

3 Keys to Gaining the Jury's Trust:

Turning Post-Pandemic Declines in Corporate Perceptions into a Tactical Advantage



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INTRODUCTION

In early 2021, Courtroom Sciences Consultants published the results of research conducted throughout the second half of 2020 that revealed positive shifts in perceptions of several industries among jury-eligible participants in the U.S.ⁱ Research participants were most likely to report a positive shift in perceptions of the healthcare industries and healthcare professionals. The Coronavirus pandemic led to an increase in favorable perceptions of many other industries and/or companies as well, including trucking and transportation, railroads, large grocery stores, the retail industry, and small businesses.

Recent survey research suggests that the window of opportunity for capitalizing on COVID-related attitude changes towards certain groups of civil defendants has closed. Jurors' perceptions of most industries and institutions have either returned to pre-COVID baselines or dipped below pre-COVID baselines. This decrease in public sentiment regarding specific industries, institutions, and large corporations may seem discouraging. However, there are many opportunities available to defense teams who wish to out-prepare plaintiff's counsel and turn pandemic-related changes into strategic advantages.

PERCEPTIONS OF CORPORATIONS AND MAJOR INDUSTRIES ARE LESS FAVORABLE

Heading into 2022, corporations faced the challenge of decreased favorability among the voting public in practically every major industry.ⁱⁱ Positivity ratings for industries like healthcare, oil, utilities, and the internet have tumbled the most, while moderate declines occurred in the retail, farming, grocery, airline, and media sectors. For instance, favorability ratings of the healthcare industry plummeted 15 percentage points from highs seen during the onset of COVID-19, and the retail industry fared almost as poorly. Even the industries that fared best experienced a modest reduction in positivity ratings, with automobile, banking, and real estate businesses seeing a dip in regard.

Voters' ideas about taxes and inflation reflected these anti-corporate feelings. Fifty-six percent supported raising the corporate tax rate by five percentage points, and 58% backed similar increases on taxes that U.S. companies pay on foreign profits.ⁱⁱⁱ While a greater majority (59%) faulted President Joe Biden for inflation being at a 40-year high, a similar percentage blamed the climb on companies. Specifically, fifty-four percent of voters saw inflation as resulting from a lack of market competition.^{iv}

A variety of explanations for the recent surge in anti-corporate sentiment are possible. Perhaps distrust in other institutions is inching over into corporate distrust. Additionally, it may be that people are angry and stressed by continuing COVID-19 concerns and policies, causing them to attribute events more negatively in general. Corporations and other industries promised a lot during the pandemic and perhaps that has raised the bar for corporate behavior. Finally, the richest Americans doubled their immense fortunes during the pandemic^v, a prominent disparity in light of the struggles many families have faced during the pandemic. Indeed, there has been much negative press on big business, noting that the most prosperous business leaders, like Jeff Bezos, Elon Musk, and Warren Buffet pay only 3.4% in taxes on average. This colors perceptions of big business as a whole.

Even small businesses, perennially held in high regard, have taken a hit lately, with views on smaller companies declining since 2020.^{vi} Moreover, our research indicates that jurors routinely conceptualize "small businesses" as very small, often family-run enterprises, like "mom and pop" grocery stores. This contrasts with the reality of most small businesses, which employ between 100 and 1500 employees.^{vii} Jurors do not hesitate to hold businesses with even as few as 50 employees to the same standards as large corporations. For these reasons, it behooves those representing smaller companies, for instance, small oil and gas companies, to consider declines in public opinion relating to both big and small business.

INCREASING JURORS' TRUST IN CIVIL DEFENDANTS

There are many steps defense counsel can take to identify and eliminate the most dangerous anti-corporate, victim-oriented jurors in the first place. However, even in a better-case scenario, a typical civil jury will include some moderately anti-corporate jurors, perhaps a few pro-corporate or pro-business jurors, and many who claim “neutral” attitudes although they actually lean one way or the other. Many opportunities are available for defense counsel to promote such jurors’ trust in their client; we outline three of these opportunities below.

EMPHASIZE LOGICAL, SCIENTIFIC DECISION-MAKING

Defense counsel has long emphasized the importance of following the law and common sense. While we do not suggest that counsel abandon such pleas, the reality is that current juries are more enticed by invitations to “follow the science” and rely on logic when evaluating the evidence and testimony to make fair, rational decisions. This may seem counterintuitive given recent media reports of American’s growing distrust in science. Yet, alarm bells about public distrust in science have been sounding for decades in response to controversial issues such as evolution and climate change.^{viii} The appearance of being a scientific, objective decision-maker is currently very in vogue, with those on all sides of the COVID debate pointing to select research results that support their position.

Most jurors also want to present themselves as intellectually savvy, and this is particularly true for plaintiff-leaning jurors. This does not mean that the defense should over-complicate its case; in fact, technical and scientific evidence and testimony should be simplified to the extent possible. Still, appealing to jurors’ intellect and their abilities to objectively consider the scientific and technical evidence has several potential benefits.

First, such appeals can help elevate jurors’ perceptions of civil defendants. Whether plaintiff’s counsel is advancing sympathy ploys or more skillfully trying to establish unattainable safety rules via reptile tactics, appeals to logic and science resonate with the same jurors who hold anti-corporate beliefs and are susceptible to opportunities to send a message to corporate wrongdoers. Almost all civil cases involve some science and a substantial portion of technical evidence; if anti-corporate jurors (or even “neutral” jurors) are seated at trial, appeals to scientific and logical decision-making can help temper the need to express anti-corporate beliefs through their case decisions.

