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Who Is Unfit?: Officer and Director Bars Before and After Sarbanes-Oxley

By Samuel B. Isaacson and Douglas W. Hyman

The United States Securities and Exchange Commission (SEC) has for years used its authority to seek officer and director bars (O&D bars) as one of its primary enforcement tools in combating fraud. An O&D bar essentially enjoins the defendant from serving as an officer or director of a public company. O&D bars can be conditional (e.g., a bar limited to a particular industry) and/or limited in time (e.g., a bar of five years). Prior to the passage of the Public Company Accounting Reform and Investor Protection Act of 2002, popularly known as the Sarbanes-Oxley Act (Sarbanes-Oxley), the SEC could only seek O&D bars in actions filed in federal district court when it could establish a violation of either § 10(b) of the Securities Exchange Act of 1934 (Exchange Act) or § 17(a)(1) of the Securities Act of 1933 (Securities Act), coupled with a showing that the individual was "substantially unfit" to serve as an officer or director of a public company. Courts struggled with how to apply the substantially unfit standard. Then, in 1995, the Second Circuit in the seminal case of *SEC v. Patel* adopted certain factors as the standard for determining whether someone is substantially unfit, thus warranting an O&D bar.[1] To the SEC's dismay, the application of the *Patel* factors often led to the issuance of conditional bars and/or bars limited in time, rather than permanent and unconditional bars. Thus, when

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Real World Juries: From Deliberation Room to Green Room . . .

By John Reed Stark and David R. Fontaine

When discussing the *Martha Stewart* verdict, Chappell Hartridge told reporters, "It's a victory for the little guys who lost money in the market because of these types of transactions. . . . It's a message to the bigwigs that they have to abide by the law and no one's above the law." But who exactly is Chappell Hartridge? A congressman or a senator? A district attorney or local sheriff? Perhaps a pundit or a law professor? The answer is none of the above. Chappell Hartridge is a benefits coordinator with Medicare who, along with 11 other jurors, voted to convict Martha Stewart.

At first glance, some may consider Hartridge's well-reported sound bite and the other frequent public appearances of members of the *Martha Stewart* jury as an appropriate means to learn about the jury's deliberations and to investigate its commitment to justice. Some might even go so far as to assert that only by listening to people like

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Hartridge can we obtain bona fide insight into the workings of a jury panel and to confirm the objectivity and integrity of its deliberations.[1]

But after watching the *Martha Stewart* jurors gleefully making the rounds of the talk show circuit, and listening to them pontificate about their exhaustive struggle, it all seems extraordinarily choreographed and calculated. One cannot help but become suspicious when within only a few hours of a verdict, those who stood in judgment—the jurors—appear seriatim on *Larry King*, the *Today Show*, *Good Morning America*, and the like. In a flash, the jury's decision and deliberations become more about the jurors themselves than about the case and more about each juror's own opportunities for fame, fortune, and celebrity than about any desire for justice.

This disturbing pattern of behavior repeated itself only a few days after the Stewart conviction in the context of the prosecutions of two Tyco executives, fomer CEO Dennis Kozlowski and former CFO Mark Swartz. For example, take juror Peter McEntegart, a *Sports Illustrated* writer, who clearly in an effort to bolster his own career and literary prominence, and within less than a week of the *Tyco* mistrial, penned a piece for *Time* magazine. "We had come together, however uneasily, only to have the marathon canceled just as we were staggering the final yards," McEntegart wrote in his article examining the impact of the judge's decision to declare a mistrial.[2]

Boasting to the *Wall Street Journal* about how, while he was waiting to appear on CNN, bookers from *Good Morning America* wrestled to secure his service, McEntagert sought to squeeze as much as he could from his jury service. The mistrial might have frustrated prosecutors and discouraged the defense team but whatever the verdict (even when *there was no verdict*), McEntagert could still try to parlay his jury service into a Pulitzer.

