Trial Strategies

By Cheryl A. Bush and Patrick G. Seyferth

# Humanizing the Corporate Defendant

For a defendant in civil litigation, a jury verdict with a lot of zeroes is a very bad thing, and for some companies, devastating. This article discusses practical presuit and litigation strategies companies can use to minimize juror bias and avoid staggering jury verdicts. The overall goal of this step-by-step approach is to convey a company's "human" face so that the facts that a company presents to consumers and jurors prove that a company acted with forethought for and attention to its customers and is a good corporate citizen. This approach begins before a lawsuit even is filed, continues through the litigation process and culminates at trial.

## Take an Earnest Approach

Lawyers defending a company's lawsuits cost a lot of money. Sometimes, after the lawyers are paid a lot of money, the company pays even more money to settle the case. A company can often avoid this through a dedicated effort to resolve claims presuit.

Consider a formal "early evaluation" that requires outside counsel to make a settlement recommendation within 90 days. In addition to saving on money that a company will pay to outside attorneys, once the company develops an "early evaluation" track record with opposing counsel, matters that ultimately do result in litigation are frequently conducted with less vitriol. Additionally, if a company has resolved prior claims amicably with a particular opposing counsel, when a matter does go to trial, that opposing counsel will likely approach the trial with considerably less animosity and fervor.

## Be Proactive

Whether it is because a company has received a number of consumer complaints or for some other reason, sometimes in-house counsel can predict future litigation. When this happens, be proactive. Hire a trial attorney to assist in developing a front-loaded action plan. Identify and interview involved employees and evaluate their witness skills. Review and consider collecting documents. And marshal the facts and themes that will demonstrate to a jury that the company conducts business with due care.

In a personal injury case, the definition of "due care" is usually the instruction the jury will receive to decide the case: due care is conduct that a reasonable person exercises in a particular situation, looking out for the safety of others. In a commercial case, due care means that a company's conduct was truthful, fair and above-board. In short, whether a commercial or personal injury case, the jury will need to hear those facts that prove that the company is a good corporate citizen. In addition to effectively responding to opposing counsel's attacks, it is the trial attorney's job to fully and effectively communicate those facts that prove that the company acted with due care.

What does this mean in terms of humanizing a company from a juror's perspective? It means, for instance, that at *each* stage of product development, if a product is at issue, a company needs to establish that it exercised forethought and attention to the quality of its product and the safety of its consumers. The same holds true if a process or contract is at issue. A company should examine the following areas in developing its due care facts.

### *Records Management*

Companies should have a consistently executed records management system in place, even before litigation ensues. Business records should be readable, usable and regarded as authentic, with authorized users able to access records efficiently.

Such a system can help prevent finger-pointing or spoliation claims by an opponent when a company cannot locate requested documents or records during discovery. An effective records management system allows you to explain to a jury, through a human-business rationale, rather than some malfeasance rationale, why certain documents no longer are available.

A solid records management system should have established procedures for:

- The timely destruction of appropriate documents as retention periods expire
- Retention of only those records with a "business need"
- Retention of records as required by statute, regulation or contract
- Established "litigation hold" procedures to ensure responsive documents are not destroyed once litigation or a government investigation is under way

### *Quality Documentation*

Training and concern about quality documentation should begin prior to any lawsuit. Corporate employees need to understand the impact of their communications, particularly given that many companies work in a global setting that relies on electronic documentation as the primary means of communication.

Corporate legal departments should implement training on and use of standards for creating and drafting internal and external communications, including but not limited to, documents, e-mails,

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contracts and letters. It is important for employees to realize that a company may be required to produce any form of written communication, especially e-mails, in litigation. An e-mail between two employees about off-hours escapades is not only embarrassing, it can create the impression that the company's employees do not think carefully about their job responsibilities.

### Product Testing

Design and development testing, and even litigation testing, serves as concrete proof that a company cares about customers, consumers and clients. Many product decisions are based on engineering judgment, founded on years of education and experience, without the backing of design and development testing. However, when a decision is based solely on engineering judgment, without the confirmation testing, the use of litigation testing can prove to a jury that a company exercised accurate engineering judgment.

Whether the product at issue is a drug, a medical device, building materials, heavy equipment, a rail-tie, an automobile or a toaster—product testing offers an effective, understandable way to explain to a jury just how much care, concern, time, resources, commitment and work employees put into the product at issue.

