When I first became a juror, I have to say, I was not inclined to favor your client.” That’s what an actual juror said after she and the rest of the jury returned a unanimous verdict in favor of our client, a Fortune 100 corporation. The case involved a plaintiff who claimed to be blowing the whistle on the company for fraud for which he was allegedly discharged in retaliation. The juror’s candor was appreciated and reflected what the trial team and we at DOAR felt: at the outset, the jury was going to have a hard time seeing beyond their stereotypes about our large corporate client.

Several national surveys support the notion that many jurors hold negative views of corporations. In one, 85% of respondents endorsed the statement “If a company could benefit financially by lying, it’s probable that it would do so.” With recent heightened awareness of corporate scandals and wrongdoing since the crash of 2008, it may be somewhat surprising to note that this percentage has been relatively stable for the past decade. Although, the level of mistrust would likely be even higher if the question referred specifically, for instance, to banks or oil companies.

Jurors can hardly be blamed for prejudice against large companies. After all, stories of the bad actors are pervasive in the media. Jurors’ opinions can be tainted by a seemingly endless series of scandals, from companies like Enron, AIG, Barclays, Tyco, and BP, to Lehman Brothers, Exxon, Toyota, GM, Apple, and Walmart, leading jurors to conclude that all large corporations
are likely unethical. Jurors naturally generalize these stories to all large corporations. Add to this that extremely few jurors have any direct experience with corporate decision-making or governance or anyone in a leadership position at a major corporation. In the absence of direct knowledge, their imaginations are allowed to run wild about corporations’ nefarious dealings.

Many attorneys tell us they feel the deck is stacked against them, and that they believe the risks of going to trial are too great, even if they believe strongly in their case. As a result, many avoid taking their case to trial and opt for settlements.

This may be particularly true in whistleblower cases, where the mere allegation of wrongdoing often activates jurors’ stereotypes about immoral corporate behavior. An experienced plaintiff attorney, with a client claiming whistleblower status, is banking on the fact that most large corporate defendants fear the uncertainty of jury trials. Thus, these plaintiff attorneys may also feel they have an advantage in negotiating settlements.

It all sounds pretty dour for corporate defendants in whistleblower cases, but it doesn’t have to be.

In a series of recent labor and employment cases, we at DOAR have developed several strategies that can counter jurors’ reliance on corporate stereotypes and actually get jurors to side with a corporate defendant. Here, in broad strokes, are some of those strategies. Overall,

Corporations are abstractions. People are real. It’s easier for people to express negative feelings toward an abstraction than an actual person. For instance, for many years, political pundits have seemed dumfounded by the fact that, while Congress’ approval rating is very low, people express much higher approval ratings for their own Congressman or Congresswomen. Recent polls (e.g., Gallup, 2013) show Congress’ approval rating languishing in the teens, while people’s individual representative’s approval ratings hover around 50%. Approval is even stronger (62%) when the respondent knows the name of their representative.

Actually, this only makes sense. The legislative branch, as a whole, is really an abstraction. In contrast, people’s actual representative is an individual person, someone they may feel they know, more so if they can name them. Humans are wired to relate to other people, not abstractions and a corporation, like Congress, is an abstraction.

The whistleblower always has the advantage of simply being a person, as opposed to an abstraction like the corporate defendant. There is an immediate rapport between the jury and the supposed whistleblower. Further, the supposed whistleblower can paint him or herself as an individual fighting against a corrupt (and abstract) system. They are even potentially heroic, willing to risk their job and being ostracized (an enormous cost for any social animal) in order to
stand up for righteous principles. Of course, the plaintiff may, in reality, be taking on the mantle of a whistleblower to exploit the heroic persona. Either way, they have an inherent advantage.

