

Persuasive Strategies for Trial in Employment Cases

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Ten Keys to Victory

1. **Understanding the Audience:** How do jurors evaluate employment disputes?
2. **Case Themes:** How do you tell a winning story from the perspective of the employee and the employer?
3. **Damages:** What drives jurors' damage awards in employment cases?
4. **Witnesses:** How can you tell if your witnesses are meeting jurors' expectations at trial?
5. **Assessing Case Risk:** What are the "Seven Deadly Sins" parties commit in employment cases and how do you avoid them?

Ten Keys to Victory

6. **Graphics:** How do you connect with jurors in the technology age?
7. **Jury Selection:** How do you (un)pick the best jury?
8. **Lawyer Styles:** How can lawyers gain credibility with the jury?
9. **Atmospherics:** What extralegal courtroom factors can affect jurors' perception of you, your client and your case, and how can you control your image during trial?
10. **Toolkit:** How can jury research help you understand case risk and develop the most effective strategies for trial?

Understanding Your Audience: It all starts with...

R-E-S-P-E-C-T

Recognize that it is you who are different, not the jurors.



Understanding Jurors: What Lawyers Think vs. Reality

Lawyer Belief

- "These jurors just don't get it."
- "If they heard all the evidence, like at trial, then they would understand."

Reality

- *You* don't get jurors.
- You have not created a story that addresses what your audience really cares about.

Constructing Case Themes: How do you tell a persuasive story?

Every winning case must have a story that is:

- ✓ Interesting
- ✓ Comprehensible
- ✓ Meets the audience's expectations
- ✓ Offers surprises
- ✓ Addresses jurors' values
- ✓ Easy for your audience to remember and repeat

Give Jurors What They Want: A Persuasive Story



Attitudes, Beliefs and Reactions to Most Employment Cases

- ❖ Jurors already understand the situation and have strong opinions about it.
- ❖ It is the employee's situation that most jurors identify with.
- ❖ Employee fear and insecurity are just part of doing business in the workplace.
- ❖ Change is generally unwelcome.
- ❖ The employer is assigned the responsibility of protecting the employee.

What Do Jurors Expect of Employees?

Attendance: They have to come to work on time

Performance: They have to be able to do the job

Behavior: They have to treat coworkers with respect

Responsibility: Be part of the solution; protect coworkers

How Jurors Evaluate Employment Cases

Sympathy for the plaintiff is virtually a GIVEN, but it rarely is the factor driving jurors' verdict. But this factor does affect jurors' verdict decisions...

Knowledge and Control

- ❖ **Increase** plaintiff's knowledge and/or control
- ❖ **Decrease** the defendant's knowledge and/or control
- ❖ **Embrace** the knowledge and control that will always be assigned to your client

What Drives Damages?

Two emotions drive jurors' desire to compensate and punish:

1. Anger
2. Fear

***So how do I put all
of this together?***

***How do I know what story
jurors **NEED** to hear?***

Benefits of Jury Research: Discrimination and Harassment Case Example

An African-American woman is suing the company where she worked for many years. She claims the company discriminated against her based on her sex and race. She says her coworkers created a hostile work environment for her by displaying nude pictures of women at their workstations and by making offensive jokes, and she claims her coworkers were extraordinarily rude to her on a daily basis. She says the company was well aware of the problem and had no real intention of stopping the behavior. The woman says that when she started complaining about these events, the company retaliated against her and ultimately fired her.

