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Law Review

Law Review: Getting a fair shake for white-collar defendants



By Chris Mondics

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With the country in a state of high anxiety and outrage, the Justice Department of President George W. Bush made clear during the nation's last financial meltdown in 2000 and 2001 that heads would roll.

One of the first to go down was the accounting firm Arthur Andersen, indicted for aiding Enron's fraud.

At the official rollout of the Andersen indictment, Justice Department prosecutors treated the press to colorful descriptions of Andersen executives shredding tons of incriminating Enron documents and deleting thousands of e-mails, just as the feds were closing in.

The clear message was that all of Andersen was corrupt and that its dirty deeds stretched all the way from its opulent, dark wood-paneled offices in Houston to the firm's headquarters in Chicago.

But there never was any persuasive evidence that anyone but a handful of Andersen accountants in Houston, where Enron was headquartered, knew anything about Enron's funny numbers.

Three years later, the Supreme Court threw out Andersen's indictment and subsequent conviction on the grounds of prosecutorial overreach - too late of course to help the 28,000 Andersen employees who lost their jobs, including hundreds in Philadelphia.

A few months after the indictment, most of Andersen's clients were gone, and the company eventually went out of business. One partner telephoned me then to ask why he was about to

lose his job even though he never had anything to do with Enron.

Now comes evidence that not only politicians and prosecutors but jurors, too, are susceptible to the wave of revulsion that inevitably follows an economic collapse. And that it can heighten the risk of jail time for white-collar defendants, even if they are innocent.

A study by Julie Blackman & Associates, a Montclair, N.J., jury-consulting firm with clients in New York and Philadelphia, concludes that jurors bring their frustrations over the troubled economy into the courtroom and that many have their minds made up before they even hear what the witnesses have to say.

"These days many jurors are angry and suspicious," said the study. "Many feel betrayed by the personal excesses that are believed to be behind this country's current strife."

Truth be told, savvy white-collar defense lawyers have long known trials are won or lost by the time the jurors take their seats in the jury box. They move to strike jurors who seem openly hostile to senior management, and they strive to keep business executives on their juries.

But the Blackman study, based on telephone surveys and focus groups of jurors and potential jurors, offers new detail on how deep the divide can be when jurors sit in judgment of white-collar criminals.

Often, a juror's view on this issue is determined by economic circumstances and education.

Homeowners sided with the accused white-collar criminals in 51 percent of the cases; non-homeowners sided with the defense only 41 percent of the time.

The study is replete with quotes from jurors who told the researchers that senior managers typically are overpaid and greedy.

"I loathe those who have entitled themselves," said one. "I probably would assume [the defendant] to be guilty, like everyone else who enriched themselves off the backs of the productive public."

Some 60 percent of respondents in this 2008 telephone survey conducted in New York City said that the country was experiencing a financial crisis because senior-level corporate executives had committed crimes.

No doubt some of them did, people being people.

But this thinking fails to take into account the other actors in the nation's financial crisis. Millions of Americans took on mortgage and credit-card debt that they could not afford.

The banks knew this but were comforted by economic models suggesting the upward trend in housing prices would make up for the mistakes. Congress, according to former Republican House Financial Services Committee Chairman Jim Leach, went along on the assumption that wider access to mortgage money was an unalloyed good, even if underwriting standards were eroded.

But according to Blackman, the consulting firm, most of the public focus has been on the

people who ran the nation's financial institutions. Bad news for any of them facing a criminal probe.

"People feel like the financial folks at the top have been pulling off a fast one and have been doing things that are impenetrable," said Julie Blackman, a social psychologist and the firm's name partner.

Blackman is a consultant to defense firms, so the survey serves as a jumping-off point for discussion of how defense lawyers can counteract the suspicions and antipathy of jurors.

She recommends that defense lawyers stress the complexity of corporate transactions and point out that even when a deal involves tens of millions of dollars, it may not have been significant enough to even cross that executive's desk.

Defense lawyers can soften some jurors' hostility by openly acknowledging that people are angry over the fallout from financial crisis, a technique she calls empathetic mirroring. But she says defense lawyers must then appeal to jurors' better instincts, noting that defendants are legally deemed innocent until proven guilty.

In her study, Blackman correctly points out that, traditionally, concern for the fairness of the nation's criminal-justice system has focused on the rights of low-income accused, who unlike CEO defendants don't have platoons of highly skilled, highly paid lawyers to defend them.

But her study is a sobering reminder that bias can cut two ways. In a fact-based criminal-justice system, her study suggests, everyone loses when emotions take over and reason disappears.

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