

business

Nacchio gets big guns' help

By Al Lewis
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Let Joe go!

Two high-profile legal organizations say the U.S. District Court in Denver botched the insider-trading trial of former Qwest CEO Joe Nacchio last April, and they are asking an appellate court to reverse his conviction.

The **Washington Legal Foundation**, a nonprofit public-interest law and policy center, and the National Association of Criminal Defense Lawyers, an association of criminal-defense attorneys, filed briefs this week in Nacchio's appeal, which will be heard Dec. 18.

Their filings are called amicus, or friend-of-the-court, briefs.

Who knew Nacchio had friends?

"They are not 'friend-of-Nacchio' briefs," corrected Andrew Schapiro of Mayer Brown in New York, who represents the defense-lawyers group. "They are friend-of-the-court

briefs. There's a principle at stake here. The lower court got it wrong."

Schapiro argues that Judge Edward Nottingham obstructed Nacchio's defense by not allowing his lawyers to put on all of the expert testimony they wanted.

Daniel Fischel, a Northwestern University law professor with a long history of testifying in white-collar cases, was expected to testify about the "materiality" or relevance of information Nacchio allegedly used in making his stock trades. But Nottingham ruled against this testimony, accepting an argument from the prosecution that it was not properly notified that the testimony was coming from Fischel.

The defense-lawyers group also argued that Nottingham erred by demanding that Nacchio turn over the gross proceeds from his questionable stock trades, instead of the net amount.

Only funds gained through illicit activities "such as forgery, prostitution, and murder for hire" are subjected to this sort of forfeiture standard, the group said. Not stock trading.

"This case raises questions of acute interest to all accused individuals who seek to use expert witnesses in their defense, or who are subject to criminal forfeiture," the group's brief reads. "The judgment should be reversed."

The Washington Legal Foundation's brief attacks the case on different grounds: the

instructions Nottingham gave to the jury regarding the definition of the word "materiality."

The government's case against Nacchio argued that he should have known the projections he was making about Qwest - as he traded his stock - could not possibly come true.

Typically, insider-trading cases involve harder (or at least more objective) information, such as the CEO knew a merger wasn't going to go through but traded his own stock before it was announced to the public. It's questionable whether softer information, such as a guess as to whether a projection would come true, is material to an insider-trading case, the foundation argues.

"The jury instructions ... expand the scope of securities fraud ... to encompass insider trading based on the possession of 'soft' information that could be deemed immaterial," the foundation said in its brief.

When executives can be prosecuted for bad predictions, it creates "a chilling effect that thwarts the full and frank exchange of ideas," the foundation said.

Paul Kamenar, a foundation attorney, said he thinks Nacchio's chances for success on appeal are strong, given the issues at stake.

No CEO should be prosecuted for making a bad call.

"We see a case that goes beyond the Joe Nacchios of the world," Kamenar said.

The foundation once wrote an amicus brief in support of accounting giant Arthur Andersen during its appeal of criminal charges. The Washington, D.C., attorney who won that case before the U.S. Supreme Court, Maureen Mahoney, is now Nacchio's attorney.

It's a safe bet Nacchio's legal team solicited these briefs, though I'm certain these groups wouldn't have written them if they weren't on board.

"To get some big organization to file briefs is significant," said Jay Brown, a University of Denver law professor who has been following the Nacchio case. "It says to the 10th Circuit (Court of Appeals), this is a much more important case."

Al Lewis' column appears Sundays, Tuesdays and Fridays. Respond to him at denverpostbloghouse.com/lewis , 303-954-1967 or alewis@denverpost.com .