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Enron to Broadcom: Defending Companies in Court After a Decade of Corporate Scandals

By Richard Gabriel

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"It's the same thing going on with America these days. It's big business. They just don't care… It felt like they thought they were bigger than the law." *- Juror in i4i v. Microsoft patent case – IP Law and Business*

The Knights of Columbus was founded by Father Michael J. McGivney in New Haven, Connecticut in 1882 with some of his Catholic parishioners to give financial aid to widows and orphans in case of the death of the breadwinner in the family. This evolved into a life insurance program with nearly 1.3 million members and more than $70 billion in life insurance policies. In conjunction with the Marist College Institute of Public Opinion in New York, they conducted a survey in February and March of 2009 to study the issue of ethics in business, interviewing

over 2,000 Americans and 110 high-level business executives. In this poll, 88% of Americans say executives' ethics are poor or only fair. When the executives rated themselves on the same scale, 65% *agreed* that their *own* ethics were only poor or fair. When asked about the driving force behind the decision-making in a company, both the American public and executives themselves placed much more importance on company profit, career advancement and personal financial gain over the interests of the company's employees or the public good.

In this same poll, when asked about common practices in corporations, more than three quarters of both the public and the executives thought exaggerated claims about the company's products and services were common. A majority of both thought that dishonesty to employees, improper accounting practices and falsifying records were common practices and more than 40% of both groups believe that Bernard Madoff's illegal financial scheme reflects a general widespread practice in business.

Both Gallup Polling and Harris Interactive have been conducting similar polling for years. In Gallup's Dec. 9th poll, they asked the public to rate the honesty and ethics in different professions. The public viewed the ethics of business executives barely above car salespeople, advertisers, members of Congress and stockbrokers.

This remarkably negative public attitude would seem to presage a wave of plaintiff verdicts in cases against corporate defendants. While there has been no noticeable spike in plaintiff verdicts or damage award amounts, this negative view shapes how jurors view the conduct of corporations and the motive that jurors attribute to their actions. In our own research, a large majority of jurors see lawsuits as a means of regulating the business and ethical practices of large companies. Given the continually falling approval ratings of Congress, the "juror-as-regulator" role may gain added relevance.

What are the current trial dynamics that shape jurors'[1] opinions about corporate defendants? How do we effectively represent corporations, given today's cynical jury pool?

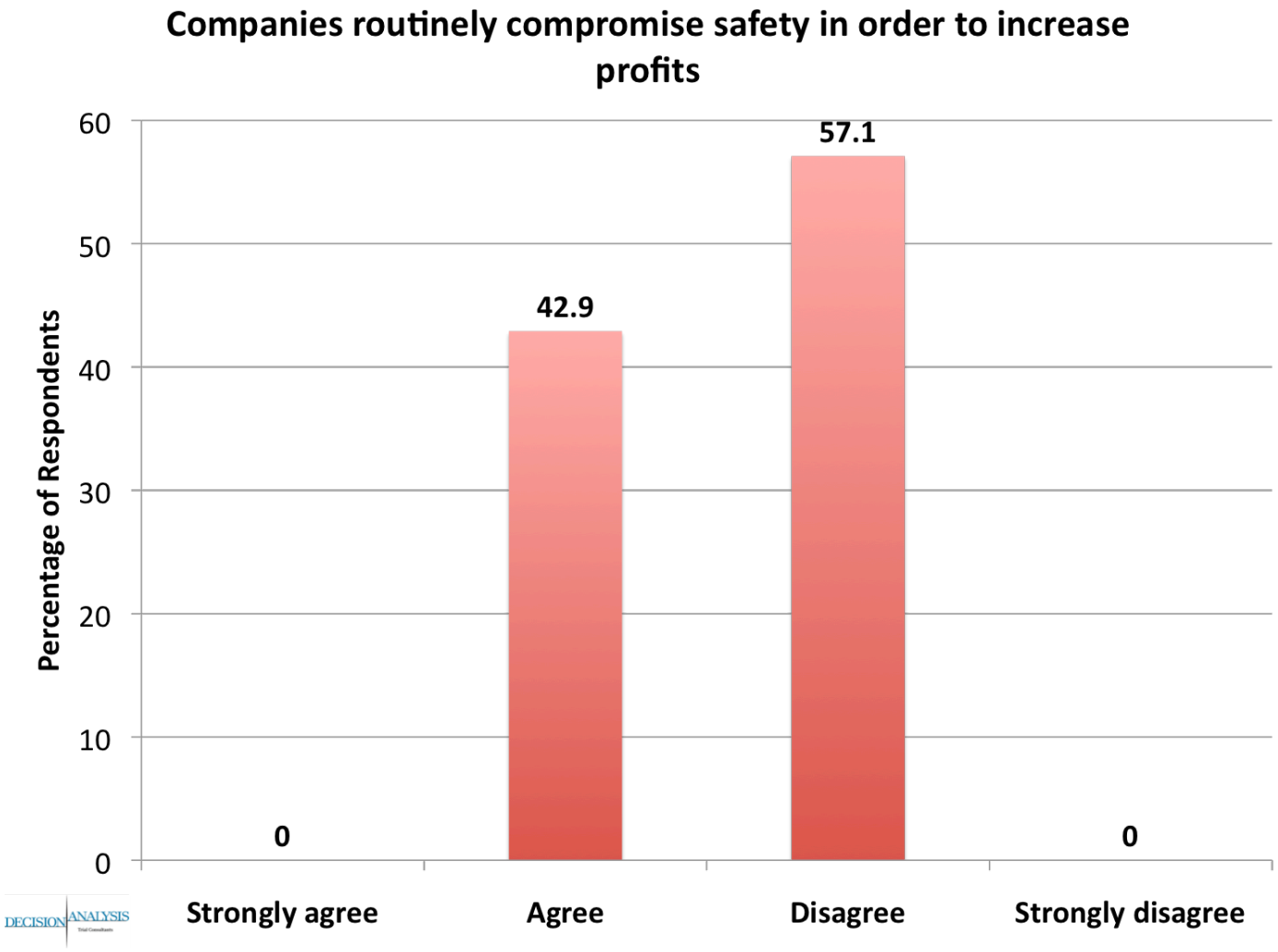
A. Distinguish between generalized and specific anti-corporate attitudes

Given this hostile jury environment and depending on the facts of a case and venue, those who represent banks, brokerages, and health insurers think seriously about settling cases these days. For those who do go to trial, counsel may look at jurors who have anti-corporate attitudes and immediately target them with cause or peremptory challenges.

