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INTERVIEW WITH STEVEN MOLO, PARTNER, SHEARMAN & STERLING, NEW YORK, NEW YORK

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Chicago trial lawyer Steven Molo recently joined the Wall Street law firm of Shearman & Sterling after 18 years at Winston & Strawn, where he was a protégé of Dan Webb.

Along with Webb and Bob Tarun he is the author of *Corporate Internal Investigations*, published in 1993 and updated twice a year since.

He is also editor and co-author of the forthcoming *Your Witness: Lessons on Cross-Examination and Life from Great Chicago Trial Lawyers.*

We interviewed Molo on January 11, 2005.

CCR: What law school did you graduate from, what year, and what have you been doing since?

MOLO: I graduated from the Universityof Illinois College of Law in 1982.

I began my career as a state prosecutor in Chicago. I was there from 1982 to 1986, when I joined Winston & Strawn.

I was an associate, then a partner at Winston & Strawn from 1986 until 2004.

Just about nine months ago, I joined Shearman and Sterling.

CCR: Why did you leave Winston & Strawn?

MOLO: Winston & Strawn is a wonderful law firm. I had nothing but great experiences there.

I was a member of our executive committee and was involved in building our litigation practice into what was, certainly by the time I left, one of the best litigation practices in the country.

But Shearman & Sterling presented a unique opportunity to join a great Wall Street law firm with a tremendous global platform.

I would also be able to help my new firm build its litigation practice similar to the way we built it at Winston & Strawn.

CCR: Shearman has a reputation of being a deal firm without much litigation. Is that an accurate reputation?

MOLO: We are a great deal firm but we also have an excellent litigation practice, which is growing.

Our firm is involved in some of the most interesting cases going on in the country today. Currently, I'm representing the former CFO of Symbol Technologies in a criminal accounting fraud case that will go to trial in the Eastern District of New York this July.

I'm also representing a substantial company in the insurance broker investigation by New York Attorney General Eliot Spitzer and the related civil suits.

I'm representing KPMG in the civil securities lawsuits that have emanated out of Shell's overstatement of its oil reserves.

I'm also representing one of the partners at a major law firm in the tax shelter investigations and related litigation.

I'm involved in a number of the mutual fund industry cases, have significant appeals pending in the 2nd and D.C. Circuits and the Illinois Supreme Court, and I'm representing Sumner Redstone in a corporate control case in Chicago.

I also have a Section 17200 case for Sears in California.

Of course, I have a great team working with me. And that's just my practice.

The firm is involved in a lot of cutting edge work.

We represent Nortel, Ford, ConEdison, Viacom, GE, and Merck in some major matters.

Jeff Factor just had a big win for Avaya. Vicky Veenker and others are doing great IP work. We have done work for most of the major investment banks and financial institutions in the country.

With the addition of Steve Hibbard in San Francisco we now have a great geographic depth – east coast, west coast, and with my addition, Midwest.

Of course, the international aspect of the firm overlays all of this. So, we have a vibrant and thriving litigation practice that is growing.

CCR: I notice on your web site that there is no specific breakout for a white-collar criminal defense practice. Is there a special group within Shearman that does that?

MOLO: As it was at Winston, there is no subgroup of litigators designated as the white-collar criminal defense practice.

However, there are an extraordinary group of former prosecutors here – people like Stuart Baskin, Tai Park, Jeremy Epstein, Fred Davis and Stephen Fishbein who all served at the U.S. Attorney's office in the Southern District of New York – Tom Martin and Steve Marzen down in Washington, who were senior officials at the Department of Justice.

And we just added Patrick Robbins to our office in San Francisco. Patrick had been the chief of the securities fraud unit at the U.S. Attorney's office in San Francisco. With everything that went on out there with the dot.com situation, that was an office that was quite active and Patrick is a terrific lawyer. We are fortunate to have him join us. So, we have quite a few people with strong white-collar experience.

