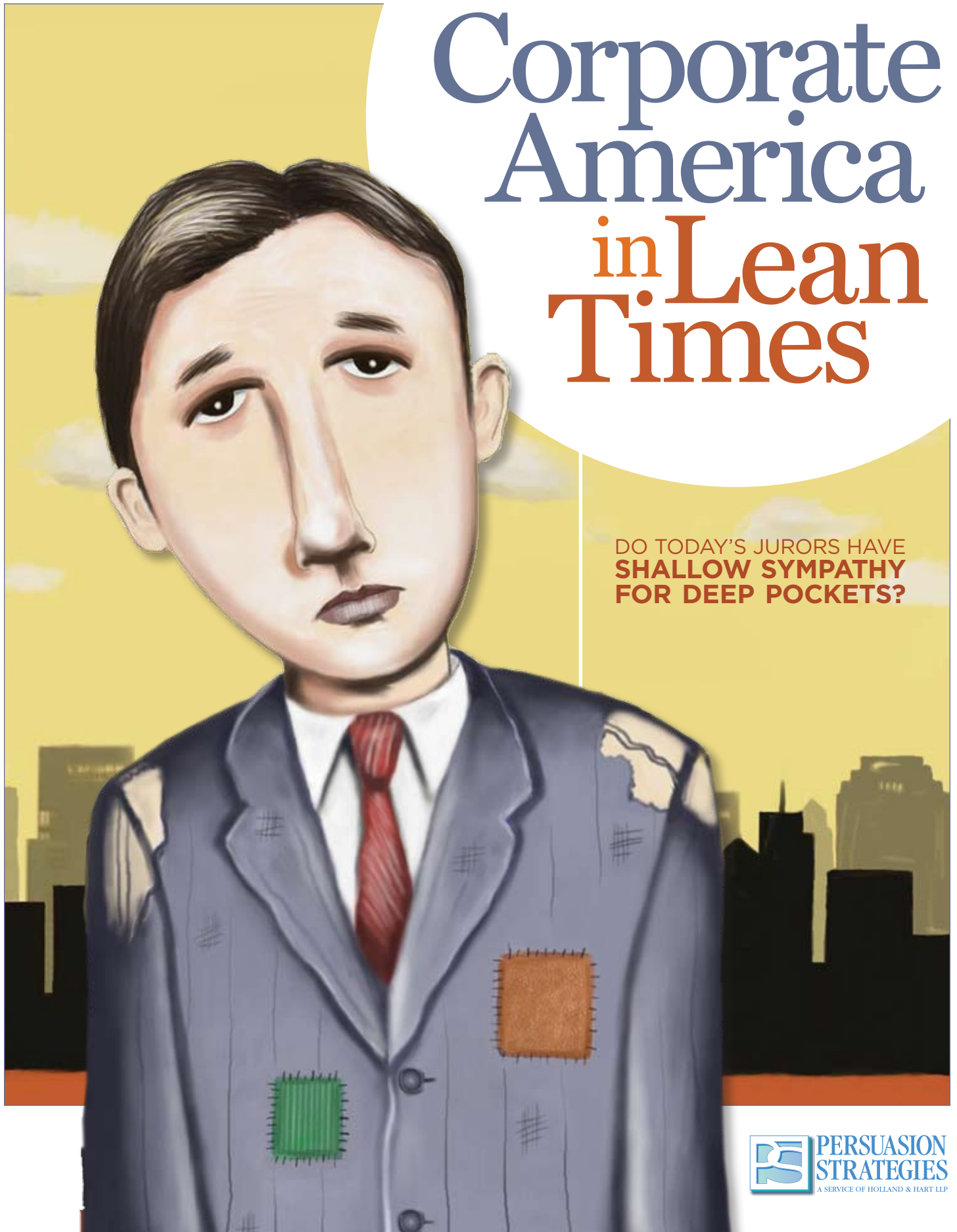


Corporate America in Lean Times

DO TODAY'S JURORS HAVE
SHALLOW SYMPATHY
FOR DEEP POCKETS?



