

What Crypto Attys Will Be Watching During The SBF Trial

By **Phillip Bantz**

Law360 (October 2, 2023, 3:47 PM EDT) -- When the curtain rises this week on FTX founder Sam Bankman-Fried's blockbuster criminal trial in Manhattan federal court, corporate crypto lawyers will be watching closely as they dissect defense and prosecutorial strategies, weigh the government's evidence and monitor how the judge steers the proceedings.

Bankman-Fried, 31, is set to go to trial Tuesday on seven counts of wire fraud and conspiracy in one of the biggest white collar cases ever involving the budding crypto industry.

Federal prosecutors allege that Bankman-Fried conspired to funnel billions of dollars in customer deposits from FTX to his privately held crypto hedge fund, Alameda Research, and used the money for investments, lavish purchases and political donations.

Bankman-Fried was arrested in the Bahamas, where FTX was based, following the company's official collapse in November. He faces a second trial slated for March on counts brought after his extradition from the Bahamas, including a charge that he bribed Chinese government officials to unfreeze trading accounts.

A key question as the first trial unfolds is whether the government can present its case against Bankman-Fried as a classic fraud scheme, one that's easily understandable to jurors who aren't crypto or finance experts, according to Justin Bernstein, a professor at the University of California, Los Angeles, School of Law, a trial consultant and a former litigation attorney.

"Clarity has to precede persuasion," he told Law360. "If the jury feels like this case is about crypto and finance, the government's in trouble. If the jury thinks the case is about lies, fraud and deception, the defendant's in trouble."

Several members of Bankman-Fried's former inner circle, including his ex-girlfriend and former Alameda chief Caroline Ellison, FTX co-founder Gary Wang and former FTX engineering chief Nishad Singh, have pled guilty and are expected to testify for the government.

"Those witnesses are going to be vital to the government's ability to tell a story," Bernstein said. "If that story is about people taking advantage of other people, that's something the jury can wrap its arms around."

Meanwhile, experts predict that Bankman-Fried's defense team will try to paint a far more complex and nuanced version of his role in FTX's downfall. For instance, his attorneys will likely argue that Bankman-Fried was working in a highly unregulated environment in a nascent industry while relying on the advice of more experienced colleagues and lawyers.

"I'm interested in how the judge balances the narrow focus I expect the government to take and the wide-angle focus that Bankman-Fried and his counsel will try to take," said Martin Auerbach, who leads Withers LLP's white collar practice in New York.

U.S. District Judge Lewis Kaplan of the Southern District of New York recently **blocked** Bankman-Fried's proposed expert witnesses, who were waiting in the wings to testify on the legality of using

loans for political donations and how FTX's terms of service allowed the company to use customer deposits for various purposes. They were also expected to testify that tech execs are often oblivious to the operations of their firm's software.

Those issues could still come up at trial, however, according to white collar defense lawyer Eugene Gorokhov of Burnham & Gorokhov in Washington.

"Just because Judge Kaplan excluded something as a matter of expert testimony does not mean the topic is off the table as a matter of factual proof, and lawyers can make arguments about the inferences that can be drawn from that proof," Gorokhov told Law360.

Bankman-Fried's proposed expert witnesses signal that his attorneys aim to "pull the lens wide and say, 'Here's the context. Here's what the crypto market looks like and here's why the crypto market is different from the standard securities market,'" Auerbach said. "The government will say, 'No, this is about a guy who knows what was going on and lied.'"

The government's only expert witness is an accounting professor poised to testify about customer deposits flowing between FTX and Alameda.

"Even though this happens to be one of the first major crypto trials, it's very much built along the same principles that fraud cases have been built on going back to time immemorial," Gorokhov said. "The idea that investors were lied to, lenders were lied to, transactions were obscured — none of that is new."

Gorokhov, who represented **Heather "Razzlekhan" Morgan** in a high-profile bitcoin-laundering case, is primarily interested in evidentiary disputes that might erupt during Bankman-Fried's trial over the admissibility of testimony on standard industry practices in the evolving world of crypto.

"Given that this is uncharted territory, a new industry, what's fair game in terms of what's admissible for how this industry works? What are the reasonable expectations of investors? What are the reasonable expectations of lenders?" Gorokhov said.

"If SBF and his attorneys can put forward testimony that some of the things that were done are normal — and I'm not talking about lying to investors, I'm talking about things like transferring money to Alameda Research, for example — if he can show that that's a standard practice, that is relevant to some very important issues at trial."

Bankman-Fried is widely expected to pursue an advice-of-counsel defense and blame two law firms that advised FTX, Sullivan & Cromwell LLP and Fenwick & West LLP, for giving bad legal advice and playing a role in the crypto exchange's demise. Fenwick & West advised FTX and Alameda when both companies were startups, while Sullivan & Cromwell worked with FTX before and after its bankruptcy.

Experts have described an advice-of-counsel defense in the FTX case as a "**Hail Mary**," partly because the burden of proof will be on Bankman-Fried, who will have to show that he had an attorney-client relationship with the firms in question and that he provided all the facts of his situation when he sought legal advice. He'd also waive any attorney-client privilege.

But whether the firms' lawyers also served as Bankman-Fried's personal attorneys, rather than solely as FTX's counsel, isn't entirely clear. If it's the latter, Bankman-Fried's advice-of-counsel defense could hinge on FTX's willingness to waive privilege, according to Daniel Silva, a shareholder in the white collar group at Buchalter PC in San Diego and former federal prosecutor.

Whether FTX "can be compelled to waive it is a fascinating issue," he said. "If not, does SBF have his constitutional rights to a fair trial impaired?"

The speediness in which the government brought Bankman-Fried to trial also has shaped up to be a significant issue. Bankman-Fried is going to trial about 10 months after FTX's **official collapse** in November.

"If the Justice Department moved maybe too eagerly, too precipitously, and didn't really back-check all of the cooperators' statements or all the allegations, there's a chance that maybe, just maybe, there will be some complications at trial," Silva said.

But he added that the cooperation of former FTX insiders who are represented by high-powered law firms strongly indicates that the government has a solid case built on what appears to be "extremely overwhelming" evidence against Bankman-Fried.

"I'll be watching for whether the evidence matches the allegations," Silva said. Bankman-Fried's former lieutenants, including Ellison, will "most likely testify against SBF and say, 'Not only am I guilty of doing this, I did it at SBF's direction and he was there the whole time.'"

"If that's how the evidence comes out, it's going to be devastating," he said.

None of the experts who spoke with Law360 expected Bankman-Fried to testify during his trial, and not just because that's generally viewed as a high-risk move for criminal defendants. He's also made many **public statements** that could be used to trip him up on cross-examination.

"Of course, that creates a challenge in terms of establishing that the government's and the cooperators' narrative is wrong," Auerbach said.

"It may be possible to attack that narrative through documents," he added. "But SBF is not going to be in a position, realistically, to take the stand and say, 'Here's what they told me.' Or, more importantly, 'Here's what I understood.'"

--Additional reporting by Rachel Scharf, Elliot Weld, Vince Sullivan and Ivan Moreno. Editing by Karin Roberts.