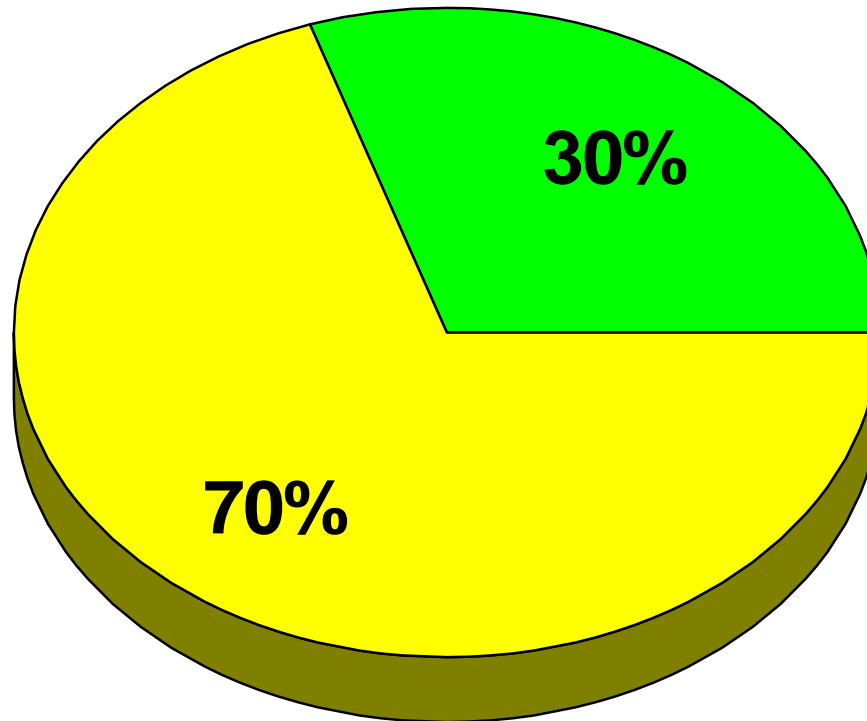
The company says that upon learning of the woman's complaints, it immediately corrected the problems. The company says the woman's problems with coworkers were the result of the woman trying to organize a union in the shop and had nothing to do with race or sex. It says the coworkers weren't discriminating, they just didn't like her. Coworkers pointed out that the woman had worked here for 18 years without complaint, and only started to raise complaints after her efforts to promote the union were rebuffed. Finally, the company says the woman lost her job solely because she refused to sign the company handbook, an action she knew would result in termination.

Original Defense Strategy

1. Deny the discrimination.
2. Explain how the company corrected the problem.
3. Attack the plaintiff.

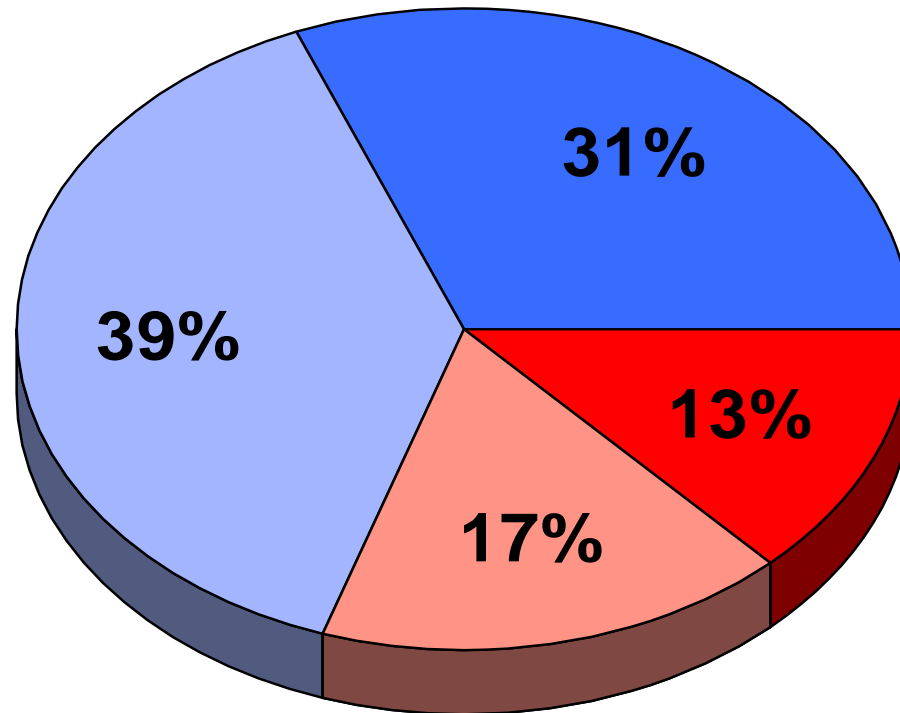
THE PLAINTIFF'S REFUSAL TO SIGN THE EMPLOYEE GUIDEBOOK WAS:

■ REASONABLE ■ UNREASONABLE

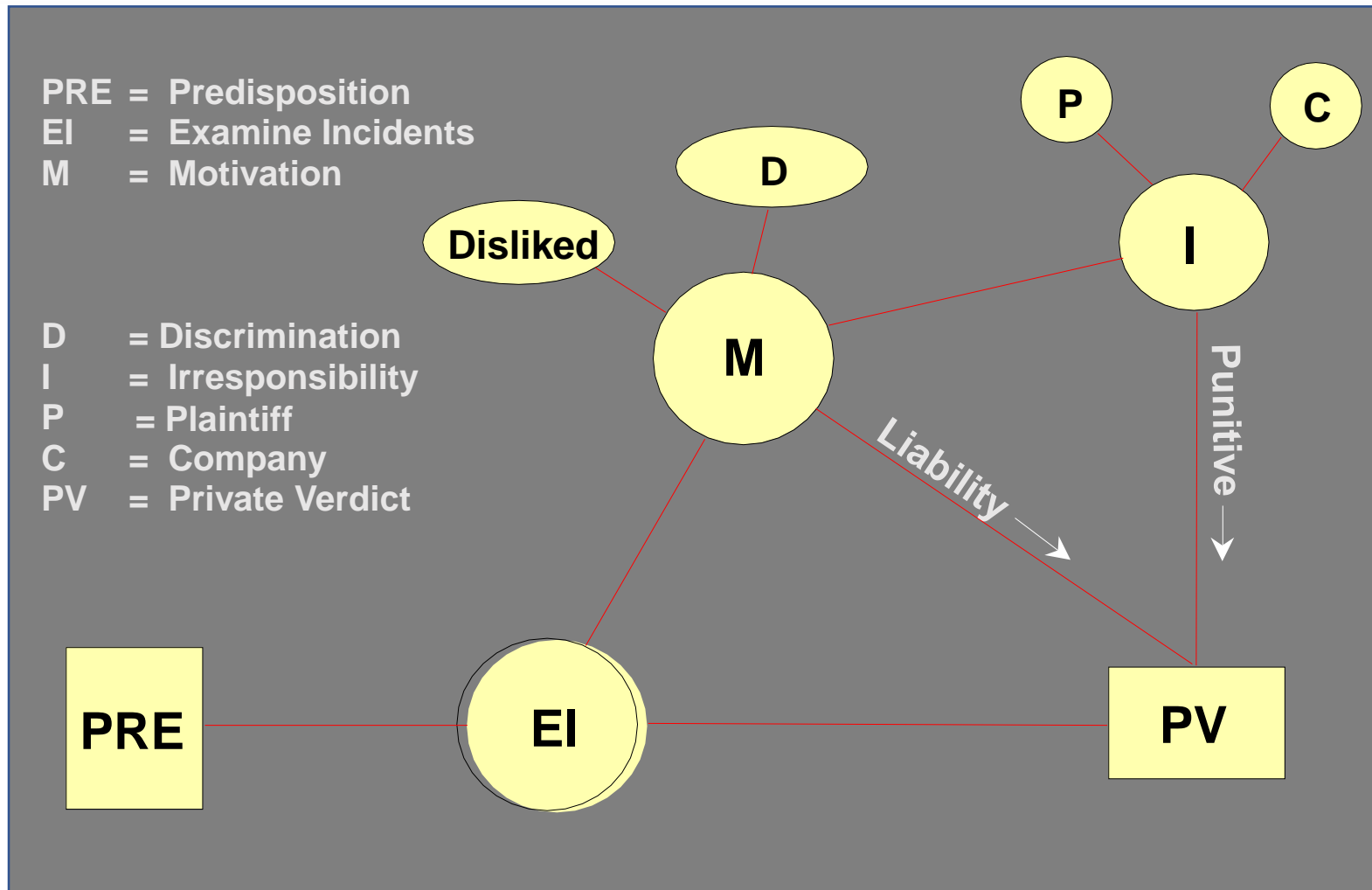


THE COMPANY CAUSED THE PLAINTIFF TO SUFFER SEVERE EMOTIONAL DISTRESS

 STRONGLY AGREE	 SOMEWHAT AGREE
 SOMEWHAT DISAGREE	 STRONGLY DISAGREE



Decision Modeling in a Harassment Case



Strategic Intervention: The New Story

- *The plaintiff's claim took everyone by surprise.*
- ~~*Defendant takes all claims of discrimination seriously.*~~
- *The process only works when the employees participate.*
- *When the plaintiff made the decision not to comply with company policy, she knew she was putting her job at risk.*
- *The plaintiff decided this company wasn't going to be part of her future.*

Witnesses: What makes a witness credible to jurors?

