

>WINNING<

Successful strategies from 10 of the nation's top litigators.

>>PETER A. WALD<<

The counter-Enron

In an era of sordid corporate scandal, an attorney clears Ernst & Young.

By Emily Heller

SPECIAL TO THE NATIONAL LAW JOURNAL

SOME CORPORATE financial scandals have a now-familiar pattern: allegations of multi-million-dollar accounting fraud followed by earnings restatements, securities fraud class actions and federal indictments.

Like so many companies under scrutiny for financial fraud, Clarent Corp., a California computer communications company, has followed that typical track.

However, the Clarent case stands out in one key area: Its auditor, Ernst & Young LLP, went to trial to defend itself against Clarent shareholders' allegations that the firm was liable for the company's fraud. Plaintiffs sought \$125 million in damages. Putting that question to a jury was risky, considering the public disdain over the steady stream of corporate financial scandals.

But the gamble paid off. In a 2005 three-week trial, a San Francisco federal jury cleared Ernst & Young of any professional liability in the accounting scam. *In re Clarent Corp. Securities Litigation*, No. 01-3361 CRB (N.D. Calif.).

"These cases get tried against the backdrop of the current wave of scandals that have swept the country the last five years," said lead Ernst & Young defender Peter A. Wald, a partner in the San Francisco office of Latham & Watkins and chairman of the firm's global litigation department.

The Clarent case "was an opportunity to test the proposition that in this day and age it would be impossible to get a jury to focus on the relevant facts...and give our people a fair shake," Wald said.

Call him 'Ernie'

Key to overcoming any juror anti-corporate bias was the testimony of the Ernst & Young partner who oversaw the Clarent audit, Wald said.

"The jurors called him Ernie," Wald said of lead engagement partner Ernest Cortes. "They

believed he was honest. They believed he had not been given the full slate of information he should have been given."

Cortes put a human face on the dry, complex world of auditing standards, Wald said. "The most important element of our victory in the Clarent trial was how remarkably effective the lead engagement partner was in explaining exactly what he and his team did and why what they did met professional standards," he said.

Important to the defense strategy was educating jurors about the role of outside auditors and the Generally Accepted Auditing Standards they follow. Auditors "are not insurance companies. They are not insurers.

They are not omniscient and they don't look at every transaction," Wald said.

The defense used experts in the case, but Cortes was central, he said. "Experts are important, but in almost every audit case that I have tried, the jurors tend to like both side's experts and think that they kind of cancel each other out," he said. Jurors "want to hear the exchange between the opposing lawyer and the engagement partner on what happened."

Lead plaintiffs' lawyer Robert S. Gans, partner in the San Diego office of New York-based Bernstein Litowitz Berger & Grossmann, said, "Peter did a terrific job for his client. I thought he really did a great job of hitting on the right theme for his case that would resonate with the jury."

The defense framed the case using documents as



TRIAL TIPS

>> Place your trust in jurors' common sense.

>> Work the case from the documents; let the documents tell your story.

>> See the whole playing field even while you are focusing on the moving parts.

guideposts, Wald said. "What I have found is that jurors tend to believe contemporaneous documents," he said. They are not always error-free and crystal-clear, he said. Nevertheless, they are "powerful pieces of evidence about the state of mind and people's views of the evidence at the time rather than through the lens of litigation," he said.

Wald used e-mails in cross-examining a plaintiffs' witness, who was a finance department employee who testified that Ernst & Young had failed to analyze certain information. In e-mails with other finance department colleagues, the witness said that they "had uncovered something that looked fishy," Wald said. They agreed that they needed to investigate, but decided not to tell Ernst & Young about the suspicious discovery, Wald said.

"Honestly, you could hear a needle drop in the courtroom when I went over that document with this witness," Wald said. The witness's own e-mails told the story, he said.

"It was certainly a Perry Mason moment," he said. "It illustrated our point."

Ultimately, a nine-month forensic investigation—which included Ernst & Young—uncovered "a very sophisticated fraud that was hatched overseas and included altered bank documents," Wald said. "There was a lot that was hidden."

Among the members of the defense team, Wald cites three partners who tried the case with him: Peter Devereaux of Los Angeles, Michele Kyrouz of San Francisco and Janet Link of Chicago. **NLJ**



RUSS CURTIS

THE GAMBLE: The most important part of the win was a believable lead witness, said Peter Wald.