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HUMANIZING THE WIZARD OF OZ

Changing A Judge and Jury's Perception of The Corporate Defendant by Revealing Its Inner-self That Is Behind The Curtain

Matthew J. Stanczyk

Moderator¹

Plunkett Cooney

Detroit, Michigan

mstanczyk@plunkettcooney.com

Bill Kanasky Jr., Ph.D.

Courtroom Sciences, Inc.

Orlando, Florida

bkankasky@CourtroomSciences.com

Kara Stubbs

Baker Sterchi Cowden & Rice LLC

Kansas City, Missouri

stubbs@bscr-law.com

Making your company more human before a judge and a jury:

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Dorothy, Tin Man, Cowardly Lion and Scarecrow's first introduction to the Wizard of Oz was in the form of a non-physical hologram with scary sound and visual effects and with an angry, somewhat narcissistic attitude. The group was scared but had hopes that this non-physical being could fulfill their needs. After all, he was known as the "Great and Powerful Oz". They were given a task and were promised many things if it was accomplished. During meeting number two with Oz, his integrity was called into question when he did not live up to his promise after Dorothy and her companions returned with the broomstick of the Wicked Witch of the West. Following the broken promise, they became angry. Oz cannot escape this integrity pitfall. He then got defensive and made matters worse for himself by saying: "*Do you presume to criticize the Great Oz you ungrateful creatures. Think yourselves lucky that I'm giving you audience tomorrow instead of 20 years from now*". Then, our hero Toto, pulled back the curtain to reveal the man behind the moniker. It was at this time that he became transparent, admitted his shortcomings, and the group realized that in many regards he was just like them. He actually did have fears, frailty, and compassion. In the end, he too becomes a hero of the movie and no longer just a name, logo, or smokey apparition. He had been humanized.

When a judge or jury hears your company's name, what are the first things that come to their minds? A commercial, whether radio or television, only about your product or services? A billboard, company logo, or multi-million-dollar office building with your name on it? Or do the judge and jury think about the faces of the people that work for you, the faces or images of your leadership and even employees? And if so, why are they thinking of them?

A. Who Are You?

a. Why is there a negative perception of corporations generally?

1. Bad mass media and social media

Does corporate philanthropy, community involvement and other good or positive news make the electronic front page? Typically not. Certainly not for national or global level companies. Simply stated, it doesn't sell. Seriously, when is the last time you saw, on any news outlet's top stories, a truly positive corporate story? Surely, you can recall or easily find negative ones. Social media is no different, and often there's not much control over what is being said. Instead, we hear about corporate tragedy, greed, integrity issues, unsafe products, and questionable leaders. This is not a new trend. It most certainly pre-dates electronic media and the internet by decades. Consider the original concept for the formation of unions and why. Then there was decades worth of legislation at both the state and national level concerning everything from stock trading, labor and employment laws, workplace safety and product safety. That did not occur because the public wore a smiley face when thinking about corporations.

ii. Historical issues

Even in the last 20 years, despite all the progress and attempts to change corporate culture and conduct through legislation and other means, there still was:

- Profits over safety and quality

- Volkswagen emission
- GM ignition switch
- Takata airbag
- Opioid litigation
- Samsung Galaxy batteries
- Peanut Corp of America salmonella
- BP Deepwater horizon²
- Financial
 - Enron
 - Worldcom
 - Lehman Brothers
 - Bernie Madoff
- Internet/social media
 - Facebook harvests data without consent
 - Security breaches involving billions of documents with personal data

According to research conducted by Courtroom Sciences, Inc. (CSI), over 1000 mock jury surveys they conducted between January 2018 and January 2020 showed 67% of those responding believed taxes on large corporations should be increased, 64% believed “lawsuits are important to keep corporations honest” and 57% agreed “corporations take advantage of individuals.”³

iii. Direct experience (negative one)

Of course, another contributor to the negative perception of corporations is from direct experience. So, instead of reading about Enron, some individuals owned stock or remember the market crash and why

² Not to mention the horrible corporate response to the crisis.

