



Re-channeling Juror Anger

Anti-corporate bias among jurors has escalated in the wake of corporate governance scandals. Overcoming such bias requires a litigation strategy that counteracts and re-directs juror anger.

BY MICHAEL T. BURR

WHEN THE U.S. SUPREME COURT handed down its landmark *State Farm* decision last year, the ruling was expected to bring punitive damage awards under a semblance of control (*State Farm Mutual Auto Insurance Co. v. Campbell*, 123 S.Ct. 1513 (2003)). To a degree, it has. Higher courts have overturned or reduced damages in a number of major cases since *State Farm* — including, for example, punitive damages in a \$1.28 billion antitrust case against Tyson Fresh Meats (*Pickett et. al. v. Tyson Fresh Meats Inc.* (M.D. Ala.A96 1103N (2/17/2004))).

Nevertheless, juries are still using punitive damages as a kind of thermonuclear bullhorn, blasting a message to corporate America. A few recent awards, from various venues and involving different case types, illustrate:

In February 2004, a jury in Tuskegee, Ala., awarded \$1.6 billion to a former policyholder of Southwestern Life Insurance Co., in a matter involving \$3,000 in fraudulently collected life-insurance premiums.

In April, a Texas jury awarded \$1 billion to the family of a woman who died from lung disease blamed on the Wyeth diet drug Fen-Phen, although reportedly the woman was using other diet drugs as well.

In June, a San Diego jury ordered Ford Motor Co. to pay \$368 million to a paralyzed crash victim, including \$246 million in punitive damages.

Although these awards might be reduced or overturned on appeal, they demonstrate that juries still speak loudly and carry a big stick—even after the *State Farm* ruling.

“Juries certainly understand the concept of awarding numbers to get someone’s attention,” says Mike Beaver, a partner with Holland & Hart in Denver, and chairman of the firm’s litigation department.

“When clear evidence of a corporate game of ‘hiding the ball’ exists, jurors speak through high damage awards,” says Karen Lisko, Ph.D., senior litigation consultant at Persuasion Strategies. “Internal memos or emails that even hint at cover-up almost always defeat the most articulate explanation a corporate witness might give on the stand at trial.”

The corporate governance scandals of the past few years have intensified the problem, fueling the anti-corporate sentiment that many jurors bring into the courtroom.

“Sometimes jurors see their job as part of a social movement to punish corporations,” says C.K. “Pete” Rowland, Ph.D., a partner with Litigation Insights in Overland Park, Kansas. “In the current climate, punitive damages are your major concern, even after *State*



Farm. Many jurors are focusing on the punitive question.”

This climate compels corporate litigants—both defendants and plaintiffs—to understand the nature of anti-corporate bias and integrate that understanding into their legal strategies.

“It’s absolutely critical to get control over that bias—and where you can, to use it as a positive force,” Beaver says.

Getting a grasp on anti-corporate bias, however, is easier said than done. Each juror brings a unique set of experiences and perceptions into the courtroom, and generalizing about their attitudes can be dangerous. Moreover, individuals often have shifting and ambivalent feelings about ethical and legal questions.

This ambivalence is illustrated in a study recently completed by Persuasion Strategies, a litigation consulting and graphics service of Holland & Hart. Two-thirds of the 500 potential jurors surveyed said they value personal ethics above the law when considering a company’s conduct. But 55 percent indicated that when ethics and the law conflict, the law should prevail (See “Ethics vs. The Law,” page 33).

Given the complex, conflicting and changing attitudes of jurors today, corporate litigants are studying juries more carefully than ever, and making a concerted effort to present evidence and witnesses in a way that neutralizes anti-corporate prejudices.

SCANDAL AND THE PUBLIC TRUST

During the past few decades, Americans gradually have become more skeptical about the motives and actions of the country’s large institutions. A series of high-profile scandals—from Watergate to Martha Stewart—have caused Americans to lose faith in government, corporations and even religious institutions. And with the recent rash of corporate governance and securities lapses, American corporations in particular have lost face (See “How Companies Rate,” page 36).