Mastery of 3 Key Abilities:

1. The ability to address the key issues on jurors' minds:
 - Safety
 - Fairness
 - Clear, documented communication
 - Transparency
2. The ability to deliver the right messages while under attack
3. The ability to strike the right balance between attitude and information while testifying

Assessing Case Risk



Seven Deadly Sins in Employment Cases

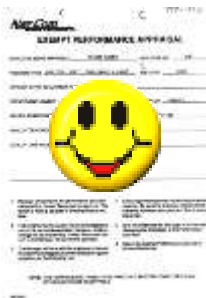
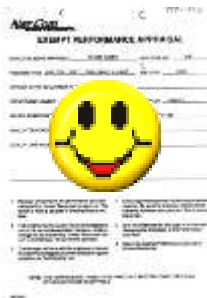
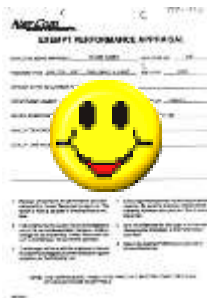
- 1. Attacking the Plaintiff**
- 2. Inconsistent or Unenforced Policies**
- 3. Angry, Worried, or Unprepared Company Witnesses**
- 4. Believing the Law will save you**

Seven Deadly Sins in Employment Cases

5. Under-appreciating the importance of Documentation and Communications

The Case of the Uninformed Executive

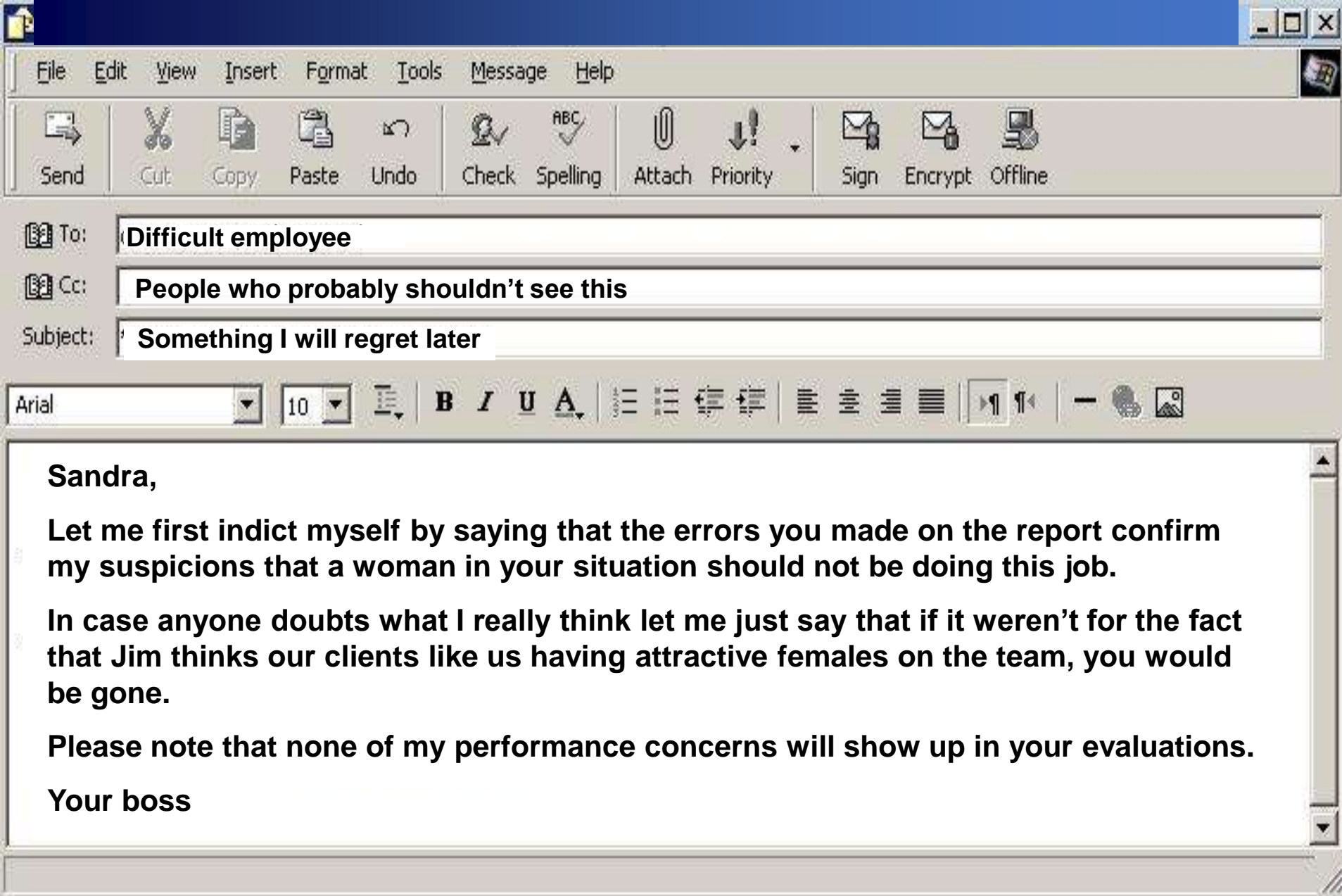
Evaluations over Time:



