'United States v. Lynch': Challenges and Strategies for Defending Against Government Experts Used in Lieu of Percipient Witnesses

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InUnited States v. Lynch, the defense faced a novel issue: Rather than using percipient witnesses to introduce evidence central to their accounting fraud case, the government introduced vast amounts of evidence through their accounting expert, thus preventing the defense from cross examining witnesses with first-hand knowledge of the transactions the government's expert claimed were fraudulent. After an 11-week criminal trial, Dr. Michael Lynch was acquitted of all charges. Had the outcome been different, the government's aggressive use of expert testimony would have offered fertile grounds for appeal. Nonetheless, an assessment of the government's strategy and the defense's response illustrates how defense counsel can effectively rebut the use of such expert testimony.

Expert Testimony in ' United States v. Lynch'

InUnited States v. Lynch, prosecutors accused former Autonomy CEO Dr. Michael Lynch of deceiving Hewlett Packard Co. (HP) about Autonomy's financial results in the years preceding HP's $11.7 billion acquisition of the British software company. At trial, the government alleged in part that Autonomy falsely inflated its revenue through accounting fraud. According to the government, Autonomy concealed that it engaged in loss-making sales of hardware for the purpose of inflating its reported revenue while maintaining publicly that it was a "pure software" company. The government further alleged that Autonomy engaged in round-trip transactions and transactions that improperly accelerated revenue in furtherance of the alleged scheme to defraud HP. In the lead up to trial, the government announced that it intended to prove that Autonomy engaged in roughly 85 fraudulent transactions—a case that rivaled Enron in complexity.

While these allegations were sensational on paper, the government faced an evidentiary reckoning at trial. During the relevant period, Autonomy had opened its books to its independent auditor, a big-four accounting firm, which in turn had produced detailed workpapers assessing and approving the very accounting decisions the government alleged were criminal. Moreover, witnesses who observed many of the impugned transactions first-hand did not believe they were fraudulent, and to the contrary, in many instances believed they were merely practical business decisions made in the wake of the great recession in an evolving competitive landscape.

Enter the government's silver bullet: expert testimony. In a typical case, an expert will apply their specialized knowledge to facts and evidence already introduced at trial through witnesses who observed or participated in

the relevant events. InUnited States v. Lynch, however, the government abandoned that approach, in part because virtually none of the key employees and auditors who executed and audited the transactions would testify that the transactions were improper, let alone criminal. Instead, the government attempted to evade the evidentiary risk those witnesses posed entirely: Rather than asking percipient witnesses about the impugned transactions, the government retained an expert to second-guess the very same accounting decisions Autonomy's independent auditors had approved in real time.

This shortcut provided several superficial advantages. First, under the rules of evidence, experts can testify about an opinion without introducing at trial the evidence upon which their opinion is based. In addition, because experts evaluate evidence based on their own expertise, the government would be able to procure an expert opinion that relied on written documents and communications selected by the government without exposing to cross-examination the individuals who actually wrote those documents and participated in the communications. Finally, expert opinions carry special weight with jurors. Unlike lay witnesses, whose testimony is often counterbalanced by hazy memories, personal biases, inexperience with testimony, and other credibility issues, experts carry a veneer of independence and objectivity, and are often well versed in testimony and deflection during cross-examination.

Before and during trial inUnited States v. Lynch, the defense raised these issues in motions to exclude or limit the testimony of the government's accounting expert. In part, the defense argued that the proposed expert testimony would not help the jury understand the evidence or determine a fact in issue because the expert was relying on the same evidence available to Autonomy's independent auditors in real time. Said otherwise, because the case did not turn on whether accounting decisions approved by Autonomy's auditors were correct or incorrect (as it may have in a civil case), a mere reevaluation of past accounting decisions would not help the jury determine whether those accounting decisions were made with an intent to defraud, as is required in a criminal case. Although the court denied the motion, the denial opened the door to a post-trial appeal on expert-related issues.

Despite denial of the motions, there still remained an opportunity to rebut the expert's testimony through cross-examination of the expert, and of the few percipient witnesses the government called at trial who were involved in the impugned transactions. During trial, the government's accounting expert testified that Autonomy should have recognized revenue differently (or not at all) on roughly 85 transactions. The expert further testified extensively about hypothetical scenarios that assumed facts not in evidence. Although the government called two witnesses from Autonomy's independent auditor, it did not attack their credibility or seek to establish that their clean audit opinions of Autonomy were incorrect. Moreover, for the vast majority of transactions at issue, the government declined to callanywitnesses with contemporaneous first-hand knowledge.