### Warnings and Instructions

A company can show that it exercised due care through its warnings and instructions, which often demonstrate genuine care and commitment to the well-being and safety of its consumers. Warnings and instructions explain that a company's on-product warnings underwent rigorous development and evaluation, especially when compared to the company's competitors. A company can retain an outside human factors expert to review proposed product warnings and instructions, before they are disseminated to consumers. Moreover, if the federal government was in any way involved in product warnings, the Federal Register may be a gold mine of potential trial exhibits.

### Recalls

It is impossible to prevent 100 percent of human error. Even in cases in which a company issued a product recall, the company must present due care facts to the jury. These facts can provide concrete evidence of whether:

- The company reacted promptly once it learned of the problem
- The company worked with a federal agency in fashioning an appropriate remedy

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- The federal agency approved of the action that the company took
- The company spent millions of dollars effectuating the recall or corrective action
- The company went above and beyond what its competitors have done when faced with a recall

### Manufacturing

Manufacturing companies should effectively communicate to employees and keep a written record of due diligence requirements and procedures, product verifications, quality control audits, secondary measurements and documentation in place to ensure a safe and comprehensive manufacturing process.

### Regulatory Compliance

Another important way that a company can demonstrate its "human" customer care and concern is through knowledge of and compliance with all applicable regulations and standards related to its product, service or industry. Examples of possible regulations or statutes include, International Organization for Standardization (ISO) standards, Federal Communications Commission (FCC) standards, National Highway Traffic Safety Administration (NHTSA) regulations, Consumer Product Safety Commission (CPSC) regulations and the U.S. Food and Drug Administration (FDA) regulations.

Many companies have internal guidelines and standards that go above and beyond applicable government regulations or requirements. Evidence that a company not only met all applicable government or industry regulations and standards, but went above and beyond by creating and complying with its own internal standards, is highly effective in convincing juries that the company acted with due care.

### Advertising and Marketing

It is important that a company has in place an effective strategy to establish that it exercised due care in its advertising and marketing. For example:

- A company can develop and implement policies and procedures for the review of all of its advertising and marketing materials, including print and broadcast campaigns, brochures, websites, catalogs, direct-mail literature, press releases, speeches, sales-training films, employee training and service seminars.
- A company can identify an outside human factors expert to review its advertising and marketing materials.
- A company can develop continuing education protocols for training on advertising and marketing issues.

## What to Do in Discovery

Many opposing attorneys would like nothing more than to avoid trial by obtaining a default judgment against a company for "discovery abuse." However, an out-and-out default is rare, and the greater danger is that a company's purported discovery abuse becomes a mini-trial in front of the jury. The real trial issues then become obscured and allow opposing counsel to argue that the company somehow hid "bad" evidence, potentially inflaming the jury. You can minimize the likelihood that this will happen by being prompt and responsive to all discovery requests and disputes.

### Responding to Written Discovery

If ever in doubt about the discoverability of a document, produce it. Even if it appears

to be a close call, a judge will probably order you to produce it. Further, a company should draft every single discovery response assuming that it will be the subject of a motion to compel or will be blown-up as an exhibit and shown to the jury. Put objections at the end of the response, not the beginning. It will sound more forthcoming.

Here's an example:

**Interrogatory:** Identify every safety feature on the 1998 widget.

**Inflammatory response:** The company objects to this request because it is vague, undefined, overly broad and unduly burdensome.

**Response that an opponent will not read to the jury:** There are so many safety features on the 1998 widget that it is impractical to list them in response to an interrogatory.

In responding to request for admissions, a company should try to avoid responses that state that the company "admits." Only criminal defendants "admit" that they did something bad.

Here's an example:

**Request:** Admit that the company manufactured the widget.

**Response:** The company manufactured the widget.

### Responding to Discovery Disputes

Respond—in writing—to any discovery dispute within 24 hours, even if all you can write is: "I received your letter raising questions about the company's discovery responses. I'm really jammed right now, but I will get back with you before next Wednesday." Lead counsel should sign the response. The message that this will convey to the court: the company took this very seriously. Remember, if it's not in writing, it never happened.