Corporate America in Lean Times

Illustrations by Jason Bullinger, Persuasion Strategies

DO TODAY'S JURORS HAVE **SHALLOW SYMPATHY FOR DEEP POCKETS?**



Your lead trial counsel puts the upcoming trial date on her calendar and curses her luck. You feel it too. "In times like these, with the economy on the skids and corporate bail-outs dominating the headlines, my jury pool is going to be a howling mob! They have no sympathy for any big company accused of causing harm. It doesn't matter who was harmed." Thinking that her case is doomed by the timing of the financial crisis,

The Persuasion Strategies National Survey Projects, 2003-2009

Persuasion Strategies' 2009 National Juror Survey is our seventh annual scientific public opinion poll examining the jury-eligible population's attitudes and opinions of legal issues that supplements over 20 years of privately sponsored mock

counsel starts to seriously consider what she would otherwise call an unwarranted settlement. But should she? Certainly, there have been downturns like this before, and there will be again, but do today's conditions really pose a heightened threat to a fair trial for a corporate defendant? To answer that question, Persuasion Strategies conducted a nationwide survey of 500 jury-eligible citizens to assess attitudes toward corporations in the current climate. Specifically, we addressed four questions:

- 1) Has the current crisis increased anti-corporate attitudes?
- 2) How are anti-corporate attitudes most likely to affect your case?
- 3) Which jurors are most likely to hold anti-corporate attitudes? and
- 4) How should you adapt to the current anti-corporate climate?

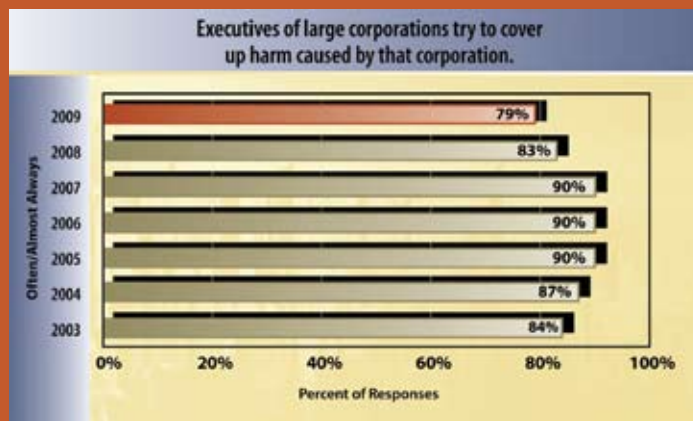
① Has the Current Crisis Increased Juror Anger Towards Corporations?

Americans' persistent bias against corporate America and its culture is no secret. Persuasion Strategies has been tracking the jury-eligible public's attitudes toward corporations since well before the Enron crisis. But the current financial crisis and visible government bailouts have raised even greater interest in perceptions of corporate conduct, leading many to speculate on the economic effects on litigation, and jury decision-making more broadly. But as far as the public's reaction goes today, we can present useful data right now that ends some of that speculation:

Widespread Anti-Corporate Bias Continues. Corporations continue to suffer substantial bias in the public eye. Data on this bias abound, and our survey results show that 91 percent of the jury-eligible population believes corporations should be held to a higher standard of responsibility

than individuals. Jurors presume corporate deception: 78 percent believe a corporation would "often" or "almost always" lie if it could benefit financially from doing so, and 80 percent believe it is "somewhat common" or "very common" for large corporations to cheat to get ahead. Prevalent perceptions of environmental harm also continue, with 85 percent believing that large corporations cause "some" or "a lot" of harm to the environment.

CHART 1



2009 respondents were significantly less likely to agree with this statement than respondents in 2004-2007.

A Desensitization Effect Also Continues. Jurors continue to express diminishing surprise at even the most egregious corporate conduct. For many, deceptive and even consistently illegal behavior is the standard, and it is the rare juror who expects corporations to behave differently. In our mock jury

trial research. We asked 500 randomly-selected jury-eligible respondents to complete a telephone survey responding to measures of attitudes toward corporations, litigation, as well as their perceptions of the economic recession and its effects. Respondents also considered and rendered their preliminary opinion leanings in eight different legal decision-making scenarios from intellectual property, to

employment termination, to oil and gas litigation. The National Juror Survey project now contains over 3,500 total participants and continues to track trends in public attitudes toward corporate conduct and legal responsibility.

