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Top Of The News

Tyco Trial: Fraud And Farce

Dan Ackman, 03.17.04, 8:30 AM ET



[More From Dan Ackman](#)

A couple of hours into the four-hour closing argument by prosecutor **Ann Donnelly** in yesterday's **Tyco International** trial in a state court in Manhattan, I looked over at the jury and noticed that many seemed to have their thoughts elsewhere. One was gazing at the back wall; another checked his watch; perhaps one was still taking notes; most were looking vaguely away.

If the jury had lost its will to listen, I decided to use my time a bit differently as well, so I started reviewing the indictment and its 35

counts against **L. Dennis Kozlowski**, the former chief executive of Tyco (nyse: [TYC - news - people](#)), and **Mark Swartz**, the former chief financial officer. Along with the 35 counts, or charges, there are 68 "overt acts" in furtherance of the alleged "enterprise corruption" between the pair. There are 80 alleged "pattern acts" as part of that enterprise. There is a separate conspiracy charge, which includes the same 68 alleged overt acts as the enterprise corruption charge.

Some of the alleged overt acts are the same as the pattern acts; some are different. Some of the overt acts and pattern acts are alleged to be separate crimes; some are not. The charging of the

famous party in Sardinia, for instance, is an alleged overt act (number 60, to be precise), but it is not alleged as one of the larcenies.

Donnelly was still going on when I looked back, and she seemed to be on a roll. Reporters during the breaks were into it, to a point, with some exclaiming that the assistant district attorney was a "quote machine," and indeed she was.

The defendants stole with "with both fists," she said. "They are here not because they blurred the line between themselves and Tyco. They are here because they obliterated it," she added. "Since when is Tyco in the business of buying art?" Donnelly scoffed. They used Tyco as their "private piggy bank," she said more than once. "Corporate criminals act in corporate criminal ways," she advised. "Greed is greed, and sometimes when you have a lot you want more," she continued. She urged the jury not to be swayed by Swartz's "cagey" testimony, because he was "like a talk show guest" and "language" was just one of his criminal "weapons." On and on she went, and in my personal favorite statement, she urged the jury to use their "life experience as New Yorkers" in assessing the evidence.

But then I realized that Donnelly had barely mentioned the evidence. She didn't cite much testimony; she rarely mentioned a document. I looked at the charges in the indictment. She had barely mentioned any of those either. She spoke for four hours, and then she introduced her colleague **Marc Scholl**.

Scholl, it was promised, would discuss the particulars underlying Donnelly's impressionistic view. After speaking for about a half-hour, he had gotten to just one of them. It was something about how corporate relocation programs are supposed to work one way, but at Tyco they worked a different way, which he alleged the directors did not authorize. Allegedly some business records were falsified along the way, though Scholl, who will continue today, has yet to point to any record in particular.

It's difficult to read the jurors' obvious and well-earned boredom--the trial is nearing the six-month mark and the transcript exceeds 12,000 pages. It may be they have tuned out because they have already decided that the case is hopeless. If it is hopeless, it may be hopeless for the defendants. I tend to think it looks hopeless for the prosecution, which doesn't seem eager to embrace evidence or actually prove any specific charge. (Full disclosure: I saw very little of the testimony, and maybe the jury already knows the stuff the prosecutors are gliding past.)

In so many ways, the Tyco case is the opposite of the [Martha Stewart case](#). In that case, the charges were so specific that some argued they were unfairly picayune.

The charges against the Tyco Two are so voluminous that, even in five months, there was not enough time to focus on them all. So the assistant district attorneys go for atmospherics, spending full days showing videos of parties and apartments, which are

certainly grotesque but which are not even alleged to be crimes. It's too bad, because it does seem that the corporate excess and raw vulgarity at Tyco might merit an indictment, but one tailored so it makes sense.

Of course there are crimes alleged, and someday soon the jurors will be roused and told--perhaps using their life skills as New Yorkers--to determine whether they are crimes in fact.



Top Of The News

Closing On Kozlowski

Dan Ackman, 05.27.05, 9:04 AM ET

The big difference between the prosecutors' closing arguments in the last **Tyco** Trial and the one winding down this week is that this time the arguments were coherent. That's good for jurors trying to follow the case, but it's not necessarily good for the Manhattan district attorney's chances of securing a conviction.

Last time around, the case was such a mess that the jurors may well have assumed there was something there--and statements by the jurors attested to that possibility. This time, Assistant District Attorney **Owen Heimer** carefully explained the nature of the alleged thefts and delivered a theory about how the defendants, **Dennis Kozlowski** and **Mark Swartz**, covered their tracks.

Entering the second day of his summation, Heimer focused for two hours on a single transaction, the alleged theft of \$37.5 million in loan forgiveness that occurred in the summer of 1999. Heimer first outlined how a legitimate bonus was recorded in board minutes, in payroll records and in tax filings. "This is how it works when nobody is stealing," he said.

But the 1999 transaction had no such records. Swartz told an underling to make an entry in Tyco International's (nyse: [TYC](#) - [news](#) - [people](#)) books reversing so-called key employee loans by \$25 million for Kozlowski, Tyco's former CEO, and by \$12.5 million for Swartz, its former CFO. The defendants say the loan reversal was an early payout of a bonus legitimately earned.

The way the record was made, the amounts were never known to Tyco's payroll department and never wound up on the defendant's W2 forms or their tax returns. The lack of paper trail "shows you criminal intent," Heimer told the jury. "It shows you the intent to steal."

