



Post-Enron Jury Perceptions and

You're sitting in your office on a Thursday afternoon when you learn that your company has been named in a lawsuit that includes the risk of huge potential damages. You recall having read the latest survey results that said that juries have been increasingly anticorporate since the Enron collapse and other recent corporate scandals. Who could blame you when three words flash through your mind: "Settle this case"? Before you jump to that conclusion, however, ask yourself this question: Does the latest information that confirms anticorporate bias automatically translate into big payouts for plaintiffs in this post-Enron era? Not necessarily. In fact, jury research conducted by two of the authors finds that a "desensitizing effect" against plaintiffs can frequently occur under certain case conditions, even in light of increased anticorporate sentiment.



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What is this “desensitizing effect” and where does it originate? It is a phenomenon whereby juries, like society in general, register less shock over time about a particular “bad act.” Early juries might first be shocked by a bad event and might blame the party with the most perceived power—the defendant—with a finding of high damages. Then, as society adjusts, juries adjust, so much in fact that later juries blame the plaintiff for not “knowing better,” for not having anticipated that the bad outcome would occur.

Consider, for example, breast implant litigation from more than 20 years ago. Research conducted by one of our authors in the early 1990s bore out the fact (and actual jury verdicts confirmed) that many jurors were initially shocked that a silicone product might potentially cause autoimmune disease in a woman. Even though some of the subsequent scientific research found no statistically significant difference between incidents of autoimmune disease in women with or without breast implants, the shock over the risk of a connection contributed in part to some significant plaintiffs’ verdicts. Jury research conducted later that decade found that subsequent lawsuits met with jurors’ heightened scrutiny of the plaintiff and her knowledge of previous litigation. Given the media’s

attention to alleged risk of silicone breast implants, certain types of jurors apparently punished plaintiffs for not “knowing better” than to get breast augmentation.

Outside the realm of product liability litigation, precedent for the “desensitization effect” exists in other corporate litigation arenas. In breach of contract cases, for example, jurors are no longer shocked (as they once were) that parties to the contract frequently meet only the prescribed minimum of the written language of the contract without performing above and beyond that required duty. Today, when plaintiffs claim that an oral contract was breached in addition to written commitments, many jurors criticize the complainant for having expected more from the defendant corporation than the legally required performance of the written elements, even if jurors also conclude that a greater moral obligation existed on the part of the defendant to exceed those “black and white” elements.

By Marsha L. Montgomery,
Karen Ohnemus Lisko, and
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What to Do about Them

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Persuasion Strategies, a service of Holland and Hart, LLP, conducted a nationwide survey of jury eligible respondents February 3–5, 2003. Survey respondents were presented with a scenario involving a contract dispute between some plaintiffs and a major corporation. After having heard that the parties had entered a written agreement in which the corporation was required to provide services to the

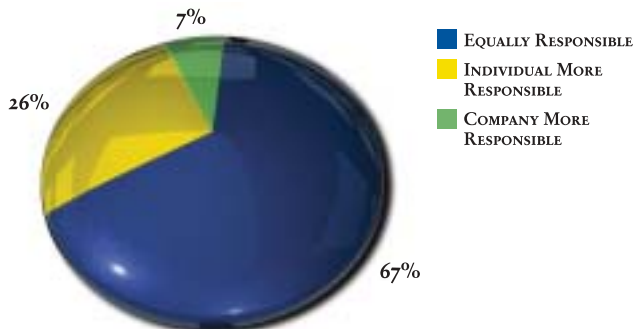
plaintiffs for several years, respondents were asked what message they would wish to send with their verdict in a case involving a major corporation. We compared their leaning (favor plaintiff or favor defendant) to the content of the open-ended response that they provided. Even jurors who indicated a leaning toward the plaintiffs voiced criticism of the plaintiffs:

- “They [the plaintiffs] should have known better now—everything [in the contract] is black and white. We are in a gray society. There are too many loopholes.”
 - “Be sure you fully understand what the corporation has written in fine print.”
 - “Before signing any agreement with a corporation, the plaintiff should carefully examine all papers and know exactly what they are signing.”
 - “A knowledgeable plaintiff would be able to identify a breach of service.”
 - “The plaintiff should have known the facts.”
- Not surprisingly, respondents favoring the defense had the following to say:
- “All parties should make themselves knowledgeable.”
 - “If you’re dealing with a person or company, both sides need to be fully knowledgeable about what they’re entering into before signing a contract together. If one party fails to do so, then they get what they deserve.”