Prior experience as a journalist is not a prerequisite for a juror to seek to profit from the jury experience. *Tyco* juror Parker Bosworth, a registered dialysis nurse, chose a similar route. Bosworth took copious notes throughout the trial, not necessarily to assist him with the deliberations of the trial, but rather to assist him with writing a book about it. Bosworth reportedly even conjured up the book's title during the trial: *Tyco—The Trial: A Nurse's Diagnosis*. Bosworth told the *Wall Street Journal* that he believed at least three other jurors were considering writing books.[3]

Ironically, as these 12 jurors pondered the fate of Dennis Kozlowski and Mark Swartz, contemplating arguments about the alleged runaway greed, selfishness and avarice of the defendants, some of the jurors were actually hatching their own plans to exploit Tyco shareholders. In addition to exploiting shareholders for their own personal financial gain, jurors could exploit shareholders to satisfy their personal cravings for attention and celebrity. Are these the proper motivations for those charged with determining the guilt or innocence of a criminal defendant?

The attention paid to the now-legendary and infamous holdout juror, 79-year-old Ruth Jordan in the *Tyco* prosecutions, raises somewhat different, but nonetheless related concerns. Whatever her motivation (be it sincere, self-serving or otherwise), the intensive attention to Jordan could give rise to yet another by-product of the juror celebrity evolution—the holdout celebrity. Potential jurors now realize that they may achieve even greater media attention and may have the chance for even greater glory by becoming a holdout, especially if they can become the sole holdout.

Those interested in a functioning and trustworthy system of justice cannot help but notice that this growing celebrity-lust contagion is spreading quickly. After the *Scott Peterson* trial, a group of jurors sauntered, rockstar style, through a throng of reporters toward a waiting podium spiked with microphones. Notorious redheaded juror, Richelle Nice, dubbed "Strawberry Shortcake" by the media and known for her nine or so tattoos and the ever-changing hue of her hair, began shopping her book deal to a CBS producer (CBS owns Simon and Schuster) before she even spoke at the podium.

Robert Blake juror, Roberto Emerick, could barely restrain himself from shameless self-promotion when CNN's Larry King commenced Emerick's obligatory posttrial interview:

> *King*: . . . [I]n your opinion as a juror, Robert Blake didn't do this or the state didn't prove it?
>
> *Emerick*: Well, I've just got to tell you right off the bat, as I was going through this trial, it was very emotional, and it took a couple years off my life. And what I did was, I chronolized everything and I put it on a CD. And here it is, *Judgment Day*. And it's available live on webtv.com. As far as answering your question, if you can repeat that again, I will.[4]

Emerick eventually offered downloads of the songs rather than to sell the songs, after a judge reportedly told him that jurors cannot profit from their service for 90 days after a case. Emerick later explained to the *Albany Times Union*, "This was a stress management thing for me. This is how I was able to cope with the pressures of being a juror and not having anyone to tell about it."[5]

Emerick said he and his rock band, "Mission in the Hills," recorded songs before he was summoned for jury duty. As the trial wore on, he realized he needed an outlet to express his feelings. Emerick said he rewrote and recorded new songs that focused on the trial.[6] Thanks to Emerick, other fame-seeking celebrity jurors can rationalize their unabashed profiteering as an innovative technique of therapeutic self-healing.

Without a doubt, the *Martha Stewart*, *Dennis Kozlowski*, *Mark Swartz*, *Scott Peterson* and *Robert Blake* cases have now firmly established that jury deliberations in notorious trials have evolved into something more akin to an episode of MTV's *The Real World*, with the jurors dutifully following a well-scripted orchestration of self-promo-

tion guaranteed to lock in at least 15 minutes of carefully calibrated stardom.

For those unfamiliar with *The Real World*, it is the MTV decade-long series that supposedly began as an earnest attempt to highlight the trials and tribulations of young people struggling to fit into the so-called "real world." However, the show instead instantly evolved into a dreadful and agonizing three-month audition for maladroit celebrity wanna-bes who by the time the show begins airing, have already secured their own agents, stylists and other representative superstar paraphernalia.

