

## Choices and Lies, or Evil?

Last week marked the confluence of three of the most important legal stories impacting Wall Street. The new law requiring hedge funds to register went into effect, Alan Greenspan departed as Chairman of the Federal Reserve – and get this – both stories were overshadowed by the selection of jurors in some courthouse down in Texas. It's hard to play down the significance of mandatory hedge fund registration or Greenspan leaving, but last week also marked the beginning of the Enron trial.

Of course, this trial really only involves two of the former officers involved in the alleged illegal activities, but it's really only these two that matter. Jeffrey Skilling, a former CEO, faces 31 charges of conspiracy, fraud, lying to auditors and insider trading, while Ken Lay, Enron's former Chairman and CEO, faces seven charges of conspiracy and fraud. Both Skilling and Lay have pleaded not guilty (and remain innocent until proven guilty, despite the impression you can get from watching some of the talking heads on television).

Arguably, this trial is about a series of extraordinarily complex financial transactions that involve tax shelters, intricate corporate malfeasance and arcane accounting fraud. In reality, any trial lawyer could have told you a few years ago that neither side would bother trying to go the complicated route. In every trial, the lawyer becomes a storyteller, much the way Homer was to the Greeks. What matters are the "themes" that each side utilizes to frame their case – and much more often than not, the lawyer whose set of themes are accepted by the jury will eventually prevail. Not surprisingly, the best way to ensure that your set of themes is accepted is to make them simple and catchy.

The prosecutors don't want jurors confused about obscure accounting terms – the prosecution's themes were clearly asserted in their opening statement: "This is a simple case. It is not about accounting, it's about lies and choices. Defendants Lay and Skilling chose to falsely assure the public there were no problems at Enron. They chose to lie."

"Choices" has always been one of my personal favorite themes, as it fits practically every case I've ever been presented with. Someone always has to take responsibility, and that is a matter of what "choices" people make. The other theme the prosecution is using is "lies." Notice that they didn't use the word "fraud," which is loaded with far more legal concepts (with names like *scienter*). Juries are made up of real people. Real people understand what it means to lie. Ask a dozen judges from throughout the country to define fraud and you'll walk away more confused than when you started. So the prosecution went with "lies and choices."

Skilling's attorney went with: "This is not a case of hear no evil, see no evil. This is a case of there was no evil." This tactic is also a common practice for defense counsel. He is attempting to increase the burden on the prosecution. As anyone who has ever sat through the last ten minutes of Law & Order can tell you, the prosecution has to prove its case "beyond a reasonable doubt." A rather high standard to begin with, it is often

ignored by jurors who assume that if someone is on trial, then they likely “did it.” So what defense attorneys do from the start is try to make that burden as overwhelming as possible. In this case, Skilling’s attorney is trying to increase that burden to proof of “evil.” In other words, unless the jury finds Skilling guilty of being “evil,” the jury should acquit. Skilling (and Lay) may or may not have conspired to defraud investors, but even if they did that’s a far cry from being evil. Even Darth Vader didn’t turn out to really be totally “evil.”

Of course, legally, trials are about the voluminous documentary evidence and lengthy testimony that will encompass the next four months, not about these themes. But that doesn’t change reality. At the end of the trial, come closing arguments, you can safely bet that the deciding factor will be whether the jurors decide this is a case about “choices and lies,” or about whether Skilling and Lay are “evil.”