Interestingly, many respondents indicated that they felt that the plaintiff and the corporation should be equally responsible for understanding the terms of an agreement. See the graph at left regarding respondents’ assignment of responsibility to parties to understand the terms of an agreement.

RESPONSIBILITY OF PARTIES TO UNDERSTAND THE TERMS OF AN AGREEMENT

SOURCE: PERSUASION STRATEGIES (A SERVICE OF HOLLAND & HART LLP)
NATIONAL TELEPHONE SURVEY CONDUCTED FEBRUARY 3–5, 2003



ENRON EFFECT VS. DESENSITIZATION EFFECT

So has jury scrutiny of the plaintiff changed in these post-Enron days of higher “disapproval ratings” of corporations? It has, but in a way that might surprise you.

The Enron scandal is on jurors’ minds. It has been a central focus during deliberations in every mock trial that we have conducted since the energy giant’s collapse, including employment cases, gas royalty cases, and patent litigation. Our research has found that jurors are disappointed but not astonished by Enron’s misconduct. Moreover, in the

months immediately following Enron's collapse, Persuasion Strategies' mock trial research indicated that jurors were astonished by Arthur Andersen's role in the company's actions. As a major accounting and auditing presence, Arthur Andersen had received generally favorable marks before the Enron scandal. The firm's fall from grace in connection with Enron, therefore, caused greater shock for jurors. Jurors have, however, already begun to demonstrate a surprising change in attitude toward accounting firms. Results from our survey show that more respondents (75 percent) hold favorable opinions of accounting firms in comparison to other types of companies. The accounting industry, therefore, appears to be bouncing back from jurors' initial disfavor with the profession immediately following Enron. See the graph below and the graphs on page 83 for a comparison of jurors' opinions of large and small companies.

As seems to be the case with many startling events, the first occurrence of an Enron-like event is followed by public outrage. The second time that a similar event occurs, this outrage is likely to decrease. Enron and subsequent corporate scandals seem to cause a "desensitization" effect on plaintiffs if certain facts about the plaintiffs are true. Results from our survey lend support to the "desensitization effect." Sixty-nine percent of respondents agreed with the statement "I was surprised to learn of Enron's actions leading to the recent collapse of

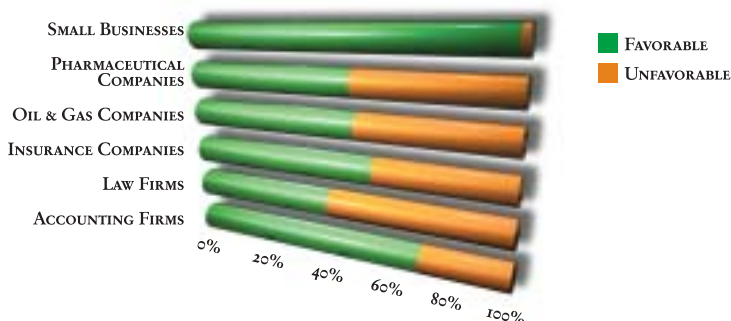
the company," while only 31 percent indicated that they were not surprised. In response to a followup question, 38 percent of respondents agreed with the statement "I would be surprised if another company acted like Enron did in the future." Sixty-two percent reported that they would not be surprised. See the graphs on page 84.

One month after Enron had declared bankruptcy, two of the authors conducted mock trial research involving a major corporate defendant. Even at that early stage, mock jurors exhibited the "should have known syndrome." In the same breath, 93 percent of mock jurors overwhelmingly agreed that "competitors would readily conspire together if it increased their profits," and they placed a greater onus on the plaintiffs to be aware of that potential and to be more aggressive in its due diligence when entering into the contract. As one mock juror in that research put it, "We know these companies conceal information. They [the plaintiffs] should have had several auditors who all looked for different things to make sure the auditors' companies weren't working together."

As you can see, however, by comparing the verdict messages of survey respondents favoring plaintiffs and the verdict messages of survey respondents favoring defendants in the graphs on page 86, neither side in a dispute should assume that the jury must automatically favor one side over the other.

