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## 'Jury selection is everything'; Stewart's fate could be sealed as process begins today behind closed doors

### COVER STORY

By Greg Farrell  
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NEW YORK -- The trial of Martha Stewart, which begins today with jury selection in federal court here, will hinge on the very quality upon which Stewart built her successful career: perfection.

The U.S. Attorney in Manhattan has accused Stewart and her broker, Peter Bacanovic, of lying to obstruct an investigation into possible illegal trading on inside information, stemming from her sale of ImClone stock two years ago. Stewart and her broker insist they're innocent.

While the trial threatens to derail Stewart's amazing career, short-sellers of Martha Stewart Living Omnimedia stock beware: Stewart doesn't lose many battles.

"Martha's an incredible fighter," says Jerry Oppenheimer, whose 1997 book, *Just Desserts*, was the first detailed look at Stewart's transformation from New Jersey debutante to high priestess of home decor. "She's really set up her own warfront to combat any negativism that's come out of the indictment and the investigation. Whether it's going to help or not help is a gamble on her part."

Since last June, when a federal indictment forced her to step down as CEO of Martha Stewart Living Omnimedia and assume the new title of chief creative officer, Stewart has been waging a public relations campaign to portray herself as a sympathetic victim of prosecutorial aggression. She launched a Web site, [Marthatalks.com](http://Marthatalks.com), featuring flattering photos of her and a selection of testimonial letters supporting her cause.

In the past two months, Stewart has taken to the airwaves, granting extensive interviews with ABC's Barbara Walters and CNN's Larry King. While she didn't discuss the particulars of her case on TV, Stewart projected the warm, personable characteristics that are hallmarks of her essays in *Martha Stewart Living* magazine and her cooking and home-improvement shows. Stewart's mother, Polish-American Martha Kostyra, was featured on both programs.

"Martha Stewart and her advisers have done what I consider to be a brilliant job, a model for high-profile celebrity trials," says Judy Leon, a media adviser at the trial consulting firm DecisionQuest. "They selected excellent media venues, safe ones, where they were in control and she could stay on message."

Leon says it was important for Stewart's legal team to respond to the characterizations of her that had been put forth by prosecutors and hammered on by late-night TV comics. "This is appropriate, because the public had only heard the negative side," she says.

Crisis communications specialist Eric Dezenhall warns that the jury's out, as it were, on Stewart's media strategy. "The big problem Martha Stewart has is the combination of the legal case and her brand," he says. "The way to

keep out of jail is to shut your mouth; the way to rescue your brand is to talk. She's trying to do two things at the same time, and there's no way you can do both brilliantly."

#### A suspicious stock sale

The case against Stewart grew out of a Securities and Exchange Commission investigation into possible inside trading of ImClone stock two years ago. Late in 2001, ImClone stock traded as high as \$70 a share, largely on the hope that cancer-fighting drug Erbitux would win approval from the Food & Drug Administration so that ImClone could market it. But on Dec. 26, ImClone CEO Sam Waksal learned from his brother that the FDA was about to reject ImClone's application.

As he later admitted in court, Waksal -- a close friend of Stewart's -- panicked. He urged his father and daughter to sell large blocks of ImClone stock and tried to unload a big chunk of his own holdings.

On Dec. 27, as she was flying from New York to Mexico for the New Year's holiday, Stewart's private jet landed in San Antonio for refueling. She checked in with her office and learned that her Merrill Lynch broker, Peter Bacanovic, was trying to reach her to discuss ImClone.

Stewart spoke with Bacanovic's assistant, Douglas Faneuil, and sold her stake in ImClone, nearly 4,000 shares, netting almost \$230,000. The next day, the FDA announced that it had rejected ImClone's application for Erbitux, sparking a plunge in the company's share price. If she had waited until the FDA announcement, Stewart's stock would have been worth about \$50,000 less.

During the ensuing SEC investigation, Stewart and Bacanovic said they had no inside information about the FDA ruling, but had an agreement to sell ImClone if the price dropped below \$60 per share. The price did break below \$60 that day.

Waksal eventually pleaded guilty to several counts of inside trading and related felonies and was sentenced last summer to 87 months in jail.

Faneuil, Bacanovic's assistant, initially corroborated Stewart's explanation of the \$60 agreement, but he eventually told prosecutors that it was a lie. He pleaded guilty to a misdemeanor and became a cooperating witness for prosecutors.

The government's case will rest primarily on Faneuil's testimony and two pieces of evidence: one of Bacanovic's work papers, where an entry for Stewart's ImClone shares has the notation "(at) 60" written on it; and Stewart's phone log, stating that "Peter Bacanovic thinks ImClone stock is going to start trading downwards."

In their indictment, prosecutors say that Bacanovic's "(at) 60" note is written in different ink from what was used elsewhere on the page. The indictment also charges that Stewart attempted to alter her phone log to say "Peter Bacanovic re imclone" before changing it back to its original text.

