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Steven draws on his extensive psychology background to write this month's E-Newsletter article.

When Words Become Deeds: The Decision to Testify in a Post-Enron World

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Deciding whether to put a client on the stand in a criminal case remains one of the most perplexing, and, at times, agonizing decisions a trial attorney faces. While it is true that the decision in most violent crime cases is generally an easy call (given the difficulty of presenting the unsympathetic sympathetically), in white-collar cases the client's more conventional occupational background and upper middle-class lifestyle make the decision more complicated. Who better to tell his story to the jury than an economically successful and articulate client whose resume is the epitome of the American success story? However, even with the ideal white-collar defendant, most attorneys know that it is not enough for their client to survive the minefield of cross, or even direct, examination relatively unscathed. The white-collar landscape of late is replete with evidence that suggests that all it takes to sour jurors on a defendant is a single answer that strikes a false note or one that jurors read as a sign that the defendant is not an honest or trustworthy person. In a case DOAR recently worked, jurors told me in post-trial interviews that they concluded our client was a "liar" based on his inability to answer in a convincing manner a question on cross examination that pertained to an incident quite peripheral to the central charges in the case. "When he said that, we knew he was a liar right there," said one juror.

It is evident from post-trial interviews and our research on juror decision-making that doing a decent or credible job on the stand is not good enough. Jurors often exhibit "confirmation bias" in that they look for any negative information about a defendant when he is on the stand that confirms the allegations against him. Once a defendant is exposed as being dishonest or, more troubling, is seen as less than forthcoming on the stand, it becomes very easy for jurors to believe that the defendant was capable of anything and everything alleged by the prosecutor. It is almost as if after a flawed performance on the stand, the defendant is thereafter marked as guilty; **the only question remaining to be decided for the jurors is: "Guilty of what?"**

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Given the steep downside, traditionally, the default decision was to avoid exposing a white-collar defendant to the vagaries of the stand if one could avoid it. While there were always exceptions -- usually resulting from a determination that the case was doomed to certain failure without some divine intervention or when one had a client without a single blemish -- generally speaking, the prudent decision for defense counsel was to keep the defendant off the stand and argue reasonable doubt; it might be added here that once the defendant takes the stand, the burden of proving the case shifts from the prosecution to the defense and any inadequacies in the prosecution's case are relegated to the background of juror thinking.

In a post-Enron world, the calculus would seem to be even less complex. With public opinion polls all indicating that the reputation of American corporate executives and politicians has never been lower, why tempt fate by exposing one's client to the judgments of jurors who have been primed by years of media coverage of corporate and government scandals to look for evidence of perfidy in even innocent and perfectly legitimate business or governing practices? Any rudimentary cost-benefit analysis within the current socio-political climate would have to conclude that the traditional decision of keeping a defendant off the stand remains the safest bet.

Yet, disturbingly, the decision is not nearly as simple as the above overview might suggest. As I will argue, recent developments in world of the white-collar litigation have created a nasty dilemma that offers no easy solutions for clients or their counsel. While I ultimately conclude that not testifying in white-collar cases is still the default decision, the new world of litigation requires a fresh analysis of the issue to evaluate the risks of putting a defendant on the stand. Understanding the challenges faced by both clients and counsel allows us to assess the risks associated with testifying as well as providing insight as to how white-collar defendants might be prepared if they need to testify.

The New Landscape of White-Collar Prosecution

One of the more interesting developments in white-collar cases over the past dozen years or so, particularly in securities fraud prosecutions as well as in political corruption trials, is the increasing use of statutes and charges that focus not on the complex financial details of the corporate environment or on the intricate operations of political institutions as racketeering operations but

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instead focus on the honesty and truthfulness of the defendants in their roles as responsible agents with fiduciary duties to shareholders or “honest services” obligations to citizens. In the criminal trials of Martha Stewart, Bernard Ebbers, Kenneth Lay and Jeffrey Skilling, the centerpiece of the prosecutors’ cases was that the defendants made false and misleading statements about the financial conditions of the companies they headed (or of their knowledge of inside information). In the political corruption trial of Governor George Ryan of Illinois, the prosecutors emphasized not the racketeering elements of the case but rather that the former governor:

“engaged in a scheme to defraud the people of the State of Illinois ... of the intangible right to the honest services of defendant RYAN, in his capacity as a state official, and of other state officials, by means of materially false and fraudulent pretenses, representations, promises and material omissions.”

In recent high profile corporate and political trials, prosecutors have made conscious and carefully calculated decisions to avoid presenting overly complex, expert-driven dissertations on corporate finance or the political process, concluding that jurors will more easily find guilt in the words and (mis)representations of high level executives or political leaders than in their prior actions within the contexts of complex organizations that defy easy explication. Years of focus group and mock trial research as well as post-trial interviews on securities and political corruption cases in a post-Enron environment provide ample support for the new tactics by prosecutors. Most jurors come to court with very little background knowledge of corporate capitalism or electoral politics but have extensive experience sizing up the honesty of someone talking to them face to face. Why try to convince jurors that a defendant’s behavior within a large organization years ago was criminal in intent when one could simply produce for them a defendant’s words, ideally right there on the stand in the form of his own testimony? It is as if in this new era, in the minds of jurors, a defendant’s words on the stand (and earlier as captured in e-mails or voice messages) have become the deeds that are subject to judgment.

