ANTI-CORPORATE BIAS IS A GIVEN, BUT CORPORATIONS SHOULD NOT GIVE UP ON THE COURTROOM

The 2002 Enron scandal created headlines – and with it, headaches for corporate defendants. Although Enron was not the first company to fall prey to corporate misconduct, it clearly was hit the hardest in the court of public opinion – and pulled other companies under public scrutiny along with it. As other corporate scandals involving WorldCom, Tyco, and Adelphia came to light, anti-corporate bias became a predominant conversation topic. While the increasing attention would suggest that the public awoke to anti-corporate bias for the first time, in fact negative public opinions toward corporations have been a “given” long before Ken Lay and Jeff Skilling became household names. Public opinion polling documented anti-corporate attitudes more than 30 years ago. For example, in 1972, more than half the population reportedly agreed with the statement, “It’s nice to see big corporations and manufacturers acting scared for a change.”

So while negative public perceptions of corporations may have become headline news for much of 2003, these perceptions are not new.

Now, three years later, shock over corporate misconduct has receded. Once a source of either individual outrage or feelings of painful betrayal, corporate scandals are now the subject of satire. The recent movie Fun with Dick and Jane, starring Tea Leoni and Jim Carrey as Jane and Dick Harper, invokes the popular image of a dishonest corporation driving individuals to desperate measures. When the Harpers’ savings are eradicated and Dick is a victim of the accounting fraud perpetrated by his company’s executive team, we see this couple go from financial security to a level of desperation that causes them to start robbing banks to forestall their home’s foreclosure. Yet, removed in time from the actual events of Enron, we are able to laugh both at and with Dick and Jane as they fumble their way through financial ruin and the consequences of corporate misconduct. The credits at the end of the movie thanking Enron, ArthurAnderson, Tyco, HealthSouth, and a myriad of other fallen companies underscore people’s ability to now make light of what once weighed heavily on the public’s collective mind.

So where does Corporate America stand today in terms of public perception, and how does this impact individual corporate defendants? With nearly 90% of all U.S. corporations engaged in litigation, the average company managing 37 lawsuits at a time and larger companies managing more than 100 cases, the question has importance for nearly all companies in business today, including all corporate defendants, as well as those who represent them. Our research with mock jurors, our interviews with actual jurors after deliberating to verdicts, and our national juror survey research indicate that while general anti-corporate sentiment is strong and will likely remain so into the foreseeable future, there are several factors that combine to make the situation for individual corporate defendants in the courtroom less dire than might be expected.

This article underscores the state of anti-corporate bias found in venires across the country today. We begin by explaining the baseline for anti-corporate bias, then discuss two key elements of today’s society that continue to work against corporate defendants. We then discuss five key factors that make the litigation landscape greener for corporate defendants than the casual observer might think. We conclude with recommendations for corporate litigants to successfully maneuver through general anti-corporate bias in the court of public opinion, plus litigation strategies for successfully navigating a corporate defendant through the courtroom.

THE “GIVENS” OF ANTI-CORPORATE BIAS

For anyone with an eye on the headlines, it is no surprise that the jury-eligible public today holds many anti-corporate attitudes. Results from our firm’s February 2006 nationwide juror survey indicate that 90% of the jury-eligible public today feels that corporate executives often try to cover-up the harm they do. Eighty percent of the jury-eligible public agrees that corporations will lie if it benefits them financially, and 77% feel that if someone sues a major corporation, the case must have some merit. Moreover, such anti-corporate opinions have been constant over the past several years. In February 2003, 84% of the jury-eligible public agreed that corporate executives often try to
cover up harm, and the proportion of the public agreeing with this sentiment has increased steadily, albeit only slightly, over the past four years. The proportion of the jury-eligible public agreeing that corporations will lie if it benefits them financially has remained constant over the past four years, hovering around the 80% mark, and the proportion believing that a case against a major corporation has some merit, which four years ago equaled 72% of the population, dipped to a low of 68% last year and is now up to 77%.

Corroborating these findings are survey results from a HarrisInteractive 2002 poll indicating that 71% of the public agreed that the typical CEO is “less honest and ethical” than the average person, and 70% feeling that CEOs are “paid too much.”