“These scandals affected a lot of people,” says Jefferey Frederick, Ph.D., director of jury research services with the National Legal Research Group in Charlottesville, Va. “People lost their jobs and their retirement savings, and jurors coming into the jury pool may have a direct or indirect experience with the results of bad corporate behavior.”

Such concrete examples reinforce and focus people’s negative perceptions, resulting in mistrust of corporations and more cynical attitudes among potential jurors. Indeed, many people today assume corporations are corrupt and deceitful. More than 86 percent of jury-eligible respondents in the Persuasion Strategies study agreed with the statement, “Executives of big companies often try to cover up the harm they do.” More than three-fourths of respondents agreed that if a major corporation could benefit financially by lying, it probably would (See “Liar, Liar,” page 34). Likewise, nearly 73 percent agreed that if someone sues a major corporation, the case must have some merit.

These biases are exacerbated by the primacy phenomenon—i.e., the human tendency to accept the first version of a story that one hears. “While the myth that jurors make up their minds during opening statements is exactly that—a myth—it is true that jurors form strong initial impressions during opening statements,” says Lisko. “Jurors will still use that opening statement as a filter for the evidence that follows it. Trial counsel has to present a compelling story supported by the evidence.”

All these attitudes can translate into a backlash against corporations. As jurors perceive social wrongs perpetrated by corporations, they take it upon themselves to right those wrongs.

“Individuals don’t feel they have a lot of power, especially compared to large institu-



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tions,” says Scott Barker, senior trial lawyer with Persuasion Strategies. “Juries have come to be perceived as the great leveler of society.”

The danger is that juries will attempt to correct broader social inequities by meting out disproportionate punishments in the courtroom. “There’s almost a Robin Hood mentality among juries,” says Matt Milano, Ph.D., president of Jury Focus Inc. in Fort Lauderdale, Fla. “Jurors all want to be fair and do a good job, but in an environment where more people think corporations have wronged the little guy, fairness goes beyond what is happening in the trial. Some jurors want to be fair in a more global sense, and try to balance the scales nationally or globally.”

This is borne out in activist notions among jurors, among whom two-thirds hold corporations accountable to higher standards than they do individuals, according to the Persuasion Strategies study (See “Unwanted Burdens,” page 34). Additionally, in agreements between companies and individuals, jurors assign greater responsibility to companies (57 percent) to ensure the terms of agreements are clear.

But anti-corporate bias affects not just corporate defendants, but corporate plaintiffs as well. “Jurors may be more cynical about the honesty and good intentions of corporate officers on both sides of a case,” says Jane Michaels, a partner with Holland & Hart. “It adds to the trial lawyer’s burden and the corporation’s burden to demonstrate that it was acting in good faith—no matter whether the context is a contract dispute, patent dispute or any business matter. Corporations need to reverse the biases that jurors might have, and that’s a bigger burden than the law might otherwise impose.”

In short, corporate litigants bear a singular burden to establish their credibility in the courtroom—no matter how clearly the judge instructs jurors about the presumption of innocence. “Because corporations must overcome jurors’ distrust,” says Shelley Spiecker, Ph.D., senior litigation consultant at Persuasion Strategies, “today’s corporate litigants bear a *de facto* burden of persuasion greater than any burden of proof.”

UNVEILING BIAS

While generalizations about anti-corporate bias are helpful tools for understanding the nature of the problem, using this understanding to develop a litigation strategy requires more careful consideration of jurors’ views. “If you want to predict someone’s behavior, you should look at their attitudes,” Milano says. “If you can’t get directly at their attitudes, demographics can help you to estimate.”

Demographics can be a treacherous tool for predicting behavior. However, analyzing demographics along with other data from the Persuasion Strategies study reveals a complex and evolving picture of attitudes toward corporations.

First, across age groups, jurors prioritize the law over ethics when considering a company’s conduct, but jurors age 65 and older lean the furthest toward the law, while those age 35 to 64 were most likely to emphasize ethics.