The defendants have argued that the bookkeeping was simply an error. But the \$37.5 million in income--unlike most of the other bonuses at issue in the case--was not recorded in Tyco's proxy statement either. Why not? Swartz and others determined that the loans and their forgiveness was part of a "broad-based" relocation plan. The plan though affected just a half-dozen employees and no one actually relocated, Heimer said.

Heimer went on to mock the defense's claim that Kozlowski, 58, and Swartz, 44, simply didn't notice the missing millions from their tax filings. The defendants were both accountants, both of vast financial experience, and were both "obsessed by taxes," Heimer said, offering several examples of that obsession.

The 1999 loan reversal may be the most powerful charge in the case, as it was the most casual alleged theft of all. The prosecutors allege also that Swartz admitted the wrong--calling it a mistake--in a conversation with **David Boies**, the lawyer whose law firm's investigation led to the indictment by the Manhattan district attorney.

But the Boies' conversation is also the foundation for the strongest defense. Even after Boies' confrontation with Swartz, where one of the alleged thefts was highlighted and even allegedly admitted, the company did not fire him. Tyco kept him on as CFO for two more months, made him the principal spokesman on investor calls, had him certify the company's financial statements and agreed to pay him more than \$50 million in severance. This conduct suggests that Tyco itself, even after it launched an investigation, did not consider even the shadiest of the bonuses to be stealing.

Heimer and Assistant District Attorney **Ann Donnelly** attacked the overall defense that Tyco knew and approved by arguing that those who were complicit in the crimes had been bought off with their own huge bonuses and perks or lacked power to challenge the CEO. Many of these employees testified at the trial and said that neither Kozlowski nor Swartz had asked them to hide or conceal anything. The prosecutors mocked those statements as "meaningless" defenses from loyalists and co-conspirators. This charge led to a strong objection from the defense lawyers, as Heimer himself had called these witnesses and had never named them as part of a conspiracy.

Several former directors also testified that they did not know about the bonuses and never authorized them. "One of the most powerful weapons at [the defendants'] disposal was the trust the directors portrayed in them," Donnelly told the jury. Though they might have asked questions, the directors had no reason to ask about bonuses they never knew were paid, she said.

Kozlowski testified he often discussed the bonuses with **Phil Hampton**, the former head of Tyco's compensation committee, who died in 2001. Donnelly called the reliance on Hampton an "outrageous story" and "despicable."

Apart from the key employee loan bonus larceny charge, the defendants face 30 additional charges, including 12 more larceny charges. Donnelly will continue her closing arguments today and perhaps into next week. Many of the charges have distinct aspects. There are hundreds of exhibits and thousands of pages of testimony the jury may wish to sort through.

But if the jury believes that even the 1999 loan forgiveness was legitimate, the entire case could fall--leading to an acquittal on all counts. If the jury believes that the 1999 deal was simply the most brazen act in a series of acts that no one knew enough about to question, the counts could fall the other way, leading to a pile of convictions.



Top Of The News

The Case Against Credit Suisse

Dan Ackman, 04.22.04, 8:05 AM ET

NEW YORK - **Frank Quattrone** sent one e-mail and there is no solid evidence any documents were destroyed as a result. Still, Quattrone is on trial in a Manhattan federal court for obstruction of justice. Meanwhile his colleagues at **Credit Suisse First Boston**, who presided over systemic document destruction, walk free.

Quattrone, the former chief of **Credit Suisse Group's** (nyse: [CSR](#) - news - people) CSFB technology unit, sent his e-mail on Dec. 5, 2000, endorsing the suggestion Dec. 4 of **Richard Char**, a senior banker in the group, that it was "time to clean out the files." Char's e-mail came after CSFB had been under investigation for six months concerning allegations that it accepted kickbacks from hedge funds in exchange for the allocation of lucrative initial public offering shares. The National Association of Securities Dealers, the U.S. Securities and Exchange Commission and the U.S. Attorney were all on the case.

During that time, the bank's own document retention policy--better described as a document destruction policy--was to trash any nonfinal deal documents, including all drafts, notes and memoranda. These are precisely the documents more likely to contain evidence of fraud or wrongdoing. Thus, every banker in the firm was working under a standing order to destroy documents. Thousands of documents subject to an SEC subpoena could have been obliterated.

CSFB lawyers never sent out a blanket notice to preserve documents that might have been relevant to the mounting inquiries. They never told the bankers about the scope of the investigations. Instead, according to testimony by Kevin McCarthy, a senior lawyer in CSFB's general counsel's office, they sent a notice about just two IPOs, the record-setting **VA Linux**--now **VA Software** (nasdaq: [LINUX](#) - news - people)--and **Selectica** (nyse: [SEL](#) - news - people).

Investigators for the NASD, the SEC and the U.S. Attorney also testified they never relaxed the so-called document preservation requirement that applies whenever a lawsuit or an investigation has been filed. McCarthy acknowledged that none of the

investigators ever limited that requirement.

The bankers were not told about the subpoenas, CSFB lawyers have testified. But the lawyers knew. With this knowledge, "A duty would arise in the lawyer, who would in turn notify the client," testified Robert Khuzami. Khuzami, now a lawyer for **Deutsche Bank** (nyse: [DB](#) - [news](#) - [people](#)), was the assistant U.S. attorney in charge of the CSFB investigation in 2000.

But the CSFB lawyers never acted on that duty until after Quattrone sent the e-mail that led to his indictment. Indeed, had Char and Quattrone not sent their e-mails, the CSFB lawyers might not have acted even then. It was Char's "reminder" to follow a policy long in place that encouraged the bank's lawyers to countermand it and to send out a document retention notice--though not until Dec. 7, three days after Char's e-mail.

