The “Spiderman Challenge” To The Presumption Of Innocence

“With Great Power Comes Great Responsibility[1]”

The “Spiderman Challenge” To The Presumption Of Innocence In Securities Fraud Cases

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Overview

There are a number of fundamental challenges that emerge for corporate executives on trial for securities fraud. I say these challenges are fundamental because they exist as the basis, or the foundation upon which these cases are tried. While these cases are notable for their complexity, these fundamental challenges derive from a simple but powerful belief likely held by many jurors: “With great power comes great responsibility.” For powerful corporate executives, this belief can mean the end of the presumption of innocence.

This belief has been buttressed by the recent collapses of major corporations like Enron and WorldCom. Then, the power and responsibility of corporate executives are directly connected to the losses suffered by employees and investors whose pension plans and stock holdings have suddenly become worthless. Then, the presumption of innocence is lost.

In the last few years, many powerful corporate executives whose personal wealth ran into many millions of dollars have come to trial. With few exceptions, they have been convicted at trial or have pled guilty. We have been involved with a number of these trials, including two trials that resulted in hung juries and one trial that resulted in an acquittal on most counts and the subsequent dismissal of the remaining counts about which the jury had hung 11 – 1 for acquittal.

While confidentiality prevents me from discussing any of the research associated with these cases in specific, here I describe research methods, general findings, and observations based on my experiences as a trial strategy consultant helping attorneys to prepare for criminal securities trials.

As the title of this article suggests, I have come to believe that the ultimate object of all pre-trial research in cases involving corporate executives is winning the war against Spiderman's challenge so as to restore meaning to the presumption of innocence.

Jurors often believe that corporate executives in positions of power are responsible for anything that happens at the corporation. "The buck stops here" also describes this view. There is positive value associated with this assumption of responsibility. The alternative of shirking responsibility is, of course, negative. And, yet, corporate responsibility must be distinguished from criminal responsibility. Great power must be distinguished from complete knowledge; great power should only be the beginning, not the end of the story. If this can be achieved, then defense trial themes[3] will come to life and assume their rightful place in guiding the jurors' deliberations.

Next, I discuss the pre-trial research methods that we use to enhance trial preparation and to improve understanding of how best to do battle for the presumption of innocence in cases of powerful corporate executives. Then, I offer recommendations based on this research. This is followed by a discussion of some of the findings that we have gleaned from exit interviews with actual trial jurors.

Pre-Trial Research Methods: Telephone Surveys, Focus Groups, And Mock Trials

Telephone Surveys[4]

All of the pre-trial research techniques we use are organized by the facts of the case. Even the telephone surveys are quasi-mock trials consisting of modules in which the prosecutor's position is followed by the defense position on a number of themes. At the end of each module, telephone survey respondents answer a number of questions that require them to choose between two statements that reflect contrasting perspectives on the case. Then, they cast verdict votes.

Demographic and attitudinal data are also gathered, which enable us to explore what kinds of people – with what attitudes and what demographic characteristics – are most likely to give pro-defense responses.

Typical telephone surveys last 30 minutes; 400 venire members, selected at random to match the census data profile of the venire, make up the data base. Because the data base is so large, telephone survey results are extremely useful in the creation of a preferred jury profile. A brief sample survey is appended to the end of this article, to provide an idea of what our surveys look like.

Focus Groups

Focus groups and mock trials are distinguished from telephone surveys by the richness of the data collected. Fewer people participate in these research activities, though, so the data are more useful for the preparation of trial presentations (i.e., openings, closings, direct and cross examinations), than for jury selection. People talk about the story of the case, react to the themes and facts and offer their common sense views on such things as the motives of corporate executives.

Focus groups typically begin with general introductions by the participants and then a free association session – before any of the case material is introduced. This way, we have the opportunity to see what people are thinking about key terms in the case, before we begin to influence them.

For example, I may ask: "What thoughts or opinions come into your mind when I say, "CEO," "CFO," "cooperating witnesses," "white collar crime," or "the effects of Enron or WorldCom on other cases involving accusations against corporate executives?"

Once people have told us their reactions to these terms, we begin to tell them the story of the case. As with the telephone survey script, the focus group script proceeds in a modular way, with attention first to the prosecutor's position followed by the defense position. Participants are asked questions at the end of each module that allow us to explore with them their reactions to the prosecution and defense themes, considered separately and in relation to each other. Unlike mock trials, focus group discussions are led by a moderator, so there is the opportunity to pursue particular ideas in depth and to encourage focus group members to react to each other's ideas.