RESPONSIBILITY OF PARTIES TO UNDERSTAND THE TERMS OF AN AGREEMENT

SOURCE: PERSUASION STRATEGIES (A SERVICE OF HOLLAND & HART LLP)
NATIONAL TELEPHONE SURVEY CONDUCTED FEBRUARY 3-5, 2003



THE HEIGHTENED STANDARD FOR SOPHISTICATED PLAINTIFFS AND DEFENDANTS: A TWO-PART TEST

Regardless of the type of litigation, the relevant sophistication of the plaintiff carries significant weight in jurors' assessment of defendant companies' fault. We have conducted a great deal of mock trial research in the last few years related to complaints of oil and gas royalty underpayments by royalty owners. Sometimes, the plaintiffs are ranchers or farmers. Sometimes, the plaintiffs are attorneys or other companies. When the defendant oil companies acted in a similar manner in both cases, the sophistication of the plaintiff seemed to make a dramatic difference in mock jurors' assessment of their claims. Mock jurors seemed to be much harder on the more sophisticated plaintiff. In those cases, damages were either mitigated or were not awarded at all.

You might suspect a David and Goliath syndrome at work here. Although that explanation is likely true in part, the entire reason seems to be much more complex. We find that jurors consistently apply a two-part test in evaluating all parties in a case. First, they seem to consistently evaluate every party's respective power. For example, in cases involving products that have malfunctioned, jurors seem to scrutinize the defendant for its prior knowledge of performance problems and, in turn, critically assess the plaintiff's access to the information about the product's propensity to malfunction under certain conditions. For example, warnings about common misuses might exist in the owners' manual. So even though the jurors might not routinely read the owner's manual for their own purchases, they typically hold the plaintiff to a higher standard of actually having read the owner's manual.

Second, jurors seem to look at the choices available to each party against the backdrop of the power that each possesses. They may want answers to such questions as these: Did the manufacturer choose to alert consumers to potential hazards? Did the research and development division look at safer alternatives to the product elements that caused problems for the user? Alternatively, did the plaintiffs avail themselves of all available information regarding uses and misuses of the product? Did they have options with other products on the market that might have been easier to operate? In addition to the evidence presented at trial about the parties' choices, many jurors supplement from their own individual experiences.

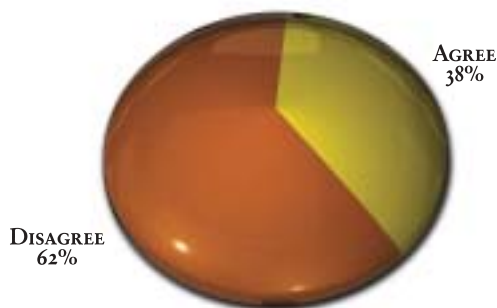
CAN JURORS' CYNICISM UNIFORMLY CREATE OPTIMISM FOR CORPORATIONS? THERE IS STILL ROOM FOR CAUTION

So does this "desensitization effect" of cynicism about events and companies signify a return to optimism for trying cases as a corporate defendant? Not automatically. Ongoing research suggests that jurors' standards for evaluating power and choices made by both parties are higher than ever. More jurors seem open to awarding damages against corporations in cases in which fault exists. One Litigation Insights study that compiled mock trial findings involving 543 mock jurors found a differ-

ence between factfinders who had evaluated cases before and after the Enron collapse. Before the Enron collapse, 46 percent of mock jurors agreed/agreed strongly that there should be a cap on the money damages awarded in a civil trial. Post-Enron, the number of mock jurors who agreed/agreed strongly dropped to 29 percent.¹ Results from our February 2003 survey revealed that 75 percent of respondents agreed with the statement "If someone sues a major corporation, the case must have some merit." At the same time, 80 percent agreed with the statement that, "if a major corporation could benefit financially by lying, it is probable it would do so."

