Delaying Elizabeth Holmes' Theranos fraud trial is paying off for the defense

Human memory is fallible. That's why defense lawyers like to age their cases — and why prosecutors were so frustrated with the multiple delays in trying Elizabeth Holmes for her role at the failed blood-testing company Theranos. Given enough time, people forget things. That can open the door for reasonable doubt.

Several times on Friday, his fourth day of testimony, former Theranos lab director Adam Rosendorff was asked about details in meetings and didn't remember them. But Lance Wade, defense attorney for Elizabeth Holmes, was able to produce minutes from a meeting, a Powerpoint presentation, and old emails that made Rosendorff look less reliable.

Making Rosendorff look unreliable is important to Holmes' defense
But not a lot less reliable.

Making Rosendorff look unreliable is important to Holmes' defense. Rosendorff gave crucial testimony about being sidelined, about not trusting some Theranos tests, and Holmes' direct knowledge of the problems in Theranos' clinical labs. The defense's strategy is to blame Theranos' lab directors for the problems in the clinic — shifting blame away from Holmes. Rosendorff linked her directly to the problems, and showed that he couldn't be responsible for decisions he wasn't aware of.

The defense's job, then, was to try to blunt that testimony.

Take, for instance, the tests for pregnancy, hCG. You may recall that Rosendorff had ordered – in an all-caps email, no less – that all tests be run on an FDA-approved device. But that wasn't done, the prosecution showed.

Today we saw emails that told Rosendorff that Edison was going to be used for the pregnancy hormone test, something Rosendorff testified he didn't know about. It seems like he forgot.

It seems like he forgot

Also in direct testimony, Christian Holmes, Elizabeth's brother, wrote to her that he was fielding a lot of patient complaints – on a thread of emails that Rosendorff wasn't included on. The inference I made from the direct examination was that the complaints were because the tests weren't accurate. But emails shown today in court suggested that the complaints were at least in part because reagents were on backorder. So that looks less bad for Holmes.

On the other hand, Rosendorff wasn't included on those emails either, and testified he wasn't aware of the backorder issue.

All of this underlines Rosendorff's complaint that he was sidelined on certain decisions. Wade did make a direct attempt to undermine it, though. The court was shown a June 2014 email from Balwani that said Rosendoff was "EXTREMELY frustrated that as a lab director he is not being kept in the loop." The email was evidently about research and development experiments being run in his lab, and appeared to be a rebuke to Vice President Daniel Young, who replied that he did update Rosendorff later.

Rosendoff was "EXTREMELY frustrated that as a lab director he is not being kept in the loop."

The defense's gambit to make Rosendorff look bad – by suggesting that Theranos quickly responded to his problems – didn't quite stick. We now have a contemporaneous email about Rosendorff's frustration at being left out of the loop, which

is exactly what he'd complained about on his direct examination. And though it seems to have been fixed in this specific instance, that doesn't mean it was fixed elsewhere.

Wade had better luck on other subjects. One key issue has been proficiency testing, a legal requirement for the lab to ensure test results are accurate. In the direct exam, Rosendorff testified that management's unwillingness to perform these tests was a major reason he quit. Earlier this week, Wade demonstrated that proficiency tests *had* been performed on the FDA-approved machines. It was only the Edisons that were lacking.

Rosendorff had previously testified that although he'd come up with a plan for proficiency testing, it wasn't implemented. That plan was drawn up in December 2013. Minutes of a meeting showed that management discussed it in March 2014.

Again, this didn't exactly cut down Rosendorff – the fact that it took three months for management to discuss it does support his account of them dragging their feet.

What does seem more questionable is a Powerpoint deck from April 2014 that Rosendorff approved. The deck was created – at Balwani's request – by an employee Rosendorff supervised.

"Did you have reason to question the accuracy of this slide deck at the time you received it?"
The slides we were shown weren't especially technical, but they emphasized that Theranos had no peer group for comparison. Because of that, normal proficiency testing wasn't appropriate – and some of the agents in standard proficiency testing specimens weren't right for use on Theranos devices either. The alternative Theranos had developed was superior for this reason, the slides said.

"Did you have reason to question the accuracy of this slide deck at the time you received it?" Wade asked.

There was a long silence.

“I think the slide deck reflected what I’d written” in the documents, Rosendorff said.

Perhaps Wade’s least successful moment was attempting to suggest that Rosendorff was bad at his job because he wasn’t returning physician calls fast enough. We saw an email exchange from October 2014, shortly before Rosendorff left Theranos, where a customer service representative nudged him to make a call to a doctor he’d promised to make a week before.

“Do I have an independent recollection of when I sent this email from seven years ago?”
In another email, also from October 2014, Rosendorff suggests that Christian Holmes should handle the call. Wade pointed out, accurately, that this is what Rosendorff testified shouldn’t happen. But the email also happened about a month before Rosendorff left. Rosendorff testified that he didn’t have a good explanation to give to the doctor — or at least one he felt comfortable with — and with one foot out the door, yeah, I can see why he’d let Christian handle it. Wade pointed out this happened a few times during that period.

I have no idea whether Wade has ever quit a job in frustration, but I certainly have, and I’d guess at least some jurors have, too. Was I carefully engaged in my work the last few weeks before I quit? Hell no. I had given up on trying to change the things I thought were wrong, and had also given up on caring about my work. The alternative was misery.

There was less bickering than earlier this week, though at one point Wade asked Rosendorff what time he’d sent an email to Holmes and got a sharp reply. “Do I have an independent recollection of when I sent this email from seven years ago?” Rosendorff asked. “No, I do not.” There was also a meeting on Holmes’ calendar that Rosendorff didn’t remember.

Aging the case gave Wade time so Rosendorff could forget. It also means that one key witness, George Shultz, is now dead. Even so, memories of unpleasant experiences are a lot stronger than memories of pleasant ones. That’s just how human memory works. Rosendorff’s memory may have dimmed over time, but I’d guess the clear spots have to do with the things that upset him the most.

https://www.theverge.com/2021/10/1/22705156/elizabeth-holmes-theranos-aging-the-case-rosendorff