Seven Deadly Sins in Employment Cases

6. Failing to give appropriate attention to juror attitudes/experiences

7. EMAIL!!



Graphics: Connecting with Jurors in the Era of Instagram, Twitter and YouTube

Today's jurors are different.



- **Jurors “know” more**
 - They believe they are more knowledgeable about legal system, lawsuits, jury system.



- **Jurors expect more**
 - Jurors expect immediate answers and are less patient than in the past.



- **Jurors attend to more information**

The PowerPoint Slide from Hell

If we took a poll right now, we'd find that most of us truly believe we respect jurors.

- And of course we do.
- But the issue is whether you are conveying respect.
- These are two separate things.



When communicating to a jury, adopt a mindset of respect.

- Let that mindset guide everything you do and say in front of the jury.
- Jurors want one thing – to know why they should feel good about finding in favor of your client.
- They aren't sitting there wishing you would go over the standard of proof again.
- Nor do they need you to tell them to use their common sense.
- And by the way, should they use their common sense, or should they follow the law?



Another important point is that, while strategic graphics can help you tell your story, some graphics are more of a distraction than anything else.

- There is no law stating that you must use a “scales of justice” graphic in your presentation.
- Yet those scales always seem to pop up in people's presentations.
- Not that there's anything wrong with it.



Do's and Don'ts of Effective Graphics

Don't have to be...

- Used continuously
- ***"High Tech"***
- Exhaustive

Do have to be...

- Used strategically
- Message driven
- Clear and Simple

Jury Selection: Key Mistakes Lawyers Make

- Misunderstanding the purpose of jury selection
- Lack of case themes
- Talking too much
- Speaking the wrong “language”
- Using voir dire for cross examination rather than catharsis
- Relying on stereotypes and personal biases