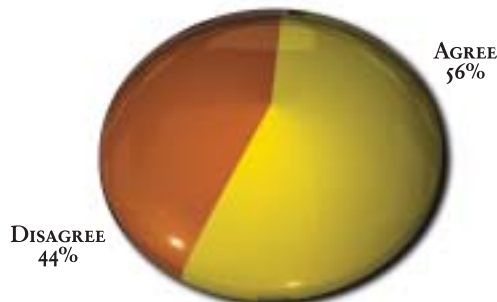
"LARGE CORPORATIONS ARE INTERESTED IN MAKING PROFITS *only* IF IT DOESN'T HURT THE PUBLIC"

SOURCE: PERSUASION STRATEGIES (A SERVICE OF HOLLAND & HART LLP)
NATIONAL TELEPHONE SURVEY CONDUCTED FEBRUARY 3-5, 2003



"SMALL COMPANIES ARE INTERESTED IN MAKING PROFITS *only* IF IT DOESN'T HURT THE PUBLIC"

SOURCE: PERSUASION STRATEGIES (A SERVICE OF HOLLAND & HART LLP)
NATIONAL TELEPHONE SURVEY CONDUCTED FEBRUARY 3-5, 2003



Additionally and likely not surprisingly, jurors seem to be placing greater focus on ethics in the post-Enron era than in previous years. In the mock trial research that we had conducted before Enron, 55 percent of mock jurors felt that, “when personal ethics and the law conflict with one another, the law should be followed.” There was a statistically significant shift in how mock jurors responded to the same question in mock trial research conducted post-Enron. Seventy-six percent of these mock jurors indicated that personal ethics should prevail; only 23 percent felt that the law should be followed. See the graph on page 87 for the pre- and

post-Enron comparison of responses to the issue of the law v. personal ethics.

For more than 20 years, numerous studies have presented findings charging that juries are pro-plaintiff, are prejudiced against business, and perform with a deep pocket approach in awarding damages.² Valuable insight into understanding how jurors treat corporate defendants appears in research conducted before the events of Enron.³ Valerie Hans, for example, discussed the findings of her research on civil jurors in business cases in a recent interview:

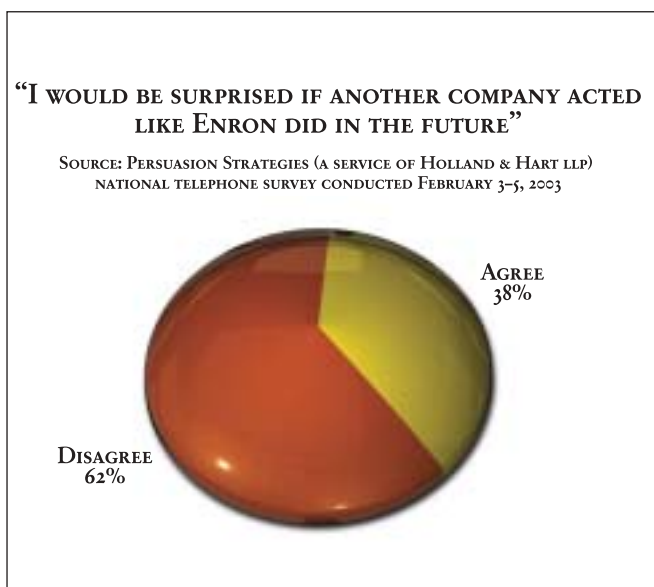
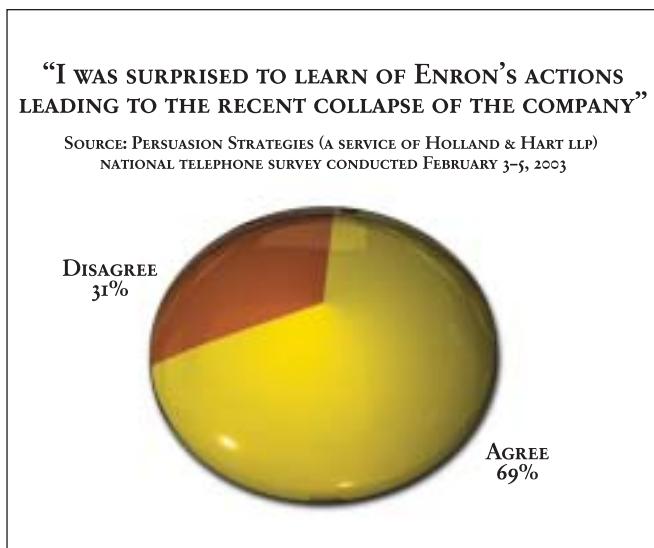
When I looked at the impact of attitudes toward business on decision making, these attitudes were only occasionally related to assessment of business negligence. Jurors do treat corporate defendants differently than individual defendants, but not primarily because of anti-business prejudice or deep pockets. Instead, I found that many jurors held high expectations of business litigants, and these high standards were important factors associated with jurors holding businesses responsible.”⁴