Additionally, background and ideology affect perceptions. Jurors with more education are less likely than their less-educated counterparts to agree that if someone sues a major corporation, the case must have merit. Political conservatives and people who pay attention to financial news are significantly more likely to agree with the statement, “Business executives share my values.”

Even geography can have an effect on juror attitudes. Those who live in a community that benefits strongly from corporate citizenship, for example, may be less apt toward an anti-corporate bias. Similarly, the types of industries that prevail in a given region can affect how jurors from those areas view corporations and the agencies that regulate them.

For example, in the industrial Midwest, which has had a manufacturing-based economy for generations, potential jurors are likely to be familiar with OSHA regulations and believe OSHA is a strong, effective organization. The opposite may be true in an area like the Southwest, with its dramatically different economic history.

“Corporate defendants should take advantage of jurors’ favorable views toward government regulators by demonstrating how they not only met, but *exceeded* regulatory standards,” adds Spiecker. “Doing so allows some of regulators’ positive credibility to carry over to a corporate defendant.”

Overall, however, jurors seem to have vague notions about government agencies and officials. Nearly 65 percent of respondents in the Persuasion Strategies study, on average, expressed a favorable opinion about various government agencies, but only 47 percent had a favorable opinion of government officials. Such ambivalence illustrates the potential difficulties in attempting to unveil unfavorable biases.

Litigation counsel have two primary tools for identifying biases in a given jury pool—mock trials and the *voir dire* process.

Mock trials and focus groups offer several advantages for litigants, and are increasingly recognized as useful tools for vetting out a case very early in the process, even before discovery begins. “Doing focus groups right at the beginning helps you to learn if you have a drop-dead loser, a strong case or something in the middle,” says Barker of Persuasion Strategies.

As a sneak preview of a potential outcome, the results can be useful in a mediation proceeding to support a settlement position. At the very least, the knowledge gained can help litigation counsel to map out a broad direction to pursue in the case—whether it’s a cut-bait settlement or a bet-the-company litigation. And exercises are useful in their ability to help counsel ascertain what aspects of the case might be strongest or weakest, and to provide insight into the potential for anti-corporate bias in the jury pool. One of the best ways to evaluate a case is to observe mock jurors deliberate case issues. “Jurors filter the evidence through their own values and sense of fairness,” says Spiecker, “which tells you not only which facts are important, but why and how they are important.”

JURIES, ETHICS & THE LAW

Jurors’ perspectives on ethics and the law have undergone significant changes in the wake of recent corporate governance scandals.

In Persuasion Strategies’ April 2004 survey of 500 jury-eligible adults, 55 percent of respondents indicated that the law should have the final word when questions of ethics and the law conflict. This figure was consistent with attitudes observed by Persuasion Strategies in its mock-trial research before Enron collapsed in 2002. But in the interim, attitudes changed markedly. A Persuasion Strategies study conducted in February 2003 showed that only 23 percent of respondents chose the law, and 76 percent said personal ethics should take precedence (See “Ethics vs. The Law”).