³ Lorie Sicafuse and Melissa Loberg, *Trial by Covid: The pandemics impact on jurors and defendants*, CLM (April 12, 2021) <https://www.theclm.org/Magazine/articles/trial-by-covid/2208>.

they lost most of their retirement account; a close relative died due to an opioid overdose or was injured by a failure in a Takata airbag. This direct experience does not mean direct experience with your company. Face it, there is guilt by association, just as there often is with lawyers. Association means “you are one of them,” regardless of how different you may be from the companies in the news or experiences that created the negative perception in the first place.

iv. You aren’t human!

To jurors and often judges, you are a faceless name on a building, a logo, or in the case of the Wizard of Oz, some 3D apparition. You are a legal fiction. Jurors are not logos or a building, and neither are the plaintiffs.⁴

b. How well do you know the outside world’s perception of your company?

While this sounds like an appropriate discussion regarding your marketing, sales and customer relations teams, that’s because it is. Those are the groups who have the information to be used for a different purpose than you would originally consider. The importance of this information, especially in the venue where the litigation is occurring, can be extremely helpful to counsel. If you are tracking feedback and/or data from social media regarding your company on a regular basis, it begs the question, why? While there may be a wide variety of reasons, the primary ones are self-evident: to increase sales and to create or maintain a positive image of the company/brand. But now you have another reason. In order to attempt to humanize the company, counsel must know the culture, the community perception, the “you know-what” people are saying, and of course, why. Counsel can then build upon the positive and create a plan to mitigate the negative.

c. Are you actively, currently, doing anything to improve negative perceptions, opinions?

Again, while this is being done primarily for the brand and marketing, the data can be used by counsel during the course of litigation. Conduct to improve perceptions may include the transparent acknowledgement of a need to change that impacts the consuming public and even the employees of the company. For example, if the company changed its approach to product design based on a lesson learned, e.g. uptick in warranty claims or a recall, which resulted in further improvement in overall product safety, this could be very helpful in defending a product developed under the new design concepts. Other important items to track, such that the information may be available to your counsel, may include:

- Community involvement, especially if there is any in the venue where you have litigation, even if not in the same city where the lawsuit is pending, as

⁴ Different issue with commercial plaintiffs but the humanizing issue is still important in such cases.

information relative to the particular state can be of value;

- Corporate philanthropy can certainly be important when faced with plaintiff's counsel's focus on corporate profit, which can be countered with corporate donations to philanthropic endeavors;
- Corporate community awards are, likewise, great pieces of information to have for your counsel;
- Company interaction in the field with consumers can definitely be effective pieces of information that start making you look more like a person from Kansas rather than a billboard. Consider such things as:
 - employee interaction with consumers or the public at conventions, festivals and townhalls.

The last point can be very effective depending upon the type of litigation that you are facing. For example, consider an aerial picture above an RV manufacturer's main campground where it holds a national summer festival for its consumers. The company employees participate in it, including the manufacturer's engineers and field representatives. They obtain feedback on everything from product improvement to customer satisfaction, but it's just not a question and answer session. They sit down with the consumers at their RV's, break bread with them, and, otherwise, show their consumers they are just like them. Fast forward to a suit involving one of their recreational vehicles on a product design issue. The aerial photograph showing hundreds and hundreds of RVs at this festival with a representative testifying about how they truly care about their customers and that these are opportunities they use regarding product design and safety, which is suddenly in front of the jury.

B. Getting the Good Story in Front of the Jury

a. Build the story long before trial

i. Knowing what you have and letting counsel know

Let's look at product liability matters. The overarching goals for defense in products liability cases are to keep the product's reputation intact (or even improve upon it) and drive away any imputation that the

product is defective or unreasonably dangerous.⁵ Once a lawsuit has been filed, it is important for counsel to become as knowledgeable as possible about the both the company and the product's history.⁶ It is also integral for counsel to understand how the product is marketed and how the public might perceive both the company and its product.⁷ This kind of knowledge and awareness is necessary to developing a theme for the defense: that the product belongs on the market.⁸ However, this is by no means limited to product liability matters.

