

## *Putting a Face on the Corporate Defendant*

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When Ford Explorers exhibited a disturbing tendency to roll over due to tire blowouts in the 1990s, neither Henry Ford nor any of his direct descendants appeared in court for the resulting civil litigation. Similarly, when plaintiffs have sued McDonald's for serving overheated coffee or causing obesity, neither the McDonald brothers, Ray Kroc, nor any of their descendants made a court appearance. Individual defendants have a face; corporate defendants do not.<sup>2</sup> Although corporate employees, even ones with high status such as CFOs, COOs and CEOs, may be present and testify in litigation involving their companies, the corporation itself cannot and does not. A corporation, as a legal entity, has no body and cannot testify. This raises the question of how to put a face on the corporation at trial, and whether different ways of representing the corporation will produce different outcomes.<sup>3</sup>

The past couple decades have seen an increase in business litigation (Hans, 1989, 2000). Litigation work, for example, increased 4.1% from the same quarter (i.e., first quarter) a year ago (O'Connell, 2011). Cronin Fisk (2011) also noted an increase in cases involving defective products. A number of possible reasons exist for the increase, including an increase in corporate accountability for wrongdoing and an increase in businesses taking each other to court to resolve disputes (Hans, 1989). With this increase

in litigation involving businesses as defendants, it is important to understand how jurors perceive corporate defendants.

Corporations as defendants face unique obstacles. First, as Hans (1989) discussed, it can often be difficult for jurors to determine liability. Instead of a clear path to liability, such as holding George accountable after he runs a stop sign and hits Ben's car, when a corporation is a defendant, jurors must determine whether--and if so, how--to hold an intangible entity to the same standard as a flesh-and-blood individual. Even in cases where an individual within a corporation is responsible, the corporation itself might still be the one named in a lawsuit, making it difficult for jurors to determine liability (Hans, 1989).

Another issue facing corporations at trial relates to its embodiment in the courtroom. The corporation itself, as an intangible entity, cannot physically be present at trial. The interested parties (e.g., defense attorneys, CEOs, and so forth) must decide how to embody the corporation at trial if they choose to embody it at all. They may choose to have no representative present or they may choose a person from the corporation to act as a representative at trial. To date, relatively little research has been done on jurors' perceptions of corporate representation at trial. With the increase in business litigation, however, this is likely to become an important area for researchers and consultants alike.

### *Testimony*

While little research has been done directly on point, research does exist on areas that bear on the topic. One area of relevance relates to perceptions of defendants who testify versus defendants who do not testify. As the Fifth Amendment guarantees, a defendant cannot be compelled to testify against him- or herself, and a number of defendants choose to exercise this right. The result of this decision can significantly influence how jurors view a defendant.

When defendants choose not to testify, judges often instruct juries not to infer anything (e.g., guilt) from a defendant's choice not to testify. Research suggests, however, that this choice not to testify, despite judicial instructions, has implications for how jurors perceive defendants. Antonio and Arone (2006), for example, researched capital cases in which defendants did or did not testify. When defendants chose not to testify, many of the jurors interviewed (27.4% of the sample) reported that they believed the failure to testify "was an obvious admission of guilt" (p. 62). Other jurors reportedly inferred that the defendant was not sorry or lacked remorse for his crime. Further, Antonio and Arone reported that jurors expected a defendant to testify on his or her own behalf and were confused and curious as to why a defendant might stay silent, often inferring that the defendant was trying to hide something.

Interestingly, according to Antonio and Arone's (2006) research, a defendant who testified fared little better than one who did not. In their interviews with jurors, they uncovered that a majority of jurors reacted just as negatively to defendants who testified. In this situation jurors most often believed the defendant was lying or showed no remorse for the crime.<sup>4</sup>

Juries' reactions to (lack of) testimony might have serious implications for corporate clients. When a corporation is on trial, for example, it is unlikely that one individual bears the entire responsibility for the harm. Therefore, if a corporation has a representative at trial, he or she might be just a mouthpiece for the corporation, and not the responsible party, per se. An important question to ask, then, is whether jurors react as negatively to testimony (or lack thereof) when the person testifying is simply a corporate functionary.

