

Making Juries Mad How Employers Pay



Michael W. Fox
512.344.4711
michael.fox@odnss.com



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Why Talk About It?

- Jury trials are a vanishing breed
- But fear of a bad jury verdict is the engine that drives
 - Personnel actions
 - Costs of defense
 - Settlement decisions

Trial Defined

Examination of evidence and applicable law by a competent tribunal to determine specified charges or claims.

The American Heritage® Dictionary of the English Language, Fourth Edition

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What Trial Really Is

- Synonyms: *affliction, crucible, ordeal, tribulation*
 - Nouns which denote distress or suffering that severely tests resiliency and character

web log of a Texas Plaintiffs' Lawyer

- The brass knocker being slammed twice in succession, followed by the bailiff's command to, "All rise!" has tightened more corporate sphincter than any angry shareholders' meeting.

Why Employment Trials Are Different

- Everyone is an expert
- Company defending its decision
 - Makes it personal
- Employer's position
 - We didn't do it!
- If jury finds you did
 - You not only did it
 - You lied to them as well

What Jurors Feel

- 55% would do what is right, even if it went against the judge's instructions
- 45% believe an important function of juries is to send a message to companies
- 73% believe without agencies like the EEOC, employees would be taken advantage of by employers
- 62% believe companies have ways to get back at those who complain of harassment

Making Juries Mad

- Trying the wrong case
- Picking the wrong theme of the case
- Picking the wrong jury
- Selecting the wrong witnesses
- Misbehaving in the courtroom
- Evidence, particularly missing evidence
- Underestimating the power of bad facts

Trying the Wrong Case

- Not all cases have to be tried
- Most are not tried
- Be aware of
 - Bad facts
 - Bad venues
 - Bad luck

Picking the Wrong Theme

- Bad employee, punished himself
 - Good
- Plaintiff is a liar
 - Better be sure you can prove it
- “She wanted it” or some similar version
 - Dangerous
- Use a positive theme, if possible

Picking the Wrong Jury

- Where the case is won or lost
- Different theories
 - Select those most like your client
 - Make sure that you eliminate those who will kill your case
- Use of stereotypes

Stereotypes

- Management types
 - Not enough of them
- Engineers, accountants
 - Precision
 - Like rules (if you followed them)
- Helping professions
 - Teachers
 - Nurses
- But remember your instincts

Selecting the Wrong Witnesses

- Not always a choice
- Can choose your experts
 - Make sure they are “teachers”
- Jurors cannot abide
 - Liars
 - Arrogance
- Applies to much more than just witnesses

Misbehaving in the Courtroom

- Courtroom is really much larger
- Appropriate dress
- Reacting to testimony
 - Rolling eyes, laughing
- Not a laughing matter

“Superior” Behavior

- CEO or other Top Dog
 - Above all this
 - Won't prepare
 - Angers when challenged
- Applies to your lawyer as well

Missing Evidence

- Juries expect documentation
 - For both performance and discipline cases
- “Missing” document
 - Possible spoliation instruction
 - Jury can assume document would be adverse to “destroyer”

The Danger of Bad Facts

- Focus on facts, not legal defenses
- View through eyes of juror
- Do not view from employer perspective

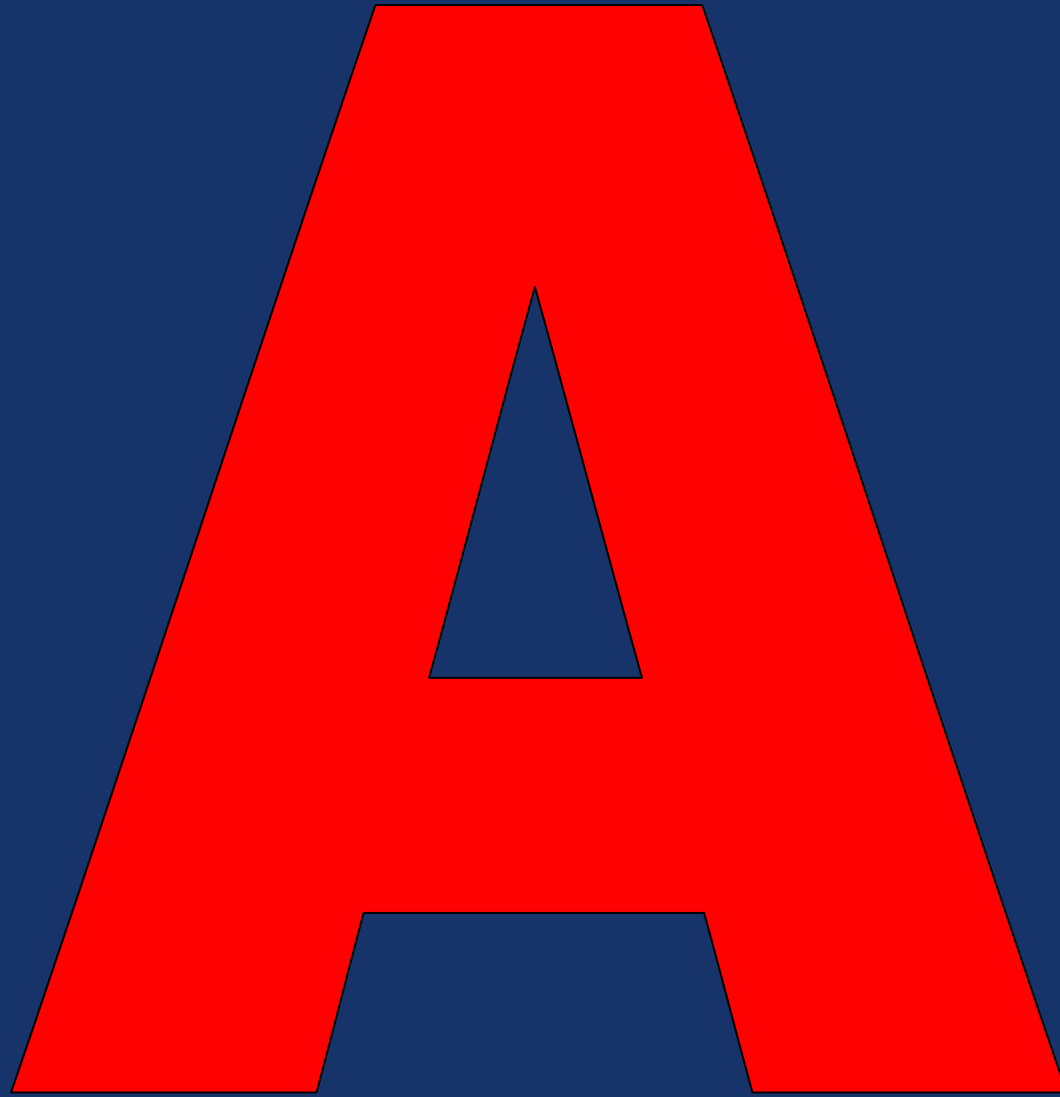
Creating Bad Facts

- Aggressive security departments
- Making an “example”
- Ignoring complaints
- Demeaning behavior

How You Treat the Plaintiff

- Avoid harsh attacks
- Avoid unnecessary personal attacks
- Avoid retaliatory behavior

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