With this interesting interpretive alchemy, the prosecutor need only to expose the defendant as a dishonest person on the stand to get a conviction. For jurors, the defendant’s words, or more broadly, the defendant’s performance on the stand are indicators of his character, and as the prosecutor will remind the jurors, character is destiny. Jurors in the Ebbers trial were deeply uninterested in the

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monthly revenue reports but very interested in how Ebbers’ words and demeanor on the stand as a purported financial naïf contrasted with his previously recorded words and demeanor captured on videotapes in which Ebbers spoke about the financial conditions of WorldCom with great aplomb to industry analysts. Following the prosecutors’ script, jurors in post-trial interviews spoke of Ebbers’ problematic testimony and how they found it “dishonest” and thus indicative of a guilty man. One juror said, “We had come to the conclusion that his testimony was not truthful” while another said “a lot of his testimony pretty much did it.” Ironically, jurors also found the prosecution’s star witness Scott Sullivan’s testimony to be dishonest, thus supporting the claim that jurors find all corporate executives to be suspect, even when they tell contradictory stories on the stand that both cannot be true.

So one might ask: If the prosecutor has in effect set a trap for the defense by daring defense counsel to put his client on the stand after telling jurors that the case is about false and misleading statements (or about perjury, obstruction of justice, dishonest services, etc.), why willingly walk into the trap and offer up your client to the gauntlet? A prosecutor in the Ebbers’ trial said he was not disappointed when Ebbers took the stand, perhaps because he knew it would be impossible for even a seasoned public speaker like Ebbers to convince the jury that he honestly didn’t know anything about the financial manipulations at the company. Why even risk it if you are defense counsel?

The answer is that in criminal cases that have as their focus the misrepresentation or dishonesty of a well-heeled client, jurors express a deep belief that basically honest people should have no trouble telling their story. In the juror’s eyes, the defendant, an individual whose worldly success often far surpasses their own, should be more than willing to stand up and justify what he said or did, especially given that the prosecutor charged him with using words in a dishonest or misleading way. Jurors thus think if there were a simple, straightforward response to the charges, they would hear it from the defendant himself. Jurors have very little patience for executives who have no trouble getting up in front of the world and justifying layoffs at their company or hyping their stock when they were on top of the world but who cannot tell jurors why they did not do what they were alleged to have said or done in the case. In our research at DOAR, we have found that jurors pay only lip service to the negative inference admonition regarding a defendant who does not take the stand and, in reality, privately condemn successful executives or elected officials who, in their eyes, “hide behind their lawyers.” To make matters worse, for most jurors, corporate executives and

politicians in a post-Enron world are guilty until proven innocent and jurors feel they have a right to demand an explanation from these high-flying executives or politicians. Under such conditions of asymmetrical moral judgment, to refuse to gratify jurors with one's testimony is done at one's own cost. It is as if jurors are saying to the defendant: 'if you won't show me yourself that you are innocent through your deeds (by taking the stand), I will assume that you have something to hide.' Ironically, hiding things or misleading others form the very basis of the allegation in the case, thus creating an interesting parallel between the refusal to testify and the counts charged. Here the simple reality is seen in an old Roman legal adage that translates roughly as follows: "He who is silent does not confess, but it is nevertheless true that he does not deny."

So, we arrive at a true Catch-22. Testify and you have flown right into the web spun by the prosecutor in their newfound respect for populist-based charges rooted in an old model of idealistic truth-telling. Any perception that the defendant is not being straight on the stand can sound the death knell for the case as often the charges involve, in spirit if not in substance, allegations that the defendant's conduct was characterized by guile, deception, dishonesty or a failure to fully disclose aspects of the defendant's or the corporation's behavior to the outside world. To come across as someone with absolutely nothing to hide is never easy and can be especially difficult for successful executives who have often gotten to where they are in the Machiavellian world of competitive capitalism by keeping their cards close to the chest. Even seasoned executives such as Bernard Ebbers or Kenneth Lay who have extensive experience talking to groups of varied backgrounds came off to jurors as less than forthright -- if not as downright liars -- when on the stand. Months of trial preparation and a tightly presented case up to that point often come to naught if the defendant's performance on the stand is anything less than flawless. On the other hand, the defendant's refusal to testify reaffirms the average juror's stereotype of the successful executive or politician as someone who has schemed and lied his way to the top and who is now engaged in yet one more misrepresentation.

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One wishes the options were not as stark as they appear. What to do in any given circumstance depends on a number of factors, but one thing is clear: One must rigorously evaluate the client for the purpose of ruling out that he cannot take the stand. It is certainly the case that some clients have an innate jury appeal that allows them to beat the odds suggested above. To gauge whether your client is part of this small coterie of executives who can pull it off, however, may require a lay person's assessment as attorneys and trial consultants associated with the case may not be the best judges of their client's character; the home team effect often gets in the way. However it is achieved, the client's true character must be explored during the lead-up to trial as jurors have a sixth sense for prevaricators. If words have become deeds as I have argued they have in many white-collar cases, the best advice remains: the fewer the better.