The phenomenon of "real world juries" has clearly grown over the past several years—as has the proliferation of so-called "stealth jurors," people who lie in order to enhance their chances of being selected for jury service in a high-profile case. Fame-seeking jurors are focused more on themselves than on the task at hand and "may just use it as a platform," said Cleveland-based jury consultant Daniel J. Young in an interview with the *San Jose Mercury News*.[7]

Jury service was not always the *American Idol* audition that it is today . . .

For instance, during the *O.J. Simpson* jury selection, jurors reportedly struggled to appear impartial and fair in an effort to market themselves as good "juror candidates." In an interview with the *Associated Press*, Richard Gabriel of Decision Analysis, a jury consultant in the 1995 *Simpson* prosecution, explained, back then, "What we saw was a very high degree of jurors who really wanted on that case." Four of the *Simpson* jurors later collaborated on books about their experience. Another juror who was excused during the trial because of the strain of sequestration later posed in *Playboy* magazine.[8]

Jury service was not always the *American Idol* audition that it is today; its history dates back as far as the Magna Carta. The jury began in the form of a grand or presentment jury with the role of inquest and was started by Frankish conquerors to discover the King's rights. Henry II regularized this type of proceeding to establish royal control over the machinery of justice, first in civil trials and then in criminal trials. It was during the 17th century that the jury emerged as a safeguard for the criminally accused.

Sir William Blackstone, the eminent Judge of the English Court of Common Pleas appointed in 1770, wrote in his commentaries, "Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. . . . the founders of the English law have, with excellent forecast, contrived that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of 12 of his equals and neighbors, indifferently chosen and superior to all suspicion."[9]

Thomas Jefferson described the right to "trial by juries impartially selected" as the best of all safeguards of liberty and property. Thus, the right to a trial by jury was guaranteed in the Constitutions of the original 13 American states, guaranteed in the body of the U.S. Constitution and in the Sixth Amendment, and guaranteed, in one form or another, in the Constitution of every state entering the Union.

Whether this latest twist in the modern jury dynamic is due to a strong societal ailment of Matlock on the brain or because of the Internet age's pervasive media and instant communication, Jefferson and Blackstone clearly did not have the now requisite posttrial juror dog and pony show in mind when drafting their historical commentaries.

Even more importantly, aside from substantiating yet another makeover never contemplated by the framers, real world juries can cause headaches for defense attorneys. "For defendants, such fame-hungry jurors can lead to unjust results because the pursuit of self-interest can overtake a juror's ability to weigh the evidence impartially," explains Eric R. Delinsky, a white-collar criminal defense lawyer at the Washington, D.C., firm of Zuckerman, Spaeder LLP.

How can jurors be relied upon to render fair and impartial judgments in an environment where jurors can so effortlessly manipulate the system? First off, the judicial system can take some steps to slow down a juror's dash from "deliberation room" to "green room." For example, courthouse administrators should not, as they did in the aftermath of the *Peterson* verdict, facilitate the jurors' media needs by providing a forum and other helpful infrastructure, essentially serving as de facto stage managers of the spectacle.

Second, judges could issue juror questionnaires that compel jurors to attest to their intentions in writing. Third, judges could also craft jury admonitions during the posttrial phase of a case, explaining the potential dangers and penalties of juror misconduct such as when a juror exploits the trial's outcome for his or her own personal gain.

Finally, judges can even help prosecutors and defense attorneys more carefully probe a juror's intentions for service and dismiss jurors who seem to be acting out of self-interest. For example, Scott Peterson's defense team believes it encountered a juror with her own agenda in a retired secretary questioned as part of the jury pool for his double-murder trial.

Peterson Juror 29308 was reportedly polite during questioning by prosecutors—promising that she could be fair, balanced, and could keep an open mind. But when defense lawyer Mark Geragos questioned her repeatedly about a recent senior citizens' bus trip to Reno, Nevada, asking, "Did you tell people on that trip that you passed the test to get on the jury and Scott Peterson is 'going to get what is due to him'?" In response, she acknowledged taking the bus trip, but denied talking about the *Peterson* case. "Did you say you were trying as hard as possible to get on this jury . . . ?" Geragos pressed.

