

LITIGATION SUPPORT A Special Report

Jury Bias? Could Be True

Recent corporate scandals might lead to more-entrenched juror hostility.



BY STEVEN LYBRAND
AND JIM DOBSON

The concern that the American jury system is inherently biased against large corporations has been a recurring criticism since the 1960s. Critics of the system point to jury awards they consider egregious, notably the \$4.8 billion award California jurors ordered General Motors to pay for injuries to passengers in their 1979 Chevrolet Malibu suit, or the \$2.3 billion judgment against Dow Corning over charges concerning silicone breast implants.

In both cases, the critics saw more emotion than logic in the awards. More recently, these critics claim that the swelling tide of anti-corporate sentiment that has occurred in the wake of heavily publicized corporate corruption cases has added further fuel to the fire. WorldCom, Enron, Tyco, HealthSouth, and Adelphia Communications are just a few of the more notorious recent cases of what has come to be called “the era of greed.”

Are these perceptions of widespread juror animus against corporations an accurate reflection of litigation today? Some think so. In May 2004, Citigroup settled its part of a class action for its involvement in the WorldCom case. Chairman Charles Prince pointed to the anti-corporate climate as the motivation for Citigroup’s willingness to pay almost \$3 billion. More recently, a syndicate of other investment banks followed Citigroup by paying out more than \$3 billion to settle their cases with plaintiffs over the WorldCom bankruptcy.

While these settlements were the product of a number of cost-benefit calculations, could at least some of the motivation to settle be more about corporate fears and stereotypes of the jury system than about its actual functioning? In cases such as the Citigroup settlement, anticipation of juror anti-corporate bias prevents jurors from even hearing the case. Again, we might ask if such beliefs are warranted.

LESS HOSTILE

Academic research on the actual functioning of jurors

reveals a less-hostile environment than is commonly perceived. Reviews of the empirical evidence on civil juries by respected academics such as University of Delaware criminal justice and psychology professor Valerie Hans and Duke University law professor Neil Vidmar suggest that juror anti-corporate and pro-plaintiff biases are less of a problem than corporations think. In 2000, Hans interviewed jurors in both actual cases and mock trials and reviewed surveys of the general public. She found that jurors are quite suspicious of plaintiff motivations in bringing lawsuits—which is similar to attitudes in the general public as well.

These views are not particularly anti-corporate: About 25 percent of those surveyed have “a great deal” of confidence in major companies; about 60 percent have “only some” degree of confidence in major companies; and only 10 percent report “hardly any” degree of confidence.

Since most of this research was conducted before 2000, what do we know about the effects of recent corporate scandals on juror attitudes?

More recent research at DOAR, our litigation consulting firm, suggests that there is significant anti-corporate juror bias. In DOAR’s jury consulting division, trial attorneys can present their cases before jurors recruited from the same judicial district in which their actual cases are pending. The idea is to replicate the demographics of the specific district to which their cases have been assigned. The case is then simulated in the setting of a mock courtroom on DOAR’s premises. Jurors hear the case and deliberate to verdict in deliberation rooms so that attorneys and their clients have real-time exposure to the deliberations. All proceedings are videotaped and transcribed for viewing and analysis by a team of social scientists.

Although abbreviated, the exercise mirrors the actual proceedings and allows attorneys to preview their cases, refine trial strategies, and prepare for jury selection. We interview the mock jurors before the exercise, and each juror completes a

detailed questionnaire that probes his or her background experiences and viewpoints on issues relevant to the case. Later, questionnaires are distributed to gauge juror comprehension and receptivity to the case strategy. After the deliberations, each member of the panel completes a verdict form.

One of DOAR's primary objectives here is to ascertain how jurors perceive corporate clients in a courtroom setting. Another is to study the ways in which jurors appropriate the arguments of an actual case.

Based on numerous mock trials of civil litigation across a range of judicial districts, we have found that jurors respond to particular cases involving large corporations in certain patterns. As might be expected, jurors do not enter the courtroom as blank slates. They come with worldviews and systems of values and beliefs that they have acquired over a lifetime. At DOAR, our objective is to analyze and predict probable verdicts. If one can understand the ways that jurors perceive the corporate world and why they perceive it in the ways they do, then jury selection, de-selection, and trial strategy can be addressed in an informed way.

EXPECTATIONS

The data generated from jury research at DOAR conducted in 2004 and 2005 reveal a persistent repetition of themes about corporations and the motivation of corporate executives. That there is suspicion of corporations and subsequent anti-corporate bias is not surprising at a time when corporate scandals seem to be a staple of the evening news. What is more surprising is that anti-corporate bias emanates from the expectations people have about the behavior of corporate executives and what people believe the role of corporations should be in the larger community.

What our findings suggest is that attorneys must determine the kinds of anti-corporate bias that exist and the demographic characteristics of the jurors who harbor such beliefs. One salient point for trial preparation is that some forms of hard-core anti-corporate bias probably won't change, and jurors harboring certain beliefs must be recognized in the voir dire process so they can be excused. Even if such jurors are few, it is important to identify them because there appear to be no facts or arguments that will convince such a juror that a corporation is not guilty of some form of malfeasance. Such jurors see their jury service as an opportunity to set right the inherent injustice of an unfair social system, and this means tagging the corporation with a nasty penalty.

