

“He is someone who people go to when they want to fight,” Brian said. “He’s very competitive.”

And so while other attorneys have negotiated plea agreements for clients accused of options misdating, Marmaro battles on, filing motions, speaking out about the perceived weaknesses of the government’s case, and getting ready for the trial of his career.

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