Outside court, Geragos told San Francisco's KTVU that the woman "wasn't the first and won't be the last" potential juror seeking to get on the panel under false pretenses. Geragos said he received a tip from a man who overheard

Juror 29308 talking about the case during a seven-hour senior citizen bus trip from Redwood City to Reno. In a declaration entered into evidence, the informant said he "recently overheard this woman say that she was a potential juror in the trial of Scott Peterson and that she had passed some sort of test. She further stated that he [Scott Peterson] was going to get what's due him." Ultimately, Judge Alfred A. Delucchi, overseeing the *Peterson* case, dismissed suspected stealth Juror 29308.[10]

Perhaps a legislative solution to this disturbing trend is the only means to curtail jurors armed with their own agendas; indeed, some precedent for such restrictions already exists. For instance, grand jury secrecy laws prohibit grand jurors and prosecutors from discussing publicly matters presented to the grand jury, and the so-called *Son of Sam* law prohibits defendants from profiting from a crime they have committed. Further, some communities have imposed restrictions on the ability of a public employee to profit, while still a public employee, from experiences as a public official. The most recent example of this occurred in the case of Montgomery County Police Chief Charles Moose, who at a time when he was still serving as the Chief of Police, sought to sell his story about his experiences during the Washington, D.C., sniper investigation.

Some other proposals that would help put a stop to juror book deals and talent searches include legislation requiring jurors to maintain their silence for a defined period of time after the conclusion of a trial or legislation banning jurors outright from profiting, directly or indirectly, from their jury service. Although this kind of preemptive lawmaking may tread dangerously close to an unlawful prior restraint, both solutions arguably strike the right balance between protecting the free speech rights of jurors and protecting the right to a fair and impartial jury guaranteed to every defendant and critical to the functioning of our nation's criminal justice system.

Such judicial stifling or legislative barriers against juror profiteering would probably not fair too well with *Martha Stewart* juror Amos Mellinger. After the *Martha Stewart* verdict, Mellinger's sound bites flooded media outlets, as he appeared on the Fox network, *Good Morning America*, the *Today Show*, *Dateline*, *Paula Zahn* and others, sounding more like Steven Siegal than a market researcher from Riverdale (his actual vocation). In a conversation with Fox's lawyer/interviewer Greta Van Susteren, Mellinger referred to Stewart as, "Basically, just a person who ran afoul of the law and had to be found guilty."[11] As Mellinger coolly voiced his final thoughts, one could almost hear the familiar chimes of *Law and Order* scene changes—doink-doink.

Mellinger's stint on the *Martha Stewart* jury was not even his first brush with greatness—he also served as a juror in the racially charged prosecution of the white men accused of murdering Yusef Hawkins in Bensonhurst in 1989. Mellinger, mused further to Van Susteren, "I've been in trials before, but I have a better feeling for the system now. I think that what we did was extremely important. And I think we really coalesced together. And I think if we could be like a poster for the jury system, that would be good. People should serve on juries."[12] Perhaps Mellinger should have moved to Santa Barbara near the *Michael Jackson* trial courtroom, and tried to hit the equivalent of a celebrity jury panel trifecta.

Like Mellinger, Chappel Hartridge would also probably argue against any judicial interference or legislation with his own post-deliberation occupational plans. Despite lacking the experience of career-juror Mellinger, Hartridge nonetheless injected a persistent dramatic flair in his interviews. When one reporter asked him who will benefit from Stewart's conviction, Hartridge quipped, "It might give the average guy a little more confidence that people can invest money in the market and everything's going to be on the up and up."[13]

Hartridge, stealing a page from Ben Affleck and Matt Damon, even shamelessly flacked his own family. Moments after the verdict, Hartridge's mother told reporters that Martha Stewart got a fair shake from her son, whom she described as a churchgoing, married father of two. "He believes in equality for everybody, rich and poor," Sallie Hartridge said of her Bronx-born son. "He's not an investor, but he's very outgoing and fair to all people."[14]

MTV's *The Real World* pioneered so-called reality television and ushered in a new era for the small screen—as reality shows now dominate its airways. Hopefully, real world juries will not achieve the same dubious honor, but we would not bet on it. The *Jackson* verdict attests to this, with the jurors parading in front of the media with their agents, peddling their books and articles, or perhaps, as suggested by one commentator, "posing naked for a special edition of *Jurors Gone Wild*."[15] ✹

John Reed Stark serves as Chief of the Office of Internet Enforcement in the Division of Enforcement of the U.S. Securities and Exchange Commission and Counselor to the Director. David R. Fontaine serves as Executive Vice President and General Counsel for Ruesch International, Inc., a Washington, D.C.–based global financial institution specializing in international business-to-business payment products and solutions.