This approach put the defense in a challenging position. Because the government's expert was one of the last witnesses to testify in the government's case, defense counsel did not know which transactions would ultimately be introduced at trial at the time percipient witnesses testified. In addition, the government declined to ask their own witnesses any questions about many of the impugned transactions, if such knowledgeable

witnesses were called at all.

In response, defense counsel mounted a multi-pronged trial rebuttal. First, defense counsel conducted highly detailed cross-examinations of Autonomy's auditors, other fact witnesses, and the government's expert witness. Because defense counsel did not know which specific transactions the government would ultimately introduce, cross-examination focused on witnesses' state of mind at the time of the alleged wrongdoing, and, for instance, whether they believed the company was engaging in wrongdoing during the relevant period. The defense also made use of extensive counter-hypotheticals that exposed many of the weakly supported assumptions upon which the government's expert relied, and the conspicuous absence of transaction-specific questions posed by the government to their own witnesses. These weaknesses were amplified to such an extent that the expert eventually resorted to describing charts used during his direct testimony as the government's charts, as opposed to his own.

Extensive cross-examination of the government's expert had a further, unexpected benefit: Although the expert's report identified the voluminous documentary record upon which the expert relied, on cross-examination, the expert admitted that he wasalsorelying on testimony from a related UK civil trial, which the government had not disclosed as a basis for his expert testimony.

Based on the expert's extensive testimony about transactions never before mentioned during trial, testimony assessing hypotheticals rooted in facts not in evidence, and reliance on supporting materials not timely disclosed to the defense, defense counsel filed a post-testimony motion to strike the expert's testimony. While this motion was denied, it again provided an additional avenue for appeal had the trial not resulted in complete acquittal, and substantial material for closing arguments.

In closing, among many other arguments, the defense highlighted the fact that the government intentionally avoided asking its own fact witnesses about many of the transactions alleged to be fraudulent, choosing to rely instead on an expert with no contemporaneous knowledge of the events in question. To counter the government's extensive use of hypotheticals based on facts not in evidence, we also highlighted the defense's counter-hypotheticals, which revealed not only deficits in the expert's opinions, but also powerful evidence that Autonomy's auditors reached or would have reached a different conclusion than the government's expert based on the same evidence. At bottom, we argued that the expert's opinions simply did not stand up to close scrutiny, as a criminal case requires. The jury agreed, and acquitted Mike Lynch and his co-defendant of all charges.

Takeaways

Prosecutors will likely continue to rely on expansive expert testimony to bolster weak evidence in criminal prosecutions. In extreme cases, as was done inUnited States v. Lynch, prosecutors may introduce entire allegedly criminal acts under the guise of expert testimony without relying upon any percipient witnesses. While no strategy guarantees victory, theLynchtrial reinforces the power of repeatedly highlighting for both the judge

and jury the limitations of expert testimony, and to the judge, its potential for appeal and reversal. Key takeaways:

• Expert-related issues present multiple opportunities for defense, including pre-trial motions, oral and written mid-trial motions, detailed cross-examination, and post-testimony motions to strike. While these defenses are not always successful at trial, pursuing them maximizes the likelihood of testimonial limitations, provides context for the judge to uphold real-time objections to testimony, and lays the foundation for appeal.

• Juries are sensitive to the idea that information is being withheld or obfuscated through lawyering tactics. Where the government's case relies heavily on expert testimony, defense counsel can highlight deficiencies in the government's lay witness evidence, and how expert testimony is being used to cover up those shortfalls.

• Detailed cross-examination of experts whose opinion contradicts the conclusions reached by other witnesses in real-time can provide powerful evidence of the absence of criminal intent, particularly where the expert agrees that a reasonable person could come to a different conclusion on a key issue.

• Finally, hypotheticals can be both a friend and foe. While the defense inUnited States v. Lynchvigorously argued for the exclusion of testimony based on hypothetical facts, such testimony ultimately opened the door to counter-hypotheticals that revealed the marginal evidence upon which the government's expert relied, and lay witnesses' reluctance to brand such conduct criminal.

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