In short, social science research supports the popular perception that the average juror holds an unfavorable opinion of corporations, questions corporate executives’ ethics, and is suspicious of corporate motives. While these findings seemingly contradict our point that the landscape is getting better for corporations, anti-corporate attitudes such as these do not mean corporate defendants should necessarily give up on the courtroom.

The “Gains” Of Anti-Corporate Bias

While anti-corporate bias is a “given” in the court of public opinion, we have recently observed some key facets of jury-decision making that have positive implications for individual corporate defendants in the courtroom. These include:

- Positive results from publicity surrounding corporate misconduct
- Jurors’ willingness to avoid lumping all corporate industries into one category
- Jurors’ readiness to scrutinize individuals as closely as corporations
- A shift in jurors’ focus in favor of law over ethics for judging corporate conduct
- Refocused juror skepticism on things non-corporate

Publicity’s Positive Results

Several months after the Enron scandal broke, we predicted a “desensitization effect” in which jurors, over-exposed to publicity about corporate scandals, would become desensitized to corporate misconduct. We compared this to the trend in the silicone breast implant litigation, to which jurors initially reacted with outrage that a manufactured material could possibly be linked to autoimmune disease. However, after media publicity “educated” jurors about the alleged dangers, jurors came to expect the possible hazards of silicone and ultimately came to frequently fault plaintiffs for not “knowing better.” Our hypothesis in 2003 was that repeated exposure to corporate misconduct would lower jurors’ expectations for individual corporate defendants and heighten their criticism of plaintiffs for failing to anticipate misconduct in cases involving a corporate defendant.

The “lowered expectations” phenomenon first surfaced in the results of a Feb. 3–5, 2003, nationwide survey that our firm, Persuasion Strategies, conducted, showing that at the time the Enron scandal was making front-page news, 62% of the jury-eligible population reported that they would not be surprised “to learn of another company acting like Enron did in the future.” And 72% of Americans felt that accounting scandals involving “major corporations” are “not isolated incidents and may indicate a pattern of deception on the part of a large number of companies.”

Our mock trial research since this time has found that both the desensitization and lowered expectations predictions are playing out. As a juror in a mock trial we conducted slightly over a year ago stated, “these (executives) are not angels. But that is not how they got to be where they are. This is business. You can’t expect them to have the same level of disclosure that you would have had when people did handshake deals. That is not the way the world works today.”

Why are lowered expectations of corporate conduct and desensitization to corporate wrongdoing positive factors for corporate defendants? Because it is easier for individual defendants to pleasantly surprise jurors by violating their low expectations when they behave well. Now, we routinely see jurors assigning credibility points to a company that has created and implemented its own set of safety standards in addition to government regulations, or to a company that has given a terminated employee a severance package or facilitated the replacement process.

In addition to the predictions we made in Spring 2003, we have observed two more “Enron effects.” First, Enron and the other corporate scandals in its immediate wake set a high bar for corporate conduct. Few cases have had the implosive impact of Enron or ArthurAnderson. As a result, many subsequent instances of corporate wrongdoing seem less egregious to jurors when compared to the “Enron standard” than they might otherwise. Second, jurors feel they have
learned about corporate misconduct and how to prevent it, and have transferred this “education” to other companies. These positive results of the publicity surrounding the corporate scandals of 2002-2003 are discussed in the remaining part of this section.

Perception became reality for much of the Enron coverage. The attention devoted to corporate scandals itself became the subject of attention. Yet, in the context of other media-novelty events such as the Columbia Shuttle disaster and angst over high oil and gasoline prices, the public actually reported paying less attention to the press on corporate scandals than was paid to other events. For example, 69% of the public self-reported following news of the crash of TWA Flight 800 in July 1996, “very closely,” as compared to 29% of the public self-reporting following Enron, WorldCom and other business scandals “very closely” in July 2002.7 Corporate misconduct as treated in the media garnered much attention, but the stories covered little substantive information on the details of the misconduct. In fact, not until these cases are litigated and the details of wrongdoing are revealed in books, such as Bethany McLean and Peter Elkin’s 2003 book, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron, does the public have much access to the true substance behind the stories.

