

LITIGATORS' STRATEGIES

Saving Major Smith

Mass. Objective. Offensive. Surprise. These are four of the nine Principles of War as set forth in an Army field manual. According to plaintiff's counsel Seth Goldberg, of counsel to Bleau, Fox & Associates in Los Angeles, and Kurt A. Schlichter of Gunderson & Schlichter in Manhattan Beach, these military principles were used in litigating the Case In Focus to a \$3 million verdict. According to the attorneys, the plaintiff, Russell A. Smith, is a U.S. Army major whose promising future has been derailed by false allegations made by the defendants. In 1996, the defendant bus company and its employees sent a letter to various military personnel alleging that the plaintiff allowed his soldiers to use drugs on its bus with his knowledge and consent. According to plaintiff's counsel, even allegations of this sort within the military irreversibly damages an officer's career. Like their client, Goldberg and Schlichter are military officers and say that, as officers, they benefit from particular types of training including intelligence preparation. According to Goldberg, "[T]hat is when you have an intelligence officer sit down and determine what the enemy can and cannot do based on his equipment, his capabilities and any intelligence he may or may not have. So what we did is,

we took the intelligence preparation of the battlefield and from that, we planned out the entire case. ... So, basically we said, 'what do we have to prove? What do we know about the enemy? — meaning the defendants. What do we have to get out of the defendants to prove our case? What do we know about our opponents — specifically the defense attorney?' Based upon all of those things, we came up with our plan as to how to approach the case, and when you come up with a plan, there are many things that you try to throw into it from the Principles of War." In discussing how their military training helped define their roles in the case, Schlichter says: "I was the hatchet man in this thing. The way someone described it is, Seth starts digging the grave and dances away. Then he kind of tugs and pushes somebody toward it and then dances away for awhile. Then he comes up and gives them a gentle tap, and they fall in. With me, I just go for their throat and throw them in. I'm an infantryman. I go up on the hill, kill everybody there and stay there until they tell me to go somewhere else. Seth's an armor guy — much more delicate and precise. It's true, I fought like an infantryman in this, and he did fight like an armor guy."

Lethal Letter

'Everything was done with malice because the communication was not to any interested person.'

Seth Goldberg was born on MacDill Air Force Base in Tampa, Fla, and as the son of a fighter pilot, was raised at bases and posts around the world. Both his mother and father currently work for the Los Angeles Unified School District as counselors. He has a brother who is completing his seven-year surgical residency at the Harvard School of Medicine and a sister, who is married with two children and works as a claims manager for a national insurance company. Goldberg received his bachelor's degree from the University of California at Santa Barbara.

While at UCSB, he joined the Army as part of the Reserve Officer Training Corps, received his commission in 1985 as a 2nd Lieutenant and has served his entire military career in the California Army National Guard, 40th Infantry Division. In 1991, Goldberg obtained his law degree from the University of LaVerne School of Law and established what is now Bleau, Fox & Associates, where he currently maintains "of counsel" status. He has been practicing for six years, specializing in personal injury, entertainment, labor, insurance bad faith and intellectual property cases. In February, Goldberg married wife, Rebecca, a science teacher at La Mesa Junior High.

What made you decide to go to law school?

"Me? Decide to go to law school? Oh, (laugh) I never thought I would get that question! ... I went through ROTC in college because I wanted to, and it wasn't necessarily because I wanted a military career. I had always kind of thought of law as a way to help people with problems that I might be able to help them solve one way or another, whether it be as a litigator, a judge, a mediator — whatever role I could possibly fit in. I knew that in college — I think my sophomore year. ... But I have been in the National Guard ever since I got commissioned, and I plan on staying in for the long haul or until they kick me out ... I really enjoy serving my country."

Mr. Schlichter [plaintiff co counsel] says your roles in court were similar to your roles in the military. You were the commanding officer and he was the infantry officer. Is that a good way to describe it?

"(Laugh) Sure. ... I was overall in charge - responsible for everything that occurred. I directed where the trial went and why certain things were done. I was lead trial counsel. He was, I guess what you call an executive officer — second

in charge. He was responsible for different things in the courtroom. I would say, "This is how we are going to do it, and he carried it out, which he did very well."