The government chose not to charge Stewart with inside trading of ImClone stock. The SEC was left to pursue that as a civil, not criminal, matter. But the feds did hit Stewart with an unusual fraud charge stemming from Stewart's initial protestations of her own innocence. In effect, prosecutors are saying that Stewart's claims that she did nothing wrong were an attempt to boost the price of Martha Stewart Living Omnimedia stock, and thus constituted securities fraud.

#### Jury selection

According to legal experts, the trial could be won or lost even before prosecutors deliver their opening arguments. In a case like this, jury selection will almost certainly determine the outcome.

"Jury selection is everything," says Chris St. Hilaire, whose firm Jury Insight consults on trials. "A lot of people spend a lot of time figuring out which message you want to put forward in a trial, but it doesn't matter if the audience isn't willing to listen and be persuaded by it."

Last Thursday, U.S. District Judge Miriam Goldman Cedarbaum ruled that reporters would not be allowed in the courtroom to watch defense lawyers and prosecutors begin the process of vetting jurors to find 12 who could be impartial.

The ruling is significant because it suggests that Cedarbaum is going to allow the attorneys to grill individual jury candidates about specific beliefs and feelings toward Stewart. Normally, in federal court, lawyers can only ask general questions of a jury pool, such as: Does anyone here feel so strongly toward Stewart that there's no way they could reach a fair verdict?

That's a problem in a case like this, says Rusty Hardin, the Houston lawyer who represented Arthur Andersen in its obstruction of justice trial and took on former Playboy model Anna Nicole Smith as an opponent over her multimillion-dollar inheritance from Texas oilman J. Howard Marshall.

"Jurors do not volunteer information to judges," Hardin says. "They hold them in respect in awe. When judges ask general questions, they're not really getting answers that truthfully plumb what jurors believe."

As a result, Hardin says, lawyers on both sides have a better chance of weeding out people with hardened attitudes about Stewart if they're allowed to ask specific questions of individuals in the jury pool. "General questions will not elicit that kind of information," he says.

Treating a trial like marketing

Once the jury is chosen, St. Hilaire advises clients to think like marketers, coming up with a simple, plausible theme and repeating it so it gets through. "Jurors are like everyone else," he says. "They're tuning out because they're bombarded by people trying to get their attention. Your ability to tell a story that's simple, clear and concise is the difference between winning and losing."

In a relatively short case like this, which is expected to last only a few weeks, the prosecution might have the upper hand, St. Hilaire argues. "Frequency becomes an issue. Over time, accusations stick simply by making them."

But the challenge for prosecutors and Stewart's defense lawyers will be to find jurors who are unbiased, a task that might prove nearly impossible.

"Because of her celebrity and the nature of the crime, this case is the most understandable of all the corporate scandals," says Dezenhall, the crisis communications expert. As in the O.J. Simpson trial, he says, the outcome will depend on three variables: Do people like the celebrity? How serious was the alleged crime? What's the public climate in which the trial's taking place?

In the case of O.J. Simpson's murder trial, Dezenhall says a man who used to be well-liked was accused of a horrible crime in a largely permissive climate.

Stewart's not particularly well-liked, except among her devoted followers, Dezenhall says. Her alleged crime isn't that serious, but her trial is taking place in a difficult climate, in which the average American wants to punish corporate executives.

"Americans view high-profile trials as part of democracy," he says. "It's the only chance for a little guy to take down a big guy."

The truth will set you free

Nevertheless, a lot of people favor Stewart. According to a recent USA TODAY poll, 36% of Americans have a positive view of Stewart, compared with 55%, who have a negative view. Despite the fact that more than half of those surveyed have a negative view of Stewart, the 36% "pro-Stewart" vote will encourage the defense team. Stewart's lawyers have to steer only one or two of Martha's fans into the jury box.

To convict, prosecutors need a unanimous decision. If the jury deadlocks at 11-1 or 10-2, a mistrial is declared. Prosecutors, who have been criticized for charging Stewart with obstruction but not charging her with inside trading, would then have to decide whether they really want to go after her again.

"My opinion is that she's going to walk," says Oppenheimer, who wrote the unauthorized biography of Stewart. "And then the world will face a colossus walking the Earth."

Oppenheimer's biography describes one previous time when Stewart's honesty was at issue: In 1996, Stewart was quoted in a McCall's article saying she would have loved to have had more children (she has one daughter), but that, "My husband had cancer that precluded him from having more children."

Her ex-husband was outraged and demanded a retraction. Several months later, Stewart was forced to write a letter to McCall's stating: "I would like to clarify that my former husband, Andrew Stewart, and I did not have more than one child for personal reasons, and not because of any medical disability on Mr. Stewart's part."

A few years earlier, in her own magazine, Stewart wrote about honesty, lamenting the fact that so many politicians and sports stars had revealed themselves to be "masters of deception."

"As a child, I was encouraged to tell the truth, and I did," Stewart wrote.

She went further, declaring that "dishonesty is a thief of time, of energy, of pride. We must remember -- and teach our children (and perhaps our political figures) -- one essential: The truth shall make you free."