However, given the pervasiveness of these negative attitudes, a majority of jurors in your pool might hold the same opinions. You simply don't have enough peremptory strikes for all of these jurors. Also, there are many jurors who may hold anti-corporate attitudes, yet still be excellent jurors for your case. How do you tell the difference?

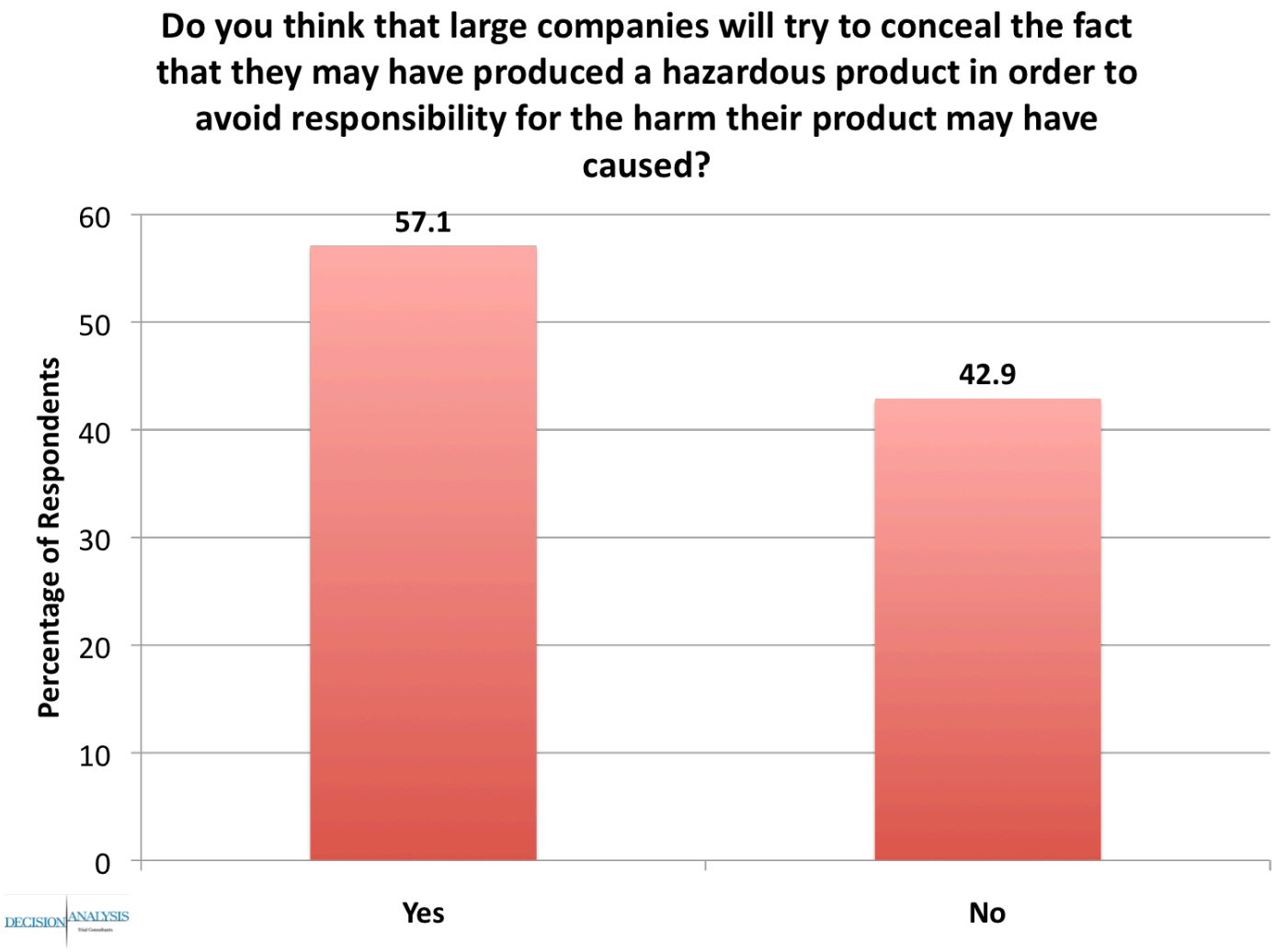
It is important to test the strength and specificity of the attitude the juror holds. For example, let's take the "profit over safety" attitude listed below. These charts came from questionnaire responses from a mock trial we did for a toxic tort product liability conference involving Benzene exposure.

[1] In this paper, I will speak mainly about jurors and juries. However, when discussing the positioning and presentation of cases, these same strategies are intended to be applied to judges, arbitrators and mediators as well.



Some jurors in that 43% column have heard the news stories in the media, read John Grisham books, and use these cultural references to form this belief. Some jurors in that 43% column have personalized this belief as a result of direct experience or their moral value system. Those who have personalized this attitude are more heavily invested in their belief because this belief has emotional roots. How do you tell the difference? You simply ask in voir dire, "Juror number 7, I noticed you agreed that companies routinely compromise safety for profit in your questionnaire. Tell me how you think about this issue." (Note: "How" questions allow jurors to describe their thoughts while "why" questions ask jurors to justify their response, which may cause jurors to dilute their original response.)