Further, numerous conversations with the client are necessary to compile enough data to formulate a strategic response to interested media.⁹ A public relations campaign that is both strategic and faithfully supports a sound legal strategy will focus on humanizing the corporation.¹⁰ Notably, if the client has a meaningful local presence and favorable humanizing factors, like significant charity work, community involvement, commitment to diversity, or commitment to environmental issues, it is important for counsel to learn about these things even if they have no legal relevance.¹¹ Highlighting positive factors early and often helps neutralize or limit bias that both the public and members of the jury may harbor against a corporate client.¹²

ii. Placing it in discovery responses

Plaintiff's counsel wants to secure damaging admissions from the defense that paint the company as a danger to the jurors and the public.¹³ One way that a plaintiff's counsel can achieve this is to trap the company into a series of damaging admissions about highly generalized propositions that suggest the company was irresponsible.¹⁴ Beginning at the discovery stage, it is important for defense counsel to prepare the company and its witnesses fully, arm them to tell the company's side of events, give them the tools to counteract any attacks, and ensure they understand the available defenses and trial themes.¹⁵ There is nothing that truly prohibits you in responding to certain discovery requests with sound bites about the company such as (depending on the type of legal action): awards for best places to work; product design awards; industry segment awards; corporate philanthropy, etc. Absent a motion to strike, this information remains in the responses which are often used as exhibits at a trial.

iii. 30(b)(6) can kill a good story as well as make one

⁵ Larry Smith, *Media Strategies in Product Liability Crises*, 22 *Of Counsel* 6 (Sept. 2003).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ John L. Altieri, Jr. § 21:42 *Conducting Voir Dire – Techniques for insurer counsel*, 2 *Law and Prac. Of Ins. Coverage Litig.* (July 2021).

¹² *Id.*

¹³ Patrick E. Foppe and Jill F. Bechtold, *From Discovery to the Courtroom*, 61 *No. 12 DRI For Def.* 56 (Dec. 2019).

¹⁴ *Id.*

¹⁵ *Id.*

Who is going to be the face of the company during trial? Your Fed. R. Civ. P. 30(b)(6) or state equivalent witness or perhaps someone from the company who cannot be called to testify, but will nonetheless be introduced to the jury, e.g. an assistant General Counsel or Corporate Risk Manager. There are pluses and minuses to this choice. If the 30(b)(6) witness is likeable and can make the jury feel a verdict against the company is literally one against the witness, you want that person present for the *entire* trial where he/she is very visible, at counsel table. It may even be more effective if the company can afford to have two people at counsel table, such as the witness and a non-witness representative, because you have two faces. Not having the 30(b)(6) witness present for the entire trial may give the impression the trial is not that important.

Pursuant to Fed. R. Civ. P. 30(b)(6), the defendant organization must designate someone to testify on behalf of the corporation.¹⁶ The “corporate representative” chosen will give binding testimony and can be anyone that the organization chooses, including current or former employees, or anyone on the outside who agrees to testify.¹⁷ However, this does not mean that the “corporate representative” produced for deposition must be the person with the most knowledge on a particular subject.¹⁸ Notably, the company has an obligation to educate the corporate representative on the requested topics so they can testify as to the organization’s knowledge, which is a distinct from their personal knowledge.¹⁹

An integral part of humanizing a corporation is picking a corporate representative that the jury can relate to, i.e., an individual who looks and comes across as sympathetic or at least likeable.²⁰ It is also important to transform scientific data into more easily understood sound bites and to identify a corporate representative that can come across credibly while striking the right balance between the simplified message and the comprehensive research that supports it.²¹

When assessing witnesses that will appear at trial, it is important to consider individuals who naturally fit the role.²² For instance, someone from New York headquarters may come across as an “outsider” during a trial in Alabama, and jurors may not feel like they can relate.²³ Thus, a regional director may be a better choice if there are concerns about a potential culture clash.²⁴ Any appearance of cluelessness, discomfort, ignorance, or arrogance from witnesses will hurt efforts to humanize a corporate client.²⁵ Notably, when putting a face on the corporation, it is important to put an individual at the defense table

¹⁶ Michelle Molinaro Burke, *Making Sure the Correct 30(b)(6) Witness is Produced in Response to Your Notice*, AMERICAN BAR ASSOCIATION (Sept. 19, 2019) <https://www.americanbar.org/groups/litigation/committees/young-advocates/practice/2018/making-sure-the-correct-30b6-witness-is-produced-in-response-to-your-notice/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Smith, *supra* note 4 at 10.