Unlike Quattrone--who was finally told in December--Char had not been told about the grand jury subpoena. But his e-mail was expressly designed to keep potential evidence out of the hands of class-action attorneys. McCarthy, likewise, characterized these lawyers, who represent the people who bought into the busted CSFB IPOs, as "lawyers who make their living by suing companies based on a fall in stock price."

But how would you describe the work of the CSFB lawyers? Some of their efforts were probably legal, such as when David Brodsky, CSFB's general counsel for the Americas, advised Quattrone to channel his communications through him, which Brodsky testified he did to preserve claims of privilege.

But standing by oblivious to the destruction of subpoenaed documents is not clearly legal. Indeed, it could be criminal. "If there is a pending proceeding, the fact that they didn't have to produce it immediately doesn't mean they had a right to destroy it. It seems highly improper and under the rules of most jurisdictions could be criminal obstruction of justice," says Deborah Rhode, director of the Ethics Center and a law professor at Stanford University.

Stephen Gillers, a legal ethics expert at New York University Law School, is more circumspect. For CSFB's inaction to be a crime, its mindset must be guilty, its motive corrupt. One needs to ask why the bank's lawyers failed to send out a document retention notice.

That's a good question, and it's one that Quattrone's lawyer John Kecker has tried to ask repeatedly. Each time, U.S. District Court Judge **Richard Owen** has sustained objections, on the grounds that the bank's actions are irrelevant to Quattrone's state of mind. But it's very relevant to a larger question of what CSFB was doing in failing to tell its bankers to stop shredding.

The case is reminiscent of **Arthur Andersen**, Gillers said. In that case an indictment of the firm led to its going bust. In this case, CSFB bought its peace with the government by paying a \$100

million fine in January 2002. It admitted no wrong.

A year later, a newspaper report published Quattrone's e-mail, and the Justice Department indicted him, calling CSFB's lawyers as witnesses. CSFB still faces massive civil suits about its IPO practices, along with **Morgan Stanley** (nyse: [MWD](#) - news - people), **Merrill Lynch** (nyse: [MER](#) - news - people) and the rest of Wall Street. Its document destruction policy may come before another jury. But for now, the wrong guy may be on trial.



Legal

Quattrone II: A Lawyer Blows Up

Dan Ackman, 04.23.04, 6:20 PM ET

NEW YORK - The U.S. government rested its case against investment banking superstar **Frank Quattrone** today by offering the most damaging evidence against him: Quattrone's own words uttered at his first obstruction of justice trial, which ended with a hung jury.

Quattrone's case now being tried in a Manhattan federal court went south from there. First, U.S. District Judge Richard Owen angrily rejected defense lawyer motions, at one point nearly throwing a document back in the lawyer's face. Then, the first defense witness--one of Quattrone's lawyers-- wound up bolstering the case against him.

This morning, prosecutors read large portions of Quattrone's testimony from his first trial on obstruction of justice charges. (The jury was told it was from an unspecified proceeding.) In that testimony, Quattrone admitted, after seeming at first to deny, that he influenced the allocation of extremely lucrative initial public offering shares, and that those allocations were used as part of a strategy to steer future investment banking business to Credit Suisse First Boston, where Quattrone headed the technology group.

In that testimony, Quattrone was shown a series of e-mails in which he discussed who should be favored in the allocation process. **Michael Dell**, chairman of **Dell** (nasdaq: [DELL](#) - news - people), in particular, asked for Quattrone's help in securing a large block of shares in one extremely hot IPO, **Corvis** (nasdaq: [CORV](#) - news - people). Quattrone agreed to put in a good word, as Dell's associates suggested Quattrone might be their "go to" banker in future deals. (Corvis, by the way, went public at \$36 per share, raising \$1.1 billion. The shares opened at \$74, an immediate 105% pop, and [traded as high as \\$114](#). They now sell for less than \$2, a fact the jury did not learn.)

Quattrone also admitted that the tech private client services group, a retail sales force that reported partly to him, had negotiated the right to a 2%-to-4% share of all tech IPOs. In early 2000, his associates were asking Quattrone to help them get more shares. That way, they would not be forced "to Morgan them" or "Goldman them." Asked what this meant, Quattrone first quibbled with the question. Finally he conceded that the e-mails meant that the tech sales force wanted more shares, so they could allocate more to technology executives than did key rivals **Morgan Stanley** (nyse: [MWD](#) - news - people) and **Goldman Sachs** (nyse: [GS](#) - news - people). "If you read [the e-mails] carefully, you can and I do [make that inference]," Quattrone

said.

This testimony in the first trial raised the issue of Quattrone's credibility in the first trial. But it also goes to the heart of his defense: that he was not involved in share allocations, which he said were the province of other departments, so he would have no reason to impede an investigation focusing on allocations. The evidence also showed Quattrone using allocations to court fellow power brokers in Silicon Valley, the so-called Friends of Frank.

On redirect examination, Quattrone's lawyers had him say that he might have "participated" in allocations "on rare occasions," but that he made no "decisions." This distinction may be lost--as anyone who works in a large organization knows, when a big boss makes a "suggestion," underlings are generally eager to please.

After the government rested, John Keker, the lead attorney in Quattrone's seven-lawyer legal team, offered Owen a document purporting to list all the evidence that had been excluded in the course of the trial. Owen did not like the submission. In fact, he hated it, demanding to know why he should reconsider evidence he had already rejected, or worse, evidence that was never submitted. Keker struggled to explain, but the judge was not happy, telling the famed San Francisco lawyer, "Come on, you know how to try a case."

