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From Selection to Summation: Preparing for My First Jury Trial

By Siobhan Briley

These days, *bona fide* trial attorneys could have a whole career of bench trials and not a single jury trial. Or they could find themselves 15 years into their careers, having tried dozens of cases, faced with an experience that years ago was the exclusive province of the young lawyer: their first jury trial. Which is where I find myself now.

I have plenty of bench trial experience. I've tried numerous cases on a variety of legal issues in federal and state courts. I am familiar with most of the judges in my judicial district, and I generally know what to expect when I'm preparing for trial. But, when the jury is added to the mix, I'm back at square one. *How do I pick a jury? What am I allowed to ask? What am I not allowed to ask? How long does it take? Is voir dire reported? How do I present my opening statement? How do I examine my witnesses so the jury is engaged and not bored? What about objections? How much can I say in support of my objections in front of a jury? Will I remember everything I need to remember? Will they like me?*

Trying to answer these questions, I collected and reviewed reams (or megabytes) of information from various sources whose advice ranged from *get enough sleep and exercise* to *write it down* to *write it down but don't memorize it* to *jury selection is about figuring out who will vote against your client no matter what*. Some of this advice resonated and some left me scratching my head. This article presents what I found to be the most useful advice in everything I heard, read, and learned. I've included a list of some of the free resources at the end.

One resource that won't be on the list, however, is my first-choice source of information and advice: people. My former boss and mentor spent years as an assistant U.S. attorney before the jury trial became an endangered species. He has more jury trial experience than anyone I know. So I called him. Then I called a colleague who had just finished a jury trial and asked for her input. The best advice I can give you is this: Never be afraid to ask a trial lawyer for advice. We make our livings—at least in large part—trying to persuade other people that we're right. A trial lawyer will almost always be happy to guide you. The list below is distilled from the experience of many other trial lawyers, some of whom I spoke to and others whose advice I read.

1. Your case, your client's experience, is a story. Find a way to tell it so that a group of people who might not start out all that interested in it will be pulled in and, ultimately, on your client's side. I once observed a moot court for an appellate argument where the appellant was a large healthcare company, and the appellee was a seven-year-old girl who had been denied coverage for treatment related to multiple sclerosis. That's all I knew before I sat down to listen to the attorney for the appellant practice his argument. I was pretty sure it was going to be a disaster. But his first two sentences were: "Mr. Chief

Justice, and may it please the Court. There's no question here that the insurance company was wrong." Suddenly, I was open to being convinced, and I listened attentively to the rest of the argument. Your client's story needs to be accessible and told so that your audience—the jury—wants to agree with you.

2. Know and understand the rules governing voir dire in your court. Read them, read them, and read them again. If you don't understand what a rule or part of a rule means, ask someone or look it up. Know how many strikes you get, and know what you can base your strikes on. Know the reasons for which you are not permitted to strike a potential juror. Know how much time and leeway your court and your judge will give you to learn about your potential jurors from them directly. You need to have a process for determining which potential jurors your client absolutely cannot live with.

   One of the people I talked to had just won a jury trial in a wrongful termination case. In the early stages of the case, I had consulted with the defendant company. I did not end up working on the matter, but my brief consultation convinced me that the plaintiff had no case. The contract at issue, in my view, clearly protected the company. The attorney for the company who tried the case, however, did not engage in any real voir dire with the jury pool, so the attorney had no opportunity to learn anything about the people sitting there, waiting to be released (or, perhaps, chosen). By failing even to try to learn about the people who would decide the client's fate, that attorney also missed an opportunity to engage these jurors and give them a chance to participate and experience being a part of the process.

3. *C*onduct yourself professionally and courteously at all times, especially when the jury is in the room. Ensure that your client or client representative conducts himself or herself professionally and courteously at all times, as well. A jury trial is not supposed to be a popularity contest, but it is not reasonable or rational to expect jurors to respect you if you are not willing to respect the process. This not only projects professionalism and respect; it gives you and your client credibility.

4. Be prepared and be organized. Review your pleadings, motions, discovery requests, and discovery responses to make sure you have complied with all procedural requirements, such as answering an amended complaint. One of my least fun trial experiences was being directed to file an answer to an amended complaint, which should have been done years before (by the first attorney on the case) and which I had failed to catch in my review. Make sure you don't owe the other side any discovery responses, and make sure you've received all discovery you've requested. If your client is seeking damages, make sure you have produced every item of information required to prove your damages.

   Write down the questions or types of questions you want to ask during voir dire. Write down your opening statement. You don't have to memorize it, and if necessary, you can read it, but it is better if you write it down and then distill it into a list of the general

points you need to cover. One of the partners I worked with when I was just out of law school would make an audio recording of his opening statement and play it back to himself while he slept. My method of remembering what I need to remember is to type it out several times, which is what I did in law school to prepare for exams. I would type out each outline as many times as I could, refining the information each time, which not only clarified what I was supposed to be learning but also helped me remember it.