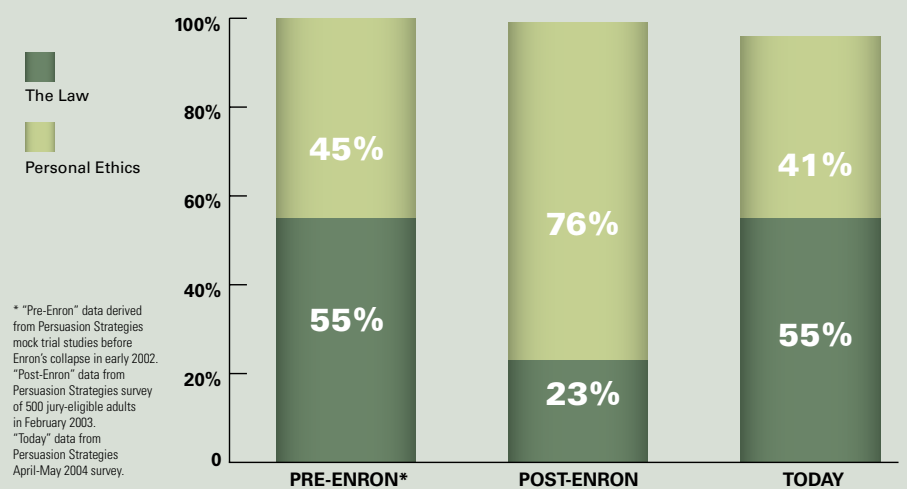
Also unclear are jurors’ opinions about who bears the responsibility for enforcing laws and ethical standards. Fully 72 percent agree with the statement, “The government needs to police corporations more these days,” but nearly 41 percent also agree that, “The government has gone too far in regulating business.”

Additionally, compared to earlier research, the 2004 survey indicates that jurors are somewhat less focused on the need for government oversight than they were in early 2003. In the 2004 study, 42 percent of respondents strongly agreed that “the government needs to police corporations more these days,” but in the 2003 study, 57 percent strongly agreed with the same statement (See “Regulatory Responsibility”).

These changes might signal a remarkably quick return to pre-Enron attitudes about ethics versus the law. But jury experts caution that the long-term effects of Enron and other governance scandals remain unknown. Of course, there have been major corporate scandals in America before that have generated considerable public outcry. But for a variety of reasons, gradually the public cooled down and turned its attention to other matters. The same process may occur this time, too. However, there is a significant difference with the recent wave of scandals. Because the recent governance misdeeds directly affected many people’s retirement savings—and, therefore, their long-term plans—they could continue influencing jurors’ attitudes for years after the show trials themselves are forgotten.

ETHICS VS. THE LAW

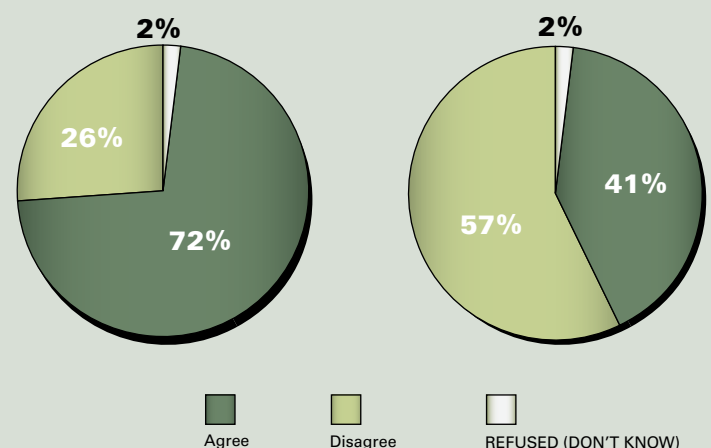
When personal ethics and law conflict, which of the two should be followed?



REGULATORY RESPONSIBILITY

The government needs to police corporations more these days.

The government has gone too far in regulating business.





Using this information, litigators can evaluate the case, discover vulnerabilities and take steps to strengthen presentations. Then, when the time comes to select jurors, litigation counsel will have a clearer idea of what biases and perceptions are most prevalent in a particular jury pool, and therefore most important to unveil in the *voir dire* process.

"If you are in a jurisdiction where there is a strong, favorably perceived corporation, people may have less animosity toward corporations," Barker says. "Biases play themselves out in different ways. You have to factor in the strengths and weaknesses of the plaintiff's case, what they are asking for, and on what basis."

In the jury-selection process, litigators should be careful not only to weed out anti-corporate jurors, but also to retain those jurors who might have balancing viewpoints. Unveiling these perspectives, however, isn't always easy.

