Legal Times
WEEK OF JUNE 5, 2006 • VOL. XXIX, NO. 23
ALM

Big Mouths

Enron chiefs Lay and Skilling took the stand and sank their own defense.

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They were at the pinnacle of success and now find themselves knocking at the jailhouse doors. They reached the top in large part by their force of personality, their controlling nature, their intellect (some might say brilliance), and their ability to sell themselves and their ideas. But the traits that served them so well in the boardroom turned out to be liabilities in the courtroom.

As their trial began in January, former Enron Chairman Kenneth Lay and former CEO Jeffrey Skilling faced the same dilemma as other recently convicted corporate executives at Tyco International, WorldCom, and Credit Suisse First Boston: Should they testify in their own defense?

Declining to testify can be difficult. For those who have reached the height of corporate success, to sit silently in the midst of battle is counterintuitive: Their natural inclination is to believe they must fight back. To sit silently at the close of the government's powerful case, especially after they have declared their innocence to family, friends, and former employees, is almost unfathomable.

Yet the risk is substantial. Lay and Skilling testified for approximately 14 days in a four-month trial. It took the jury less than six days to deliberate and convict. Their testimony was key to their convictions, as it has been with other corporate executives who have recently fallen on their own words.

By testifying, executive defendants shift the focus of deliberations in large part from the evidence produced by the government to the credibility of their own words and manner. The principal questions that jurors ask each other become: Did you believe their story when they denied participating in the fraud? Did you believe them when they said they didn't know what their underlings were doing?

Once a juror decides that the defendants lied about their involvement, the juror often concludes guilt regarding the specific criminal charges. Although jurors try to be faithful to the judge's instructions, their deliberations tend to focus on supporting the conclusion already reached regarding the defendants' credibility.

Lay and Skilling learned this the hard way. And without proper consideration of the many factors that influence whether a defendant should testify, other executives may learn this harsh lesson as well.

SKEPTICAL JURORS

According to press reports, the decision to testify was crucial in sending Lay and Skilling to prison. The jurors said they had a negative view of both Lay and Skilling after the two men testified. Consider some of the jurors' statements (reported in *The Washington Post* on May 25):

- "Both defendants said they had their hands firmly on the wheel [and] [t]o say you didn't know what was going on with your company . . . was not the right thing to do."
- "[Lay] was very focused, but he had a bit of a chip on his shoulder that made me question his character."
- "When [Skilling] got on the stand and knew what a [technically complicated] chart was and how it worked, we knew he was involved."
- Lay's sale of stock "defined the word 'intent.' " "It went very much to the character of the person he was—cashing out at the expense of his employees."

Clearly, the jury wasn't convinced by Lay and Skilling.

We likely will never know how they and their lawyers made the decision to testify. Obviously, the ultimate choice rests with the defendant himself. But it is possible to identify the key questions that any defense team must ask before putting the client on the stand.

First, what is the client's alleged involvement?

Next, what is the message his testimony should convey to the jury?

And finally, can the client manage his own personality traits—the very characteristics that he used to become successful—so as not to alienate the jury?

WHAT DID HE DO?

Unlike on "Perry Mason," "L.A. Law," or "Boston Legal," there are very few surprises about what the jury will hear. The government writes an indictment (65 pages long in the Enron case), produces all its evidence during discovery, and turns over any exculpatory evidence it stumbles across. The defense should never be surprised by the prosecution's case.

Indeed, in the Enron case, there were no smoking guns, no documents directly linking Lay and Skilling to the financial chicanery. This is common in these types of suits. In virtually all financial fraud cases, the defendant's knowledge, intent, and motivation are the critical issues.

So the real question is how the evidence of the defendant's actions will play out. How will the jury react to the government's tale of fraud and chicanery? Was the defendant an active participant directing the illegal conduct, or did he learn of the misconduct and simply fail to stop it? How will the jury react to the fact that defendants gained financially—often a lot—from their conduct?

