



# The Flip Side: Employment Trial Trends and Strategies from Plaintiff and Defendant's Counsel

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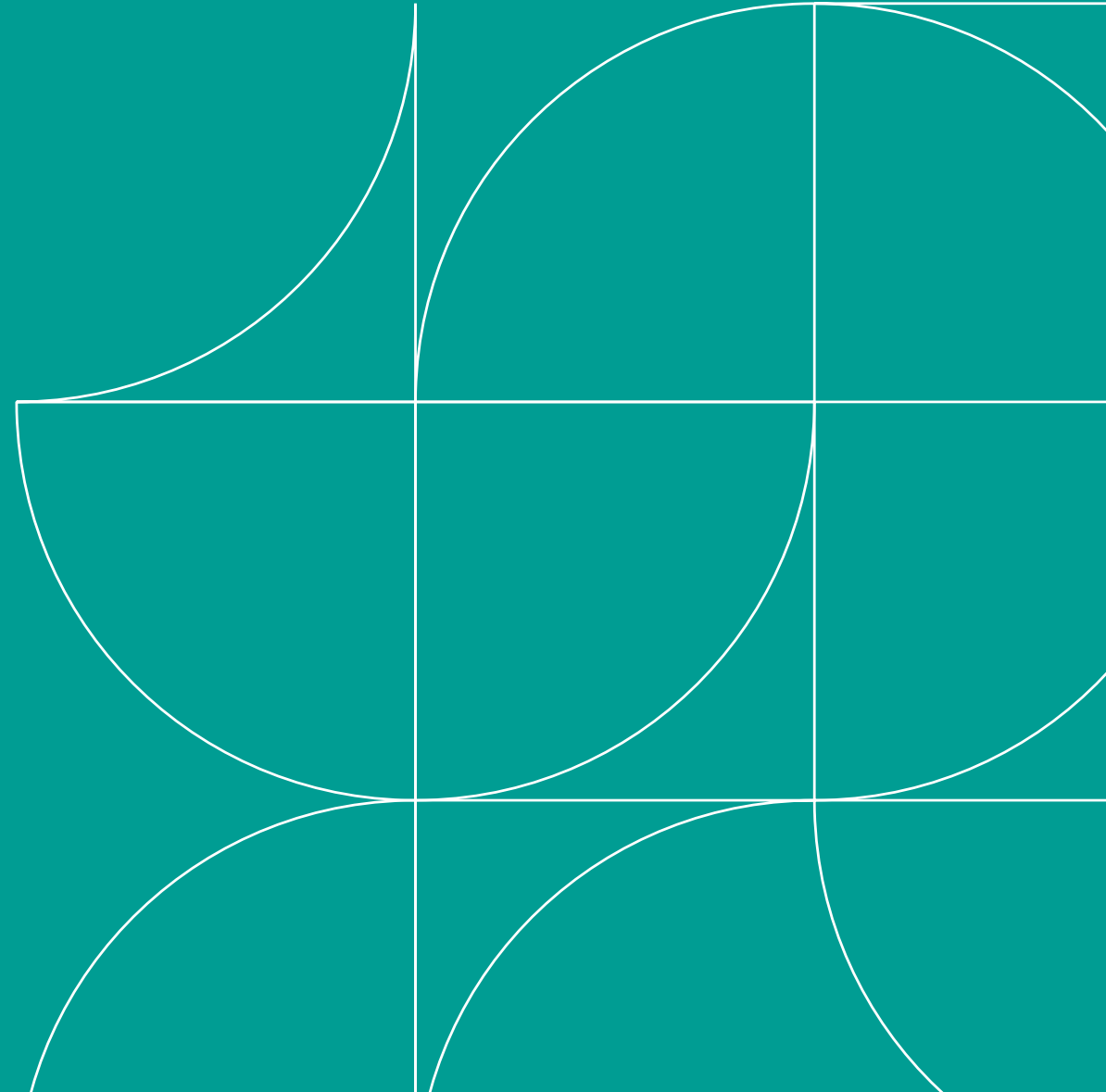
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**Seyfarth Shaw LLP**

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## *Voir Dire – Plaintiff and Defense Approaches*

*Here, in Ross v. Deitrich case in Middlesex Superior Court, the trial judge acted within his discretion in rejecting the plaintiffs' questions, at least as they were phrased, as confusing and phrased in a manner that appeared designed to persuade the jury before the evidence began. The judge, although not asking the questions proposed by the plaintiffs' attorney, did explore potential juror bias, by "ask[ing the prospective jurors] generally if they have any biases or opinions" after telling them that the case was a medical malpractice lawsuit.*

MA Appellate Court regarding proper boundaries for voir dire



# Voir Dire – Plaintiff and Defense Approaches

## Plaintiff Approach

- The central question is whether a juror’s experiences and perspective will stop them from listening to the evidence fairly.
- A danger for plaintiffs is the over exploration of bias – as individuals who are attuned to discrimination will more often admit to some bias than those who are not.

vs.

## Defense Approach

- The key is to try to elicit evidence of bias against the employer including by understanding prior life experiences, and discrimination or harassment experience.
- Voir dire is not about finding great jurors but about eliminating biased ones.
- Consider a mock jury exercise before trial to educate you for jury selection.

