

# PUBLICATION

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## Who's Your First Round Pick? – Drafting Your Corporate Trial Representative

February 08, 2019

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**With NFL football over, I'm thinking about who my team will select in the upcoming 2019 NFL Draft in April. I'm torn between different personnel options. Do I go with the high-level corporate office business exec with the quick first step and killer resume and experience? Do I go with the local operations manager who has great hands and knows (and feeds) the local market and jury pool? Or how about the topic-area expert – the department head – with explosive speed and the ability to explain to a jury our policies and procedures?**

"What is he talking about?" you ask.

Maybe I'm not evaluating and drafting a football player. Maybe I'm evaluating and drafting my corporate trial representative.

"But it's only February!" you declare. "Isn't it too early to be thinking about the April draft?"

It's never too early to be thinking about who your corporate trial representative might be. At Waffle House, we have a tradition of attending all of our civil trials – of "showing up," in person, at all matters of importance. That means that we have a suitable corporate representative at counsel table and me or one of my in-house colleagues sitting in the back pew in a Polo shirt, trying to look like an aging, second-career law student. But who is suitable to be that corporate trial representative?

That's the tough one. We've learned a lot from trial wins and even more from trial losses. We start thinking about who our corporate representative might be on day one of a case, right after service. Identifying that person early can be very helpful in terms of interrogatory verifications, lining up a suitable 30(b)(6) deponent, and perhaps most importantly, getting a non-lawyer employee invested in the lawsuit in the same way that the folks in the legal department are. (Unless it's a business-to-business lawsuit, you're not going to want a corporate lawyer as your trial representative, *especially* in a P.I. case. Sorry, but nobody relates to the lawyers, except maybe other lawyers).

Everybody knows that the burden of proof is on the plaintiff in all civil matters, sort of ...not really. My point? Don't ignore your case in chief. If your sole defense is poking holes in the elements of the plaintiff's claim, great! Hope that works out for you! But if you ignore your case in chief and put nobody up, or put up a weak representative, or rely upon your witnesses' disjointed testimony from plaintiff's case in chief, who is the average juror going to like, respect, relate to, or believe on your side of the courtroom once those jurors retire to the deliberation room? Which employee will you be proud to affirmatively thrust forward as the face of the company? The high-level exec from corporate? They probably have the gravitas of being with the company a long time, can speak extemporaneously about the company, and can fight off a tough cross examination. The local manager? They see our jury panel on a daily basis and understand the pulse of the community, so the average juror might better relate to them. How about the company's topic area expert who is a whiz on your policies and procedures? That person knows your systems cold and can recite chapter and verse about the way the company is supposed to do things. Maybe some combination thereof?

You don't have to put all of your eggs into the trial representative basket. Maybe it's a smooth corporate office exec as the trial representative, but you make sure the local manager is prominently featured in your case in chief, even if never called to the stand by the plaintiff. Again, keep asking yourself this question: Who is the jury going to like, respect, relate to, or believe on our side? If your answer is "Not sure, but we're going to poke lots of holes in the plaintiff's case on cross," then you need to go back to square one – to your draft board.

If you're lucky, you'll find a "unicorn" at the company – a single warm body that can check most or all of those boxes. You'll want to draft someone who is intelligent, thoughtful, and unflappable on the witness stand; someone who possesses gravitas at the company, and yet who can be the "everyman" or "everywoman" (and ideally has local connections, or at least a relatable backstory); and someone who, perhaps most importantly, has a thorough understanding of the company and its history of how things are done. Yes, I know. Unicorns are hard to find; otherwise, they'd simply be called horses.

But it doesn't mean you shouldn't be looking for that person – or combination of people – very early in the lawsuit, even on day one. Get that person involved in the case early – sitting in on key interviews and depositions, perusing the way-too-long 30(b)(6) topic list right alongside you, and ultimately sitting at counsel table. Also consider putting that person up last in your case in chief, to bat clean-up for your case. I like putting the trial representative up last because they are the only substantive witness who has the luxury of watching the entire trial and can see what issues were muddied by either side's witnesses and need to be clarified, corrected, explained, or emphasized to the jury.

Good luck with your draft! Now can somebody please let a good quarterback fall to the Jaguars at pick No. 7?