

The Wall Street Journal
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Monday, March 29, 2004

Executives on Trial: Tyco Executives May Not Benefit From a Mistrial
By Mark Maremont and Colleen DeBaise

LEGAL EXPERTS SAY a mistrial is the most likely outcome in the trial of former Tyco International Ltd. executives, after jurors said their deliberations were "irreparably compromised" by infighting and one juror appeared to indicate her sympathy for the defendants by flashing them an "OK" sign. Although a mistrial usually is considered a victory for the defense, legal experts said the strange twists in the jury room may give the defendants in this case less reason to celebrate. Notes from the jury and the unusual public gesture by the one panelist suggest that this wouldn't be a typical hung jury of two divided camps, but one in which a single juror was convinced of the defendants' innocence and simply refused to deliberate further, making it impossible for the entire panel to reach a decision on the evidence.

"This could be the best thing that happened to the prosecutors," said Steven Kobre, a former prosecutor, now a New York defense attorney. Instead of facing criticism that they couldn't convince a jury of guilt beyond a reasonable doubt, he said, "it may be that prosecutors could have proved their case, but were faced with a juror who was either biased or who wouldn't deliberate."

It is also considered extremely likely that prosecutors in Manhattan District Attorney Robert Morgenthau's office would opt to retry the case, having had an opportunity to refine what many observers said was a flawed and overly broad trial strategy. Legal experts said prosecutors typically win about 80% of cases they retry, though those statistics may be skewed by the fact that the government retries only cases it believes it can win. It opts to drop charges or reach plea bargains in weaker cases.

It's possible that deliberations could get back on track when they resume this morning in New York's state Supreme Court. After Judge Michael Obus expressed pessimism that the trial would continue past Friday, jurors unexpectedly sent a note asking for a break over the weekend. The judge granted the request, telling the 12-member panel that time away from the trial and one another might be "of some assistance" to them. He also denied defense requests for a mistrial.

A mistrial would be an anticlimactic end to the six-month trial, one of the highest-profile cases stemming from the recent wave of corporate scandals. Former Chief Executive L. Dennis Kozlowski and former Chief Financial Officer Mark Swartz are charged with looting Tyco of \$170 million in compensation that wasn't authorized by the board, and a further \$430 million in illicit stock sales. The panel of nine men and three women has been deliberating since March 18.

John Blume, a Cornell University law professor who has studied jury deliberations, said, "Realistically, you will know pretty quickly on Monday

whether this 48-hour break has done any good, and whether you will be able to make any progress." But, he added, "in general, when situations get like this, a mistrial is almost inevitably the result."

He also cautioned against jumping to conclusions that the lone juror is behaving irrationally or unreasonably blocking the process. "After a certain point, I'm not sure a juror is necessarily obligated to continue deliberating," he said. "If somebody believes the prosecution has not proved its case, that's a reasonable decision in our jury system." If there is a mistrial, lawyers on both sides will be eager to hear from jurors about how they felt about the evidence in the case. The answers could well push one side or the other into plea-bargain discussions.

There was a mistrial last year in the federal obstruction-of-justice trial of Frank Quattrone, a former Credit Suisse First Boston investment banker, after jurors deadlocked 8-3 in favor of conviction. The case is scheduled to be retried next month.

In the Tyco case, discord in the jury room first became apparent late Thursday, when jurors sent out a series of notes saying the tone of deliberations had become "poisonous." The notes suggested that one juror was convinced of the defendants' innocence and would no longer deliberate. In a note sent separately, the apparent lone juror said that others refused to recognize "that the prosecution had not proved its case"

On Friday morning came a potential clue to the identity of the lone panelist: Juror No. 4, Ruth Jordan, a former teacher in her 70s who has a law degree, circled her forefinger and thumb in the "OK" sign as she passed the defense table.

"That sounds like something out of a John Grisham novel," said Kirby Behre, a former federal prosecutor in Washington. "It indicates that she has already made up her mind."

An alternate juror in the trial, who was dismissed when deliberations began, said it was Ms. Jordan's handwriting on the note sent to the judge on Thursday by the lone juror. The alternate juror, Simon Cuesta, said Ms. Jordan throughout the trial had seemed to favor the defense.

Because the jury is still deliberating, Ms. Jordan wasn't called to comment.

The Tyco trial started Sept. 29 and involved nearly 50 witnesses and more than 700 exhibits. It centers on allegations that Messrs. Kozlowski and Swartz pocketed several huge bonuses without board approval and without disclosure to shareholders of Tyco, a huge, Bermuda-based conglomerate. The defense has argued that the bonuses were approved and the executives did nothing wrong. But the trial also has featured extensive testimony about the defendants' lavish lifestyles, and has come to symbolize the excesses of the late 1990s.

Before leaving for the weekend on Friday, jurors sent the judge a note saying, "Let us be clear. This is not a hung jury based on a lack of unanimity. This is a jury that has ceased to conduct respectful, open-minded, good-faith deliberations."

Robert A. Mintz, a former federal prosecutor in New Jersey, said it was still possible the jury could return to normal deliberations, but the huge amount of attention paid to juror No. 4's apparent gesture makes that less likely. "For her to back off now, she will have to do so in a very public way," he said. "That kind of thing can serve to further isolate the juror, and add to the feeling she's being singled out for simply sticking to her guns."

If the judge lets deliberations go on, resulting in a conviction, that could give the defense strong grounds to appeal, legal experts said. "The appearance of pressure on an individual juror to convict will make it virtually impossible for any conviction that does occur to be upheld on appeal," said Eric M. Freedman, a law professor at Hofstra University.

In the event of a conviction, prosecutors likely would try to address that issue by asking the judge to question the jurors more closely than usual, to see if the change of heart was made conscientiously. The judge can't dismiss the one juror. In federal courts, a case can be decided by 11 jurors, but in New York, the defense must consent to a reduction in the number of jurors. Given that the apparent lone juror seems to favor the defense, that's unlikely.

Chad Bray of Dow Jones Newswires contributed to this article

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REGION: (Bermuda (BERM); United States (USA); Northeast U.S. (USE);
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(NAMZ))

LANGUAGE: EN

OTHER INDEXING: WSJ; CNW; CRM; DJWI; FRT; GEN; HIY; WEI; BD; NME; NY; US;
USE; IDD; XDJGI; XSP5; IDU; NND; TFR; TPT; TYC

Word Count: 1260

3/29/04 WSJ C1

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