Except where noted, references to specific relationships between the variables in these surveys are based on statistical significance at a .05 level or lower.

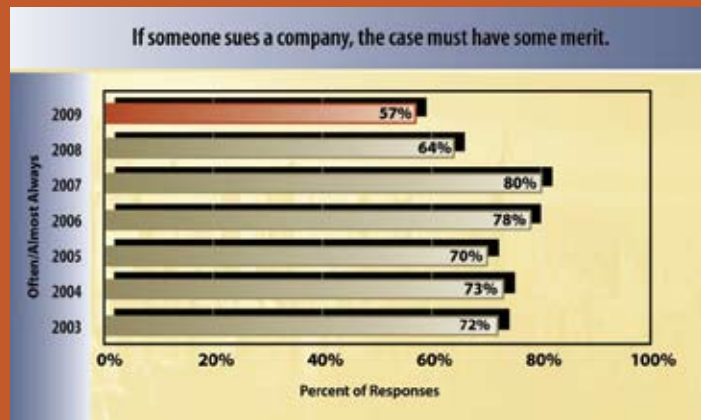


research, this expectation serves as both a reason to vilify corporate entities – “They’re *all* a bunch of liars and cheats” – but just as often benefits specific defendant corporations in contrast to such a negative standard – “They seem like *they’re* trying to do the right thing.” In addition, a rebound can occur against plaintiffs, that is, jurors frequently criticize plaintiffs for not expecting the worst and protecting against it serves the corporate defendant well.

This “desensitization effect” is evident in our 2009 survey data which shows that bad corporate conduct is simply less surprising in the face of today’s financial crisis. In some instances, respondents reported the least anti-corporate attitudes since 2003. For instance, 57 percent believe that if someone sues a company, the case must have some merit – down from 80 percent two years ago. A full 58 percent believe there are “somewhat too many” or “far too many” lawsuits against large corporations.

The data supports the somewhat surprising conclusion that the financial crisis and today’s desperate economic outlook have *not* increased juror anger, and if anything, have contributed to a flattening of jurors’ reported bias against corporations.

CHART 2



② How Are Juror Attitudes About Corporations Likely to Affect Your Next Case?

Several common themes provide an important backdrop for jurors' reactions that transcend venue and case facts:

Alienation from Corporate Culture. Most members of the jury-eligible population today consider themselves to be quite distant from corporate executives. When asked whether business executives share their values, 84 percent respond with "very little" or "somewhat," a number that compares to 69 percent just five years ago. Less than a quarter of the survey respondents (23 percent) consider themselves to be "very much" in agreement with the notion that what is good for American corporations is also good for Americans. Recent news items regarding big bonuses earned by executives whose companies were assisted in government bailouts have done little to engender an affinity for corporate America.

Law versus Ethics. Over the years, close to one-third of the population would place personal ethics over the law when the two conflict. This attitude is strongly predictive of at least an initial predisposition against corporate litigants. Interestingly, however, we have noted a trend since 2003

(after the Enron, Arthur Anderson, and Tyco debacles had made an indelible

impression on the public) that the law has increasingly won out over personal ethics.

The Role of Regulators. Arguably, emphasis on the law translates into an emphasis on the need for regulation. Responding to the open-ended question of who jurors believe is responsible for the recent downturn in the United States economy, 31 percent responded that the blame lies with "politicians" or "government." Seven in ten respondents agree that the government should do more to police large corporations.