If you get a response to this statement similar to one I have received in the past, *"A company should take extra measures and extra precautions [beyond the legal requirements]"* you know that this juror will be expecting a higher standard of conduct from the company. Similarly, you can take the "big corporations hide their bad deeds" question asked below and ask, "Tell me about your response to this statement." and "How long have you felt this way?"



If you get a response like, "*Big companies are always passing off something that is harmful as not harmful*," you can note that the word "always" indicates a deep and significant bias. You also need to closely watch jurors' nonverbal signals and listen to their tone of voice as they respond. Their voice and body language will carry important clues about the depth of their feeling about the issue.

Proposing and conducting mini-opening statements prior to voir dire will also allow you to determine whether jurors' views are generic media-driven attitudes or are deeply embedded beliefs. This is a relatively recent jury innovation, where both sides deliver a three to five minute opening statement to the jury panel prior to voir dire. A simple question to ask jurors after these mini-openings is, "You have just heard the plaintiff's basic allegations in the case. What do you think?" Then listen carefully to their words and their voice and watch their nonverbal signals as they talk about their impressions. The more deeply embedded the negative corporate attitude, the quicker jurors are to latch onto plaintiff claims of negligence or misconduct and the stronger their grip.

Employing these tools in voir dire will give you a better understanding of how to effectively identify your highest risk jurors.

B. Plan to defend against the "worst case" scenario

In preparing a case for trial, the defense often looks at the legal claims in the case and existing discovery. When you have lived with a case for months, if not years, you have developed strong factual and legal arguments that have been tested and vetted within the firm, with the client, and through pre-trial motions. As a result, it is easy to develop a "war room" mentality that minimizes the strength of the plaintiff's case. When we are preparing for conducting focus groups or a mock trial and going over the proposed plaintiff presentation, we sometimes hear, "Oh, they don't have the facts to support that allegation." Or, "They would never make that argument!" Come trial, the argument is then made and is extremely effective. Since we did not test for it, we did not develop an effective counter-argument.

In constructing the plaintiff's case for jury/judicial research or brainstorming purposes, it is important to anticipate adverse rulings by the judge as well as the strongest structure, sequence, and content in the plaintiff's case, even if you think the arguments and factual construction of events is speculative and implausible. Remember, attorneys who predominantly handle plaintiff's work (especially in the personal injury arena) have a different worldview than attorneys who predominantly handle corporate defense work. It is important to insert these different values into the plaintiff presentation because they activate different parts of a juror's brain and decision-making. (A parallel of these different values can be seen in the work of George Lakoff in his analysis of the cognitive differences between liberals and conservatives.)

In preparing for the "worst case", you are anticipating not only a plaintiff's case presentation but a case that jurors may construct themselves in deliberations out of both side's cases. The exercise of stepping into opposing counsel's shoes and developing their strongest case is useful in the following ways:

- It allows you to more accurately respond to plaintiff's allegations, especially ones you consider to be specious.
- It forces you to consider the emotional impact of some of the plaintiff's arguments and intangible issues (presence of an injured plaintiff in court, adverse publicity, etc.).
- It allows you to consider whether you are properly allocating trial time to the most important jury issues.
- It allows you to anticipate and preempt some plaintiff arguments.

Finally, planning the "worst case" allows you to systematically evaluate and weigh trial risks. By playing out different plaintiff scenarios and potential defense responses, it gives a company a more accurate number of variables that can affect the outcome of the case. Thus, their risk analysis is more informed.

C. Translate that "worst case" scenario into a case narrative

When asked about the difficulties of taking a very vivid world that existed in his head and rendering it for an audience in his latest blockbuster *Avatar*, director James Cameron said, *"My challenge as director is to make it as real as possible for them. A 3-D film immerses you in the scene, with a greatly enhanced sense of physical presence and participation."*

Most defense teams do not have a $400 million budget to work with or a battery of CGI effects teams. But they do have a story. And part of the defense's job in a trial is to put a jury into that world, to tell as vivid and real a story as possible and to let them understand what really happened in the case.

To understand the importance of case narrative in how the defense tells its story, let's look at two exemplar structures.

Plaintiff Narrative Structure

1. Company X is a big company
2. They have a lot of money, experience, power, knowledge, expertise, etc.
3. Here's what they knew at the time the plaintiff was harmed by them
4. Here are the industry standards that they have to comply with
5. Here are the regulatory/legal standards they have to comply with
6. Here are Company X's own internal policies and procedures
7. Here is how Company X broke these industry/regulatory/legal standards
8. Here are the foreseeable and preventable problems about their product/service/promises
9. These same and foreseeable and preventable problem happened to this poor plaintiff
10. Here are all the defendant's inconsistencies, errors, and bad acts
11. Here is why they did it intentionally
12. Here is why you need to award a lot of money
13. Here is why the law tells you to find for the plaintiff

Now, this may not be a classic plaintiff outline, but plaintiffs have learned that starting their case by talking about their poor injured client and what happened that damaged their client only invites early scrutiny and criticism from the jury about what they should have done differently.

As a result, this structure emphasizes that the defendant company has the most power of the parties in litigation. By emphasizing the inequity in size and power, plaintiffs hope to raise the "standard of care" (even applied to cases where there is no legal standard of care requirement) by which the defendant is judged. They then seek to establish all the rules that govern the way that Company X should operate. Next, they show that there are recognized problems that should have been remedied by the defendant. Finally, they explain how these problems and rule violations caused damage to the plaintiffs. This immense amount of setup is intended to demonstrate that the defendant's foreknowledge either created a situation that the defendants knew was intentionally harmful or that they were recklessly indifferent to the potential harms of their actions.