1. Martha Stewart is appealing her conviction and requested a new trial for, among other reasons, Hartridge's failure to truthfully answer his juror questionnaire. In a motion filed in federal district court in Manhattan, Stewart's lead lawyer, Robert Morvillo, said Chappell Hartridge lied on his jury questionnaire by not disclosing that he had been arrested and charged in 1997 with assaulting a woman with whom he lived. After spending a few days in jail following the incident, Hartridge was released when the woman declined to press charges. Morvillo said in court documents that had he known about Hartridge's past, he would have struck him from the list of potential jurors for Stewart's trial. "Such a violent act of rage against a woman evidences extreme misogynist tendencies," he said. "Given that one of the defendants in this case is a woman, these tendencies were especially important in the determination of Hartridge's biases." Greg Farrell, *Stewart Says Juror's Past Taints Verdict*, USA Today, April 1, 2004 at p. 1B.

2. Peter McEntagert, *One Angry Man: A Juror Gives an Inside Account*

of Why the Tyco Trial Fell Apart, TIME, April 12, 2004, at p. 47.
3. Julia Angwin, *Tyco Jurors Are Prizes in Hunt by TV 'Bookers*,' WALL ST. J., April 6, 2004, at p. B1.
4. *Legal Panel Discusses Scott Peterson Death Sentence; Robert Blake Acquittal,* CNN LARRY KING LIVE, March 16, 2005.
5. (No author), *Juror In Robert Blake Trial Releases CD About Case*, TIMES UNION, 2005 at p. A02.
6. *Id.*
7. Jessie Seyfer, *Weeding Out Liars Takes Priority in Jury Selection; High-Profile Cases: Background Checks, Analyzing Questionnaires Among Tactics*, SAN JOSE MERCURY NEWS, April 3, 2004 at p. 1.
8. Kim Curtis, *Experts: Stealth Jurors More Common In High-Profile Cases*, Associated Press State and Local Wire, April 1, 2004.
9. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–50 (Cooley ed. 1899). For a more complete discussion, *see* Justice Byron R. White's eloquent opinion in *Duncan v. Louisiana*, 391 U.S. 145 (1968), at 151152, 155156 ("The history of trial by jury in criminal cases has been frequently told. It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689. . . . The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our Constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers afforded him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.") (citing BLACKSTONE'S COMMENTARIES at 349–50).
10. Jason Dearen, *Peterson Trial Judge Dismisses Alleged Prejudiced 'Stealth' Juror: Five New Prospects Picked for Panel*, ALAMEDA TIMES-STAR, April 14, 2004.
11. *Interview With Martha Stewart Trial Jurors Amos Mellinger and Jonathan Laskin,* Fox on the Record with Greta Van Susteren, March 8, 2004.
12. *Id.*
13. Wesley Pruden, *Saving the Streets from Martha Stewart*, WASH. TIMES, March 9, 2004 at p. A04.
14. Soni Sangha and Corky Siemaszko, *Jury Bites Back Her Swagger Turned Them Off*, DAILY NEWS, March 6, 2004, at p. 5.
15. Lana Berkowitz, Andrew Guy Jr., Eyder Peralta, Louis B. Parks, Syd Kearney, *Too Much Information*, HOUSTON CHRONICLE, March 23, 2005, at p. 3.

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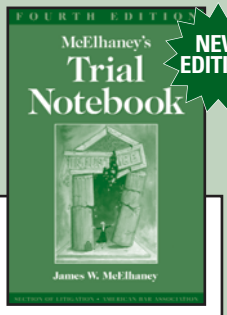

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