Keep every promise made, including promises about "when" you will produce documents. Letters responding to discovery disputes are not simply correspondence to opposing counsel—they are exhibits to your opposition to motions to compel, which accurately demonstrate that your company is the model of good faith.

### Responding to Request for Witness Designations

A company's counsel should write a letter to opposing counsel offering a "first round of depositions" that responds to each request for designation, setting clear boundaries on what the witnesses will testify about. If opposing counsel agrees, great. Whether opposing counsel agrees or not, you need to serve a formal response to the deposition request in advance of deposition dates. Make sure that at the beginning of a deposition, the scope of the particular witness's designation is stated on the record.

Avoid responses that state that the company "admits." Only criminal defendants "admit" that they did something bad.

### Identifying "Designated" Company Witnesses

It is very likely an opposing party will ask a company to present for deposition persons knowledgeable about a litany of topics related to the claims or defenses in the case. Traditionally, companies have taken a "less is more" approach to these depositions, seeking to minimize the number of employees presented for testimony by producing one or two deponents to handle multiple topics.

Instead, consider a "more is more" approach. By producing a number of prepared, informative witnesses, a jury has the opportunity to meet more of a company's people and comes to understand better all the work and effort that went into the conduct or decisions at issue. Produce those employees for depositions who will best provide the jury with a comprehensive picture of the care that your company takes in its conduct and decisions.

## Preparing the Company Witness

A company should approach company witness depositions carefully and thoughtfully, with adequate preparation. When employees testify convincingly and passionately about what they do, it highlights the human side of your company.

### The Mechanics of Company Witness Preparation

Proper preparation of company witnesses requires a minimum of two meetings, and perhaps several more. The initial meeting with a witness has several goals. First, it gives a novice company witness an overall understanding of the testimony and trial process, as well as what is involved in the particular lawsuit.

Second, it allows counsel to assess an employee's skill-set as a witness and get an understanding of the witness's overall knowledge of the project, product or contract. Reviewing documents and discussing the witness's individual role, and the roles of others, provides both trial counsel and the company with a roadmap of areas that the company may still need to explore or clarify.

Third, if the case is technical or document-intensive, at the close of the first meeting you should provide the company witness with a collection of relevant documents. This collection should consist of

- Documents that will help the witness remember and explain what happened
- Documents that your opponent may use in the deposition or at trial
- Documents that your counsel may use—on re-direct—at the deposition

Finally, end the first meeting with a homework assignment. Ask your company witness to review the collection of documents. The witness should feel comfortable with the content of the documents before the next deposition preparation meeting.

Once the witness has a comfort level with the documents, the second or third preparation sessions can focus on asking the witness questions that opposing counsel will, might or should ask, starting out slow, and progressing to harder, more adversarial questions.

### The Substance of Company Witness Preparation

One traditional deposition preparation strategy, explained to a witness variously as, "Answer 'yes' or 'no' if you can," or "The more talkative a witness is, the greater chance of blundering into trouble" or "If you say less than 150 words, I'll buy you lunch," can lead to a staggering jury verdict. First, it is essential that deposition

testimony be truthful and complete. Second, cryptic "yes" or "no" answers will not humanize a company.

Witnesses are sometimes worried that opposing counsel will ask them questions outside their area of experience. One way you can give employees a comfort level in testifying is to use the analogy of a "witness box." Inside the witness box are the employee's education, experience, work history and common sense. If an employee is asked a question and the answer is not in the witness box, the employee should feel free to refer the opposing attorney to the appropriate person or group at the company who may be able to answer that question.

Sometimes, employees are still unsure whether the answer to a deposition question is in their personal witness box because they "kinda-sorta-maybe-probably" think that they know answers. In this circumstance, a witness should be encouraged to rely on his or her personal comfort level in giving such testimony under oath. One good guidepost is to give employees "your boss's boss's boss" advice. If the employee's boss's boss's boss asked the employee to answer that same question, would the employee answer it on the spot, or would he or she respond, "I'll get right back to you."

### Re-Direct Examination

Too often, when opposing counsel finishes asking questions at an employee deposition, the attorney defending the deposition says, to him- or herself, "whew," and on the record says, "We'll reserve" or "No questions." However, at trial this allows opposing counsel to cherry pick sound bites from the deposition: sound bites that will unfairly cast the company in a negative light. There is a direct correlation between unrebutted employee sound bites in the opponent's case-in-chief and staggering jury verdicts.