As a result, media coverage has created a general anti-corporate perceptual backdrop with a very accessible narrative. But with the average juror knowing little about the specific details of Enron or WorldCom, these cases have set a high perceptual bar with comparatively limited substantive information supporting the perception of large-scale misconduct. Obviously, few other companies’ wrongdoing rises to the level of Enron or WorldCom, particularly when the details of an individual company’s alleged failings are contrasted with the more legendary stories of unmitigated corruption. As a mock juror in a contract dispute in the upper Rocky Mountain region recently stated during deliberations, “to some degree it is a pox on both their houses. Sure, (the companies) did some things wrong. But it is not like anyone lost their life savings in this deal or anything.”

Finally, jurors have transferred their heightened awareness of corporate conduct to corporations themselves. Jurors feel they learned about the need for Corporate America to “clean up its act,” and we have observed a tendency for jurors to perceive that companies learned that they too need to “clean up their acts.” As one mock juror in a products liability mock trial in a large city in the Southwestern U.S. recently stated, “(The company) knew people would be watching them. There is no way that they would have set out to do anything wrong. Could they have put on better warnings? Probably. But I don’t think they were trying to hide anything—they would know they could get caught.” Similarly, in an antitrust mock trial in Denver, Colorado, one juror exonerated a corporate defendant’s conduct with the following summary statement, “a big corporation like this would not have let something like that slide, especially today when you have to dot all the I’s and cross all the T’s.”

**Differentiation Among Corporate Industries**

As already noted, anti-corporate bias is a “given” in the court of public opinion and will persist into the future. However, most anti-corporate bias plays itself out on a more generalized scale, involving broad brush negative attitudes toward corporate executives and corporate motive. Over the past four years, we have learned that jurors are inclined to assess various industries differently, and most recently we have observed that even the more general perceptions of anti-corporate bias fluctuate when evaluated on a per industry basis. In other words, jurors are willing to suspend their generalized anti-corporate bias in exchange for a pro-company or pro-industry bias.

Not surprisingly, the oil and gas industry has consistently fared poorly in the eyes of public opinion. This industry has declined in the public’s favor as the media’s attention has turned its focus on high gasoline prices and questions the role of energy resources in the war in Iraq. But the oil and gas industry is not the only industry viewed outside the framework of general anti-corporate attitudes. Other industries fare more and less favorably when compared to one another as well.

Importantly, jurors scrutinize industries and evaluate them apart from their more generalized anti-corporate perceptions. As the following chart illustrates,
while nearly 90% of jurors agree with the general statement that “Executives of companies often try to cover up the harm they do,” only 74% believe this to be true of pharmaceutical executives.

And negative perceptions of an industry as a whole have mixed effects on jurors’ more issue-specific attitudes. As the following two charts illustrate, the oil and gas industry’s negative image makes jurors more likely to believe that an oil and gas company would lie for financial gain than they are to believe that corporations in general would lie for financial gain. However, jurors are less likely to believe that if someone sues an oil and gas company the case has merit than they are to believe that if someone sues a “corporation,” the case has merit.

Does jurors’ willingness to differentiate corporations on an industry basis carry over into increased willingness to assess individual corporate defendants from their industry peers? It depends on how effectively counsel differentiates the company in the courtroom. For example, a little over a year ago we conducted mock trials in two different construction disputes in the Northwestern United States. In the first mock trial, jurors largely characterized the corporate defendant as “just another construction company.” In the second mock trial, counsel’s presentation motivated jurors to differentiate the defendant from other contractors. As one juror summarized, “This company was the owner. It’s not like they were like every other contractor out there. Their role was different.”

In summary, the industry in which your company or client is a part will work to either mitigate or exacerbate anti-corporate bias. In addition, through the various techniques we outline in the last section of this article, companies today can (to some extent) control how much or how little of jurors’ anti-corporate bias carries into an individual case.

**Jurors’ Readiness To Scrutinize Individuals As Closely As Corporations**

Just as jurors’ more general anti-corporate attitudes are affected by industry-affiliation, this same moderating effect is found with regard to jurors’ comparison of individual versus corporate responsibility. In general terms, jurors feel that corporations should be held to a higher standard of
responsibility than individuals, a belief that has consistently increased over the past three years. University of Delaware professor Dr. Valerie Hans, who has done considerable research on this issue, has documented that this heightened sense of corporate responsibility is based on jurors’ perceptions that corporations possess more resources and knowledge than individuals. Hans suggests that these perceptions coincide with expectations that corporations should make greater use of these superior resources and knowledge.8

Thus, it is no surprise that when asked to choose whether an individual or a company has more responsibility to ensure that the terms of an agreement are clear, a majority of the jury-eligible population reports that the company should bear greater responsibility. Interestingly, this finding has increased slightly over time. This result is likely an artifact of the perceived increasing power imbalance between corporations and individuals noted in the following section. While these numbers have increased by a few percentage points over time, one-third of the jury-eligible population still believes that greater responsibility resides with the company.

