

Media Challenges Excessive Secrecy in Federal Prosecution of Theranos Founder Elizabeth Holmes

By Steve Zansberg

Corporate High Flier Gets Grounded, Charged

Elizabeth Holmes achieved global notoriety in the early 2000's when, after dropping out of Stanford at age 19, she founded and served as CEO of Theranos, Inc., a Silicon Valley start-up that claimed to conduct some 240 separate tests on miniscule blood samples (a single droplet obtained from a simple finger prick). So persuasive was Ms. Holmes in touting her company's groundbreaking "Edison" technology, she raised hundreds of millions from investors, raising the company's estimated value to \$9 billion (her personal net worth was estimated at \$4.5 billion). Theranos' board of directors included such luminaries former U.S. Secretaries of State George Shultz and Henry Kissinger, former U.S. Secretary of Defense William Perry, former U.S. Senator Sam Nunn, and retired four-star Marine General James ("Mad Dog") Mattis.

Then, in October 2015, the house of cards came tumbling down. *Wall Street Journal* reporters John Carreyrou and Chris Weaver broke the story, ahead of the FDA, that the company's technology was both unproven and unreliable. In March 2018, the SEC charged Holmes and Theranos President Ramesh "Sunny" Balwani with having deceived investors by "massive fraud"; Holmes agreed to pay a \$500,000 fine, return 18.9 million shares to the company, relinquish her voting control of the company, and to be barred from serving as an officer or director of any public company for ten years. Three months later, a federal grand jury indicted Holmes and Balwani on nine counts of wire fraud and two counts of conspiracy to commit wire fraud for distributing blood tests with falsified results to consumers.

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Dow Jones & Company Seeks Unsealing of Multiple Pleadings

In March 2020, United States District Court Judge Edward Davila, in the Northern District of California (San Jose), granted the two defendants' motions to sever their trials. Ms. Holmes' trial was set to begin on August 31, 2021.

In August, Dow Jones and Company (d/b/a *The Wall Street Journal*) filed a [motion](#) to intervene in the case for the limited purpose of seeking the unsealing of three sets of judicial records: (1) the docket, in which 40% of the more than 880 entries were identified simply as "SEALED DOCUMENT," (2) all filings in connection with the defendants' motions to sever their trials, including the transcript of a closed hearing the court held on the motions; and (3) all filings in connection with the government's motion seeking an independent psychological examination of

defendant Holmes, pursuant to Fed. R. Cr. P. 12.2, in response to her notification of a possible mental health defense she may present, (which the court had granted).

Following an expedited briefing schedule, the Court conducted a hearing on Dow Jones' motion on August 26, only five days before voir dire was to begin. Both Holmes and Balwani opposed Dow Jones' motion, and urged the court to maintain the sealing of the motion papers until the jury had been selected and sworn in. Defense counsel argued that it would be more efficient to order the seated jurors and alternates to avoid the subsequent press coverage of the unsealed pleadings than to spend weeks in voir dire finding potential jurors who were untainted by the prejudicial coverage that would be triggered by the unsealing.

Judge Davila [granted](#) Dow Jones' motion, ordering the unsealing of the two sets of motion papers on Saturday, August 28, (with limited redactions) just three days before potential jurors were to arrive at the courthouse for voir dire. Upon the release of the previously sealed records, news outlets across the world [reported](#) that Holmes was planning to assert that Mr. Balwani, with whom she had a long affair, [had controlled her every move and decision](#), and that she was a victim of "intimate partner abuse syndrome."

Voir dire began on August 31, as scheduled, and a jury was seated after only two days. Neither side exercised all of its peremptory challenges.

The Wall Street Journal) filed a motion to intervene in the case for the limited purpose of seeking the unsealing of three sets of judicial records.

Trial Exhibits Posted on the Internet the Day They're Introduced

In a follow-up [letter](#) it sent the court, raising a couple of issues in response to the order unsealing the motion papers and docket, Dow Jones asked Judge Davila to make the exhibits introduced into evidence available to press (and public) for copying on the same day they were introduced, and urged the Court to conserve the resources of the clerk's office by posting the admitted exhibits on the court's website. The next day, Judge Davila entered an [Order](#) directing the parties, at the end of each day of trial, to provide a thumb drive to the court clerk with the admitted exhibits on it, which are then [posted](#) on the court's website.

Media Coalition Seeks Unsealing of Completed Juror Questionnaires

Prior to being called into the courtroom for questioning, all of the potential jurors filled at a 28-page [questionnaire](#) containing 68 questions. In the introduction section, the questionnaire notified the potential jurors:

Your answers are confidential. It is important that you understand that the Court is sensitive to your privacy. They will be reviewed by the Judge and the lawyers in this case. After a jury has been selected the original questionnaire will be returned to the Clerk of the Court and kept under seal and will only be disclosed, if at all, with names and other identifying information removed.

Through the two days of voir dire, the parties referenced those questionnaires 216 times; Judge Davila granted Holmes' motion to strike all potential jurors who indicated on their completed

questionnaires that they had read John Carreyrou's bestseller book *Bad Blood: Secrets and Lies in a Silicon Valley Startup*.

