BerkeleyLaw
UNIVERSITY OF CALIFORNIA
Berkeley Center for Law, Business and the Economy

University of California, Berkeley
School of Law
2850 Telegraph Ave, Suite 500
Berkeley, CA 94705-7220

Ph: 510.642.0532 – Fax: 510.643.7095
E-mail: BCLBE@law.berkeley.edu
http://www.law.berkeley.edu/bclbe.htm

The White Collar Defense Dilemma: To Testify or Not?

By Kevin Chiu, J.D. Candidate 2018 | November 9, 2015

The question of whether or not a defendant should take the stand remains a rightfully contested issue for legal professionals in the practice of white collar criminal defense. With no clear, empirical evidence to suggest an advantage from this nuanced decision, lawyers are racked with the quandary of predicting how their client(s) would handle the high stakes of cross examination and direct jury exposure in legal matters that turn mostly on a defendant's perceived credibility and motives at the time of the alleged crime.

Back in late October, a federal court in the Southern District of New York heard oral testimony from Anthony Allen, former head of global liquidity and finance at Rabobank and lead defendant in the first US criminal trial of traders involved in the London interbank offered rate (Libor) interest rate scandal. The prosecution questioned Allen regarding a number of communications made between him and traders in the bank. In one instance, Allen had responded in a message to a trader, "No worries mate, glad to help." Allen contended that the response was simply a dismissal to the trader that he was not going to comply with the request, which Allen testified as "not right."

An objective view would have prevented a reasonable juror from gleaning that interpretation form the text of Allen's email. On the surface, it appeared that Allen was assenting to their demands to adjust and falsify information in the bank's Libor submissions. This demonstrates the primary reason white collar defendants are willing to testify at trial: to give a direct interpretation and diffuse any statements or events that may seem incriminating on face value.

Yet the value proposition of a defendant taking the stand is quick to expose the inherent gambling risk of doing so given how unpredictable the outcomes have been for those who have testified and those who have remained silent. Despite Allen's efforts to personally clarify and explain a number of troubling emails and texts between him and traders, a jury delivered a guilty verdict on November 5 to Allen and two other traders at Rabobank.

Other cases have shown no recognizable or consistent correlation between testimony and verdict. Raj Rajaratnam, founder of the now defunct Galleon Group, was at the center of one the largest insider trading controversies in recent memory, profiting over $63 million from 2003 to 2009 from illicit insider trading. Rajaratnam originally intended to testify at his own trial, a move many considered to be risky given that the strategy was rarely used. Rajaratnam ultimately didn't testify and received a guilty verdict and a prison sentence of 11 years, the longest ever for insider trading. Previously, Jeffrey Skilling and Kenneth Lay of Enron fame both testified at their own trial only to receive a guilty verdict. In the legal community, the recent prosecution of Steven H. Davis, Stephen DiCarmine, and Joel Sanders, former senior partners at the now defunct law firm Dewey & LeBoeuf, resulted in a mistrial. In what many considered a bold risk, counsel for the defendants chose not to call a single witness, let alone have testify regarding the alleged accounting improprieties that took place to overstate the firm's financial health.

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While lawyers recognize the benefit of inserting the defendant's own perceived take on the facts and issues of the case into the jury's consciousness, the gambit can be a double edged sword. Opposing counsel jumps at the opportunity to take a direct crack at the defendant through cross examination, which not only dictates the direction of the dialogue between counsel and the defendant, but opens the very significant risk of exposing personal flaws and credibility issues that serve only to amplify any doubt on the defendant's own testimony. Nevertheless, to desperate defendants, a chance to tell their side of the story may just be the last gasp of breath in cases where the deck is already stacked against them.