"Attorneys are often too afraid to ask about attitudes, fearing that they'll plant a bad attitude that wasn't there before," notes Ken Broda-Bahm, Ph.D., senior litigation consultant at Persuasion Strategies. "But for *voir dire* to serve the critical function of addressing juror bias, those attitudinal questions need to be asked." In order to avoid introducing negative themes, Broda-Bahm suggests asking jurors open-ended questions about their views and experiences with corporations and including questions which give jurors two options. "For example, 'Some feel that a profit motive is mostly bad, and others feel that it is mostly good. How many of you are in that first group?'"

In practice, jurors' skeptical attitudes toward corporations may be mixed with skepticism about plaintiffs who bring frivolous lawsuits or who make unreasonable demands. The Persuasion Strategies study shows that negative bias toward personal injury lawyers is almost as strong as negative opinions about corporate defenders. Specifically, 51 percent of respondents indicated unfavorable impressions toward personal injury plaintiff lawyers, compared to 57 percent reporting

unfavorable impressions of corporate defense lawyers.

"Jurors may think the plaintiff is goldbricking in the courtroom, trying to play off the anti-corporate bias," Barker says. Accordingly, litigation counsel should ask jurors questions that probe their opinions about plaintiffs and trends in damage awards.

"In jury selection, it has become increasingly important to look very carefully at jurors' attitudes toward punitive damages," says Rowland of Litigation Insights. "There's a tendency to make mistakes in jury selection by overreacting to increasing distrust of corporations, and overlooking the tort-reform track that runs parallel to the anti-corporate track." Eliminating jurors who might feel betrayed by corporations, but who haven't abandoned their conservative views on damages, can result in a jury with a stronger impulse toward punishment than might have been the case before the collapse of Enron.

Navigating this issue can be tricky, because revealing jurors' concerns about punitive damages can compromise their status in the eyes of the plaintiff's counsel. This sensitive issue should be addressed carefully by using a questionnaire from the court, not by questions in oral *voir dire*.

RE-CHANNELING SKEPTICISM

Understanding jurors' anti-corporate bias is one thing. Applying that understanding to a litigation strategy is quite another. Between conflicting perspectives and unpredictable effects, litigators can face a significant challenge in presenting the client's case in the optimal light.

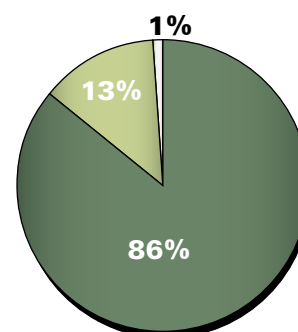
The first—and arguably most important—actions occur before any complaint is filed. Namely, corporate legal counsel ensure that ethical and legal standards are understood and enforced within the organization. Concordant with today's corporate governance regulations, companies must demonstrate their due diligence by documenting efforts to ensure forthright behavior. Such documentation can be helpful at trial in establishing the company's conscientious practices, and overcoming jurors' anti-corporate biases.

Once a case reaches the courtroom, the first impression that a litigator makes may be the most important one—considering the potentially deadly combination of anti-corporate bias and the primacy phenomenon.

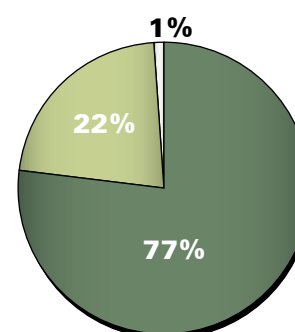
"It puts tremendous importance on the ability to get your story across in the opening statement," says Michaels of Holland & Hart. "The role of a good trial lawyer is to establish a rapport with the jury at the outset. Put a human face on the corporation. Get the

LIAR, LIAR

Executives of big companies often try to cover up the harm they do.



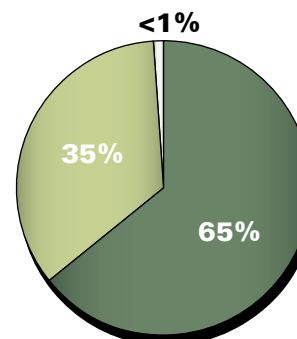
If a major corporation could benefit financially by lying, it's probable that it would do so.