In the Enron case, for example, defense counsel must have asked themselves some tough questions about the facts. How bad does it look that the client sold millions of dollars' worth of stock shortly before the collapse, while telling the world that Enron was financially sound and that people should invest because the stock was "an incredible bargain"? What about the change in 401(k) plans that prevented employees and retirees from selling shares? Will the jury overlook the fact that employees lost everything, including their jobs?

WHAT'S THE MESSAGE?

With this in mind, then, is there an opening that the defense can exploit by having the defendant testify? What message is the defendant trying to send to the jury? And how believable is that story? Is it clear, simple, and rational?

The defendant's story of what really happened cannot stand alone. Defense lawyers must be able to use the government's own witnesses and documents to back up the defendant.

If that testimony is not corroborated in critical areas and the defendant's conduct cannot wholly be viewed as consistent with innocence—and the defendant's is the only voice actually claiming innocence—then he is in a very difficult position.

Character witnesses may not help. Instead of bolstering the defendant's credibility, they may tend to highlight the paucity of the defense's case. He has friends but no facts in his corner. And with a few well-chosen questions on cross-examination, good prosecutors can destroy any value in calling even the most highly regarded character witness.

Nevertheless, even in this challenging situation, a defendant taking the stand to assert his innocence may still be a good idea. Perhaps he can believably convey his hands-off approach to management. Perhaps he can convince the jury that he was misled because he trusted his subordinates or that the fraud was concealed from him because he never would have approved of such conduct. Of course, all of this would need to be corroborated in some fashion.

This would not be the time for the defendant to show off his deep knowledge of complex financial transactions in a tutorial for the jury. Such testimony could and did backfire with Lay and Skilling. It left the jury with the conclusion that they knew exactly what was going on or, if they did not know, they were willfully blind in not knowing.

In shaping the defendant's testimony, one simple but critical question must be answered: What will the defendant's testimony add that cannot be obtained from other sources?

The defendant should not take the stand to introduce evidence that can be introduced from other sources with much less risk. For instance, if part of the defense claim is that the Sept. 11 attacks, manipulative short-sellers, and critical news articles caused the company's collapse, such a fact pattern certainly could be developed in other ways and tied together in closing argument.

WILL THE JURY LIKE HIM?

In addition to analyzing what the message is, it is important to consider how the defendant will deliver the message. Does he look like a choirboy, or does he seem shifty? How does he talk? Is he straightforward and simple in his language? Does he make eye contact? Is he congenial, personable, and articulate?

A corporate executive often leads others by the force of his will. Can he now avoid appearing overbearing and controlling? He succeeds by being focused and in command. Can he now present himself as someone who didn't know what was going on? He prides himself on his financial brilliance. Can he now bring himself to claim ignorance of the accounting statements?

How will he react to rapid-fire cross-examination from a determined prosecutor? How will he react when his motives are snidely questioned? Will his righteous indignation at being accused of crimes he believes he did not commit sound sincere?

How does he compare with the government's witnesses in terms of personality and overall believability? Will he be forthcoming during cross-examination or develop a sudden case of selective memory on the key points of the case? Will he come off as honest or evasive?

Can he control himself and his own emotions? Sometimes a flash of anger, a smile, or a turn of phrase can make or break the overall impression. Without a confession, the "truth" is decided by 12 individuals who come in with their own intellect and notions of fairness, character, and common sense.

For any defendant, the decision to testify or to exercise his Fifth Amendment right to stay silent is a complicated, sometimes gut-wrenching choice. Perhaps Lay and Skilling would have been convicted even if they had kept quiet. But perhaps not.

Without testimony from these two defendants, the jury would have been forced to focus on the veracity of the eight Enron defendants who cut deals and testified against Lay and Skilling. The jury likely would have spent more time wondering whether these witnesses had a motive to embellish testimony to reduce their own sentences and questioning how well their testimony was corroborated. The focus would not have been on the defendants, on what they said, how they said it, and how many millions they made.

As one juror commented: If Lay and Skilling had not testified, "I would have always had questions."

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