²¹ *Id.*

²² Lisa Blue and Robert Hirschhorn, § 20:4. *When your client is a corporation*, 1 Blue’s Guide to Jury Selection (Nov. 2021).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

who will be present throughout the *entire* trial.²⁶ A constantly changing face destroys continuity and handicaps jurors' ability to form an association with the corporate representative and the company.²⁷

The following factors should be considered when selecting an appropriate corporate representative:

- appearance, presentation, savvy, and intelligence
- existing knowledge that can be helpful or harmful
- access of the designee to privileged information
- availability and willingness to prepare
- testimonial experience
- likelihood that the representative will be deposed in a personal capacity; and
- any paper trail leading back to the designee²⁸

While the other side cannot have any input on the identity or position of the corporate representative, in 2020, the Advisory Committee on Civil Rules recommended an amendment that requires opposing parties "to confer in good faith about the matters for examination."²⁹ Generally, this formalized the best practice of discussing notice issues with opposing counsel.³⁰

Nonetheless, a suitable notice of deposition should contain "reasonably particular" topics that are loosely drafted to avoid an objection that a particular topic was not part of the deposition notice.³¹ On this front, it may be helpful to prepare a deposition outline. During the deposition, plaintiff's counsel will (1) attempt to establish that the corporate representative is not the "right" witness to testify on the requested issues or (2) attempt to establish that corporate representative is the "right" witness, but is not knowledgeable on the issues.³² If the selected corporate representative does not have the requisite

²⁶ *Id.*

²⁷ *Id.*

²⁸ Joyce C. Wang, et al., *Speak for Yourself: The 30(b)(6) Deposition*, AMERICAN BAR ASSOCIATION (Sept. 19, 2019), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/speak-yourself-30b6-deposition/.

²⁹ Tiffany Ward and Jessica Kennedy, *A Review of the 2020 Amendment to Rule 30(b)(6): A Guide for Practitioners on How to Approach the New Corporate Deposition Process*, Florida Bar Journal (Jan./Feb. 2021) <https://www.floridabar.org/the-florida-bar-journal/a-review-of-the-2020-amendment-to-rule-30b6-a-guide-for-practitioners-on-how-to-approach-the-new-corporate-deposition-process/>; Burke, *supra* note 15.

³⁰ Ward and Kennedy, *supra* note 28.

³¹ Burke, *supra* note 15.

³² *Id.*

knowledge and cannot ascertain information from corporate records, then the organization may be precluded from introducing testimony on these areas at trial.³³

Further, if the court finds that the witness was unprepared, unresponsive, and unwilling or unable to provide the necessary factual information, the corporate may face sanctions for failing to appear.³⁴ Some courts have ordered corporations to redesignate witnesses or designate additional witnesses, while other courts have rejected motions to compel additional designees in cases where the original designee provided the best chance of obtaining the information sought and there was no evidence the corporate acted willfully or in bad faith.³⁵

Ultimately, it is best to start early when preparing witnesses.³⁶ A cost-benefit analysis must be applied to each witness that counsel is thinking of using.³⁷ It is important to verify that witnesses have first-hand knowledge of the facts they are going to testify to, familiarity with the necessary documents involved in the case, and preparation for all possible areas of cross-examination.³⁸

If your 30(b)(6) witnesses does not make a good appearance in front of a jury or is not prepared to testify before a jury, gets visibly shaken, or worse, gets upset, you are in trouble. This person is supposed to be the face of the company, the messenger to the jury. It cannot be underscored enough that this single witness can kill the best defenses and jury perception of your company. And yet, companies and even the witnesses often do not heed counsel's advice on the necessary time for preparation. 30(b)(6) witnesses can be reptile food! Reptile questions and themes most often have their origins with the 30(b)(6) witness. On the other hand, such witnesses can also be the storyteller, but they must do their homework to tell it. Their counsel must also guide them on having that type of information from review of documents and discussions with other employees. Recall the earlier example about the recreational vehicle manufacturer festival.

iv. Non 30(b)(6) witnesses

You may find that you should call multiple company witnesses at trial or that plaintiff may call some in his/her case in chief. Do not underestimate the potential positive impact of witnesses who may not be management level employees and do not have significant testimony experience. There is true opportunity to humanize the company through these witnesses, and the key is knowing them, their families, and their backgrounds. General witness background information is always appropriate on examination. You may also have the opportunity to inquire about community involvement or it can be sewn into an answer to a question like, "please tell the jury a little about yourself." During this narrative response, the witness

³³ *Id.*

³⁴ Wang, *supra* note 27.