Agree Disagree REFUSED (DON'T KNOW)

UNWANTED BURDENS

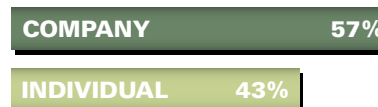
Corporations should be held to a higher standard of responsibility than individuals are.



Agree Disagree REFUSED (DON'T KNOW)

In an agreement between a company and an individual, how would you assign responsibility to ensure that the terms of this agreement are clear?

Using 100% as your total, how much responsibility, as a percentage, would you assign to.....



SURVEY METHODOLOGY

To obtain the information cited in this article, Persuasion Strategies surveyed 500 jury-eligible adults throughout the United States between April 20 and May 3, 2004. A random-digit dial method was used to reach a statistically valid representative sample of households. Screening questions were used to ensure respondents were jury eligible.



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Tactics for Combatting Anti-Corporate Bias



The best defense is almost always a *thematic offense*. Assuming a de facto burden of persuasion, showing why you are right legally as well as factually, and incorporating your case *weaknesses* into your proactive story

are the keys to success in any legal setting.

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You must first prove that the corporation did the right thing. You must do so by presenting witnesses who can *tell that story simply and powerfully*.

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When you're trying to spot and strike the anti-corporate juror, what you don't see matters most. Nothing matters more than the *attitudes* of the potential jurors on your panel. Look out for those jurors who are most likely

to begin with a presumption of wrongdoing and hold defendants to a higher standard of corporate behavior.

Kenneth Broda-Bahm, Ph.D.

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Aim your themes and message toward your tougher audience on the jury. Plaintiff-oriented jurors need to hear that your corporate behavior was *just* and *right*, rather than simply hearing you defend your actions as *legal*.

Karen Lisko, Ph.D.

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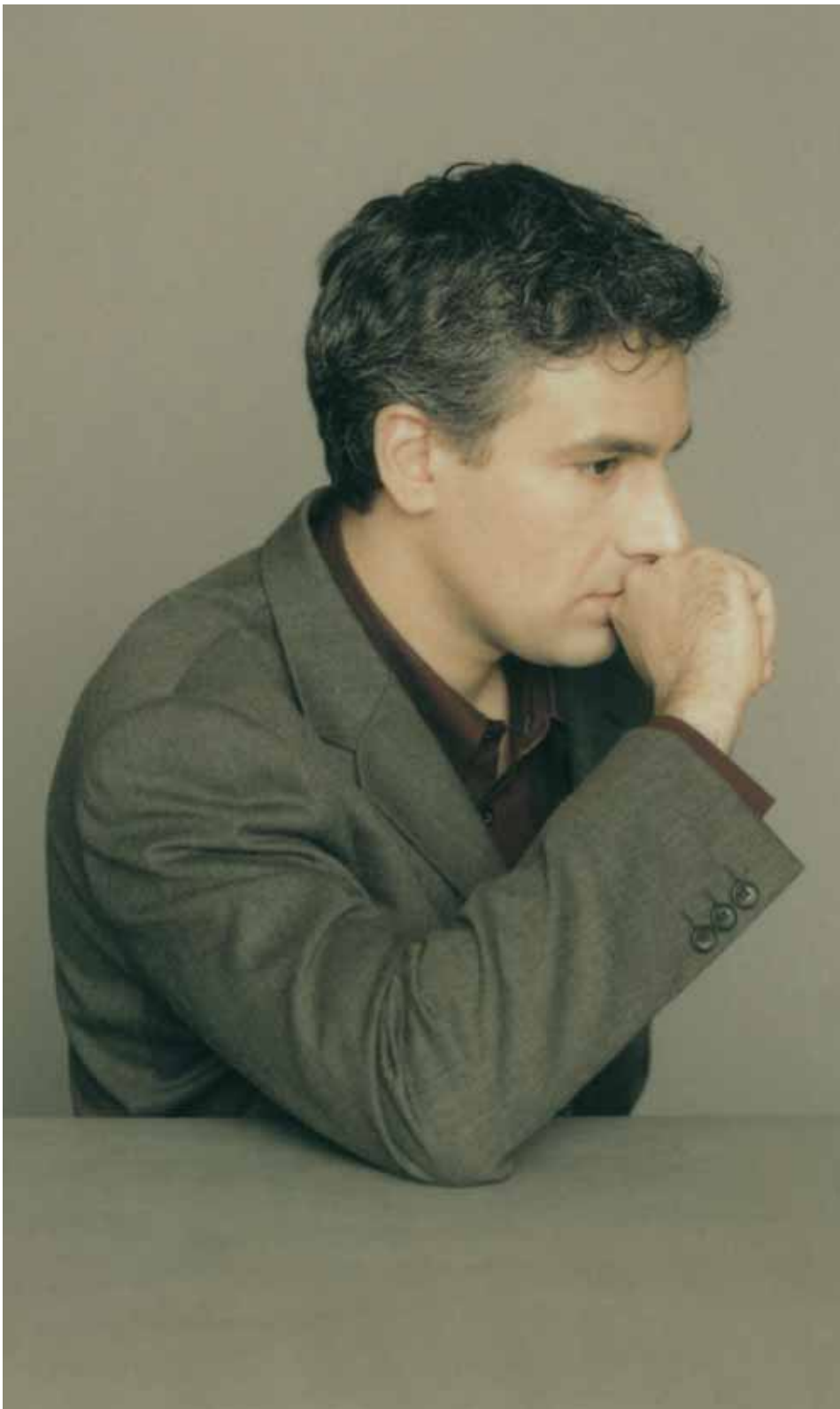
While the opening statement provides the most important chance to accomplish these goals, every corporate witness that a litigator puts on the stand will affect the jury’s opinions of the company. “Witnesses need to be prepared to explain their actions and answer tough questions,” Michaels says. “They need to come across not just as corporate automations, but human beings who want to do the right thing.”