Assume the depositions of the company's witnesses, especially if videotaped, will be read or shown to the jury. Therefore, they are not just depositions: They are trial testimony. Trial counsel for the company must be prepared—with trial exhibits—to conduct a thoughtful, complete re-direct examination at the deposition.

If the opponent uses the deposition at trial, the company's rebuttal is often admissible in the opponent's case-in-chief. Frequently, however, opposing counsel will not even seek to admit the employee's deposition testimony when a proper re-direct examination has been conducted.

### The Employee Deposition Preparation Checklist

Depending on the case, it may be helpful to run short, "mock" depositions for company employees facing a deposition for the first time, particularly if your opponent is an adept questioner. Requiring your company witness or trial representative to respond to tough questions during preparation sessions will minimize inaccurate answers during the deposition. The following provides a checklist, for use in preparing a company employee for deposition:

- Always tell the truth. Remember, telling the truth means more than just truthfully answering questions.
- Think about what is in your witness box before the deposition.
- Be proud of your work and the decisions you made. Be confident.
- Explain why you did what you did.
- If you made a mistake, say so.
- Be polite and respectful: Don't argue.
- Testifying under oath is important. Don't feel rushed into speaking as soon as opposing counsel stops talking.
- Some lawyers ask long-winded questions but they only care about getting the witness to agree to the three words in the middle of the very long question. Listen carefully.
- Words used in deposition are used according to their precise dictionary definitions, their precise legal definitions or their every-day meanings. It is important to understand which definition opposing counsel is using.
- Depositions are not normal, everyday conversations. Don't guess what the next question may be.
- Until you have given 50 depositions, don't try to be funny.
- You don't have to give a different answer just because the opposing attorney asks the same question again.
- "I don't know" and "I don't remember" mean two different things.
- If you don't remember, it's okay to say so.
- "I don't know" may be an incomplete answer.
- If opposing counsel is confrontational and abrasive, it is okay to say, "Please don't yell at me." The witness controls deposition breaks, etc.
- Just because the opposing lawyer says something is a "fact" doesn't mean it really happened, and just because a document existed six years ago does not mean that it exists today.
- Always tell the truth.

## What to Do for Trial

### Select a Meaningful Company Representative

The simplest way to humanize a corporate client is to let the jury get to know as many people from the company as possible. Too often the selection of the company representative—the person who will sit with trial counsel during trial—is a missed opportunity. In every civil jury trial, the decision or conduct of company employees is squarely at issue. The jury most wants to hear from the company employees, and it is one of these people who makes the best company representatives.

Sometimes the company representative is an in-house attorney supervising the case, but it is not always advisable for an attorney to fulfill this role at trial. Every member of the jury has taken time from his or her normal job to decide this important case. Another attorney at counsel table communicates little about the company's pride in its conduct and may communicate that only the lawyers care about the jury's decision.

The best company representative, particularly in a case that has "staggering verdict potential," is an employee who was personally involved in the conduct or decision at issue. This person needs to come to trial every day; sit next to trial counsel; appear interested and respectful; and hand the occasional note to his or her lawyer. The company representative needs to be there when the opposing expert accuses him or

her of fraud, unfair dealing, carelessness, recklessness or even murder. That person needs to be there—to look the jury in the eye—when the verdict is read.

It is helpful to select the best corporate representative early in the case. The more involvement a company representative has in reviewing documents—talking about why the company did a good job, and his or her responsibility for a particular product, service or contract—the more personally invested he or she will become in assisting with discovery and trial. Expect the company representative will testify at trial—whether or not he or she is listed on a witness list.

### Local Counsel as an Asset

Trials frequently happen in small towns, where everyone knows one another. Give serious thought to hiring a local attorney to assist the company's lead counsel at trial.

Local counsel is likely to have a greater understanding of potential jury bias. Interviewing local counsel is an effective way to discover information about jury pools, local judges, politics and any bias that is particular to that jurisdiction. It also may be helpful to conduct some jury verdict research to identify what type of jury bias you may face at trial.

It is absolutely necessary that the local attorney actively and meaningfully participates at trial, especially during voir dire and direct/cross examination of important local fact witnesses to minimize potential jury or venue bias.