### *Defendant Characteristics*

Hans (1989) has noted that several factors unique to corporations might influence jurors' perceptions. She posited that a corporation's reputation, along with the utility of its product and its size, can all affect how jurors view it. Others (e.g., Hans, 1994; MacCoun, 1996) have suggested the activity of corporations can also influence jurors' perceptions; for example, commercial, non-commercial, and non-profit activity can all affect how juries view corporations.

One factor affecting jurors' perceptions of corporate defendants relates to the (perceived) wealth of such defendants. The "deep-pocket effect" suggests that jurors will award higher damage awards when the defendant is perceived as wealthy. Indeed, Hans (1989) noted that critics often posit that "civil juries penalize corporations for their ample resources, treating them as deep pockets..." (p. 177). While an interesting prospect, research has failed to provide evidence for such an effect. Bornstein (1994), for example, reported that a defendant's status affected jurors' perceptions (see below), but no deep-pocket effect emerged. Although mock jurors expected high-status defendants to pay more, those expectations arose from punitive motivations and were mediated by sympathy. Similarly, Hans and Ermann (1989) found that higher awards functioned more to punish bad behavior than as a response to a defendant's wealth. MacCoun (1996) reported similar results. In his research, MacCoun (Experiment 1) found that individuals found corporations liable more often and awarded higher damages when the defendant was a corporation rather than a relatively wealthy individual or a relatively poor individual. Thus, although jurors do appear to show an anti-corporate bias, the bias is driven more by corporate defendants' status as corporations rather than their actual or perceived wealth.

### *Standards of Responsibility*

Perhaps one of the most influential factors jurors consider in corporate litigation is the standard of accountability. As Hans (2000) has noted, establishing a standard causes debate among scholars. Some (e.g., Nader & Smith, 1996), for example, argue that corporations, due to their size and the nature of being a corporation, owe more to the public and therefore should be held to a higher standard of responsibility. At the other end of the spectrum, some (e.g., Hovencamp, 1991) argue that courts should actually hold corporations to lower standards. Finally, others (e.g., the United States Supreme Court) argue that courts should treat corporations the same way they treat individuals. In this instance, the corporation is no different from an individual on trial. The U.S. Supreme Court supported the "corporation = person" view in *Santa Clara County v. Southern Pacific Railroad Company* (1886), noting tersely that a private corporation is entitled to all of the rights and protections individuals enjoy. Indeed, Hans noted that jurisdictions across the United States have adopted pattern instructions charging jurors with treating corporations the same as individuals. (For a more thorough discussion of this issue, see Hans, 2000).

Despite a legal basis for treating a corporation as an individual, research has shown that jurors hold corporations and individuals to quite different standards (see, e.g., Hans, 1989; Hans & Ermann, 1989). One study, for example, found that people judge corporations and individuals differently, even

when the actions of both are identical, suggesting that they hold corporations to a higher standard (Hans & Ermann, 1989). Participants in this experiment judged corporations more harshly and punished them more severely than individuals. Further, participants defined recklessness differently when considering an individual or a corporation as a defendant. Robbinette (1999) echoed this sentiment, noting that people often hold groups to higher standards of accountability because groups are seen as more effective than individuals. Her results bore this out, finding that participants assigned more responsibility and blame to a group defendant as opposed to an individual defendant. Robbinette further reported that participants awarded punitive damages more frequently when a group defendant (i.e., a group of employees from the corporation versus an individual employee) was present. If courts require a reasonable person standard (instead of a reasonable corporation standard), it might indeed behoove corporate defendants to place a physical representative of the corporation at the defense table. Jurors might be more able to apply a reasonable person standard when a person is in fact present.

Another study reported that jurors might not be as forgiving of corporations. As Hans (1989) put it, "critics perceive harsh treatment for businesses in cases that pit corporations against individual litigants" (p. 177). MacCoun (1996), for example, noted that jurors held negative views of defendant corporations, being skeptical of testimony or believing them to be more careless in their conduct. MacCoun offered that jurors might find it easier to impose some penalty against a faceless entity rather than a flesh-and-blood individual. When the defendant is not readily identifiable it becomes easier to impose sanctions because the "it" is not a real person, making the consequences of sanctions harder to visualize.