The picture is very different, however, when jurors are asked to evaluate individuals’ and companies’ responsibilities in the context of a specific question of legal responsibility. As the following charts illustrate, when defined within the more narrow context of potential product liability, a majority of jurors feel that companies need to do a better job testing products before they sell them to consumers, but even more jurors feel that consumers need to take more responsibility to use products safely.

Our mock trial research indicates that, in an individual case context, jurors typically look first at what the individual could or should have done differently and then at what the company did. This goes beyond the issue of damages mitigation to a fundamental question of how the events in question could have been prevented. As one mock juror in a recent product liability lawsuit put it,

“We would not be here today if it were not for someone backing up and not looking behind them. This is a case about protecting people from their own irresponsibility. The attorney for the company kept calling this an “accident.” But no one made him back up. I’m sorry that he paid with his life, but it was his fault. So no, I don’t think the company was negligent.”

Thus, while jurors continue to consistently report heightened standards for companies compared to individuals in general terms, on a more claim-specific basis and particularly on a case-specific basis, these general anti-corporate attitudes are supplanted by a focus on individual responsibility and critically, a contrast between individual and corporate responsibility.

**Shift in Jurors’ Focus on Law Over Ethics For Judging Corporate Conduct**

By far the biggest perceptual shift impacting jury decision-making that we have observed is jurors’ increasing inclination to focus on the legality of a company’s conduct over the ethicality of that company’s actions. Specifically, in the “pre-Enron” era, when asked to assume that the legality and ethicality of a litigant’s conduct were conflicting, jurors exhibited a slight preference to focus on the legalities over the ethics of conduct. As the accompanying chart shows, we saw potential jurors take a sharp swing toward focusing on the ethics of corporate conduct in the wake of Enron and other scandals, with nearly three-fourths of the population favoring ethics over the law. In April 2005 we observed a shift back, with just over 58% of the jury-eligible population indicating that the law should take precedence over a more ethical analysis when the two conflict. Notably, this trend has remained constant for
the past two years, as 60% of the jury-eligible population endorsed a legal standard over an ethical one as recently as February 2006. Similar results are observed when prospective jurors are asked to weigh the importance of

the ethicity of a company’s actions against the legality of the company’s actions, although when presented with this wording a slight majority of jurors still side with the ethical viewpoint. Why is this perceptual shift significant for corporate defendants? It allows jurors to maintain negative perceptions of Corporate America in general, and even negative perceptions of individual industries, yet find in favor of an individual defendant without feeling bad for having voted that way. The words of one Midwestern mock juror during deliberations in a case involving a major oil company defendant illustrate this point.

“I don’t like what (oil companies) charge. It is like how it used to be with the railroads. They didn’t want to pull one box car, they wanted to pull 100 box cars. That is where their money was. And on top of it, they would blow the whistle in the middle of the night, and we got nothing out of it. We had to listen to the whistle and we got nothing out of it. Companies are in business for themselves. That hasn’t changed, and it is not gonna change. But we have to decide whether what (the oil company) was doing is legal. I don’t like it. They charge too much. But it is legal, so they had a right to do it. And according to these (jury) instructions, that is the end of our discussion.”

REFOCUSED JUROR SKEPTICISM ON THINGS NON-CORPORATE

Nothing makes someone look better than being seated next to someone who looks really bad. Such is the case for American corporations today. Media focus on corporate scandals has been supplanted by coverage of the war in Iraq, reports on the seemingly-weekly decline in President Bush’s popularity ratings, and questions about America’s homeland security. Public opinion polling shows that favorable ratings for the federal government have fallen sharply, from 59% in 2004 to 45% in the fall of 2005. Results of our annual national juror survey show declining favorability ratings for government officials as well. Perhaps not surprisingly, when compared to each other, executives in Corporate America are now more attractive than officials in government.