Regarding the Case in Focus, you said the defense did not avail themselves of certain information. For instance, they could have determined the plaintiff's damages because the military is so structured and his career could be predicted.

"Precisely. There is very little question of where Maj. Smith could have gone but for the letter. There is also very little question as to who the letter should have gone to. They based their whole defense on Section 47(c) of the Civil Code, which is an interested person privilege, and it just does not apply in this instance. ... It is usually used in the employment context. For example, you can convey defamatory material, provided it is without malice. But you have to get over the 'without malice' first before you can communicate it ... [I]n this instance, everything was done with malice in our case because the communication was not to any interested person. They sent it to the Department of the Army in Indianapolis that handles pay and the distribution of money on government contracts. They have nothing to do discipline over [Smith]. Then they also sent it to USPFO [U.S. Property and Fiscal Officer] of California, Helen Starling, who is basically a transportation clerk. She coordinates

transportation in the state of California. That's all she does."

Why did the defense choose these people?

"These are people they had just dealt with [concerning the buses]. ... They 'copied' it also to the Inglewood armory — nobody at the Inglewood armory, just the Inglewood armory, which is where my client happened to work. Now, who should the letter have gone to? It should have gone directly to my client's battalion commander. That's the person who has the authority to deal with this situation because of the nature of the charges. Now one of the parties they could have sent it to — an interested person, would have been some body with a contract. There actually is a military bus agreement or contract that governs the defendants' conduct and that was not complied with either."

The defendant is a bus company that the army had contracted with before?

"Correct."

Had there been any prior incidents between the defendant bus driver and military personnel?

"They deny it, and I have to kind of agree with that. I think the bus driver for some reason, I am not exactly sure why, got upset. Now the allegations were that the smoking [of pot] and the drinking occurred on the way up and on the way down. First of all, none of

it ever occurred. What I *surmised* occurred was that a soldier had smoked a cigarette in the bathroom and upset the driver on the way back. ... The driver [Ramos] went ahead and locked the door to the bathroom when they stopped on the way back at Buttonwillow at the McDonald's. Then what occurred is one of the soldiers, who happened to be a LAPD officer, said, 'Hey, I want to use the bathroom! Why are you locking it?' [The driver] stated that people were smoking pot. Gonzales [the officer] naturally says, 'Well, that is not true! I would have smelled it,' and [the driver] says, 'I am locking the bathroom.' ... Gonzales, after he gets the commander — my client, and tells him what is going on, ... my client and his executive officer walk over to [the driver]. He is, you know, an infantry officer. When you get into certain situations, you are not paid to be nice. You are direct and up front because people's lives are on the line. So, he basically went up to Ramos and in a relatively loud voice, said, 'No one is smoking pot on your bus! You need to unlock the bathroom! I have three LAPD cops on the bus.' Ramos asked, 'Oh is one of those Gonzales?' My client said, 'Yes. You need to unlock the bathroom' and walked away. Now you have got Ramos, who has been embarrassed in front of the public, who then has to get back on a bus full of guys in the military, and he can't say anything."

Was there any subsequent conversation between the parties?

"None subsequent. No conversations between these guys. [The driver] gets to Orange Blossom Lines, and the only thing I can think that happened was that Ramos and Ardecki [the vice president of Orange Blossoms] got together, and Ardecki said, 'Yeah, I know how to get this guy.' Now if that occurred or not, I don't know. ... [Ardecki] maintained that he believed Ramos. Now Ardecki never conducted an investigation and never talked to anyone other than the driver. The key things are that Ramos said he made a telephone call and spoke to Ardecki that Sunday from Buttonwillow on the bus company's 800 line. Well, there was no telephone call billed on the 800 line for that day

at all, ... and I am sorry, Pac Bell is going to bill if you make a telephone call. That is just a fact of life. One of the other key things was that Ardecki said he spoke to Ramos on the following Thursday, which was June 27th. Well, he billed the government on June 26th. How can you bill the government for a \$200 cleaning fee when you don't really talk to your employee until the day after you bill the government? Clear evidence of malice. Plus, it is the duty and responsibility of a bus driver to clean the bus. He doesn't get paid any extra money, yet [Ardecki] turns around and bills the government \$200 for it."