Write down any preliminary issues and arguments you want to raise with the court before the jury is called in. Write down the order in which you'll call your witnesses. Write down what evidence you intend to introduce through each witness. Write down the questions you plan to ask your witnesses, with headings for each category of proof. Include a notation for each exhibit you plan to introduce and what you need to say to introduce it. I even wrote down "MOVE TO ADMIT," in all caps and bold, so I didn't forget. An exhibit is useless if you forget to have it admitted into evidence.

I use a trial notebook for all my trials into which I put all the materials noted above. The binder has tabs for the pleadings in the case, any relevant motions, arguments I intend to raise at the beginning, my opening statement, deposition transcripts for impeachment or refreshing recollections, witness outlines, exhibits, my oral motion for a directed verdict, and my closing argument. Now I need to add a tab for jury instructions.

5. If possible, review jury instructions for cases like yours before preparing your proposed jury instructions, including proposed verdict forms. Most jurisdictions require you to use the language in the model jury instructions, but you still have to decide which instructions you believe the jury needs to hear to render a verdict for your client. Reviewing and preparing jury instructions also helps you determine what evidence is essential to win your case. The process ensures that you don't overlook anything, just as preparing an order of proof for a bench trial can.

6. Know and understand the Rules of Evidence. Consider making a list or chart of the grounds for objections so you know what to say when you hear an objectionable question or answer.

7. Find out your judge's individual practices, if any. In some courts, judges post their individual rules and practices on the court website.

8. Give yourself more time than you think you need. Preparing for a jury trial requires commanding numerous moving parts, many of which influence the preparation of other parts. You likely will find that you will have to revise your trial brief after preparing your proposed jury instructions, or you'll select additional—or delete some—jury instructions after determining what grounds you have for a motion in limine. If you're lucky enough

to have a second chair or even a trial team, delegate but make sure you have time to review whatever motion or document you've delegated before you have to submit it. Few things are more stressful than having to revise a 25-page motion when the deadline to file it is just hours away.

9. Do your best to have fun, or at least enjoy the process. Having to think on my feet and respond to challenges in the moment is one of the reasons I love going to trial. I'm nervous about voir dire and presenting my case to a jury, but I'm also excited, anticipating the moments when I get it right and feel that rush of success, which is excellent balm for the inevitable moments when I stumble. In the end, all we can do is what's within our control: represent our clients to the best of our abilities. For me, that's something I love doing, even when I'm terrified.

A Few Helpful Resources

- Lana K. Alcorn, "Ten Things I Wish I'd Known before My First Trial," *For the Defense*, Sept. 2007.
- Mark Romance, "Trial Preparation: 3 Tips for Starting with End in Mind," ABA Commercial & Business Litigation Committee, *Practice Points*, Sept. 21, 2016.
- Saba F. Syed, "Top Five Lessons from My First Jury Trial," ABA Real Estate, Condemnation & Trust Litigation Committee, *Practice Points*, Feb. 25, 2019.
- Brett Godfrey, Godfrey Johnson, P.C., "Advanced *Voir Dire* and Jury Selection (Part 1)" (undated online article).
- Brett Godfrey, Godfrey Johnson, P.C., "Advanced *Voir Dire* and Jury Selection (Part 2)" (undated online article).
- Hon. R. P. Jones, "Tips from the Bench" (undated document).

Siobhan Briley is an attorney at Pugh, Hagan, Prahm in Coralville, Iowa.

A Young Lawyer's Guide to Litigating a Remote Trial

By Travis S. Hunter and Alexandra M. Ewing

For better or worse, the COVID-19 pandemic changed many aspects of the legal industry. For litigators, one of the major changes was the uniform adoption of remote proceedings. Although there was initial pushback on such proceedings, including constitutional challenges to the inability to cross-examine live witnesses in the Delaware Court of Chancery (*see* Letter Opinion in *Forescout Techs., Inc. v. Ferrari Grp. Holdings, L.P. & Ferrari Merger Sub, Inc.*, C.A. No. 2020-0385-SG, Trans. ID 65768444 (July 14, 2020)), it appears such remote proceedings are here to stay for the foreseeable future, and courts have enacted guidelines to cover such proceedings (*see Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, C.A. No. N18C-12-074 MMJ CCLD, Trans. ID 65625266 (May 8, 2020)). For practitioners and clients, remote proceedings can reduce costs in litigation by reducing travel costs. For the court, remote proceedings can allow for more flexible scheduling. And, while trials were always the quintessential "live event," even they have migrated into the virtual world to some degree.