While jurors’ general skepticism toward government may be giving corporations a break in terms of public opinion, the results are not entirely positive. Specifically, governmental skepticism has transferred to jurors’ increased reluctance to trust government to regulate business. We observed a dramatic shift from 2004 to 2005 in the public’s views on governmental regulation. While the majority of the public in 2004 disagreed that the government has gone too far in regulating business, by 2005 there was a dramatic reversal of public opinion. By 2005, the exact same percentage believed there has been too much governmental regulation. That percentage is even slightly higher today in 2006. This trend may be due to the public’s perception that the government has failed to effectively regulate Corporate America and thus additional governmental intervention would be ineffective. To the extent that skepticism over governmental regulation intersects with jurors’ sense of personal vulnerability in a particular case, refocusing of negative attention on government may backfire against corporate defendants.
TWO PERCEPTIONS THAT CONTINUE TO CHALLENGE CORPORATE DEFENDANTS IN THE COURTHROOM

Clearly there is more to anti-corporate bias than meets the eye, and many positive developments in terms of jury decision-making are good news for corporate litigants heading to the courtroom. However, there remain two key factors that work against corporate litigants and that influence jurors in virtually all cases involving a company defendant.

PERSONAL VULNERABILITY PERSISTS

There is no denying that the Enron scandal invested jurors with a sense of personal vulnerability with large corporations. However, that sense of vulnerability has been fueled by events following Enron and is likely to stay with us for the foreseeable future. Public concern surrounding how the government is handling the war in Iraq is growing. Currently 57% of the American public feels that economic conditions are “getting worse.”10 There are just two additional sources of vulnerability for jurors. Many jurors tell us during interviews that they feel they are at the mercy of big corporations, who they perceive to be dictating prices, consumer choices, and making safety and privacy decisions based on bottom-line profit analyses.

With equal consistency, our jury research finds that jurors put little stock in the government’s ability to effectively police corporate conduct. Now more than ever before, jurors believe that the government is in Corporate America’s back pocket. Some jurors feel a need to return large verdicts to fulfill the corporate policing function vacated by the other branches of government. For a majority of jurors, trials are now the social equator. In 2004, nearly three-fourths of the public believed that courtroom trials play an important role in promoting corporate responsibility. As a result, in some cases jurors literally talk about “taking matters into their own hands,” wanting to return a verdict that will send a message not only to the individual defendant but to Corporate America as a whole. With many jurors feeling at the mercy of big business and perceiving the government as a poor caretaker of corporations, they see their role in the courtroom as making business take care of consumers.

THE POWER IMBALANCE IS INCREASING

Magnifying jurors’ sense of personal vulnerability is the sense of a strong power differential between the average American and Corporate America. Most jurors feel that corporations have far more resources and power than not only individual citizens, but even consumer organizations. Jurors also perceive a growing gap between individuals who run the typical corporation and individuals who run the typical household today. Currently, a little less than one-third of the public believes that business executives share their values. While this percentage is up from 2005, when only one-fourth of the population believed that business executives shared their values, these numbers are indicative of a wide gap between how jurors perceive themselves and how they perceive corporate executives.

The media also does its part to fuel this widening gap between the average individual juror and Corporate America. Articles reporting that the average CEO salary is 500 times that of the average hourly worker contribute to the perceived disparity.12 As a result, it is difficult for jurors to identify not only with companies but with the decision-makers who are the typical defense witnesses at trial.

Does this mean your company or the one you represent should give up on the courtroom? Not necessarily, and particularly not if you can implement the strategies outlined below:
**STRATEGIZE EFFECTIVELY BEFORE GIVING UP ON THE COURTROOM**
**DIFFERENTIATE YOUR COMPANY IN THE Court OF PUBLIC OPINION**

Our pretrial research confirms that companies can gain an advantage at trial by differentiating themselves from more general anti-corporate perceptions. But why wait until the courtroom to show your company’s true colors? Efforts at differentiation do not go unnoticed by the public or by jurors. The key is to find out what matters to the jury-eligible public and credibly demonstrate how those same values matter to your company. While focus group research can effectively answer such questions, public opinion polling is an additional source of information. For example, although coincidental, BP p.l.c.’s “Beyond Petroleum” slogan parallels survey research we conducted in 2005, finding that “developing alternative energy sources” was ranked by the public as the most important objective for oil and gas companies – taking a higher priority than “expanding oil and gas production in the United States,” “developing more reliable energy resources overseas,” and “conserving existing energy supplies.” Thus, a message like BP p.l.c.’s not only violates jurors’ more general negative perceptions of oil and gas companies as fixing gasoline prices, it is also congruent with jurors’ values.