Let's now look at how the defense instinctually wants to respond to this plaintiff structure:

Typical Narrative Structure of Defense Response

1. We are a really good company who does a lot of good things for our customers
2. Here is what really happened here
3. Here is what the real standards are (industry, regulatory/legal, etc.)
4. Here is what our internal policies or procedures really say
5. This case is not about
6. Our better experts and more prominent witnesses all say
7. Here is what the plaintiff did wrong
8. They were not harmed that badly
9. Here is why the plaintiff has not met their burden or the legal definitions

D. The Problem with Defense Mode

It is instinctual to respond to negative allegations about the character of the company by wanting to show the jury all of the positive things the company has done. But structurally, it can create some real problems for a defendant. First, jurors often are skeptical about the "good company" story, at best thinking that this story sounds like a commercial with little relevance and at worst thinking that the company is hiding something. Second, unless cross-examination has significantly damaged the plaintiff's case, jurors are listening to the defense at the beginning of the case from a skeptical perspective.

The problem with jumping into a counter chronology of case events is that it presumes that jurors are keeping a neutral mind and holding the plaintiff's version of events in a separate part of their brains while they listen to the defense's case. The laws of primacy suggest that while jurors may not entirely adopt the plaintiff's version of events at this point, they may very well have adopted the plaintiff's frame of reference. Additionally, a counter chronology keeps the focus firmly on the conduct of the defendant. While jurors may be persuaded that the corporate picture is not as bleak as the plaintiffs portray, they are probably willing to believe that at least some of the allegations are true. The counter chronology sets the stage for jurors to negotiate in deliberations just how bad the defendant was.

"Just because it's [a big chemical company] and they have money, they weren't malicious. He [plaintiff] should get paid, but not millions." - Juror in toxic tort mock trial

Plaintiffs also use the most obvious and common sense standards and policies to make the defense admit they are required to or at least ought to adhere to these standards. They then use the defendant's conduct to show that they did not follow their own policies or violated a standard in some way. In response mode, the defense is put in the difficult position of either claiming they did not violate the standards or polices, or that these standards did not apply to this situation.

Finally, in response mode, the defense sometimes relies too heavily on PMK or expert witness testimony to deliver a persuasive version of events in the case. However, jurors often dismiss or discount these witnesses as delivering "the party line." Moreover, jurors are more impressed by a witness' involvement in the actual events of the case and their ability to communicate with the jury than by their resume credentials.

E. The Lure of Knowledge and Expertise

Most jury instructions contain language that instructs jurors to treat a corporation the same as an individual. However, this legal requirement is starkly contradicted by how jurors actually see corporations. In her excellent 2000 book Business on Trial, Valerie Hans demonstrates that around 60% of poll respondents and mock jurors and more than 40% of actual jurors believe that a corporation should be held to a higher standard of responsibility than an individual. Consider what this belief does to the burden of proof and the legal definition of negligence. If the measure of negligence is the failure of what a reasonable *individual* would or would not do in a similar circumstance, a *corporation* would obviously have to do or not do more to accomplish this standard. Say Acme Corporation is being sued for a product defect claim. If they have a higher standard of responsibility, they would be expected to go further to understand whether their product could be used or misused in a particular way - further than even their own engineers (as individuals) might go.

There are two fundamental issues that jurors investigate when they are looking at liability: 1) the ability of the defendant company to foresee harms it may cause and 2) their ability to prevent those harms. The greater the

knowledge, power, expertise and experience the defendant company is believed to have, the more the jury expects them to foresee and prevent potential harms. Jurors will bring a higher level of criticism against those that they perceive have the ability to control the final outcome.

This can create difficulties, especially when a great deal of defense strategy is based on establishing expertise. In many a defense camp, expertise is one of cornerstones of credibility. Yet, jurors use this same expertise to raise the standards for the defense and turn a more critical eye to the conduct of the defendant company.

So, given all of these fundamental problems with juror bias, typical defense responses, and expertise, how does a corporate defendant create an effective strategy for presenting their side of the story?

F. Do Not Tell the "Other Side" of the Story

It is common in voir dire or opening statements for the defense to ask jurors to "wait until they hear both sides of the story." This phrase contains a risky concept for the defense. First, it presumes that jurors will wait to judge all the facts in a case. They don't. More importantly, this statement presumes that there is really only one story with two sides. This invites the jurors to adopt facts from both sides and create a composite narrative of the case. Knowing that jurors often negotiate both liability and damages using facts and arguments from both sides, this supposes that jurors will find that the corporate defendant did something wrong, maybe just not as bad as the plaintiff alleges.

It is far more effective to tell a different story altogether. Instead of starting with "Here's why what the plaintiffs say happened did not happen…", thus emphasizing the plaintiff's version of events a second time, it is better to reframe the case as "Here is what really happened in this case: here is the proper sequence of events, here is the proper cast of characters, here is what you need to know about our industry and corporate culture to understand what really happened here."

I recently worked on a case where a fruit and vegetable processing company was accused of trespassing onto a neighboring property by allowing its irrigation water to flow onto that land, causing construction and building damages that delayed the expansion of their neighbor's business operation. The initial instinct of the defense was to refute the plaintiff's allegations by having their own witnesses and experts talk in-depth about the irrigation and water elimination system they had in place. After conducting research, we discovered that jurors faulted the plaintiff in how they built their plant. Thus, we shifted the focus of the case from water to *"how the plaintiffs caused their own damages through their own shoddy construction methods."* The defendant company still prepared strong explanations for the water, it just became a secondary focus in the case. The jury came back with a defense verdict.

G. Focus on the Plaintiff

This shift in focus brings up another important strategy - constructing the case around the plaintiff's choices: their inconsistencies, their failures, their mistakes, and their misrepresentations. This strategy can make a corporate defendant nervous, especially when the plaintiff is injured, an employee of the company, or the family of someone who died in an accident. The concern is that the defense will be "blaming the victim", thus alienating the jury who may feel sympathy for the plaintiff.