The headline of an article in the *National Law Journal* years before the events of Enron read, “Jurors Do Not Trust Civil Litigants. Period.”⁵ Since October 2001, this message continues to gain momentum and appears with increasing frequency in such headlines as these: “Lawyers Find Jury Pool Polluted by Antibusiness Biases”⁶ and “Twelve Really Angry Men: The Parade of Corporate Scandals Is Giving Jurors Plenty of Reasons to Distrust Big Companies. A New Study Suggests It’s Only Going to Get Worse.”⁷ Most recently, the headline of the cover story in the February 2003 issue of *Diversity and the Bar* reads, “National Juror Perception Survey Warns that People of Different Color Have One Thing in Common: Distrust Towards Corporations.”⁸

Without question, jurors’ sympathy toward corporations has never been lower, but their scrutiny of plaintiffs and of their use of power and choices remains high.

TURNING THE RESEARCH INTO PRACTICE

Given the combination of the “desensitization effect” and decreased corporate sympathy, you have many choices in evaluating your own cases.



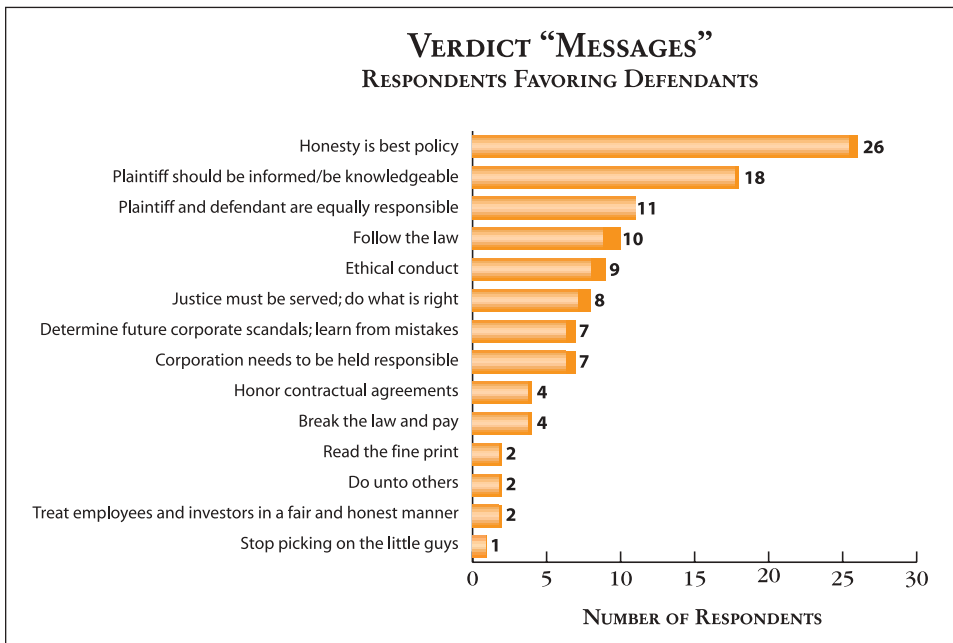
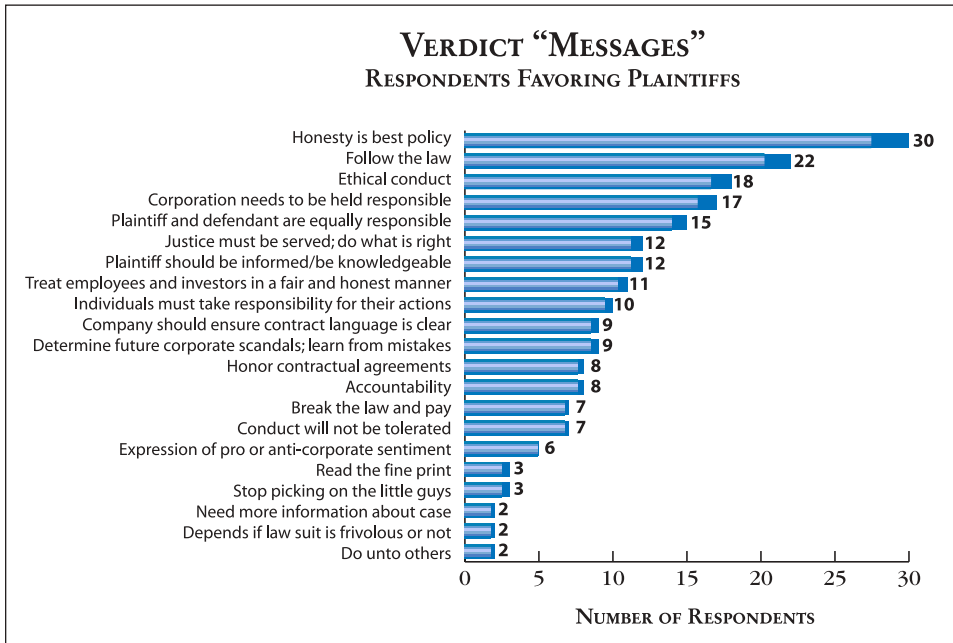
Combat Anticorporation Bias in Daily Practice

