

## SBF's Testimony Was Necessary Risk for Defense With Few Options

By Holly Barker 2023-11-07T04:45:37000-05:00

- SBF found guilty on seven counts of fraud, conspiracy
- His decision to testify wasn't bad one, some attorneys say

FTX founder Sam Bankman-Fried was facing a mountain of evidence—including some [damning testimony](#) by people who were once his closest professional and personal confidants—when he decided to take the stand in his own defense at trial over the cryptocurrency exchange's catastrophic collapse.

In some cases, a defendant doesn't need to take the stand. They can rely instead on the prosecution's "beyond a reasonable doubt" burden by exploiting gaps in the government's proof to persuade a jury—or at least one juror—to vote not guilty.

But Bankman-Fried's wasn't such a case.

There was very little to lose, given the weight of the prosecution's evidence, defense attorney [Kevin O'Brien](#) of Ford O'Brien Landy LLP said. "They needed a game-changer."

It also wasn't totally unreasonable to think that Bankman-Fried might charm the jury.

"He had worked his magic at investor conferences, and on television shows, and Senate subcommittees over and over again," O'Brien, a former prosecutor, said. "Maybe he could do it with this jury? But it wasn't meant to be."

By all accounts, the cross-examination of Bankman-Fried was highly effective, and he came across as [evasive](#) at times.

The jury at the US District Court for the Southern District of New York deliberated for less than five hours Nov. 2 before finding the disgraced crypto maven guilty of seven counts of fraud and

conspiracy.

Even so, the fact he was found guilty doesn't mean that his decision to take the stand—or that counseling him to do so, if that the was case—was the wrong call, some attorneys say.

“Every case and every client is different,” Miami-based defense attorney [David Markus](#) of Markus Moss PLLC said in an email. “There are cases where you need to call the client and you can't judge the decision based on the result.”

“If you want to win a federal criminal case, you have to be willing to take risks,” Markus said. “You may not be second-guessed if you take the easy path, but you will rarely win.”

Bankman-Fried's lead lawyer, Mark Cohen, didn't respond to Bloomberg Law's request for comment.

## Knowledge, Intent

The conventional wisdom is that you don't put your client on the stand unless there's a really compelling reason to do so, [Sean McKenna](#), a former prosecutor and partner at Spencer Fane LLP, said.

And there's a good reason for that: When defendants take the stand, they open themselves up to cross-examination and could come across as deceptive or unreliable. They may also open the door to a lot of evidence that wouldn't have otherwise come in.

“The government typically has so much information,” McKenna said. Prosecutors can wreck a defendant with their own words, he said.

“I think they probably felt they had no choice but to put him up,” McKenna said.

There are really two considerations at play, [Brandon Essig](#), a white collar partner at Lightfoot, Franklin & White LLC, said.

“One, you have a defendant that creates a favorable impression in front of the jury, and the jury tends

to like them,” he said. “And two, there’s something very kind of discrete and specific about the evidence in the case that someone that needs to testify about and refute, and they do an effective job doing so.”

Bankman-Fried’s defense “really wasn’t going to come in any other way,” according to [Elisha Kobre](#), a former federal prosecutor and partner at Bradley Arant Boult Cummings LLP.

The prosecution spent weeks painting the former CEO—once famous for touting effective altruism—as a liar and a fraudster. At closing, Bankman-Fried’s lawyers [said](#) he was acting in good faith and had been unfairly painted as a villain.

Taking the stand gave Bankman-Fried the opportunity to tell his side of the story, to explain that things were moving fast and had spun out of control without his knowledge or awareness, Kobre said. It also gave him the opportunity to contradict some of the statements his co-conspirators attributed to him.

“Evidently the jury did not believe it,” Kobre said. “But it gave him the chance.”

When a defendant takes the stand, it also scratches a certain itch that jurors might have to know what’s in the defendant’s mind, according to [Jacqueline Jacobson](#), a partner with Monico & Spevack.

Jurors are instructed not to draw any adverse inferences from a defendant’s decision not to testify. But that doesn’t mean they don’t want to hear from defendants, Jacobson said.

When you’re talking about someone’s good faith, she said, it’s easy to imagine a juror thinking: “Well, why don’t you just get up on the stand and talk about it?”

Ultimately, whether to testify is entirely up to the client. A lawyer can advise their client on the risks and potential benefits of testifying in their own defense. But the client has to make the final call.

“They have to live with it,” Jacobson said.

## Challenges, Consequences

Before Bankman-Fried testified in front of the jury, he did a [dry run](#) for Judge Lewis A. Kaplan.

“They basically compelled the guy to testify before the trial on this important issue,” O’Brien said. “It’s really kind of an unfair advantage to the government.”

Usually, putting a defendant on the stand is one of the few opportunities defense counsel has to surprise the prosecution.

Kaplan ordered the dress rehearsal so he could decide whether to allow Bankman-Fried to testify about the role lawyers played in his decision-making. But Bankman-Fried was claiming good faith. He wasn’t formally asserting an advice-of-counsel defense.

It was also probably difficult for counsel to help Bankman-Fried prepare, given that he was in jail for the duration of his trial.

“It’s really difficult for any defense attorney to work with an incarcerated defendant,” Jacobson said.

Bankman-Fried may also pay a price at sentencing for testifying.

A defendant who goes to trial is already going to lose the benefit of a reduction for acceptance of responsibility.

And a defendant who testifies also risks an obstruction-of-justice enhancement, if a judge decides they weren’t truthful on the stand, Essig said. It might make little difference in Bankman-Fried’s sentence, which will be driven by an [astronomical economic loss](#).

Even so, “it’s like a trial penalty booster,” he said.

Bankman-Fried is represented by Cohen & Gresser LLP.

The case is [United States v. Bankman-Fried](#) , S.D.N.Y., docket 11/1/23 .

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