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WHITE-COLLAR CRIME

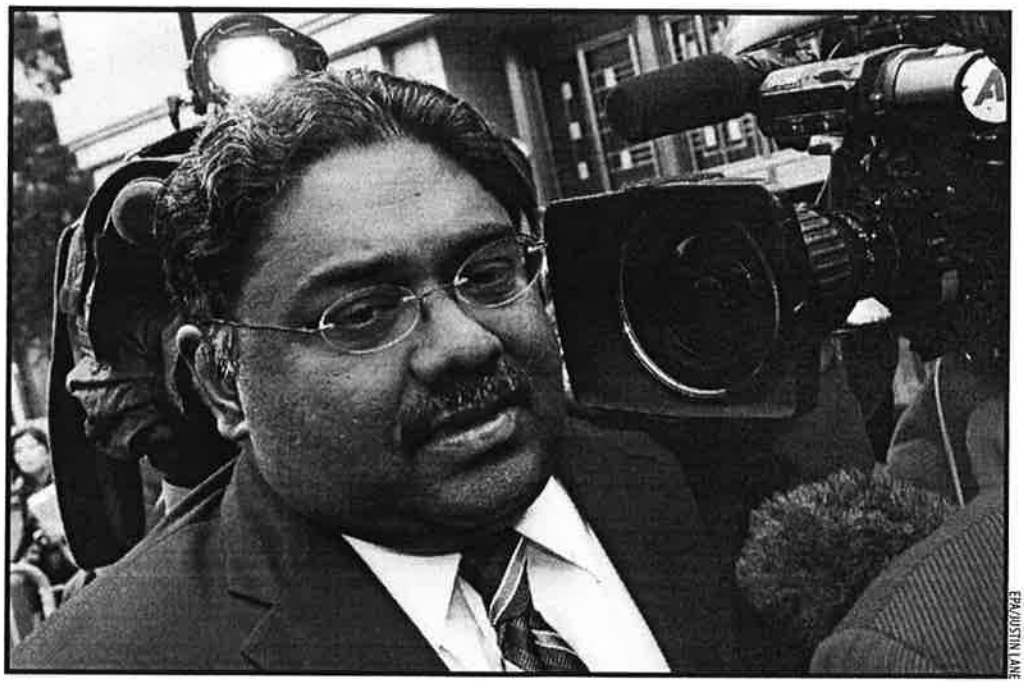
Taking a stand on taking the stand

The decision about whether a defendant testifies should be exceptionally nuanced; ramifications are hard to judge.

BY HANK ASBILL AND KERRI RUTTENBERG

Whether white-collar defendants should testify at trial is the subject of much debate among criminal defense lawyers. Ultimately, this critical decision must be carefully evaluated in every case, in multiple stages of the process. Balancing the risks against the anticipated rewards of a defendant testifying will differ depending on whether the risks are of substance (e.g., harmful facts that could emerge during cross-examination) or of presentation (e.g., a danger the defendant may testify in a manner that will hurt his credibility with the jury). Contrary to conventional wisdom, there should be no default position. Absent fatal substantive problems with the defendant's testimony, thorough preparation can eliminate most, if not all, of the presentation risks.

The decision about testifying has garnered recent media attention—particularly with the t[illegible]onviction and unprecedented lengthy sentence of Raj Rajaratnam for insider trading. According to pretrial press reports, Rajaratnam told people close to him that he intended to take the witness stand to explain and justify his conduct. Commentators simplistically noted that testifying would be risky because Rajaratnam could make a mistake in cross-examination and lose the case. Ultimately, he did not formally testify, and many commentators—with no knowledge of all the strategic, legal and personal issues leading to his decision—later blamed the conviction on the defendant's choice to remain silent. However, the decision about whether the defendant testifies is—or at least should be—exceptionally nuanced, and the ramifications of that decision are very hard to judge.



EPA/JUSTIN LANE

RAJ RAJARATNAM: The former hedge fund manager chose not to testify at his insider-trading criminal trial, and some outside commentators blamed his conviction on his choice to remain silent.

virtually every business crime trial—including Rajaratnam's—the key battleground is the defendant's knowledge and intent, particularly when there is no dispute over what was said or written. Rules, laws and regulations governing business conduct are complex and opaque. Prosecutors know that when a case hinges on a "battle of the experts," reasonable doubt ensues. Recognizing that risk, during the past decade they have focused on simplifying their case themes and theories. Did the defendant knowingly and willfully lie about or omit important facts? Did he shun his responsibilities as a C-level executive to advance his career, make more or avoid losing money or further some other personal objective? Was he deliberately blind—ignoring fraud red flags—or did he act in good faith and genuinely believe, regardless of whether he was wrong or foolish, that his conduct was lawful or legitimate? Clearly, the defendant among all potential witnesses is in the best position to answer these questions. It is less clear whether the defendant should take the stand to do so.