1. **Have the Public Hear From Your Executives**

In addition to slogans and ad campaigns, consider letting key executives “speak” for your company, even if by action alone. The case of Microsoft is one good example. Clearly not immune to its own share of litigation and formerly in the headlines for antitrust violations, our interaction with jurors indicates that Bill and Melinda Gates’ charitable contributions have effectively caught jurors’ attention. Now, while few jurors we talk to recall Sun Microsystems or the DOJ’s allegations of antitrust against Microsoft, many quickly describe Microsoft’s former CEO as a wealthy businessman and generous philanthropist.

Even more effective are CEOs who are able to use personal examples from within the company to show the public that the company is aware of and abides by rules of conduct and has a moral “corporate compass” guiding its actions. One such way to effectively communicate a company vision is to create a corporate and compensation structure tied to ethics, such as a bonus compensation structure for top executives connected to corporate performance in achieving diversity goals.13

Having jurors hear from your company’s executives before litigation hits is particularly strategic in light of the fact that jurors discount executives’ testimony after litigation has ensued. Recent survey results corroborate our post-trial interviews with jurors in that the majority of jurors prefer to hear from lower-level employees with more hands on experience and control over daily decision-making than from executive-level employees at trial.14 As a result, the jury-eligible population is most receptive to hearing from corporate executives before litigation hits.

2. **Make Your Social Responsibility Count**

Can public messaging designed to differentiate your company backfire? The answer is yes, if jurors perceive it merely as an attempt to curry public favor. Social science research demonstrates that in order for corporate altruism to be effective, there needs to be a good “fit” between the act(s), the message, and the company’s product line.15 Our research adds one additional key element for corporate altruism to be effective, and that is congruence with corporate motive. The acts and message should be consistent with what jurors intuit to be a company’s inherent overriding motive - profit. This further explains why BP p.l.c.’s slogan works so well - it is consistent with what jurors’ perceive to be a viable profit motive for an energy company - making money by tapping into alternative energy resources.

3. **Stay Abreast of the Perceptions of Your Industry**

It is all too easy to get involved in the daily work of the corporate world and lose sight of how the public perceives particular industries. Because industry-affiliation is a stronger predictor of juror bias than jurors’ general anti-corporate attitudes alone, knowing how the jury-eligible public views your industry is a valuable tool in assessing current and prospective litigation and in advising corporate executives and stakeholders on litigation risk.

Many times, the media is an unreliable predictor of how the public really perceives corporations. For example, the insurance industry and lawyers get notoriously negative press, yet our national survey research shows that over half of the jury-eligible population holds favorable opinions of these two occupations. In contrast, the public holds much more negative opinions of oil and gas companies than might
be expected from the headlines alone. Following public opinion polling and working with litigation consultants with industry-specific expertise are two key ways to help ensure that your predictions of public opinion are accurate.

4. Make Sure Lower-Level Employees Are Keyed In To Key Values

Over a year ago we recommended that companies should communicate internally as if their image depended on it. This recommendation is even more true today. Jurors continue to view paper documents as stronger evidence than witness testimony. And email continues to be “smoking gun” evidence for many plaintiffs in litigation. So for today’s litigation climate, be sure that lower-level employees not only are mindful of what not to say in emails and internal company memos, but are also mindful of what to say. Have employees include references in documents that show they are identifying problems and working to create solutions because doing so is a good idea, not because it is required by some legal rule or governmental agency. Colgate-Palmolive’s “situation report” concept encouraging employees to identify potential problems within the company and forward them up a chain of command is an excellent example of how a company can create a “record” demonstrating proactive attention to rectifying potential problems in the workplace.