Second, appeals to jurors’ logical and scientific sides instills a sense of accountability, especially if they are advanced during *voir dire*, “We understand that you are not legal or scientific experts, nor are you expected to be. It is important to us, however, that you will use logic in your decisions about this matter and will evaluate the scientific evidence and testimony to the best of your ability to reach a fair decision. Is there anyone here who might have difficulty doing that?” Defense counsel can also ask jurors with certain occupations (such as a nurse or a high school teacher) whether they rely on logic and science in their jobs.

Third, in making such appeals, civil defendants are expressing a belief that jurors are capable of reaching a logical, scientifically sound conclusion on their own; this caters to jurors’ desires to feel relevant and understood. This can lead to increased attention to and recall of defense evidence and testimony, even when both sides retain technical or scientific experts. In the deliberation room, jurors clinging to pro-plaintiff arguments about corporate greed or community safety will be forced to refute clear scientific and logical defense arguments that are understood by their peers.

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ACCEPT RESPONSIBILITY

Our interviews with both mock and actual jurors reveal that a top explanation for an unexpected plaintiff verdict or inflated (i.e. nuclear) damage award is, “The defendant(s) didn’t take any responsibility.” We agree with trial lawyer Bob Tyson, who advised defendants to “accept responsibility in every case.”^{ix} This does not necessarily mean stipulating to liability, although doing so is warranted in many cases and can be a critical strategic move. An appropriately designed mock trial can provide answers for counsel and clients wishing to test the effects of stipulating to liability. For example, a mock jury panel can be split with one subsample exposed to presentations in which the defense admits liability, and another subsample exposed to presentations in which the defense disputes liability.

Depending on the venue and case facts, accepting some percentage of responsibility can be a wise decision even when (mostly) disputing liability. This is particularly true in venues with modified comparative fault. For example, accepting 10-15% of the fault may be enough to gain trust and quell motivations to punish in some cases. Again, pre-trial research projects such as appropriately designed focus groups and mock trials can test the effects of acceptance of fault so that the defense can make informed decisions about whether to accept some fault, and if so what percentage to accept.

There are still many opportunities to accept responsibility in such cases. If there are “bad facts” – and every case has them – the defense should embrace these facts and then either explain them at trial or accept responsibility for the facts while showing the jury that such facts are not a factor in negligence or causation.

Of course, in many cases the defense will want to strongly dispute liability and does not believe that any acceptance of responsibility is warranted. There are still many opportunities to accept responsibility in such cases. If there are “bad facts” – and every case has them – the defense should embrace these facts and then either explain them at trial or accept responsibility for the facts while showing the jury that such facts are not a factor in negligence or causation. The defense also can accept responsibility for its policies and practices – e.g., *we are responsible for requiring thorough hazard assessments; we are responsible for employees’ (specific) training; we are responsible for monitoring employees’ driving records and real-time violation alerts; we are responsible for requiring employees to document (fill in the blank)*. Such responsibilities will vary across cases but should be acknowledged to help demonstrate the efforts and complexities involved in running a business of any size.

EVALUATE AND PREPARE WITNESSES

Corporate representatives and employees are best positioned to tell the “good company story” and increase jurors’ trust in the defendant(s). A key fact witness who is relatable, presents and communicates well, and effectively navigates questioning from opposing counsel can dramatically shift jurors’ existing perceptions and motivations in the right direction, leading to a favorable defense outcome. However, many jurors inherently distrust corporate representatives, thinking “Of course they are going to tell a good company story...that’s their job.” They also question the motivations of individual defendants, often assuming that “they have a lot to lose.”

Hence, the selection of who serves as the corporate representative is critical. The corporate representative has a tremendous weight on their shoulders and their performance at deposition and/or trial is vital as our research has shown that deposition testimony is the decisive measure of damages in a case. Selection of a corporate representative shouldn’t simply be based on their level of knowledge about company operations. It is essential that corporate representative candidates be assessed on their ability to withstand challenging questioning and be fully trained to identify and avoid opposing counsel’s tricks and traps. A neurocognitive training program, conducted either virtually or in-person, is crucial to achieve confident results.

Most adults in the U.S. have become more comfortable with virtual solutions in the midst and wake of the coronavirus; this is true among older adults as well as those who would label themselves as “technologically challenged.” Increased comfort and use of virtual communication presents tremendous opportunities for witness evaluation and preparation. Although in-person witness evaluation and training are always highly beneficial, in many instances initial witness assessments and skills trainings can be conducted virtually. This eliminates barriers to travel and time constraints. In addition, virtual trainings can be split into shorter segments, avoiding witness stress and fatigue. For some witnesses, the entire training can be effectively conducted virtually; for others, a hybrid approach is best. For example, a witness may participate in an initial assessment and skills training virtually, followed by an in-person follow-up refresher with mock questioning.

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Juror witness evaluation studies also can be conducted virtually with reliable results. These can be especially helpful in selecting a corporate representative or a key expert witness. For instance, counsel may record mock questioning sessions with two or more potential corporate representatives, and mock jurors participating virtually can provide their reactions and feedback for how witnesses can improve. Such studies can certainly also be conducted in person, but virtual options are available to maximize efficiency and reach.

CONCLUSION

Though decreased favorability ratings about most industries and institutions in the wake of COVID-19 present a threat to defendants in civil suits, meeting this challenge with informed preparation and legal strategy can help restore jurors' faith in corporate defendants. By seizing upon the current positive regard for logical and scientific thinking, counsel may nudge jurors to rely less on emotional decision-making in civil suits. Accepting responsibility sincerely and specifically may also renew trust in corporations. Finally, the compelling nature of an able witness telling a good company story cannot be overstated. Taken together, these opportunities can allow defense counsel to turn post-pandemic declines in corporate perceptions into a tactical advantage.

CITATIONS

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