The plaintiff was a captain when the incident happened and now he is a major. Was this a promotion that had already gone through when the letter was sent?

"Correct. In the Army there are many ways to get promoted, but generally what occurs is you go before a promotion board where, once you are eligible and you have met all your requirements, ... you can put your promotion packet in front of a promotion board. Now, Maj. Smith had put his packet in front of a promotion board that had met in, I think, October 1995. The promotion board results came out in December of 1995 meaning he was eligible for a promotion to major. He knew that and applied for the position with the inspector General and was accepted starting the end of July, beginning of August 1996. The letter [from the defendant] came out the end of June."

So in regards to positions he was up for at the time the letter was sent out . . .

"The problem is when you get investigated for charges of this type, the Army does what is called a flagging action. The flag is basically 'no favorable actions are permitted,' which means you can't get promoted until the investigations are completed. ... [The investigations] stopped him from getting promoted, and he wasn't promoted for eleven months — after both of the investigations had been completed and the flags had been removed. There was one investigation completed by the

40th Infantry Division Commander and one conducted at the state level. ... The first one we got a copy of, and he was cleared. The recommendations of the investigator were to take no further action against the unit or the officer, stop doing business with Orange Blossom Lines, and not pay the \$200. In the second investigation, we don't know what the conclusion was, but we do know that the military never demanded the \$200 back. So, what we did was that we drew the inference that somebody still believed that this could have occurred."

So, in many respects, there is still a flag on the plaintiff?

"Yes. A lot of people out there will still say, 'Gee I heard about that,' and there may be some credence given to it. That is a problem. Once you put it out there, it is not coming back."

In discussions between you and the defense attorney, were the parties too far apart or was it that the damage had already been done?

The damage was done because he had lost the position with the Inspector General, which was very prestigious — *very* prestigious. That is when he started losing pay. He wasn't promoted because of these two investigations until almost eleven months later, and that's when we determined that he is going to be damaged. ... A lot of the things that occurred were not only the loss in pay, but he also lost the IG [inspector general] job. The IG solves problems for soldiers — a fast track problem solver. It is a prestigious position, and it is even more prestigious on the national level, which is where Smith was heading. ... He we also not given, what we call the in-residence course for the Command and General Staff College, which is *very* important. Now he is going to have a very difficult time based upon his time and grade with the changes in th promotion rules, because if he had been promoted in June or July of 1996, he would be under a different promotion rule than he is now. The promotion rules changed Jan. 1, 1997, so that creates a further problem with his time line."

So, in this case, you needed a verdict?

"Well, the verdict is important, [but] the problem is the military is very unique. When you have a unique society like this, officers that are higher up, even though they have several positions of trust and all the officers are even among themselves, the particular officer that they'll choose will be the one without problems. So even though Maj. Smith has gotten a civil verdict in his favor — 12-0 across the board on just about every question and he would make that known, he would most likely not be chosen because he has these allegations. ... Now the flag is not generally known. That is a personnel action. The problem is the allegations of drug use are known. They are out there, and they are not coming back. That is the problem. Drugs in the military in the '70s and early '80s almost destroyed the Army and the Air Force."

Really?

"Oh yeah! It was a *really* bad problem coming out of Vietnam, a really bad problem, and one of the things the military decided to do was go ahead and clean itself up. If you or charged with [drug use], even if you are not found culpable, that is going to stick with you. Once that information is out there and people know about it, you are dead in the water. That is what has happened to him."

Is Smith going to say in the military?

"He is going to stay in the military. He is going to try and make his retirement. There is no guarantee that he will make his retirement, because you have what are called, mandatory promotion boards, and ... you have basically two looks. I don't remember the time frame, but he would not be able to be promoted before his second look, basically. So he has to get promoted what we call 'below the zone' meaning there is a certain time line which you can get promoted that is an average. If you are below the zone, you are below the average, meaning you have done very well. There is no guarantee of that, and that is a real problem for him, because if he doesn't get promoted to lieutenant colonel, he is out. No retirement No benefits. Nothing. *Zero*."