In a recent focus group involving a corporate executive, we saw a very interesting dialogue emerge between a Jewish woman with a graduate degree and an African American man with some college or technical training. The man argued that white collar crime was worse than murder because when a company went under because of corruption, it was as if everyone who had lost their job had been killed. They could no longer support their families. Their lives were over. The woman argued that murder was much worse than white collar crime because as long as you were alive you could find another job. The man who argued with her, and other working class people in the focus group, showed disdain for her and for this idea. They told her it might be easy for her to find another job, but would not be easy for them.

Here is an excerpt from the transcript of their exchange:

MAN: *[White collar crime is] probably one of the worst crimes that could be committed. It could be up there. Because murder—I'll give my life to save all you people—but if you take all our money, then what can you do for us?*

WOMAN: *Go out and get another job. If I'm dead—*

MAN: *Everybody is not educated like you*

WOMAN: *You run 75 people. I think that a lot of times, again, just my opinion, white collar crimes are these things that a lot of people do and few people get caught. I'm not saying that I would do it, but like Martha Stewart—*

MAN: *I remember a couple of years, just seeing people crying on TV because they lost their job because of what some people did. You see them on the street taking their bags, nowhere to go with their kids hungry.*

This exchange may be understood to reveal an important difference based on race and class with regard to the perception of white collar crime. While in many cases, African American men are believed to be good defense jurors, in white collar crime cases, they may not be good defense jurors. Focus groups, of course, can only hint at such differences. The telephone survey, as noted earlier, is the only research method with a large enough data base to allow the naming of jury selection strategies.

Mock Trials

Mock trials are designed to resemble the real trial as much as possible. That said, mock trials last only a day or two and most often include little or no evidence. Mock trials are theme tests. The typical form includes statements by counsel which take the form of "clopenings," hybrids of openings and closings. Usually, in our mock trials, we use a debate-like format – the prosecutor goes first, followed by the defense attorney. Then the prosecutor goes again, followed by the defense attorney. While giving the defense attorney the last word is different from what happens at the real trial, it is hard for the defense attorney to go twice, with no new information introduced by the prosecutor.

As the day proceeds, mock jurors fill out questionnaires and take "leaning" votes after each presentation. When all four presentations are done, they complete a lengthy questionnaire in which they react to the key ideas of the prosecutor and defense presentations. They are asked how much they agree or disagree with each idea. Sample items might include:

As the CEO, Mr. Smith should have known that revenues were being counted improperly. The buck stops with him.

1	*2*	*3*	*4*
Strongly Disagree	*Disagree*	*Neutral*	*Agree*

It is not fair that the prosecutors are going after Mr. Smith and letting the Chief Financial Officer and Chief Accounting Officer off the hook without being charged.

1	*2*	*3*	*4*
Strongly Disagree	*Disagree*	*Neutral*	*Agree*

The cooperating witnesses who will testify against Mr. Smith are not credible because they are motivated to lie to protect themselves.

1	*2*	*3*	*4*
Strongly Disagree	*Disagree*	*Neutral*	*Agree*

As many as about 50 people may listen to the attorneys' presentations. Then, based on their pre-deliberation verdict votes and a few demographic characteristics (e.g., gender and education), mock trial participants are divided into 12 person juries. They are provided with a verdict form and asked to deliberate with the goal of reaching unanimous verdicts.

As with the focus groups, everything is taped and transcribed for future reference and analysis.

After the mock trials and the focus groups are complete, much new information is known by the attorneys. Verdict votes have been taken; rationales have been offered. Once these research days are complete, though, there is more to learn from a careful analysis of the findings. Participants in both sorts of research activities complete questionnaires and these data are entered into the computer and analyzed with a view toward understanding: (1) Which defense and prosecution themes received the highest levels of support, (2) What distinguished those who acquitted from those who convicted – what ideas, beliefs, attitudes, or demographic characteristics seem to promote pro-defense verdicts? With regard to the second purpose especially, telephone survey data serve an important corroborative function.

The transcripts provide insights into how mock jurors' thinking evolved over the course of the day – our analyses include explorations of how the accumulated weight of the information affects jurors' thinking. After all of the data have been analyzed, our reports to attorneys feature an Executive Summary, in which we offer recommendations for trial strategy based on what naïve listeners, mock jurors actually said. Such recommendations might include highlighting certain proposed themes and de-emphasizing others that were less persuasive to mock jurors, or developing demonstratives to clarify particular issues. For example, research often reveals mock jurors' difficulties in understanding corporate structures and individual executives' responsibilities. These can be important factors in jurors' judgments about whether a defendant knew or should have known about financial irregularities.