After that motion, Keker made another, this time for an acquittal, and introduced another lawyer, Jonathan Bach, to make the argument, such motions being generally hopeless in any event. But Owen was not interested in hearing Bach. Instead he asked lead prosecutor Steven Peikin to marshal the reasons that the government had made a case good enough to go to a jury. Peikin did so easily and the judge announced, "The motion is denied in its entirety." Bach never said a word.

After a lunch break, the defense called its first witness, Richard Char, the man who sent the "clean out the files" e-mail that Quattrone seconded, leading to his indictment. But Char could not be found around the courtroom, forcing Quattrone's team to call its second witness, Adrian Dollard.

Dollard was (and is) a lawyer in CSFB's Palo Alto, Calif., office, where Quattrone was based. The portly native New Yorker was called to testify on two points. The first, which no one disputes, is that the CSFB legal department had not sent out a general document retention notice at the time Quattrone sent his e-mail on Dec. 5, 2000 (see: "[The Case Against Credit Suisse](#)"). Second, he was to defuse earlier testimony by CSFB general counsel Gary Lynch, who said that Quattrone told him in January 2003 he did not know about a pending grand jury subpoena at that time. Quattrone's statement was either a lie, as prosecutors say, or a mistake, as the defense contends.

Dollard was one of eight lawyers who helped prepare Quattrone

to testify in an unrelated matter in September 2002. When Quattrone was cross-examined in that instance, he was asked about his Dec. 5 e-mail, which no one had shown him in his full week of preparation. Later he told Dollard the e-mail had slipped his mind, and Dollard reminded him that there were other e-mails soon after that countermanded it.

Dollard later retrieved copies of the related e-mails sent a day before and days after and showed them to Quattrone. But the documents he collected did not include the Dec. 3 e-mails from David Brodsky, a senior CSFB lawyer, informing Quattrone about the grand jury.

The banker's lawyers now say that Quattrone misspoke, his memory having been incorrectly refreshed by Dollard.

Peikin then stated his intention to cross-examine Dollard with the events surrounding Quattrone's suspension by CSFB in January 2003, which was caused in part by his perceived lie to Lynch. Kecker rose in protest, furious, saying any mention of the suspension would be not just wrong, but "reversible error." After the lawyers huddled among themselves, a compromise was reached and the hapless Dollard retook the stand.

In February 2003, Lynch and Stephen Volk, CSFB's chairman, called Dollard as part of their investigation of Quattrone, Dollard testified. They brought up the Brodsky e-mails, which were news to Dollard. But Dollard never told them about how, just two months earlier, he had confused Quattrone, he admitted. On redirect, Dollard said no one asked him for his view.

Still the impression was left that Quattrone had a lawyer on the witness stand gilding the lily. Lynch's testimony, a minor point, had become a major embarrassment. Quattrone's legal team had taken its first foot forward and wound up two steps back.



Top Of The News

Martha And The Mandelas

Dan Ackman, 07.20.04, 10:10 AM ET

As you may have heard, **Martha Stewart** was on trial recently on federal obstruction of justice charges. For some reason -- it remains a mystery to her -- she was found guilty of those charges after a trial in which she offered barely any defense at all. Many were left wondering: Why didn't Stewart's lawyers do something to help her? Why didn't they insist she testify instead of letting her hang out to dry?

Last night, in an interview with **Larry King** on CNN, Stewart, the former chief executive officer of **Martha Stewart Living Omnimedia** (nyse: [MSO](#) - news - people), answered, at least, the last question. She says she wants to write a book to answer the first.

KING: If this whole thing could go back to the whole thing? Would you just have not have sold the [**ImClone Systems** (nasdaq: [IMCL](#) - news - people)] stock, what?

STEWART: Well, that's a hard question, because I sold it for a specific reason -- it was going down. And I can't imagine, I mean it's just such a conundrum to decide what I could have done, what I should have done, what I should have done afterward. There's so many variables, Larry, in a thing like this.

KING: Like what? What made you sell when you did on the day before the company announced the one viable product in its pipeline had been rejected by the U.S. Food and Drug Administration?

Actually, I made that second question up. King never asked it, showing why his show has become a favorite vehicle for felons, like Stewart, contemplating appeal, and for alleged felons awaiting trial, like **Enron's Kenneth Lay**.

But had she testified, she would have been asked at least one follow up about her story that she sold her ImClone shares as a result of a prior arrangement with her **Merrill Lynch** (nyse: [MER](#) - news - people) broker, Peter Bacanovic, rather than because she was tipped off by her broker's assistant, as the jury found.

King moved on, soon enough hitting the topic of Stewart's potential appeal. Martha, on the advice of her trial lawyer Robert Morvillo and her newly retained appeal specialist Walter Dellinger, a former solicitor general of the United States, said she has three options: drop her appeal and go to jail; appeal while staying out of jail; or go to jail and appeal while inside.

The first option, simply serving the five-month sentence, is pretty good, not so much for her as for "business, Wall Street, advertising, they would like to see finality. They would like to see an end to all of this."

"Obviously," King said.

But wait, the second option is good, too. Again, Stewart wasn't thinking about herself, but about Justice. Stewart said: "I, as a person, with rights, with a belief in the judicial system and fairness, think that an appeal is the way to go. So, what do I do, OK? What do you do? What would you do, Larry?"

King would not be tricked. **Time Warner** (nyse: [TWX](#) - news - people) pays him to ask questions, not answer them.

Stewart's third option is to go to jail and appeal while serving her sentence. This may be having her cake and eating it too, as serving her sentence would satisfy Wall Street and the Advertisers, and by appealing, she could still serve Justice.

There is one problem: winning her appeal means she would face another trial. She could be convicted a second time, and potentially face a stiffer sentence than the five months in prison **U.S. District Judge Miriam Cedarbaum** ordered her to serve, which is the minimum.