The boom of remote proceedings has increased the ability of young lawyers to become involved. Indeed, young lawyers are capable users of technology and often the best members on the trial team to present a case using remote technology. Junior lawyers are also sophisticated users of graphics and are typically familiar with the presentation software used in remote proceedings to share PowerPoints and other graphics. Given this, clients can be very receptive to allowing young lawyers to take substantive and active roles in a remote trial.

In light of the changing dynamic, young lawyers should consider the following as they prepare both themselves and their more senior colleagues for the fully remote trial.

Trial Preparation

Outside of witness preparation, trial preparation changed very little as part of remote trial proceedings. There was still the need to prepare motions in limine and the pretrial order. If anything, however, those tasks took on greater importance during the remote trial. After all, a highly negotiated pretrial stipulation typically leads to a smoother trial—something that is particularly important in a remote trial, where there is less room for error, given the high reliance on technology. The process of deposition designations also takes on added importance because the video clips need to be prepared well in advance to ensure they stream properly over the Zoom trial platform. As junior lawyers are typically the ones preparing the deposition designations, it is important that such designations are prepared in advance and reviewed in advance.

Graphics preparation is also key. Trials typically involve demonstratives, but the remote trial does not afford the ability to create such demonstratives on the fly in the courtroom. Gone are the

days of the whiteboard chronology. Nor is there the opportunity for the posterboard with key facts or evidence. All of this information is now typically prepared in advance as part of a PowerPoint presentation. Junior lawyers, who are typically most familiar with such software, are often in the best position to prepare such graphics. And, because the remote trial environment allows senior team members to "pop into" various Zoom sessions on a moment's notice, it is often best to have the junior members of the trial team work with witnesses (such as experts) on preparing the necessary trial demonstratives.

Preparation of Witnesses

Given the ubiquitous nature of remote videoconferencing platforms, it is likely that your witness or witnesses have some level of familiarity with the technology required to testify remotely. That said, it is very important to do practice runs with any applicable technology. Make sure that the witness has appropriate bandwidth and adequate sound quality. Double-check that the witness understands all functions of the technology that may be used while providing remote testimony. In particular, attempt to replicate how evidence will be presented at trial and will be shown to the witness. Confirm the witness's familiarity with any sort of features that you may use and want to incorporate (screen sharing, digital pointers, any sort of drawing or highlighting tools). If possible, the witness should have a setup that includes two screens: one designated for exhibits and one for displaying the questioning attorney.

Set your witness up for success, and be clear about expectations for testifying. It is important to control the setting from which the witness will testify. The witness should find a quiet, plain or formal location from which to testify. Testifying from a home environment may cause a witness to treat the experience too informally. Witnesses should be reminded that this is a formal process. Set expectations on proper dress. Be cognizant of all aspects of a witness's presentation, including possible rocking or fidgeting in a desk chair. Test out and optimize lighting and camera angles. Eye contact is critical to our perception of credibility, and most laptops will need to be raised so that the camera is at eye level. Witnesses should also be aware of any features associated with their personal technological setup and be able to turn off any unnecessary notifications.

If all preparation is also occurring by videoconference, it is helpful to schedule shorter—but more frequent—meetings with a witness. Videoconferencing can be draining, and it is often difficult to host longer sessions and be able to hold everyone's attention on a videoconference, as compared with an in-person "war room" setting. And without the need for travel, take advantage of the opportunity for earlier preparation. Remote practice sessions can be a great opportunity to collaborate and get multiple colleagues involved in a witness's preparation.

Finally, the senior attorneys on the team would do well to spend some time with the junior team members who will be presenting witnesses at trial as they run through their examinations. It is often important to see the examination presented in advance and offer tips and tricks to the junior lawyers on presentation style. It also important to consider evidentiary objections that might be made to the examination in advance so that the junior lawyer can be prepared for them. This is

particularly important in remote trials, where the examining attorney is often "on an island" with limited ability to communicate with colleagues in real time in a manner that would be possible if everyone were in a courtroom together.

The Remote Trial

The remote trial is where the magic is made, but it does take lots of preparation to make it run smoothly. If the members of the trial team will not be in the same location, coordination and planning during the remote trial are critical. It helps if every team member has a full copy of any trial exhibits, whether electronic or otherwise. If possible, schedule a full trial team meeting every morning before court begins and once the trial session wraps up for the day. The partners on the team should be very clear about delegation and make sure that any team members who will not be appearing at trial on a given day are able to complete any necessary tasks. The junior lawyers on the team who will be presenting witnesses should make sure to practice the testimony with the witness well in advance.