On September 15, ten media entities (American Broadcasting Company, Inc. d/b/a ABC News, the Associated Press, Bloomberg L.P., The Daily Mail, Dow Jones and Company, Inc., NBCUniversal Media, LLC, The New York Times Company, Portfolio Media, Inc., Three Uncanny Four LLC, and the Washington Post Company), filed a [motion](#) to intervene in Holmes' case for the limited purpose of seeking the unsealing of the competed questionnaires of the twelve seated jurors and five alternates. The motion noted that numerous courts have held that written questionnaires used in the jury selection process, as here, are an integral part of voir dire, and therefore are subject to the same First Amendment right of public access as applies to the oral voir dire conducted in open court. The motion attached as an exhibit the [order](#) that another judge in the Northern District of California had entered in 2011, in the perjury trial of former San Francisco Giant Barry Bonds, making the juror questionnaires available to the public on the same day the potential jurors were called into the courtroom for questioning.

Ms. Holmes took no position in response to the Media Coalition's motion, but reminded the court that the questionnaire had promised to maintain the jurors' anonymity and had assured them their answers would remain confidential. The Government opposed unsealing the questionnaires until the jury renders its verdict, and even then the jurors' names should be redacted. While arguing that there is no consensus in federal courts that a presumption of access applies to juror questionnaires, the Government's response cites three compelling interests it claims warrant continued sealing: (1) avoiding jury tampering, (2) protecting jurors' privacy, and (3) encouraging candor of potential jurors – in future cases – in responding to questionnaire questions, which the Government argues would be undermined by the judge's renegeing on his promise to this set of jurors.

In its [reply](#), the Media Coalition argued that while interests (1) and (2) are unquestionably compelling, the Government had made no showing, as required by *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) that unsealing creates a "substantial probability" of harm to either of those interests. The Government's stated concerns that members of the press or public would attempt to influence the jurors' deliberations were completely speculative, and therefore insufficient to meet the Government's burden of proof. The Media Coalition's reply also pointed out that there are "less restrictive means" to avoid juror tampering, including prosecuting any actual offender under the federal criminal law and potential imposition of contempt sanctions.

With respect to jurors' privacy rights, the Media Coalition's reply noted that only three of the 68 questions on the questionnaire could arguably be said to elicit the kind of highly personal and potentially embarrassing information the *Press-Enterprise* court recognized as raising cognizable privacy interests. With respect to those three questions, the Media Coalition urged the court to abide by the *Press-Enterprise* prescribed process of asking the jurors to indicate affirmatively they did not wish to have their answers disclosed. As to the Government's request that all the jurors' names be redacted, the Media Coalition's reply noted that the jurors and

alternates were all called into the jury box to be sworn in by their last names, announced in open court, so there is no basis to treat that information as confidential.

Finally, in response to the government's expressed concern that disclosing these questionnaires would inhibit candor in responses of future potential jurors, because they would not "trust" the judge's promise to maintain their confidentiality, the Media Coalition pointed out that the "less restrictive means" would be to not make overbroad promises on future questionnaires that run afoul of the holding of *Press-Enterprise*.

The Court heard oral argument on the Media Coalition's motion on Thursday, September 30. Judge Davila announced that he planned to notify the jurors that a request had been made to unseal their questionnaires, and he will invite them to indicate whether they object to having any of their answer(s) disclosed, and will meet with each juror, individually in chambers, to discuss any such designation(s). He intends to issue his ruling on the motion to unseal the week of October 4.

Transparency Comes Slowly, But Surely, to U.S. v. Holmes

The trial of Elizabeth Holmes is expected to last 13 weeks (nine more). Throughout the two years the case was being readied for trial, the defendants' lawyers prevailed upon Judge Davila to keep 40% of the filings in the case under seal "provisionally." Such excessive secrecy was consistent with how Theranos, Inc. operated with respect to its employees – all in an effort to keep the truth from coming out. Judge Davila described Dow Jones' initial motion to unseal the court file as a welcome reminder for the court to reconsider its earlier "provisional" protective order, and he responded by unsealing more than 26 court filings notwithstanding the defendant's objections to that motion. Thereafter, he immediately granted Dow Jones' request to order that all exhibits admitted into evidence at trial be posted on the court's website the same day they are shown to the jury.

At press time, Judge Davila had not yet ruled on the Media Coalition's motion to unseal the completed jury questionnaires. Hopefully, they will be released (with minimal redactions) consistent with U.S. Supreme Court precedents holding that voir dire is to be conducted in the open, with only limited exceptions, based on judicial findings.

Dow Jones and Co, and the Media Coalition are represented by the Law Office of Steven D. Zansberg, LLC in Denver, Colorado. The Government is represented Assistant United States Attorneys John Bostic, Jeffrey Schenk, Robert Leach, and Kelly Volkar. Ms. Holmes is represented by Kevin Downey, Lance Wade, Andrew Lemens, Patrick Looby, Jean Fleurmont,

Richard Cleary, Jr., Amanda McDowell, and Katherine Trefz at Williams and Connolly in Washington D.C. and by John C. Cline (solo practitioner) in San Francisco. Mr. Balwani is represented by Jeffrey Coopersmith, Molly McCafferty, Seema Roper, Amy Saharia, Guy Singer, Jenna Vilkin, and Amy Walsh at Orick Herrington, Suttcliffe in Los Angeles.