

CORPORATE DEFENSE IN A SKEPTICAL AGE:

A Model For Crafting Your Message

A P E R S U A S I O N S T R A T E G I E S P E R S P E C T I V E



CORPORATE DEFENSE IN A SKEPTICAL AGE:

A Model For Crafting Your Message

A P E R S U A S I O N S T R A T E G I E S P E R S P E C T I V E

Juror: Umm, you know going into this trial I knew very little about [this large corporation], very little, and like I say, I would be predisposed against “Corporate America” and would go that way. But now, I think I have a better feeling about [this corporation].

Interviewer: So what did [this corporation] do during trial to change your mind?

Juror: They laid out a general system of quality control and corporate structure. That didn’t impress me that much, but it certainly made me feel better about them.

Interviewer: Okay.

Juror: You know, it wasn’t bullet-proof, obviously, but there was at least something there that I felt gave me a feeling that they recognized the importance of quality and the importance of a customer.

page 2

Persuasion Strategies conducted the preceding post-trial interview following the conclusion of a major product liability trial involving a large “household name” corporation. Jurors in this case returned very low damages after that company successfully built a positive image and took some responsibility during the trial for its own choices. The juror’s candor shows two things: First, it illustrates the extent of anti-corporate bias as a juror predisposition; and second, it shows that this predisposition can be overcome by crafting a specific positive message for your corporation.

This Persuasion Strategies perspective draws from our experience on this case and hundreds of other cases across the nation, as well as two national surveys conducted in the past two years focusing on anti-corporate attitudes within the juror-eligible population.¹ Bringing this research and experience to bear, this paper lays out a specific model designed to assist corporate executives, in-house counsel and trial counsel in crafting a “message” designed to first prevent litigation, and second to prevail in litigation when it becomes inevitable. By incorporating this “message” into corporate culture and communication, and



**PERSUASION
STRATEGIES**
A SERVICE OF HOLLAND & HART LLP

¹Persuasion Strategies conducted a nationwide survey of 500 randomly selected jury-eligible respondents between April 28th and May 3, 2004. This survey constituted a retest as well as an expansion on a prior survey of 505 randomly selected jury-eligible respondents conducted February 3rd through 5th, 2003.

by building it into every phase of trial preparation (briefing, witness statements, voir dire, opening statement, closing argument, and media strategy), companies can maximize their own potential to convey a positive (and thus persuasive) message in a somewhat negative climate.

The juror-eligible population across the country continues to have high demands and low expectations for corporate behavior. While the courtroom remains risky territory for corporate defendants, there are encouraging signs that the level of trust among potential jurors is moving toward a “post-Enron rebound.” The full extent and nuances of these findings are detailed in our most recent analysis of national survey findings published by the *Corporate Legal Times*,² but the following are among the most important findings:

- Corporate defendants face high demands in the courtroom, with clear majorities of the juror-eligible respondents reporting that corporations should be held to a higher standard, and should bear a greater responsibility for ensuring fairness and clarity in agreements.
- Corporate defendants face low expectations with most juror-eligible respondents believing that executives lie if they can benefit from it, and cover up the harms they create.
- Jurors, however, continue to balance responsibilities by scrutinizing the actions and choices of those who do business with corporations, and by emphasizing the government regulators and the law (and not just corporate ethics) as important touchstones.

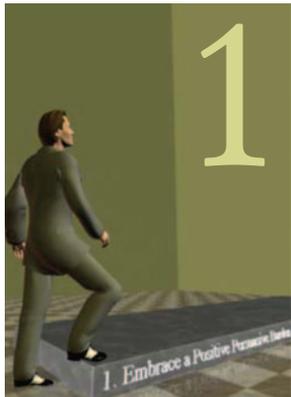
In light of this litigation climate, developing a clear and positive message for the corporate defendant is crucial. While the *Corporate Legal Times* report details and contextualizes this data, the present Persuasion Strategies perspective goes beyond the descriptive level to identify the specific strategies that are key to developing a positive corporate image in these times. In our experience, effective corporate defense messages can be formed based on six specific steps, each building from the message elements that precede it.