Having a talented courtroom technology specialist or "hot seat" operator is even more important in a remote trial. But even with a superb hot seat operator, the full trial team should be well versed on the procedure for the presentation of electronic trial exhibits. The trial team should be in constant communication with any technician. This is particularly important for cross-examinations, during which a technician is more likely to need to pull up some sort of document or prior testimony for impeachment on the fly (and attorneys may not be able to pass physical notes or whisper to the technician in anticipation of the need to display a particular item). If presenting attorneys will be implementing their own screen share, they should be sure to do multiple practice runs and be very familiar with any and all features of the screen share. In particular, each presenting attorney should ensure that he or she is not sharing portions of a screen that should not be displayed, such as inadvertently showing trial notes or broadcasting email messages from team members to the virtual courtroom.

Conclusion

As a young lawyer, be sure to take advantage of any additional opportunities that may come your way through a remote trial. Videoconferencing tends to allow for a greater number of attorneys to attend trial and for greater flexibility in trial preparation. Use that to your advantage, and look for opportunities.

Travis S. Hunter is a director and Alexandra M. Ewing is an associate at Richards Layton & Finger in Wilmington, Delaware.

No Soul to Be Damned

By Mitchell R. Edwards and Katherine B. Savage

> *Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?*
> —Edward, First Baron Thurlow (1731–1806)

Decades of research show that juries tend to treat corporate defendants less favorably than individual defendants. *See, e.g.*, Robert J. MacCoun, "Differential Treatment of Corporate Defendants by Juries: An Examination of the 'Deep-Pockets' Hypothesis," 30 *Law & Soc'y Rev.*, No. 1, 121, 140 (1996); John C. Coffee, "No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment," 79 *Mich. L. Rev.* 386 (1981). This "anti-corporate bias" transcends jurors' sex, age, race, family income, education, employment status, occupation, political ideology, and prior jury experience. Indeed, it seems a distaste for corporations may be the one thing most Americans can agree on. *See* MacCoun, *supra*, at 140.

Anti-corporate bias deeply impacts the public perception of financial institutions in particular, with less than 33 percent of people surveyed saying they trust financial institutions. Paola Sapienza & Luigi Zingales, "Chicago Booth/Kellogg School Financial Trust Index reveals highest level of anger about the economy since 2013," *Univ. of Chi. Booth Sch. of Bus. and Nw. Univ. Kellogg Sch. of Mgmt.*, Feb. 9, 2021. Anti-corporate bias is closely tied to the "deep-pockets hypothesis"—the proposition that juries treat wealthy actors less favorably than poorer actors. MacCoun, *supra*, at 143.

Anti-corporate bias against financial institutions arises, in large part, from the Enron/WorldCom financial meltdowns of the early 2000s, followed by the 2008 financial crisis. Staff Reports, "*Biggest Bank Settlements*," *Wall St. J.* Thus, for the better part of 20 years, banks and other financial institutions have been front and center in the public's perception of corporate misconduct.

Financial institutions face a peculiarly complex type of anti-corporate bias. Before their jury service, most jurors will have had a personal interaction with a bank but not a chemical company or a manufacturer, which many jurors may never personally encounter. Thus, even if the case has nothing to do with how banks treat their customers, many jurors' only touchstone for banks is *their experience* as a bank customer—and these experiences may impact their decision-making.

There are a variety of steps financial institutions can take—both before a dispute arises and after trial is under way—that can reduce the negative impacts of jurors' potential anti-corporate bias. In short: Be honest, be sincere, and be human.

Pre-Litigation Steps to Combat Anti-Corporate Bias

A company's public persona plays a role long before a case is filed or charges are brought. The public perception of the company may influence the nature of the claims brought and the legal strategies the plaintiff may pursue. *See* Michele DeStefano Beardslee, "Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys," 22 *Geo. J. Legal Ethics* 1259, 1270 (2009).

For heavily regulated industries, like the financial industry, it is not uncommon for investigations to follow news of alleged misconduct. Indeed, the spin that the media put on a controversy may limit a company's defenses or narrow potential avenues for resolution.

Leverage Good Citizenship
Generally, corporations with a positive public persona may fare better in the courtroom. For example, although Microsoft is frequently embroiled in litigation—ranging from antitrust claims to employment disputes—many jurors deliberating these cases are quick to describe the generosity and philanthropy of Bill and Melinda Gates, Microsoft's founder and former chief executive officer (CEO) and his former wife. Persuasion Strategies, *Anti-Corporate Bias Is a Given, But Corporations Should Not Give Up on the Courtroom* 8. This example suggests that, however peripheral the claim may be to the company's core business, corporations must be proactive about the public relations aspects of their legal controversies.