For example, in one of DOAR's mock trials of a class action, one juror vehemently stated that the law must be superseded by the opportunity "to make history here today." To this juror, the case represented an opportunity to correct an unjust system of economic distribution. Such hard-core anti-corporate jurors will not listen to the evidence of a case. Jurors within this hard-core group also express the idea of conspiracy: that corporations "are all in cahoots with one another" or that "they are in bed together." Such jurors see corporations as in opposition to ordinary folk.

Even more interesting is a juror view of corporations as an entity that forms part of a protective hierarchy that should protect ordinary people. Such jurors see corporations as part of a protective network of authority to serve the larger social order. When things go wrong, or flaws in the system become evident,

these jurors believe that those in positions of authority have failed to protect the interests of the majority of the population. In their minds, there is no room for other explanations. For example, if something goes wrong with an investment, this type of juror assumes that those in power have not carried out their obligations to protect the individual investor.

These jurors firmly believe that both the corporate structure as well as government should be held liable and make right any loss. Since such institutions are held to be the "experts," they are charged with protecting people, even from their own follies. Such jurors believe that ordinary people should be able to put their trust in this hierarchical system that they charge with keeping the social order running smoothly.

For example, after hearing about a securities class action against major corporations, in which the defense argued a form of caveat emptor, one such mock juror expressed her belief that those issuing securities have all the responsibility for any risks even when the risks are clearly disclosed in the offering materials: "But for the most part, an ordinary person does not read that (disclosure material for investors), they rely on the experts. And that's why there are so many tiers . . . that's why there are so many tiers of experts."

Professor Hans found that juries hold corporations to a "reasonable corporation" standard rather than the traditional legal standard of a "reasonable person." In securities litigation, the reasonable person standard refers to what a prudent person would do in governing her or his financial affairs (e.g., investment decisions), when considering the level of responsibility to which to hold a (corporate) defendant. The "reasonable corporation" standard is more stringent. Just how stringent depends on how jurors define the obligations of a reasonable corporation.

Case strategy directed toward such jurors must take into account juror perception of how "the system" works. Such jurors must be convinced during the trial that "those in charge" have not failed them and that power resides in different kinds of corporate entities (such as investment funds), to conduct (i.e., investigate) the investments they recommend. Some hold the common view that corporations routinely violate ethical practice and sacrifice the "common good" for the sake of profits.

FAITH IN THE SYSTEM

Not all jurors, of course, are hostile to the capitalist system. One important finding of our research is that there are different types of anti-corporate sentiment. The less ideologically inclined anti-corporate jurors who may hold the corporate world accountable for public well-being may also believe in the traditional American value of a free-enterprise system. They might be more amenable to lucid explanation and information than those who are skeptical of, or who reject, capitalist economics on principle. Their deepest value is that the "system" they believe in should not fail them. Although difficult, it may be possible to convince them that corporate defendants are not necessarily liable since responsibility can lie elsewhere.

There are also jurors who express an alternative view of corporations and thus do not harbor anti-business sentiments. In the deliberations of mock trials of securities cases of investor-plaintiffs against corporate entities, pro-defendant jurors cited the plaintiffs' responsibility for assuming the risks of voluntary investment decisions. They often believe that the

plaintiffs are pursuing corporate defendants because they cannot retrieve their losses in any other way and that plaintiffs are unfairly seeking “deep pockets” wherever they can find them. Beyond these types was a type of juror who concentrated on evidence and the law. Such evidence-driven jurors are the friends of those attorneys with complicated cases who need such jurors to cut through the emotional appeal of some of the “bad facts” that are part of all complicated civil litigation.

The types of jurors we have discussed cut across demographic lines. While certain economically and socially advantaged individuals hold some of the most intransigent anti-corporate views (some even hold the corporate world accountable for all social ills), jurors who may be customarily cut for economic or ethnic characteristics, in fact, may be corporate-friendly.

These findings may offer a truer reading of juror behavior than studies of juror attitudes based on survey research. When engaged in the fray of deliberating a case (mock or actual), jurors are less self-conscious about how they appear to others and more engaged in the process. The mock trial allows us to observe how jurors perform and what they say in the actual situation. In mock deliberations, individuals are less concerned with how they present themselves to a researcher (who is not in the room during deliberations) and

more engaged in the process of group judgment and decision making than when they are asked to report their views one-on-one during interviews or on questionnaires.

In a mock trial, jurors are caught up in the heat of deliberating and deciding the verdict with their fellow jurors. So engaged do they become that they appear to forget, at times, that they are participating in the exercise of a mock trial.

Qualitative jury research indicates more anti-corporate bias than the academic research has found. Yet, even if it were the case that anti-corporate bias is not as extensive as it appears, attorneys representing corporate defendants, especially in class action suits, must still engage in the delicate task of not only identifying jurors with anti-corporate biases or tendencies, but of determining what forms these beliefs take.

What emerges from jury research is that jurors may bring a variety of anti-corporate biases to trial. The good news is that these various forms can be identified and addressed through incisive questioning in voir dire and by the use of informed and insightful trial strategy.

Steven Lybrand is a senior research consultant and Jim Dobson is vice president of jury consulting at DOAR, a litigation consulting firm based in Lynbrook, N.Y.