- Unless a legal reason exists for not doing so, go above and beyond the minimum required by a contract's terms when dealing with parties to your contract. Build a paper record of having done so. Jurors tend to reward a company for having gone beyond the prescribed minimum. Many find it novel that a company would exceed legal expectations.

- Caution employees at all levels of your company to refrain from making flippant remarks in emails about individuals or other companies. Jurors frequently find "truth in jest" and often take these emails as an indication of the "real" dynamics of a relationship between your company and another party even when it may not be fair for jurors to draw that conclusion.
- Make sure that the employees in your company

who have the day-to-day responsibility for implementing a contract know the contract terms and how they are to be fulfilled. Jurors tend to believe daily behavior over a corporate witness' statements about a company's daily goings-on. Truly, an ounce of prevention is worth a pound of cure.

• Because jurors seem to conclude that a company acts out of a profit motive, your strongest posture in a case is to embrace that profit motive. To argue credibly that a priority on profits motivated your company to act ethically, review your company's routine behavior through the lens of consistency in a profit-motivated, ethical mode.



Consider Anticorporate Bias in Trial Preparation

- Objectively evaluate the other side's use of power and choice in your case to determine how the "desensitization effect" might play. To attain the greatest benefit from this evaluation, conduct early focus group research before the completion of discovery rather than waiting to do a mock trial closer to trial.
- Also assess in the focus group research how factfinders could evaluate your company's use of power and choice against the other side's uses of those factors.
- Some in-house counsel have effectively used the preparation for focus group research to conduct a "peer review" with the company's management to apprise them of the

strengths and weaknesses of the case. The peer review process involves gathering a panel of business decision makers to hear and evaluate the case against the company and its defense. The peer review panel should include business decision makers who will be directly affected by the outcome of the lawsuit, but if possible, the panel should also include other business people who are not familiar with the lawsuit and/or who have no direct vested interest in its outcome. Ideally, these “neutrals” should be the “peers” of the directly involved business people, peers who can encourage open and honest evaluation of the strengths and weaknesses of the company’s case. In-house counsel should also be a part of the peer review process to give the business people information about the trial preparation and process and their own evaluation of the case.

During a peer review, the panel listens to an oral summary of each side’s case as presented by in house counsel, outside counsel, or both. Following the presentation of the cases, the panel discusses what they see as the strengths and weaknesses of the company’s case, and each panel member recommends what amount, if any, he or she would be willing to settle the case for, given the arguments heard in the peer review. The peer review process is not intended to produce a binding decision on settlement or trial strategy, but it offers in-house counsel, outside counsel, and business decision makers alike a somewhat neutral “practice run” on which to test the strengths and weaknesses of the company’s case and, if settlement is an option, to help determine an appropriate settlement range.

