



Turning Juror Expectations Around: Enhancing Corporate Image through Direct Examination

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Expectations. They help motivate us, understand the world around us, and judge the behavior of ourselves and others. The courtroom is ripe with expectations. Plaintiffs expect to be compensated for a wrong done to them. Defendants expect to be vindicated. Attorneys for both sides expect to win. Judges expect to follow the law. Jurors expect to decipher the truth and dispense justice. Deciphering the truth is tricky business and jurors, whether consciously or not, rely largely upon their expectations about how a truthful person acts compared to how a dishonest person acts. When one of the parties is a corporate defendant, jurors' expectations about corporate America and corporate executives inevitably come into play.

Jurors have expectations that work against both parties in a lawsuit involving a corporate defendant. A recent national survey conducted by Zagnoli McEvoy Foley with jury-eligible Americans showed that 79% of respondents believe corporate executives will lie to increase profits – an anxiety provoking statistic for any corporate defendant walking through courtroom doors. On the other hand, the same survey reveals that 77% of respondents also believe that all too often individuals will blame their own problems on a corporation and 72% believe large damage awards do nothing but make lawyers rich. Once testimony begins in a trial, jurors will start analyzing witnesses to see if each individual fits within his or her expectation, or stereotypes.



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Knowing Americans' general attitudes is one thing but having a thorough understanding of jurors' expectations in a specific trial venue is crucial when developing case strategy and in jury selection. One of the things we at ZMF specialize in is pretrial jury research, helping trial teams across the country better understand their jurors' expectations, and developing a trial strategy to work within the parameters of those expectations. The suggestions put forth in this article represent some of what we have learned through research conducted with thousands of jurors over the last decade and our personal expertise in psychology and communication.

A witness's behavior on the stand will either meet or violate expectations—whichever direction it goes, the result can help or hurt the corporate defendant. Obviously, meeting expectations that a corporate defendant will lie or skirt responsibility for misconduct could result in a plaintiff verdict and high damages. Conversely, violating jurors' expectations in a positive direction can greatly enhance juror perception, giving the defendant a positive bounce. Recent corporate scandals from Enron to gigantic executive severance packages make it a lot easier for corporate defendants to declare, "Our company is different, I am different." Below are five strategies corporate defendants can use during direct examinations to enhance jurors' perception, to get that "positive bounce."

Humanize

Having a corporate representative sitting at counsel table to put a "face" on the company and to briefly testify is not enough. The corporate defendant must also reveal aspects of his or her humanness to the jury. One simple, and often overlooked, method to do this is to incorporate elements of personal history into the direct examination. Some questions to consider include: How did you get into this line of work? Why did you choose to work for this company? Why are you here testifying today? What does it mean to you that Mr. Plaintiff claims your company did X? How does this company compare to others you have worked for in the past? What do you think the strengths of this company are? What are the challenges?

This strategy was used by defense counsel in a medical malpractice birth case involving a very serious and hyper-defensive male physician defendant. In the early part of his direct examination, counsel asked the defendant, "Doctor, how did you get into the field of obstetrics?" His response was "I like to be happy and babies make people happy." As he said this, he got a broad smile on his face and visibly relaxed. In this very basic encounter, he shared an intimate part of himself with the jury and invited them to empathize with him.

In another example, a large data storage company was defending the validity of one of its patents. In an otherwise dry and technology-heavy trial, the company's engineering director provided a surprising human factor for jurors by describing how he has tried to figure out how things work since he was a child, the support his company gives him to experiment and invent new technologies, and what it means to him to have his name on a patent. His testimony brought the personal significance of earning a patent to life for the jury—who would want to take that away from a real-life inventor?

Enhancing the corporate image cannot happen if jurors do not see a human with whom they can relate.

Distance

As indicated above, many jurors expect large corporations to be corrupt, to take advantage of their employees, and for executives to lie. Use these expectations to your advantage by distancing and setting yourself apart from the new template of bad corporate behavior.

Let jurors know this defendant is not Enron, not Arthur Andersen, not WorldCom. On direct examination, have the corporate witness acknowledge the common belief that many American corporations have become corrupt and make it clear that type of behavior would not be tolerated at this company. Provide specific examples to set this company apart by talking directly about this company's ethics and sharing the steps this company has taken to protect its employees.

Take Responsibility

One of the most challenging tasks for a corporate defendant is the tightrope walk between taking responsibility for one's own actions and admitting liability. Erring on the side of taking responsibility could lead to a conclusion, by judge or jury, that the defendant admits liability. Erring on the side of total deniability, however, could incite jurors' anger at a corporate executive for failing to take any responsibility and result in punitive damages to teach a lesson. Even though jurors recognize that CEOs cannot possibly know everything that goes on within a company, they have an expectation that the CEOs should be on top of everything or should at least take responsibility for not knowing. Jurors repeatedly tell us the buck stops at the top and any indication that the top executive is trying to blame someone else will likely backfire.

Taking responsibility does not have to be all or nothing—there are a lot of steps between taking responsibility for the specific claims in a lawsuit and presenting the defendant as responsible and humble. Rather than take a hard line strategy of denying every allegation the plaintiffs assert, figure out which battles absolutely need to be fought and what the defense can take responsibility for at trial. Giving a little will gain the defense a wealth of credibility with jurors.