Accomplishing this requires litigation counsel to choose the correct witnesses and help them prepare to represent the company’s interests at trial. “The idea that you can just stick your CEO or CFO up there without very careful preparation, from both a substantive and communications perspective, has always been wrong,” Rowland says. “But in today’s climate, it’s an even bigger mistake.”

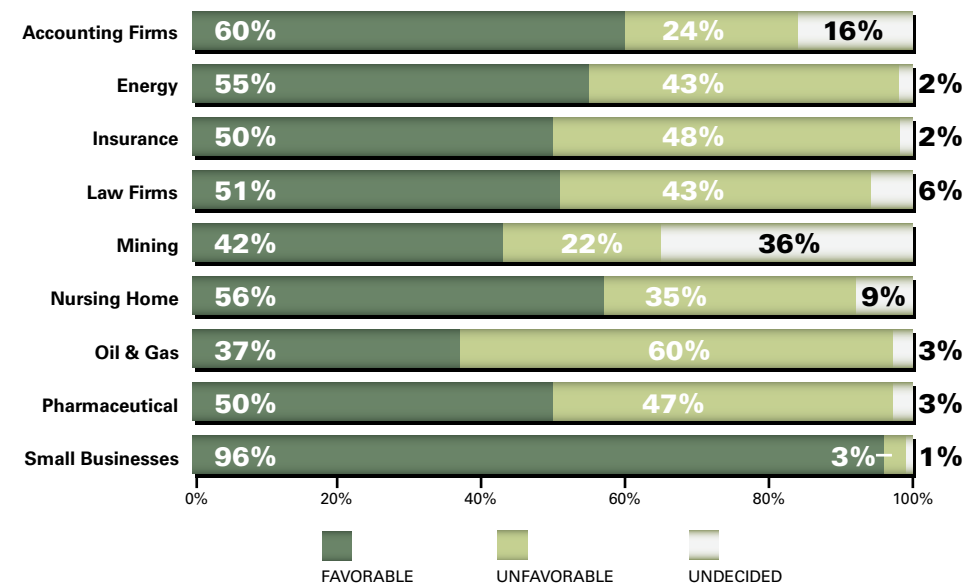
“Corporate defendants who present themselves to a jury have a positive persuasive burden to prove that they set and meet high standards,” concludes Broda-Bahm. “They need to convince jurors that they behave honestly, ethically and responsibly.”