Of course, not every company is connected to a billionaire philanthropist, but that does not mean that companies should eschew good corporate citizenship. Being a good corporate citizen does not require a billionaire founder. It requires being conscious of the major events and trends taking place in the community.

Apologize When Appropriate
When a company makes a misstep and a dispute arises, a sincere apology to those affected can help quell the public fallout and reduce the volume of ensuing litigation. For example, the University of Michigan Health System has encouraged its doctors to apologize for mistakes since 2002. That year, the number of malpractice lawsuits and notices of intent to sue the health system fell by about 50 percent, and its legal expenses dropped by two-thirds. *See* Persuasion Strategies, *supra*, at 10.

Similarly, when JetBlue encountered inclement weather in February 2007 and kept its airline passengers on the runway for hours without food and with overflowing bathrooms, the company issued a public, robust apology. Public Apology Central, *JetBlue Airways*. In addition to acknowledging that "we subjected our customers to unacceptable delays, flight cancellations, lost baggage," and that "hold times at 1-800-JETBLUE were unacceptably long or not even available," JetBlue crafted and published the "JetBlue Airways Customer Bill of Rights" to show its "official commitment to you of how we will handle operational interruptions going forward, including details of compensation." *Id.*; *see also* JetBlue Passenger Bill of Rights. Some have

speculated that JetBlue's profuse apology may have helped reduce the number of lawsuits filed in response to the incident.

Apologies, however, can be a gamble, depending on the facts and circumstances. While many states' "apology laws" exclude from evidence a healthcare provider's expressions of sympathy to a harmed patient, the same statutory protection may not apply to other professionals or industries. *See, e.g.*, Me. Rev. Stat. tit. 24, § 2907 (prohibiting introduction into evidence of "any statement, affirmation, gesture or conduct expressing apology, sympathy, commiseration, condolence, compassion or a general sense of benevolence that is made by a health care practitioner or health care provider"). Whether a pre-litigation apology is viable or advisable depends on the facts of the case and the law of the jurisdiction.

At bottom, the goal is to quell the anger and assume responsibility, where doing so is appropriate and legally sound. Being proactive and directly addressing those impacted from the outset can substantially improve a company's prospect of avoiding litigation.

Assess Your Position
When litigation becomes inevitable, companies should assess their position and the impact anti-corporate bias may have on their case. There are a variety of steps a company can take to do this, ranging from informal focus groups to hired case-strategy consultants and to full-blown mock trials. The right approach depends on the facts of the case, the nature of the allegations, and the financial means of the corporation. Regardless of the approach, however, the goal is the same: understanding the strengths and weaknesses of your case, including which facts and issues are likely to be most salient to the fact finder.

Engaging these types of consultants early enables lawyers (and their clients) to determine how much time they may need to spend dealing with the "noise" that constitutes anti-corporate bias. Tammy Worth, "Lawyers work hard to overcome jury bias against corporate clients," *Columbus Bus. First*, Apr. 16, 2007. For financial institutions facing multimillion- or even billion-dollar claims, a realistic case assessment can also help persuade management to settle the case early.

Tools to Combat Anti-Corporate Bias Before, During, and After Trial

Once the litigation train has left the station and a jury trial is inevitable, there are several ways to combat anti-corporate bias.

Uncover Bias in Voir Dire
Voir dire is an excellent opportunity to discover potential jurors' latent and not-so-latent anti-corporate bias. Lawyers must ask difficult questions that may reveal unspoken prejudice, while remaining respectful. It is important to thoroughly vet prospective jurors' past experiences with banks. For example, during voir dire, lawyers should consider asking (a) whether prospective

jurors, or their families, have been employed by a bank or lending institution; (b) whether they have applied for a loan with a bank or lending institution, the nature of the loan, and what the experience was like; and (c) whether they have any experience with foreclosure proceedings. 44 Am. Jur. *Trials* 613, § 53, Defense of Lender Liability Litigation; Written voir dire questions; form.

In addition, lawyers should use voir dire to address any current events that may exacerbate the anti-corporate bias based on the facts of the case. Effective and thorough voir dire can help litigants spend more time addressing the merits of the case and can minimize the amount of time lawyers must spend addressing the background noise of generalized anti-corporate bias.

Narrow the Issues

Strategically narrowing the scope of the dispute throughout the pretrial stages of litigation can also help limit the impact of anti-corporate bias and keep jury deliberations focused on the issues before the jury. From this perspective, aggressive and laser-focused motions to dismiss, motions for summary judgment, and motions in limine to exclude inadmissible or improper evidence can be used to limit the plaintiff's opportunities to evoke possible anti-corporate bias.