Research into stereotypes and stereotype change may help to elucidate this explanation. When people hold strong stereotypes, they think of the stereotyped group as "them," a rather faceless entity in which all members are the same and interchangeable with one another. To change a stereotype, one goal is to change seeing a group as "them" and begin to recognize individual members of the group as individuals. The same thinking might apply to corporate defendants; rather than see the corporation as an "it," attorneys might try to have jurors conceptualize it as an individual, perhaps by even having an individual physically represent the corporation at trial. One way this might benefit defendants is by allowing jurors to put themselves in the defendant's place (Robbinette, 1999). Shaver (1985) suggested that taking a defendant's perspective might make jurors more able to understand extenuating circumstances, perhaps leading to less severe treatment. Indeed, MacCoun (1996) noted that plaintiff attorneys often try to depersonalize a corporate defendant in order to sway the jury. Similarly, results from Robbinette's (1999) research lend support to the idea that having an individual (i.e., an individual as an actor in a group, not as a representative of the group) be accountable for a group's action might be to its (the group's) benefit. Robbinette explained this further, noting that participants in her research were more likely to focus on the plaintiff and what he/she may have done to contribute to the negative outcome when an individual was the defendant.

Hans and Lofquist (1992) reported contradictory findings, however, reporting that civil jurors did not express any bias against corporate defendants.<sup>5</sup> A majority, in fact, reported they attempted to treat the corporation the same as they would treat an individual, holding the two to the same standard of responsibility. In line with this, the authors noted that jurors in their research preferred to consider the facts in terms of individual actors rather than organizational entities, an idea Hans and Lofquist labeled "the juristic person standard." Hans and Lofquist went on to report that these jurors often expressed more negative attitudes toward the plaintiff rather than the corporation "and sometimes

had trouble concluding that business entities should be responsible” (p. 110).<sup>6</sup> One reason for this discrepancy, according to Hans and Lofquist, was the absence of “an identifiable corporate presence in the courtroom” (p. 110).

One potential explanation for these differing findings might involve the type of business in which the corporation was involved. Researchers have reported, for example, that mock jurors have different perceptions of a corporation depending on its financial motives. When a corporation was engaged in commercial activity, jurors judged it more harshly than when the corporation was non-profit (Hans, 1994). MacCoun (1996) suggested that juries maintain higher standards for corporations, particularly those acting for-profit. To support his contention, he noted that studies have shown jurors treating corporations more harshly than individuals, but individual defendants (when engaged in commercial activity) received equally harsh treatment as corporations. Robbinette (1999) suggested that “if the actor’s identity evokes higher expectations among evaluators, then responsibility judgments will increase” (p. 40-41). It seems possible that people have higher expectations for corporations acting for-profit and therefore judge them more harshly when they do not meet those expectations. Robbinette went on to suggest that jurors not only determine whether a defendant’s action (or lack thereof) caused a certain consequence, but jurors must also consider “what the actor should have done, given his or her social position” (p. 8, emphasis in original).

Research examining corporate social responsibility (“CSR”) seems to support this contention. Vlachos, Tsamakos, Vrechopolous, and Avramidis (2008) investigated how poor CSR might affect consumer impressions and behavior. Their analyses revealed negative effects associated with poor CSR. The more suspicious a consumer was, the more s/he considered multiple CSR attributions, which negatively affected attitudes (e.g., trust) and behaviors (e.g., patronage). Wagner, Lutz, and Weitz (2009) also noted that inconsistent CSR information can fundamentally affect consumers. The more inconsistent information available, the more negatively consumers perceived the corporation. A corporation trying to save face when facing a civil or criminal action might benefit from having a representative at trial. Following this logic, a corporate defendant engaged in noncommercial activity should receive more lenient treatment. MacCoun (1996) did not find this, however. Instead, he found that, when engaged in personal activity, participants judged corporations more harshly than wealthy individuals. This finding seems to lend further support to the idea of an “anti-corporate bias” expressed by juries.