## Tips on Preparing Jury Instructions



***While the law assumes jurors will be able to internalize and follow these instructions, that may not always be the case [...] The reality is that jurors will do their best to understand those things but most jurors are not lawyers and understanding hundreds of pages of jury instructions and making deep meaning around those is not something that happens on the level that courts or the law pretends.***

Justin Levinson, a law professor at the University of Hawaii Manoa regarding federal racketeering trial of Michael Miske

[How Are Jurors Holding Up 4 Months Into The Miske Trial? Better Than You Might Think, Experts Say - Honolulu Civil Beat](#)



# Tips on Preparing Jury Instructions

## Plaintiff Approach

- A precharge is critical in discrimination cases, so that a jury, while watching the evidence come in, knows the basic standards of proof.
- Use the language of the caselaw in your instructions and object to instructions that are confusing or, on the facts of the case, irrelevant.
- Don't overshoot. Creative and incorrect jury instructions – on either side – provide a good basis for appeal.

vs.

## Defense Approach

- Jury instructions should be written in clear English understandable to a lay jury.
- Tailor the instructions to your case.
- Consider written objections to Plaintiff's proposed instructions to preserve issues for appeal.





## Order of Witnesses – Plaintiff’s Counsel Gets The First Shot

*...further suggests that your first witness should be purely about what the defendant did wrong. Depending upon the case, these witnesses are almost universally shorter witnesses at trial as well. The jury should understand from the very beginning that the defendant’s conduct is the conduct that they are judging – not the plaintiff’s conduct. If you put your client on first, the jury will be hearing the case from your client’s perspective first. Additionally, you will have to talk about all of your client’s damages at the beginning of trial. Your client would then be on the stand for a while on cross-examination where the defendant’s attorney will be continuously calling into question your client’s credibility. I prefer my first witness to have a short cross; one that can do little or no damage to your case. You want to have a good first day of trial*

David Ball,  
*David Ball on Damages*



# Order of Witnesses – Plaintiff’s Counsel Gets The First Shot

## Plaintiff Approach

- Consider carefully whether to call adverse witnesses and when to call them.
- Try to understand who the defense will – must – call as it is preferable to cross these witnesses if you don’t need them to get over a directed verdict motion.
- Table set before calling the Plaintiff, and end on a high note to remind the jury why they’re there.
- Realize that a 20 minute witness that paints a particular or poignant picture can be as important as a “major witness” called to set the entire narrative.

vs.

## Defense Approach

- Consider asking the Court to have each witness appear only once
- Make sure you have good communication between counsel so your company witnesses are there when needed (judges and juries hate delay!)

# Experts – When To Use and When to Challenge



***Even before the Rule 702 amendment went into effect [in December 2023], the U.S. Court of Appeals for the Fourth Circuit confirmed “the indispensable nature of district courts’ Rule 702 gatekeeping function” in cases challenging expert testimony. See *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 284 (4th Cir. 2021).”***

Respected Defense firm on expert testimony  
in federal Courts



# Experts – When To Use and When to Challenge

## Plaintiff Approach

- Juries are moved by the story; don't clutter this up.
- Where you need to explain something that might be outside the jurors' experiences, consider an expert.
- If the damages analysis is particularly complicated, use an expert.

vs.

## Defense Approach

- Make sure your expert, and your opponent's expert, has to have some knowledge –or expertise -- that the ordinary juror would not have
- Sometimes when Plaintiffs try to introduce HR experts or damages experts there is a good argument that the expert is just giving opinions on issues which should be left to the jury.
- Beware of junk science



## *Damages – How Each Side Can Best Address Damages with the Jury*

***When discussing how much to award for pain and suffering, it was clear that there was a punitive element in some jurors' calculations. This resulted in damage awards in the millions for several jurors and \$18M for one. Once the facilitator explained that pain and suffering is different than punitive damages, the awards came down a bit but still ranged from \$500K to \$3M.***

Excerpt from Seyfarth Mock Jury Report



# Damages – How Each Side Can Best Address Damages with the Jury

## Plaintiff Approach

- If you are confident about liability, consider suggesting a number. But you always run the risk of offending a jury and having them back off on the key issue of liability.
- As for mitigation, deal with this as a narrative issue – and then through your expert.
- With respect to emotional distress, a treating physician may be very helpful, and a forensic expert is helpful if the nature of the emotional harm is very particular to the field.

vs.

## Defense Approach

- The old adage that Defendants should never mention a number or discuss potential damages, because that is conceding liability, is not always true—each case requires some judgment on that issue and a calculation of risk.
- Consider a mitigation expert since this is defendant's burden



## *Trial Graphics – Tips for making them as effective as possible*

***“[B]etween 65 and 80 percent of the world’s population may be visual learners. Without regard to learning type, visual cues assist in processing speed. Indeed, a neuroscience study at the Massachusetts Institute of Technology found that the human brain can process images seen for only 13 milliseconds, while it takes 3.75 seconds to process a complete sentence. Trial lawyers need to be able to meet jurors where they are, to respect a dominant learning style and the practicalities of processing information. Doing so means that oral presentations and instructions must be supplemented and reinforced by ... visual aids[.]”***

“Visual Presentation Helps Juries See the Law,” Robert A. Clifford and Sarah F. King

ABA Litigation Journal, April 2023

[Visual Presentation Helps Juries See the Law  
\(americanbar.org\)](https://www.americanbar.org/publications/litigation_journal/article/visual-presentation-helps-juries-see-the-law/)



# Trial Graphics – Tips for making them as effective as possible

## Plaintiff Approach

- Graphics can be helpful *but* be careful not to look too polished or as though you are selling something to the jury. It is their case.

vs.

## Defense Approach

- Jurors increasingly want to see digital presentations
- Timelines can be very effective
- Keep it simple



# thank you

## contact information

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