³⁵ *Id.*

³⁶ Ford, Gregory J. *How to Talk to a Jury in a Complex Business Case*, 66 AmJur Trials 435 (1998)

https://1.next.westlaw.com/Document/l710c4004b02f11d997b78566ed1d337f/View/FullText.html?VR=3.0&RS=cb1t1.0&_rTS=20211227205223120&transitionType=Default&contextData=%28sc.Default%29.

³⁷ *Id.*

³⁸ *Id.*

discloses about being a volunteer firefighter, or volleyball coach, or church pastor. Likewise, you can bring out the human concept of being anxious and nervous during testimony because he/she is not a frequent witness. If your witness is going to be nervous, then ask them on direct if they are and why. Jurors can connect with this.

b. Voir dire

i. You must take advantage to the extent the court will allow

Voir dire is counsel's first opportunity to meet with jurors and jurors' first chance to judge counsel.³⁹ Therefore, preparation and pre-voir dire investigations are key.⁴⁰ Before conducting voir dire, it is important to get local knowledge, know the courtroom, talk with local counsel, review juror lists and learn to pronounce jurors' names correctly, review the record, and research any past or present publicity about the case.⁴¹

Commercial cases may present a David versus Goliath dynamic to jurors, who may have sympathy for the "little guy" beyond what the law or the evidence warrants.⁴² Further, defense counsel will have to contend with the fact that some jurors may have experienced personal dissatisfaction with the client company ranging from lack of service, failed business transactions, or frustration with products they feel are inferior or overpriced.⁴³ Thus, while interacting with prospective jurors, it is strategic to begin personifying and humanizing a corporate client as early as possible.⁴⁴ Take the following statement by defense counsel to prospective jurors for example, "[I]t is my privilege to represent before you the 9,000 men and women of the Old Faithful Insurance Company, which has served the needs of small businesses since the Revolutionary War and has been part of the community for 50 years. Have any of you visited their building on Johnson Street? Perhaps you walked in one of the annual cancer walk-a-thons that the client sponsors."⁴⁵ It may also be meaningful to emphasize to the jury that they will be asked to validate the decision made by a few men and women in the client company, while subtly suggesting that a decision for the plaintiff will be hurtful to the men and women that make up the company.⁴⁶

³⁹ *Id.*

⁴⁰ David Landin, et al, *Inside Jurors' Hearts and Minds: Improving Jury Trial Results with Effective Voir Dire*, 48 No. 12 DRIFTD 30 (Dec. 2006).

⁴¹ *Id.*

⁴² Ellen Kreitzburg, *Jury Selection: The Law, Art and Science of Selecting a Jury*, JURYSELLAS § 11:11 (Nov. 2020) [https://www.westlaw.com/Document/I900853447e0211daa7fce54230161a65/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I900853447e0211daa7fce54230161a65/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

⁴³ *Id.*

⁴⁴ John L. Altieri, Jr. *supra* note 10.

⁴⁵ *Id.*

⁴⁶ *Id.*

Then there is the data you have been gathering and given to counsel. Counsel can take the bad data and attack during voir dire and the good to build up:

- Did any of you attend the 30 different charity events my client sponsored in the last two years;
- Were any of you aware my client received the Best Places to Work award in (whatever locations you can ask about);
- Did any of you attend the company summer festival in the last couple years in ___(city) and meet some of our employees;
- Were any of you at the town hall we held where our company leadership answered questions about our future investment in ____ (whatever state you are in),

Written juror questionnaires may also be integral at the voir dire stage where they can increase the amount of information to be learned about prospective jurors.⁴⁷ Some jurors will disclose opinions and information about themselves in a written questionnaire that they will not express orally in open court.⁴⁸ Some key guidelines for effective written juror questionnaires include:

- Keep it simple and short
- Avoid questions required by statute or always asked in oral voir dire
- Ask jurors to explain their answers
- Provide minimal formatting for juror's answers – it is revealing whether a juror scrawls several large words diagonally across an answer space or several complete sentences of text in nearly ruled lines
- Cooperate with opposing counsel, and include questions they want to add to the questionnaire
- Consider questions in prior similar cases
- Consider judicial efficiency where a questionnaire can reduce the time needed for voir dire.
- Be flexible, come to court with both the desired questionnaire and an abbreviated version.⁴⁹

⁴⁷ Landin, *supra* note 39.