Given that she did order the minimum sentence, and given that she did dismiss the most serious charge against her, securities fraud, King asked what Stewart thought of Cedarbaum: "Judge Cedarbaum is an elegant lady. She happened to go to the same college I went to, do you know that?" Stewart replied. Stewart went on to imply that Cedarbaum's belief in jurors and the justice system might be a little naïve, given the obvious injustice that happened to Stewart.

This is where Stewart's book would come in: "And I think I'll write a book. Because I think it could be helpful to other people, just about -- just about what lawyer to choose, how to behave, how to attend an interview. I mean there's things that, you know, there's no how-to book about this," Stewart announced.

King responded: "You mean your lawyers never told you not to lie to federal investigators? Is that the kind of advice that would be in the book?"

Actually, I made that question up, too.

Instead, King mentioned some pals they have in common, like **Donald Trump**, of whom Stewart said: "Well, Donald Trump has been a very big supporter and a very nice source of comfort for me. And I've known him for quite a few years. And what he says about that is his opinion." In other words, keep it to yourself, Trump.

They went on to discuss another mutual friend, **Barbara Walters**, who had interviewed Stewart earlier. In that interview, Stewart said, "Many good people have gone to prison. Look at **Nelson Mandela**."

To some this sounded like Stewart was comparing herself to Mandela, who served 27 years in prison, most of it at hard labor, for his opposition to Apartheid in South Africa.

This comparison may seem arrogant, but Martha did not mean it that way: "And what I said, and I am so in awe and so -- I love Nelson Mandela so much. I said Nelson Mandela was able to survive 27 years in prison. I could survive five years [she meant months]. I wasn't comparing myself to Nelson Mandela. I am not a Nobel Prize winner. I am -- my -- our situations are -- well, it shouldn't have and it didn't. If you watch the tape. I watched it. I mean, I didn't seem like I was comparing myself to Nelson Mandela in any way. And I really don't want anybody to be confused about that."

OK, no one is confused. Mandela wrote a book, too, called *Long Walk to Freedom*. Stewart did not reveal the title of her own book. She could call it: *Short Stay in Danbury, Or Not*.



Top Of The News

Martha Trial: 'Everyone Is Telling The Same Story'

Dan Ackman, 02.05.04, 8:10 AM ET

NEW YORK - If there is a lesson to be learned from the trial of **Martha Stewart**, it may be this: If you must engage in conspiracy, do it with people in your own tax bracket.

Yesterday in a Manhattan federal court, **Douglas Faneuil**, the former assistant to **Peter Bacanovic**, Stewart's former stockbroker, testified that he told Stewart that **Samuel Waksal**, the founder of **ImClone Systems** (nasdaq: [IMCL](#) - [news](#) - [people](#)) and a friend of Stewart, was trying to sell his shares in his company just before Stewart issued the order to sell hers.

Faneuil testified that Stewart called Bacanovic's office in the early afternoon of Dec. 27, 2001, and asked what was going on with Waksal. Faneuil told her that he was trying to sell his shares in the company. "All his shares?," Stewart asked. All the shares he held at **Merrill Lynch** (nyse: [MER](#) - [news](#) - [people](#)), Faneuil replied. Stewart asked for the price of ImClone shares; Faneuil told her. She then said, "I want to sell my shares."

Faneuil's testimony about the conversation, coupled with the testimony of Waksal's assistant the day before, are the most direct evidence that Stewart had nonpublic information when the fabled tastemaker and founder of **Martha Stewart Living Omnimedia** (nyse: [MSO](#) - [news](#) - [people](#)) sold her 3,928 ImClone shares. The next day ImClone announced that the U.S. Food and Drug Administration had rejected its application for the approval of its Erbitux cancer drug, the one product in its pipeline, causing a steep decline in the share price.

Faneuil then related how he misled Merrill Lynch and U.S. federal investigators probing attempted sales of ImClone shares by Waksal and completed sales by his daughters, at least when they added questions about Stewart's sale. Similar alleged lies and evasions are the basis for the obstruction of justice and related charges against Stewart and Bacanovic.

Days after the sale, on Dec. 31, 2001, a Merrill administrator asked Faneuil about the ImClone sales. Faneuil called Bacanovic, who told him emphatically that Stewart's ImClone sale was to generate a tax loss, Faneuil testified. But the assistant knew the explanation was phony since Stewart sold the shares at a gain.

Four days later, Faneuil was interviewed over the telephone by the U.S. Securities and Exchange Commission. Most of the questions were about the Waksals, but the SEC asked about Stewart, too. Faneuil told the investigators that Stewart called, asked for a price quote and ordered the sale.

Soon after, Faneuil hired his own lawyer, Jeremiah Gutman, who told him to return to the SEC and tell the truth. "I was crying, I told him, I can't do it," Faneuil said, and he put off the task. But later that day, Gutman called him and said that Merrill Lynch had reached an agreement with the SEC "to hand over Waksal on a silver platter in exchange for looking the other way on Stewart," Faneuil testified. He added that he was skeptical, but agreed to go along.

Later, Stewart's financial planner called Faneuil wondering why Stewart had sold ImClone at a gain, which actually foiled their tax strategy. Faneuil reported the call to Bacanovic, who was on vacation. Bacanovic told him that the ImClone sale was pursuant to a prior agreement. He repeated several times that they'd agreed to sell the shares at \$60. Faneuil couldn't get in a word edgewise, he said. Finally Bacanovic demanded, "OK?" and Faneuil agreed.