### Don't Miss the Voir Dire Opportunity

Voir dire is the first opportunity the trial team has to humanize the company for the jury. This is the best opportunity to help jurors identify with the people they will be hearing from. As often as possible, refer to the company's employees by name.

Select some of the issues to be tried, and ask potential jurors if they have faced those same issues. For example, if opposing counsel will argue the company is a bad company because it destroyed documents, ask a potential juror whether, in his or her job, he or she saves every single piece of paper created, sent or received. When the answer is no, ask "Why not?"

If a company clearly made a mistake that has led to litigation, the most human thing trial counsel can do is acknowledge the mistake in voir dire (and opening and closing statements).

### Embrace "Bad" Documents or Facts

Trial counsel for the company should not hide from challenging or negative documents or facts, but instead proactively discuss them, as early as possible, with the jury. Sometimes "bad" documents are nothing more than opposing counsel's argument about selective portions of one document. When read as a whole—and when the opposing counsel's selective "highlights" are put into context—the documents can assist the company in establishing it acted with due care. While "bad" documents or facts can lead to a staggering jury verdict, avoiding them will only make the situation worse.

### Mock Trials

In cases headed for trial, the best real-world test of jury bias is a mock trial. The most effective mock trials are held in the same or highly comparable jurisdiction as the jury pool. Although company trial representatives and witnesses should never participate in mock trials directly, mock videotaped direct and cross-examinations can be done in advance and played for the mock jurors.

Apart from disclosing potential jury bias, mock trials are an invaluable tool in refining trial themes and allow trial counsel to emphasize the themes that work and eliminating those that do not. In cases with a smaller verdict potential, a jury focus group is a cost effective option.

### Trial Testimony and Exhibits

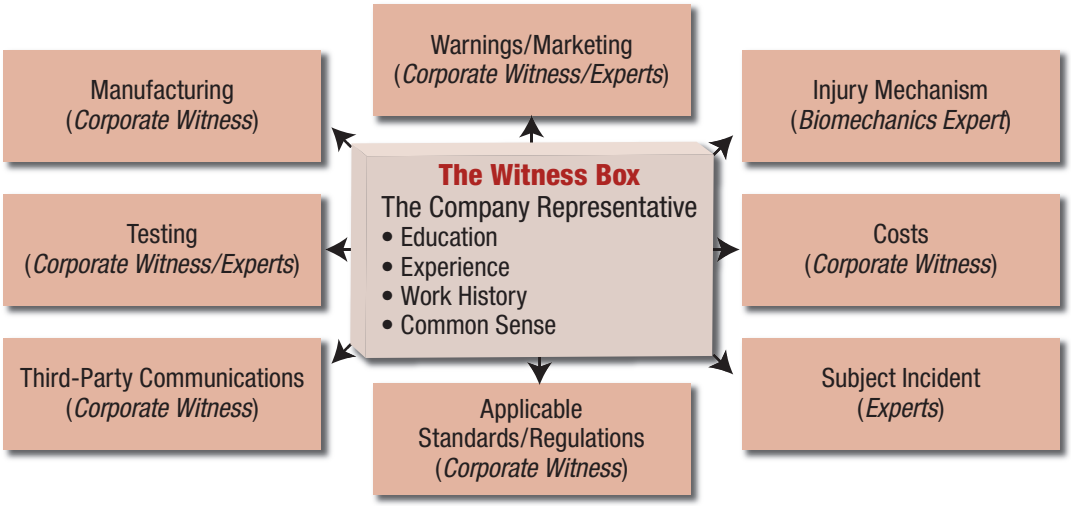
Above all, the jury needs to understand what is being said and described during trial. Attorneys and corporate witnesses should use common language when testifying. The due care facts behind the product or contract should be described to the jury in plain language and with everyday images.

When offering a trial exhibit, it should conform to the "six-second" rule. A juror should understand exactly what the exhibit is communicating in six seconds or less. The more complicated the exhibit, the less likely the jury will hear the explanation and how it proves the company's due care in the matter at hand.

## Conclusion

The best way to humanize a company throughout all stages of litigation is to have a proactive, front-loaded strategy demonstrating facts that show forethought and attention was given for the quality of the company's products or services and the safety of its customers. Implementing practical steps which demonstrate a company is a good corporate citizen and conducts itself with due care will minimize the potential for staggering jury verdicts.

**The Product Case Witness Box**

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