Pre-trial research is enormously powerful. The more prescient you are about what is likely to happen at trial, the more useful the results will be. The greatest risk of pre-trial research is mis-estimating what will happen at trial. The research remains powerful, but the implications are misleading and detract from effective trial preparation.

Of all the research strategies, mock trials, which are most like real trials, are the most likely to reveal to you the outcome of your trial. People often ask how often we win and lose the cases we work on. We win more than we lose, but that is actually not the right question to ask.

The right question is, "Does your pre-trial research show what is likely to happen at trial?" To that question, the answer is yes. We have done telephone surveys where at the end, 75 percent of the participants voted guilty. We have seen defendants in those circumstances convicted. We have done telephone surveys where at the end, about 50 percent voted guilty. We have seen those defendants acquitted. The difference between 50 and 75 percent is enormous.

In one case, we did three mock trials, and despite our instructions to try to reach a unanimous verdict, all three mock juries hung. At trial, so did the real jury. We have done mock trials where the rates of conviction were so high, that defendants decided to plead guilty rather than stand trial. If the research is well-designed, that is, if it matches the themes that emerge at trial, it will illuminate the future.

Trial consultants have a kind of “crystal ball” mystique, especially when it comes to jury selection. This is undeserved and serves to undermine the real contributions trial consultants can make to trial preparation. Jury selection is the tip of the iceberg. What lies beneath the surface is what makes jury selection strategies possible and powerful.

Post-Trial Exit Interviews

In a number of cases involving corporate executives, we have conducted post-trial interviews with the jurors. These interviews are typically conducted over the telephone. Unlike pre-trial research, jurors are not paid for their participation. While jurors' descriptions of deliberations and of how they and others reasoned about their verdicts are especially useful in cases where juries hang, there is broader applicability of these findings as well. Lessons learned at one trial can be applied at another.

Recommendations From Pre-Trial Research In Cases Involving Corporate Executives

Telephone Survey Findings

There are a number of findings we culled from telephone surveys; these findings are drawn from surveys of at least 400 people. In some cases, results from more than one survey were combined and are reported together.

The “Spiderman Challenge” Confirmed: Many Believe That CEOs Should Know Everything

Our data suggest that the general public has high expectations about what a CEO should know. In one survey, 75 percent of respondents agreed or strongly agreed that a CEO should know everything that goes on in the company.

Top Executives Should Be Able To Rely On Others

On the other hand, 80 percent of respondents agreed or strongly agreed that top executives should be able to rely on others to handle the company's accounting properly. This finding suggests a possible route to reduce the negative impact of the Spiderman challenge on corporate executive defendants.

FINDINGS VARY WITH REGARD TO HONEST BUSINESS PRACTICES: THE WORDING OF THE QUESTION MATTERS

We have asked telephone survey respondents what they think about honesty and corporate life. We have seen differing opinions, depending in part on how we have posed the question. For example, in one survey, about half the respondents agreed or strongly agreed that most companies are run honestly and ethically, but in another about 70 percent agreed or strongly agreed that illegal practices in business are common.

PEOPLE DO NOT BELIEVE THAT PROSECUTORS ARE BEING OVERZEALOUS WHEN IT COMES TO CORPORATE EXECUTIVES

In one survey, two-thirds of the respondents disagreed or strongly disagreed with the idea that the government has been too aggressive recently in these kinds of prosecutions. Only about 20 percent agreed or strongly agreed that prosecutors have been too aggressive.

Recommendations Based On Focus Groups and Mock Trials

Over the last several years, we have watched hundreds of people participate in discussions of securities fraud cases, in either focus groups or mock trials. Based on these observations, we have a number of recommendations for attorneys defending these cases:

Intent, Intent, Intent.

You cannot over-emphasize that in the absence of criminal intent, jurors must acquit. It is very difficult to get jurors to focus on intent, but it is essential that they do so. Actions in the absence of intent to commit a crime are not enough, and jurors must understand that and consider it in their deliberations.

Emphasize The Burden Of Proof And The Presumption Of Innocence.

We often hear mock jurors suggest that "where there's smoke, there's fire," or "If he was indicted, he's probably guilty of something." Remind jurors that for each charge about which they deliberate, they must ask themselves: "Has the government proved this beyond a reasonable doubt?"