Another way to reconcile the findings is to consider that Hans and Lofquist (1992) focused on the plaintiff-versus-defendant comparison, whereas MacCoun (1996) and others have focused on the type-of-defendant comparison. Jurors might perceive corporate defendants more favorably than plaintiffs, while simultaneously perceiving corporate defendants less favorably than individual defendants.

### *Presence at Trial*

To date, only one study that we know of has actually examined reactions to a defendant’s presence at trial in a jury simulation study in a civil trial. In a series of two experiments, McGorty (2004) examined the effects of corporate presence (or absence) in the courtroom, corporation size, and damage severity (Experiment 1). In Experiment 2, McGorty again examined the effect of corporate presence (or absence) in the courtroom, corporation size, and professional relatedness of the offense.

She operationalized corporate presence/absence as whether a high-ranking corporate official sat with counsel during the trial. For example, in both studies, the “corporate-present” condition involved the CEO joining defense counsel at the defense table, whereas the lawyer sat alone in the “corporate-absent” condition.

Corporate presence affected jurors’ perceptions of both plaintiffs and defendants. McGorty (2004, Study 2) reported that mock jurors perceived defendants more positively when a representative was at trial. Absence of a representative, conversely, benefitted perceptions of the plaintiff: Participants reported more positive views of the plaintiff when the corporation had no representative at trial. Mock jurors in the corporate-representative-present condition further reported they would have had more negative perceptions of the defendant had no representative been in the courtroom. Absence of a representative often led mock jurors to wonder about that absence (Experiment 2). This curiosity about defendant absence seems to fall in line with Antonio and Arone’s (2006) research regarding criminal defendant testimony. Perhaps absence leads jurors to question what the defendant is hiding. In terms of damage awards, McGorty (2004) found no major differences in juror damage awards when the corporation had a representative compared to when it did not; that is, the absence of a physically present defendant did not result in higher damage awards. Of course, differences in perceptions of corporate defendants can be important even if they do not influence damage awards, as by influencing judgments of negligence and consumer behavior.<sup>7</sup>

### *Conclusion and Implications for Trial Consulting*

A number of factors can affect the decisions juries make. One of the least studied, yet undoubtedly important, factors in civil litigation is corporate representation at trial. With an increase in business litigation and an increase in public dissatisfaction with corporate wrongdoing, corporations naturally want to do all they can to avoid liability judgments or large damage awards. Fortunately for corporations, empirical research has not borne out the “deep-pocket hypothesis.” Unfortunately for corporations, however, researchers have empirically demonstrated an “anti-corporate bias.” One possible way for corporations to assuage this bias in juries is to have a representative at trial. By putting a face to the corporation, juries might be less likely to see an intangible “it” with whom they feel no connection and begin to see (and judge) the corporation as a person, with whom it might be easier to establish a connection.

Corporations often have a number of tools at their disposal when they go to trial. An individual plaintiff who takes on a corporation might face a Goliath with tremendous financial and personnel resources with which to work. The individual plaintiff, however, has something the corporation does not: an actual physical presence at trial. By physically representing itself at trial, a corporation stands a better chance of winning over jurors.

Trial consultants working on behalf of corporate defendants can, and should, take steps to “personalize” a corporate client at trial. As with many other areas, more research will help clarify the extent to which such personalization can benefit a corporation. Current research trends, however, indicate that providing a physical defendant can affect jurors’ perceptions of the corporation, often to its benefit.

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### Endnotes

- <sup>1</sup> Please address correspondence regarding this article to [Sarah Thimsen](#). We thank Beth Foley for suggesting the idea for the article and for her encouragement.
- <sup>2</sup> Some corporations might be said to have a symbolic face. For example, one could say that Bill Gates is the “face” of Microsoft. However, if a plaintiff sues Bill Gates, then Bill Gates would likely be present at trial; but if the same plaintiff sues Microsoft, then he would probably not be.
- <sup>3</sup> Throughout this article, we use the term “representation” to refer to “standing for” or “embodying” the corporation, and not in the more customary sense of providing legal representation.
- <sup>4</sup> Antonio and Arone (2006) interviewed jurors in capital cases. It is important to note that less severe cases might reveal different results.
- <sup>5</sup> These data are based on interviews of jurors in actual cases as opposed to relying on mock jurors as the research cited above had done. Also, the jurors might have had nonconscious biases.
- <sup>6</sup> This trend might possibly be shifting, however. With recent economic turmoil and the amount of attention corporations (e.g., Goldman Sachs, BP) have received for their bad behavior and its far-reaching consequences, jurors could potentially become more punitive. An employment practices liability attorney, for example, recently reported that she has seen juries, acting in response to the plaintiff's economic difficulties, awarding higher awards to plaintiffs suing for emotional distress (Sclafane, 2010; see also Cronin Fisk, 2011).
- <sup>7</sup> Because McGorty's (2004) study had mock jurors award damages on the presumption of defendant liability, her data do not speak directly to these judgments.