Encourage employees to take your company’s key values and work them into contemporaneous documentation. Evidence in documents of how your employees keep consumers’ and other companies’ interests in mind when making decisions is another effective way to differentiate your company from the anti-corporate stereotype of companies putting their profits over the public’s interest. Teach employees to show the rationale and values behind key decision-making. Contemporaneous documents with the above-type references will help your company create its own “smoking gun” paper trail for litigation down the road.

DIFFERENTIATE YOUR COMPANY IN THE COURTROOM – OR KEEP IT FROM GETTING THERE

1. Engage a Consultant Early in the Process

Often the most important precursors to an attractive settlement or verdict in your favor are focused discovery and critical witness designations. Focused discovery should not be confused with exhaustive, “leave no stone unturned” discovery. Rather, focused discovery is that which more narrowly concentrates on the issues most important to the factfinder. Critical witnesses are those whom jurors clamor to hear from and whom counsel sometimes miss. We have encountered countless cases where we determined that a central fact or witness was essential for the jury, only to hear, “It’s too late. Discovery is closed,” or “We can’t include an expert on that issue. Our deadline has passed.” We often hear the words “closed” or “passed” because trial teams might stall in hiring a trial consultant should the case settle. However, early case assessment facilitated by an experienced trial consultant can contribute to a better settlement and a stronger case at trial. An experienced consultant can be helpful early in the discovery process in the following three ways: 1) focus group research, 2) case strategy assessment, and 3) witness preparation for deposition.

Focus Group Research. While mock trial research typically occurs at the close of discovery, and closer to trial, focus group research occurs in the earlier stages of discovery (and can also supplement mock trial research). When budgets are tight, focus group research is a better use of limited funds than a mock trial. Earlier information, albeit more broad, gives you more opportunity to work with what you learn – in designating new fact and/or expert witnesses, in crafting the story framework for the case, in determining persuasive witness order, and in defining important teaching demonstratives.

Case Strategy Assessment. When the case budget precludes focus group research, a consultant with case-specific experience in the litigation type can provide invaluable “jury view” assistance in assessing the strengths and weaknesses of your case. Consultants typically review summary documents in the case and meet with trial counsel to collect a case overview. There exist numerous patterns of litigation-specific jury decision making that transcend venue. Therefore, a consultant with strong experience in your type of case begins her assessment with an advantage of knowing what matters to jurors in that particular type of case.

Witness Preparation for Deposition. Forget the theory that witness preparation with a consultant is unimportant unless the witness is being videotaped. The audience for that deponent is not simply a jury who might view excerpts of video at trial. For settlement purposes, opposing counsel is also going to assess how the witness comes across, whether or not a camera
accompanies her into the deposition room. The deponent who testifies with confidence and credibility contributes directly to the bottom line of opposing counsel’s settlement evaluation. Consultants who specialize in witness preparation can make the difference in empowering the witness to testify as effectively and credibly as possible. And if a deposition is noticed for video, it is all the more important that the witness present the most credible and compelling testimony possible at the time of the deposition. In our post-trial interview work, we consistently hear jurors tell us that they discount witnesses who have even minor contradictions in their substantive answers or demeanor between deposition and trial.

2. Communicate Some Remorse to Defuse Potential Litigation and Reduce Juror Anger

Beginning in 2001, the University of Michigan Health System’s annual attorney fees dropped from approximately $3 million to $1 million. Malpractice lawsuits and notices of intent to sue fell from 262 filed in 2001 to about 130 per year since. Why? Since 2002, its hospitals have been encouraging doctors to apologize for mistakes. Social science research confirms our experience that appropriate apologetic communication can disarm anger in potential litigants as well as seated jurors. An effective apology can suggest that the company recognizes it contributed to an undesirable outcome and that it is willing to take (some) responsibility. A well-timed and delivered apology can restore balance and heal wounds in addition to strategically separating the company from the wrongdoing by suggesting that the actions were an aberration or that a similar adverse outcome will be preempted in the future.

While a useful strategy for preventing litigation, an apology may also benefit defendant companies at trial. Under the right circumstances, a genuine apology can reduce juror anger and mitigate not only damages but assignment of liability. An effective apology can also show the high risk “personally vulnerable” jurors why they do not need to “police” a company – there is no problem that needs to be solved because it is being taken care of.