Help Jurors Pay Attention To Context, In General, And To Signs Of A Lack Of Secrecy In Particular; This Tends To Benefit The Defense.

Draw their attention to general corporate practice, what others in the company knew and did, and the history of the practices at issue. Point to evidence that shows that the defendant was open and not secretive in his business activities.

Use demonstratives to show how your client fits into the corporate organizational chart: Who is above him, who is below him, how far removed is he from other departments?

Highlight The Distinction Between Corporate Responsibility And Criminal Responsibility.

You will have to pre-empt jurors' presumption that CEOs and other corporate-executive defendants are responsible "by virtue of their position."

Similarly, give jurors room to say that they may not like a particular practice, but help them recognize that this does not make it illegal.

If You Are Arguing That The Practice At Issue Was Common Practice, Connect This Explicitly To The Defendant's State Of Mind.

Since the practice was widespread, your client assumed it was legal and acceptable. If you do not make this connection explicit, jurors may hear this argument as "Everyone else was breaking the law, why shouldn't I?"

Emphasize The Ambiguity Of GAAP Rules And Other Securities Laws, And The "Gray Area" In These Regulations.

Many jurors are receptive to the idea that government rules can be confusing and unclear, and that skilled professionals may interpret them in differing ways. However, people whose jobs require them to think in black-and-white ways tend to react quite negatively to this line of argument.

Address The Tension Between Inconsistent Defense Themes: "There Was No Wrong Done" Versus "Others Did It."

When a defendant points the finger at others, some jurors can hear this as undermining the defense theme that the practices in question were perfectly legal. Smarter and more sophisticated jurors seem to pick up on this most, and sometimes, it is the pro-defense people who are most troubled by the inherent tension in these positions.

Avoid Repeated References To The Defendant's Experience And Expertise

They often serve to strengthen jurors' perceptions that the defendant "should have known" what was going on at the company.

Exit Interview Findings

Exit interviews provide data on the rightness of the recommendations that followed from pre-trial research. The results of exit interviews have confirmed the recommendations we offered. This is important not only as we look behind us at the verdicts that have already been reached, but especially as we look to the future for upcoming trial preparation.

For example, in exit interviews, jurors who voted to convict have talked a lot about how "the buck stops here."

One pro-prosecution juror told us:

> *It was hard for me to believe that the head of the company was not looking at reports… It just was not possible that he did not know. He was the head of the company from the beginning.*

In contrast, pro-defense jurors talked about how they did not find criminal intent, and how the practice at issue was so common that the defendant had no idea it was not legal. We have heard comments like these:

> *The defendant was operating in an environment where this was clearly standard practice. You'd think the prosecution would have tried to work harder*

on that.

There was a lot that was not right, but did they intend to do it? Was it the regular course of business or did they intend to plan or scheme to defraud someone?

And, pro-defense jurors considered the role of others at the corporation:

We thought there was a possibility that he was duped by other executives.

Verdicts and exit interviews shed real light on how jurors reacted to the trial themes. We have been reassured to see that our predictions have been generally accurate. The implications for future trials include efforts to strengthen defense positions that emerged in pre-trial research and were elaborated during exit interviews.

Conclusion

Spiderman's challenge notwithstanding, there are ways to enliven the presumption of innocence and to move beyond the notion that "with great power comes great responsibility." For corporate executives, this is essential to their defense. Our pre-trial research and exit interviews reveal and confirm the importance of emphasizing intent and the context in which the defendant worked. The difference between corporate responsibility and criminal responsibility must be made clear. Even powerful corporate executives can not be expected to know everything.

In the post-Enron era, defendants in securities cases have been deeply disadvantaged by the cultural climate. By drawing jurors' attention to this "air they breathe," one can begin the process of re-asserting the rightful place of the crucial principles of justice – the presumption of innocence and the burden of proof.

As I suggested earlier, trial consultants have had something of a "crystal ball" mystique. We offer so much more than that. The pre-trial research and the exit interviews we do reflect our commitment to gathering data, developing theories and seeing you advance them in the well of the courtroom. In this way, as I have described in this article, we can help you to see the terrain ahead of you. We can tell you the strengths and the challenges contained within your trial strategies. By illuminating the likely course of future events, we can help you to maximize your chances of winning at trial.