CCR: You mentioned that you are representing the CFO of Symbol. Symbol was granted a deferred prosecution agreement. Isn't this an avenue for corporations to team up with federal prosecutors to get a deferred prosecution agreement and then cooperate against individuals and send individuals to jail?

MOLO: I certainly hope not.

CCR: Not about your case, but generally, there is a boom in deferred prosecutions. Why is this happening?

MOLO: Since the Holder and Thompson memos, you have seen the government seeking the cooperation of the company in order to root out whatever the problem was. Some would argue that it is more than seeking. It is actually coercing the cooperation of the company, because the government has such a heavy hammer.

Back when I started practicing law, there weren't that many prosecutions of corporations, because there wasn't much of an incentive for prosecutors to go after them.

The big bang was in prosecuting an executive for doing something wrong. You couldn't extract that big of a penalty from a company. Now with the penalties being as great asthey are, and the ancillary fallout in terms of issues like debarment and such, depending on the industry that you are in, there are real consequences for companies convicted of crimes. Companies, if they are offered an opportunity to avoid the risk of conviction, take it.

All business is about managing risk. Business people want to get the problem behind them as quickly as they can. They want to guard against the downside. And these agreements have offered an opportunity for people to do that.

CCR: The U.S. Attorney's manual says a major objective of such agreements is to "save prosecutive and judicial resources for concentration on major cases."

MOLO: Pre-trial diversion historically had been used for first-time offenders for minor crimes. The notion of t he pre-trial diversion has evolved.

Deferred prosecution is a little more sophisticated concept and it better fits the corporate situation than a pre-trial diversion agreement.

These agreements have gotten more elaborate. The first one we saw of much consequence was the deal Prudential Securities struck in 1994 or thereabouts. Since then, there have been what – at least eight or nine over the last couple of years?

CCR: Twelve by my count of the last eighteen months or so.

MOLO: Okay, twelve. In fact there was America On-Line last week. It was just announced recently.

CCR: The first shoe to drop is the deferred prosecution of the company, and the next shoe that drops is the indictments of the executives.

MOLO: Because typically, the company says – these are the people that did wrong, this is what they did. We have identified them. Which is what these agreements typically require. They require the companies to identify individuals who have engaged in wrongdoing. The government often is not going to be satisfied with a mere deferred prosecution agreement. They are going to want to make an example of people.

CCR: President Bush today appointed Michael Chertoff to be head of the Department of Homeland Security. Chertoff was head of the Criminal Division at the Justice Department when Arthur Andersen was prosecuted.

People say that when Andersen was criminally prosecuted, they rejected a deferred prosecution agreement.

They were effectively forced out of business after being found guilty at trial. The company waseffectively forced out of business. And this sent a shock through the business community. Many people in the boardrooms decided – never again.

MOLO: They said never again to what?

CCR: Never again would they go down a road of facing down a prosecutor without some kind of sure out. And deferred prosecution agreements give them the out. Do you buy into that?

MOLO: Well, it's clear, if you are a public accounting firm, you can't afford to take a conviction. General Electric, in a celebrated case, took the government to the mat. That was tried by my former partner Dan Webb.

The government charged GE with price-fixing. GE went to trial and was acquitted.

So, depending on the nature of the industry and the nature of the alleged wrongdoing, companies will take on the government. But financial institutions can't afford to take the chance. However, some companies can.

Yet, some of these deferred prosecution agreements have been struck with companies that are not in the financial services or other highly regulated industries.

CCR: Like Monsanto last week in a bribery case.

MOLO: Right. All of these cases are fact driven. We're doing jury research all the time and in all kinds of cases. We are always gauging the public sentiment toward corporations and whether or not they find them to be trustworthy. There was very serious questioning of corporate credibility post-Enron.