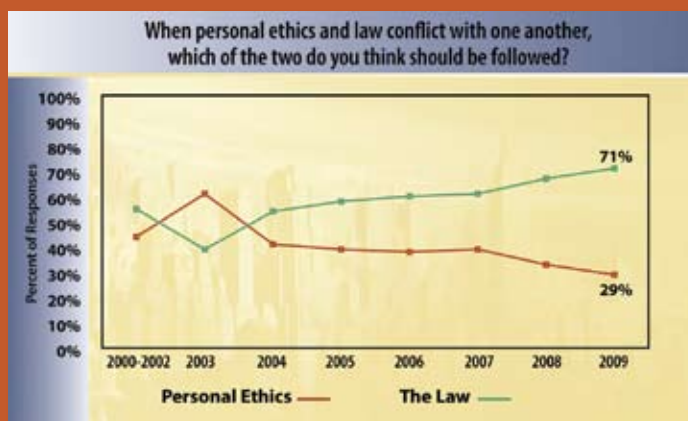
These themes and others form a context to how jurors see your case. By emphasizing shared values with the population, by explaining how your client not only followed the law but acted ethically as well, and by showing that the corporation not only met but exceeded regulations, you stand the best chance of adapting proactively to current juror attitudes.

③ Which Jurors Are Most Likely to Harbor the Worst Attitudes?

Jurors' perceived vulnerability is one dynamic underlying the themes of alienation from corporate culture, an emphasis on ethics, and a preference for increased regulation. Individuals who feel powerless in this economy are more likely to hold negative beliefs relating to corporate litigants. The 2009 survey results show, for instance, that those who are less educated, feel less secure in their job, have not worked in a management role, who occupy blue collar



CHART 3

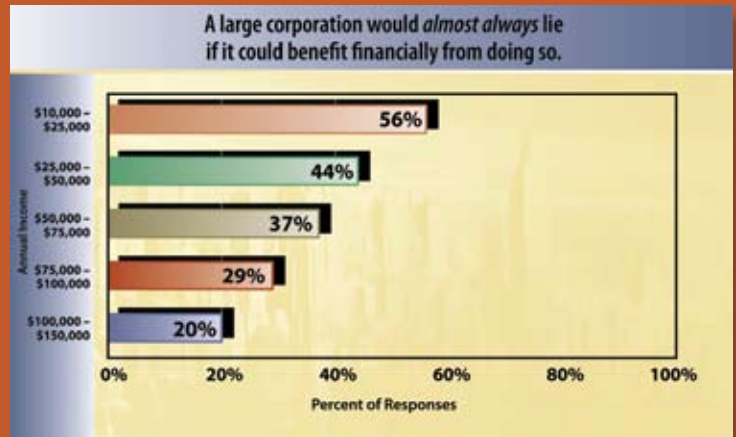




or low wage positions, or who have changed jobs frequently in recent years are more anti-corporate. These profile characteristics are especially relevant to jurors' perceptions in employment disputes and are particularly powerful predictors of juror attitudes toward corporate honesty.

At the same time, Democrats, environmentalists, jurors who support regulations and prioritize ethics over law are also harder on corporations in lawsuits. This cluster of characteristics is linked to negative perceptions of corporate ethics, support for stronger policing of corporations, and increased perceptions of corporate environmental harms.

CHART 4



Easy Times For Juror Hardship

Americans continue to suffer real effects of economic recession. Nearly all survey respondents (96 percent) report some level of personal concern over the state of the economy. More than three quarters (79 percent) report being negatively affected by the downturn in the United States and world economies, and nearly half (46 percent) are concerned they will be negatively affected in the near future. A full 74 percent report some concern over their ability to pay their current bills and half report being financially worse off than they were a year ago.

More importantly, ripple effects have directly impacted the national jury pool. Prospective jurors are seeking – and Courts are granting – relief from jury duty at high rates due in large part to financial hardship. Americans cannot risk missing work, upsetting a

fragile employer, or missing potential job opportunities while sitting in the jury box. Reluctant jurors seek recusals with desperate voices and mounting monthly bills in hand. More than four in ten (43 percent) respondents said that jury service lasting more than two weeks would probably or definitely cause a financial hardship.

So, how does increasing juror hardship affect your jury selection and trial strategy?