Humanize the Client

It can be difficult for jurors to identify with companies and the decision makers who are the typical defense witnesses at trial. Many jurors feel that corporations have more resources and power than individual citizens, and that CEOs making 500 times the salary of the average hourly worker do not live in the same reality or play by the same rules as most jurors. *See* Persuasion Strategies, *supra*, at 7. However, while it is easy to despise a large, amorphous corporation, it is much harder to dislike an individual person. When appropriate for the given circumstances of a case, lawyers should consider putting the corporate executive or leaders on the witness stand to testify before the jury, to help humanize the client.

This can be a complicated decision. On the one hand, corporate executives—and especially those in the C-suite—may know less about the day-to-day activities of their companies than the mid-level managers. On the other hand, jurors consistently feel that these executives *should* know about the goings-on in their companies, and so jurors may deem their absence conspicuous. Gerald A. Klein, "The CEO as Witness: Super Hero or Arch Villain," *ABTL Rep.*, Summer 2005. Further, it can be difficult for executives to commit to participating in a long, drawn-out trial, where the exact dates and times for their testimony are unknown. Yet, jurors do not generally view the middle managers as the "face" of the company in the same way. Thus, the fact that middle managers may be more available and, oftentimes, more "in the know" does not necessarily make them the most effective witnesses for combatting anti-corporate bias.

Lawyers should spend time preparing their clients' corporate executives to testify in depositions and at trial, to ensure that these individuals present a sympathetic and authentic presence. For any corporate representative—but especially those at the top—it is important that lawyers

emphasize the need for honest, straightforward, non-defensive answers to questions, which explain in layman's terms why they do what they do. Worth, *supra*.

Be Accountable

Demonstrating that company personnel are accountable and responsible in response to issues or concerns can soothe jurors' anti-corporate bias. Specifically, it can help for jurors to hear actual employees and executives from the company express sympathy, regret, or even just a recognition that something went wrong—even without admitting fault. Jurors, like most people, want individuals and entities to take responsibility and be held accountable.

Choose Appropriate Jury Instructions

At the end of the trial, after taking every opportunity to combat anti-corporate bias with honest and straightforward testimony and meaningful accountability, the last thing a corporate defense lawyer can do to promote a fair and impartial deliberation that is devoid of (most) anti-corporate bias is to call it out by name—i.e., propose a specific jury instruction.

For example, the Eleventh Circuit Court of Appeals provides the following pattern instruction for cases involving a corporation as a party:

> 3.2.2 The Duty to Follow Instructions—Corporate Party Involved
>
> Your decision must be based only on the evidence presented here. You must not be influenced in any way by either sympathy for or prejudice against anyone. You must follow the law as I explain it—even if you do not agree with the law—and you must follow all of my instructions as a whole. You must not single out or disregard any of the instructions on the law. The fact that a corporation is involved as a party must not affect your decision in any way. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice. When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for the acts and statements of its employees that are made within the scope of their duties as employees of the company.

Judicial Council of the United States Eleventh Judicial Circuit, Committee on Pattern Jury Instructions (2013 revision), *Pattern Jury Instructions (Civil Cases) 3.2.2—The Duty to Follow Instructions—Corporate Party Involved*. A simpler, shorter version of the instruction might read:

> Do not let bias, prejudice or sympathy play any part in your deliberations. A corporation and all other persons are equal before the law and must be treated as equals in a court of justice.

O'Malley, Grenig & Lee, *Fed. Jury Prac. and Instructions*, Civil Comp HB § 6:1.

Because the impact of anti-corporate bias is sufficiently well established, some courts have found reversible error where a plaintiff's lawyers have improperly encouraged the jurors to consider the corporate defendant's wealth, its status as a foreign entity, and the plaintiff's need for a substantial verdict in his or her favor. *See Foster v. Crawford Shipping Co.*, 496 F.2d 788 (3d Cir. 1974) (reversible error where plaintiff's counsel emphasized that the corporation was foreign, that it had substantial assets, and that the plaintiff would be a ward of the state if no award was made); *but see Strickland v. Owens Corning*, 142 F.3d 353, 358–59 (6th Cir. 1998) (finding no plain error where plaintiff's counsel made inflammatory remarks during closing argument meant to foster anti-corporate bias and wrongfully implied that the jury could award punitive damages). This supports the importance of identifying and advocating for a corporate-bias instruction to preserve these issues on appeal.

Conclusion

Anti-corporate bias is a fact of life for corporate defendants—particularly banks and other financial institutions. However, it need not present an insurmountable obstacle in a jury trial. While anti-corporate bias may increase the odds of a plaintiff's verdict or a higher verdict amount, financial institutions can take steps to limit that risk.

