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4 Takeaways From Ex-Theranos Exec Balwani's Fraud Verdict

By **Dorothy Atkins**

Law360 (July 8, 2022, 10:15 PM EDT) -- Former Theranos executive Ramesh "Sunny" Balwani likely faces a tougher sentence for his recent fraud and conspiracy conviction than his co-conspirator, former Theranos CEO Elizabeth Holmes, due in part to his age and experience, but his defense attorneys have teed up clear issues that are ripe for appeal, according to legal experts.

On Thursday, after a four-month trial and five days of deliberating, a jury of five men and seven women **convicted** the 57-year-old former Theranos chief operating officer of two counts of conspiracy and 10 counts of fraud for defrauding investors and paying patients with bogus claims about the once high-flying startup's blood-testing technology.

Balwani's trial follows Holmes', which ended after four months on Jan. 3 with a jury **convicting** her of four counts of conspiracy and fraud related to some investors. But the jury cleared Holmes of charges that she defrauded patients and hung on other investor fraud counts. Holmes' sentencing is scheduled for Sept. 26, and Balwani's is set for Nov. 15.

The back-to-back trials and their different verdicts have legal experts comparing the cases and anticipating hard-fought sentencing hearings and appeals.

Ford O'Brien LLP partner Kevin O'Brien, a white collar defense attorney and former federal prosecutor, said the fact that Holmes, who testified in her defense, received a partial acquittal while Balwani, who didn't testify, was convicted of all counts suggests that Holmes effectively swayed at least some jurors.

"The only explanation is that she got some benefit of the doubt," O'Brien said. "That her testimony and her appearance was stage-managed pretty effectively by [Holmes'] defense."

Here are four takeaways from the high-stakes Balwani verdict.

DOJ Scored With Streamlined Case Against Balwani

Michael Weinstein of Cole Schotz PC, a former federal prosecutor, told Law360 that Balwani's 12-count conviction shows that federal prosecutors — John Bostic, Robert Leach and Jeffrey Schenk — likely benefited from getting to try the same charges against a second Theranos executive.

"I think the government streamlined the case. They refined their evidence and they were more selective with their witnesses that they put on," he said. "The end result was a tighter case — a tighter narrative — resulting in the [conviction on all counts]."

The government's case-in-chief against Balwani **lasted 20 days**, making it substantially shorter than the government's 35-day case-in-chief against Holmes.

During Balwani's trial, the government called many of the same investors, patients and former Theranos employees who testified against Holmes. However, prosecutors notably didn't call Theranos board members or journalists, like former Defense Secretary James Mattis, a onetime Theranos board member, or Fortune Magazine writer Roger Parloff, who both took the stand against Holmes.

The missing witnesses created an opportunity for Balwani's counsel to attack the government's case,

according to legal experts, with defense counsel suggesting repeatedly during **closing arguments** that the missing witnesses' testimony would have weakened prosecutors' case against Balwani.

But ultimately, the jury rejected the defense's argument and concluded that the government didn't need to call those witnesses to secure a victory, Weinstein said.

Balwani's Age, Experience and Alleged Personality Cut Against Him

Legal experts say that Balwani's age and decades of experience working for Silicon Valley technology companies, including Microsoft, likely made him a less sympathetic defendant than Holmes, who met Balwani when she was an 18-year-old college student and he was 38.

"He doesn't have the naivete that she had. He doesn't have the youth that she had," Weinstein said. "He really wasn't given the benefit of the doubt about what to say and how to say it. The jury [concluded that] he should have known better."

Although Balwani's jury never heard Holmes' **abuse claims** against him, U.S. District Judge Edward Davila, who presided over both trials, **rejected** Balwani's efforts to exclude testimony about the pair's decadelong relationship and whether Theranos investors were aware they were dating.

"At the end of the day, he's an older gentleman, and she's a younger girl," Weinstein said. "I don't think that relationship bodes well for him."

O'Brien noted that Balwani also never took the stand to explain his text messages with Holmes in which he wrote that he was responsible for everything that happened at the company.

But even putting the pair's relationship aside, the defense also never countered testimony from investors and former Theranos workers who described Balwani as angry and difficult to work with, O'Brien added.

"He's not the sympathetic personality she is," O'Brien said. "He sounds like he's a difficult guy, like he's stubborn, and he rode roughshod over people, which I don't think she did."

O'Brien added that jurors heard particularly damning testimony that Balwani **replaced** an argumentative Theranos lab director with his own personal dermatologist.

"It's like Caligula putting a horse in the Roman Senate," O'Brien said of the testimony. "He could do anything he wanted."

Balwani Is Likely to Face a Tough Sentence

Legal experts expect prosecutors to seek tough sentences against both former executives in order to send a message to Silicon Valley to deter fraudulent fundraising by executives of publicly owned companies and privately owned startups like Theranos.

"I think [Balwani's verdict] continues to send a signal to Silicon Valley that what you say and how you say it — both to investors and the market — are going to be scrutinized by the U.S. Department of Justice," Weinstein said.

Although each of the 12 counts comes with a maximum 20-year sentence, legal experts agree that Judge Davila likely won't issue maximum sentences for each count or stack them for a 240-year sentence.

But given Balwani's conviction on all counts, his refusal to accept responsibility for the fraud and the hundreds of millions of dollars lost in the alleged scheme, Balwani's prison sentence will likely be lengthy — and tougher than Holmes', according to white collar defense attorney Jen Kennedy Park of Cleary Gottlieb Steen & Hamilton LLP.

"These are serious charges, these are high-profile cases, and the judge is likely to impose significant prison time," Park said.

Weinstein noted that the government may also ask the judge to order Balwani to forfeit assets, particularly because prosecutors have said they believe Balwani has at least \$1 million available to secure his bond.

"That's certainly something to watch out for," Weinstein said.

Balwani's Defense Has Teed Up Issues Ripe for Appeal

Less than an hour after Balwani's conviction, Balwani attorney Jeff Coopersmith of Orrick Herrington & Sutcliffe LLP released a statement saying his client is considering appealing the verdict, and legal experts anticipate that the appeal could challenge multiple evidentiary rulings by Judge Davila.

O'Brien and Park agreed that Balwani's most significant evidentiary loss appeared to be Judge Davila's refusal to instruct the jury that they can infer that a missing Theranos database contained evidence unfavorable to the government.

"It would have been huge if they got that instruction," O'Brien said.

Both Balwani's and Holmes' defense teams argued in pretrial hearings that the government failed to preserve the Theranos database, which they claimed contained exculpatory patient data. However, Judge Davila consistently ruled throughout both trials that there's no evidence the database contained information that could have vindicated the executives outright, and Theranos never provided prosecutors with a decryption key to unlock it in the first place.

Still, Balwani's counsel teed up the issue for appeal by raising arguments throughout trial and by calling a technical expert to testify on the missing database as **one of only two defense witnesses**, Park said.

Park also said she expects Balwani's attorneys could raise arguments on appeal about whether there was sufficient evidence to show that Balwani defrauded patients, particularly because Holmes was cleared of those charges.

The government is represented by Jeff Schenk, John C. Bostic, Robert S. Leach, Kelly I. Volkar and Amani S. Floyd of the U.S. Attorney's Office for the Northern District of California.

Balwani is represented by Jeffrey B. Coopersmith, Stephen A. Cazares, Aaron P. Brecher and Amy Walsh of Orrick Herrington & Sutcliffe LLP.

The case is U.S. v. Elizabeth Holmes, et al., case number 5:18-cr-00258, in the U.S. District Court for the Northern District of California.

--Editing by Alanna Weissman and Nicole Bleier.