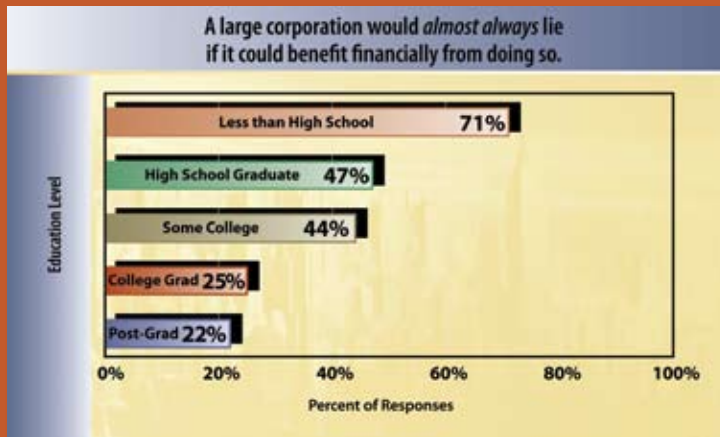
Jurors who pursue hardship excusals are different from those who do not. Our experience and research show significantly stronger anti-corporate attitudes amongst jurors for whom a two-week trial would cause financial hardship. They also show significantly more anti-corporate reactions

to common disputes including intellectual property, contract, oil and gas, and a typical employment termination action.

How can your approach to juror hardship result in advantage at trial? First, identify your high-risk juror profile with particular concern for how hardship may influence that profile and your case (e.g., many hardship jurors are higher risk for corporate defendants). Then, consider the following:

- **Evaluate the size of the jury pool.** In a smaller pool, hardship excusals can become more valuable and harder to achieve, creating stricter initial criteria for juror removal. In a larger pool, hardship jurors may be released more leniently since there are plenty of jurors to replace them. If hardship jurors are high-risk for your case, request a larger than normal pool so hardship will not be considered restrictively.

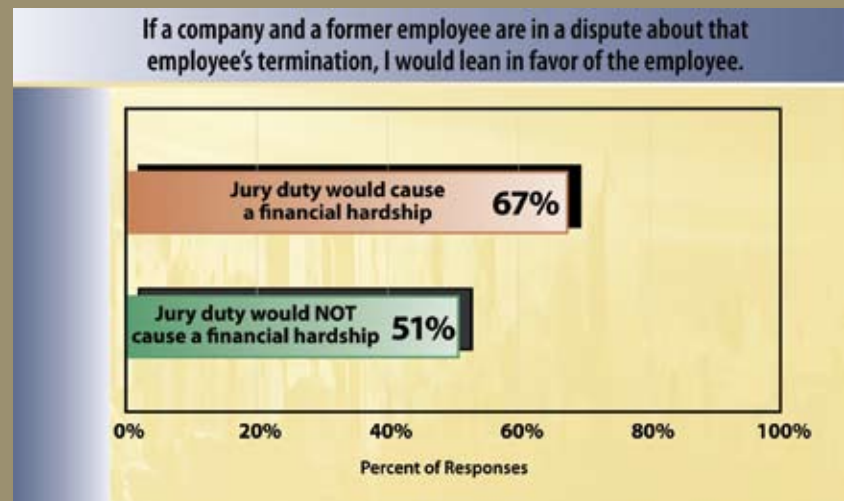
CHART 5



By emphasizing shared values with the population, by explaining how your client not only followed the law but acted ethically as well, and by showing that the corporation not only met but exceeded regulations, you stand the best chance of adapting proactively to current juror attitudes.

- **Request a supplemental juror questionnaire.** Use a specially tailored written questionnaire to learn about juror hardship while identifying and correlating high-risk attitudes with potential hardship concerns. This gives you greater power in assessing whether a relaxed approach to hardship may be more beneficial to your case. Adjust your hardship strategy accordingly.
- **Conduct instructive voir dire.** Some of your “good” jurors will have debatable hardship excuses and you may choose to voir dire them in hopes of keeping them in the pool. Beyond asking careful and strategic questions that introduce reasons the juror should not be excused, consider pursuing a Court instruction that informs jurors that not all circumstances result in hardship excusals, and jurors should not hold it against any of

CHART 6



- the attorneys for doing their best to achieve an impartial jury panel.
- **Determine your flexibility.** When making accommodations to improve prospective jurors' ability to serve, be willing to streamline your case

approach, adjust the court schedule (e.g., shorter days or creative calendars), or cater to juror needs. It may result in a substantially more favorable pool from which your jury is selected.