Appendix

Sample Telephone Survey – Securities Fraud Case

Demographics

Questions about gender, age, ethnicity, education, county of residence are included at the beginning of survey and are used to design the sample, so that the sample is representative of the population of potential jurors. Additional questions about marital status, employment, home ownership, religion and income are included at end of survey.

Attitudes About Corporate Life

Do you have any opinions about corporate executives?

____ 1. Yes

____ 2. No

If yes, how would you describe your opinion of corporate executives?

1	2	3	4
Strongly Negative	Negative	Neutral	Positive

Now I am going to ask you a few questions about your attitudes in general. Please tell me how much you agree or disagree with each statement.

Most companies are run honestly and ethically.

1	2	3	4
Strongly Disagree	Disagree	Neutral	Agree

Chief Executive Officers (CEOs) should know everything that goes on, even in large companies with many different departments.

1	2	3	4
Strongly Disagree	Disagree	Neutral	Agree

Top corporate executives at a large company should be able to rely on the company's outside auditors to alert them to any accounting problems.

1	2	3	4
Strongly Disagree	Disagree	Neutral	Agree

The government has been too aggressive recently in prosecuting people in corporate

leadership.

1	2	3	4
Strongly Disagree	Disagree	Neutral	Agree

Now, let me begin to tell you about the case. This is a case brought against

Andrew Kilton, Chief Executive Officer (CEO) of CorTac Industries. CorTac is a large corporation employing over 50,000 people and Mr. Kilton, CorTac's top executive, has been charged with securities fraud. Specifically, he is accused of defrauding shareholders by reporting false earnings for CorTac for the year 2003.

Here is what the prosecutors say:

Prosecutors say that Mr. Kilton illegally reported over $2 million in revenues for CorTac between January and December 2003. Here is how he did this:

When Kilton saw that CorTac was not going to make as much money as Wall Street analysts were predicting for the end of 2000, he took money out of the company's reserves and made it look like new earnings. Reserves are funds that companies set aside for specific future expenditures, such as building renovations They cannot be used to make a company look better financially when it is falling short at the end of the year.

The prosecutor says that Kilton did this because CorTac's actual revenues in 2003 were lower than Wall Street analysts had estimated they would be. Kilton knew that if CorTac did not meet the estimates, the company's stock value would drop. Much of his compensation was in stocks and stock options, and he did not want his investments to lose value.

Now here is what the defense says:

The defense says that Mr. Kilton is not guilty of these charges. As a multi-billion dollar corporation, CorTac had a huge financial staff which was under the direction of the Chief Financial Officer and Chief Accounting Officer. They were responsible for accounting for CorTac's financials and gave Mr. Kilton the information upon which he relied.. A CEO can only do his job if he is able to delegate certain responsibilities to others. The errors of the CFO and CAO should not be held against Mr. Kilton.

The defense also says that Mr. Kilton should not be charged with a crime for his use of the company's reserve funds. Figuring out how much a company needs to set aside in reserves is an estimate at best. It is never a definite number. In this case, Mr. Kilton had over-estimated. When he realized that funds could be released from the reserves, he applied these funds in other ways. At worst, this was a mistake. It was certainly not a crime.

With which of these two statements do you agree more?

____*1.* *As CEO, Mr. Kilton alone must take responsibility for any problems with the revenues.*

OR

____*2.* *Mr. Kilton reasonably relied on the Finance Department and its executives to give him accurate information. Their errors, not his, explain the problem with the reserves.*

As the CEO, Mr. Kilton should have known that revenues were being counted improperly. The buck stops with him.

1	*2*	*3*	*4*
Strongly Disagree	*Disagree*	*Neutral*	*Agree*

It is not fair that the prosecutors are going after Mr. Kilton and letting the Chief Financial Officer and Chief Accounting Officer off the hook without being charged.

1	*2*	*3*	*4*
Strongly Disagree	*Disagree*	*Neutral*	*Agree*

Since Mr. Kilton was known as a "hands-on" CEO, it is hard to believe he did not know about the fraud at CorTac.

1	*2*	*3*	*4*
Strongly Disagree	*Disagree*	*Neutral*	*Agree*

Based on what you have heard so far, how would you vote on the charge of securities fraud?

____ *Guilty*

____ *Not Guilty*

____ *Can't Say*

[1] Uncle Ben says this to his nephew, Peter Parker aka Spiderman, in Stan Lee's comic.

[2] This article is based on a talk given at a Continuing Legal Education Seminar, "Securities Litigation: Current Developments & Strategies," February 2, 2006, organized by Larry Zweifach of Heller Ehrman ander 2006).