Corporations were receiving very high negative ratings. They are bouncing back a little bit now. We saw the government failing to get convictions in Tyco's Dennis Kozlowski case. We saw former Tyco general counsel Mark Belnick's acquittal. There was an acquittal in Adelphia. In the Cendant case, the jury hung on the case against the CEO after a 33-day deliberation. So, I'm not so sure that an overzealous prosecutor is just going to get a company to roll over every time.

At a certain point in time, the pendulum begins to swing back. And it takes a particular type of management team, a particular type of general counsel to stop and assess the facts and say – we didn't do anything wrong here. We are prepared to take this case to trial and accept the consequences if we lose.

It is not necessarily wholly irresponsible to the shareholders of the company to do so. In fact, in many respects, in the right situation, it is the responsible thing to do.

CCR: It is clear that with all of these twelve deferred prosecution agreements, there is no denying that there was corporate criminal culpability. And when a corporation cuts this kind of deal, they agree not to deny the facts as stated in the agreement – which generally lay out the criminal wrongdoing.

MOLO: Well, yes, the companies in these cases often acknowledge responsibility without admitting criminal liability or guilt. In the deferred prosecution, a criminal charge is brought. That sits out there for two years. And assuming that the company does what it is supposed to do under the agreement, then the criminal prosecution is dropped. There is never a finding of guilt. There is never an admission of guilt.

CCR: Given the proliferation of these agreements, why would any corporate counsel plead guilty to a crime again?

MOLO: The government might insist on it.

CCR: I don't see any instances of major companies in the last six months being forced to plead guilty.

MOLO: I can't off the top of my head think of any either. I have been involved in cases where a subsidiary of a company took the plea. There were situations where you were able to work it out so that the main entity might not be forced to plead guilty, but you plead out the subsidiary.

And that avoided certain collateral consequences for the organization. But the deferred prosecution is a much more attractive alternative. It is more attractive from the government's standpoint because they are getting somethinghere. Under a plea agreement, they could require cooperation, and the company would cooperate, but it is not quite the same as having a deferred prosecution with the sword of Damocles hanging over your head.

CCR: You could get it through probation.

MOLO: You could get it through probation, but it is not quite the same.

Having this hammer is much more effective from the government's standpoint. And from the company's standpoint, it is much more attractive, because it ends up never having been convicted. It will be interesting to see if any of these companies end up at odds with the government over whether or not they fulfilled their obligations.

And if they didn't, will the government say – we are not going to dismiss it, we are going to go forward with thecase?

CCR: Do you think it puts the individual executives at an unfair disadvantage – to be facing both the government prosecutors and the corporate defense attorneys working together against the individual?

MOLO: Yes. The company is scrambling to save its neck and to prevent a criminal prosecution and conviction.

If certain individuals need to be sacrificed along the way, depending on the corporate culture, that is going to be the way the chips fall. The board is under tremendous pressure now.

As we saw with the WorldCom settlements last week, the potential financial penalty to directors is very real. Directors are now faced with digging into their own pockets to write checks. Believe me, that is going to motivate people to take action, regardless of the e ffect on any individual executive or employee.

I have seen situations where companies have admirably stuck by people where they believe that they have not done anything wrong. They have refused to fire them immediately or put them on administrative leave. But now there is a lot of pressure on directors to do what the government is going to ask them do.

CCR: The other situation is what we are seeing in HealthSouth. Bob Bennet represents HealthSouth. We interviewed the U.S. Attorney in that case, Alice Martin. And she told us about her dealings with Bob Bennett. "At our first meeting, Mr. Bennett came in and said – HealthSouth wanted to waive its privileges," Martin said. "He said – we want to cooperate, and we want to do whatever we can to help you determine who, what, when and why this fraud occurred. Here are my telephone numbers, including my home number, and you call me directly, because I want to make sure whatever you need gets done."

The result? More than twelve executives have plead guilty. And the company hasn't been charged. It's like de facto non-prosecution of the company.