To avoid the appearance of a personal attack, it is useful to frame the juror's job as investigating the actions, conduct and intent of ALL of the parties in the case. Thus, the defense has the obligation to present everything needed for the jury to consider the credibility of the claims. This is mainly a shift in the tone and intent of the case presentation. Instead of the defense attacking the plaintiff, they are merely introducing the plaintiff's actions and

representations for the jurors to consider. This may seem like semantic spin, but it is in fact an important distinction.

Instead of viewing jurors as neutral arbiters, it is better to think of them as critics - their job is to look for fault in all of the parties. The more time they spend finding fault with the plaintiff, the less time they have to attribute liability to a defendant.

The character of the plaintiff is important. We live in a culture that places a great deal of importance on personality. A UC Davis study recently reported that the Tiger Woods scandal has reportedly cost the shareholders of Nike, Gatorade and other sponsors between $5 and $12 billion. Jurors are armchair psychologists looking at the motivation and intent of the parties. Even with the most seemingly sympathetic plaintiff, jurors are tolerant and even desirous of aggressive defenses that probe into the character of an injured party.

I have done a lot of cases for state, county, and city agencies when they have been sued for defective road design in accidents where motorists have been injured or killed at an intersection or on a highway. While the temptation is to focus on defending the engineering of the road, this introduces complexity into the case and shifts the jurors' attention to what the agency did or did not do with their design. Having spent a lot of time in cars themselves, jurors find it much easier to simply to look at what the drivers did or did not do behind the wheel to prevent the accident. Jurors will put themselves literally in the driver's seat, second-guessing the decisions they made at the time of the accident.

To illustrate how dramatic this shift in focus can be, Merck, in defending itself against Vioxx product liability claims discovered that defending the science behind their drug was less effective than presenting the health and lifestyle factors of the plaintiff or decedent that contributed to their death or injury. While they sustained a couple of early losses in the Vioxx cases, many later trials returned defense verdicts.

One of the best ways to focus on the plaintiff is to use his or her own words and actions to prove your case. By using the plaintiff's own testimony, witnesses, and experts to create a series of minor or major concessions, you can whittle down the amount of disputed issues in the case in order to argue that the "plaintiff agrees with us on these points."

H. Establish the Role of Jurors Early

"We wanted to make a statement. We wanted to let all the companies know that they can't do this. It's not right. You can't hide information. You have to give all the information."

- Juror in Ernst v. Merck trial – CBS News

With the plummeting confidence ratings of Congress and politicians in general, jurors increasingly feel as if they have little say in effecting societal change through their vote. Mock jurors in our research projects routinely say that they view the courts as an effective system to regulate the practices of business. As jurors, they know their vote will be counted. This obviously can be problematic for a company defending itself in court. Jurors acting as regulators can use their verdict vote to correct what they see as problematic business practices, even if the practices do not meet the legal test of liability or contractual violations.

As a result, it is important to establish the correct role of the jury as early as possible in the case. This role establishment does not displace the Court's instruction. Rather, it is imposing how the defense sees the juror's role in relation to how they interpret the law and evidence in the case. This role does not have to be stated directly to the jury "Your job is…", but can be established by asking direct and cross-examination questions of the witnesses.

For example, in a bad faith insurance case, the traditional role established for the jury is to find whether the insurer was reasonable in how they handled the claim. However, this traditional role already has jurors looking for behavior they could consider *unreasonable*. Since both the insured and the insurer have a good faith obligation in the insurance contract, it is better for the insurer defendant to reframe the jury's role as investigating whether both the *insured* and insurer were reasonable in how they presented and handled the claim.

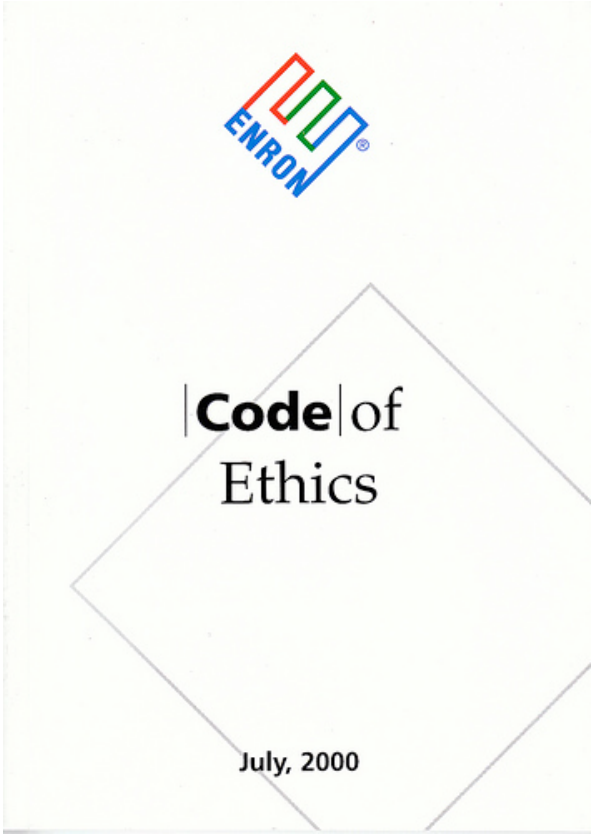
In establishing the jury's role, ask them to actively search for information that supports your case. Start by exploring the irrefutable facts that the plaintiff has to admit. In the insurance bad faith example, did the plaintiff provide their engineering or medical reports in a timely manner? Were they complete or was there missing information?

While plaintiffs have the burden of convincing the jury of their factual narrative, the defense's main goal is to have the jury question the evidence. This investigative role sets the stage for the corporate defendant to question the plaintiff's reasonableness and to plant the seeds of doubt that the burden of proof has been met.

Finally, role definition should come directly from the anticipated legal instructions in the case. Although many instructions are determined at the end of the case, there are also many instructions that are standard. For example, California jury instructions on product liability under the instruction on Causation: Substantial Factor has language that talks about whether the factor contributed to the harm and then says it has to be *"more than a remote or trivial factor."* This language can be incorporated into examinations, statements and arguments in characterizing the jury's investigative role.