In contrast, failure to acknowledge some level of responsibility can fuel jurors’ personal vulnerability and increase the likelihood that jurors perceive a need to take matters into their own hands because the company still “doesn’t get it.” In a recent product liability case in which the defendant did not acknowledge some responsibility for the accident, one mock juror stated, “I am so angry. I feel so angry at this company for working in such a public area and treating this (case) so cavalierly.”

This typical juror reaction highlights company representatives’ role in communicating messages that can prevent litigation or improve trial outcomes. The public at large and jurors in particular view executives, spokespersons, and even attorneys as ambassadors of the company. They assume representatives’ actions and communication reflect the values and sentiments of the company. Clearly, an effectively and appropriately communicated apology can benefit defendant companies by preventing litigation and potentially influencing jurors’ impressions of company behavior.

3. Leverage Factfinders’ Two Key Perceptual Criteria To Your Advantage

We continue to find that jurors’ and judges’ perceptions of parties and their evaluation of litigants’ responsibility centers around two key factors – the parties’ perceived power and the parties’ respective choices and how those choices were exercised. Social science research confirms that the more choices a party is perceived as having, the greater the responsibility attributed to that party. Enhancing your opponent’s perceived power and increasing your opponent’s set of choices while concurrently demonstrating how you used your power and choices responsibly is an effective way of diffusing anti-corporate bias in the courtroom. This strategy is most effective when you are able to present the issues of power and choices as neutral facts and allow the factfinders to infer on their own that had your opponent made different choices, the outcome could have been avoided.

Using the discovery process to answer critical questions such as, “Which of the parties in this situation used its power more responsibly?” “Which party had greater choices?” and “How did the parties use their respective choices?” are excellent strategies for steering discovery in your favor. Frequently in our work with corporate litigants we find that initial case weaknesses can be repositioned as case strengths when framed within the perceptual context of a party’s power and choices. To illustrate, in one wrongful termination case, a defendant company’s records told a contrasting story from the testimony of company decision-makers viewing the terminated employee through hindsight.
Company records showed that the plaintiff received positive performance reviews and was promoted several times, then summarily fired for non-performance. Company supervisors’ testimony, focused on the later part of the plaintiff’s employment, told a story of an employee who created problems for her colleagues and customers. To address this inconsistency, we developed a theme contrasting the company’s choice in promoting the plaintiff with what she chose to do with her increasing power stemming from the promotions. The language that follows illustrates how this theme chained out,

“Fine Woods had high hopes for Ms. Plaintiff as a manager. In fact, we thought she was such a promising employee that we promoted her - three times. We hoped she would choose to make a life-long career at Fine Woods. Instead, she chose to jeopardize her staff, jeopardize her store, and as a result jeopardize the company. Ultimately, she chose to jeopardize her job. You’ll see that Fine Woods’ management regretfully evolved from being initially excited about giving Ms. Plaintiff management growth opportunities down to eventually giving Ms. Plaintiff the benefit of the doubt as long as they thought they could. They gave her the benefit of the doubt until they had to ultimately doubt the benefit she brought to their company.”

CONCLUSION

Anti-corporate bias is certainly a factor to consider in the evaluation of any lawsuit involving a corporate defendant today. However, there are some signs that the litigation landscape is not as dire as one may suspect. Moreover, companies that set about to strategically differentiate themselves in the court of public opinion are likely to face a friendlier jury pool, and find that they do not necessarily need to give up on the courtroom.

THE PERSUASION STRATEGIES NATIONAL JUROR SURVEY

The preceding article is an analysis of results collected by Persuasion Strategies (2003-2006). For the past four years, Persuasion Strategies has conducted an annual scientific public opinion poll involving over 500 randomly selected and stratified households. Focusing on the jury-eligible population across the country, this research addresses the public attitudes toward corporate legal responsibility and misconduct in a number of different settings. Additional survey results and analysis are available at www.persuasionstrategies.com.

ABOUT PERSUASION STRATEGIES

Persuasion Strategies, a service of Holland & Hart LLP, is a team of nationally recognized litigation consultants, graphics and video professionals with over 60 years combined experience. Their diversity of experience combined with national litigation expertise fuels their ability to understand the nuances of jury, judicial, and arbitrator decision-making.

3 Data acquired from Persuasion Strategies’ nationwide survey of 500 jury-eligible adults, conducted in February 2006.
13 Ibid.