For the first time in any research that we have ever encountered in our industry, we have developed a complete anti-corporate juror profile comprised entirely of statistically significant research findings. The detailed profile includes 22 profile points each proven to predict an anti-corporate outcome. Contact us to learn more about this profile.

④ How Can I Adapt To Today's Anti-Corporate Bias in the Courtroom?

So, the most pressing question is what, if anything, can a corporate litigant do to adapt to the current attitudinal climate?

First, don't give up on the courtroom. Relying on headlines, it would be easy to conclude that the pool of potential jurors has never been more distrustful of corporate America than it is today, and, in response, to opt to settle or to seek a perceived safe harbor in bench trial or arbitration. As our previous *Persuasion Strategies / Inside-Counsel* Special Reports have shown, arbitrators and judges are not immune to the trends in public attitudes, and more importantly, our 2009 survey shows no marked increase in anti-corporate attitudes. While anti-corporate attitudes remain high, they are not significantly higher than they have

been in other years. In fact, some attitudes – corporate honesty in particular (see charts 4 and 5 on pgs 6-7) – are actually growing more favorable toward corporations. A jury trial will always require caution, careful jury selection, and attention toward building a responsible image for your corporate client, but the present economic climate should not cause you to have

Do Top Notch Graphics Signal Deep Pockets to Jurors?

Let's face it, jurors start with a presumption that a corporation will have greater financial assets than an individual plaintiff. Will putting on a Pixar animation against a black and white blow-up reinforce that belief? Probably. But dumbing down your presentation to appear like the pauper can backfire and make jurors think that you are unprepared.

Jurors appreciate the value of visual learning and the efficiencies of electronic presentation. This is especially true for your most biased decision-maker who may have a limited educational background and lower income. In most situations, the visual communication advantage

substantially outweighs the risk of reinforcing pre-existing negative attitudes. Persuasion Strategies' litigation experience and post-trial interviews inform the following four recommendations for using visual media throughout your case:

- **Early birds get more bang for their buck** - Do an analysis of your case and pinpoint the most difficult facts or concepts. Be creative in considering how visual media helps make your point. Many would not think that a big budget in video, technical illustration and 3D animation would be a wise investment in a severance tax case, but recently an international oil and gas company's slate of demonstrative exhibits represented a six figure trial investment yet returned a verdict leading to tax savings of nine figures, a very respectable ROI for any portfolio.
- **Be prepared** - If you are unsure of how opposing counsel will use graphics, err on the safe side and develop your own before it's too late. Few things are

any greater fear of the courtroom. Our mock trial research with corporate clients continues to illuminate successful ways to overcome anti-corporate bias in a variety of cases.

Second, differentiate your corporate client from the pack. Potential jurors who closely follow the news may center their blame for the recession on real estate giants and a few players in the financial industry, but others may generalize their negative feelings toward corporations overall. In that context, your goal in the courtroom is to show your jury that *your* company differs from *their* image of corporate America. As long as you can demonstrate it in actions and not just in words via a commitment to: high standards, careful business practices, and loyalty to long-term employees, jurors will see your client in a different light.

Third, resist the temptation to play the financial sympathy card. Some might assume that in a recession, jurors are less likely to award large damages against a company for fear of causing job losses. You cannot count on that assumption. Even when told that a company employs a large number of individuals, two-thirds of the respondents would still consider an award of high damages against that company to be a good thing if the company acted based on greed or irresponsibility. Only 15 percent responded that a high award in a case would be bad because it would hurt employees or consumers. In that context, jurors are likely to view any pointed references to the

financial vulnerability of the company or the number of workers who depend on you as a distraction or as an admission of guilt. In addition, 78 percent of the surveyed population believes that a corporation would “often,” or “almost always” lie if it could benefit financially from doing so, and any suggestions of fiscal challenge on your company’s part may not be believed. Certainly, if jurors are going to conclude that a negative result for the corporate defendant is a negative result for their local economy, they are going to reach that conclusion on their own.