When Bacanovic returned to the office, he took his assistant out for coffee and related the story of how in just a few short years he'd become top performer at Merrill. According to Faneuil, the broker spoke of his relationship with Stewart, emphasizing their intense loyalty to each other. When Faneuil tried to say he knew what had really happened on Dec. 27, he told the court that Bacanovic put his hand on Faneuil's shoulder and said, "With all due respect, you don't know what happened."

Two weeks later, the matter came up again. Faneuil testified that Bacanovic told him: "Listen, I've spoken to Martha; I've met with her and everyone is telling the same story. We're all on the same page, and it's the truth." Once again, the assistant agreed.

In March 2002, he spoke again to the federal investigators, this time including criminal prosecutors. But by June, he'd had a change of heart, Faneuil told the jury. He hired a new lawyer and agreed to a plea bargain in which he'd cooperate against Bacanovic and his client.

On cross-examination, David Apfel, Bacanovic's lawyer, raised Faneuil's admitted use of marijuana and ecstasy but failed to shake Faneuil in his version of events. Faneuil did concede that no one had told him "explicitly" to lie, and that he, Faneuil, had himself twice lied to the government.

Apfel spent much less time on Faneuil's potentially more important admission that he had said nothing during his original discussion with the government about the reason Bacanovic was unable to phone Stewart himself on the day in question. Faneuil admitted that even now he wasn't quite sure why Bacanovic was unavailable.

Why, if the star broker was fixing to rig a trade for his best client, would he let his assistant who he'd employed for just six months relay his crooked message? Defense lawyers will surely argue that the broker would not and did not.



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Outclassed

Sotheby's defendant had a defense team befitting his lofty status. But the prosecution had the facts -- and a deadly touch

By Dan Ackman

Scott Muller was cross-examining Christopher Davidge, the former CEO of Christie's International plc, and was having a rough go of it. Muller, representing A. Alfred Taubman, former chairman of Sotheby's Holdings Inc., listened to Davidge freely admit to his role in the price-fixing conspiracy between the two great auction houses. But Davidge refused to admit the small points. Muller, a partner at New York-based Davis Polk & Wardwell, kept pressing.

Muller asked about a man named Lord Camoys, who had once served on the Sotheby's board. He wanted Davidge to say that Camoys was a prominent man in British society.

Davidge testified that he'd heard of Camoys, but refused to concede his renown. Finally, Muller cried out in frustration: "Wasn't he lord chamberlain to the queen of England?"

Yes, Davidge answered, "but that wouldn't make him well known." The jury got a big kick out of Davidge's response and his added comment that being a lord was no big deal because there were lots of them. Muller let the matter drop and never asked Davidge anything else about Camoys or about what Davis Polk later alleged was his role in the conspiracy.

While the Camoys exchange came to nothing, it epitomizes the trial and conviction of Taubman on criminal price-fixing charges.

The eight-lawyer Davis Polk team, led by Robert Fiske Jr., the venerated former U.S. Attorney and the original Whitewater prosecutor, was beaten at every turn by a team of Justice Department antitrust lawyers.

The government's side didn't look like much next to the well-tailored Davis Polkies. Of the three -- John Greene, Patricia Jannaco and Philip Cody, all career trial lawyers for the

antitrust division -- only Jannaco, a graduate of Brooklyn Law School, spent any time in private practice, and that was just for one year. The prosecutors were led by Greene, 56, a Fordham law graduate and infantry platoon leader in Vietnam, whose blunt style matched his hydrant-shaped physique. But what they lacked in polish they more than made up for in substance -- and in an ability to score points with the jury in federal district judge George Daniels' court in Manhattan. The prosecutors wasted few words in explaining the conspiracy, dealing sharp, telling blows to defense witnesses. They had marshaled a good set of facts, and they used them to full advantage, making all of their points with economy.

Fiske and his Davis Polk colleagues defending Taubman, on the other hand, rarely managed to undercut or explain away the government's wealth of incriminating evidence. They offered a traditional attack-the-rat defense, insisting that the price-fixing conspiracy had been orchestrated by Diana "Dede" Brooks, former CEO at Sotheby's, and by Davidge, without Taubman's knowledge or consent. They cast Brooks, the only witness who could implicate Taubman directly, as a skilled liar who squealed on her former boss to save herself from prison.

They also offered defenses more tailored to aging tycoons. They said that Taubman, while chairman, kept his distance and never even asked about the auction house's bottom line. And they theorized that Taubman was so wealthy -- his net worth having climbed as high as \$1.2 billion -- and was of such an impeccable reputation based on his charitable works that he would never have risked his liberty and good name for the relatively paltry sum to be gained through price-fixing.

The Justice Department lawyers kicked away each leg of the defense so deftly that jurors who spoke to reporters after the trial said that the guilty verdict wasn't a close call.

Davis Polk's team, for its part, never articulated a plausible explanation for the most damning evidence against its client: that Taubman and Sir Anthony Tennant, his opposite number at Christie's, held a dozen private, one-on-one meetings, all but one of which occurred at Taubman's New York apartment or his flat in London. They offered no reason for why Taubman hid the fact of those meetings from his closest associates and from Sotheby's executives.

Taubman faces three years in prison and a fine. His April 2 sentencing will cap a four-year saga that has cost both auction houses dearly, in reputation and cash. Their September 2000 class action settlement carried a joint price tag of \$512 million. Sotheby's paid an additional criminal fine of \$45 million after pleading guilty to antitrust violations. Christie's got off easier, having rolled over first with a grant of amnesty from

prosecution for itself and Davidge in return for helping to make the case against Sotheby's. Tennant, of Christie's, was indicted along with Taubman, but under British law could not be extradited on price-fixing charges. Brooks pleaded guilty and agreed to testify in exchange for a possible lighter sentence. That left Taubman alone, a 76-year-old shopping-mall mogul with Davis Polk by his side.

