Defending Masters of the Universe in White-Collar Cases

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"A $90,000 area rug, a $35,000 toilet, a $3,000 ashtray, and a $1,400 trash can! Ladies and gentlemen of the jury, look at the wildly extravagant lifestyle of this defendant. His office redecorating bill came to an astonishing $1 million," snarls the prosecutor, pointing at the successful chief executive officer of a major company, on trial for alleged financial improprieties having nothing to do with his office décor. The defense attorney cringes, and the CEO is not quite sure what to do. Grin? Shake his head in disbelief? Look embarrassed? Be apologetic? For what, being successful?

In a white-collar case, the government loves to shine the spotlight on corporate executives' pay and perks, and for good reason. Research based on surveys about state and federal white-collar-crime trials found that jurors feel "betrayed" by the personal excesses that are believed to be behind America's current economic strife. Julie Blackman, Ellen Brickman & Corinne Brenner, "Can White Collar Defendants in Securities Fraud Cases Get a Fair Trial?" (e-book, Feb. 3, 2010). One potential juror stated that she believed rich people who wanted to get richer were committing a crime. Although she was excused for cause, her comment speaks volumes about attitudes toward white-collar defendants. The researchers conclude that "the reflexive ascription of criminality to the wealthy and the powerful may be the last bastion of acceptable prejudice." *Id.* at 2.

Addressing Reflexive Prejudice

How best to address this reflexive prejudice when representing a rich, successful corporate executive? Ignore it and hope that the jury will too? Try for a curative instruction down the road? Attempt to explain away the perks? Or maybe go on the offensive: "Of course, my client was paid big bucks! He was worth every dime!" History tells us that the government or the media, or both, will focus on any appearance of lavish spending. Hoping the jurors won't notice is not an option. Better to address the subject head-on, as early in the trial as possible.

File a motion in limine. Trial courts have broad discretion in determinations of admissibility based on considerations of relevance and prejudice, and these decisions are not lightly overruled. Move to exclude evidence of your client's lifestyle, such as references to vacations, automobiles, real estate, use of a corporate jet, and other perks. Citing Federal Rules of Evidence 401, 402, and 403, you can argue that such evidence has no relevance to the offenses charged and will only serve to inflame the jury. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940), and progeny hold that appeals to "class prejudice" are improper and that trial courts should be alert to prevent them. If how your client is remunerated by his company or how he chooses to spend his compensation is irrelevant to the underlying charges,

Published in *Litigation*, Volume 39, Number 3, Summer 2013.

the government's attempt to present this evidence is an improper appeal to class prejudice:

> The problem with a general rule of permitting evidence of an affluent lifestyle to show "motive" for committing a crime is that it ignores the real possibility that the extreme or extravagant wealth or spending was made possible by legitimate means and, if so, the introduction of such evidence would appeal solely to class prejudice.
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> *United States v. Jackson-Randolph*, 282 F.3d 369, 378 (6th Cir. 2002).

"That the defendant went to Las Vegas, or bought a new car, tells us nothing about why he defrauded the insurance companies." *United States v. Ewings*, 936 F.2d 903, 906 (7th Cir. 1991). If the trial court agrees with you, wonderful. You can now focus your energies on defending the substantive charges. However, in the overwhelming number of cases, the evidence will come in, and here's why.

The government may argue that evidence of the defendant's lifestyle or spending is relevant to show motive for committing the alleged crimes in that your client, the chief executive officer (CEO), needed large amounts of money to maintain his lifestyle and spending habits. Stated otherwise, the extravagant lifestyle itself was the underlying motive to commit fraud. Although each case turns on its own facts, a successful motion in limine to keep the lifestyle evidence out will demonstrate that the government does not have direct or circumstantial evidence of the charged criminal activity, the money spent on the lifestyle was available to your client from a legitimate source (whatever perks your client enjoyed were known and sanctioned by the board, the shareholders, or both, and a part of the employment contract), and the level of spending during the period of the alleged illegal activity was not atypical.

If the trial court denies your motion, address the issue at voir dire. Research demonstrates that jurors who are highly educated, who earn more money, or who are successful professionals or business owners are less likely to vote to convict white-collar defendants. The less a juror understands of the complexities of high finance and the world of top corporate executives, the more likely he or she will succumb to the "greedy pigs at the trough" stereotype of corporate executives, bringing the juror that much closer to a guilty vote. Bring the issue of wealth and lifestyle out in the open while picking the jury: "My client is a successful corporate executive who has been handsomely rewarded by his employer. By any standards, he is rich and has a lifestyle to match. Is that a crime?" Ask the jurors if they know anyone who is a successful corporate executive. Engage them in a discussion of pay-for-performance in corporate America. Strike a theme: *Just because you're rich doesn't mean you are guilty*. Wesley Snipes's lawyers' successful defense of felony tax fraud charges resonated with the theme: "Crazy ain't a crime. If it were, half of Hollywood would be in prison." Draw the sting. Desensitize the jury to the glamour beginning with voir dire and follow through in your opening statement.

Address the issue of executive pay. Although some CEOs are overpaid or, even worse, paid for incompetence, jurors can appreciate the difference between pay-for-performance and pay-for-incompetence only by first understanding the CEO's job, the marketplace, and the stakes involved. When a congressman suggested to Ford CEO Alan Mulally that he should take a salary of one dollar, given the near-bankrupt state of his company, Mr. Mulally politely declined and took home nearly $17 million in compensation. That seems outrageous until placed in context. Mr. Mulally's payday came on the heels of a billion-dollar turnaround that transformed a $970 million loss at Ford into profits of nearly $700 million just one year later. Knowing that, $17 million doesn't sound like quite so much.

