Courtroom Losers

Various legal experts explain why entrepreneurs make lousy witnesses and what to do if you have to take the stand.

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Litigation
Entrepreneurs often make lousy witnesses. Here's why
The verdict is in: when business owners testify in court, they can be their own worst enemies. In a courtroom, lawyers agree, CEOs all too often undermine their cases by showing aggressiveness and arrogance--traits that may have contributed to their entrepreneurial success in the first place. It's not always so much *what* CEOs say in court that's damaging; it's *how* they say it that turns jurors against them.

These days virtually all companies confront a potential minefield in the stupefying array of statutes dealing with employment, safety, and the environment--as well as all varieties of liability and malfeasance. But here's the unhappy truth: big companies are better at self-defense. William S. Laufer, an associate professor of legal studies at the University of Pennsylvania's Wharton School, estimates that 95% of corporations convicted in federal cases are small and closely held. The reason? Small companies are often less sophisticated and also make easier targets. But be it a federal, state, or local case, chances are, the jury will cast a jaundiced eye on any business owner who takes the stand. "Juries have always been hostile to employers," explains Harold Brody, a Los Angeles lawyer who defends management.

By most estimates, only 5% of lawsuits against companies go all the way to trial. Still, that translates into thousands of companies landing in court each year. And when a small company stands accused, the CEO usually plays a key role. "Even when the CEO is not named as a defendant, you see plaintiffs' attorneys trying to drag him or her into court to boost the perceived monetary value of the case," says Gordon Katz, a trial lawyer at the Boston firm of Sherburne, Powers & Needham.

How can you survive a courtroom ordeal? Here are some pointers from the pros:

Prepare thoroughly for the deposition, the sworn pretrial testimony usually taken by opposing counsel. The first rule for any executive scheduled to take the stand, Katz says, is to spend ample time with his or her attorney, getting ready for the pretrial examination. "If you're not well prepared, there's a good chance that your deposition will have embarrassing things in it," he says.

Barry Cappello, a plaintiffs' lawyer in Santa Barbara, Calif., videotapes CEO depositions to show the jury later--a technique that he says is becoming increasingly popular. Cappello finds that he

often catches the executive and his or her lawyer off guard. "They come in thinking the trial is six months away, and I destroy them in the deposition," he says. "My case is won there."

Avoid appearing arrogant. "You can't coach a CEO to be less arrogant; that's like asking a tiger to lose his stripes," argues Paul Killeen, a Boston lawyer who defends management. "But if you've got an arrogance problem, it's not going to help your case." The reason is clear. "Humility is a rare trait in CEOs," agrees Cappello. "But having humility, without being maudlin, is very important in front of a jury."

Answer only the questions asked, concisely and simply. "CEOs spend their days making sure they're well understood," says Brody, "so it's counterintuitive for them to confine themselves to narrowly answering a question. You find them volunteering too much information, especially under cross-examination...and that's typically not well received by juries."

Noelle C. Nelson, a trial consultant in Santa Monica, Calif., recommends that you address the jury as you would peers but in vocabulary simple enough for teenagers. "It is not demeaning to the jurors," Nelson explains. "The vocabulary level in the United States is roughly that of a bright 15-year-old."

Be aware of your demeanor. Jurors have little to distract their attention, so they'll study you the entire time. "They notice everything, especially body language," says Margaret Harris, a plaintiffs' lawyer in Houston. "And flashy jewelry? That's a no-no, at least for my clients. I don't mind when the other side wears it."

Analysis
Settle or Fight: The Defendant's Dilemma

When a lawsuit strikes your company, you face a critical question: do we settle this thing and move on, or do we gear up for trial?

If the case looks like a slam dunk for the plaintiff, it obviously makes good business sense to settle. However, a gray-area case, or even a frivolous one, poses a more perplexing situation. In the growing field of employment litigation, in particular, companies may find themselves falsely accused. "Unfortunately, you see lawyers taking cases that should not be taken," says Houston employment lawyer Margaret Harris. Understandably, companies regard such cases as tantamount to blackmail. But let economics, not outrage, guide your response, defense lawyers counsel. "Even some of the most aggressive employers will engage in nonbinding mediation because it is often successful and leads to a settlement you couldn't get otherwise," explains Los Angeles lawyer Harold Brody. "Going to trial is very expensive and draining."

Once you add the costs of your time and attention to your potential legal bills, it's easy to see why settling is by far the most common outcome. "Most businesspeople are coming to view settling these kinds of cases as part of the cost of doing business," explains Boston employment lawyer Gordon Katz.

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