SIX STEPS TO CREATING YOUR CORPORATE DEFENSE MESSAGE: STEP I. EMBRACE A POSITIVE PERSUASIVE BURDEN

The law teaches us that it is the Plaintiff who bears the burden to prove, and the defense carries no burdens of its own. While legally correct, this view is persuasively naïve. In the current climate, any corporation who is hauled onto the docket to defend its actions carries a clear and significant obligation to effectively demonstrate that its actions were correct and right.

In our most recent survey, almost 50% strongly agreed that if someone sues a major corporation, the case must have some merit, and fully 65% of the juror eligible respondents felt corporations should be held to a higher standard of

²Burr, M. (2004, August). Re-channeling Juror Anger. *Corporate Legal Times*, 14:153, pp. 30-36.



responsibility than individuals. Specifically, jurors viewed corporations as having the greater responsibility to ensure clarity in agreements between an individual and a corporation. Asked “In an agreement between a company and an individual, how would you assign responsibility to ensure that the terms of this agreement are clear?,” the average responsibility level for the individual was 43% while the average responsibility for the company was 57%.

In the immediate aftermath of the Enron scandals, our 2003 national survey indicated that more than three-quarters of respondents indicated that they would prioritize ethics over law in evaluating a corporation's conduct. One of the more hopeful findings from our 2004 survey indicates that this supposed “Enron effect” may have been remarkably short lived: Those who would prioritize ethics over law fell from 76% post-Enron in 2003 to 41% in 2004. Yet we may be too hasty if we presume that we're back to the good old days quite so quickly. A lingering result may still be with us in the form of greater salience for narratives of corporate wrong-doing, generally lowered expectations for corporate responsibility, and a persistence of the view among a still-solid portion of the national jury pool that it is more important to be ethically *right* than it is to be legally *safe*.

In view of these findings, the idea that the defense carries no burdens is a legal fiction. Corporate defendants need to convince jurors that they behave honestly, ethically, and responsibly and for that reason, they carry a positive persuasive burden to prove that they set and meet high standards. Corporate defendants who are successful before trial and during trial are those who embrace that burden as the foundation for their entire strategy. Assuming this *de facto* burden of persuasion, and realizing that it is far greater than any legal burden of proof, is an important step in overcoming jurors' learned-distrust of today's corporate litigants.

STEP 2. PLAY TO THE 'TOUGH CROWD'

In addition to setting a higher standard, some jurors also begin with a presumption of corporate wrong-doing. Unfortunately, there aren't enough peremptory strikes in the world to get rid of this “tough crowd.” The majority of our 2004 jury eligible respondents felt personally removed from corporate values, with 67% disagreeing or strongly disagreeing that “business executives share my values.” And the perception of what values corporations *do* hold is even more disturbing. More than three-quarters of potential jurors (77%) in our 2004 survey agreed or strongly agreed that if a major corporation could benefit financially by lying, it's *probable* that it would do so. This is also consistent with the results from our 2003 national juror survey which found that 82% of jurors believed a major corporation would lie if it could benefit them financially.

The reality is that many-to-most of your potential jurors will *begin* the trial



believing that corporations a.) operate from a different values system than they do; b.) will try to cover up the harm jurors believe they inflict; and c.) will lie if they think they can get away with it. The fact that fully half of the juror eligible population in this survey are willing to *presume* that a case filed against a corporation must have merit is a strong indication of how low the expectations for corporate behavior have sunk. So as a result, it is not a matter of removing a few “bad apples” during jury selection, it is a matter of addressing the tough audience which constitutes a large portion of the “barrel.”

What characterizes the plaintiff-oriented juror is a notion that “values are king.” As a result, your corporate defense theme can no longer be addressed to those who are willing to assume you operated in good faith and require that the plaintiff prove their case. To gain the edge at trial, then, it is *critical* that corporate defendants aim their themes and arguments toward that tougher audience on the jury. It is no longer enough to say, “We followed the law.” Now corporate defendants have to go the extra defense mile and say, “We followed the law and it was the right thing to do.”