Many members of today’s jury pool face the full scope of economic recession and significant financial challenge for the first time in their lives. As they absorb the shock, they also find new ways to incorporate the changing climate into their existing views. Just as they find new ways to criticize corporations and decry corporate conduct, they also find new reasons to scrutinize plaintiffs and other businesses that interact with corporations. Your lead counsel is right to be concerned about an upcoming trial date but our data and experience suggest that at this point, she has no reason to be any more concerned than she was a few years ago. In fact, if anything, you both should see opportunity in jurors’ desensitized expectations of corporations and corporate conduct and find the best route to favorably differentiate your company and demonstrate to jurors that in spite of this economy, you remain strong, capable, and most of all, ethical. ●

worse than exchanging demonstratives and being locked out of the ability to visually defend against the other side’s killer illustrations. Make sure your case has the visual advantage it needs. You can always jettison what’s unneeded, but it may be impossible to add demonstratives after the exchange.

- **Mix it up** – Having the same charts and graphs come up on the screen can be as boring as saying the same thing over and over. Jurors complain about repetition and compliment variety. Along with graphics, animations and videos, consider a physical model. Although a good model can be as expensive as a computer animation, it has an old school appeal that seems to say “low budget.” Models have the additional advantage in large courtrooms where your witness is across the room from the jury box. Having the witness come up with a pointer to a model placed in front of the jurors is a valuable technique to bring

the testimony (and the witness) closer to the decision-makers.

- **Read your jury** – If you see the jury’s eyes glaze over with the next video clip or spreadsheet, consider jettisoning the rest. Testing multimedia beforehand is a good way to anticipate probable juror reactions but nothing matches the actual trial experience. Rely on your team’s instincts on whether to use each demonstrative. If you sense resentment as you pull up a graphic, consider making it the last of that type.

The answer to the question of whether jurors equate high quality graphics with deep corporate pockets is as varied as each individual in the box. Instead of worrying that jurors will infer “deep pockets” from your demonstrative exhibits, the more important question to ask is whether they effectively communicate in a fair and efficient manner.



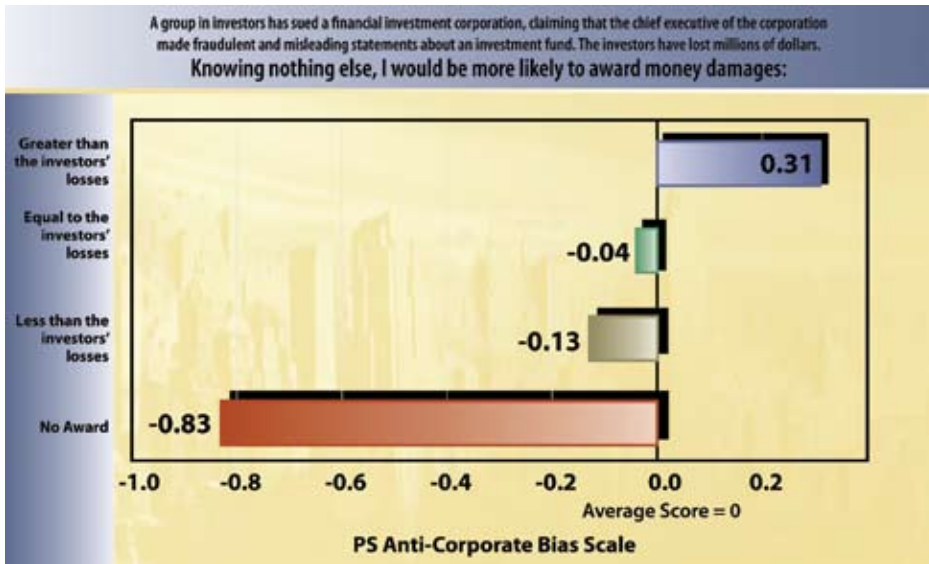
You Can Measure Your Potential Jurors' Anti-Corporate Bias