Jury research and the experience of defense trial lawyers make plain that jurors in business crime cases want and expect to hear the defendant's benign explanation for his conduct and his passionate and adamant denial of his guilt. Although the court will instruct jurors that defendants have no burden of proof and their silence cannot be used against them, many jurors openly, secretly or subconsciously discount or ignore these instructions.

Jurors assume executives are smart, educated and articulate and generally have the ability to be competent, effective witnesses. Jurors also assume that white-collar defendants have the resources—including money, experts, investigators and skilled counsel—fully to prepare for their testimony. And jurors believe that if they were embroiled in similar suspicious circumstances, they would have the guts and confidence to stand up for their reputation, family, career and freedom.

White-collar defendants often are perceived to have insurmountable personality deficits as witnesses. Certainly, counsel must be sensitive to the unique testimonial challenges business executives face. Usually, these testimonial deficits are the very same personality traits—developed over many years—that have served these executives well in their professional lives. Individuals who are smart, strategic and efficient and who manage others like themselves may come across as arrogant, evasive, manipulative or condescending in the contrived setting of a courtroom trial. Through nuanced and thorough preparation, however, criminal defense lawyers can significantly ameliorate these risks so they do not become the driving factor when the time comes to make a final decision about testifying.

To overcome these deficits, both in preparation for and during the defendant's testimony, perhaps the most important factor is the defendant's trust in his lawyer. Criminal defense counsel must earn this trust over time, clearly demonstrating not only their judgment and skill, but also their belief in the defendant's innocence and their joint ability to communicate that message to the relevant decision-makers.

Ultimately, a white-collar defendant must be able (through preparation) and willing (through trust in his attorney) to give up control on the stand. He must answer unanticipated questions and not answer ones that are not posed. He must be flexible on the direct examination's structure, order and content, and respond immediately, simply and truthfully, leaving the tactical considerations (which may change on the fly) in his counsel's hands.

All of this can be particularly difficult for the business executive, who is used to directing others. The instinct to control strategy and other aspects of the case as a means of fighting back may be very strong for someone personally accused of professional misconduct. In court, however, the defendant must be polite and deferential. He must submit to and embrace the artificial and sometimes intimidating setting. He must suppress any anger at opposing counsel, witnesses and the judge. He must respect the fairness, intelligence and decency of jurors individually and collectively because every word he speaks, every facial expression he makes, every action he takes in their presence—even his choice in clothing—will be judged by strangers who control his future.

Preparation also is difficult because the constructive criticism that is a necessary part of witness preparation can feel deeply personal. That feedback can be perceived as an attack on the client's sense of self when authority and certainty—ordinarily sources of pride, accomplishment and respect for a business executive—are criticized as causing the defendant to appear evasive, arrogant, impatient, condescending or even dishonest as a witness. If the client does not fully trust the process, the jury system and his lawyer's confidence in the case, his preparation—the predicate for effective and genuine testimony—can fall short.

Moreover, being charged in a criminal case creates significant emotional, financial, physical and familial stresses. And the trial is the culmination of these pressures. In addition to preparing the defendant substantively and stylistically to testify, criminal defense lawyers also must appreciate and, to the fullest extent possible, help their clients resolve these parallel issues.

Absent insurmountable substantive problems with the defendant's testimony that affect credibility or guilt, rarely is it necessary before trial begins to make a final decision whether he will testify. The decision may depend in large part on how the trial is going. If an adverse verdict appears likely, the defendant may have little to lose by testifying. If the defense is winning or the evidence appears in equilibrium, the defendant and his lawyer must carefully balance the pros and cons of taking the stand.

Either way, fear of failure should not be allowed to dictate the ultimate decision. Preparation should be relentless and continuous and must include laying the collateral groundwork necessary to ensure the favorable assessment of that critical evidence—including eliciting broad good-character evidence from government as well as defense witnesses and ensuring the defendant acts consistently with that evidence in public at all times. If the foundation has been laid to enhance the prospect the testimony will be well-received; if the defendant trusts his attorney enough to relinquish control of the presentation; if the defendant has been thoroughly prepared stylistically and substantively and if the client truly believes that his jurors want to do the right thing, he will be positioned successfully to withstand even the most skilled cross-examination and effectively advance his cause.

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