STEP 3. FIND YOUR BEST YARDSTICK

Corporate litigation by nature tends to pull jurors into an unfamiliar world. Any message to the effect of “we behaved well” is likely to meet the implicit response of “compared to what?” One beneficial result of the increasing media scrutiny of corporate behavior is that the well-informed citizen now has numerous *bad* examples to which to compare your company. But jurors need a positive standard, yardstick, or litmus test.

The most accessible yardstick is often found among government regulators. Mock trial and focus group research we have conducted in venues across the country over the last several years consistently demonstrates jurors look to government agencies to provide them with a clear sense of what a responsible company should have done in any specific case. In resources litigation, the Federal Energy Regulatory Commission (FERC) is sovereign, while in employment litigation, the Equal Employment Opportunity Commission (EEOC) carries great weight. According to both our 2003 and 2004 national surveys, potential jurors continue to hold a generally favorable view of government regulators. Still, you are best off viewing the regulations as a “necessary but not sufficient” test of corporate behavior since fully 72% of our respondents believe that the government needs to do more to police corporations these days.

Despite this preference for greater policing, jurors’ trust in regulators can be a positive if corporate defendants are able to prove that they not only met, but *exceeded* regulatory standards. If jurors are convinced that a company goes “above and beyond,” then part of the positive credibility that attaches to the regulators and the regulations will carry over to the corporate defendant.



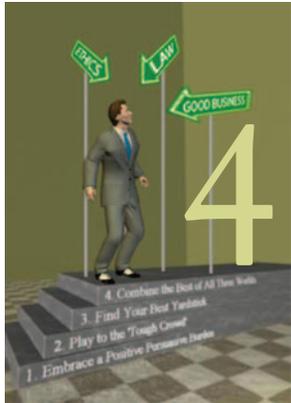
One additional yardstick may be found in the actions of other comparable businesses. With an overwhelming majority of jurors viewing trials as an effective way to police corporate conduct, today's corporate defendant needs to be aware that jurors are evaluating not only *its* conduct, but its conduct vis-à-vis corporate America. Jurors are asking not only "What did this company do well?," they're asking "How does this company stack up to the others?"

STEP 4. COMBINE THE BEST OF ALL THREE WORLDS (ETHICS, LAW, AND GOOD BUSINESS)

Despite what your high school football coach may have said, the best defense is truly a "defense." Defense requires a simple but clear focus on "what you did well." One potential "silver lining" to these results may be that a company that is able to prove that they followed a pattern of ethical and honest behavior will make an impression. An interesting result in our 2004 survey is that a majority of respondents (67%) would give greater weight to a company's ethics in evaluating a company, yet a majority (55%) feel that when ethics and the law conflict, it is the law that should be followed. The respondents who, with apparent inconsistency, are going with the majority on *both* of those questions may represent the ambivalence seen in many defense-oriented jurors who want to hold companies to high ethical standards but, when push comes to shove, realize that it is the law that needs to be the litmus test. The smart corporate defense theme, of course, emphasizes both: We did things right by doing the right thing.

But one additional component is also sometimes necessary. In this new climate of heightened expectations and heightened skepticism, it is not enough to be legally correct, but it may not be enough to be ethically righteous either. Potential jurors want to believe that companies and executives did the right and the legal thing, but may have a much easier time of it when they believe that ethics and the law coincide with good business. In other words, it is too much to ask jurors to believe in an altruistic motivation. If on the other hand, the profit-motive, the desire to compete and to sell products and services, is consistent with legal and ethical conduct, than jurors have a much easier time explaining to themselves and others why the company acted legally and ethically.

One of the best ways to evaluate a case is to observe mock jurors deliberate case issues during a research exercise. Contrary to what many might assume about jurors, they generally do take their roles very seriously and try their best to understand and apply the law. But being human, jurors (and we might add, judges too) can't resist filtering the arguments, witnesses, and evidence through their own sense of fairness, as well as their own view of how business usually operates. For that reason, the best theme is one that is able to explain a business's actions by showing that what it did was a.) the right thing to do, b.) consistent with a business-oriented motivation, and c.) consistent with the law.