**We asked two trial consultants to offer their perspectives on this article. On the following pages, Jill Holmquist and Bill Grimes provide their thoughts.**

## *Corporate Representation & Anti-corporate Bias Response to Thimsen, McGorty & Bornstein*

BY JILL P. HOLMQUIST AND MARTIN Q. PETERSON

*Jill P. Holmquist, JD President of Forensic Anthropology, Inc. (FAI), has been a trial consultant since 1995. Martin Q. Peterson, PhD is the founder of FAI and has been consulting on trials for decades. FAI, incorporated in 1989, provides a broad range of litigation consulting services nationally for both plaintiff and defense counsel on cases involving matters from personal injury and medical malpractice to complex business transactions and intellectual property.*

Sarah Thimsen, E. Kiernan McGorty, and Brian H. Bornstein provide a great overview of the challenges facing corporate defendants, as well as revealing a few challenges for plaintiffs suing corporate defendants.

Since we work with both plaintiffs and defendants on a wide variety of cases, including personal injury, products liability, contract disputes and patent and trademark infringement cases, we have a wealth of experience dealing with the challenges cases present on both sides and in developing approaches for surmounting them at trial. In our work, we have observed juror decision-making that both conforms to and contradicts the research reported.

Despite the paucity of empirical research on the topic, the authors' recommendation of having a corporate representative at trial to combat anti-corporate bias is generally considered a necessity. We agree and recommend selecting a representative who has clout in the corporation. The jury must understand that this is a senior person who will take responsibility, if necessary, for correcting any problems or deficiencies. The corporate representative is "the hammer"; she must be able to sit in judgment of employees and take action if necessary to right any wrongs.

The corporate representative comes in alone and leaves alone. She does not socialize with counsel and counsel greets her formally with a handshake. The representative, sitting behind counsel table, takes notes on a pad of paper and makes no attempt to discuss what is going on during the day – she remains above the fray. This relieves jurors of the need to send a message to the corporation because the corporation is paying attention.

To bolster the company's seriousness, we often advise corporate clients to take responsibility for whatever errors they made. As the article noted, sympathy for the plaintiff can influence judgment of corporate responsibility. But when a corporate representative communicates empathy for the injuries suffered by plaintiff and accepts responsibility for its role, it becomes more human and less blameworthy.

Plaintiff's counsel, however, can use corporate personification to his advantage. He should call the corporate representative to testify when possible and point out her lack of knowledge when she

cannot—emphasizing the impotence of the “corporate functionary”. Rather than making points with a look at opposing counsel’s table, he should look at the corporate representative to drive home that the plaintiff’s message is to the corporation. He should ask why the corporate representative “is here now but wasn’t there then”. That way, the corporation’s personified presence can be framed as providing the jury the opportunity to tell the corporation what to do to rectify its wrongs.

In our experience, jurors (including mock jurors) willingly ascribe responsibility to corporations for the actions, good or bad, of the people who comprise it. The most common exception occurs when liability is solely based on *respondet superior*. Some jurors balk at holding a corporation responsible for an employee’s independent actions. But plaintiffs can establish liability by linking the solitary actions to corporate policy; the employee’s conduct is an extension of the corporation’s conduct.

Similarly, jurors are willing to attribute human motivations to the corporation. Its people’s motives become the company’s motives. We believe that explains why a corporation’s for-profit or non-profit status makes a difference, why it has social responsibility and why jurors are willing to punish a corporation for bad behavior. Impressions of a corporation’s goodness and the desire to punish arise from moral judgments. Morality is a human standard and jurors readily apply those standards to corporations.