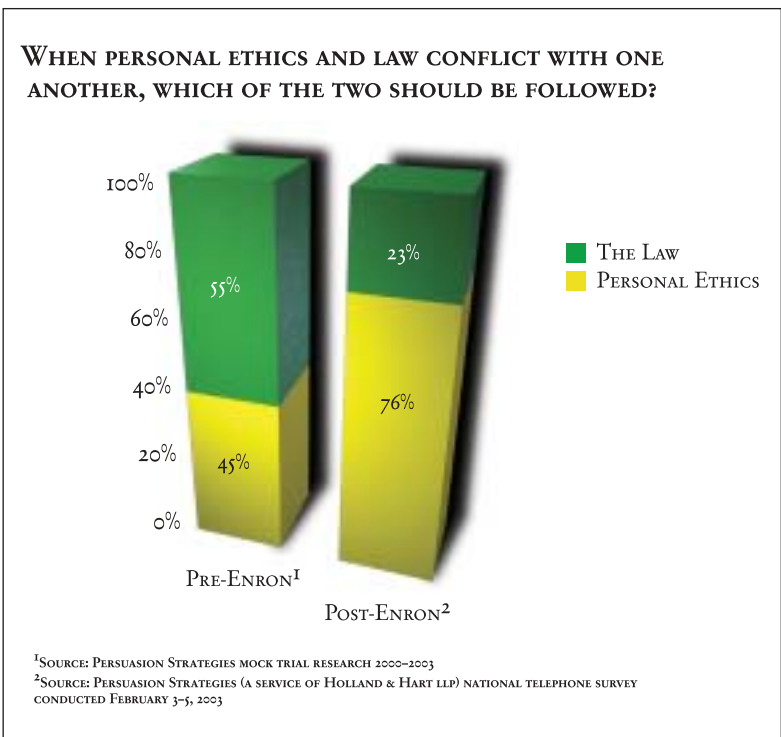
Minimize Anticorporate Bias at Trial

- When preparing oral argument for trial with your trial team, have them avoid initially pointing the finger at the other side. Jurors are sensitive to such “negative campaigning” and can stop listening before hearing all of your evidence. Rather, lay the groundwork for jurors to conclude that the other side’s case is weak and then lead them to draw that conclusion first.
- Use a three-part approach to the defense of your case at trial to create the greatest persuasive effect for “desensitization effect” jurors:
 - First, have your trial team plan the case presentation around a primary focus on what your

company did well. Such an approach is highly effective for two reasons. First, it takes the high road and positions factfinders to being persuaded through the unexpected. (Many jurors expect you to complain about the other side first and often seem to be turned off by that approach.) Second, you and trial counsel will lead from strength with a proactive approach whereby you characterize your company’s effective use of power and choice.

- Second, within the case presentation, use a secondary approach that can work well if handled in a balanced manner. Consider where you might admit that your company may have made less than perfect choices within the case events if you can do so sincerely and in a manner that takes appropriate responsibility without admitting fault.⁹

For example, one helpful technique is to focus the jury on the idea that corporations are simply the sum of the people who act on the corporations’ behalf and that all people make less than perfect choices from time to time. This approach, however, requires the testimony of a company witness of an appropriate level in the company hierarchy. For this approach to be effective, the jury will need to hear



someone that they perceive to be “in charge” admitting the error and taking responsibility. In addition, before adopting this approach, recognize that the company witness will need to be very carefully prepared in order to present this testimony in a way that gets the message across without sounding as if the

corporation is merely making excuses or, perhaps worse, trying to put the blame on its employees.

- If your company made some errors that fall short of negative, consider a brief “mea culpa” on a few errors. Jurors frequently appreciate a sincere acknowledgement of imperfection

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- Julie S. Congdon and Patricia M. Hamill, “Managing Outside Counsel in Litigation: A Primer,” *ACCA Docket* 21, no. 4 (April 2003): 40–57, available on ACCA OnlineSM at www.acca.com/protected/pubs/docket/am03/primer1.php.

ON PAPER:

- AUDREY CHIN AND MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (Rand Corporation 1985).
- Michael Freedman, *Twelve Really Angry Men*, *FORBES*, Oct. 14, 2002, at 52.
- Valerie P. Hans, *The Illusions and Realities of Jurors’ Treatment of Corporate Defendants*, 48 DE PAUL L. REV. 327 (1998).
- VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (Yale Univ. Press 2000).

- Valerie P. Hans and William S. Lofquist, *Jurors’ Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC’Y REV. 85–115 (1992).
- *Interview by Jeffrey T. Frederick with Valerie P. Hans, Ph.D.* COURT CALL (American Society of Trial Consultants), Winter 2003, at 10.
- Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the “Deep-pockets” Hypothesis*, 30 LAW & SOC’Y REV. 121 (1996).
- Michael Orey and Milo Greylin, *Lawyers Find Jury Pools Polluted by Anti-business Biases*, WALL ST. J., Aug. 12, 2002, at B1.
- Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849 (1998).
- Bob Van Voris, *Jurors Do Not Trust Civil Litigants. Period*, Nat’l L. J., Nov. 2, 1998, at A24.

