

When Laughter Is The Best Defense

Faced with 12 angry jurors, corporate advocates might try a little humor.

BY MICHAEL D. JONES

Americans are angry. That could be bad news for corporations because today's angry citizen is tomorrow's angry juror. Somehow or other, the lawyers who defend business need to reduce the fury in the courtroom before their clients get burned.

A recent CNN poll showed that 75 percent of Americans are upset about the way things are going in this country. They're furious that Bernie Madoff made off with so much money, and that banks and other bailed-out corporations are still making lavish purchases. They're mad that their good credit does not allow them to get a loan because banks made countless loans to people with bad credit. And they're incensed that college savings and retirement funds are melting.

Politicians of both parties are mining this rich vein of rage, and the media are fanning the flames. A *Tampa Tribune* column says "Backlash to Corporate Greed Is Growing." A *Baltimore Sun* article decries "A New Low for Corporate Greed." The *Washington Times* describes "The Age of Corporate Greed." Some op-eds urge that greedy executives be prosecuted and put away.

Some companies have already been hit in the anti-business backlash. On Feb. 24, an Alabama jury struck Novartis with a \$78.4 million verdict for overcharging Medicaid for prescription drugs—a verdict that included \$50 million in punitive damages. Granted, Alabama has long been criticized for its anti-corporate verdicts, but the current mood in the country knows no geographic, political, or demographic boundaries.

Every day, in cities and towns across America, angry citizens open their mail to find a letter summoning them to jury duty. They may be asked to sit in judgment against a corporation alleged to have put profits over people. And

they will not be in much of a mood to listen to what the corporation has to say.

THE ANGRY PANEL

As jury consultants Robert Minick and Dorothy Kagehiro explained in their 2004 article "Understanding Juror Emotions: Anger Management in the Courtroom," irate jurors are "the least influenced" by the defense's presentation of its case.

This is partly because anger is not purely cognitive, according to the Web site of the American Psychological Association. It produces physiological and biological changes, including increased heart rate, higher blood pressure, and increased adrenaline. Angry people, according to the association, tend to "jump to and act on" conclusions.

Jurors who jump to conclusions are not likely to favor the less immediately sympathetic party or the side with the more nuanced argument. All too often, that is the corporate defendant.

Traditional assumptions about the best jurors for business may not work today. When it comes to anger and fear, no group of jurors is exempt. White-collar workers are just as angry as blue-collar workers. They have also suffered greatly in this economy, and they also blame corporate greed. In some ways, newly disillusioned white-collar workers may be more dangerous than jurors who are constitutionally anti-corporation because the former are harder to spot in voir dire and stronger advocates against the corporation in the jury room.

I defend corporations for a living. I have traveled the back roads of Louisiana, Mississippi, Alabama, and Georgia, and the inner cities of Baltimore, Milwaukee, and Queens, N.Y., all the while getting to know and understand citizens who harbor anger against the system. Along the way, I've learned that breaking through this emotional

barrier requires more than a logical presentation in the courtroom.

Two of the most potent tools for swinging the incensed jury panel are humor and emotional redirection.

TIME TO LAUGH

The American Psychological Association suggests humor as a mechanism for individuals trying to control their own anger. Laughter can also be used to great effect in the courtroom. I have certainly found humor to be an effective tool when representing unpopular defendants in hostile jurisdictions.

As a fundamental matter of biology, it is difficult to laugh and rage at the same time. It doesn't matter why a person laughs. When she chuckles or giggles or guffaws, the whole world seems a better place. As Mark Twain wrote, "Humor is the great thing, the saving thing. The minute it crops up, all our irritation and resentments slip away, and a sunny spirit takes their place."

Laughter does have to be used carefully. As jury consultant Laurie Kuslansky notes in her insightful 2004 article "A Serious Look at Humor in Litigation," humor that works in the courtroom does not come at the expense of a litigant or witness who may be hurt and with whom the jury will then sympathize. Appropriate humor "brings consensus, provides comic relief, or is self-disclosing, universal, and honest."

A self-deprecating reference to the lawyer's own human frailty, for instance, forces jurors to focus on him as a fellow human being. When the jury laughs after I note as I run my hand over my obviously balding head that I "lost my Afro" many years ago, it relieves the tension in the courtroom, eases my own sense of follicle grief, and makes it harder to dislike me and my client.