I. Set the Rules of the Game

After being sworn, jurors sit in their bleacher seats and wait for the game to start. However, they don't know if they are watching football, basketball, or cricket. Usually, it is cricket -- they have no idea how this game is played and what rules they need to know to judge the game. Rules are important for jurors to appreciate both the substantive and legal issues in the case. As a result, the first party to establish the "rules of the game" has an advantage.



When going through the evidence in the case, it is important for the defense to establish the real rules that manufacturers, suppliers, stores, insurers, and banks follow when conducting their business. For example, in the previous insurance case example, a rule to develop for the jury would be, *"In order to reasonably handle a claim, an insurer needs comprehensive information from doctors in order to thoroughly investigate and resolve the claim."*

A second set of rules is determined by how the parties define the key definitions in a case. Thus, in a disability discrimination case, the party that better defines the term "reasonable accommodation" for jurors when describing how an employer dealt with a worker's disability will have a distinct advantage as they go through the evidence.

This is even more important in defining the legal concepts in the case. We too often wait until closing argument to explain legal terms the jurors will be using to answer the verdict questions in the case. Although the judge is charged with delivering the key legal definitions in jury instructions, it is important to develop the conceptual

framework for the underlying principles of "negligence" or "contract" in order to help jurors define and sort evidence as they are listening to testimony and arguments.

If possible, these substantive and legal rules should also be established graphically (preferably in board form) so they can become a reference for jurors throughout the case and in deliberations.

J. You are Who You Appear to Be

"I decided from looking at the paperwork they knew the problems this medication was causing and they hid it from us. Rather than telling us the good and the bad, they only told us the good."

- Juror in Ernst v Merck trial - CBS News

"If I could say it in one word: hiding. Every time a question was asked, any one of [the Merck] witnesses circumvented the questions by going somewhere else. Just give us a straight answer."

- Juror in Ernst v Merck trial – Wall Street Journal

When working on a trial, we tend to think that jurors will judge the alleged conduct based mainly on their historical analysis of the timeline of events in the case. In fact, jurors see the trial, to a certain extent, as the reenactment of the events of the case. Jurors also see the corporate representatives and witnesses as embodying the attitudes of the corporation. In evaluating a claim of employment discrimination, the demeanor of the witnesses both on and off the stand will tell jurors a lot about whether the company had a "hostile work environment."

So what do jurors expect of a corporate defendant in litigation?

a. Jurors would like companies to represent the concepts of Peter Drucker's management model rather than those of economist Milton Friedman. Peter Drucker believed that a company's primary responsibility is to serve its customers and profit was not the primary goal, but rather an essential condition for the company's continued existence. Milton Friedman believed in a macroeconomic policy known as monetarism where a free market, profit, and a certain acceptable level of unemployment were all necessary and natural economic processes. (Despite these ideal expectations, jurors begrudgingly accept that most companies are more concerned with profit than service.)
b. Jurors want corporations to care about their customers, clients, and employees.
c. Jurors expect that corporations will continuously improve their products, services, and processes.
d. Jurors expect that companies should not simply meet government standards for basic minimal requirements. Rather, they want companies to exceed government requirements. The bigger the company, the greater this expectation. In fact, jurors would like large corporations to lead the government in setting standards for an industry.
e. Jurors would like a company to be loyal to its customers, clients, or employees. Many jurors these days do not believe that a company is obligated to be loyal, but they would prefer it was.
f. Jurors expect companies to foresee most, if not all, problems associated with their products, services, contracts, etc. As a result, they expect a company to have a greater ability to prevent problems.
g. Jurors expect a company to clearly communicate their policies, procedures, and processes in defending themselves.

Given jurors' high expectations and the negative attitudes described at the beginning of this article, how should a company present itself at trial?

1. Jurors often listen to the events of a case in a trial. ("Acme Corporation should have done X, they didn't, here's what they did do, the plaintiff was harmed…") In order for jurors to stand in the company's shoes, they want to know the decision-making process within the company. For example, in a wage and hour dispute, jurors want to know why the company has classified certain employees under a management or executive exemption. How did the company think about the work of these employees that made their discretionary and independent judgment important to their jobs? By having individual corporate representatives or PMKs walk through their thought processes ("At the time I was looking at this issue, here's what I was thinking…"), jurors have a greater understanding of the decisions behind the actions. It also shows jurors that there is no collective conscience called the COMPANY. Rather, a company is made up of individuals making individual decisions, and those decisions are the result of a thoughtful process. Without the process, jurors are free to interpret the motivations of the company, and plaintiff allegations of greed make a rather compelling story.

2. Avoid presenting the "good company" story as a commercial. This will arouse suspicion and create automatic resistance from jurors. Good deeds such as charitable contributions and innovations that have helped customers should be discussed, but only by tagging them onto relevant subject matters. For example, in defending a patent infringement action, the company can discuss why they developed a product innovation to overcome a specific (and unique) problem their customers were having.

3. Jurors anthropomorphize companies. Jurors have a much better sense of the character of a company and its culture through small actions and deeds. Thus, talking about the weekly donut brainstorming sessions, the litter pick-up day at a local park, or Friday Guitar Hero competitions will tell jurors more about the company than its United Way campaign. The more that companies can show direct involvement, communication, and contact with their community, employees, and customers, the better.

4. Especially with large companies, there is a temptation to present uniformity and consistency in their policies and actions. However, this can paint the corporation with the shiny gloss of perfection and raise the standards by which they are judged. Given this, it is important to embrace some of the irregularities and inconsistencies (without admitting liability) within a company. In fact, it is important to represent the struggles and challenges a company strives to imperfectly overcome in order to accurately explain its actions. In defending the Board of Director's decision to sell a company in a shareholder action, we spent time explaining the financial problems the company was having and the lack of suitable bidders to help jurors understand the painful process the Board undertook before making its recommendation to sell. No company is perfect, and human decision-making by definition, is an imperfect process. There are times it is appropriate for a company representative to say, "At the time, we were dealing with several challenges. In hindsight, we might have done a better job of communicating with our shareholders. But I still believe we made the right choice." By admitting to inconsequential errors, this allows the jury to understand the challenges the company was attempting to solve. We need to keep reinforcing that the standard is reasonableness in most of these trials and not perfection.