First, witnesses need to have first-hand knowledge of the matters at issue. While jurors might be impressed by the CEO, they will be able to discern if that person was uninvolved in the situation. Contrariwise, picking a functionary employee is unwise when a higher-level person can tell the story, because it sends the message that the company is not taking the matter as seriously as it should. This can cause jurors to decide that the company’s senior executives haven’t learned their lesson, and that harsher treatment is justified.

Second, corporate witnesses need to present the company’s story in a way that jurors will understand and appreciate. “The difficulty with having the top person on the stand is that such people tend to be blunt, direct people who don’t beat around the bush,” Milano says. “They are not used to being questioned in the way they will on the stand, and they can come across as arrogant.” This result can cause jurors to conclude that the company’s leaders are aloof to the concerns of others, and therefore they need to be taught a lesson.



HOW COMPANIES RATE



Additionally, corporate witnesses need to overcome the anger and frustration of being involved in a legal conflict, and focus on presenting the human side of the corporate conduct in question. “We have all talked for years about the need to humanize our corporate clients, but now we have more sophisticated ideas about how to do that,” Beaver says. “It includes things like communicating values.” Skeptical jurors, he explains, often believe that a corporation lacks values. Seeing corporate witnesses on the stand, talking about how their decisions reflect the corporation’s values, helps jurors to recognize that corporations do indeed have values.

At the same time, corporate witnesses should also acknowledge errors that have been made, and express how those errors conflict with the corporation’s standards. “When a company witness says, ‘That’s not the way we want to do things, and it shouldn’t have happened that way,’ it humanizes them,” Beaver says. “It’s often not the ultimate issue, but admitting the mistake disarms juror prejudice.”

Further, when a past mistake has generated negative publicity for the company, litigation counsel should take the initiative to raise the issue, rather than allowing the opponent to bring it up. A direct approach works best. If there are any possible corporate connections with previous corporate scandals, counsel should bring them up, lay them openly on the table and try to defuse them as soon as possible. The best time to accomplish this goal is during jury selection.

While corporate witnesses should admit wrongdoing where appropriate, these admissions should be presented in a context of an overall “good company” case. The opening statement and the witness testimony that follows should focus on the company’s good faith, its compliance with the law and its adherence to ethical principles.

Finally, litigators and corporate witnesses should take pains not to appear spiteful or combative in court, because such behavior reinforces the notion that corporations are mean and valueless. On the other hand, when a corporation’s lawyers and witnesses behave graciously and humbly—by owning up to human failings and expressing a commitment to ethical values—they serve to counteract anti-corporate biases among jurors.

Indeed, the barrage of negative publicity over the past few years actually might have lowered the bar for most companies. To the degree jurors actually expect companies to behave dishonestly and unethically, witnesses who reveal the company’s better nature can serve to turn anti-corporate bias toward their favor.

In other words, as Beaver says, “Exceed juror expectations, and you can re-channel their skepticism.”

The preceding article is an analysis of results collected by Persuasion Strategies in April 2004. Additional survey results and analysis are available at www.persuasionstrategies.com/litigationtips.

Persuasion Strategies, a service of Holland & Hart, LLP, is an integrated team of nationally recognized litigation consultants, graphics and video professionals and trial attorneys whose collective work spans 45 states and more than 60 years. Their diversity of experience combined with national litigation expertise fuels their ability to understand the nuances of jury, judicial and arbitrator decision making. For more information, please contact Karen Lisko, Ph.D., at (303) 295-8393 or visit www.persuasionstrategies.com.



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