One of the most effective, and perhaps safest, methods is to make the jury feel as if they're watching one of those beloved buddy movies, like the *Lethal Weapon* series with Mel Gibson and Danny Glover or *48 Hours* with Eddie Murphy and Nick Nolte. Those movies are characterized by witty, fast-paced exchanges between two ultimately lovable characters.

The main stumbling block to this approach—besides the importance of not joking around at a serious moment during the trial—is that it requires great chemistry between co-counsel. You've got to be able to toss the conversational ball back and forth. If one of you comes across as irritated or uncomfortable, you will only make it easier for the jury to be irritated with you.

Once during a closing argument, I commented that my co-counsel was much older than me. The jury snickered. Taking the cue, my co-counsel stood up and objected to being called old. Despite the seriousness of the case and the charges against our client, the jury, and even the judge, burst into laughter. After that, it was hard for our opponents to whip up any real anger against us or our clients.

Another way to use humor in a nonconfrontational way is through trial exhibits. In that same case, the jury

was visibly amused by a graphic that showed all three opposition experts stacked on top of each other like circus clowns. They came tumbling down after the base on which they stood crumbled because, as I noted, their case condemning my client was built on a "weak, wobbly, unscientific foundation." Later even one of our opponents acknowledged the power of that humorous graphic. And the jury cheerfully recalled the interaction between me and my co-counsel.

FEEL SOMETHING ELSE

Sometimes humor alone will not tame the irate juror. Effective anger management also means helping the jury to substitute one less-favorable emotion for another more favorable. The premise here is that often logic alone cannot stop the flow of strong emotions. If a jury is determined to shed tears, rather than try to talk them out of it, give them a different victim to cry for.

My opponent in a negligence lawsuit tried to bring the jury to tears for his client, a senior citizen severely injured in a car accident in pre-Katrina New Orleans. I had started out representing the automobile manufacturer, but after the manufacturer was dismissed from the case, the company asked that I stay to represent the suburban dealership, which was scared to death of what might happen before an inner-city New Orleans jury. I had gone to college in New Orleans and grew up in northern Louisiana, where I regularly spoke to church audiences, so the Bible belt culture is quite familiar to me.

My opponent had cautioned me that I had no chance. At trial he set out to stoke prevalent David-versus-Goliath sentiment, while looking for opportunities to point out that I was a "Washington lawyer" from a large firm.

In his closing argument, he waxed eloquent about how sad it was that his client was wheelchair-bound for the rest of her life. Rather than try to tamp down this natural emotion, I actually set out to ratchet up the emotional temperature but move it in another direction—toward the defense.

My opponent argued how awful it was that the negligence of the car dealership, in making faulty repairs to his client's brakes, had left his client paralyzed. Anticipating this approach, I had chosen as my corporate representative not the dealership owner or the manager, but the shy brake mechanic who had worked on the car. I argued how unfair it was to leave this cloud hanging over his head. I quoted *Proverbs* about a good name being "greater than riches" and Shakespeare's *Othello* about the value of a good reputation. I even used his small flashlight during closing argument to "shine the light on the evidence." By the time I was done some two hours later, the expected sobs for the injured grandmother had turned into tears for the falsely accused brake mechanic.

When the jury came back with a verdict for my client, it was my opponent who, to everyone's surprise, wept audibly. Instead of a lone individual seeking justice from an uncaring corporation, the case became about two ordinary

people, an injured grandmother and an honest mechanic who was also a husband and father and who had a reputation for thoroughness. Rather than try to take the emotions out of the case, I simply redirected them.

A corporation on trial in an unfriendly jurisdiction typically tries to change the venue to some friendlier locale. But when the majority of American citizens are facing or fear serious economic pain, there is really nowhere else to go. Any company heading to trial needs a strategy for

dealing with juror anger. Without it, the worst words for a corporate defender and his clients might be: "The jury has reached its verdict."

Michael D. Jones is a litigation partner in the Washington, D.C., office of Kirkland & Ellis LLP and author of the CD titled "Getting Juries to Listen: Creating Memorable Stories and Images." He can be reached at michael.jones@kirkland.com.



KIRKLAND & ELLIS LLP