⁴⁸ *Id.*

⁴⁹ *Id.*

c. Character evidence, humanizing evidence and ways to potentially make admissible

i. Is willful misconduct or gross negligence alleged, or are punitive damages sought?

While FRE 404 narrowly limits the use of evidence of a person's character or propensity to act in a certain way, the rule does not expressly discuss the admissibility of evidence of a corporation's character.⁵⁰ Further, while FRE 608 and FRE 609 allow evidence to be admitted for the purposes of impeachment, the rules are silent on corporate impeachment.⁵¹ Ultimately, it is unclear whether the Federal Rules of Evidence allow a corporate representative to be impeached with evidence of a corporation's untruthful character, which is a separate consideration from the witness's truthfulness.⁵²

However, legal scholars have argued that courts will likely continue to apply FRE 404 to corporations based on long-standing and widely accepted rationales for limitations on character evidence.⁵³ Notably, where plaintiff's counsel will often rely on the theme of "profits over safety" by telling the story that the defendant is driven solely by profit and will sacrifice safety for money, defense attorneys may rebuke such arguments in pretrial motions as inadmissible character evidence.⁵⁴ A corporate defendant's character trait generally has "no bearing on plaintiff's claims and would only serve to confuse the jury and prejudice the defendant."⁵⁵

Extrapolating the applicability of FRE 404 to corporations, scholars have also argued that FRE 608 regarding impeachment should also apply to corporations.⁵⁶ In effect, this would mean that a corporate representative may be impeached by evidence of a corporation's untruthful character and that corporations may be held responsible for dishonest acts.⁵⁷ At the core of this question is "whether and to what extent a corporation's character for dishonesty actually affects the veracity of a corporate representative testimony."⁵⁸ The argument has also been made that corporate representatives should only be impeached by evidence of a corporate conviction when there is direct or indirect linkage between the witness and the prior conviction.⁵⁹ However, there has yet to be clarification on this front.

⁵⁰ [Geoffrey M. Stannard, *The Liar and the Loophole Corporate Character Evidence and Impeachment*, 81 Brook. L. Rev. 239 \(2015\).](#)

⁵¹ *Id.*

⁵² *Id.* at 242.

⁵³ *Id.*

⁵⁴ David R. Kott, et al. *Keep Reptile Theory Out of the Courtroom* 62 No. 9 DRI For Def. 20, 23 (Sept. 2020).

⁵⁵ *Id.* See also, [In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.](#), 888 F.3d 753, 784-86 (5th Cir. 2018); [In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings](#), MDL No. 2545, 2017 WL 2313201, at *2-3 (N.D. Ill. May 29, 2017)

⁵⁶ Stannard, *supra* note 62 at 242.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 246.

So, if faced with claims of negligence, you are entitled to present evidence *your employees* acted reasonably. With gross negligence, the burden is typically showing reckless disregard, a heightened standard which, depending on your state, may require a higher burden of proof such as clear and convincing. For states that allow punitive damages, a showing of willful acts, wantonness or recklessness is often required. Many plaintiff attorneys make boilerplate allegations like the above. Thus, during discovery you may be able to attack them with non-character evidence about the company and its people to show the proof requirement can't be met: the company engineer testifies he is required to take home the personal watercraft and ride them, so he is intimately familiar with how the predecessor model feels and operates when he is starting new model product development; just shy of distribution of the new model, he is again required to take it home and ride over a period of time. He does so with his family including his children. If he was not reasonable in his decision-making process or willfully disregarded the safety of others, would he put himself at risk or his children? Of course not.

While lawyers cannot control the characters, plots, or resolutions of the story told during trial, it is imperative for corporate defense counsel to describe the client's facts favorably and persuasively, i.e., portray the client as the good guy and a good corporate citizen.⁶⁰

For a corporation, this may mean framing the conflict as the opposing side "oppressing a company that innovates, employs thousands, and provides beloved products."⁶¹ The focus should be on recharacterizing the conflict, and while the case law is sparse, positive stories may be admissible so long as relevance can be proven. To be admissible, evidence must be relevant. Under FRE 401, evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action⁶²

Notably, "the knowledge and actions of a corporation's human decision-makers and actions of a corporation's human decision-makers may be imputed to it."⁶³ While this may have adverse effects where the negative actions of individuals may be imputed to a company, it can also have beneficial effects where the positive actions of individuals may be imputed to a company.