Consider using an executive headhunter to testify as an expert to explain the CEO market. Why do CEOs get paid so much in first place? As reported in the *Wall Street Journal* article "In Defense of the CEO," in "superstar economies"—as in the market for CEOs—even a slight edge in ability can translate into enormous payoffs. Major League Baseball pitchers earn disproportionately more than Triple-A players for throwing fastballs only a couple of miles an hour faster. When the stakes are in the billions, shareholders are more than happy to sign a multimillion-dollar paycheck, even if the recipient CEO is just slightly better than the next best option. The expert can explain why it makes sense for the board and the shareholders to authorize perks: The corporate jet, albeit expensive and glamorous, enables more face time with senior company employees in different locales and is an efficient use of the CEO's scarce and valuable time. The chauffeured limo allows the CEO to have conference calls and read reports during the morning commute. The expert can also educate the jury about other perceived corporate excesses like the often misunderstood golden parachute that took hold during the merger wave of the 1980s, when CEOs had to choose between merger opportunities benefiting the shareholders and keeping their own jobs. Not a gratuitous windfall, the golden parachute gives CEOs an incentive to place the long-term interests of their companies ahead of their own job security. *See* Ray Fishman & Tim Sullivan, "In

Defense of the CEO," *Wall. St. J.*, Jan. 12, 2013, at C1.

The Scapegoat Theme

If your defendant happens to be the fall guy, develop the universally understood scapegoat theme. The corporate executive, the fund manager, the industry leader all become perfect and convenient scapegoats when things go wrong. Criminal defense attorney Mark Mahoney posits in his presentation "The Corporate Officer as Scapegoat" that no better example of scapegoating driving criminal investigations and prosecutions exists than in the wave of corporate fraud litigation over the past decade. Mahoney argues that scapegoating stops with the simple revelation that the victim (the defendant) is a scapegoat. Educate the jurors about how scapegoating works. Reveal how the prosecutor is enlisting the jury to pile on. An expert on corporate life can explain how a CEO functions, which can in turn lead to an awareness that high-level executives delegate responsibility to others and do not (and should not) have complete knowledge of everything that happens in a company. Harvard Business School professors Michael Porter and Nitin Nohria argue in the *Harvard Business Review* that the skill to extract from subordinates the necessary critical details to inform top-level decisions is a vital CEO skill. CEOs are multitaskers who delegate a significant amount of responsibility to accomplish corporate goals. Showing pages from their appointment books or describing the events of a particular day or week can put the events in a helpful context. Showing how many emails the CEO sent and received on a particular day may help the jury understand, for example, how much time did or did not go into reading a particular email. Testimony as to how the CEO's second in command and vice presidents are screened, hired, supervised, paid, and rewarded, and that they are expected to do their jobs with little supervision, can also be useful to the jury in understanding the realities of corporate delegation. It's not enough to say that your CEO client was "busy." Rather, demonstrate it and show examples of the scope of responsibility and the complexity of the CEO's job.

This is a sophisticated dance that requires subtlety and credibility. Remember Bernie Ebbers' doomed "ostrich-in-the-sand" defense. CEOs cannot pass the buck. This is an important element of what Blackman and her colleagues refer to as the "Spider-Man Challenge" to the presumption of innocence: With great power comes great responsibility. One of the mock jurors in their study opined, "For that kind of money, he had to know what everybody was doing." Another said, "When you're running a billion dollar company, you know what you're doing. . . . He knows exactly what he's doing."

Avoiding this mind-set by picking the right jury is more effective than trying to disabuse the wrong jury of its notions of CEO omniscience. Research shows that jurors with advanced education and financial savvy understand that high-level executives succeed by delegating and are typically not involved in the accounting details underlying criminal charges. These jurors are more receptive to an argument that the CEO should not necessarily go to jail because he made a bad hire.

Finally, consider allowing your client to testify. Many defense lawyers abhor this idea, and often for good reason; corporate bigwigs can come across as arrogant, entitled, and pompous.

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They are used to barking orders. There is a real risk that their attitude may hurt their case. On the other hand, the best way to humanize your client may be for him to take the stand. He has a story to tell: How he struggled to climb to the top of the corporate ladder; his successes and failures; being a husband, father, son, brother—a story that offers the jury an opportunity to connect with him.

White-collar defendants often have huge egos and, even in the midst of their own criminal trial, can be slow to realize that they do not call the shots in the courtroom—that they have to sit in that witness chair and answer questions until they are excused. Those "yes, sirs" and "yes, ma'ams" don't come easily to our clients. It's painful to watch, but that's when the humanization happens. If your CEO can withstand being beaten up by the prosecutor without admitting to wrongdoing, you will have advanced your cause. If the jury feels he's been humiliated or even humbled, its urge to punish further will diminish and the jurors' protective instincts may even kick in, allowing them to see your client for who he really is rather than as a stereotype.

While some defense attorneys shy away from acknowledging and addressing the success, pay, and lifestyle of their corporate executive clients for fear of inflaming the anti-wealthy feelings of the jury, it is better to take the bull by the horns. Juror prejudice against wealthy corporate executives cannot be eliminated, but bad jurors can be avoided. At a minimum, they can at least be educated that prejudice has no place in their decision making. They may still stick it to your client, but hopefully, it won't be because of his wealth and lavish lifestyle. ■