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rather than a strident denial of any wrongdoing whatsoever. Once you have made that admission, make sure that you clearly explain why that error does not rise to a level of negligence.

- Once your company has established (1) what it did well and (2) where it could have chosen more wisely, jurors will likely be more receptive to hearing what the other side did poorly in its own abuses of power and choice. Do not misconstrue this tip as meaning that you should aggressively go after the other side. Make this section your tertiary leg of the case presentation. Rather, devise a checklist of mutual responsibilities for plaintiffs and defendants. Then argue how your company met its responsibilities and how plaintiffs failed to meet theirs. See the graph below for more on this three-part approach.

THREE-PART APPROACH TO MINIMIZING ANTI-CORPORATE BIAS IN OPENING STATEMENT



- Subtly underscore the sophistication of the other side. Rather than having trial counsel state that the other side was sophisticated, introduce to jurors the evidence that they need to draw that same conclusion themselves.
- Be alert to particular types of jurors who are more resistant to the “desensitization effect.” We know that general juror demographics alone are not reliable predictors of how your particular

case will be decided, but we also know that juror attitudes and experiences are important factors to consider when selecting a jury. Findings from our mock trial research and posttrial interviews with actual jurors have indicated that jurors with the following key attitudinal sets are likely to be more dangerous for corporate litigants than other jurors might be:

- Jurors who are shocked at the corporate choices leading to the Enron collapse.
- Jurors who believe that corporations bear more than a 50/50 responsibility for ensuring that the terms of a contract are clear.
- Jurors who believe that profit motivation inherently correlates with unethical business practice.
- Jurors who believe that ethics should supersede the law.
- Jurors who believe that breaches of contract can be equated with a moral violation—which, by the way, strongly correlates with high punitive damages.
- Jurors who believe that the fact of a lawsuit means that the case against a corporation must have some merit.
- “Status inconsistent” jurors who have achieved a higher level of education but have chosen a lower status occupation.
- Jurors who have no interest in serving in a management capacity.

CONCLUSION

Anticorporation bias does not automatically translate into proplaintiff verdicts because jurors are prone to scrutinize both the plaintiff and the defendant in their respective uses of power and choice. Even in light of a favorable bias toward the plaintiff, there are avenues that you can pursue as the corporate defendant to mitigate the anticorporate bias. ☐

NOTES

1. *Litigation Insights*, INSIGHT, June 20, 2002.
2. See AUDREY CHIN AND MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (Rand Corporation 1985); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DE PAUL L. REV. 327 (1998); Valerie P.

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- Hans and William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85-115 (1992); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*. 40 ARIZ. L. REV. 849 (1998).
3. See VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (Yale Univ. Press 2000).
 4. In COURT CALL, Winter 2002, at 10, the quarterly publication of the American Society of Trial Consultants, Jeffrey Frederick, Ph.D., interviews Valerie Hans, Ph.D., about her comprehensive research. See VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (Yale Univ. Press 2000).
 5. Bob Van Voris, *Jurors Do Not Trust Civil Litigants*. Period. NAT'L L. J., Nov. 2, 1998, at A24.
 6. Michael Orey and Milo Greylin, *Lawyers Find Jury Pools Polluted by Anti-business Biases*. WALL ST. J., Aug. 12, 2002, at B1.
 7. See Michael Freedman, *Twelve Really Angry Men*, FORBES, Oct. 14, 2002, at 52, for a summary of findings from a survey conducted by the Minority Corporate Counsel Association.
 8. For a summary of the findings of a telephone survey conducted by the Minority Corporate Counsel Association ("MCCA") and DecisionQuest in September 2002, see Galina Davidoff, Ph.D., *National Juror Perception Survey Warns That People of Different Color Have One Thing in Common: Distrust toward Corporations*, DIVERSITY & THE BAR, Feb. 2003, available on the MCCA website at www.mcca.com/site/data/magazine/coverstory/jurorperception0203.htm.
 9. In certain cases, of course, it may be wise to admit liability. The approach noted above is for those cases in which you feel that an admission of liability would not be appropriate.
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