Long before litigation or disputes arise, banks and financial institutions can build a culture of transparency and accountability, and they can be vocal about their commitments to ethical and moral issues of the day. When faced with allegations of misconduct or scandal, banks should avoid blaming hourly employees and should instead assume responsibility, where appropriate, without admitting fault or liability.

Once litigation is under way, banks and financial institutions should work hard to gain a realistic understanding of their case and the facts that are likely to be most salient to the jurors—including those facts that are top of mind due to news stories or social movements. Tools like effective voir dire and thorough witness preparation can go a long way toward taking the wind out of the anti-corporate sails. Last, lawyers representing banks and financial institutions can combat jurors' tendency to impose higher standards on corporations by calling out these issues in clear, concise jury instructions.

Mitchell R. Edwards is a partner and Katherine B. Savage is an associate at Hinckley Allen in Providence, Rhode Island.

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How Can Litigators Make a Connection with the Jury by Emphasizing Core Values?

By Courtney Devon Taylor

One of my most vivid memories from my first year as an associate is helping a partner prepare for an opening statement. As the most junior person on the team, my role was to support the partner by drafting the first cut of the statement and assisting in court, as needed.

The firm's midtown Manhattan offices were too far from the courthouse for us to walk there. To my surprise, the partner leading the team insisted that, rather than take a cab, we instead take the subway. My colleagues and I stumbled and fumbled as we carried all of the team's litigation bags and demonstratives down dozens of steps and through the subway turnstiles. It was not easy, and I remember being quite irritated by the inconvenience of it all. During the subway ride, I asked the partner why we did not just take a cab. I expected that he would tell me that the subway was faster and more direct and that he was not inclined to sit in Manhattan traffic. But that was not his response. Instead, he said, "Normal people take the subway. And our jury will be comprised of normal people. To persuade people, we need to know them, and that starts by sharing the same spaces."

I did not give his words much additional thought at the time. But years into my career, I realized that what he was trying to convey to me was that to persuade, we must find common ground. At trial, we must make a connection with individuals who are not lawyers, unlike in most of our day-to-day interactions.

Identifying the Core Value and Presenting It

Every trial lawyer knows that one of the most critical tasks at trial is to connect with the jury. It is the jury that ultimately determines our clients' fates. And it is for this reason that many practitioners believe that the jury selection process is a critical aspect of a trial.

But the odds of getting the exact jury you want are slim. Inevitably, there will be individuals on the jury with whom you or your client do not have a natural affinity for one reason or another. In these circumstances, it is important to remember that there are core values or community principles that bind us all and about which we can generally agree. By developing a narrative arc that emphasizes our shared values, a trial attorney can connect with, and ultimately persuade, jurors of all kinds.

A core value is a principle that guides a person's belief system. It influences our views of right and wrong, and it helps us differentiate good from bad. Core values root us in who we are and affect the way that we interact with one another and function in society.

First things first, a trial attorney must identify the relevant core value in the case. The core value answers the question of why should the jury care? To be clear, that question is not always easy to answer. As many commercial litigators know, jurors often do not find breach of contract disputes or disputes about business torts particularly compelling. But honing in on a value that most people agree on can make commercial disputes more relatable. For example, in a tortious interference dispute, the relevant core value for the plaintiff may be that we cannot permit underhanded behavior that creates an unfair system. For the defendant, perhaps the value centers on the need for a free market. Whatever the value, counsel should go into the trial knowing what it is and weaving it into each stage of the trial, from jury selection all the way through the closing argument.

Jury Selection

In instances in which the court permits counsel to conduct voir dire, counsel can take the opportunity to frame the thematic backdrop against which prospective jurors should consider the case. This is the first opportunity for effective counsel to introduce the shared core value at issue.

Consider the hypothetical of an alleged burglar on trial. One possible shared value that the prosecution can emphasize is that, as we can all agree, we have a right to feel safe in our homes. In addition to some of the more standard jury selection questions, counsel can preview that theme by asking, “Have you ever been made to feel unsafe in your own home?” This type of question will get the prospective jurors thinking about the importance of the value even before the opening statement.

Opening Statement

All experienced trial counsel will use the opening statement to foreshadow evidence and to front any weaknesses in the case. But at this early stage, counsel should also state the shared value, elaborate on it, and connect it to the forthcoming evidence.

Continuing to use the burglary trial as an example, an effective opening statement will not only explain how the evidence will demonstrate each element of the crime but will also explain how burglary offends our shared value of wanting to feel safe in our homes.

Witness Examination

Trial attorneys should not make the mistake of thinking that the opening statement and closing argument are the only opportunities to connect their case to the core value. After an attorney determines the witnesses’ evidentiary functions, he or she should then consider the direct or indirect emotional connection that those witnesses make to the shared value and should elicit responses to this effect.