Furthermore, while out-of-court statements and documents are generally inadmissible as hearsay under FRE 801, strategically invoking the business records exception to hearsay may serve as another tool for

⁶⁰ [Joyce Rosenberg, Luke, I Am Your Lawyer: Making Sure Your Client Is the Good Guy in the Story](#), 82 J. Kan. B. Assn. 14, 15 (Feb. 2013).

⁶¹ *Id.*

⁶² Fed. R. Evid. 401.

⁶³ [In re Dole Food Co., Inc. Stockholder Litig.](#), 110 A.3d 1257 (Del. Ch. 2015).

corporate defendants to better tell their side of the story. Under FRE 803(6), records of a regularly conducted activity (including an act, event, condition, or opinion) may be admitted if:

- (A) the record was made at or near the time by – or from information transmitted by – someone with knowledge;
- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
- (C) making the record was a regular practice of that activity;
- (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
- (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.⁶⁴

Trial judges have broad discretion in the admission of evidence under the business records exception.⁶⁵ However, the types of records admitted under this exception include: desk calendar appointment diaries, computer data compiled and printed out for trial, billing statements, a notation added to a formal document by an employee, information in an electronic database, sales records, and more.⁶⁶ However, a party seeking to invoke the business records exception must come to trial with a competent witness who is able to lay a proper foundation that satisfies the statutory requirements.⁶⁷ Ultimately, corporations are made up of real people whose stories can be presented to jurors in a way that is humanizing and relatable. While the admissibility of a “good company story” has not been covered thoroughly in case law or legal scholarship, these interaction stories can be presented throughout a trial via opening statements and witness examinations.⁶⁸ During direct examinations of company witnesses, it is advisable to personalize witnesses throughout the interaction with asides or discussions of their

⁶⁴ Fed. R. Evid. 803(6).

⁶⁵ Russell L. Wald, *Foundation for Offering Business Records in Evidence*, 34 Am. Jur. Proof of Facts 2d 509 (1983) [https://www.westlaw.com/Document/Id7891877ab8011d98870f5816ad77317/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Id7891877ab8011d98870f5816ad77317/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

⁶⁶ Roy E. Fitzgerald, *Evidentiary Trial Issues in Evidence in Florida* (Florida Bar, 2018); David F. Binder, § 16:9. *Made or compiled as regular business practice*, Hearsay Handbook 4th (Nov. 2021) [https://www.westlaw.com/Document/Ia77984023c0611dab1a2b9c33170ecb1/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/Ia77984023c0611dab1a2b9c33170ecb1/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

⁶⁷ Brian Wahl, *Admitting corporate records under the Business Records Exception to the hearsay Rule: Lessons from Florida*, Inside Counsel (Nov. 20, 2014) <https://www.bradley.com/insights/publications/2014/11/admitting-corporate-records-under-the-business-r-#:~:text=One%20key%20rule%20for%20all,custodial%20or%20other%20qualified%20witness.>

⁶⁸ David Lender, et al. *Humanizing the Corporation: Tips for Successfully Representing Large Corporations in the Courtroom*, CORPORATE COUNSEL (Nov. 16, 2015) <https://www.weil.com/~media/files/pdfs/016111507-weil.pdf>.

families and other humanizing background subjects.⁶⁹ However, it is important not to open the door to an attack from plaintiff's counsel and to do the work to exclude harmful evidence in limine.⁷⁰

C. Conclusion

You, the corporation, are not human and there is nothing you could ever do to change that. However, you likely have the tools in your corporate shed to greatly assist in humanizing the company before a judge and jury. It is just that you may not have considered the information you possess for this purpose as the reason it was mined and tracked had nothing to do with litigation. If you are not mining and tracking it, you should consider doing so as there is no downside since it certainly helps in potentially improving the brand and marketing. Regardless, when faced with litigation you should educate your counsel on what you have available through your marketing, sales and customer relations teams that may be beneficial to changing the general negative perception of you as a corporation, humanizing you and otherwise mitigating the disadvantage of not being human.

⁶⁹ *Id.*

⁷⁰ *Id.*