Muller's difficulty with Davidge illustrated a persistent tendency by the defense to score debating points while missing the bigger picture. Under cross-examination, as in his direct testimony, Davidge admitted that he had lied repeatedly to conceal the scheme. "I lied ... yes ... I did not tell the truth That's correct ... and I knew it was a lie," Davidge said, over and over. But Muller wouldn't take yes for an answer.

After Davidge conceded that he had denied the plot even to lawyers for Christie's, Muller whipped himself up to a righteous climax: "You looked them straight in the eye, and you said 'no,' didn't you, sir?" "I don't know if I looked him in the eye, but I did say 'no,' " Davidge answered, retaining his British cool. As Muller became more overwrought, Davidge seemed all the more likable and credible.

The most damning evidence against Taubman was his own diaries and schedules, which showed the extent of his contact with Tennant. The diaries often omitted mention of Tennant's name. Instead they referred to him as "A" or "a gentleman." One entry, for instance, read: "Possible meeting at London flat with a gentleman."

That much was widely reported during the trial. But more remarkable was that Muller's cross-examination helped put that evidence in its most negative light. In questioning Melinda Marcuse, Taubman's executive assistant, Muller urged her to say that the omissions and code words were innocuous, products of the personal styles of the various Taubman staffers.

But then Muller watched Marcuse drop the hammer on her boss. He asked why a particular calendar entry referred to Tennant only as "gentleman." Marcuse answered that the auction world was full of gossip, and that it was "[her] job to protect Mr. Taubman's privacy." She kept Tennant's name out of the records for fear that the purpose of the meeting might be "misconstrued." Thus, rather than being inadvertent, Marcuse implicitly told the jury, the omissions were part of a deliberate strategy.

A centerpiece of Davis Polk's defense was its claim that Taubman kept his distance from the finances of Sotheby's. To advance that theory, the defense used, among other

witnesses, William Sheridan, the chief financial officer of Sotheby's. Sheridan testified that Taubman had never called to ask about the firm's financial posture and that he was "meek" and "silent" at board meetings, where his main concern was lunch.

On cross-examination, the Justice Department's Greene asked a simple question: Had Taubman been negligent in his duties as the Sotheby's chairman? Absolutely not, Sheridan replied: "Not when he had a bulldog like Max Fisher." Fisher, a Michigan oilman and financier who served as the vice-chairman at Sotheby's, was Taubman's longtime confidant. Once Sheridan explained how Fisher -- whom Sheridan described as a financial genius -- had kept Taubman constantly informed, another key leg of the defense case was kicked away.

The defense's efforts to depict Brooks as a liar appeared no more successful. While she admitted that she had lied repeatedly to conceal the scheme -- if she had not, there would have been no scheme -- prosecutor Cody pointed out in his re-direct examination that the defense had not asked about a single lie other than those used to further the scheme. Brooks' lies about the scheme were essential to the scheme, and to the defendant, if he in fact had ordered it. Cody, by pointing out that Brooks' dishonesty was limited to price-fixing, seemed to do much to restore Brooks' credibility with the jury, which, at the end of the day, believed her.

The prosecutors even turned Fiske's presentation of character witnesses to the government's advantage. In one of the more unusual moments of the trial, Fiske called to the stand Damon Keith, a sitting judge on the 6th U.S. Circuit Court of Appeals. Keith was one of the first blacks appointed to the federal bench and has served 34 years. Over the years, he served with Taubman on several civic and charitable boards. Based on that association, Keith testified that Taubman enjoyed "an absolutely wonderful reputation for honesty and integrity ... without a single blemish on it."

Fiske walked Keith through some of the highlights of his own career, including winning a prize that Supreme Court Justice Thurgood Marshall had once won. Cody looked on, appearing bored, as Fiske led up to Keith's chairmanship in 1989 of a committee commemorating the bicentennial of the U.S. Constitution. One of that committee's achievements was the placing of a plaque in federal courthouses and law schools listing the Bill of Rights. (Never mind that the Bill of Rights itself was not passed until 1791, making its bicentennial two years later.) Fiske then moved to place a copy of the plaque "in evidence." "Any objection?" Daniels asked.

"No objection to the Bill of Rights," Cody said.

The resulting laughter took some of the wind out of Keith's testimonial.

Then, the gray, pencil-thin Cody, an assistant chief of the antitrust division, with more than 30 years on the job, did more damage, with a few short questions on cross. Despite their long association, Keith said that Taubman never told him about meetings with Tennant. Indeed, as far as Keith knew, his good friend Al never even knew Sir Anthony Tennant.

Throughout the trial, Davis Polk never came up with a justifiable explanation for the Taubman-Tennant meetings. Fiske brought up a number of legitimate topics that they might have been discussing -- the British value-added tax, for instance. But there was no evidence that they actually did discuss them. Taubman never testified. In his closing, Fiske was left -- beyond extolling the wonders of a system that let ordinary people decide Taubman's fate -- arguing not much more than presumption of innocence and reasonable doubt. But the jurors decided that, despite the former, there was none of the latter. They took 10 hours, spread over two days, to find Taubman guilty as charged.

Fiske may have been dealt a tough hand in his defense of Taubman. Folding was probably not an option. But if Taubman had an easy case, he wouldn't have needed eight lawyers, plus a jury consultant, from Davis Polk. And he wouldn't have needed Bob Fiske.