For example, testimony from the homeowner who suffered the burglary about the effect it had on her overall sense of safety would likely be powerful, as would testimony from the responding police officer about the effect the burglary had on the neighborhood at large.

As another example, consider an employer being sued for terminating an ineffective chief executive. If your client is the employer, shared values that you might want to stress are that we all work for our reward and that nobody should get a free lunch. Eliciting testimony stressing principles of hard work and proven results supports those values.

Closing Argument
In addition to tying together all of the evidence entered during the trial, the closing argument is the time for counsel to explain how the evidence affirms or cuts against our core values. Remind the jury about the shared values that you agreed about at the start of the case.

In the case of the employer defending a claim against its former chief executive, you can remind the jury that "we agreed that we all work for our reward. But here, plaintiff tries to get benefits to which he is not entitled, and giving people rewards in excess of what they have earned does not help anyone."

Conclusion
Connecting with others can seem difficult, especially in present times, when there are so many social and political issues that cause division. Indeed, there have been times when I have tried cases before juries and questioned whether I had anything in common with the jurors. But then I remember what my colleague said to me years ago on that subway ride to court. So go ahead, take the subway—or do whatever is necessary to push you beyond your everyday interactions and familiarize yourself with people of varying backgrounds and perspectives. By doing so, you can identify shared values that will serve you well the next time you find yourself in front of a jury.

Courtney Devon Taylor is a partner with Hogan Lovells in Philadelphia, Pennsylvania.

PRACTICE POINTS

Four Tips for Managing Expert Witnesses

By Daniel J. Marran

Litigators generally recognize that a good expert can advance a client's case in myriad ways—timely advice on discovery regarding key technical issues, well-supported written opinions that forestall likely avenues of *Daubert* challenges, and credible presentation of complex issues to a jury, to name just a few. And litigators generally recognize the converse—a bad expert can do real harm by means that are even more varied—wastes of time on irrelevant issues, missed deadlines and attendant workflow bottlenecks, sloppy draft opinions requiring extensive supplemental revisions, damaging concessions at deposition, wooden or opaque trial testimony.

Less universal is the acknowledgement that, sometimes, the difference between a good expert and a bad expert can be found in how they are managed. Below are a handful of practice tips for maximizing the odds for a productive expert engagement.

Find an Expert with the Right Expertise

Careful management can't overcome a lack of relevant expertise. It is best to avoid having the deciding factor in the expert retention decision be an impending deadline, rather than the best available match between expert qualifications and the engagement. Budget ample time to find the right expert well in advance of any report and disclosure deadline. For issues where subject matter experts are plentiful, check with your colleagues for recommendations or comb filings from similar cases to identify candidates. If dealing with more idiosyncratic topics, look to authors and editors of leading academic textbooks or industry publications, or consider employing a search firm. In either case, adequate lead time is a necessity to adequately evaluate the universe of potential candidates.

Obtain Early Buy-in on Scope of Work

Experts are not immune to thinking that they can lawyer at least as well as the lawyers themselves. Be clear from the outset as to the issues requiring an expert opinion, the evidence likely to be reasonably available, and any assumptions to be supplied by counsel. To the extent that there's disagreement over the scope of the assignment or the work necessary to produce a well-supported opinion on the relevant issues, have that discussion as early as possible. Don't wait until you receive a draft report to discover that your expert thinks you need to subpoena an army of third parties or believes that one of the report's fundamental assumptions is unreasonable.

Challenge Your Expert (Before Opposing Counsel Can)

You do your expert (and your client) no favors by soft-pedalling criticism of weaknesses in their opinions. Holes in your expert's report will come out at deposition if you're fortunate—or at trial if you're not. Well in advance of the final report, think critically about your expert's premises and conclusions. Raise your concerns directly and plainly with the expert herself. Push back on

hand-waving until there's a persuasive explanation, or at least a frank acknowledgement of any necessary inferential leaps. Even if there is no way to short-circuit the anticipated attack, early due diligence ensures that your expert is prepared to defend their theory to the fullest extent possible.

Stay on Top of Your Expert's Schedule Throughout the Litigation

Your case is unlikely to be your expert's sole, or even highest, priority. Other expert engagements, professional obligations, and personal commitments will carve chunks out of your expert's schedule—and a competing commitment days before the report deadline, deposition, or trial can leave you stuck with an expert that is overtired, underprepared, or resentful toward you—perhaps even all three at once. Avoid this by staying on top of your expert's schedule. Flag case deadlines with the expert well in advance (notifying them promptly of any scheduling amendments), and get written confirmation that she has blocked out sufficient time for your case.

Daniel J. Marran is a litigation associate at Partridge Snow & Hahn LLP in New Bedford, Massachusetts.

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