



Corporations Have Feelings Too: Personalizing the Deep Pocketed Defendant

(Session: “Personalizing the Corporate Defendant”)

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Juries tend to be biased against corporate defendants based on the notion that corporations are motivated only by profit. And juries are more likely to award damages against defendants which possess vast resources. While there is not a single approach that should be applied in all cases, this paper suggests some general strategies when defending a corporate client before a jury. Because each case involves a different plaintiff and case-specific injuries and damages, each strategy needs to be evaluated on a case-by-case basis.

With that said, the best strategy for representing a corporate defendant is to “humanize” your client by focusing on “people”: the individuals who work for the corporation and those who are helped by your client’s products or services. Your client representative needs to focus on presenting the human side of the corporate conduct in question by talking about values and how these values direct the company’s decisions.

Humanizing the Corporate Client Starts with You

Be very careful to present *yourself* and your *client* as gracious and humble by acknowledging human feelings and demonstrating a commitment to values. The jury will form its *initial* opinion about the company based on its perception of *you* as the corporation’s lawyer. Then, with every corporate witness you offer at trial, the jury’s initial impression of the company will be solidified. They need to come across not just as a corporate employee; but as a person who wants to do the right thing.

Selecting Your Corporate Witness

Jurors are considered to be “peers” in the community who are charged with deciding issues of fact that affect the litigants. The problem is that most jurors do not consider themselves “peers” of a corporation or the executives who run the company. Part of your job in selecting a corporate representative is to identify someone who is personable, someone with whom the jurors can relate to, and someone who shares the jurors’ ethics, values and view of responsibility.

The careful selection of the corporate representative should be made early in the case. You should consider the selection process like an interview and should have a template of what qualities you are looking for in your “ideal” witness. In litigation, “Plaintiff” is always the plaintiff. But, as the corporate defendant, you get to choose who will “be” the company. The corporate witness must know the ins-and-outs of the company and be able to describe what the company is about, how it has contributed to the community, how much its employees like working there, what honors the company has been awarded, what the company has done for the marketplace, and how it has addressed the plaintiff’s alleged complaint or issue.

In choosing your corporate representative, consider which *person* you would like to put on trial. A jury is less likely to find fault and legal responsibility in a *person* it likes, as opposed to an impersonal corporation, which is, in reality, simply a legal designation.

It would be wrong to assume that just because your witness is employed by the company that he/she is adequate. And, do not fall into the trap that the highest-level executive is the best-qualified witness to testify. The executive may not have the necessary firsthand knowledge--or time to be extensively prepared--of the matters to which he/she will testify. Jurors may be impressed by the CEO or Chief Engineer, but there is a high likelihood that the jury will also assume this person is not personally aware of the issues in your case. Your witness will be forced to explain why he/she does not know the specifics of the case, which will detract from the message you are trying to convey about the company. Jurors expect corporate representatives who testify to have a good understanding, if not direct involvement, in the litigated issues. Second, if a high-level executive is called, the jury will impart knowledge of the problem to the highest level of the company. This will unfairly legitimize the issue and necessarily justify an explanation why the highest in command did not respond.

On the other hand, seeking a “professional witness,” who was designated only to tell the company story, may give the jury the impression that the corporation is not taking the plaintiff’s allegations seriously.

You should also consider the demeanor of your potential corporate witnesses. Business owners and executives tend to have personalities that make them well-suited for running a company, but not for conveying compassion. They tend to be blunt and emotionally detached because their job requires these qualities, which can create an impression of the company as being cold and uncaring. And, if there are weaknesses in your client’s personality or appearance, do not try to hide those “deficiencies.”

Corporate witnesses should go to great lengths not to appear spiteful just because a lawsuit has been filed against it. Otherwise, your client will simply reinforce the jury’s belief that corporations are mean and not willing to accept criticism. Your witness should not be dismissive of the plaintiff’s allegations, regardless of how far-fetched they seem. The problem is that most jurors do not know the law, the corporate culture, or the industry, but they will want to know whether the company has, at least, considered the alleged issue and given it careful consideration before dismissing or disregarding the complaint.

Voir Dire

To properly address anti-corporate bias, do not ignore the importance of determining potential juror attitudes. Anti-corporate bias is real. Your primary task in *voir dire* is to eliminate jurors who already come to trial biased against your client. You must ask questions that identify what reputation, if any, precedes this particular case. You should also determine whether your client has a history of “questionable” business practices *unrelated* to the litigation that will negatively impact the jurors’ treatment of your client in the subject litigation.