5.Trials are often about putting the actions of the defendant company on trial. Yet jurors are often missing important context for the actions they are asked to judge. The historical background of an industry and a particular company within that industry can give needed context to the jury. In recent tobacco cases, Altria (formerly Phillip Morris) has brought in a cultural historian to testify about the pervasiveness of smoking in a given era as well as the warnings that smokers were aware of. Although a criminal case, the recently

dismissed trial of a Broadcom's CFO William Reuhle saw a great deal of defense testimony about the commonness of stock back-dating prior to rule changes in 2005.

"The defense was very, very selective. And they used a lot data and they construed their data the way that only went as far as they molded their opinion; they molded the facts."

- Mock juror in product liability case

6. Take and share responsibility. Trials often become a dispute about who had responsibility for what. Corporate defendants can get into trouble by issuing blanket denials of responsibility. Accept and even embrace responsibility for issues for which the company has a legal obligation, and issues for which company responsibility seems obvious. ("Of course we have a responsibility to keep our store premises in a reasonably safe condition.") Then switch the focus to the responsibilities the plaintiff has ("The plaintiff had a responsibility to be reasonable careful.")

7. Characterize the choices the parties made in the case. Here are two jurors' views of choices in product liability cases.

Plaintiff juror's view of choice
"I think the problem I had was not so much with the drug itself, but with the fact that all the information wasn't given to the people, so that they could make an educated decision on whether or not it was worth the risk for them to take that drug."

- Juror in Ernst v. Merck trial – CNN News

Defense juror's view of choice
People are going to do what they want. Okay? Maybe if they put a label on that said "could cause cancer." It still means could, could maybe not. You know, there are warnings on alcohol, but the people that manufacture the alcohol don't tell me how to use it. I choose what to do with it.

– Mock juror in Benzene case

Jurors will always speak about the choices the parties made in relation to the responsibility they should take for their actions. Since much of a plaintiff's case is based on the harm being caused to an unwitting and unknowing victim, it is important to show that the plaintiff is making clear choices in their actions.

8. Use corporate representatives closest to the incidents at issue. There are times when a company is accused of bad behavior and the temptation is to have a CEO or someone in the executive suite testify at trial. Although jurors always want to hear from these high stature people (see juror quotes below), this testimony poses a couple of risks. First, these executives may know little, if anything, about the disputed issue. They tend to have no first hand knowledge of the issues, and they are then forced to explain to the jury why they don't know all of the specifics involved in the issue. Unfortunately, jurors expect most corporate representatives who testify to have a good working knowledge, if not direct involvement, in the litigated issues. Jurors universally dislike continuous responses of "I don't know." or "I don't recall." At the very least, jurors want to know why the inquiry is outside the witness' knowledge. Second, the higher up the executive, the more the jury will impart knowledge of the "problem" at the highest levels of the company. If they believe the "higher-ups" knew about the problem, they will also believe that something should have been done about the problem sooner.

More than the title of the executive testifying, jurors really want to see or hear someone from the company that they feel has some accountability for the company. Whether it is a PMK, percipient company witness, or senior executives, jurors want to know that these representatives have a say in how the company deals with the litigated issues.

"Every life counts to us. If they care, then show it. Not one bigwig from Merck came down. Not one of them took the time. One death in my life would make a difference. Why wouldn't it make a difference to them?"
– Juror in Ernst v Merck trial – Wall Street Journal

"I think a lot of the jurors, we all thought if this was that big a deal to Microsoft, they might have had some of their more executive-type people present. I think a lot of the jurors, we all thought if this was that big a deal to Microsoft, they might have had some of their more executive-type people present."
- Juror in i4i v. Microsoft patent case – IP Law and Business

9. There is a tendency to take some of the plaintiff's allegations and be instantly dismissive. From a defense standpoint, some of the charges can seem so preposterous that the initial thought is that they do not even dignify a response, or should be waved off as insignificant. The problem is that jurors don't know the law, they don't know the industry, and they don't know the company. Jurors want to know that the company has closely looked at the alleged behavior and given it careful consideration before disregarding the complaints. It's like a customer complaint. If we call our wireless carrier to complain about charges on our cell phone bill, we would be incensed if the customer service rep said to us, "Why are you calling us? Those charges are spelled out very clearly on page three of your bill." Instead, most reps are now trained to say, "Let's look at this together. What are the charges you don't understand? Oh, here they are on page three. I can see how you might have missed those. Do you understand the charges now?" This careful consideration communicates both respect and responsibility.

10. Show neutral third party involvement. Since plaintiffs typically try to establish that the defendant company has all of the knowledge and power in a market, it is useful to establish that the company was in compliance with government regulations. Not only do jurors see this as a valid technical defense, but it minimizes a company's power by showing that it is regulated by one or more agencies. The company's compliance to PTO, OSHA, EEOC or FDIC regulations can give a neutral third party stamp of approval to the company's actions.

"At first, I was for the plaintiff also, and I was sympathetic for this man. But the chemical companies, you know, they did a great job of protecting themselves. They were within guidelines and there was no -- there was no decisive studies and no solid proof that, you know, that benzene caused this man's lymphoma. So how can you rightfully say, legally blame the chemical company when there's no proof?"
- Juror in toxic tort mock trial

11. Don't get married to the timeline. The defense in many cases puts together a chronology of events in the case. This becomes the de facto organization of trial events. In fact, a timeline can serve to undermine certain defenses by showing more extensive company knowledge or involvement prior to the events in dispute. Timelines can be effective if they illustrate only the events you want to highlight. Consider creating separate timelines for only the periods that serve your story of the case.