MOLO: It all emanates out of the same mindset that has been launched by the Holder and Thompson memos. The Thompson memo says – we expect you to cooperate. And we deem cooperation not just saying yes, but to produce people, to waive privileges and do whatever we ask you to do.

That's a helluva string that they can pull for a long time before they even have to make the indictment decision. Maybe they will or won't prosecute HealthSouth. Maybe they will see what happens with the prosecution of the CEO.

CCR: How is it different practicing in New York compared to Chicago?

MOLO: My practice pretty much has been all over the United States for some period of years. It is not really that different for me. I still handle cases all over the United States. The quick answer is that it is not different.

Many lawyers from Chicago will tell you that they are more inclined to take a case to trial than some of their counterparts in other parts of the country. I don't know whether that is true or not. But some people take that view. I know I enjoy being in the courtroom. I intend to continue to spend a lot of time there.

CCR: Is that real – more cases are forced to trial in the Midwest because of lawyer defiance?

MOLO: I wouldn't call it defiance. The American Lawyer magazine did a story a couple of years ago suggesting that more cases do get tried by Midwestern firms than some of the New York firms. I think clients benefit by having a lawyer who is sensible, but can take a case to trial if that is what is required.

CCR: Physically being in New York instead of Chicago doesn't affect your practice?

MOLO: No. And I still practice in Chicago. I have a number of significant matters there right now. I amin the middle of handling a yield burning case for UBS down in the Illinois Supreme Court. I'll be there representing Sumner Redstone in a shareholder issue in Cook County tomorrow.

Obviously, New York being the center of the financial world, there is more going on here than anyplace else. And certainly Attorney General Spitzer has made it even more interesting.

CCR: On Martha Stewart, what's your read?

MOLO: It is fair to say that her status in the community made her a more ripe target for prosecution than maybe somebody else might have been. That being said, the jury convicted her.

CCR: Eliot Spitzer. He's running for Governor and many believe for President. And he is running in a tradition of white-collar crime prosecutors running for higher office. Do y ou find anything wrong with that?

MOLO: Attorney General Spitzer has been aggressive in pursuing the cases that he has brought. He has had an effect in changing certain practices in certain industries. It is up to the voters to decide whether or not they are in favor of what he has done and how he has done it. He has proven to be a popular politician.

CCR: Is there bitterness in the defense bar over Spitzer?

MOLO: I don't know that there is bitterness. People respect the power that the Attorney General wields, which is quite vast.

CCR: Are we out of this current wave of prosecutions triggered by Enron, WorldCom?

MOLO: No, if anything, prosecutors are going to be even more vigilant in prosecuting these types of cases, since they have seen the results they have been able to bring about. History has shown us that these types of prosecutions tend to come in cycles.

In the 1970s, you had the focus on foreign corrupt practices. In the 1980s, there was insider trading. In the 1990s, you had the savings and loan situation. Now, you have all of the accounting issues since 2000.

Sarbanes-Oxley has imposed requirements on corporations that certainly were not there before and that are cause for companies to be a lot more careful about things than they might have been before.

The government has hired a lot of lawyers and they seem to be finding things to do.

CCR: Has your business boomed as a result?

MOLO: All you have to do is look at the number of lawsuits that have been filed and the number of open investigations and you can conclude that anybody that does this for a living has had a lot more work. And that's not just defense and corporate investigations, but also counseling companies when an issue arises. There is a lot more at stake now than before. People understand that the enforcement environment is such that conduct that had gone on for years as merely the custom and practice in an industry and sometimes occurred in an open way is now being challenged as illegal.

White-collar criminal laws are inherently broad and prosecutors have always been vested with vast discretion. The technical standard for prosecuting a corporation is any act committed by an agent of the company for the benefit of the company—that can be enough to impute criminal liability to that company.

It has always been a question of whether the prosecutor would exercise his discretion to do so. But now, there is a different enforcement mindset. So, yes, there is much for companies to be concerned about.

CCR: The Supreme Court has reconsidered the Sentencing Guidelines. Were the sentences being handed down to white collar convicts fair?