Although we have seen jurors judge corporations as humans, they can be less likely to feel sympathy for a corporation, which might explain harsher juror judgments of corporate actions than individual actions. It is difficult to feel empathy for the consequences of bad behavior to a corporate entity, especially a large one. Because it is difficult to envision corporate “suffering”, its status as an entity can trump personalization. It has no feelings and no emotional hardship, so there is no basis for sympathy.

We suspect that sympathy for the corporation, however, can be vitiated simply by extreme conduct. In criminal cases, the offensiveness of the human defendant’s conduct can squelch any prospect of sympathy for him. Similarly, the desire to punish a corporation or prevent it from repeating egregious conduct could easily outweigh any perceived harm to the corporation, its people or even its customers. It seems logical that the harshness or leniency with which a corporation is judged can stem largely from its actions, rather than its status.

In addition, corporations profit enormously by providing goods and services to the public, which can differentiate them from individuals. We have observed that jurors’ judgments of corporate conduct increase in severity when a company derives great profit at the expense of, and without regard for harm to, individuals.

However, we have also seen jurors judge individuals more harshly than corporations. Pro-tort reform jurors often ascribe improper motives to individuals and invent explanations for conduct they would never attribute to corporations. We have also seen pro-business jurors exhibit lower expectations of corporations out of deference to their right to profit. Caveat emptor suggests that corporations even have the right to engage in somewhat shady conduct and we have seen jurors excuse behavior they might not tolerate in an individual. Perhaps in some way, the depersonalization of a corporation can work to the defendant’s advantage.

Jurors’ judgments about corporate liability and blameworthiness, in our experience, derive from many factors. We hope that the Thimsen, McGorty, and Bornstein article inspires new research that sheds light on how having a corporate representative at trial affects jurors’ judgments about the propriety of individuals’ and corporations’ conduct.

## *Response to Thimsen, McGorty & Bornstein*

BY BILL GRIMES

*Bill Grimes has been a litigation consultant for over twenty years. He has been with [Zagnoli McEvoy Foley LLC](#), Chicago, IL.*

*Putting a Face on the Corporate Defendant* brings to mind what media theorist Marshall McLuhan famously wrote in 1964, "The medium is the message." He was referring to electronic communication beginning to dominate the industrialized world, namely television. What McLuhan meant, exactly, is debated to this day, but communication researchers and practitioners know the *who, when, where and how* often dwarf the *what* of the message.

Thimsen, McGorty and Bornstein reveal the unique dynamic created by the presence of corporate defendants in litigation, but the distinction is probably less in the jurors' eyes than the litigants. True, "a corporation, as a legal entity, has no body and cannot testify," but most jurors, number one, don't think in terms of legal entities, and number two, don't really care that a corporation is an "it." That's a good thing. Jurors think in terms of people and their motivations. As litigation consultant Beth Foley of Zagnoli McEvoy Foley says, "Facts don't sell cases, people do."

While empirical research is lacking in this regard, jury consultants know anecdotally and through post trial interviews that most jurors prefer there be a face of the corporation in court everyday, that it be someone relevant, and that they hear from him/her. [*Whether a criminal defendant should testify or not is a separate matter. Many variables need to be taken into account. This response will not address that issue.*]

As Thimsen, McGorty & Bornstein allude to; who the face of the corporation is requires some thought. Simply assigning a corporate "mouthpiece" is unwise. It's akin to a reporter doing a story on how hurricanes form and National Hurricane Center offering up its spokesman rather than the researcher who flies into the eye of the hurricane. Who would you rather hear from? The researcher has the credibility and better stories. You would feel slighted by the PR person, so would a jury.

Juries will also sense tokenism if the corporate face is someone who really doesn't fit, or doesn't testify. Juries do not necessarily need a senior executive. They are looking for knowledge and accountability.

As *Putting a Face on the Corporate Defendant* reveals, anti-corporate bias exists in the courtroom. A credible, likable, relevant corporate face will help soften that predisposition. And jurors prefer the medium of that message be a "him" or "her," rather than an "it."

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