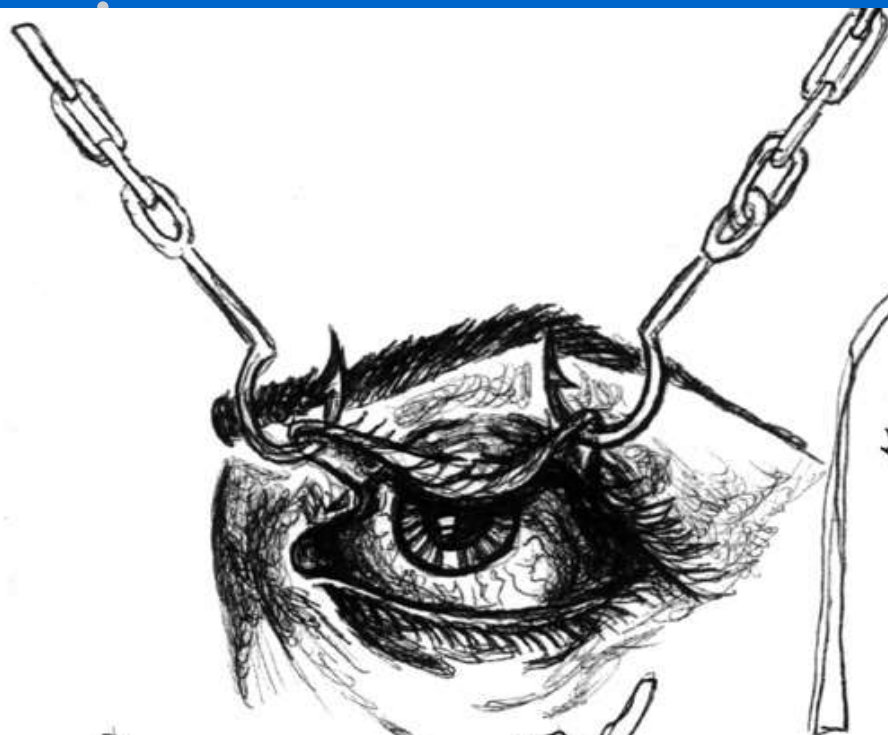
Jury Selection: Key Mistakes Lawyers Make

Lawyer Belief

- “Smart jurors will understand my case.”

Reality

- Smart jurors still have attitudes, beliefs and experiences.
- A smart juror with dangerous attitudes can hurt you.



OPEN YOUR
[REDACTED] EYES
TO THE TRUTH, YOU FOOLS!

WE LIVE IN TIMES WHEN
NONE OF THIS MATTERS. A
total collapse & destruction
is inevitable. All the managers
& corporate leaders will have
no place in this new world. The
only vital skills will be stealing
& fighting & killing. The world will soon
regress into a primal state
& chaos will rule because we are
to overpopulated & greedy for
this primal state to work. Everyone;
young & old, black & white, worker &
manager, poor & rich; Everyone will
suffer & die together as one. So,
this whole "study" will produce information
that is useless & will not stop what
has already slowly started.

Anyway, Keep On Rotting in the Free
World, & have a nice day, you
Social Puppets.

Jury Selection

Two key goals of jury selection:

- 1. Identify your enemies*
- 2. Hide your friends*

The Importance of Understanding and Respecting Jurors' Attitudes and Beliefs

Attitudes and Beliefs are powerful information filters for jurors.

- Attitudes are expressions of the self.
- People are motivated to maintain their attitudes, favoring information that supports their attitudes and resisting information that is inconsistent with those attitudes.
- Attitudes from real-life experiences are particularly tough to change.
- Attitudes are often more predictive than demographics.
- Attitudes, beliefs and experiences should be central to the jury selection process
- **Your mission: *Identify the beliefs, attitudes and experiences that will influence the voting behavior of your *most dangerous jurors*.***

Some Dispositive Attitudes in Employment Cases: Pro-Plaintiff Jurors



The diagram illustrates juror attitudes in employment cases, organized into three rows of stylized human figures. The top row features two red rectangular boxes with white text, each flanked by a group of figures. The middle row also has two red rectangular boxes with white text, flanked by groups of figures. The bottom row consists of a single row of figures without boxes. The figures are black silhouettes with white faces, arranged in groups of varying sizes.

**Negative Opinions
of the Defendant**

**Negative Workplace
Experiences**

Strict Liability

Sufferers

Five Questions that Identify Dangerous Plaintiff Jurors

1. Do you have any strong negative opinions of the defendant?
2. Do you have any medical, financial, family or other issues or concerns that would make it difficult for you to serve on this jury?
3. Have you ever sued anyone/been a plaintiff in a lawsuit before?
4. Based on what you've heard about this case so far, would you feel bad or a little guilty if the plaintiff didn't receive some compensation in this case?
5. How many of you feel that an employer must have done something wrong if an employee feels unfairly treated at work?