MOLO: Sentencing, if done correctly, is a highly discretionary exercise. The judge is weighing a whole host of factors to come up with a sentence that in that case serves the purposes of punishment, retribution, and deterrence. I don't know that the sentencing guidelines, with mandatory minimums, necessarily provided for that.

Anybody who has done this for any period of time can tell you the story of somebody who got some sentence that just seemed way out of line for what the facts of that case were.

What is truly unfortunate is that the guidelines have had the effect of intimidating and coercing individuals to take guilty pleas in situations where they might otherwise have challenged the allegations against them at trial.

The consequences of going to trial are so onerous that someone looks at the situation and says—I'll take the option of spending six years in jail if it means that I don't have to run the risk of a certain 20 years or 25 years if I'm convicted at trial.

Given the broad nature of the criminal law, given the broad nature of these types of crimes, given the fact that in many instances these are people who have led wholly law-abiding lives otherwise, it is unfortunate that people have been prevented, as a practical matter, from saying—I'm innocent, I don't think I've done anything wrong, I'm prepared to contest these charges and not have to worry about it being a life defining situation if I get a bad jury, or a judge who makes evidentiary rulings that create a difficult environment to put on a defense.

I think the Supreme Court's decision will open things up and make it much more fair.

CCR: Were you involved with the representation of people alleged to have engaged in public corruption?

MOLO: Yes.

CCR: Chicago has a reputation of being one of the more corrupt cities in the country. Is that reputation legit?

MOLO: Chicago is one of the great cities in the world. It is a tremendous environment for people to do business. It is a great place to live culturally, socially.

Except for the Cubs not finding a way to get to the World Series, it is a terrific place. And Boston showed us this year that maybe there is hope after all.

CCR: Are you still a Cubs fan?

MOLO: Yes. And I was at the infamous 2003 Bartman playoff game.

But back to corruption, there is a history of very aggressive prosecution of corruption in Chicago dating back to the days of my former partner Jim Thompson, when he was the U.S. Attorney, and Judge Bauer who preceded him.

Some of the cases involving the intangible rights theory under the mail fraud statute were developed there in the case of *U.S. v. George* and some others.

Herb Stern when he was the U.S. Attorney in New Jersey and Thompson when he was the U.S. Attorney in Chicago were the leaders in that area.

Unfortunately there have been a series of politicians and judges who have been prosecuted in Chicago.

I just think that goes to show you that human nature overtakes common sense sometimes. People get greedy and stick their fingers in the till and violate the public trust.

CCR: Is it the lake effect? I mean, is it more corrupt there, or are the prosecutors more aggressive?

MOLO: There is more aggressive prosecution of it in Chicago than in other parts of the country.

From my experience, I can tell you that the quality of the bench in Chicago is tremendous – both in the federal and state courts. And the quality of the trial bar is outstanding.

CCR: A big deal here in DC is the CIA leaks case. The special prosecutor is Patrick Fitzgerald, the U.S. Attorney in Chicago. Do you have any representation in that case?

MOLO: I do not.

CCR: Give us your read of the case.

MOLO: I don't know Pat real well, although we do know each other.

His reputation for integrity is great.

I have no doubt that he will not do anything other than call them as he sees them.

My own personal experience in dealing with him on cases is that I found him to be open, fair and reasonable.

He is a bright guy. He's a career prosecutor. He has no apparent political agenda here.

I doubt the Department of Justice could have invented somebody who could have been better for this case.

As to where the case goes, your guess is as good as mine.

True to his fashion, there have not been a lot of press reports as to what is going on in the case. I have no idea.

I encountered him once casually at an event and asked him – how much time are you spending in Washington?

He wouldn't even tell me that. Not that you have to be in Washington to be doing all the work.

However that turns out, it will be the result of a diligent and serious effort and his best judgment as to what is right.

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For more information on the topics covered in this issue, please contact:

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