Therefore, one key to mitigating anti-corporate stereotypes is to focus almost exclusively on the actual, flesh and bone people who work for the corporation. In several recent cases, we have advised our clients to open with something like, “My name is X and I represent Y Corporation” and then immediately start telling the story of the case in terms of the people involved. The case, therefore, becomes whistleblower versus other people, rather than a corporation, David v. Davids, rather than David v. Goliath. This also instructs against the common defense tactic of trying to score points with the jury by telling them the story of company, the history of the company, the laudable things the company does. This tactic often comes off as stale public relations. It doesn’t resonate, because jurors can’t relate to it viscerally, because it’s not about people. Highlighting the people who work for the corporation, rather than the corporation itself, helps to level the playing field and undercut the whistleblower’s advantage. Next, highlight the people who work for the corporation, rather than the corporation itself, helps to level the playing field.
Prospective jurors with senior management experience tend to be more defense-oriented, more likely to assume the whistleblower to be a problem employee, and, of course, more likely to be the target of a plaintiff’s peremptory challenge.

So there are a couple of recommendations for telling the corporation’s story, but what about dealing with the whistleblower’s story. First and foremost,

Many jurors come in to court predisposed to the notion that corporations are malevolent employers, caring more about profits than people. As evidence, consider all of the books on management that cite companies like Southwest Airlines. The authors write with breathless astonishment describing hyper-successful companies that actually treat their employees well.

At the same time, whistleblower cases necessarily have some component of alleged retribution or retaliation. This plays right into jurors’ expectations. When threatened, the malicious corporation has no problem trying to silence its internal nemesis through a counterattack.

This point is the basis of one of DOAR’s key recommendations to our clients. Any perceived attack on a whistleblower in court will only reinforce to the jury the notion that the corporation is capable of the very retribution or retaliation the plaintiff is claiming. It is tantamount to the violent outburst on the stand from a defendant accused of assault. It just makes the accusation so much more believable.

This is also often the hardest recommendation for clients to heed, and for good reason. Whistleblowers often accuse companies of egregious wrongdoing. For its part, the corporate client believes it has done nothing wrong. Thus, it is natural for the company and its lawyers to resent (to put it mildly) the false accuser. Add to that the resources that have to be expended to defend the company and a whistleblower can become the focus of a great deal of ire. Further, trial attorneys pick up on and reflect their clients’ desire to expose and humiliate the whistleblower and soon everyone is riled up, champing at the bit for the chance to show the jury what a dishonest, scurrilous, loathsome, so-and-so the plaintiff really is.

Stop. While all of this resentment is perfectly natural, it can lead to some pretty severe self-inflicted wounds. Attacking the plaintiff, though potentially deeply satisfying, has an enormous downside and is never worth losing the case at trial. Framed as a dichotomy, the trial lawyers and clients usually see the wisdom of staying at arm’s length from the plaintiff.
This is not to say that the supposed whistleblower will not be held to account for the false accusation, just that the impeachment will come from a figurative third party, the testimony and documents. While it may be true that “living well is the ultimate revenge,” winning at trial is a close second.

To sum up, attorneys believe that many jurors are predisposed to think the worst about a corporate defendant in a whistleblower action. Whistleblower plaintiffs and their attorneys can (and do) try to take advantage of jurors’ stereotypes about corporations. To counter this, we advise defendants to focus on corporate employees, particularly those to whom the jury will relate, and to use these employees to tell the corporate defendant’s story. In addition, we strongly recommend that the trial team avoid anything that jurors can construe as an attack on the plaintiff, as this will only serve to reinforce the plaintiff’s claim of having been attacked by the corporation through retribution or retaliation.

Finally, each whistleblower case has its idiosyncrasies, and these recommendations are meant as general guidelines. It is best to perform pre-trial research to analyze how mock jurors will likely see specific whistleblowers and corporate defendants. In all, though, we believe strongly that these cases should not be settled out of fear of jurors’ anti-corporate stereotypes. Our recent experience demonstrates that whistleblower cases can be tried and won, if steps are taken to mitigate jurors’ anti-corporate stereotypes.