Some Dispositive Attitudes in Employment Cases: Pro Defense Jurors



**Favor Caps
on Damages**



**Positive Opinions of/
Identifications with
the Defendant**

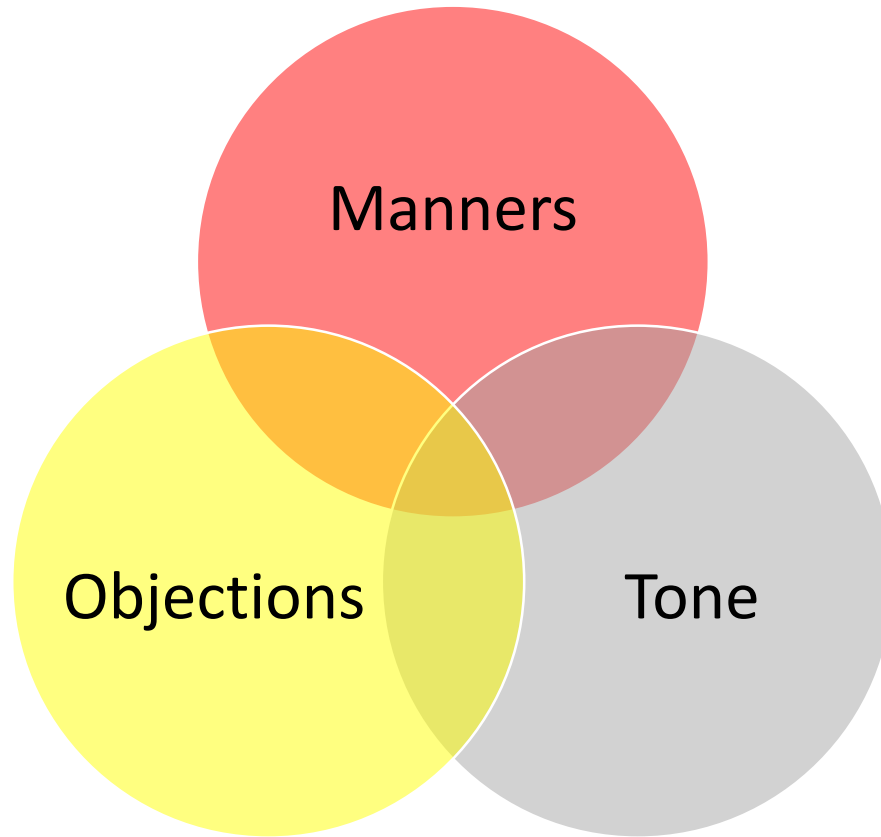


**Strong Beliefs in
Personal Responsibility**

Five Questions that Identify Dangerous Defense Jurors

1. Do you have any strong positive opinions of/own stock in the defendant company?
2. Do you have a supervisory/managerial role in your job?
3. Have you ever been sued/been a defendant in a lawsuit?
4. Do you believe people are too quick to blame others for problems they cause themselves?
5. Do you believe there should be a limit on the amount of damages a plaintiff can recover in a lawsuit? Would you have difficulty awarding damages for things that are hard to put a dollar figure on, such as mental anguish?

Atmospherics and Lawyer Conduct: Additional factors that can affect verdict



Remember: The jury is always watching

Jury Research as Part of Your Strategy Toolkit

Common Misconceptions about Jury Consultants



- Rankin Fitch in *Runaway Jury*
- A “mind reader” or “people reader”
- A “data dumper” that leaves all of the findings from the “research” for you to figure out

How Jury Consultants Can Help You Be Persuasive

- ❖ Provide advantages at trial with strategic insights about juror case processing
- ❖ Understand and manage case risk
- ❖ Identify profiles of dangerous jurors and how to eliminate them from your jury; assistance with jury selection at trial
- ❖ Prepare witnesses to deliver key messages while under attack
- ❖ Craft the story jurors need to hear to be persuaded to your client's side
- ❖ Large and small scale research options (e.g., mock trials, online jury research, focus groups, shadow juries, post trial juror interviews)