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Court Report

Auction Fix A 'Conspiracy From On High'

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NEW YORK -

Seeking some wiser voice than those who testified at the price-fixing trial of **A. Alfred Taubman**, former chairman of **Sotheby's Holdings**, federal prosecutor John Greene invoked Adam Smith in his closing argument to the jury yesterday. Smith, known in his day as a moral philosopher, advocated free trade. But being in favor of trade is not the same as being pro-business, and Smith also offered a few zingers that would hardly endear him to his local chamber of commerce.



Alfred Taubman and a few of his lawyers.

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices," Smith wrote in his *Wealth of Nations*, which Greene referred to as an "economic textbook." Lawyers for Taubman objected strenuously to Greene's use of the line, but District Judge George Daniels allowed the prosecutor to utter it. (The judge split the baby, permitting prosecutors to quote Smith but forbidding them from projecting the line onto a video screen).

For Greene, Taubman was exhibit 'A' as evidence of Smith's insight. As chairman of Sotheby's Holdings (nyse: [BID](#) - [news](#) - [people](#)), he held a series of secret, one-on-one meetings with **Sir Anthony Tennant**, his counterpart at **Christie's** auction house. At these meetings, Taubman and Tennant hatched a scheme to fix prices, specifically the commissions paid by sellers, Greene said. The chairmen then instructed their respective chief executive officers, **Diana "Dede" Brooks** and **Christopher Davidge**. Taubman and Tennant watched from "on high" as their subordinates carried out their designs--right to the point where they turned state's evidence against their bosses.

That Taubman and Tennant met a dozen times, a fact left undisputed, is the strongest evidence in the case against the former, a shopping mall magnate who remains the largest shareholder in Sotheby's. Taubman refused to testify in his own defense; as a result no one testified about what was said at those meetings. But Greene said that Smith knew

what was going on, even if his death in 1790 prevented him from appearing at the trial.

Taubman, surrounded by lawyers and his jury consultant, watched expressionlessly, as he had throughout the trial. In that trial, the self-made multimillionaire was portrayed as dependent on handlers, falling asleep at board meetings, concerned mostly with what was for lunch and inattentive to the bottom line--and that portrayal was painted by his own defense team. He faces up to three years in prison if convicted.

Tennant remains home in London; under British law, he cannot be extradited for trial in the U.S. Davidge was granted immunity and Brooks pleaded guilty to price-fixing, agreeing to cooperate with the U.S. government in exchange for consideration on sentencing.



Anthony Tennant: Safe at home.

With the courtroom overflowing with lawyers, reporters and the merely curious, Greene built his case also on testimony by Brooks and Davidge, which he called consistent and credible. Robert Fiske, attorney for Taubman, called Brooks a skilled, unrepentant liar. The entire case came down to Brooks' word, Fiske argued; if she could not be believed, the jury should acquit Taubman.

Greene argued that Taubman was frustrated by the erosion of the auction house's profits. After the fat years of the late 1980s, sales at Sotheby's fell from \$2.9 billion in 1989 to \$1.1 billion in 1992. Profits dwindled almost to zero. The value of Taubman's stake in the company fell by almost \$300 million, a sum that was significant even to him. His net worth was, by several witness's accounts, at least \$700 million.

Taubman, therefore, seized on the ascension of Tennant as Christie's new chairman. Tennant was a successful businessman like himself, "with a keen eye on the bottom line," Greene said.

The two met in Taubman's apartment. Taubman told no one about the meetings; not the then-CEO of Sotheby's, nor his closest business associate, who testified as a character witness, Greene noted.

Tennant, for his part, reported to Davidge: "They had a very good meeting," at which they agreed that the auction houses were being "killed" by their willingness to make concessions on commissions charged to sellers of art and other collectibles, according to Davidge's testimony at trial. Taubman and Tennant then instructed Brooks and Davidge to make a deal that would help the houses--at the expense of their clients--which, by all accounts, they did.

If the issue of secret chairman meetings was Greene's strongest point, his weakest was the delay between the first meeting in April of 1993,

and the ultimate announcement of the new, nonnegotiable commission schedules, which Christie's made in February of 1995; followed by Sotheby's soon after. If the chairmen really were behind this arrangement, Fiske asked why it took two years to get done.

Fiske offered instead an alternative scenario. He said that Brooks herself was the prime mover, motivated by her desire for wealth from Sotheby's stock options and her craving for fame as a CEO on the rise, famous in the art world and beyond. Taubman, by contrast, was so rich he had no reason to cheat.

He went on to claim that Brooks arranged to fix prices through **Lord Camoys**, after he joined the Sotheby's board in 1994. Camoys then cut a deal with Tennant, who reported to Davidge, who reported to Brooks.

Fiske seemed to confuse himself with his Lord Camoys story, and all but conceded he had no evidence to support it. But he reminded the jury repeatedly that he needed no evidence, since the defendant is presumed innocent and has no burden of proof.

Brooks, in her testimony, explained the time gap by saying she needed to learn the ropes as a new CEO. Davidge said they needed time to know and trust each other. But Fiske kept returning to his argument that neither should be trusted by the jury. He reminded the jurors time after time that the United States had to prove its case beyond a reasonable doubt, and that the jury system is the key to the American system of justice which "We think is the best in the world."

Brooks, he said, was an admitted liar, a conniver who could deceive even lawyers. "I tell you, Dede Brooks is a walking reasonable doubt," he said.

Taubman was not only represented by Fiske, a former United States Attorney, but also the New York firm Davis Polk & Wardwell. This defense team cost tens of thousands of dollars a day. But at the end of the day, Taubman's best defense was reasonable doubt and the presumption of innocence. These defenses come with the Constitution and are, in theory, available to all Americans. Sometimes the best things in life are free.