You must also introduce your trial theme and the corporation’s “story” during *voir dire*. Accept the persuasive burden to tell the *positive* story about your client that differentiates it from other companies that might come to the jurors’ mind.

Opening Statement

Do not miss the opportunity to personalize the corporation during your Opening Statement. From the beginning, express to the jury your *personal* pride in representing your corporate client and the confidence you have in its employees. If the jury has been pre-instructed regarding its treatment of your client, briefly remind the jury of the equal treatment your client deserves, but emphasize that your corporate client is really comprised of conscientious individuals, doing the best job they can. For example, identify by name the individuals responsible for the design and manufacturing processes and explain how individual company employees perform their jobs with great care and concern for the consumers.

The plaintiff will attempt to characterize your corporate client as a greedy, financially motivated conglomerate serving only its own self-interest. Internally embrace the stereotype, *then* work aggressively to disprove it. The plaintiff's stereotype will lead to distrust because it will not match the quality of the witnesses and reality you will present.

In most cases, a plaintiff's attorney will tell a compassionate story requiring sympathy. They will make the jurors want to "take care of" or "make-up for" what happened to the plaintiff. The plaintiff's attorney will emphasize the natural feelings of sympathy and revenge. Your job as the defendant's attorney is to acknowledge the feelings of sympathy and compassion, but shift the focus to target "higher" emotions like fairness, justice and honor to the American rule of law.

While the plaintiff has sympathy on its side, the defense has justice and fairness, which typically override sympathy. One can feel sympathetic, without assigning blame to your client, especially if your client acknowledges the harm, without accepting responsibility for it. Sympathy depends on the situation or the person. Justice and fairness are not fact specific. If the jurors dislike the plaintiff, despite the level of harm, jurors will often find a way to support fairness. Your job is to simply give jurors a basis for making a difficult decision easy.

Again, if the jury has been pre-instructed, mention the duty to set aside sympathy, prejudice, and bias.

California Jury Instruction 100:

You must decide what the facts are in this case. And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom. Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

Because the plaintiff gives its Opening Statement first, the tendency for defense attorneys is to respond point-for-point to the plaintiff's story. Buck this trend and tell a completely different story, forcing the jury to pick which story to believe. The more attention the defense gives to the plaintiff's case, the more attention the jurors will give it as well. Responding point-for-point in Opening Statement necessarily assumes that jurors will keep an open mind and will be able to keep separate the plaintiff's version of events until the defendant's case-in-chief. A point-for-point strategy keeps the jurors' focus on the conduct of the corporation. You end up defending (*i.e.*, making excuses for and justifying) the conduct, instead of telling your own company's

story. A point-for-point Opening Statement simply sets up a negotiation or a compromise during deliberations. Do not ask jurors to wait until they hear both sides of the same story. Doing so assumes that jurors can and/or will wait. However, telling the same story (with two sides) invites jurors to adopt facts from both sides *of the same story* to create a composite story which will require jurors to negotiate both liability and damages using facts and arguments from both sides. Instead of re-telling the plaintiff's story with a few "defense-friendly" twists, it is better re-frame the story with a different sequence of events, different cast of characters, and the full version of the corporation's decision-making analysis.

In telling its story, the plaintiff will attempt to characterize your corporate client as a greedy, financially motivated conglomerate serving only its own economic interests. The plaintiff's strategy to characterize your client in this way will simply open the door for you to paint a completely different picture. At the end of your story, your client should not be viewed as some nameless, faceless conglomerate concerned only with making money at the expense of the safety of its customers. They will view the corporation as the *person* you selected to represent the company.

Closing Arguments

In addition to highlighting the key evidence presented, your Closing Argument should remind the jurors of the *individuals* who testified "as the corporation." Work to solidify the juror's perception that corporations are comprised of real people who work with honest motivations. Assuming you have conducted yourself in such a way to endear the jury to you, you can emphasize the personal involvement by using words like "we" and "our."

The best strategy is to convince jurors that it is in the corporation's economic interest to do the right thing. Jurors must conclude that all business decisions were made by fair-minded people, and not corporate flow charts and Profit and Loss balance sheets.

Conclusion

Where there is a deep seeded anti-corporate attitude, your goal is to differentiate your client from other corporations. You will not alter deeply held philosophies and convince jurors they have been wrong all this time. But, you may convince them that those attitudes should not be applied to your client.