

TRIAL TECHNIQUES AND TACTICS

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IN THIS ISSUE

When you think of “trendy”, the image of a defense lawyer is not usually the first thing that comes to mind. However, as defense lawyers, understanding trends—particularly consumer trends—can provide valuable insight into the minds of jurors. This article explores six emerging consumer trends and discusses how being “trendy” can lead to better results at trial.

Turning Trends into Tactics

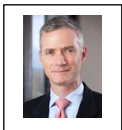
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ABOUT THE COMMITTEE

The Trial Techniques and Tactics Committee promotes the development of trial skills and assists in the application of those skills to substantive areas of trial practice. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

Recently, *Forbes* set out six global consumer trends for 2019. With the first quarter of 2019 in the rearview mirror, as defense counsel, it is time to recognize these trends and how they are impacting the way we prepare and try cases.

Trend 1. Beauty for One and All

Beauty is for everyone, but people are not interested in looking the same anymore. “Conformity is over. Beauty is becoming less about fitting in and more about expressing yourself,” says Bunny Kinney, editor-in-chief of Dazed Beauty. According to consumer researchers, people are rejecting brands that force them into a predefined mold of beauty. As trial lawyers, it is easy for us get in the habit of seeing cases, strategies, and tactics as one size fits all. We cannot be lulled into thinking that all cases or all jurors of a certain type fit into a defined category. Every case is different. Every juror is different. Our challenge is to find ways for the case to express its uniqueness in ways that jurors can latch on to.

Trend 2. Responsible Consumerism

Consumers will seek out brands that help them make better, more responsible choices. Consumer research shows that companies that are socially responsible are becoming more attractive.

As a trial tactic, this suggests that if you represent a corporation, at least some of your trial presentation needs to point out the “good citizenship” of your client. Some may take issue with spending too much time humanizing a corporate defendant, but

researchers have found that in job seekers, social responsibility is becoming a more important factor than salary or even career development. Thus, it is worth exploring how social responsibility can play a role in your trial presentation.

Trend 3. We are What they Eat

Healthy eating comes to the forefront of consumer trends in 2019. People are making informed choices about what they eat. Consumer research suggests that consumers want the seller to tell them that the product is healthier, locally grown, etc. Consumers want to know the important information as simply as possible.

What does this have to do with trial tactics? The answer: the desire to understand where food comes from and its health risk/benefits suggests that we need to give jurors sufficient background about our clients and why they made (or did not make) the decisions they did in a given instance. Give them the answers in a simple and straightforward way.

Trend 4. Safe at Home

The cocooning trend (staying inside one's home, insulated from perceived danger, instead of going out) got its name in the 1980s. According to consumer research, this trend will take on new meaning as the uncertainties of contemporary life drive people into the comfort of home. People are turning their homes into safe, self-sustaining places and prioritize security and a sense of sanctuary over design aesthetics. For example, smart homes can now offer even more than a traditional security system once

did, thanks to app-based access to lights, thermostats, and locks. Consumers see these systems as lifestyle enhancements in addition to security.

As it relates to trial, this consumer trend suggests that Reptile tactics of the plaintiffs' bar are here to stay. The Reptile theory asserts that you can prevail at trial by speaking to, and scaring, the primitive part of jurors' brains. As many now know, the fundamental concept is that the reptile brain is conditioned to favor safety and survival. Thus, the focus of the plaintiff's case is on the conduct of the defendant, not the injuries of the plaintiff. The jurors are not interested in plaintiff's injury, even when severe, according to the theory. Rather, the only truly effective way to engage jurors is to demonstrate how the defendant's conduct endangers the jurors and their families. Defense counsel has a variety of ways to fight the Reptile and need to be ready.

Trend 5. Luxury Meets Next-Gen HENRYs (high-earners-not-rich-yet)

This will be the year that the luxury industry meets the HENRYs. The leading edge of the millennial generation will reach 38 in 2019 and begin to hit their stride in terms of career and income as Generation Y's oldest will turn 22. These consumers will be the most educated, most connected, and those with the most money. These people will be the focus of luxury brands as they attempt to gain their dollars. As trial lawyers, our juries will have more and more HENRYs. It is not yet fully known how these educated, connected, and wealthy jurors will decide issues of liability and damages. But, whatever develops

as more cases go to trial with these juries, the lessons we will learn will need to be taken to heart.

Trend 6. Digital and Physical Shopping Converge

Brick-and-mortar retailers are scrambling to meet demand and convenience, while digital retailers are opening physical spaces as people begin to realize the wastefulness of shopping online. Consumer researcher, Bob Phibbs, coined the phrase "phygital retail." Similar to the convergence of digital and physical, it is time to rethink our trial presentations. For years, if you did not have a 50 slide PowerPoint for an opening statement or closing argument you could not step foot in a courtroom. But, with the hybrid needs of consumers with both physical and digital desires, it is a good reminder that not everything is better with electronic presentations. There is still a place for flip carts, foam boards, models, and handouts in trial presentation. In an increasing digital age, trial lawyers want to be on the cutting edge, but just as digital retail is finding, sometimes communicating in physical or more tactile ways can be more persuasive.

In the end, these six trends have one overarching theme--be real. *Forbes* acknowledges that authenticity is an overused term, but we cannot escape that what people want from their retailers—and likely their lawyers—is to be real, be human. Even in a changing world, authenticity survives. Thank goodness human connection remains one trend that does not look like it is going anywhere any time soon.

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