One example can be found in an employment discrimination case with a Fortune 500 company. Among other things, mock jury research revealed that some jurors were so angry with the apparent "mismanagement" of a former executive's dismissal that they were willing to agree that the conduct was discriminatory and award punitive damages. In its defense, the corporate executive neutralized juror discontent by simply acknowledging that he did not handle this employee's situation as well as he could have. The CEO admitted he tried to let the employee down easy instead of making a clean break, but he now sees that was a mistake. Taking responsibility for mismanaging a situation is a far cry from admitting the decision was based on discrimination, but it effectively takes away jurors' ability to argue in deliberations that the company should be punished because the whole thing was handled so poorly.

**A CEO cannot get away
with saying, "No one
told me."**

Consistency

Consistency is one of the key components of credibility. During witness testimony of a corporate defendant, jurors will look for consistency in the witness's demeanor and consistency across corporate witnesses.

Jurors are instantly suspicious when a witness's demeanor changes from direct to cross-examination. While a defensive or hostile stance on cross-examination is understandable, jurors interpret it as a possible sign of trickery. For jurors, the truth should remain consistent regardless of who is asking the questions. When preparing corporate witnesses to testify, practice to make sure the witness's tone, word choice, speech rate, and facial expressions do not change from direct to cross-examination.

For example, one witness we worked with recently was a trial attorney and was very skeptical of any question asked on cross-examination. Even though she was very comfortable and appeared confident on direct examination, as soon as the cross-examination would begin, she squinted her eyes, frowned, and spoke in very slow deliberate sentences. When queried on this change in demeanor, she replied that she was listening intently to the questions and was trying very hard to not fall in the opponents trap—all understandable behaviors, but it made her look suspiciously defensive to mock jurors. With practice, her testimony became much more consistent by incorporating some of the behaviors into the direct examination phase (e.g., listening intently to the questions) and eliminating some from the cross-examination phase (e.g., frowning).

Consistency in message is also important for credibility of a corporate defendant and is achieved when jurors hear the same message from more than one person in the company. While hearing from a top executive can be important to defend against liability, it is often not enough to enhance the company's image with jurors. Very few jurors can identify with a CEO who is responsible for global operations and has a seven-figure salary. However, most jurors can identify with the "regular" employee who works in the trenches. Hearing a CEO testify that XYZ Company is a safe, responsible company that treats employees well is rather easy for jurors to dismiss. Hearing the same, consistent message from lower-level employees makes the statement true and believable.

A consistent message conveys that the messenger is both trustworthy and believable.

Nonverbal Communication

Attending to a witness's nonverbal signs is one of the most basic and obvious ways of enhancing communication, but is continually overlooked by trial teams preparing corporate defendants to testify. One particularly common scenario is that a corporate executive performed well at a deposition—said all the right things and gave nothing away. Because the words were on point, many attorneys would conclude this is a great witness that does not need a lot of prep work before trial. What is not apparent on the pages of a deposition transcript are this witness's repetitive blinking and shifting gaze. When the witness's deposition video was tested with a group of mock jurors, the trial team was shocked to learn that jurors strongly disliked this witness; they thought he was "shady" and covering up the truth. The nonverbal communication completely derailed the apparently flawless verbal testimony. In this case, the witness wore contacts to the deposition, which dried out and irritated his eyes. The easy solution was to have him wear glasses to trial.

Communication is 80% nonverbal.

Even though the fix is usually not as easy as in the above example, working with a witness's nonverbal communication is not an impossible task, but is one most attorneys are not trained to recognize. One particularly useful technique is to use videotape and watch the playback on mute. Attend to the witness's level of eye contact, body movements, gestures, facial expressions. Then turn the sound back on and attend to the witness's speech rate, tone, volume, and length of pauses. To prevent overwhelming a witness, pick one nonverbal component to work on at a time. Bringing in a communication expert or trial consultant can be particularly useful in working with some of these subtle testimony pitfalls.

If the witness has some mannerism that is innate or so habitual that it will not go away, do not try to ignore it and hope the jury will not notice it (they will). Bring it up during the direct examination so the witness can give a rationale for the mannerism and then move on. It only takes a minute but can make a world of difference. For example, one corporate defendant we worked with in a product liability case had a medical condition that caused intermittent hand tremors. The witness was distraught knowing that he would likely have tremors while on the stand. We proposed a two-prong solution. First, bring up the tremors during voir dire by asking the venire if anyone would be distracted by the tremors during a witness's testimony. Second, when the tremors started during the witness's testimony, the attorney asked on direct, "Mr. Johnson, I see that you have a slight tremor in your left hand. Why is that?" The witness responded by giving a simple answer and then moving on to the next question. By addressing it directly, the witness was able to relax on the stand and jurors had a reason for the behavior so they did not have to draw their own conclusions.

In sum, when working with corporate defendant clients to prepare them to testify at trial, keep in mind the words of Dennis Wholey, "Expecting the world to treat you fairly because you are a good person is a little like expecting the bull not to attack you because you are a vegetarian." Even if jurors hold anti-corporate attitudes, you can turn those juror expectations around and prove this defendant is the exception.

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