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**David vs. Goliath – How and Why to Personalize the Corporate Client in Litigation**

**I. Background**

**#1 Emotion motivating a runaway jury verdict? Anger.**

The primary motivator of a runaway jury verdict of any kind is juror anger – not sympathy. Juror anger is the most dangerous of all emotions to the defense. Leveraging sympathy for an injured plaintiff at trial can certainly result in a favorable verdict for the plaintiff. However, when a jury runs away with a verdict or awards an astronomical figure, it is due to juror anger.<sup>1</sup> A juror experiencing anger is much more likely to make punitive attributions towards a defendant compared to a juror who is not.<sup>2</sup> When a juror feels angry, his or her ability to empathize with a defendant is greatly hindered.<sup>3</sup>

**What do juries typically know about corporate defendant at the end of trial?**

In a typical trial, the jury knows nothing about the corporate defendant other than they hurt someone. In many cases, plaintiff makes an effort to paint the corporation as a greedy, deep pocketed institution that does not care about plaintiff. In fact, using the Reptile Theory, plaintiffs’ attorneys will go even further to anger the jury. For example, in a case involving a slip-and-fall in a retailer, plaintiff’s attorney may imply the company puts profits over safety, wants a “discount,” or simply does not care about customer safety.

**What should the jury know about your company?**

In the face of plaintiff’s attacks against the corporate defendant, the defense must have a strategy to humanize the corporation. Getting a jury to identify with your corporate client is critical, especially when it comes to damages. Why? Jurors will impose higher damages awards against corporate defendants when they cannot relate to the corporation on a human level.

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<sup>2</sup>Lerner, J.S., Goldberg, J.H., & Tetlock, P.E., (1998) Sober second thought: the effect of accountability, anger, and authoritarianism on attributions of responsibility. *Personality and Social Psychology Bulletin*, 24, 563-574.

<sup>3</sup> Winterich, K.P., Han, S. & Lerner, J.S. (2010) Now that I’m Sad, It’s Hard to Be Mad: The Role of Cognitive Appraisals in Emotional Blunting. *Personality and Social Psychology Bulletin*, 36, 1467-1483.

Without that connection, a corporate defendant runs the risk of being viewed as a faceless brand name with a big bank account. Instead, the defense must demonstrate the company is a conscientious, cooperative member of society. The company's mission, values, community engagement efforts, and details of the people who make up the brand should all be communicated through the course of trial.

## **II. Why personalize the corporate client?**

### **Consumer Driven Society**

We live in a consumer-driven society that runs on business brands. Think about the number of products you use every day. Whether it is the toothpaste you use to brush your teeth, the car you commute in, or the coffee you drink every morning, some type of business creates essentially everything you consume. Yet, we would venture to guess you do not normally think about what lies behind the brand name of the products you use. It would be unnatural for people to contemplate the history of the companies that produce those products. The stories of the employees and officers who comprise those businesses, the corporate values and visions, and how such businesses effect or transform the communities in which they operate. But this is exactly the type of information that enables jurors to relate to corporate defendants.

Getting a jury to identify with your corporate client is critical, especially when it comes to damages. Why? Jurors will impose higher damages awards against corporate defendants when they cannot relate to the corporation on a human level. Without that connection, a corporate defendant runs the risk of being viewed as a faceless brand name with a big bank account. In California, the defense can of course request the judge instruct the jury that a corporation is "entitled to the same fair and impartial treatment" as a human being [CACI 104]. Nevertheless, it is very dangerous to rely on the law without a personal connection to your business client. Claims professionals and defense counsel must partner together to develop the corporate story and provide the jury with a basis to identify with the insured client. This story should include a corporate representative who is present every day of trial. The story telling itself will take place during jury selection, opening statement, witness examinations, and closing argument.

## **III. How to personalize the corporate client**

### **Corporate Representatives**

Selecting a corporate representative is an important decision. He or she will be the face of your insured client's business. You will want this person to be present during trial proceedings as much as possible, hopefully every day. This person may never testify, but they will serve as a representative in the courtroom the jury can use to tie a face to a defendant company. Of course, make sure this individual has a pleasant demeanor and cares about the company. Claims professionals and defense counsel should select and prepare this individual before trial.

Having the corporate representative present through each and every day of trial proceedings creates a lasting impression on the jury. Their presence will demonstrate to the jury the business cares about the lawsuit and is equally invested in the outcome, thereby humanizing the corporation.

## **Voir Dire**

Jury selection is the defense's only opportunity to weed-out prospective jurors who hold anti-corporate sentiments. It is also the defense's first opportunity to begin telling their corporate story.

While typical jury instructions advise California jurors they must "not let bias, sympathy, prejudice, or public opinion influence your verdict" [e.g., CACI 100], the reality is no one can completely leave their biases at the door when they walk into a courtroom. It is impossible. For this reason, it is crucial to question prospective jurors about their feelings towards corporations, whether they think they should be punished (regardless of whether there is a claim for punitive damages), and whether there are any personal or family experiences that could lead them to view corporations in a negative light.

The questioning should also begin to incorporate background facts about your client's business. This will set the stage for when the full corporate story comes out during trial. You want to begin to frame your client's story as early as possible. The earlier you do, the more likely the jury will remember the information.

By discussing potential voir dire questions in preparation for trial, claims professionals and defense counsel will ensure the insured client's story is presented effectively from the outset.

## **Opening Statement**

The best time to tell the full corporate story is during opening statements. Plaintiff attorneys typically focus on the defendant's conduct during their opening statements, not the actions of the Plaintiff. For this reason, defense counsel should utilize opening statements to reframe the story. Part of reframing the picture presented by Plaintiff's counsel involves telling the jury about the history of your corporate client's business and the corporate representative sitting in the courtroom. It also involves telling the jury about the business' mission, its purpose, and what it has done for the community. You want the jury to hear this story from the very beginning, as it will shape the way jurors view the evidence presented during trial.

## **Witness Testimony**

Depending on the defense strategy developed by defense counsel, the claims professional, and the insured client, the defense may not end up calling any corporate client witnesses for examination. This was the case described above in *Howell*.

If, however, the defense intends to question a corporate witness, make sure to remind them of the business' history during preparation. During trial, ask them questions about the company's story and contributions to the community. Also, elicit testimony from the witnesses about their personal involvement in the company, and what it is they love about their job. Such testimony fosters a connection between the jury and the corporate defendant. It humanizes your client.

## **Closing Argument**

For all of the reasons set forth above, do not wait until closing arguments to convey the corporate story. Delaying this story until closing will simply be too late to have any real impact on the jury. Furthermore, the defense runs the risk of never being able to tell the tale if counsel does not present sufficient evidence to support it during the defense's case in chief. Reiterate the good the corporate client has done for the community and solidify a connection between the jury and the company. Counsel must tell the jury what an honor it has been to represent the company and how thankful they are for the attendance of the corporate representative.

## **Takeaway**

Personalizing the corporate client is an essential defense strategy to reduce potential exposure at trial. Putting a face to a company name with your corporate representative and weaving your corporate story throughout trial, will diffuse juror anger, appear reasonable in your defense arguments, and minimize the likelihood of a runaway jury verdict.