12. Teach the jury about the industry, the market, and the company. It is important to create basic tutorials to establish definitions, standards, and norms for the jury to measure both the defendant's and the plaintiff's conduct. Because of defense counsel's and a company's immersion in a case over a number of years, they become so familiar with the terminology, concepts, and acronyms that they forget that the jury is hearing this for the very first time. As long as the intention is to teach the jury and take them inside the world of

the company, it is almost impossible to be too basic. Too often we will communicate to a jury that the case is complicated and hard to understand. We then throw up our hands at the end of the case when they have not understood what we thought was obvious. This means we have to break down the industry, the market, the company, and the case into small blocks and build it back up, piece by piece.

While some of these tutorials can be presented by company witnesses, most of this burden is carried by the hired experts. These tutorials can actually help bolster the expert's credibility. Whether it is a witness or an attorney, jurors automatically give credence to those individuals who are better able to help them understand the case.

13. Plaintiff's cases often carry (either directly or indirectly) hidden assumptions about the evidence or the parties in the case. In closing argument (and in preparing witnesses for cross-examination), it can be effective to enumerate these assumptions in order to correct them before they are used by jurors in deliberations. For example, in a pharmaceutical product case, counsel might state, "Plaintiffs would have you believe that it is the obligation of our company to anticipate ALL the possible side effects of this drug. That is neither medically possible or required by the law."

14. Finally, in presenting the case, we cannot underestimate the importance of demonstrative or graphic evidence. This does not mean just developing a plan for using Trial Director or Sanction to bring up and illustrate documents. This does not mean developing a really good timeline or PowerPoint presentations. A comprehensive presentation plan needs to be developed that goes through the evidence and stops frequently to ask, "How important is this? Will a jury understand it?" Then ask, "What would best illustrate this point?" and "What is the best media (board, flipchart, animation, document treatment, PowerPoint) to communicate this point?"

    Hollywood directors and their Directors of Photography spend an inordinate amount of time storyboarding their movies. This helps them plan their shots and decide how to direct their audience's attention. In many cases, we will actually storyboard the case, planning which case evidence and testimony needs to be rendered into visual form in order to clarify or add impact.

K. The Power of Uncertainty

I have spent a great deal of time in this article discussing affirmative defense strategies in telling the company story. However, jurors' evaluation of liability and their assessment of damages both decline the more uncertain they are about what really happened in the case, what really caused harm to the plaintiff, and the extent of that harm. We often hear that jurors want evidence to convince them "beyond a reasonable doubt" in a civil case. Some plaintiffs have started asking voir dire questions and asking for cause challenges on jurors who are uncomfortable with the preponderance "tipping of the scales" burden. When jurors are making what they consider to be important decisions about the lives and money of companies and individuals, they want to be sure of their decision. The less certain they are, the less likely they are to find for the plaintiff.

Most of this uncertainty is developed through cross-examination in the plaintiff's case in chief. However, the more the defense can introduce outside variables that contributed to the plaintiff's harm, the more uncertain the jury will be that the defendant company's actions caused the plaintiff's harms.

"The plaintiffs didn't present a case that says, 'Your product really made him sick.' They presented a case that said, 'Your product's got something to do with it.' But it wasn't good enough."

– Juror in product liability mock trial

L. Representing Powerful or Unpopular Companies

As a special note, those representing certain industries like health insurers, oil and gas concerns, and chemical, pharmaceutical, or tobacco companies obviously can face a much more hostile audience these days. Here are few bullet points on defending companies in these specific industries.

What Not to Do

- Don't tell jurors to ignore or put aside their bias.
- Don't try and instruct away their bias.
- Don't try and sell the jury on all the good things the company does.
- Don't tell them to only look at the facts and the law.

What to Do

- Confront juror biases head on by acknowledging they may exist.
- Create context by establishing the history and development of the industry.
- Establish and embrace the company's culture and values.
- Establish expertise in the company's core competencies.
- Establish the chief challenges, risks, and vulnerabilities the industry and company has and continues to face.
- Establish the creativity, innovation, and valid strategies the company has employed to overcome these challenges.
- Establish links and partnerships with reputable or familiar institutions.
- Embrace the company's business motive.
- *Sincerely* acknowledge the harms that have befallen the plaintiff (if not disputed).
- Call jurors' attention to the emotional pulls in the case and spotlight the bias.
- Highlight the temptation to use these emotional pulls or biases to decide the case.

Conclusion

The number of corporate scandals over the last decade has significantly changed jurors' view of how American business is conducted. This has made defending and representing corporations in trial much more complicated. However, with careful thought and planning, companies can take a jury inside their world, helping them understand how they operate. More importantly, by employing careful trial strategies, defense counsel can control and define the focus of the litigation.

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Editor's Note

Wow. Every issue I say to myself "This is our best issue yet!". I'm saying it again. It's amazing to watch an issue come together and I am grateful to all our authors, consultant-authors and consultant-respondents for contributing to yet another terrific issue of *The Jury Expert*.

We have articles on corporate defense strategies after a decade of corporate malfeasance, how to use simple rules for better jury selection, the legal and ethical implications of using trial consultants for witness preparation, specifics on how to prepare your witness to answer the "were you prepared" question, implications of the heightened use of images/graphics in the courtroom, skin color bias, and how defense attorneys can present damages issues effectively. Eighty-one pages of awesomeness!

I hope you find this issue useful AND if you do, please comment on our website. I know (courtesy of Google Analytics) how many of you read every issue. Comment! Or blog. And if you blog, let me know so I can link to your blog. Think of it as a small thing you can do to thank the authors who work hard to give us practical, relevant ideas to improve your litigation advocacy.

Happy January! And for those of you in snow-bound places--spring is a LONG ways away. So make some hot chocolate and hunker down and read *The Jury Expert*.

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