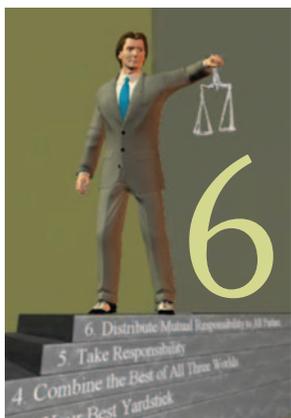




STEP 5. TAKE RESPONSIBILITY (WITHOUT NECESSARILY ADMITTING FAULT)

The juror interview which began this essay related to a case involving a large corporate defendant facing a series of similar claims. Initially attempting a “scorched earth” deny-everything type of defense, the company found themselves losing, and losing badly. Based on the results of several mock trials, however, the company found that they could dramatically reverse their fortunes in court by simply and sincerely owning up to some small measure of responsibility. Obviously, this isn’t a legally sound strategy in every case – it depends absolutely on the facts. But our experience across the country is that where corporations can honestly admit a reasonable and controllable amount of fault, the dividend from the jury is most often greater credibility, greater trust, and much smaller damages. Jurors refuse to accept that any party in the case is completely above reproach. A corporation shows it is only human by admitting a safe level of fault. An apology also provides a productive opportunity for defusing an emotionally charged situation. If the Plaintiffs have had enough opportunity to dig, then there is almost always something exists that any corporation would prefer not to own up to. However, when jurors perceive that they’re witnessing a corporate game of “hiding the ball,” then it becomes much more likely that they will want to punish that corporation. The “smoking gun” internal memo or email hinting at a cover-up will always be more memorable and salient to jurors than a dozen witnesses trying to explain that evidence away. For this reason, taking responsibility where one can is a step that begins long before trial and continues through trial.

page 7



STEP 6. DISTRIBUTE MUTUAL RESPONSIBILITY TO ALL PARTIES

Another potential “silver lining” to this more skeptical attitude toward corporations is that it is likely to spill over into increased responsibility for those who deal with corporations, be they individuals or other businesses. If expectations are lowered, then it is more ‘expected’ that a corporation may place its own interests paramount. And when that is the case, the onus falls on individuals who deal with corporations to look out for themselves.

The fact that jurors expect individuals or other corporations to look out for themselves translates to something we call the “desensitization effect” in litigation. For example, in our 2003 national juror survey, 69% of respondents agreed with the statement “I was surprised to learn of Enron’s actions leading to the recent collapse of the company.” At the same time, however, in response to a follow-up question, only 38% agreed with the statement “I would be surprised if another company acted like Enron did in the future.” We have observed that jurors become desensitized to corporate bad acts with each new Enron or Tyco headline. The bottom line here? If you’re a plaintiff, jurors will look at how likely it is that you could have anticipated the allegedly negligent

behavior of the defendant company. If you could have anticipated it and failed to avoid harm, you just lost some degree of juror sympathy.

As long as your message includes an answer to the critical question, “what did you do well?” then the stage is set for jurors to take a more realistic look at the responsibilities of the plaintiff and other parties as well. Distributing responsibilities ought not amount to a “blame them, not us” strategy, though ideally, that can be the effect of the strategy applied well.

Potential jurors exhibit a relatively high level of faith in the courtroom to promote corporate responsibility with 70% in our 2004 sample agreeing or strongly agreeing that “courtroom trials have played an important role in promoting corporate responsibility.” In addition, 78% agreed or strongly agreed that “a jury trial is an effective way to address wrongdoing by corporate executives.” The risk of being called to account by this jury pool is a daily reality to today’s corporations. Imagine, however, the large company that is discussed by the actual juror in our opening example. Knowing the extent of anti-corporate bias, and even knowing that this bias created a known predisposition for this juror, the corporation could have either tried to remove the jury for cause (very unlikely) peremptorily (never enough strikes), or it could have despaired their chances of receiving a fair hearing. Or they could have done what they actually did: tell a forceful and positive story about their own company, which embraced a positive persuasive burden, targeted their own worst jurors, took and distributed responsibility, all while building a clear and positive impression of what they did well. That is the strategy for corporate defense in this skeptical age.



- Litigation Consulting
- Demonstrative Graphics
- Legal Videography
- Advocacy Training