Given the prevalence of anti-corporate bias, and the impossibility of discerning that bias from demographics and experience alone, many corporate litigants find themselves wishing that potential jurors arrived at their courtroom wearing a pre-printed label showing how they stack up against the national averages on that bias. While such labels don't exist, it is possible to measure your potential juror's anti-corporate bias based on a short series of questions. Relying on eight years of data collected from a national random sample of 4,291 juror-eligible Americans, Persuasion Strategies has

developed a scale consisting of a specific weighted combination of seven attitudes concerning corporations, government regulation, ethics, and lawsuits. When juror responses to this series of questions are scored via a supplemental juror questionnaire or oral voir dire, that score serves as a statistically significant and reliable predictor of initial juror leaning on a wide variety of cases that pit an individual against a corporation. This finding holds both generally and in the contexts of employment, intellectual property, contract, products liability, and investor claims. In short, potential jurors with a higher score on the *Persuasion*

CHART 7



Strategies Anti-Corporate Bias Scale (PS-ACBS) are significantly more likely to report a leaning against the corporation in litigation. For example, in our April 2009 survey, respondents were asked what their initial leaning would be in a case involving a group of investors who lost millions of dollars and are suing a financial investment corporation, claiming that the chief executive of the corporation made fraudulent and misleading statements about an investment fund. As chart 7 indicates, response on that question was strongly predicated on where jurors fell on the PS-ACBS scale.

In this chart, the decimals represent average anti-corporate bias scores of the survey respondents to this scenario. Positive scores indicate a greater-than-average level anti-corporate bias (e.g., those scoring .31 would award more than the plaintiffs have lost), and negative scores indicate a less-than-average anti-corporate bias. As indicated, those who score higher on the scale are more likely to award money damages. In a number of other tests, Persuasion Strategies has found that the same pattern applies to other types of cases that involve an individual versus a corporation, including employment, products liability, intellectual property, contract, and personal injury cases. In each case, in response to a simple description of the fact pattern, respondents with a higher score are significantly more likely to lean against the corporation.

In high-stakes litigation in today's economic climate, you need every tool to assess your potential fact-finders. It makes sense to discover how your potential jurors stack up on this scale and use individual juror scores as part of the overall picture in assessing your venue and informing your strikes. By incorporating a specific mix of questions into your supplemental juror questionnaire or your oral voir dire, you can add this specific tool to your arsenal. Contact Persuasion Strategies for more information on how to use the *PS Anti-Corporate Bias Scale* on your next trial. ●

Need More Information?

In this report, you have read about our multiple years of data on anti-corporate bias, our High-Risk Juror Profile of the attitudes, experiences, and demographics that significantly correlate with bias against a corporate party in litigation, as well as the *Persuasion Strategies Anti-Corporate Bias Scale*, a slate of questions that can be incorporated into a supplemental juror questionnaire or oral voir dire and used to predict jurors' initial leanings in a number of different litigation types. For more information on any of these items, contact a Persuasion Strategies consultant. We would be happy to mail you a copy of the High-Risk Juror Profile and to work with you on incorporating the *Anti-Corporate Bias Scale* into your next jury selection.



Dr. Karen Lisko,
Senior Litigation Consultant
(303) 295-8393



Dr. Shelley Spiecker,
Senior Litigation Consultant
(303) 295-8164



Dr. Ken Broda-Bahm,
Senior Litigation Consultant
(303) 295-8294



Dr. Kevin Bouilly,
Litigation Consultant
(303) 295-8476



If you would like additional information on persuasive, cost-effective litigation graphics, please contact C. Pen Volkmann, Director of Graphics & Video Services (303) 295-8120



Did you know that a honeybee never sleeps?

She works constantly, making 154 trips out of the hive collecting nectar and transforming it into just *one teaspoon of precious honey*.

Persuasion Strategies works tirelessly to distill the facts of your case into its most persuasive message—for a jury, judge, or arbitrator.

Great research. Even better case strategy. *Now that's sweeter than honey.*

